No. 15-3582

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, ET AL.,

Plaintiffs-Appellants,

v.

SCOTT WALKER, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, NO. 11-CV-1128, THE HONORABLE LYNN ADELMAN, PRESIDING

BRIEF OF DEFENDANTS-APPELLEES

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
State Bar #1102199

DANIEL P. LENNINGTON
Deputy Solicitor General
State Bar #1088694

Attorneys for Defendants-Appellees

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
(608) 261-7206 (Fax)
tseytlinm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' jurisdictional statement is not complete and correct. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Plaintiffs-Appellants[1] ("Plaintiffs") filed the complaint on December 13, 2011, asserting claims under 42 U.S.C. § 1983 for alleged violations of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution. Dkt. 1.[2] Plaintiffs filed an amended complaint on March 2, 2012, asserting claims under 42 U.S.C. § 1983 for alleged violations of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution, and also asserting claims under the Voting Rights Act, 52 U.S.C. § 10301 (formerly 42 U.S.C. § 1973). Dkt. 31. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. This appeal is a review of a final judgment, dated November 5, 2015, in favor of Defendants-Appellees[3] ("Defendants") and dismissing all of Plaintiffs-Appellants' remaining claims in this case. A.21. No motion for new trial or alteration of judgment was filed. Plaintiffs-Appellants filed a timely notice of appeal on November 17, 2015. There are no claims that remain for disposition. *See* 7th Cir. R. 28(a)(3)(i).

---

[1] Ruthelle Frank, Carl Ellis, Justin Luft, Dartric Davis, Barbara Oden, Sandra Jashinski, Anthony Sharp, Pamela Dukes, Anthony Judd, Anna Shea, Matthew Dearing, Max Kligman, Samantha Mezaros, Steve Kvasnicka, Sarah Lahti, Dominique Whitehurst, Edward Hogan, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Frank Ybarra, Sam Bulmer, Rickie Lamont Harmon, and Dewayne Smith.

[2] All citations to Dkt. refer to the Civil Docket for Case No. 11-cv-1128 in the United States District Court for the Eastern District of Wisconsin.

[3] Scott Walker, Thomas Barland, Gerald Nichol, Timothy Vocke, Kevin Kennedy, John Franke, Harold V. Froehlich, Elsa Lamelas, Michael Hass, Mark Gottlieb, Patrick Fernan, James Miller, Tracy Jo Howard, Barney L. Hall, Donald J. Genin, Jill Louise Geoffroy, and Patricia A. Nelson.

STATEMENT OF ISSUES

1. Was Plaintiffs' attempt to raise an allegedly narrower version of Count 1 foreclosed by the mandate in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014)?

2. Even if Plaintiffs were permitted to raise their allegedly narrower version of Count 1, would this new count conflict with the holding and reasoning of *Frank* and *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008)?

3. Does Wisconsin's decision to exclude ID cards issued by the United States Veterans Administration ("VA IDs") from its list of permissible ID cards for voting purposes survive rational-basis review?

INTRODUCTION

Having lost in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), Plaintiffs seek to resurrect their claim that Wisconsin's voter ID law violates the Constitution for some people who do not yet have ID cards, based upon the very same evidence that was before this Court in *Frank*. Plaintiffs now argue that although *Frank* may have disposed of their original claim, lurking in their complaint all along was a never-before-mentioned, allegedly narrower variation of that original claim.

The mandate rule, however, forecloses this type of gamesmanship. Plaintiffs waived the alternate version of arguments they now assert by not raising them to the district court before *Frank*, and nothing in *Frank*'s mandate suggests that they get another bite at the apple now. In any event, even if the mandate rule did not apply, Plaintiffs' new version of their claim would be foreclosed by the reasoning and holding of both *Frank* and *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008). This Court in *Frank* reviewed the very same evidence Plaintiffs rely upon now—problems with name mismatches, missing documents, and the burden of traveling to multiple agencies—and held that this evidence is insufficient under *Crawford* to establish a violation of the Equal Protection Clause.

Plaintiffs also attack Wisconsin's law because VA IDs are not on the approved list of IDs. But the list of acceptable forms of ID is finite, and it has to be: elections are managed by poll workers who must be able to quickly identify whether an ID is on the approved list. Wisconsin thus acted entirely reasonably when it determined that the list would not include various forms of ID, including VA IDs.

The district court's judgment rejecting Plaintiffs' claims should be affirmed.

STATEMENT OF THE CASE

I. Wisconsin Enacts Act 23 To Require Voters To Present Proof Of Their Identity

Under Wisconsin's voter photo ID law, 2011 Wisconsin Act 23 ("Act 23"), an eligible elector must present documentary proof of ID to vote. Wis. Stat. §§ 6.79(2)(a) and 6.87(1). "Wisconsin requires photo ID for absentee voting as well as in-person voting; a person casting an absentee ballot must submit a photocopy of an acceptable ID." *Frank*, 768 F.3d at 746. Act 23 permits nine acceptable forms of photo ID: (1) a Wisconsin driver license; (2) a Wisconsin state ID card; (3) a U.S. military ID card; (4) a U.S. passport; (5) a certificate of U.S. nationalization that was issued not earlier than two years before the date of the election at which it is presented; (6) an unexpired Wisconsin driver license receipt; (7) an unexpired Wisconsin ID card receipt; (8) an ID card issued by a federally recognized Indian tribe; and (9) an unexpired ID card issued by an accredited college or university in Wisconsin. Wis. Stat. § 5.02(6m)(a)–(f); *see Frank,* 768 F.3d at 746.

With certain exceptions, Act 23 requires that an elector present one of these forms of photo ID to an election official, who must verify that the name on the ID conforms to the name on the poll list and that any photograph on the ID reasonably resembles the elector. *See* Wis. Stat. § 6.79(2)(a).[4] "[W]hen a person who appears to vote in person lacks a photo ID but says he has one, and therefore casts a provisional ballot, the state will count that ballot if the voter produces the photo ID

[4] Similar requirements apply to absentee voters. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.87(1).

by the next Friday." *Frank,* 768 F.3d at 746; *see* Wis. Stat. § 6.79(2)(d) and (3)(b); Wis. Stat. § 6.97(3)(b). If an in-person voter presents photo ID 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 that person may not vote. Wis. Stat. § 6.79(2)(d).

To accommodate eligible electors who do not yet possess an acceptable photo ID and to ensure that no elector is charged a fee for voting, the Wisconsin Department of Transportation must issue an ID card to such electors 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(5)(a)3. Moreover, Wisconsin state officials must issue valid photo ID cards without requiring applicants to present any document that must be paid for, *see Frank*, 768 F.3d at 747, and Wisconsin regulations provide a mechanism for individuals who encounter a hardship in obtaining qualifying documents, Wis. Admin. Code § Trans 102.15(5m).

II. Plaintiffs Sue To Block Act 23's Voter ID Requirement

Plaintiffs filed this lawsuit in December 2011, asserting constitutional claims under the Fourteenth and Twenty-Fourth Amendments against state officials responsible for enforcing Act 23. Dkt. 1. On March 2, 2012, Plaintiffs amended the complaint to add claims under the Voting Rights Act, 52 U.S.C. § 10301 et seq. (formerly 42 U.S.C. § 1973). Dkt. 31. The amended complaint ("Complaint"), is the

operative complaint in this case. It asserts ten separate counts, only two of which are at issue in this appeal: Count 1 and Count 6.

Count 1 alleges a "Violation of the Fourteenth Amendment" because "[e]ligible Wisconsin voters in Class 1 lack one or more primary documents required to obtain a Wisconsin state ID card and are subjected to multiple legal and/or systemic practical barriers to obtaining the ID card under GAB's implementation of the photo ID law and DMV's restrictive regulatory scheme." Dkt. 31:61–62. "Class 1," the Complaint explains, consists of "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 systemic practical barriers to completing the process of obtaining an ID." Dkt. 31:51.

Count 6 alleges that Act 23 violates the Equal Protection Clause because Defendants accept nine forms of photo ID, but not VA IDs. Dkt. 31:67. The Complaint noted that this claim was brought on behalf of "Class 6," which "includes all veterans of a uniformed service of the United States who are eligible Wisconsin voters, lack accepted photo ID, and possess a [VA ID]." Dkt. 31:59.

III. The District Court Grants To Plaintiffs Complete Relief On Count 1

On April 23, 2012, Plaintiffs simultaneously moved to certify its classes, including Class 1, and for a preliminary injunction against the enforcement of Act 23. Dkt. 49; 63. Plaintiffs sought "a preliminary injunction ordering that Defendants permit . . . [Class 1] . . . to execute an affidavit of identity in lieu of presenting one of the limited forms of photo ID acceptable under Act 23." Dkt. 50:1.

In describing Class 1, Plaintiffs argued that some voters, "especially homeless, elderly, disabled, minority and rural voters, have barriers to accessing DMV offices at all." Dkt. 50:14. Plaintiffs also described voters who were never issued birth certificates, who have birth certificates who do not match their names, or who otherwise faced burdens in obtaining certain underlying documents. Dkt. 50:14–17.

In November 2013, the district court held a trial on all of Plaintiffs' claims. Plaintiffs' presentations at the trial were that Act 23 should be enjoined because it allegedly creates barriers to voting. "The credible evidence convincingly proved that Act 23 will impose harsh and widespread burdens on voters," Plaintiffs claimed. Dkt. 194:1. "These are not merely abstract statistics." Dkt. 194:1. Plaintiffs alleged that the burdens imposed by Act 23 affect Class 1: "This includes voters who face substantial legal and practical barriers to obtaining ID (Claim 1)." Dkt. 194:2. Plaintiffs presented evidence concerning the following alleged harms related to Class 1: difficulties in obtaining underlying documents, problems with birth certificates, and the inconvenience of dealing with "multiple bureaucracies." Dkt. 194:67–70.

On April 29, 2014, the district court permanently enjoined Defendants from enforcing Act 23, thereby granting to Plaintiffs complete relief on Count 1. *Frank v. Walker,* 17 F. Supp. 3d 837, 880 (E.D. Wis. 2014). In the context of Plaintiffs' Fourteenth Amendment claims, the district court considered the alleged burdens imposed by Act 23: "the burdens it imposes on the right to vote fall primarily on individuals who do not currently possess a photo ID." *Id.* at 853. The court

identified the same alleged burdens identified by Plaintiffs in the Complaint, their motions, and their briefs: problems with birth certificates, problems in obtaining underlying documents, and the inconvenience of traveling to a government agency to obtain necessary documents. *Id.* at 853–62.[5]

The district court found that "it is likely that a substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting." *Id.* at 862. The district court also found that "because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future, this particular state interest has very little weight." *Id.* at 847. Furthermore, the district court made extensive findings demonstrating that the poor are less likely to have photo IDs than persons of average income. *Frank*, 17 F. Supp. 3d at 854–62. The burdens identified by the district court, therefore, fall "particularly [on] those who are low income," and these low-income voters will likely be "deterred from voting." *Id.* at 862.

In light of these legal and factual conclusions, the district court enjoined Act 23 on a statewide basis. *Id.* at 880. Notably, the district court declined to rule on all of Plaintiffs' constitutional claims, including Count 6, which is the claim dealing with Wisconsin's refusal to accept VA IDs. *Id.* at 843. The district court explained: "by not addressing all constitutional claims, I am leaving the door open to

[5] The district court also found that Act 23 violated Section 2 of the Voting Rights Act, which is not relevant to this appeal. *Frank*, 17 F. Supp. 3d at 879.

successive appeals. But unlike the unjustified-burden constitutional claim [Count 1], the remaining constitutional claims do not overlap substantially with the Section 2 claim and could more easily be addressed in separate proceedings." *Frank*, 17 F. Supp. 3d at 843.

IV. This Court In *Frank* Reverses On Count 1, Without Remanding For Further Considerations Of That Count

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), this Court reversed the district court's judgment, after relying heavily upon *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008). In *Crawford*, the Supreme Court considered Indiana's voter ID law, which is "[f]unctionally identical" to Act 23. *Frank,* 768 F.3d at 750. *Frank* explained that *Crawford* "concluded that both the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections justify a photo ID requirement." *Id.* at 745. *Frank* added that *Crawford* decided that the burdens encountered in obtaining a photo ID are not significantly more than the usual burdens of voting, adding that "[t]hese observations hold for Wisconsin as well as for Indiana." *Id*. at 746.

Addressing Act 23 in particular, and the alleged hardship encountered by Wisconsin voters without photo IDs, *Frank* explained that the "record in *Crawford* contains evidence about the same kind of frustration, encountered by persons born out of state, who are elderly and may have forgotten their birthplaces and birthdates (if their parents ever told them), who are uneducated (and thus may not grasp how to get documents from public agencies), or who are poor (and may have

trouble getting *to* a public agency, or paying for copies of documents)." 768 F.3d at 747. This Court explained that the "judge in Indiana thought, just as the judge in Wisconsin has found, that *some* voters would be unable, as a practical matter, to get photo IDs—because of age or infirmity, lack of ability to pay for birth certificates, or difficulty of obtaining them from public-records bureaus thousands of miles away in other states." *Id.* at 748. These difficulties and hardships were "deemed . . . an inadequate basis for holding Indiana's law unconstitutional" in *Crawford*. *Id.* at 747. After discussing Wisconsin's interest in a photo ID law, the Court then held that *Crawford* "requires us to reject a constitutional challenge to Wisconsin's statute." *Id.* at 751[6]

While the Court held that because of *Crawford*, challenges to voter ID laws—including Act 23—could not be based upon "predictions about the effects of requiring photo ID," the Court did not foreclose all challenges based on evidence (not just predictions) of Act 23's actual impact on a voter's ability to vote. *Id.* at 747. While it did not explain what, specifically, would constitute a successful as-applied challenge to a voter ID law, it did give an important clue: "[i]f the reason [certain voters] lack photo ID is that the state has made it impossible, or even hard, for them to *get* photo ID, then 'disenfranchised' might be an apt description." *Frank*, 768 F.3d at 748.

[6] The Court also ruled that Act 23 did not violate the Voting Rights Act, which is not an issue present in this appeal. *Frank*, 768 F.3d at 755.

This Court issued its mandate on March 25, 2015. Dkt. 221. According to the mandate, "[t]he judgment of the District Court is REVERSED, with costs, in accordance with the decision of the court entered this date." Dkt. 221:8.

V. The District Court Denies Plaintiffs' Post-*Frank* Renewed Motion For A Permanent Injunction

One day after this Court issued the mandate, Plaintiffs filed a "Motion for Permanent Injunction, Class Certification, and Judgment on Remaining As-Applied Claims." Dkt. 222. Plaintiffs' motion sought relief for two claims, and two classes, that are relevant to this appeal: Count 1 (Class 1) and Count 6 (Class 6).

Plaintiffs sought final judgment on Count 1, and certification of Class 1, on the theory that Plaintiffs could articulate "as-applied claims" on behalf of Class 1 voters. Dkt. 223:2. Plaintiffs argued that these voters, instead of presenting a valid photo ID to vote, should be permitted to sign an affidavit. Dkt. 223:17–18. Plaintiffs explained that several examples highlighted the need for this remedy, including individual potential voters who might experience hardships in collecting the documents necessary to obtain a valid photo ID, and individuals with problems related to birth certificates. Dkt. 223:17. Plaintiffs thus argued that the court should "certify Class 1 for the reasons outlined in Plaintiffs' post-trial brief [filed before *Frank*] (see Dkt. #194 at 92-99), and focus on the application of Act 23 to that class." Dkt. 223:17. Later, in their reply brief, Plaintiffs changed course, asserting that they were *only* bringing an "as-applied" claim on behalf of a subset of Class 1 members. Specifically, Plaintiffs appeared only to seek to represent those whose (a) "underlying documents required by DMV to obtain ID contain name mismatches or

other errors that must be amended before DMV will issue accepted ID"; (b) "underlying documents required by DMV to obtain accepted ID cannot be obtained unless the voter interacts with an agency other than the DMV"; and (c) "underlying documents required by DMV to obtain accepted ID do not exist." Dkt. 237:10.

Plaintiffs also sought final judgment on Count 6, and certification of Class 6, regarding individuals who possess only VA IDs, Dkt. 223:9. Plaintiffs argued that by not accepting VA IDs, Act 23 violated the Equal Protection Clause. *See* Dkt. 31:66–67. For unexplained reasons, Plaintiffs now sought to expand Class 6 to those with VA IDs, even if they have other forms of ID acceptable under Act 23. Dkt. 223:9.

On October 19, 2015, the district court denied Plaintiffs' renewed motion. A.1. The court explained that in its decision after trial, it left only certain claims unresolved. A.1. Specifically, "[t]hose claims involved Act 23's failure to include certain forms of photo ID, such as veteran's ID cards"—that is, Count 6. A.1.

The district court held that Plaintiffs' Count 1, and certification of Class 1, was not a claim that it "left unresolved" before *Frank*. A.2. "I found that Act 23 imposed unjustified burdens on voters who currently lack photo ID and will face heighted barriers to obtaining ID." A.2. But on appeal, *Frank* foreclosed any "constitutional claim based on a 'prediction' that barriers to obtaining photo ID will prevent a group of persons from voting. The plaintiffs' reformulated Class 1 claim fits this description." A.3–4. Plaintiffs' renewed motion sought the same relief,

"based on the prediction that it will be hard for them to obtain ID, and that therefore they are 'likely to be deterred from voting in future elections.' Pls.' Br. at 18. *This is precisely the claim that I previously resolved in the plaintiffs' favor and was reversed on*." A.4 (emphasis added). The district court explained that the "Seventh Circuit reversed my decision and did not remand for further proceedings in connection with this claim." A.2. "Rather, it held that the plaintiffs' claim was no different than the claim the Supreme Court considered and rejected in *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008)." A.2. Citing the mandate rule, the district court explained it was not permitted to disregard this Court's decision. A.2.

With regard to Count 6, and Class 6, the court noted that Plaintiffs had originally defined Class 6 as those individuals possessing a VA ID, yet without any acceptable form of photo ID for voting purposes. A.13. "However, they have since expanded the proposed class definition to include all persons who possess a veteran's ID, regardless of whether they also possess Act 23-qualifying ID." A.13 n.9. In any event, the court did not certify this class; instead, the court held that it is "rational for Wisconsin to limit the number of acceptable IDs to a manageable amount, while at the same time accepting enough forms of ID to make it likely that most voters will already possess one of the accepted forms." A.16. Noting that Wisconsin "had to draw the line . . . somewhere," it was not unreasonable to exclude VA IDs. A.17.

SUMMARY OF THE ARGUMENT

I. Count 1 asserts that certain voters are subject to unlawful barriers to voting in violation of the Fourteenth Amendment. Dkt. 31:61–62. This Court in *Frank* held that Plaintiffs did not present sufficient evidence to prevail on Count 1. Plaintiffs now claim that they may continue to litigate an allegedly narrower version of Count 1.

The mandate rule forecloses Plaintiffs' attempts to re-litigate Count 1 for two independently sufficient reasons. First, Plaintiffs never raised this new-version theory of Count 1 to the district court before *Frank*, meaning that any such theory fails to survive *Frank*'s mandate. *See United States v. Husband*, 312 F.3d 247, 250–51 (7th Cir. 2002). Second, *Frank*'s mandate simply did not permit Plaintiffs to submit any new evidence or arguments on Count 1, which necessarily precludes Plaintiffs from arguing that Count 1 contains a previously unidentified narrower version. *See United States v. Polland*, 56 F.3d 776, 778 (7th Cir. 1995).

II. Even if Plaintiffs were permitted to assert their new version of Count 1, consistent with the mandate rule, this claim would be foreclosed by the reasoning and holding of both *Frank* and *Crawford*. *Frank* considered the evidence that Plaintiffs rely upon in this appeal, and found that the evidence insufficient to establish a violation of the Equal Protection Clause under *Crawford*. *Frank,* 768 F.3d at 746–50. Specifically, this Court considered the very same alleged shortfalls that Plaintiffs rely upon in this appeal—voters with name mismatches or errors, voters who must obtain documents from non-DMV agencies, and voters for

whom underlying documents do not exist—and found those alleged shortfalls wanting as a matter of law.

III. Plaintiffs also appeal the district court's decision that Wisconsin acted reasonably in not including VA IDs on the list of acceptable ID cards. The decision of which ID cards to accept represents a classic case of legislative line drawing, which is subject only to rational-basis review. *See McDonald v. Bd. of Elec. Comm'r of Chicago*, 394 U.S. 802, 807 (1969). Act 23 permits nine forms of photo ID. Wis. Stat. § 5.02(6m)(a)–(f). As the district court explained, Wisconsin had to draw the line somewhere and it was entirely reasonable to exclude VA IDs, along with any number of other IDs, as a matter of administrative convenience. In any event, to prevail on this claim, Plaintiffs would need to establish impermissible intent to discriminate against a certain category of voters, a showing they simply cannot make. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002).

ARGUMENT

I. Plaintiffs' Repackaging Of The Very Claim That This Court Rejected In *Frank* Fails As A Matter Of Law

A. *Frank*'s Mandate Forecloses Plaintiffs' Attempt To Litigate A New Version Of Count 1 Before The District Court

1. The mandate rule contains two prohibitions relevant to the present case. First, "any issue that could have been but was not raised on appeal is waived and thus not remanded." *Husband*, 312 F.3d at 250; *accord Barrow v. Falck*, 11 F.3d 729, 730 (7th Cir. 1993) ("An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand and used as a reason to disregard the court of appeals' decision."). "Second, any issue conclusively

decided by this court on the first appeal is not remanded." *Husband*, 312 F.3d at 251. "For instance, where this court stated that 'the sentence is Vacated, and the case is Remanded for resentencing on the issue of obstruction of justice,' we held based on the mandate rule that 'the only issue properly before the district court was the appropriateness of an enhancement for obstructing justice.'" *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) (quoting *Polland*, 56 F.3d at 778).

2. To understand why these two aspects of the mandate rule each prohibit Plaintiffs' attempt to litigate a new version of Count 1, a little background is instructive. In Count 1, Plaintiffs alleged that Act 23 violated the Fourteenth Amendment for eligible voters in Class 1 who "lack one or more primary documents required to obtain a Wisconsin state ID card. . . [and] are subjected to multiple legal and/or systemic practical barriers to obtaining the ID." Dkt. 31:61–62. The district court completely resolved this claim after a full trial, ruling in Plaintiffs' favor. Dkt. 195:38–39. As the district court explained below, "[t]his 'Class 1' claim is not a claim I left unresolved in my prior decision. It is the constitutional claim on which I granted relief: I found that Act 23 imposed unjustified burdens on voters who currently lack photo ID and will face heightened burdens to obtaining ID." A.2.[7]

In *Frank,* this Court "reversed" the judgment of the district court as to Count 1, without leaving any aspect of that Count unresolved. *Frank*, 768 F.3d at 755. In reaching that decision, this Court explained that, *inter alia*, Plaintiffs' submission

[7] The district court's interpretation of its own prior order is entitled to substantial deference, and cannot be set aside "unless the record clearly shows an abuse of discretion." *Arenson v. Chi. Mercantile Exch.*, 520 F.2d 722, 725 (7th Cir. 1975).

on Count 1 failed to prove a constitutional violation because Plaintiffs' proof rested on mere "predictions about the effects of requiring photo ID." *Frank*, 768 F.3d at 747–48. This Court did not remand to the district court to consider any other aspect of Count 1, including for purposes of permitting Plaintiffs to submit additional arguments to support that count. *Id.* As the district court properly articulated, the only remaining issues open to that court after *Frank* were the constitutional claims that the court previously left unresolved, such as Count 6. A.2.

3. In their argument below, Plaintiffs asserted that they should have been permitted to litigate an allegedly narrower version of Count 1. Dkt. 223:2. While it was not clear below what, precisely, this variant was, *see infra* p. 20, the above-described sequence shows that *any* attempt by Plaintiffs to litigate *any* new version of Count 1 after losing in *Frank* is foreclosed by *both* aspects of the mandate rule.

First, with regard to the prohibition that "any issue that could have been but was not raised" cannot be resurrected after an appellate decision, *Husband*, 312 F.3d at 250, it is too late now for Plaintiffs to raise a new version of Count 1 that they never raised before *Frank*. The mandate rule required Plaintiffs to raise any counts, or versions of counts, to the district court before appeal. The mandate rule prohibits Plaintiffs' transparent attempt to sandbag the district court, this Court, and Defendants by claiming—for the first time after losing in *Frank*—that Count 1 actually contained a previously hidden new variant. *See Husband*, 312 F.3d at 250.

Second, as to the "any issue conclusively decided by this court on the first appeal is not remanded" prohibition, *Husband*, 312 F.3d at 251, this aspect of the mandate rule provides an additional barrier to Plaintiffs' attempt to re-litigate any new version of Count 1. As the district court correctly observed, this Court "reversed" on Count 1, without remanding to permit Plaintiffs to, for example, submit new arguments or new evidence on this Count. A.2. That reversal conclusively decided the "issue" of whether Plaintiffs could prevail on Count 1, given the evidence and arguments they submitted at trial. Indeed, the only reason any proceedings remained in the lower court after *Frank* was that other counts still remained in the case, such as Count 6 discussed below. A.1. In such circumstances, the mandate rule prohibits the district court from any further proceedings on this fully litigated count, including considering arguments on an alternative version of Count 1. *See Polland*, 56 F.3d at 777–78.[8]

4. On appeal, Plaintiffs make two arguments as to why the mandate rule does not foreclose their alleged narrower version of Count 1. The first argument is a red herring, while the second flouts the mandate rule and impermissibly attempts to amend their complaint through an appellate brief.

a. Plaintiffs first argue that *Frank* did not hold that "Act 23 is immune to any [as-applied] challenge based on the burdens that Act 23 imposes on an individual

[8] That is not to say that every use of the term "reversed" in a disposition of this Court would always trigger this aspect of the mandate rule. Appellants' Br. 25. Rather, when a party raises all of its arguments on a count before this Court, this Court concludes that the count fails as a matter of law and does not indicate that any further argumentation or evidence should be considered on remand, this second aspect of the remand rule prohibits further lower-court proceedings on that count.

voter or certified class of individual voters." Appellants' Br. 16–17. This is both an accurate observation about what *Frank* did not hold and irrelevant. *Frank* did not foreclose all as-applied challenges to Act 23 or any voter ID law that either Wisconsin or another State might enact. In fact, *Frank* gave a clue as to what a successful as-applied challenge might look like: the plaintiff must prove with evidence, not just "predictions," that "the state has made it impossible, or even hard, for [a voter or certain voters] to *get* photo ID." *Frank*, 768 F.3d at 747–48.

This recitation of what *Frank* did not hold does not help Plaintiffs because *Frank did* hold that Plaintiffs failed to support Count 1 with sufficient evidence to prevail. That some other plaintiff could hypothetically bring a successful as-applied challenge to either Act 23 or another State's voter ID law—by submitting the sort of evidence that plaintiffs here and in *Crawford* failed to marshal—does not support Plaintiffs' appeal. *Cf. Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 666 (7th Cir. 2010) ("Our disposition of this facial challenge does not preclude a future plaintiff, *properly armed with evidence of actual collusion among Wisconsin gasoline dealers*, from bringing an as-applied challenge to the Act or an enforcement action against those dealers under antitrust laws at a later time." (emphasis added)).

Notably, in *Stewart v. Marion County*, No. 08-CV-586, 2008 WL 4690984 (S.D. Ind. Oct. 21, 2008), a voter bought an as-applied challenge to Indiana's voter ID law, the same law the Supreme Court upheld in *Crawford*. The district did not hold that *Crawford* prohibited the bringing of any as-applied claim. Rather, the court properly applied the holding and reasoning in *Crawford*, and then concluded

that the plaintiff could not prevail because his allegations were of the same character as the evidence that the Supreme Court found insufficient in *Crawford*. *Id.* at *3. The same mode of analysis would be appropriate if another plaintiff brought an as-applied challenge to Act 23. The district court would analyze the reasoning of *Crawford* and *Frank*, and then adjudicate the case. If the plaintiff failed to allege or produce sufficient evidence proving—not just "predict[ing]"—that "the state has made it impossible, or even hard, for [the voter] to *get* photo ID," then the plaintiff's claim would necessarily lose. *Frank*, 768 F.3d at 747–48; *see infra* pp. 22–26.

b. Plaintiffs next assert that the district court should have adjudicated the following allegedly narrower version of Count 1: Act 23 violates the Equal Protection Clause as applied to three categories of voters:

> (1) Eligible Wisconsin voters who have name mismatches or other errors in a document needed to obtain ID (hereinafter "underlying document");
>
> 2) Eligible Wisconsin voters who have to obtain an underlying document from an agency other than the DMV, e.g., a Social Security card, in order to obtain ID; and
>
> (3) Eligible Wisconsin voters for whom one or more underlying document(s) necessary to obtain ID do not exist.

Appellants' Br. 20 ("Three-Specific-Categories Claim").

As a threshold matter, as explained above, this argument violates the mandate rule both because no narrower version of Count 1 was raised to the district court before *Frank*, and because this Court in *Frank* did not remand to consider any alternative versions of Count 1. *See supra* pp. 15–18.

But even putting the mandate rule aside, this argument is an impermissible attempt to "amend [Count 1] in [an] appeal brief." *Cody v. Harris*, 409 F.3d 853, 859 (7th Cir. 2005) (citation omitted). Count 1 alleges a Fourteenth Amendment claim for "[e]ligible Wisconsin voters in Class 1." Dkt. 31:61–62. The Complaint defines Class 1, in turn, as "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 systemic practical barriers to completing the process of obtaining an ID." Dkt. 31:51. *The Plaintiffs' new Three-Specific-Categories Claim appears nowhere in the Complaint*. Indeed, the first time Plaintiffs asserted this theory was in their post-*Frank reply brief*, A.3, n.1, meaning that any argument that the Three-Specific-Categories Claim existed within Count 1 all along was waived below. *See James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir. 1998).

Notably, Plaintiffs have never attempted to assert formally this Three-Specific-Categories Claim. Plaintiffs could have sought leave to amend the Complaint to add such a claim, although the longer they waited, the more likely such relief would have been denied. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). Even after *Frank*, Plaintiff could have filed a new lawsuit alleging this claim. Such an approach might well have faced some *res judicata* issues, depending on how plaintiffs articulated the new claim, but such challenges can sometimes be overcome. *See generally Whole Woman's Health v. Cole*, 790 F.3d 563, 591 (5th Cir. 2015) *as modified by*, 790 F.3d 598 (5th Cir. 2015). While either of

these two approaches may have been met with difficulties—depending on their timing and specific content—they would have been far preferable to what Plaintiffs attempted to do: seek to amend their complaint through an appellate filing before this Court, during a second appeal.

B. Even If Plaintiffs Were Permitted To Assert Their New Version Of Count 1, That Claim Would Be Foreclosed By The Holding And Reasoning in *Crawford* And *Frank*

If the Plaintiffs' Three-Specific-Categories Claim somehow survives both the mandate rule and the fact that Plaintiffs never actually asserted this Claim before the district court, then that Claim would still be foreclosed by both *Crawford* and *Frank*. This conclusion applies whether the issue is viewed from the point of view of *Crawford*'s precedential effect, or *Frank*'s law of the case. *Devines v. Maier*, 728 F.2d 876, 880 (7th Cir. 1984) ("[M]atters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court, unless there is plain error of law in the earlier decision." (citations omitted)).

In *Frank*, this Court held that, under *Crawford*, a voter ID law may not be challenged successfully based on mere "*predictions* about the effects of requiring photo ID." 768 F.3d at 747 (emphasis added). "If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect. Actual results are more significant than litigants' predictions. But no such evidence has been offered." *Id.* This Court therefore rejected Plaintiffs' challenge to Act 23 because, among other problems, the case was hampered by a "lack of evidence about what has happened

in other states (or even in Wisconsin itself in 2012)." *Id.* This was the same problem that the Supreme Court found fatal in *Crawford*. *Id.* The Court noted that it was not foreclosing a challenge to either Act 23 or some other voter ID law where the plaintiff submitted sufficient evidence *proving*—not merely "predicting"—that "the state has made it impossible, or even hard, for them to *get* photo ID." *Id.* at 748.

As noted above, Plaintiffs' Three-Specific Categories Claim asserts that Act 23 is unlawful with regard to Wisconsin voters who "(1) . . . have name mismatches or other errors in a document needed to obtain ID . . . ; (2) . . . have to obtain an underlying document from an agency other than the DMV, . . . ; and (3) . . . for whom one or more underlying document(s) necessary to obtain ID do not exist." Appellants' Br. 20. If this Court allows Plaintiffs to assert this new claim now, the question would be whether it survives *Crawford* and *Frank*. Given that Plaintiffs' new claim rests upon the same logic and the very same evidence *Frank* and *Crawford* held insufficient, Plaintiffs' new claim fails as a matter of law. *See, e.g.*, *Stewart*, 2008 WL 4690984, *3 (dismissing an as-applied challenge to Indiana's voter ID law because "the Court concludes that even though Plaintiff asserts an 'as applied' challenge to the Voter ID Law, the reasoning in *Crawford* still applies to Plaintiff's claim").

Voters with mismatches and other errors. Plaintiffs claim that Act 23 is unconstitutional as applied to eligible voters who "have name mismatches or other errors in a document needed to obtain ID." Appellants' Br. 20. But this Court in

Frank specifically considered Plaintiffs' trial evidence about individuals who tried to "correct records to remove an error from a birth certificate," and found Plaintiffs' evidence insufficient under *Crawford*'s standard. *See Frank*, 768 F.3d at 747. The fact that some eligible voters may have name mismatches on underlying documents is relevant only so far as those individuals might have serious trouble obtaining photo ID in the future. *Id.* This is insufficient to support an Equal Protection Clause claim under *Crawford* because it was based upon "prediction about the effects of requiring photo ID," and Plaintiffs did not make a showing, by actual proof, that the "state has made it impossible, or even hard, for them to *get* photo ID." *Frank,* 768 F.3d at 747–48. Given that Plaintiffs presented no additional evidence to prove that the "state has made it impossible, or even hard, for" voters with name mismatches or other errors "to *get* photo ID," this aspect of Plaintiffs' new claim fails as a matter of law.

Voters who must obtain documents from a non-DMV agency. Plaintiffs also allege that Act 23 is unconstitutional as applied to voters "who have to obtain an underlying document from an agency other than DMV, e.g., a Social Security card, in order to obtain ID." Appellants' Br. 20. In *Frank,* this Court considered Plaintiffs' showing of the burdens associated with traveling to multiple agencies, noting the possibility that "some voters would be unable, as a practical matter, to get photo IDs—because of . . . the difficulty in obtaining them from public-records bureaus thousands of miles away in other states." *Frank*, 768 F.3d at 748. But this Court rejected Plaintiffs' evidence as insufficient under *Crawford*

because the district court "could not ascertain how many people were in that category." *Id.* This failure of quantification made this evidence a mere "prediction" "about the effects of requiring photo ID," as opposed to concrete evidence that Act 23 made it "impossible, or even hard" to obtain a photo ID. *Id.* at 747–48. Notably, Plaintiffs still have not attempted to establish how many persons who fall with those "who have to obtain an underlying document from an agency other than DMV," would, "as a practical matter," be "*unable*" to get a photo ID from those other agencies. *Id.* at 748 (emphasis added).

Voters for whom underlying documents do not exist. Plaintiffs allege that Act 23 is unconstitutional for voters "for whom one or more underlying document(s) necessary to obtain ID do not exist." Appellants' Br. 20. This Court in *Frank* considered Plaintiffs' evidence as to these voters, noting the "frustration[] encountered by persons born out of state, who are elderly and may have forgotten their birthplaces and birthdates (if their parents ever told them), who are uneducated (and thus may not grasp how to get documents from public agencies), or who are poor (and so may have trouble getting *to* a public agency, or paying fees for copies of documents." *Frank*, 768 F.3d at 747. The fact that an individual currently lacks an underlying document does not mean that the "state has made it impossible, or even hard, for them to *get*" that underlying document, or a sufficient substitute, and then obtain some form of permissible photo ID. *Id.* at 748. Accordingly, Plaintiffs' claim that some people lack underlying documents is just a "prediction[]

about the effects of requiring photo ID," not an actual claim of disenfranchisement. *Id.*[9]

II. Wisconsin's Decision Not To Add VA ID Cards To The List Of Permissible ID Cards Survives Rational Basis Review

When the voting regulation at issue does not impact a plaintiff's right to vote, and does not classify based an impermissible basis, rational basis scrutiny applies to an Equal Protection Clause claim. *McDonald v. Bd. of Elec. Comm'r of Chicago*, 394 U.S. 802, 807 (1969). In the present case, Plaintiff veterans—Sam Bulmer, Carl Ellis, and Rickie Lamont Harmon—all possess valid Act 23 photo IDs in addition to a VA ID, A.13–14, and no impermissible classification such as "wealth or race" is alleged. *McDonald*, 394 U.S. at 807. Accordingly, the failure to include VA IDs on the list of permissible IDs under Act 23 is subject only to rational basis review. *Id.* at 809.

To prevail on a rational basis equal protection claim, a plaintiff "must show the defendants: (1) treated him differently from others who were similarly situated, (2) intentionally treated him differently because of his membership in the class to which he belonged . . . , and (3) . . . that the discriminatory intent was not rationally

[9] Plaintiffs argue that this Court should revisit *Frank* because of the Fifth Circuit's recent decision in *Veasey v. Abbott*, 796 F.3d 487, 504–13 (5th Cir. 2015) (*en banc* petition pending, No. 14-41127). Appellants' Br. 26–27. *Veasey* held that Texas violated Section 2 of the Voting Rights Act in enacting its own voter ID law. 796 F.3d at 493. *Veasey* specifically declined to opine on the Fourteenth Amendment claim that Plaintiffs assert here. *Id.* at 513. Plaintiffs' citation to this out-of-circuit decision, decided on statutory grounds, does not even arguably satisfy the "plain error of law" standard to overturning a decision of this Court, addressing a constitutional question. *Devines*, 728 F.2d at 880.

related to a legitimate state interest." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002) (citations omitted). Under the final prong, courts must uphold a law if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Plaintiffs can satisfy none of these three prongs. Notably, Plaintiffs only make arguments as to the last prong.

First, Plaintiffs cannot establish that Defendants intentionally treated the Plaintiff-veterans differently from others similarly situated. Every eligible Wisconsin voter is treated the same under Act 23. When any eligible voter shows up at the polls to vote (or votes by absentee), the eligible voter must provide one of nine forms of ID. Wis. Stat. § 5.02(6m)(a)–(f). Plaintiff-veterans may do the same. The fact that Plaintiff-veterans possess an additional form of ID that they *wish* to use does not mean they were intentionally treated any differently that other Wisconsin voters, who also likely possess multiple forms of photo ID. For example, Wisconsin law enforcement officers (and retired officers) may possess photo IDs issued by their agency, Wis. Stat. § 175.48, yet Wisconsin law enforcement officers are not treated differently than others similar situated. They must use one of the nine accepted forms of ID, and they cannot use their law enforcement ID. Anyone who has multiple forms of ID is similarly situated to veterans with a VA ID card, including employees of the federal judiciary who have a photo ID, *see* A.16, or even certain riders of the Milwaukee County Transit System who may receive a photo

ID.[10] Yet all eligible voters—regardless of what IDs they may have—must comply with Act 23.

Second, Plaintiffs cannot establish that Defendants intentionally treated Plaintiff-veterans differently because of their membership in the class to which they belong. It is unclear whether Plaintiffs are claiming that Act 23 discriminates against veterans who have a VA ID card or veterans who simply want to use their VA ID card instead of another acceptable form of ID. As the district court noted, Plaintiffs' description of Class 6, for purposes of Count 6, has differed at different points in this litigation. A.13, n.9. Whatever the classification alleged, Act 23 does not treat any *class* differently because of their classification; Act 23 treats *documents* differently. Nine forms of photo ID are accepted, but not VA ID cards. This does not mean Defendants are discriminating against a class, no matter how the class is defined.

Third, even if Plaintiffs could assert that they were treated differently, they have not established that Act 23 lacks a rational basis. States have a significant "scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). An act is unconstitutional "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* And of course, states are "presumed to have acted within their constitutional power despite the fact that, in practice, their

[10] *GO Pass*, Milwaukee County Transit System, http://www.ridemcts.com/fares-passes/go-pass/ (last visited Jan. 11, 2016).

laws result in some inequality." *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).

Act 23 compiles a list of acceptable forms of ID, which is classic, rational line-drawing. "Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315–16 (1993) (internal quotation marks omitted). As this Court has recognized, "every line drawn by a legislature leaves some out that might well have been included." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 655 (7th Cir. 2013) (quoting *Village of Bell Terre v. Boraas*, 416 U.S. 1, 8 (1974)).

As the district court explained, it is "rational for Wisconsin to limit the number of acceptable IDs to a manageable amount, while at the same time accepting enough forms of ID to make it likely that most voters will already possess one of the accepted forms." A.16. The list of acceptable IDs must be limited, and the list must be reasonable in size. Lists are administered by poll workers, and the list must be manageable to permit poll workers to be familiar with each type of ID. While the current list is nine general forms of ID, that list is actually much greater

because of the variety of the types of ID within each category. For example, Act 23 permits use of an "identification card issued by a U.S. uniformed service," Wis. Stat. § 5.02(6m)(a)3, an identification card issued by an accredited university or college, Wis. Stat. § 5.02(6m)(f), and an ID card issued by a federally recognized Indian tribe, Wis. Stat. § 5.02(6m)(e). Poll workers must already be familiar with a list of cards, and adding to that list would require more training and could lead to delays at the polls as workers compare voters' IDs with a growing list of acceptable ID cards.

Plaintiffs posit three reasons as to why it is irrational for a state to permit some forms of photo ID, but not VA IDs. These arguments are wrong, and also do not address the first two necessary prongs of Plaintiffs' equal protection claim.

Plaintiffs first argue that VA IDs are "materially identical" to Wisconsin driver licenses, therefore, it is irrational to exclude VA IDs. First of all, Plaintiffs' definition of "materially identical" is that both forms "are issued by the government, and both contain a name and photograph among other identifying information." Appellants' Br. 31. Many forms of ID fit this bill. For example, as the district court explained, the federal judiciary issues a card with a name and photograph among other identifying information, including a date of issuance and expiration. A.16. No cases suggest that the Constitution requires Wisconsin to accept all possible forms of ID that are "issued by [a] government, and . . . contain a name and photograph among other identifying information." Appellants' Br. 31. On the

contrary, this is classic legislative line drawing, as explained above. *See Beach Commc'ns, Inc.*, 508 U.S. at 315–16. Even if the line drawn by the Wisconsin legislature is imperfect, "it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (citation omitted)

Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014), relied upon heavily by Plaintiffs, Appellants' Br. 32, 35–37, 40, is not to the contrary. In that case, this Court held that it was irrational for Indiana to exclude secular humanists from the list of authorized celebrants in its marriage-solemnization statute. But as the district court explained, "Indiana did not defend its exclusion of secular humanists from its list of approved marriage celebrants on the ground that including them would open the door to an unmanageably long list." A.19 (citing *Ctr. for Inquiry, Inc.*, 758 F.3d at 874). Indiana claimed it was simply preferring religious views over non-religious views. *Ctr. for Inquiry, Inc.*, 758 F.3d at 874. Indiana's discrimination against secular humanists was also irrational because the statute "discriminate[d] arbitrarily among religious and ethical beliefs." *Id.* at 875. Act 23 does not arbitrarily discriminate against beliefs or even categories of individuals. What Act 23 does do is engage in necessary line-drawing by identifying a finite, manageable list of

acceptable documents that election officials may enforce at the polls. Some documents made the list, while others did not. That is entirely permissible.[11]

Next, Plaintiffs attack the district court's conclusion that Act 23 could permissibly include military-issued IDs and tribe-issued IDs, but exclude VA IDs. Plaintiffs believe that the "entire chain of reasoning . . . rests on the flawed assumption that VA IDs are 'less secure' than Wisconsin-issued IDs." Appellants' Br. 34. The district court, however, did not rest its reasoning on this argument: "[t]here is no dispute that veteran's ID is 'just as secure' as some forms of military and tribal ID that are acceptable under Act 23." A.16. Instead, the district court relied on the fact that active-duty military families were more likely to relocate from state to state than veterans. Due to this mobility, these individuals "may not reside in Wisconsin long enough to find themselves in need of a Wisconsin driver's license or state ID card." A.17–18. And because tribes are quasi-sovereign, the district court noted that it was rational to believe that tribal ID cards "hold the

[11] Neither is Plaintiffs' argument supported by *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432 (1985). That case was not about line drawing, but about denying a special-use permit for a group home based solely on the criteria that the potential residents of the home would be mentally retarded. *Id.* at 437. The government had no rational justification for the discrimination, and the Court held that the decision rested only upon "irrational prejudice against the mentally retarded." *Id.* at 450. The present case involves no "prejudice" against veterans possessing VA IDs. Similarly, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), cited by Plaintiffs, does not support their position. Appellants' Br. 37–38. In that case, the Civil Service Commission (and other federal defendants) excluded by rule all persons except for American citizens and natives of Samoa from employment in most positions in the federal service. This was a case, like *Center for Inquiry*, where the government chose to exclude a group of individuals from a particular benefit or status, and the government's reason for the exclusion lacked a rational basis. *Hampton,* 426 U.S. at 116. Wisconsin's reasonable decision to limit the number of acceptable photo IDs for purposes of Act 23 does not irrationally discriminate against any group of people.

same status within the tribal community as Wisconsin state ID cards hold outside of it." A.18.

Finally, Plaintiffs' attack the district court's reasoning that Act 23 serves Wisconsin's interest in administrative efficiency, which is the idea that the list of Act 23 IDs should be a finite, "manageable amount" so it can be effectively administered by local election officials. Appellants' Br. 36. The district court opined that if Wisconsin were required to accept every form of ID "just as secure" as the IDs that are already accepted, then the list would continually expand and poll workers would need to be continually retrained. A.17.

Plaintiffs argue that "the mere specter of having to amend Act 23 again to comply with the Equal Protection Clause at some point in the future cannot be a valid defense." Appellants' Br. 36. But the district court properly held that it is rational to have a relatively small and manageable group of ID cards on the list of approved Act 23 IDs. A.16. So when an eligible voter comes to a polling location, the poll worker can recognize the ID card, or briefly refer to a manageable list. If every card "just as secure" were constitutionally required under Act 23, then the list may become unwieldy to administer. For example, while poll workers might recognize some forms of ID, such as a Wisconsin driver license, there may be dozens and dozens of ID cards on the list that the poll worker may not recognize. Comparing the proffered ID to the list of acceptable IDs, therefore, could cause delay in poll lines and perhaps require more poll workers. Wisconsin's decision to limit the permissible IDs rationally advances the interest of ease of administration,

and thus survives rational basis review. *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2081–82 (2012) (administrative considerations may be sufficient to show a rational basis).[12]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

s/Misha Tseytlin
MISHA TSEYTLIN
Solicitor General
State Bar #1102199

DANIEL P. LENNINGTON
Deputy Solicitor General
State Bar #1088694

Attorneys for Defendants-Appellees

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
(608) 261-7206 (Fax)
tseytlinm@doj.state.wi.us

[12] Plaintiffs argue that it would actually be easier to include VA IDs than to exclude them, then purport to cite evidence of "confusion." Appellants' Br. 39–40. The email cited, however, references a confusion regarding ID cards issued by the U.S. uniformed services under Wis. Stat. § 5.02(6m)(a)3., and whether that type of ID card is valid for both active and retired military personnel. JA.10. No portion of the email suggests confusion over whether a card issued by the "United States Veterans Administration" qualifies as an "identification card issued by the U.S. uniformed service," under Wis. Stat. § 5.02(6m)(a)3.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X This brief contains 9,309 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

_ This brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

X This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2007** in **12 point Century Schoolbook**, or

_ This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

Dated this 26th day of January, 2016.

s/Misha Tseytlin
MISHA TSEYTLIN
Solicitor General

CERTIFICATE OF SERVICE

I certify that on January 26, 2016, I electronically filed the foregoing Brief of Defendants-Appellees with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 26th day of January, 2016.

s/Misha Tseytlin
MISHA TSEYTLIN
Solicitor General