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

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v. Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, *et al.*,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Governor Scott Walker, Judge Thomas Barland, Judge Gerald C. Nichol, Judge Michael Brennan, Judge Thomas Cane, Judge David G. Deininger, Judge Timothy Vocke, Kevin J. Kennedy, Nathaniel E. Robinson, Mark Gottlieb, Lynne Judd, Kristina Boardman, Donald D. Reincke, Tracy Jo Howard, Sandra M. Brisco, Barney L. Hall, Donald J. Genin, Jill Louise Geoffroy, and Patricia A. Nelson (collectively, "Defendants"), by their undersigned counsel, hereby submit this Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Plaintiffs Shirley Brown, Sam Bulmer, Dartric Davis, Matthew Dearing, Pamela Dukes, Carl Ellis, Ruthelle Frank, Mariannis Ginorio, Rickie Lamont Harmon, Edward Hogan, Eddie Lee Holloway, Jr., Sandra Jashinski, Anthony Judd, Max Kligman, Steve Kvasnicka, Sarah Lahti, Justin Luft, Samantha Meszaros, Barbara Oden, Anthony Sharp, Anna Shea, DeWayne Smith, Dominique Whitehurst, and Nancy Lea Wilde (collectively, "Plaintiffs") have

filed a motion for a preliminary injunction enjoining the enforcement of the photo identification requirement for voting created by 2011 Wisconsin Act 23 ("Act 23"). Plaintiffs separately filed a motion to certify seven classes of plaintiffs, to which defendants respond separately. In the present motion, plaintiffs allege that Act 23 severely and unjustifiably burdens voters in plaintiffs' proposed Classes 1 and 2 in violation of the Fourteenth Amendment, that Act 23 constitutes an unconstitutional poll tax as to voters in proposed Class 5, and that Act 23 violates the equal protection rights of voters in proposed Class 6 who are not permitted to use a Veterans ID card to vote. Plaintiffs also allege that the enforcement of Act 23 violates equal protection and substantive due process because of the manner in which Division of Motor Vehicle (DMV) offices exercise discretion in determining whether to grant or deny applications for Wisconsin driver's licenses or photo ID's. Finally, Plaintiffs allege that enforcement of Act 23 in Milwaukee County violates Section 2 of the Voting Rights Act because it will result in the denial or abridgement of the right to vote on account of race.

The injunctive relief that Plaintiffs have requested is not necessary because two Wisconsin state courts have already enjoined enforcement of the photo ID provisions of Act 23. *See Milwaukee Branch of NAACP, et al. v. Scott Walker, et al.,* Appeal No. 2012AP000557, Dane County Circuit Court Case No. 11-CV-5492; *League of Women Voters of Wisconsin et al. v. Scott Walker et al*., Appeal No. 2012AP000584, Dane County Circuit Court Case No. 11-CV-4669. The cases are currently pending before two different districts of the Wisconsin Court of Appeals. Plaintiffs acknowledge (Docket No. 50, p. 6, n. 2) that preliminary injunctive relief only becomes appropriate in this case if the injunctions in *both* state court cases are stayed or reversed.

Furthermore, even if the state courts may, in the future, stay or reverse the injunctions entered in those cases, preliminary injunctive relief is not appropriate because all eligible voters can currently obtain absentee ballots for all remaining 2012 elections (which include the June 5, 2012, statewide recall election, the August 14, 2012, fall primary election, and the November 6, 2012, general presidential election) without showing photo identification. *See, e.g., http://gab.wi.gov/elections-voting/voters/absentee.* Plaintiffs can, therefore, already vote absentee in all remaining 2012 elections without the need for photo identification. Because a trial in this case is scheduled for September 2012, this Court's decision on Plaintiffs' request for permanent injunctive relief will likely be issued well in advance of any election in which Plaintiffs and the other members of Plaintiffs' proposed classes cannot already vote without ID. Therefore, it is unnecessary for this Court to decide Plaintiffs' motion for a preliminary injunction.

Finally, even if the Court concludes that the relief Plaintiffs are requesting is necessary, Plaintiffs have not met their burden for a preliminary injunction as to Act 23. As to the merits of Plaintiffs' claim, Plaintiffs have not met their burden of persuasion on this preliminary injunction motion. They have not established a reasonable likelihood of success on the merits of their claims that Act 23 severely and unjustifiably burdens voters in plaintiffs' proposed Classes 1 and 2 in violation of the Fourteenth Amendment, that Act 23 constitutes an unconstitutional poll tax as to voters in Class 5, or that Act 23 violates the equal protection rights of voters in Class 6 who are not permitted to use a Veterans ID card to vote. They likewise have not established a reasonable likelihood of success on the merits of their claim that the enforcement of Act 23 violates equal protection and substantive due process or that enforcement of Act 23 in Milwaukee County violates Section 2 of the Voting Rights Act.

BACKGROUND

I. BACKGROUND ON ACT 23.

Prior to Act 23, an eligible Wisconsin elector voting at a polling place or by absentee ballot was not required to present identification, other than proof of residence in certain circumstances. Under Act 23, an elector will be required to present proof of identification to vote at a polling place or by absentee ballot.

Proof of identification is defined as identification that contains the name and a photograph of the individual to whom the identification was issued, which name must conform to the name on the individual's voter registration form. Wis. Stat. § 5.02(16c); 2011 Wis. Act. 23, § 1. Acceptable photo identification can take any of the following forms:

- A driver's license issued by the Wisconsin Department of Transportation ("DOT") under Wis. Stat. ch. 343 that is unexpired or has an expiration date after November 2, 2011.
- An identification card issued by DOT under Wis. Stat. § 343.50 that is unexpired or has an expiration date after November 2, 2011.
- An identification card issued by a U.S. uniformed service that is unexpired or has an expiration date after November 2, 2011.
- A U.S. passport that is unexpired or has an expiration date after November 2, 2011.
- A certificate of U.S. naturalization that was issued not earlier than two years before the date of the election at which it is presented.
- An unexpired driving receipt issued by DOT under Wis. Stat. § 343.11.
- An unexpired identification card receipt issued by DOT under Wis. Stat. § 343.50.
- An identification card issued by a federally recognized Indian tribe in Wisconsin.

- An unexpired identification card issued by an accredited university or college in Wisconsin that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than two years after the date of issuance, if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented.

Wis. Stat. § 5.02(6m); 2011 Wis. Act 23, § 1.

Act 23 requires, with certain exceptions,[1] that an elector who seeks to vote in person at a polling place must present one of the acceptable forms of photo identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph on the identification reasonably resembles the elector. Wis. Stat. § 6.79(2)(a); 2011 Wis. Act 23, § 45.[2] If an elector appears in-person to vote at a polling place

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[1]The photo identification requirements do not apply to: a military or overseas elector voting by absentee ballot; an elector who has a confidential listing as a result of domestic abuse, sexual assault, or stalking; an elector who has been required to surrender his or her driver's license due to a citation or notice of intent to revoke or suspend the license and who presents an original copy of the citation or notice in lieu of the license; an absentee voter who has previously supplied acceptable photo identification and whose name and address have not subsequently changed; and certain absentee voters who are indefinitely confined due to age, physical illness or infirmity, or who reside in a nursing home, a qualified retirement home or certain other specified types of residential facility and who comply with specified alternative methods of voter verification. Wis. Stat. § 6.87(4)(a)-(b), 2011 Wis. Act 23, §§ 67-71.

[2]Similar requirements apply to absentee voters. An elector who applies for an absentee ballot in person at a municipal clerk's office must present one of the acceptable forms of photo identification to the clerk, who must verify that the name on the identification corresponds to the name on the elector's ballot application and that any photograph on the identification reasonably resembles the elector. Wis. Stat. § 6.86(1)(ar); 2011 Wis. Act 23, § 56. If an elector applies for an absentee ballot by mail, the elector must enclose a copy of an acceptable form of photo identification with his or her ballot application and the clerk, before issuing the ballot, must verify that the name on the identification conforms to the name on the ballot application. Wis. Stat. § 6.87(1); 2011 Wis. Act 23, § 63. If an elector applies for an absentee ballot electronically and does not enclose a copy of an acceptable form of photo identification with his or her ballot application, the elector must enclose a copy of an acceptable photo identification when the elector submits the absentee ballot. Wis. Stat. § 6.87(4)(b)1.; 2011 Wis. Act 23, § 66.

and does not have one of the acceptable forms of photo identification, the elector must be offered the opportunity to vote by provisional ballot pursuant to Wis. Stat. § 6.97. Wis. Stat. § 6.79(2)(d) and (3)(b); 2011 Wis. Act 23, §§ 47-50. Such a provisional ballot will thereafter be counted if the elector presents acceptable photo identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election. Wis. Stat. § 6.97(3)(b); 2011 Wis. Act 23, § 90. If an in-person voter presents a photo identification bearing a name that does not conform to the voter's name on the poll list or a photograph that does not reasonably resemble the voter, then the person may not be permitted to vote. Wis. Stat. § 6.79(3)(b); 2011 Wis. Act 23, §§ 48-50.

To accommodate eligible electors who do not yet possess any of the acceptable forms of photo identification and to ensure that no elector is charged a fee for voting, Act 23 requires the DOT to issue an identification card to such an elector free of charge, if the elector satisfies all other requirements for obtaining such a card, is a U.S. citizen who will be at least 18 years of age on the date of the next election, and requests that the card be provided without charge for purposes of voting. Wis. Stat. § 343.50(a)3.; 2011 Wis. Act 23, § 138.

Finally, Act 23 requires the Government Accountability Board ("G.A.B.") to take a variety of steps related to preparing for and implementing the administration of the new photo identification requirements. First, G.A.B. must revise its instructions for voters at the polling place to reflect the photo identification requirements. Wis. Stat. § 5.35(6)(a)4a.; 2011 Wis. Act 23, § 4. Second, G.A.B. must revise absentee voting instructions and informational materials, absentee ballot application forms, and absentee certificate envelopes to reflect the photo identification requirements. Wis. Stat. §§ 6.869, 6.87, and 6.875; 2011 Wis. Act 23, §§ 62, 64, and 73-82. Third, G.A.B. must revise the written notice to be

distributed to provisional voters to reflect the photo identification requirements. Wis. Stat. § 7.08(8); 2011 Wis. Act. 23, § 93. Fourth, Act 23 requires G.A.B. to engage in outreach to identify, contact, and provide assistance to groups of electors who may need assistance in obtaining or renewing acceptable photo identification. Wis. Stat. § 7.08(12); 2011 Wis. Act 23, § 95. Finally, Act 23 requires G.A.B. to conduct a public information campaign in conjunction with the primary election of February 21, 2012, for the purpose of informing prospective voters about the new photo identification requirements. 2011 Wis. Act 23, § 144.

II. STATUS OF THE PHOTO IDENTIFICATION REQUIREMENT FOR VOTING CREATED BY ACT 23.

The photo identification requirement for voting created by Act 23 has been temporarily and permanently enjoined by the Dane County Circuit Court. *See Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, Case No. 11-CV-5492 (Dane Co. Cir. Ct.) (Flanagan, J.), *hereinafter* "*NAACP*," (March 6, 2012, Order Granting Temporary Injunction) (Dkt. #37-3)); *League of Women Voters of Wisconsin Education Network, Inc., et al. v. Scott Walker, et al.*, Case No. 11-CV-4669 (Dane Co. Cir. Ct.) (Niess, J.), *hereinafter* "*League*," (March 12, 2012, Decision and Order Granting Summary Declaratory Judgment and Permanent Injunction) (Dkt. #37-4).

The defendants in *League* have appealed the circuit court's final decision and order to the Wisconsin Court of Appeals, District IV. The defendants filed their opening brief and appendix on May 25, 2012. The permanent injunction in *League* remains in place.

A bench trial in *NAACP* concluded on April 19, 2012.[3] The circuit court ordered post-trial briefing, which will be completed by June 19, 2012. The temporary injunction in *NAACP* remains in place.

In light of the pending permanent and temporary injunction orders, G.A.B. has suspended all implementation of the photo identification requirement for voting, along with suspending all public educational and informational campaigns associated with photo ID. *See, e.g., www.bringit.wi.gov.*

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and internal quotations omitted); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 870 (7th Cir. 2006) (citing *Mazurek*); *Goodman v. Ill. Dep't of Fin. and Prof'l Regulation*, 430 F.3d 432, 437 (2005) (citing *Mazurek*).

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[3] In *NAACP*, the Wisconsin Court of Appeals, District II denied defendants' petition for leave to appeal a non-final order on April 25, 2012. The Wisconsin Court of Appeals also denied motions to stay the respective permanent and temporary injunctions in *League* and *NAACP*.

Although the *NAACP* and *League* cases were certified by the Wisconsin Court of Appeals to the Wisconsin Supreme Court, the Wisconsin Supreme Court refused certification in both cases on April 16, 2012.

As set forth below, Plaintiffs have not established that they are entitled to preliminary injunctive relief.

ARGUMENT

I. INJUNCTIVE RELIEF IS UNNECESSARY BECAUSE ACT 23 IS ALREADY ENJOINED.

Plaintiffs have requested that Act 23 be enjoined. (Dkt. #50 at pp. 4-5). Act 23 is already enjoined. And, it is likely to be enjoined for some time, as the *League* case is pending in the Wisconsin Court of Appeals, and that court has refused to stay the permanent injunction entered by the Dane County Circuit Court.[4] Likewise, the temporary injunction in the *NAACP* case is pending as the parties complete post-trial briefing, which shall be completed by June 19, 2012. Accordingly, there is no reason for this Court to grant Plaintiffs any relief because Act 23 is enjoined. Act 23 will remain enjoined unless *both* state court injunctions are lifted.

Furthermore, Plaintiffs may request absentee ballots for all remaining elections in 2012, thus mitigating the effect in the event that the state court injunctions are lifted this year. Wis. Stat. § 6.86(2m). Plaintiffs can take steps now to ensure that they will be able to vote in all remaining 2012 elections by requesting absentee ballots without showing identification. Because a trial in this case is scheduled for September 2012, a decision on Plaintiffs' request for permanent injunctive relief can be entered in plenty of time to obviate the need for consideration of Plaintiffs' motion for preliminary injunctive relief. Accordingly, their motion for a preliminary injunction must be denied.

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[4] Even if the state court injunction should be lifted or vacated, such an action would be statutorily stayed for 30 days. *See* Wis. Stat. § 809.26"

II. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS OF ANY OF THEIR CLAIMS.

A. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Requirement for Voting Created by Act 23 Excessively Burdens the Rights of Members of Classes 1 and 2 to Vote.

1. Plaintiffs' Alleged Burdens Are Not Unconstitutionally Severe.

Plaintiffs' present two groups of voters who they allege are severely burdened by the photo ID provisions of Act 23. Members of proposed Class 1 are those eligible Wisconsin voters who lack an acceptable form of photo ID, who also lack one or more of the forms of documentation needed to obtain a free Wisconsin ID card from the DMV, and who face legal or systemic barriers to obtaining an ID. (Dkt. #64 at p. 4). Plaintiffs contend that members of proposed Class 1 may lack a certified copy of their birth certificate, either because they face difficulties in obtaining a certified copy of their birth certificate from the appropriate vital records office, because a birth certificate actually does not exist for a given individual, or because the name on an individual's birth certificate does not match their current name. Even though Act 23 did not change anything about the process for securing an ID card from the DMV, other than that the DMV now issues ID cards free of charge, Plaintiffs contend that the DMV's requirements for obtaining an ID card impose severe burdens on voters. (Dkt. #50 at p. 15). Plaintiffs acknowledge that the DMV's "stringent requirements" for obtaining an ID card were necessary in order to comply with federal "REAL ID" requirements (Dkt. #50 at p. 9), but they assert that as applied to voting rights, the process for obtaining an ID card constitutes an unconstitutional burden (Dkt. #50 at p. 16). Plaintiffs are incorrect.

Birth certificates present problems for some Plaintiffs and members or Plaintiffs' proposed Class 1. A birth certificate is the most common document that a person might use to prove their citizenship to DMV to obtain a driver's license or state photo identification card. *See* Wis. Admin. Code § TRANS 102.15(3m). Most, if not all, of Plaintiffs' claimed difficulties in obtaining a Wisconsin driver's license or state photo identification card stem from the fact that members of Plaintiffs' proposed Class 1 lack certified copies of their birth certificates, are unwilling to get certified copies of their birth certificates, have certain errors on the certified birth certificates they posses, or believe that the alleged burdens associated with obtaining their certified birth certificates are too great.

Another common problem for members of Plaintiffs' proposed Class 1 is the lack of a Social Security card, another document that might be used to prove one's identity for purposes of obtaining a driver's license or state photo identification card from DMV. *See* Wis. Admin. Code § TRANS 102.15(4).

This category of burdens clearly does not constitute a severe burden on the right to vote. In *Crawford v. Marion County Election Board,* the Supreme Court expressly found that "the inconvenience of making a trip to the [bureau of motor vehicles], gathering the required documents and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. 181, 198 (2008). Similarly, *Crawford* found that "[b]urdens . . . arising from life's vagaries," such as losing or forgetting one's ID, "are neither so serious nor so frequent as to raise any question about the constitutionality of [Indiana's voter ID law]." *Id.* at 198. The first category of burdens that Plaintiffs identify, therefore, does not establish a severe or widespread burden on the right to vote.

Plaintiffs assert that the process for obtaining an ID card from the DMV is made all the more burdensome because the DMV does not adequately publicize certain "exception" procedures, particularly the MV3002 form that can be used in the rare instance when an individual's birth certificate does not exist. (Dkt. #15 at p. 15). Although Plaintiffs paint the MV3002 procedure as an unadvertised but available exception that would help many individuals, the MV3002 procedure is actually only available to a *very* small number of individuals for whom a birth certificate actually does not exist. Approximately 99.99 percent of individuals born after 1930 have a birth certificate. (Dkt. #62-7 at p. 18 (Jim Miller Depo., p. 63)). Even for individuals born before 1930, the percentage of individuals for whom no birth certificate exists is very small. *Id.* The MV3002 petition procedure is only available in lieu of a birth certificate when an individual secures verification from a vital records office that no birth certificate exists for that individual. (Dkt. #62-7 at p. 17 (Miller Depo., p. 62); Dkt. #62-1 at pp. 9-10 (Boardman Depo., pp. 46-47)). It is not a tool that can be used by voters who simply do not have a certified copy of their birth certificate available, nor by those voters who choose not to go to the trouble or expense of securing a certificate copy of their birth certificate. Therefore, the fact that the MV3002 petition procedure is not more widely advertised does not impose an additional burden on voters. To the contrary, it saves voters the trouble of believing they may be subject to an exception and therefore not bringing their birth certificate to the DMV, when in fact they are not eligible for the MV3002 exception.

Likewise, Plaintiffs overstate the burdens imposed on voters whose birth certificates do not exactly match their current names. In many such cases, as even Plaintiffs later acknowledge, the DMV has indeed accepted the individual's birth certificate notwithstanding a name mismatch. (Dkt. #50 at p. 33). Furthermore, as explained by Jim Miller, Chief of Technical

Training for the DMV's Bureau of Field Services, if an individual presents a birth certificate with minor misspellings and has other documentation verifying the individual's name, the ID card would likely be issued. (Miller Depo. at pp. 142-143, 157 (Benedon Decl., Ex. C)).

As set forth by the United States Supreme Court in *Crawford*, the burdens Plaintiffs identify in gathering the underlying documents needed to obtain a free ID card and in bringing those documents to the DMV do not constitute burdens that are so significant as to be unconstitutional. 553 U.S. 181.

Members of Plaintiffs' proposed Class 2 are those eligible Wisconsin voters who lack an acceptable form of photo ID and who would experience financial burdens in securing a Wisconsin ID card. (Dkt. #64 at p. 5). Plaintiffs assert that the cost of obtaining a certified copy of a birth certificate, as well as transportation costs incurred in gathering necessary documents, constitute financial hardship. (Dkt. #50 at pp. 20-21).

In considering Plaintiffs' argument in this regard, it must be emphasized that Wisconsin's voter ID law does not require *anyone* to pay a fee in order to vote. Any eligible elector can obtain a free photo ID from DMV simply by informing the agency that a free ID is needed for the purpose of voting. Wis. Stat. § 343.50(a)3.; 2011 Wis. Act 23, § 138. In *Crawford*, similarly, Indiana provided for free voter ID cards and the court noted that this saved the law from any claim that it imposed an unconstitutional fee on voting. *See Crawford*, 553 U.S. at 198. The concern raised by Plaintiffs, however, is not that a fee is charged for the voter ID itself, but rather that individuals who do not have an acceptable form of voter ID may have to present a certified birth certificate to DOT in order to obtain such ID and that the pertinent vital records agencies—whether in Wisconsin or elsewhere—may charge a fee for the birth certificate. *Crawford*, however, expressly acknowledged the same problem and noted that "Indiana, like most States,

charges a fee for obtaining a copy of one's birth certificate." *Id.* at 198, n.17. That fact, however, did not prevent the Court from upholding the facial constitutionality of Indiana's voter ID law. Likewise, the *Crawford* Court was not persuaded that the burdens of gathering required documents and making a trip to the DMV were constitutionally significant. *Id.* at 198. The mere fact that some voters might have to pay for a birth certificate in order to obtain a free ID thus is not, in itself, enough to invalidate a voter ID law.

2. The State has a Compelling Government Interest in Preserving the Integrity of the Electoral Process.

The State has numerous important interests at stake. These interests must be weighed against the burdens to Plaintiffs of obtaining Act 23 ID.

The United States Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," but this right "is not absolute." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "[T]he States have the power to impose voter qualifications and to regulate access to the franchise in other ways." *Id.* When the Court considers a challenge under the Fourteenth Amendment, it thus applies "more than one test, depending upon the interest affected or the classification involved." *Id.* at 335.

Accordingly, the Supreme Court has rejected a "litmus-paper test" for "[c]onstitutional challenges to specific provisions of a State's election laws" and instead has applied a "flexible standard." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Crawford*, 553 U.S. at 190 n. 8. Under this standard, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."

Crawford, 553 U.S. at 190. A regulation that imposes a "severe" burden must be "narrowly drawn to advance a state interest of compelling importance," *Burdick*, 504 U.S. at 434 (internal quotation marks omitted), but "reasonable, nondiscriminatory restrictions" that impose a minimal burden may be warranted by "the State's important regulatory interests." *Anderson*, 460 U.S. at 788. "However slight the burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 190 (internal quotation marks omitted). In *Crawford*, the Court plainly recognized the legitimacy and importance of the State's interests in deterring and detecting voter fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of the election process. *Crawford*, 553 U.S. at 191-97. The Court did not require the State to present evidence to justify those interests, but rather said:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 196. Likewise, the Court readily acknowledged the independent importance of the State's interest in promoting public confidence in the integrity of the electoral process. *Id.* at 197. Other post-*Crawford* decisions in voting ID cases have recognized the same State interests with equal readiness. *See, e.g.*, *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011); *League of Women Voters of Indiana 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).

Plaintiffs nonetheless suggest that the State's interest in preventing fraud is not legitimate enough to justify photo identification requirements because there is no evidence of recent

instances of voter impersonation fraud in Wisconsin. (Dkt. #50 at pp. 21-23). That argument fails for a couple of reasons. First, the argument has been specifically rejected in *Crawford* and *Common Cause/Georgia*. *See Crawford*, 553 U.S. at 191-97; *Common Cause/Georgia*, 554 F.3d at 1353-54. In particular, the Seventh Circuit decision in *Crawford* pointed out that, in the absence of effective voter identification procedures, voter impersonation fraud is very difficult to detect. *Crawford v. Marion County Election Board*, 472 F.3d 949, 953-54 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008). The absence of prosecutions for that type of fraud, therefore, does not compel the conclusion that such fraud does not occur. On the contrary, the alleged infrequency of prosecutions for voter impersonation fraud is equally consistent with either of two possibilities: (a) that such fraud does not occur; and (b) that such fraud occurs but goes undetected. In the absence of additional probative evidence, the infrequency of such prosecutions, without more, is insufficient to confirm that such fraud does not exist.

Moreover, even if voter impersonation fraud could be affirmatively shown to be rare in Wisconsin at the present time, history nonetheless shows such fraud to be a real and significant danger. The United States Supreme Court has expressly recognized that danger and has held that states have a legitimate and important interest in addressing it by imposing reasonable photo identification requirements that will prevent such fraud. *Crawford*, 553 U.S. at 195 (noting that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists."). Constitutional principles do not require a state to wait until a particular type of voter fraud has become a serious problem before it takes reasonable affirmative steps to prevent such fraud.

Second, it is not true that photo identification requirements *only* protect against the type of fraud in which a would-be voter tries to impersonate another individual on the registration roll.

Photo identification requirements also provide protections against unlawful voting under invalid voter registrations. For example, photo identification requirements will make it easier to identify and prevent unlawful voting by a registered voter who has subsequently been convicted of a felony or by a person who is not a United States citizen, but who has established residency in Wisconsin and has managed to register to vote in the past. Similarly, photo identification requirements will help to deter and prevent: (1) unlawful voting by registered Wisconsin voters who no longer maintain residency in this state but have not yet been removed from the registration rolls; and (2) unlawful double voting by individuals who register to vote in more than one state.

Therefore, even if it could be proved that it is currently uncommon for one registered voter to impersonate another registered voter at the polls, the State would still have a legitimate and important interest in addressing the significant risk of these other forms of unlawful voting by requiring voters to provide proof of identification when they vote.

The State has a legitimate and important interest in promoting public confidence in elections. *Crawford*, 553 U.S. at 197. The Supreme Court noted:

> public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Id. (quoting National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process, at 1618 (2002)). In our democratic system of governance, promoting public confidence in elections is an important good in its own right, without regard to whether the current level of voter confidence can be correlated with voter turnout statistics. Where there is evidence of an erosion of public confidence in the integrity of elections, the State is entitled to

act to arrest that erosion and is not required to postpone remedial action until voters have become so demoralized that they have permanently given up on the voting process. Moreover, even if public confidence in electoral integrity could never be shown to result in a measurable increase in turnout, the State would still have a legitimate and important interest in promoting such confidence for the purpose of generally encouraging a healthy respect for our democratic institutions. And when it does so, the inevitable conclusion is that there is indeed a legitimate and compelling interest in preserving the integrity of the electoral process.

Considering the State's important interests in seeing that the photo identification requirement created by Act 23 is enforced, and balancing those interests against the alleged burdens that Plaintiffs face, the Court must "make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190.

In sum, Plaintiffs have failed to demonstrate the lack of a compelling government interest in requiring all voters to present an acceptable form of identification in order to vote. To the contrary, as recognized by the United States Supreme Court, there are several legitimate and important State interests that are sufficiently weighty to justify the burdens imposed on some voters. Plaintiffs have failed to demonstrate a likelihood of success on their claim that the photo ID requirements of Act 23 violate the Fourteenth Amendment rights of members of proposed Classes 1 and 2.

B. Plaintiffs are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Requirement Arbitrarily and Unreasonably Burdens the Voting Rights of Veterans in Class 6.

Plaintiffs are not likely to succeed on the merits of their claim that the Wisconsin Legislature's decision not to include Veteran Identification Cards (VIC's) as a permitted form of

photo identification for voting is arbitrary and unreasonable. Although Plaintiffs only briefly address this argument in their brief in support of their motion for preliminary injunction (Dkt. #50, p. 24), they cite to and incorporate by reference their earlier brief seeking injunctive relief as to certain named plaintiffs (Dkt. #33, p. 26). It appears that plaintiffs concede that a rational basis analysis is appropriate on this issue, and that the relevant inquiry is whether the burden imposed is justified by the state's regulatory interests. (Dkt. #50, p. 24; Dkt. #33, p. 26).

In *McGowan v. Maryland,* 366 U.S. 420 (1961) the United States Supreme Court described the rational basis test:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26. A court will not strike down a state policy merely because it "may be unwise, improvident, or out of harmony with a particular school of thought." *Eby-Brown Co., LLC v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 295 F.3d 749, 754 (7th Cir. 2002). Rather, the rational basis inquiry requires the Court to consider only whether any state of facts reasonably may be conceived to justify the classification, and it is enough that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker even if the decisionmaker never articulated that rationale. *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 685 (7th Cir. 2005) (citations and internal quotations omitted).

There is a rational basis for the Legislature to exclude VIC's. Unlike some of the other forms of acceptable Act 23 ID for purposes of voting, VIC's do not include an expiration or issuance date. *See http://www.va.gov/healthbenefits/access/veteran_identification_card.asp*;

Dkt. #34-9. Without an expiration or issuance date, it is not possible to judge when the VIC was created or issued to determine whether the photograph on it is current as to provide an accurate, current visual depiction of the cardholder. Without a relatively current photograph to identify an individual cardholder, VIC's do not serve as a good proxy to confirm a voter's identity at the polls.

Furthermore, based on information available from the Department of Veterans Affairs, it is unclear what, if any, forms of identification or verification are needed for an individual to secure a VIC. The Department of Veterans Affairs website merely states:

> How do I receive a VIC
>
> To receive a VIC, the Veteran must have his/her picture taken for the card at the VA Medical Facility. The card will be mailed to the Veteran within 7-10 days after the Veteran's eligibility has been verified. To ensure the VIC is received at the appropriate address, it is important that the Veteran's address is verified and the correct address is entered in the VistA computer system. If the U.S. Postal Service cannot deliver the card, it will be returned to the facility where the Veteran requested the card.

http://www.va.gov/healthbenefits/access/veteran_identification_card.asp (last accessed May 29, 2012). It is not clear what, if any, mechanisms are in place to determine that the person who shows up at the VA Medical Facility to have his picture taken actually is the eligible veteran he claims to be. Therefore, unlike some of the other forms of acceptable Act 23 ID for purposes of voting, VIC's may not serve as a reliable method of verifying identity.

Of course, the Legislature nonetheless could have included VIC's in Act 23. However, the Legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them. The Supreme Court could not be clearer than it was in *Williamson v. Lee Optical of Oklahoma*:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one

> step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here.

348 U.S. 483, 489 (1955) (internal citations omitted).

Plaintiffs have made it clear that in-person voter fraud is not a problem they would have chosen to address had they been in position to substitute their judgment for that of the Legislature, and, in fact, had they chosen to address this problem at all, they would not have resolved it by requiring the presentation of photo identification at the polls. This is a policy determination that the Legislature is empowered to make, and Plaintiffs' strong desire for a different result does not translate into a constitutional violation. *See Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 829 (S.D. Ind. 2006). Thus, the Legislature's choice to exclude VIC's passes rational basis scrutiny, and Plaintiffs are not likely to succeed on the merits of this claim.

C. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Requirement Imposes a Poll Tax on Voters in Class 5.

Plaintiffs assert that "voters… who have gone their whole lives without birth certificates but were able to vote nonetheless, now must pay a fee in order to continue voting." (Dkt. #50 at p. 25). Plaintiffs' statement is imprecise. Voters need not pay a fee to vote. For the discrete number of qualified electors who do not possess a birth certificate, however, they might procure a certified copy of a birth certificate at some cost and then use that certified copy to obtain a free state photo identification card from DMV for purposes of voting. The relevant legal question is whether the cost related to procuring a birth certificate for that vanishingly small group of

affected individuals amounts to an unconstitutional poll tax under controlling law. The answer is: No.

Plaintiffs assert that the photo identification requirement for voting created by Act 23 constitutes a poll tax in violation of the Fourteenth and Twenty-fourth Amendments to the United States Constitution. (Dkt. #50 at p. 25). Plaintiffs are incorrect.

The Twenty-fourth Amendment prohibits the charging of a tax in order to vote. It provides that:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States for or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV.

The Seventh Circuit has already held, in evaluating Indiana's photo identification law, that a requirement of photo identification for purposes of voting is not an unconstitutional poll tax. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). That court explained: "The Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black. The purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes-dilution being recognized to be an impairment of the right to vote." *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Siegel v. LePore*, 234 F.3d 1163, 1199 (11th Cir. 2000)).

Here, Plaintiffs do not argue that requiring voters to show identification at the polls is itself a poll tax. Rather, Plaintiffs argue that, because some voters do not possess the identification required, those voters will be required to spend money to obtain the requisite documentation to obtain a form of Act 23 ID, and that this payment is equivalent to a tax on the right to vote. (*See* Dkt. #50 at pp. 25-26).

Plaintiffs' analysis is incorrect. Although obtaining identification required under Act 23 may come at some cost to certain Plaintiffs, it is neither a poll tax itself (*i.e.*, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax. There simply is *no* poll tax created by Act 23.

This conclusion is consistent with *Harman v. Fornessius*, 380 U.S. 528 (1965), the only Supreme Court case considering the Twenty-fourth Amendment's ban on poll taxes. In *Harman*, the Supreme Court considered a state statute that required voters to either pay a $1.50 poll tax on an annual basis or go through "a plainly cumbersome procedure," *id.* at 541, for filing an annual certificate of residence. *Id.* at 530-32. There was no dispute that the $1.50 fee was a poll tax barred by the Twenty-fourth Amendment. *See id.* at 540. Accordingly, the only question before the Court was whether the state "may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence." *Id.* at 538.

The Court enunciated the rule that a state may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 542. Applying this rule, the Court determined that the state's certificate of residence requirement was a material burden: among other things, the procedure for filing the certificate was unclear, the requirement that the certificate be filed six months before the election

"perpetuat[ed] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," and the state had other alternatives to establish that voters were residents, including "registration, use of criminal sanction[s], purging of registration lists, [and] challenges and oaths." *Id.* at 541-43. Accordingly, the Court concluded that "[w]e are thus constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

The photo identification requirement for voting created by Act 23 is not analogous to the requirement in *Harman*. Act 23's requirement that voters identify themselves at the polling place by showing one of several forms of photo identification is not a poll tax. Voters have only to verify their eligibility by showing identification at the polls, which does not constitute a tax. Nor does Act 23's photo identification requirement place a material burden on voters "solely because of their refusal to waive the constitutional immunity" to a poll tax. *Harman,* 380 U.S. at 542. Voters are not given the choice between paying a poll tax or obtaining identification; all voters are required to present identification at the polling place. *Cf. Harman*, 380 U.S. at 541-42. Thus, Act 23's photo identification requirement does not constitute an unconstitutional poll tax in violation of the Twenty-fourth Amendment.

Nor is Act 23's requirement that voters show identification at the polling place a poll tax under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), is the leading Supreme Court case considering whether a state law is a poll tax under the Equal Protection Clause and is the case upon which Plaintiffs primarily rely. (Dkt. #33 at pp. 27-28.)

In *Harper*, the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals exercising their right to vote in the state was unconstitutional under the Equal Protection Clause. 383 U.S. at 665-66 & n. 1. The Court held that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications," *id.* at 668, and that the imposition of poll taxes fell outside this power because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process[.]" *Id.* Because the state's poll tax made affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter qualifications, the Court concluded that the tax was invidiously discriminatory and a per se violation of the Equal Protection Clause. *Id.* at 666-67.

Act 23's photo identification requirement falls outside of *Harper*'s rule that "restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford*, 553 U.S. at 189-90. The requirement that individuals show documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay for them. On the contrary, requiring individuals to show identification falls squarely within the State's power to administer elections. Photo identification addresses the most basic voter criterion: That individuals seeking to cast a ballot are who they purport to be and are in fact eligible to vote.

Plaintiffs nonetheless assert that "[v]oters in Class 5 are compelled to pay for documents… in order to obtain a 'free' state ID card" and that "[a]s applied to them, Act 23 constitutes an unconstitutional poll tax." (Dkt. #50 at p. 26). This argument is not consistent with *Crawford*. *Crawford* involved an Indiana state requirement that a citizen voting in person or at the office of the circuit court clerk before election day present a photo identification card issued by the government. *Crawford*, 553 U.S. at 185. The state would provide a free photo

identification to "qualified voters able to establish their residence and identity." *Id.* at 186. A number of plaintiffs challenged this requirement on the ground that the "new law substantially burdens the right to vote in violation of the Fourteenth Amendment." *Id.* at 187.

Wisconsin, like Indiana, provides free photo identification cards to individuals who need them for voting. Also like Indiana, Wisconsin electors may incur a fee in securing the underlying documentation needed to obtain the free identification card. The Supreme Court's decision in *Crawford* suggests that this situation is not problematic.

Although the Supreme Court was unable to agree on the rationale for upholding Indiana's photo identification requirement, neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied to Indiana's photo identification requirement. *See Crawford*, 553 U.S. at 203. The lead opinion explained that *Harper*'s "litmus test" made "even rational restrictions on the right to vote . . . invidious if they are unrelated to voter qualifications." *Id.* at 190. But, according to the lead opinion, later election cases had moved away from *Harper* to apply a balancing test to state-imposed burdens on the voting process. *Id.* Under these later cases, a court "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* The lead opinion then proceeded to apply this balancing test to the Indiana photo identification requirement. *Id.*

Crawford did not purport to overrule *Harper*, however, which remains as an example of an electoral standard for which a state would never have sufficiently weighty interests to justify the requirement that a fee be paid in order to vote. *Id.* Additionally, although the *Crawford* Court noted that charging a tax or a fee in order to obtain a photo identification card for voting would be problematic under *Harper*, the Court specifically recognized that some of the

underlying documentation necessary for obtaining the free photo identification card carries a cost. *Id.* at 198 n. 17. Because *Crawford* did not extend *Harper*'s per se rule to other burdens imposed on voters, but left it applicable only to poll tax requirements, *Crawford* does not support Plaintiffs' argument that Act 23's photo identification requirement is invalid under *Harper.*

In sum, because any payment associated with obtaining the primary documents required to procure Act 23 photo identification is related to the State's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under *Harper*, and the burden is not sufficiently weighty to be unconstitutional as applied to Plaintiffs under *Crawford.* Act 23's photo identification requirement for voting does not violate either the Twenty-fourth Amendment or the Equal Protection Clause as applied to Plaintiffs, and Plaintiffs are not likely to succeed on the merits of this claim.

D. Plaintiffs are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Law Results in Inconsistent and Arbitrary Treatment of Voters in Violation of Equal Protection.

Plaintiffs assert that voters' equal protection rights are violated because Act 23 effectively subjects voters to DMV decision-making and control over whether they will be issued an ID card and, consequently, permitted to vote. Although it is true that some otherwise eligible voters will be able to obtain a free ID card and others, due to their lack of required documentation, will not, Plaintiffs have failed to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

"It is well settled that equal protection does not require absolute equality or precisely equal advantages." *French v. Heyne,* 547 F.2d 994, 997 (7th Cir. 1976), citing *Ross v. Moffit,* 417 U.S. 600, 612 (1974). The Equal Protection Clause "does not require the government to give

everyone identical treatment; rather, the clause provides for the right to be free from invidious discrimination in statutory classifications and other governmental activity." *Cooper v. City of Chicago Heights*, 2011 WL 5104478, * 8 (N.D. Ill. Oct. 27, 2011), quoting *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir.1996). The types of inconsistent treatment of which Plaintiffs complain – inconsistency in offering the MV3002 birth certificate exception procedure, inconsistency in the types of secondary document that will be required, differences in leniency in accepting "other" forms of identification – are of the types of minor differences in treatment that simply do not rise to the level of a constitutional violation.

Additionally, Plaintiffs have altogether failed to establish that certain voters are treated less favorably than other "similarly situated" persons or groups. Without first establishing that other *similarly situated* individuals or groups were treated more favorably, it is unnecessary to even discuss whether there is a compelling state interest that justifies the allegedly disparate treatment. And even if Plaintiffs could establish that certain voters were treated less favorably than other similarly situated voters, there is a compelling state interest that justifies any unequal treatment.

The "similarly situated" requirement has been part of equal protection jurisprudence for well over a century. *See, e.g., Moore v. State of Missouri*, 159 U.S. 673 (1895); *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The Seventh Circuit recently emphasized this point in explaining that "although equal protection requires that all persons similarly circumstanced shall be treated alike, the constitution does not require things which are different in fact to be treated in law as though they were the same." *Marin-Garcia v. Holder*, 647 F.3d 666, 673 (7th Cir. 2011). In *Marin-Garcia*, for example, the court rejected an equal protection challenge to an immigration law that resulted in the de facto deportation of citizen children of illegal alien parents, because

citizen children of illegal alien parents are not "similarly situated" to citizen children of citizen parents. Here, Plaintiffs have failed to even argue, let alone establish, that certain voters were treated less favorably at DMV offices and that those individuals were similarly situated to other voters who they assert was treated more favorably.

Plaintiffs assert that the DMV lacks consistently disseminated and applied policy or practice, and applies arbitrary decision-making, in instances when a voter lacks the basic forms of documentation that are typically required for obtaining an ID card from the DMV. (Dkt. #50 at p. 29). Plaintiffs complain primarily of DMV's handling of the MV3002 procedure, instances where an individual's birth certificate does not match other documentation of his or her name, and methods that the DMV accepts for proving residency. But Plaintiffs have not established disparate treatment of similarly situated individuals.

Plaintiffs complain generally of the DMV's decision not to publicize the MV3002 procedure, which enables individuals for whom no birth certificate exists to follow an exception procedure in lieu of presenting a birth certificate. But the MV3002 petition procedure is only applicable to individuals for whom no birth certificate exists, and a birth certificate exists for an estimated 99.99% of individuals. (Dkt. #62-7 at p. 18 (Jim Miller Depo., p. 63)). Publicizing a procedure that will only be available to such a miniscule number of voters is more likely to confuse and create false hope and inaccurate expectations than it is to actually help voters. (Fernan Depo. at p. 132 (Benedon Decl., Ex. C)).

Plaintiffs assert that even when the MV3002 procedure is made available to eligible voters, it is implemented arbitrarily because of the different types of secondary documentation that may be required of different individuals. For example, a 90-year-old who lacks a birth certificate may be able to present a family bible documenting her birth along with the MV3002

form, whereas a 20-year-old lacking a birth certificate will be required to present additional documentation, such as early school records, early medical records, or other like documentation. (Dkt. #62-7 at pp. 18-19 (Jim Miller Depo., pp. 62-63)). But a 20-year-old and a 90-year-old are not similarly situated for purposes of an equal protection analysis. First, it is *extremely* unlikely that a 20-year-old actually lacks a birth certificate, whereas it is slightly more likely that a 90-year-old lacks a birth certificate. *Id.* In addition, a 20-year-old can more easily obtain the types of secondary documentation that help demonstrate birth in the United States, such as very early medical records or school records, whereas it may be next to impossible for a 90-year-old to obtain such documentation. Therefore, a 20-year-old and a 90-year-old are not similarly situated, and it is appropriate for DMV officials to require different types and amounts of secondary documentation before accepting an MV3002 in lieu of a birth certificate.

Plaintiffs present the story of one elderly voter who went to the DMV with an affidavit from her childhood school district in Louisiana, but she was turned away for lack of a birth certificate without being told of the MV3002 procedure, whereas other plaintiffs were offered the MV3002 procedure. (Dkt. #50 at p. 30). But Plaintiffs do not establish that the first elderly voter told the DMV employee that she lacked a birth certificate, and therefore the individuals in that example also may not be similarly situated for purposes of an equal protection analysis.

As for the claimed inconsistencies in handling instances of name discrepancies between an individual's birth certificate and his other documentation, some of the alleged inconsistencies are overstated. In general, the more minor the inconsistency – such as a minor spelling error in a name or a birth certificate presenting an ethnic name when the individual's other documentation uses an Americanized version of the name – the more likely that the birth certificate will be accepted. (Miller Depo. at pp. 142-143, 157 (Benedon Decl., Ex. C)). When an entire name is

different, it is unlikely the birth certificate will be accepted. (Miller Depo. at pp. 154-156 (Benedon Decl., Ex. C)). Again, these situations are not similar, and do not establish an equal protection violation.

Finally, Plaintiffs assert that there is inconsistency in the type of documentation that DMV team leaders and field supervisors will accept to establish an individual's proof of residency. (Dkt. #50, p. 35). Here again, Plaintiffs fail to identify how similarly situated groups of individuals are being treated differently. In fact, their examples seem to suggest that DMV employees commonly make accommodations to assist voters in securing an ID card; there is no suggestion that certain groups of voters are granted flexibility while others are not.

As set forth above, not every inconsistency in treatment amounts to an equal protection violation; the Fourteenth Amendment does not require absolute equality in all circumstances. *French* 547 F.2d 994 at 997; *Nabozny*, 92 F.3d at 453. Plaintiffs have not established any significant degree of inconsistent or arbitrary treatment of similarly situated voters.

Even if Plaintiffs could establish that voters presenting similar circumstances have been treated differently in a significant way in their efforts to obtain an ID card from the DMV, Plaintiffs' equal protection claim would still fail. Interestingly, the alleged inconsistencies of which Plaintiffs complain stem from instances where DMV employees are attempting to be flexible in finding ways to help voters secure an ID card – using the MV3002 birth certificate exception procedure, accepting birth certificates with minor name differences even though the name is supposed to match, and accepting methods of proof of residency that are "off list." Plaintiffs complain that the DMV's procedures are too restrictive and "stringent," amounting to a "bureaucracy navigation test." (Dkt. #50 at p. 9). Apparently, Plaintiffs would prefer that the rules be less "stringent," yet they also complain when DMV employees attempt to exercise

discretion in an effort to make the process more flexible and less stringent. Plaintiffs, at various points in their arguments, want it both ways. They don't want a process that is too stringent or bureaucratic, yet they also apparently don't want any room for discretion, because discretion necessarily leads to some degree of inconsistency.

The process for securing a state ID card from the DMV necessarily entails some minor degree of inconsistency because of the many employees and supervisors who are involved in implementing Department of Transportation rules and procedures. But any inconsistency or small degree of difficulty that voters may experience in securing an ID card from the DMV is justified by the State's legitimate interests in requiring that individuals present identification at the polls – and first secure identification if they do not already have it – in order to assist in deterring and detecting voter fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of the election process. *See Crawford*, 553 U.S. at 191-97. *See supra S*ection II.A.2. Therefore, Plaintiffs are not likely to succeed on the merits of their equal protection claim.

E. Plaintiffs are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Law Has Rendered Wisconsin's Electoral System Fundamentally Unfair in Violation of Substantive Due Process.

Plaintiffs argue that Act 23 has rendered Wisconsin's electoral process so fundamentally flawed and unfair as to violate voters' rights to substantive due process, but Plaintiffs have not pointed to any record evidence supporting that assertion. As Plaintiffs themselves acknowledge, "isolated and inadvertent election errors" do not constitute constitutional deprivations (Dkt. #50 at p. 36), yet a few isolated and inadvertent instances of confusion or inconsistency are all Plaintiffs identify. Plaintiffs allege that the Defendants have been unable to ensure uniform

implementation of Act 23, and that there has been a systemic lack of adequate training and monitoring of elections officials as well as a failure to adequately notify and assist voters (Dkt. #50 at p. 37), but all Plaintiffs point to in support of those sweeping allegations are a few isolated incidents that they have not shown to be representative of the implementation of Act 23 on the whole.

Plaintiffs complain that the DMV has no experience with voting, yes is responsible for determining whether an individual will be able to obtain a state ID card, one of the many forms of identification acceptable under Act 23 (Dkt. #50 at p. 37). This fact does not establish that Act 23 has rendered the electoral process fundamentally flawed or unfair. To the contrary, there is no reason for DMV officials and employees to be experts on voting law or Act 23, as long as they are aware that individuals are entitled to receive a free state ID card if needed for voting and they issue driver's licenses and state ID cards in accordance with established rules and procedures. Plaintiffs do not allege that DMV officials are failing in these basic duties, and they do not explain why anything more should be required.

Plaintiffs' assert that there were instances where elections officials erred by incorrectly requiring an individual's name and address on his or her ID to exactly match the information on the poll list. Although the evidence demonstrates that a few such errors were committed, there is no evidence establishing that these incidents were anything but isolated and inadvertent errors. Even though more than 10 voters are believed to have been turned away due to nonmatching information between their ID and the poll list, Plaintiffs have not demonstrated that this error was widespread or that more than a few poll workers out of the thousands of poll workers statewide made such errors.

Finally, Plaintiffs assert that G.A.B., either due to inadequate funding from the legislature or otherwise, has not sufficiently educated the public as to the requirements of Act 23, thus leading to voters being confused or unprepared and ultimately disenfranchised. (Dkt. #50 at pp. 40-41). Although Plaintiffs may prefer that G.A.B. had undertaken its public education efforts in a different way, such as by a direct mailing to all registered voters, they do not deny that G.A.B. indeed performed an extensive public information campaign. Rather, they complain that some voters may not have been reached by G.A.B.'s efforts. Again, this does not amount to a system that is so fundamentally flawed and unfair as to violate substantive due process.

The evidence that Plaintiffs rely on in support of their substantive due process argument is a far cry from that presented in other cases addressing whether election procedures were fundamentally unfair in violation of substantive due process. For example, in *League of Women Voters of Ohio v. Brunner*, the court denied a motion to dismiss when the plaintiffs made specific factual allegations that registered voters were denied the right to vote because their names were missing from the rolls, inadequate provision of voting machines caused 10,000 Columbus voters not to vote, poll workers refused assistance to disabled voters, and provisional ballots were not distributed to some voters, causing voters to be denied the right to vote, while provisional ballots were provided to other voters without proper instructions, causing 22% of provisional ballots cast to be discounted. 548 F.3d 463, 478 (6th Cir. 2008). In effect, the plaintiffs specifically alleged that tens of thousands of voters were denied the right to vote or had their votes not counted, which the court found supported a claim of "a system so devoid of standards and procedures" as to violate substantive due process. *Id.*

By contrast, here, Plaintiffs have identified only isolated instances of errors or misunderstandings on the part of a few voters and elections officials. For example, elections

officials should not turn voters away if the address on their ID does not exactly match the address in the poll book, but Plaintiffs have not demonstrated that this occurred in more than a few isolated instances. Nor have Plaintiffs established that there exists widespread confusion and among elections officials, as opposed to a very small number of elections officials being misinformed about some of the intricacies of the law. All Plaintiffs have shown is that a small number of isolated and inadvertent election errors occurred during the initial implementation of the Act 23 photo ID requirements at the February 2012 election, which is insufficient to establish a violation of substantive due process. Plaintiffs have not demonstrated that the system is fundamentally unfair and flawed, and therefore they are not likely to succeed on the merits of their claim of a substantive due process violation.

F. Plaintiffs are Not Likely to Succeed on the Merits of Their Claim That the Photo Identification Requirement for Voting Created by Act 23, as Applied in Milwaukee County, Violates Section 2 of the Voting Rights Act.

1. To Prevail On A Section 2 Voting Rights Act Claim, Plaintiffs Must Demonstrate A Causal Connection Between Act 23 And The Denial Or Abridgement Of Minority Voters' Opportunity To Participate In The Electoral Process.

Section 2 of the Voting Rights Act ("VRA") states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a).

A violation of Section 2 of the VRA is established "if, based upon the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus "a plaintiff can prevail in a section 2 claim only if, based on the totality of the circumstances, . . . the challenged voting practice results in discrimination on account of race." *Gonzalez v. Arizona*, --- F.3d ----, 2012 WL 1293149, at *13 (9th Cir. Apr. 17, 2012) (*en banc*) (citations and internal quotation marks omitted). A copy of *Gonzalez* has been filed herewith as Exhibit A to the Declaration of Carrie Benedon.

There are two types of claims under Section 2 of the VRA: vote denial claims and vote dilution claims. Professor Daniel Tokaji has described these distinct claims:

> [I]t is important to distinguish two analytically distinct types of VRA cases: those involving vote denial and those involving vote dilution. "Vote denial" refers to practices that prevent people from voting or having their votes counted. Historically, examples of practices resulting in vote denial include literacy tests, poll taxes, all-white primaries, and English-only ballots. "Vote dilution," on the other hand, refers to practices that diminish minorities' political influence in places where they are allowed to vote. Chief examples of vote-dilution practices include at-large elections and redistricting plans that keep minorities' voting strength weak.

Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691-92 (Summer 2006); *see also id.* at 718 ("Vote denial cases are different from vote dilution cases. The most obvious difference is that next-generation vote denial cases, like first-generation vote denial cases, mainly implicate the value of participation; by contrast, second-generation cases involving vote dilution mainly implicate the value of aggregation.").

Here, Plaintiffs have alleged both vote denial and vote dilution under Section of the VRA (Dkt. #50 at pp. 42-44), but the argument in their brief does not support a claim of a violation of the VRA on vote denial grounds. In support of their claim of vote dilution, Plaintiffs merely argue that "Act 23 dilutes the voting rights of African-Americans and Latinos in Milwaukee County by creating a faulty, error-prone 'practice or procedure' that will lead to uncast and uncounted ballots for minority voters." (Dkt. #50 at p. 44).

A claim that Act 23 will lead to "uncast and uncounted" ballots is exactly what defines a claim of vote denial. *See Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (distinguishing between vote denial and vote dilution claims and indicating that the former "refers to practices that prevent people from having their vote counted") (citation omitted). Thus, although Plaintiffs couch their arguments in terms of both vote denial and vote denial, it is clear that they are only arguing a claim of vote denial, and Defendants will not further respond to Plaintiffs' vote dilution argument.

In order to prove their vote denial claim, Plaintiffs must establish causation. *Gonzalez*, 2012 WL 1293149, at *13 (citation omitted). "Although, proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of a causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." *Id.* (citations and internal quotation marks omitted).

"[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (emphasis in original); *see also Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 315 (3d Cir. 1994) (rejecting the contention that Pennsylvania's voter-purge statute violated section 2 of the VRA simply because more minority

members than whites were inactive voters); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (upholding Virginia's appointment-based school board system against a section 2 VRA challenge despite a statistical disparity between the percentage of blacks in the population and the percentage of blacks on the school board); *Salas v. Sw. Tex. Junior College Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting a section 2 VRA challenge to an at-large voting system based exclusively on a statistical difference between Hispanic and white voter turnout); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting a section 2 VRA challenge to Tennessee's felon-disenfranchisement law that rested primarily on the statistical difference between minority and white felony-conviction rates). A Section 2 claim "based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes the disparity, will be rejected." *Gonzalez*, 2012 WL 1293149, at *13 (citation and internal quotation marks omitted). This approach applies to both vote denial and vote dilution claims. *Id.*, at *13 n.32. (citation omitted).

2. Plaintiffs Have Not Demonstrated That Act 23 Causes a Prohibited Discriminatory Result.

In support of their argument, Plaintiffs assert that "black and Latino voters in Milwaukee County disproportionately lack accepted photo ID when compared to their white counterparts." (Dkt. #50 at p. 45). Plaintiffs further assert that "Milwaukee's African-American and Latino voters also have greater difficulty than white voters in fulfilling DMV's documentary proof requirements" for obtaining an ID card. (Dkt. #50 at p. 47). In support of those conclusions, Plaintiffs have submitted the report of Mark A. Barreto, Ph.D. and Gabriel R. Sanchez, Ph.D., which details the results of a survey that Dr. Barreto conducted of a sample of Milwaukee County

residents. (Dkt. #62-10). Dr. Barreto's survey and corresponding report do not establish that Plaintiffs have a reasonable likelihood of success on their Section 2 vote denial claim.[5]

Although Plaintiffs have submitted evidence, in the form of survey response statistics, showing that African-American and Latino residents of Milwaukee County may be less likely than their white counterparts to possess a qualifying ID and less likely to possess the forms of documentation needed to obtain a state ID card, Plaintiffs have not shown that these persons cannot obtain a form of ID that is sufficient for purposes of voting under Act 23. *See* Wis. Stat. § 5.02(6m). The survey questions that were asked as part of Dr. Barreto's survey did not seek to determine whether respondents *could obtain* an acceptable form of ID or whether respondents *could obtain* the forms of documentation needed to obtain a state ID card; the survey questions only asked whether the respondents *already possessed* the documents.

Question 12 of Dr. Barreto's survey asked:

> 12. Think about the last time you had to use or show your birth certificate? Some of the people we've talked to have lost or misplaced their official birth certificate. How about you? Do you have a certified official copy of your birth certificate with you, or at your home – or like some people, do you NOT have a certified copy of your birth certificate?

Question 14 asked:

> 14. Okay, great, and how about a social security card? Do you currently have your actual Social Security Card, not a print out?

Question 14a asked:

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[5] The expert report of Barreto and Sanchez is unsigned and did not contain the data or other information considered by the experts in forming the opinions contained therein, as is required by Federal Rule of Civil Procedure 26(a)(2)(B). For the reasons set forth in greater detail in Argument Section I of Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification, the expert report is inadmissible and should not be relied on.

> 14a. What about any of these other documents that serve as proof of identity? An expired Wisconsin ID card or drivers license, driver's license or state ID card from another state, a U.S. federal government employee or military identification card, including for any dependents, or a marriage certificate or judgment of divorce?

(Dkt. #62-10 at p. 51).

Significantly, none of those questions, or any other questions in the survey, asked survey respondents whether they would be able to obtain a birth certificate, a social security card, or one of the other types of documents that could serve as proof of identity. (Dkt. #62-10 at pp. 49-53). Plaintiffs have submitted no evidence regarding whether African-American and Latino voters, while currently lacking a form of ID acceptable under Act 23 and perhaps currently lacking other forms of identification, nonetheless *could obtain* the necessary documents for acquiring a state ID card from the DMV. The fact that an individual might not have a certified copy of his birth certificate or his social security card in hand does not mean that an individual cannot secure those items with relative ease. Plaintiffs have also 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 the barriers faced by white voters.

Plaintiffs have not demonstrated that Act 23 *causes* a prohibited discriminatory result. While they have submitted a proposed expert witness report attempting to establish that African-American and Latino voters in Milwaukee County are less likely than white voters to possess a form of qualifying ID and the documents used for obtaining a state ID card, Plaintiffs have offered no evidence whatsoever to demonstrate that these voters are unable to procure qualifying photo ID. Plaintiffs have only completed one part of the analysis. They have not demonstrated that these individuals are unable to obtain a form of qualifying ID.

Plaintiffs have submitted evidence purporting to establish a statistically significant racial disparity in rates of possession qualifying ID and certain other forms of documentation between white and African-American and Latino voters in Milwaukee County, but that is not enough to prove their claim. *Gonzalez*, 2012 WL 1293149, at *13. Plaintiffs have not demonstrated that eligible African-American and Latino voters are unable to obtain qualifying ID. Without that additional showing, Plaintiffs cannot demonstrate that Act 23 causes a prohibited discriminatory result, which is necessary to prove their claim. *Id.* In short, there is not sufficient evidence showing that implementation of Act 23 will produce a racially disparate impact on the ability of African-American and Latino voters in Milwaukee County to cast a vote that will be counted.

3. The Senate Factors Are Not Appropriately Part of the Analysis of a Claim of Vote Denial Under the Voting Rights Act.

Plaintiffs assert a claim of vote denial under Section 2 of the Voting Rights Act. *See supra* Sec. II.F.1. Yet, they assert that the Court should weigh a set of "Senate Factors" factors, as they are known, which are typically used to evaluate the "totality of circumstances" for a claim of vote dilution. *Thornburg v. Gingles*, 478 U.S. 30 (1986); (Dkt. #20 at pp. 29-43). Specifically, the Supreme Court has indicated that these "factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims." *Gingles*, 478 U.S. at 45.

Whether the Senate Factors play any part in the analysis of a vote denial claim is doubtful. Professor Daniel Tokaji distinguishes between vote denial and vote dilution claims and explores the reasons why some of the factors that would be considered in a vote dilution case (such as a redistricting case) would not be pertinent to the analysis in a vote denial case:

> Whatever dangers of proportional representation exist in applying a disparate-impact standard to vote dilution cases, they do not exist at all in vote denial cases. For example, allowing a plaintiff to make a prima facie against a voter ID

> law by showing the law has a more severe effect on black voters than on white voters is a far cry from requiring proportional representation. Thus, the concerns that led Congress to avoid a simple disparate-impact standard in vote dilution cases are not germane to vote denial claims.

Tokaji, *supra*, 57 S.C. L. Rev. at 722-23.

Plaintiffs specifically discuss the Senate Factors relating to (5) whether the effects of discrimination hinder the ability of members of a minority group to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; and (9) whether the policy underlying the use of the voting law is tenuous. (Dkt. #50 at p. 45). Factors (5) and (6), at a minimum, simply are not applicable to a claim of vote denial the way they would be to a claim of vote dilution. Vote dilution challenges "involve practices that diminish minorities' political influence, such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak," *Simmons*, 575 F.3d at 29. Thus, it is apparent why factors (5) and (6) would apply to a vote dilution claim, as those factors address the history or practice of minority groups' inability to fully exert political influence. But factors (5) and (6) are not appropriate considerations on a claim of vote denial. As to Factor (9), the policy underlying Act 23 is not tenuous. To the contrary, the United States Supreme Court has recognized that there are several legitimate and important State interests that justify voter photo ID laws, among them promoting public confidence in elections. *See supra* Sec. II.A.2.

In evaluating Plaintiffs' likelihood of success on their Voting Rights Act claim, the relevant inquiry is whether Plaintiffs have demonstrated that Act 23 *causes* a prohibited discriminatory result. As explained above, Plaintiffs have not made their showing, and therefore are not likely to succeed on the merits of this claim.

III. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE LIKELY TO SUFFER IRREPARABLE HARM BECAUSE ACT 23 IS ENJOINED.

As discussed above, the relief that Plaintiffs requested is unnecessary. There is no risk of irreparable harm to their right to vote when they can currently vote without the need for photo identification, and when they can ensure that they will be able to vote in all remaining 2012 elections by obtaining an absentee ballot without the need for photo identification. Plaintiffs have not asserted that this alternative procedure for voting offends their constitutional rights.

If the Court concludes that Plaintiffs' request for relief is still necessary, Defendants agree that a likelihood of irreparable harm is presumed in circumstances where the deprivation of a fundamental constitutional right cannot be remedied by monetary damages, s*ee Elrod v. Burns*, 427 U.S. 347, 373 (1976), and particularly in cases involving the denial of the right to vote, *see, e.g., Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986).

IV. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION MUST BE DENIED BECAUSE PLAINTIFFS HAVE NOT DEMONSTRATED THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, Plaintiffs have not met the third and fourth factors for a preliminary injunction, namely, "that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (2008) (citations omitted). Plaintiffs inappropriately discount the State's and public's legitimate and weighty interests in seeing that laws that are validly enacted by the Legislature are applied uniformly and evenhandedly.

Act 23 was intended to prevent fraud and to preserve the integrity of elections for all Wisconsin voters. The State and public have a substantial interest in seeing that the policies

reflected by Act 23 are enforced. Furthermore, the State and the public have a substantial interest in seeing that laws of uniform applicability, like Act 23's photo identification requirement, are applied uniformly to *all* eligible voters choosing to vote at the polls. Special treatment is not contemplated by the law. Surely, the public has an interest in seeing that laws enacted by their elected representatives are applied across the board, as intended. This includes applying the law to Plaintiffs.

V. THE ALTERNATIVE RELIEF THAT PLAINTIFFS HAVE REQUESTED AS TO PROPOSED CLASSES 1, 2, AND 6 WOULD REQUIRE THE COURT TO CRAFT VOTING PROCEDURES THAT THE LEGISLATURE DID NOT INTEND.

As an alternative to enjoining Act 23, Plaintiffs have requested that the Court craft an affidavit of identity procedure to permit voters in proposed Classes 1 and 2 to vote without photo identification, and that the Court permit voters in Class 6 to use a Veterans Identification Card to vote. (Dkt. #50 at p. 4). The Court should not enter such relief, which would require the Court itself to make policy that it is the province of the Wisconsin Legislature to determine. Plaintiffs have not suggested what information the proposed affidavit of identity would contain, nor have they suggested how this procedure would be administered at the polls on election day. Their suggested alternative relief would require the Court to engage in creating a new requirement for voting out of whole cloth.

Plaintiffs also have not suggested how allowing certain voters to show a Veterans Identification Card would be administered, when thousands of poll workers have already been trained as to the forms of acceptable identification, with VIC's not included as an acceptable form of identification. Such alternative relief would require the Court to create and enforce a policy that the Wisconsin Legislature did not intend. The Legislature did not include VIC's in

Act 23 as a form of identification sufficient for purposes of voting. The Court would essentially be re-writing Act 23 if it allowed these Plaintiffs to use VIC's to vote.

CONCLUSION

The relief Plaintiffs have requested is currently unnecessary because the photo identification requirement for voting created by Act 23 has been temporarily and permanently enjoined in state circuit court. If they are registered voters or can register to vote, Plaintiffs and other members of Plaintiffs' proposed classes can currently vote in elections in Wisconsin, and also can obtain absentee ballots for all remaining 2012 elections without photo identification. Thus, Plaintiffs and proposed class members are suffering no harm. Plaintiffs' motion for preliminary injunction must be denied.

Even if the Court concludes that Plaintiffs might still be harmed absent injunctive relief, the Court must deny Plaintiffs' motion for a preliminary injunction. Plaintiffs have not demonstrated they are likely to succeed on the merits of any of their claims, nor that the balance of equities is in their favor or that an injunction would be in the public interest.

Dated this 4th day of June, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar # 1030182

/s/ Carrie M. Benedon

CARRIE M. BENEDON
Assistant Attorney General
State Bar # 1055436

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar # 1066228

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 (Bellavia)
(608) 266-9231 (Benedon)
(608) 266-7477 (Kawski)
(608) 267-2223(Fax)
bellaviatc@doj.state.wi.us
benedoncm@doj.state.wi.us
kawskicp@doj.state.wi.us