UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v. Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR A PERMANENT INJUNCTION, CLASS CERTIFICATION, AND JUDGMENT**

## INTRODUCTION

The Court should deny Plaintiffs' motions, Dkt. 222. In its April 29, 2014, decision and order, the Court stated that it "may not rewrite the photo ID requirement to conform it to constitutional requirements." (Dkt. 195:39.) Contrary to that statement, Plaintiffs now ask the Court to order Defendants to accept three forms of ID to vote: (1) U.S. Department of Veterans Affairs ID cards; (2) Wisconsin technical college ID cards that meet certain criteria; and (3) out-of-state driver licenses that meet certain criteria. (Dkt. 222:1.) Plaintiffs' motions effectively ask the Court to rewrite the voter ID law to allow forms of ID that the Wisconsin State Legislature did not list in Wis. Stat. § 5.02(6m) (defining qualifying forms of "identification").

Beyond their policy preference for additional forms of ID, Plaintiffs also want the Court to create an affidavit exception procedure. The Court already rejected this idea because it would amount to "judicial legislation." (Dkt. 195:39 (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995)).) The Court should again reject Plaintiffs' affidavit exception request because elected legislators, not courts, enact the law.

The Court should deny class certification. The Court must grant or deny class certification by order, as is required by Rule 23. Class certification fails for many reasons, including because: (1) there are no viable Plaintiff

class representatives in putative classes 3, 4, and 6; and (2) putative classes 1, 3, 4, and 6 do not comply with Rule 23. Putative class 1, in particular, is vague, indefinite, and would prove utterly unmanageable.

Finally, Plaintiffs' four as-applied claims fail or are barred by the Seventh Circuit's judgment. Plaintiffs' constitutional claim as to putative class 1 is an effort to re-litigate, under the guise of a sweeping "as-applied" class action claim, the same Fourteenth Amendment challenge that the Seventh Circuit rejected. Likewise, Plaintiffs' claims that veterans IDs, technical college IDs, and out-of-state driver licenses should have been expressly authorized by the Legislature are policy preferences cloaked as non-meritorious challenges under the Fourteenth and Twenty-fourth Amendments. The Court should deny Plaintiffs' motions for the reasons argued in this brief.

## BACKGROUND

Plaintiffs have filed motions for class certification, a permanent injunction, and judgment as to as-applied claims that they believe are not foreclosed by the Seventh Circuit's judgment. (Dkt. 222.) They have filed no evidence in support of their motions and are relying solely upon the trial record that was created in November 2013. (Dkt. 223:9-18.)

Plaintiffs will be filing a reply brief by May 15, 2015. (*See* Dkt. 226.) On reply, Plaintiffs should not be permitted to make new arguments or to rely upon evidence submitted for the first time on reply. *See, e.g.*, *Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005) (arguments raised for the first time in a reply brief are waived); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 586 (7th Cir. 1999) (same). "[A] moving party may not submit new evidence with a reply to support a new argument." *Shurr v. A.R. Siegler, Inc.*, 70 F.Supp.2d 900, 912 (E.D. Wis. 1999) (Adelman, J.). Such tactics are inappropriate "sandbagging." *Id.*

Defendants also object to any attempt by Plaintiffs, on reply, to rely upon declarations or affidavits that were filed prior to trial. Such documents contain hearsay that is not subject to any exception to the hearsay rules. They were not admitted into the trial record, and the facts described in them are years-old and stale.

Plaintiffs' motions and supporting brief do not address DMV's administrative rulemaking in September 2014, which created petition exception procedures for those seeking to obtain a free state ID card.

This rulemaking was important to the Seventh Circuit's decision. Addressing the rules, the Seventh Circuit stated: "at the time of trial it was no harder to get supporting documents in Wisconsin than in Indiana, and today it is easier in Wisconsin than in Indiana." *Frank v. Walker*, 768 F.3d 744, 747 (7th Cir. 2014).

DMV's petition-based exception process, which was created by rule following *Milwaukee Branch of the NAACP v. Walker*,[1] has been successful. Between September 15, 2014, and April 18, 2015, there were 677 petitions filed with the DMV. (Declaration of Kristina Boardman, ¶ 13, filed herewith.) 545 petitions have been resolved with the customers obtaining qualifying ID. (*Id.*) Thirty-six petitions were cancelled at the customer's request. (*Id.*) Forty-seven petitions are currently in process, either waiting for additional information from a government agency in Wisconsin or another state or for additional information from the customer. (*Id.*) Forty-nine petitions are in "suspended" status because the customer has neglected to respond with additional information. (*Id.*)

An example of a petition exception process success story is Plaintiff and putative class 1 representative Shirley Brown. She used the petition procedure to obtain qualifying ID from DMV on September 29, 2014. (Boardman Decl., ¶ 18.a.; Ex. B.)

Other Plaintiffs who are putative class representatives obtained qualifying ID during or after trial. Plaintiffs have not informed the Court of these facts:

- Plaintiff and putative classes 1 and 6 representative Sam Bulmer obtained a Wisconsin state photo ID card from DMV on November 14, 2013, the second-to-last day of trial. (Boardman Decl., ¶ 18.b.; Ex. B.)
- Plaintiff and putative class 1 representative Anthony Judd passed away weeks before trial on October 26, 2013, after a tragic car accident. (Boardman Decl., ¶ 21); *see also* http://tinyurl.com/pk66nqc; http://tinyurl.com/pybkfc2 (last visited April 23, 2015).
- Plaintiff and putative class 1 representative Justin Luft obtained his state ID card from DMV on October 9, 2014. (Boardman Decl., ¶ 18.e.; Ex. B.)

[1]2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262.

- Plaintiff and putative class 4 representative Edward Hogan obtained his Wisconsin driver license from DMV on September 8, 2014. (Boardman Decl., ¶ 18.d.; Ex. B.)
- Plaintiff and putative class 6 representative Rickie Lamont Harmon obtained his state ID card from DMV on February 13, 2014. (Boardman Decl., ¶ 18.c.; Ex. B.)

DMV is in the process of making the emergency rules promulgated in September 2014 permanent. On January 20, 2015, DMV submitted a proposed final draft rule to Governor Walker for his approval. (Boardman Decl., ¶ 14.) A revised proposed final draft rule was submitted to Governor Walker on February 2, 2015. (*Id.*) On February 10, 2015, Governor Walker issued his written approval of the proposed revised final draft rule. (*Id.*)

On February 13, 2015, the rules were referred to the Senate Committee on Transportation and Veterans Affairs. (Boardman Decl., ¶ 16.) On February 17, 2015, the rules were referred to the Assembly Committee on Transportation. (*Id.*) The permanent rules are under review by each standing committee and are anticipated to be effective by June 1, 2015. (*Id.*, ¶ 17.)

On February 11, 2015, the Wisconsin State Legislature's Joint Commission for Review of Administrative Rules ("JCRAR") granted DMV's extension request for the September 2014 emergency rule. (Boardman Decl., ¶ 15.) On March 12, 2015, DMV submitted a written request for an extension of the emergency rules to JCRAR. (*Id.*) That request was granted on April 9, 2015, and the emergency rules are extended until June 13, 2015. (*Id.*)

## LEGAL STANDARDS

### I. Class certification

A party seeking to certify a class action must meet two conditions. First, the party must show the putative class satisfies the four prerequisites of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). Second, the action must qualify under at least one of the three subsections of Rule 23(b). Fed. R. Civ. P. 23(b); *Rosario*, 963 F.2d at 1017.

It is Plaintiffs' burden to establish compliance with Rule 23 by a preponderance of the evidence. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). This Court "may not simply assume the truth of the matters as asserted by the plaintiff." *Id.* Class certification requires Plaintiffs to "affirmatively demonstrate [their] compliance with [Rule 23]—that is, [they] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Defendants described the legal requirements for class certification at length in their post-trial brief at pages 82 through 89 and in their brief opposing class certification at pages 2 through 7. (Dkt. 176:82-89; Dkt. 83:2-7.) Defendants adopt that briefing here.

## II. Permanent injunction

Plaintiffs seeking a permanent injunction must demonstrate that: (1) they have suffered irreparable harm; (2) monetary damages are inadequate to remedy the injury; (3) an equitable remedy is warranted based on the balance of hardships between the plaintiffs and the defendants; and (4) the public interest would be well served by the injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

# ARGUMENT

## I. The Court should enter an order denying class certification.

The Court must either grant or deny Plaintiffs' class certification motion by order, as is required by Rule 23. Federal Rule of Civil Procedure 23(c)(1)(A) states: "At an early practicable time . . . the court *must determine by order* whether to certify the action as a class action." (Emphasis added.) "It is important that the question whether the case is to proceed as a class action be resolved sooner rather than later." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 486 (7th Cir. 2012).

For the reasons that follow, and as argued in Defendants' prior briefs opposing class certification, *see* Dkt. 83, Dkt. 176:82-104, the Court should enter an order denying class certification.

### A. The Court should deny class certification as to putative class 1 because it does not satisfy Rule 23.

"It is axiomatic that for a class action to be certified a 'class' must exist." *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981). What Plaintiffs propose in class 1 is not a class, as it vaguely references all voters lacking ID who face barriers to obtaining ID. It is a dissimilar group of individuals with factually disparate circumstances regarding obtaining qualifying ID. Class 1 cannot be certified because it does not satisfy Rule 23.

*First*, as a preliminary matter, Plaintiffs have not informed the Court whether putative class 1 representatives have passed away or have obtained qualifying ID since trial. It is Plaintiffs' burden to establish compliance with Rule 23 by a preponderance of the evidence. *Messner*, 669 F.3d at 811. They have failed to meet their burden.

Of the putative class 1 representative Plaintiffs who presented trial evidence, there appear to be only two who lack qualifying ID: Ruthelle Frank and Eddie Lee Holloway, Jr. As noted above, Shirley Brown used the petition exception procedure to obtain qualifying ID, and Anthony Judd has died.

*Second*, class definitions must be definite enough to be ascertainable. *See Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 493 (7th Cir. 2012); *Oshana*, 472 F.3d at 513; *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977). Putative class 1 is too indefinite to certify. It is defined by Plaintiffs 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.)

As Defendants argued in their post-trial brief, it is unreasonably difficult or impossible to determine who is in class 1. (Dkt. 176:95.) Plaintiffs' definition is essentially meaningless because no one can ascertain what meets the standard of a "legal or systemic" practical barrier to completing the process of obtaining an ID. (Dkt. 31:51.) To be in class 1, is it enough that a voter forgot to bring his birth certificate to the DMV? Some might argue that forgetfulness is a "systemic practical barrier" to "obtaining" an ID. This example, while extreme, illustrates why class 1 is not certifiable because the criteria to be a part of the class are too vague. Class 1 is indefinite and would prove unmanageable.

*Third*, putative class 1 cannot be certified because it does not satisfy the commonality requirement of Rule 23. *See* Fed. R. Civ. P. 23(a)(2). To raise common questions of law or fact, the plaintiff must demonstrate that class members have suffered the same injury. *Wal-mart*, 131 S. Ct. at 2551. "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (citation and internal quotation marks omitted). A class definition that entails individualized questions of fact and law, and which produces unique answers respective of each claimant, does not meet the requirements for commonality. *See Jamie S.*, 668 F.3d at 496-97. It is not enough that all class members have suffered a violation of the same provision of law to meet the commonality requirement. *Wal-mart*, 131 S. Ct. at 2551.

There are not questions of law or fact common to putative class 1. Each member of the class faces different circumstances in obtaining qualifying ID. Some class members may have no birth certificate; others may find that their birth certificate is difficult to obtain. Others may be poor and struggle to gather the funds needed to take a bus to DMV. Still others may have difficulty complying with DMV's procedures for various reasons. All of these circumstances are different reasons why one could face a "legal or systemic" practical barrier to completing the process of obtaining an ID. (Dkt. 31:51.) There are not common questions of law or fact in putative class 1 to meet Rule 23(a)(2).

*Fourth*, putative class 1 does not meet the typicality requirement. *See* Fed. R. Civ. P. 23(a)(3). The only remaining potential class 1 Plaintiff representatives are Ruthelle Frank and Eddie Lee Holloway, Jr. Their circumstances are not only completely distinct from each other, but they are not typical of other voters who lack ID cards.

Ms. Frank has an atypical situation. As trial evidence showed, she could obtain a free state ID card from DMV if she obtained a certified copy of her birth certificate and went to DMV with the certificate and the other documents she already has in her possession. (*See* Dkt. 176:99, 117-18; Boardman Decl., ¶ 22.) She refuses to do so. Ms. Frank is not a typical member of putative class 1 because her so-called "practical barrier" to getting an ID is her own obstinacy.

Mr. Holloway also has an atypical situation. His birth certificate reads "Eddie Junior Holloway," instead of Eddie Lee Holloway, Jr. (Dkt. 176:91; Dkt. 179:43 (trial transcript, 11/04/13).) It is very unlikely that the difficulty that *all* members of putative class 1 face is a transposition or misspelling on

their birth certificates. Setting this abnormality aside, Mr. Holloway cannot represent putative class 1 members who *lack* a birth certificate. He has one. Also, he could likely use DMV's petition process to obtain qualifying ID. (Boardman Decl., ¶ 23.)

*Fifth*, class representatives must be parties to the case. Fed. R. Civ. P. 23(a)(3) ("representative parties"); *see also* Fed. R. Civ. P. 23(a)(4) ("representative parties"). Plaintiffs cannot rely upon alleged threatened injuries to non-parties (*i.e.*, non-Plaintiffs) in support of class certification. Given that the only remaining viable putative class 1 Plaintiff representatives do not have claims typical of the class, class 1 fails this requirement of Rule 23.

*Sixth*, putative class 1 does not qualify under any subsection of Rule 23(b). *See* Fed. R. Civ. P. 23(b); *Rosario*, 963 F.2d at 1017. Plaintiffs have asserted that putative class 1 qualifies under either Rule 23(b)(1) or Rule 23(b)(2). (*See* Dkt. 64:17-18; Dkt. 177:95.) Neither proposition is correct.

To satisfy Rule 23(b)(2), Plaintiffs must demonstrate that:

> The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . .

Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not . . . require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000).

Plaintiffs cannot meet this standard because, due to the class's vague definition, members of putative class 1 will face different "legal or systemic practical barriers" to obtaining qualifying ID. (Dkt. 31:51.) The interests of the putative class are not cohesive and homogenous—they are varied and disparate.

Plaintiffs also cannot meet the standard for a mandatory class action under Rule 23(b)(1). Class treatment is appropriate under this subsection when individual—as opposed to class—treatment would risk the establishment of inconsistent conduct for the defendants, or when individual cases would, as a practical matter, be dispositive of the claims of nonparties.

Fed. R. Civ. P. 23(b)(1)(A), (B); *see Spano v. The Boeing Co.*, 633 F.3d 574, 577 (7th Cir. 2011). Here, putative class 1 does not pose these risks because it is so vaguely defined and its likely membership's circumstances are so diverse that individual treatment would be superior to class treatment.

*Finally*, putative class 1 does not satisfy the numerosity requirement. Fed. R. Civ. P. 23(a)(1). Generally, a class of 40 or more is enough to satisfy numerosity. *See Barden v. Hurd Millwork Co., Inc.* 249 F.R.D. 316, 319 (E.D. Wis. 2008); *see also Pruitt v. City of Chicago, Ill.* 472 F.3d 925, 926 (7th Cir. 2006). Plaintiffs have not met their burden to establish that there are a sufficient number of members in class 1 to justify treating this group as a class.

### B. The Court should deny class certification as to putative classes 3, 4, and 6 because they do not satisfy Rule 23.

#### 1. There are no representative Plaintiffs in putative classes 3, 4, and 6 based upon the record before the Court.

Putative classes 3, 4, and 6 cannot be certified because there are no representative party Plaintiffs in these classes. Defendants will not belabor the point; it has been briefed already and argued in closing argument at trial: *see* Dkt. 176:92-95; Dkt. 186:2130-31 (trial transcript, 11/15/13).

The following chart illustrates this. Plaintiffs who presented no evidence at trial are designated by ~~strikethrough text~~; those who currently have a form of qualifying ID based upon their trial testimony or facts learned after trial are designated by ~~*italics and strikethrough text*~~; and deceased Plaintiffs are designated by ~~***bold italics strikethrough text***~~:

| Class | Class representative Plaintiffs |
|---|---|
| Class 1 | Ruthelle Frank, ~~*Shirley Brown*~~, ~~***Nancy Lea Wilde***~~, Eddie Lee Holloway, Jr., ~~Mariannis Ginorio~~, ~~Frank Ybarra~~, ~~*Sam Bulmer*~~, ~~Dartric Davis~~, ~~*Justin Luft*~~, ~~Barbara Oden~~, ~~*DeWayne Smith*~~, ~~Sandra Jashinski~~, and ~~***Anthony Judd***~~ (Dkt. 31, ¶ 108.) |
| Class 3 | ~~Anna Shea~~, ~~*Matthew Dearing*~~, ~~Max Kligman~~, ~~*Samantha Meszaros*~~, ~~Steve Kvasnicka~~, and ~~Sarah Lahti~~ (*Id.*, ¶ 118.) |
| Class 4 | ~~*Domonique Whitehurst*~~, ~~*Edward Hogan*~~, and ~~Sarah Lahti~~ (*Id.*, ¶ 121.) |
| Class 6 | ~~*Sam Bulmer*~~, ~~*Carl Ellis*~~, and ~~*Rickie Lamont Harmon*~~ (*Id.*, ¶ 127.) |

As the chart illustrates, there are no representative party Plaintiffs in putative classes 3, 4, or 6 who satisfy Rule 23.

In *Payton v. County of Kane*, the Seventh Circuit stated that it would be "of course, impermissible" for the named plaintiffs to attempt to "piggy-back on the injuries of the unnamed class members." 308 F.3d 673, 682 (7th Cir. 2002). If parties lack standing to pursue their own claims because they already have a qualifying ID, presented no evidence at trial, or are deceased, these Plaintiffs cannot pursue class claims based upon injuries to non-parties who allegedly lack qualifying ID. "Standing cannot be acquired through the back door of a class action." *Id.* (citation and internal quotation marks omitted).

Plaintiffs have not met their burden under Rule 23 to show that there are any parties in this case who are representative of persons in putative classes 3, 4, and 6. Class certification must be denied. For the same reason, the corresponding claims should be dismissed because there are no Plaintiffs with standing to pursue them.

**2. Putative classes 3, 4, and 6 do not satisfy Rule 23.**

Putative classes 3, 4, and 6 do not satisfy Rule 23, and Plaintiffs have not met their burden to demonstrate that these classes are certifiable.

*First*, these classes do not satisfy the numerosity requirement. Fed. R. Civ. P. 23(a)(1). Putative class 3 is defined as "all Wisconsin voters who are residents of Wisconsin for voting purposes, who lack any accepted photo ID, and who would be forced to surrender an out-of-state driver's license in order to obtain a free Wisconsin ID card for voting purposes." (Dkt. 31:55.) With regard to putative class 3, in their 2012 class certification brief, Plaintiffs relied upon deposition testimony that was speculative, at best. (*See* Dkt. 64:18-19.) Plaintiffs have not pointed to trial testimony to demonstrate their contention that class 3 meets numerosity. Instead, they suggest that there are at least 100 out-of-state students at Carthage College and 40 or 50 at Lawrence University. (Dkt. 177:101.) Plaintiffs presented no evidence that these students lack *all* forms of qualifying ID or that they even have out-of-state driver licenses.

Likewise, Plaintiffs pointed to testimony from a Wisconsin Government Accountability Board ("GAB") employee that he is aware of 10 "snowbirds," but Plaintiffs point to no evidence that these individuals lack *all* forms of qualifying ID or that they have out-of-state driver licenses. Plaintiffs cannot

even muster a single Plaintiff who meets class 3's definition, let alone substantiate, by competent evidence, the 40 or more class members necessary to satisfy Rule 23(a)(1). *See Barden*, 249 F.R.D. at 319.

Putative classes 4 and 6 fare no better than class 3. Putative class 4 is defined as "all enrolled students at accredited Wisconsin technical colleges who lack any form of accepted photo ID other than technical college ID cards." (Dkt. 31:57.) Putative class 6 is defined as "all veterans of a uniformed service of the United States who are eligible Wisconsin voters, lack accepted photo ID, and possess a Veterans Identification Card ('VIC') issued by the U.S. Department of Veterans Affairs." (*Id.* at 59.)

There is not a single Plaintiff in this case who lacks *all* forms of qualifying ID but yet has a technical college ID card or a veterans ID card. Plaintiffs relied upon "common sense," hearsay, and fuzzy math to support their claim that putative class 4 is sufficiently numerous to be treated as a class. (Dkt. 64:20). In post-trial briefing, they speculated that there are "tens of thousands" of technical college students in Wisconsin, but they could not estimate how many of them lack *all* forms of qualifying ID, yet have a technical college ID card. (Dkt. 177:102.) Plaintiffs have not met their burden as to numerosity for putative class 4.

Plaintiffs initially attempted to extrapolate the number of likely class 6 members from a document that is not part of the trial record. (*See* Dkt. 64:22, n.13.) Then, in their post-trial brief, Plaintiffs relied upon hearsay and the speculation of a single witness regarding there being "at least 15 or 20 other veterans who did not have DMV-issued ID." (Dkt. 177:103-04.) Lacking DMV-issued ID does not mean that an individual lacks *all* forms of qualifying ID. In any event, Plaintiffs' evidence does not satisfy the numerosity requirement. There is not one Plaintiff in this case who meets the class 6 definition.

*Second*, Plaintiffs cannot meet the typicality and adequacy of representation requirements of Rules 23(a)(3) and (4) because there are no representative Plaintiffs in this case for putative classes 3, 4, and 6. Both of these parts of Rule 23 require "representative *parties*." Fed. R. Civ. P. 23(a)(3), (4) (emphasis added). No party Plaintiffs fall into putative classes 3, 4, or 6. The representative Plaintiffs for these classes either (1) already have qualifying ID; or (2) presented no trial evidence to substantiate that they are representative of class members.

Plaintiffs have not met their burden under Rule 23 to establish that putative classes 3, 4, and 6 are certifiable. The Court should enter an order denying class certification.

### C. Alternatively, Plaintiffs forfeited their right to pursue class certification when they did not timely appeal this Court's April 29, 2014, order denying class certification.

Plaintiffs' class certification motion faces a procedural hurdle. Plaintiffs forfeited the right to pursue class certification when they failed to timely appeal the Court's April 29, 2014, denial of class certification. For this alternative reason, class certification must be denied.

Plaintiffs assert that a class certification motion was "pending" as to putative classes 1, 3, 4, and 6. (Dkt. 222:1.) They are wrong. On April 29, 2014, this Court ordered: "**IT IS FURTHER ORDERED** that the Frank plaintiffs' motion for class certification is **DENIED** as **MOOT**." (Dkt. 195:70.) No class certification motion was pending when Plaintiffs filed their instant motions.

The Court's April 29, 2014, order was accompanied by a judgment in Plaintiffs' favor. (Dkt. 196.) But Plaintiffs did not timely file a motion under Rules 59 or 60 in this Court to challenge the denial of class certification. Nor did they raise the issue of class certification denial via a timely appeal to the Seventh Circuit. *See* Fed. R. Civ. P. 23(f) (14 days to appeal class certification denial; court of appeals jurisdiction is discretionary). They forfeited the right to appeal this Court's denial of class certification or to pursue the topic further before this Court.

## II. The Court should deny Plaintiffs' motions for a permanent injunction and judgment as to as-applied claims.

### A. The voter ID law does not impose unconstitutional burdens on putative class 1 voters.

#### 1. The Seventh Circuit's judgment resolved Plaintiffs' class 1 "unconstitutional burdens" claim, so Plaintiffs cannot pursue it again.

Plaintiffs cannot avoid the Seventh Circuit's rejection of their Fourteenth Amendment claim by repurposing it as a class action. This Court ruled that Act 23 violates the Fourteenth Amendment by imposing a substantial burden on the subgroup of "eligible voters who lack a photo ID

[who] are low-income individuals who either do not require a photo ID to navigate their daily lives or *who have encountered obstacles that have prevented or deterred them from obtaining a photo ID*." (Dkt. 195:24 (emphasis added).) The Seventh Circuit reversed this Court's judgment, holding that there was no Fourteenth Amendment violation, while specifically addressing the alleged practical and systemic barriers facing voters who need to obtain qualifying ID. *Frank*, 768 F.3d at 747-51.

This Court would have to disregard the Seventh Circuit's decision if it were to find a Fourteenth Amendment violation with respect to a class made up of the same subgroup addressed in this Court's reversed decision. This is not allowed under the law of the case doctrine, which provides that "when a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." *Creek v. Vill. of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). "On remand a trial court is bound by enunciations of law made at the appellate level." *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 572 F.2d 574, 577 (7th Cir. 1978). This Court cannot grant Plaintiffs' motion for judgment with respect to putative class 1 without ignoring the express and implied rulings of the Seventh Circuit in its October 6, 2014, decision.

There is no difference between a challenge to how Act 23 applies to the subgroup of voters facing "legal or systemic practical barriers" to obtaining ID—which was what this Court and the Seventh Circuit ruled upon—and a class action challenging Act 23 on behalf of a class of that same subgroup of voters. Plaintiffs do not explain how their proposed class of "eligible Wisconsin voters who lack photo ID and face systemic practical barriers to obtaining an ID," (Dkt. 223:16), differs in any way from the subgroup of voters that was already addressed by both this Court and the Seventh Circuit.

Putative class 1 contains individuals who would have to amend their birth certificates to obtain an ID, individuals who do not have birth certificates and thus must search for other documentation, and individuals who would have to make multiple trips to government offices to obtain underlying documents necessary to obtain an ID. (Dkt. 223:16-17.) The Seventh Circuit specifically addressed these individuals in its decision. It addressed the testimony of witnesses who "had been frustrated when trying to get photo IDs" and two witnesses who testified that "distance or poverty hindered them when trying to obtain birth certificates or correct records to remove an error from a birth certificate." *Frank*, 768 F.3d at 747.

This implicates the *Anderson/Burdick*[2] test, which balances the interests put forth by the State against the burdens imposed by an election regulation. That test would apply the same regardless of whether one characterizes the claim as relating to a subgroup of voters facing barriers or a class of voters facing those same barriers. Because the Seventh Circuit has already ruled on this issue, this Court could not find a Fourteenth Amendment violation as to putative class 1 without rejecting the Seventh Circuit's holdings. And without a violation of the Fourteenth Amendment, there is no basis for this Court to enter any relief, regardless of whether the relief is more limited than the form of relief this Court previously granted.

The Seventh Circuit applied *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and ruled that there was no unconstitutional burden on the right vote due to the existence of voters who face barriers to obtaining ID. Specifically, the Seventh Circuit stated:

> 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 so may have trouble getting *to* a public agency, or paying fees for copies of documents).

*Frank*, 768 F.3d at 747. The Seventh Circuit held that these types of practical or systemic barriers were not sufficient to show an unconstitutional burden on the right to vote because "the district judge in *Crawford* also discussed these problems; so did the Supreme Court, which deemed them an inadequate basis for holding Indiana's law unconstitutional." *Id.* Yet Plaintiffs seem to think that the Seventh Circuit's decision did not address a claim that a class of voters exists who face burdens in obtaining ID. The Seventh Circuit already addressed these concerns and rejected them. *See id.*

In addition to the burden component of the *Anderson/Burdick* test, the result here should be the same when one considers the State's interest side of the equation. Plaintiffs do not attempt to address the applicable State interests in their brief, likely because this Court would have to reject the Seventh Circuit's holdings regarding the State interests supporting voter ID in order to grant Plaintiffs' motions with respect to putative class 1.

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[2]*See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

In Plaintiffs' post-trial brief, they argued that the Court should grant relief to putative class 1 because the asserted governmental interests, such as preventing fraud and promoting confidence in elections, were merely "conjectural." (Dkt. 177:71.) The Seventh Circuit rejected this position by holding that the photo ID requirement was supported by the State's interests in preventing fraud and promoting voter confidence. *Frank*, 768 F.3d at 749-51.

Plaintiffs' current argument regarding the class 1 claim is based on a misunderstanding of the Seventh Circuit's statement that this case involved a facial challenge to Act 23. (*See* Dkt. 223:6-7.) The Seventh Circuit characterized this case as involving a facial challenge—"to Act 23 as written ('on its face')"—not because it did not involve any evidence regarding how Act 23 applied to voters who faced burdens in getting identification, but because it did not involve any evidence as to how the law affected voter turnout in elections that had already occurred. *Frank*, 768 F.3d at 747. Specifically, the Seventh Circuit noted that this Court "did not make findings about what happened to voter turnout in Wisconsin during the February 2012 primary," and there was no trial evidence of whether photo ID requirements actually resulted in reduced turnout either in Wisconsin or in other states. *Id.* As the Seventh Circuit summarized, "[a]ctual results are more significant than litigants' predictions. But no such evidence has been offered." *Id.*

The Seventh Circuit's statement about a facial challenge was related to the pre-enforcement nature of the challenge; it was not a holding that this was a case where "individual application facts do not matter." (Dkt. 223:7 n.1 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011).) Plaintiffs presented witness testimony regarding how Act 23 applied to individual circumstances, which this Court extensively relied upon in its ruling. (*See* Dkt. 195:22-38.) The Seventh Circuit specifically addressed this type of evidence in its decision reversing this Court's judgment. *Frank*, 768 F.3d at 746-47. It is inconsistent with the record for Plaintiffs to assert that this case did not involve evidence regarding the application of Act 23 to the circumstances of individuals who would be in putative class 1.

The Seventh Circuit did not leave open the possibility that this Court could find a Fourteenth Amendment violation based upon the same evidence introduced at trial, as applied to a group of people whose circumstances were already addressed by the Seventh Circuit's decision. The Seventh Circuit's holding does not change just because Plaintiffs are now attempting to secure a more limited remedy. The *Anderson/Burdick* balancing test analysis for the

putative class 1 claim is the same as the balancing test that was applied by this Court and subsequently reversed by the Seventh Circuit. The putative class 1 claim suffers from the same deficiencies the Seventh Circuit addressed. It is based on the same evidence introduced at trial—Plaintiffs' predictions about what will happen if the law goes into effect—with no evidence of the "actual results" of how the voter ID requirement impacts elections. This Court cannot find a Fourteenth Amendment violation as to putative class 1 without completely disregarding the Seventh Circuit's holding that the trial evidence was insufficient to support a Fourteenth Amendment violation. Without a violation, this Court cannot grant the relief Plaintiffs have requested. Their motions should be denied.

**2. The putative class 1 claim fails on the merits because class 1 members can use the DMV's petition exception process to obtain qualifying ID.**

Even if the Court determines that the class 1 Fourteenth Amendment claim is not foreclosed by the Seventh Circuit's judgment, the claim fails on the merits. Voters in this putative class will be able to obtain qualifying ID with little effort using the DMV's petition exception process created following *Milwaukee Branch of the NAACP v. Walker*. There will be no unconstitutional burden.

In *NAACP*, the Wisconsin Supreme Court held that the DMV must issue free photo ID cards for voting "without requiring documents for which a fee continues to be charged by a government agency." 851 N.W.2d 262, 281 (2014).

After *NAACP*, in September 2014, the DMV promulgated administrative rules that expanded the documentary options to apply for a free photo ID card for voting. *See* Emergency Rule 1421, Wis. Admin. Reg. 708B, http://tinyurl.com/jvox3l4 (last visited April 23, 2015). The rules allow the DMV to consider documents like baptismal certificates, hospital birth certificates, delayed birth certificates, census records, early school records, family Bible records, and doctor's records of post-natal care when a certified copy of a birth certificate is deemed unavailable. *Id.* (creating Wis. Admin. Code § Trans 102.15(5m)(b)). DMV's promulgation of these rules caused the Seventh Circuit panel to conclude that "at the time of trial it was no harder to get supporting documents in Wisconsin than in Indiana, and today it is easier in Wisconsin than in Indiana." *Frank*, 768 F.3d at 747.

As discussed in the Background section above, DMV's petition process has been successful. Those voters who could face hiccups obtaining qualifying ID because their birth certificates are out-of-state, missing, or never existed will be able to use the petition process to obtain a free state ID card to vote. These options will permit voters likely to be members of putative class 1 to obtain qualifying ID without incurring burdensome costs.

As to other practical problems, such as traveling to the DMV, the Supreme Court in *Crawford* rejected these types of concerns. *See Crawford*, 553 U.S. at 198. Such concerns are no more burdensome than the process of voting itself. *Id.* They do not result in a constitutional violation.

Finally, to remedy their "as-applied" undue burdens claim, Plaintiffs ask the Court to craft an affidavit exception procedure. (Dkt. 222:2; Dkt. 223:18.) The Court already rejected this alternative because it would amount to "judicial legislation." (Dkt. 195:39 (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995)).) The Court should again reject this alternative because it would amount to writing a law that the Legislature did not enact.

### B. The voter ID law does not violate the Equal Protection Clause by not permitting voters to use VA ID for voting.

Wisconsin did not violate the Equal Protection Clause by authorizing nine different forms of photo ID, *see* Wis. Stat. § 5.02(6m)(a)-(f), while choosing not to include a tenth form: ID cards issued by the U.S. Department of Veterans Affairs ("VA ID"). Plaintiffs have fallen far short of demonstrating that Wisconsin's list of nine forms of ID imposes an "'invidious' distinction" that would violate the Equal Protection Clause. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1998).

First, no Plaintiff in this case has standing to pursue a claim regarding VA ID. Of those who represent putative class 4, all have qualifying ID.

As another initial matter, Plaintiffs focus on the wrong distinction. While they analyze Act 23 as creating an unconstitutional distinction as to everyone with VA ID, the relevant group in the analysis is those who have VA ID but do not have any *other* form of qualifying ID. The equal protection analysis looks to "the interests of those who are disadvantaged by the classification," *id.*, and only those who have a VA ID but no other qualifying ID could possibly be disadvantaged by the Legislature's decision not to

include VA ID as a qualifying ID. Those who have another form of qualifying ID face no additional obstacle to voting and are not "disadvantaged."

The Legislature's exclusion of VA ID when it drew the lines regarding accepted forms of ID meets the "lenient standard" of rational basis review. *Smith v. City of Chicago*, 457 F.3d 643, 650-51 (7th Cir. 2006). Plaintiffs have not met any of the three elements necessary to prevail on their claim: "(1) the defendant intentionally treated [them] differently from others similarly situated, (2) the defendant intentionally treated [them] differently because of [their] membership in the class to which [they] belonged, and (3) the difference in treatment was not rationally related to a legitimate state interest." *Id.* at 650-51. Under rational basis review, courts must uphold a law if "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) (emphasis added; citation and internal quotation marks omitted).

Plaintiffs have failed to show that there is no conceivable state of facts that supports limiting the acceptable forms of ID to the nine chosen. Wisconsin has an interest in limiting the number of ID forms to a discrete number so that poll workers can implement the law in a way that ensures only the accepted forms are used. In the abstract, the State could accept any number of forms of ID that would benefit a small group of people by saving them the hassle of securing a new form of ID. In the real world, though, the State needs to put some limit on the acceptable forms of ID. The Legislature balanced this need with the interests of voters in being able to comply with the law as easily as possible and decided to accept nine different forms (although, it is actually more than nine forms because there are multiple Indian tribes and branches of the armed forces).

Compiling a list of acceptable forms of ID is classic legislative line-drawing, and the "restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (internal quotations marks omitted). The difficulty facing a legislature is that

> [d]efining the class of persons subject to a regulatory requirement . . . 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.

*Id.* at 315-16 (internal quotation marks and alterations omitted). As the Seventh Circuit recently 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 *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)). This is why statutes that are both overinclusive and underinclusive can survive rational basis review "because 'perfection is by no means required' and the 'provision does not offend the Constitution simply because the classification is not made with mathematical nicety.'" *Id.* at 656 (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)).

Plaintiffs have advanced no argument regarding whether there are sufficient voters who have a VA ID—but no other form of qualifying ID—such that it was irrational for the Legislature to exclude VA ID. Most veterans will also have another form of ID. Does the benefit of adding VA ID to the list outweigh the cost of making the voter ID law harder to implement? This is a question that the Legislature decides, not this Court. While it may seem like judicially adding the VA ID card would not create much administrative burden, the logic of Plaintiffs' argument would require the State to accept any form of ID that met the most minimal standards of one of any of the forms that is accepted. Thus, a judicial decision to add a tenth form to the statute would open the door for even further additions.

Plaintiffs ignore the extensive body of law regarding rational-basis review of legislative line-drawing when arguing that Wisconsin must accept every form of ID that meets the most minimal standard of any form that is accepted. Wisconsin is not required to take all forms of ID that lack an expiration date merely because some forms of ID that are accepted also contain no expiration date, such as retiree military IDs that qualify under Wis. Stat. § 5.02(6m)(a)3, or tribal IDs that qualify under Wis. Stat. § 5.02(6m)(e). Similarly, the fact that a Wisconsin state ID card or driver license could possibly have a picture that was 16 years old does not mean that Wisconsin must accept any form of ID that might have a picture that is 16 years old. This is a case of some who might have an "equally strong claim to favored treatment [being] placed on different sides of the line." *Beach*, 508 U.S. at 315-16. The Legislature has to draw a line somewhere. Courts sensibly recognize that it does not violate the Equal Protection Clause when some were left out that could have been included.

Further, there are valid reasons for treating both active duty military personnel and members of Indian tribes differently than veterans. Active duty personnel are frequently relocated to different areas of the country and even overseas and, therefore, those stationed in Wisconsin might not be expected to have a Wisconsin driver license or ID card given that the State is only a temporary residence. Veterans no longer in service, however, do not face these issues and thus can establish residency in one location. This is sufficient to satisfy rational basis review even if Act 23 also allows military ID issued to retirees. *See Heller*, 509 U.S. at 321 ("courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends").

With respect to members of federally recognized Indian tribes, the State faces unique issues not present when dealing with nontribal members. While Act 23 does not require that the tribal ID card be "unexpired," the State did not act arbitrarily in providing a different standard for ID issued by the tribes, which "retain the powers of a sovereign nation in the limited realm of internal affairs," *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003), such as the issuance of ID cards to their members. Because Native Americans are protected by the Voting Rights Act, the State sensibly allowed tribal members to use ID issued by tribes. Tribal members might rely solely on a tribal ID card, rather than one issued by the State of Wisconsin, and the failure to include tribal ID would likely have led to a legal challenge. Given the unique status of Indian tribes, it does not violate the Equal Protection Clause for Wisconsin to set out different standards for tribal ID cards than those issued by the State or the federal government.

The courts wisely do not second-guess legislative line-drawing in the way Plaintiffs seek because "[t]he problems of government are practical ones and they may justify, if they do not require, rough accommodations,-illogical, it may be, and unscientific." *Smith*, 457 F.3d at 655 (citation and internal quotation marks omitted). Plaintiffs fail to recognize that "[t]he rational-basis test is deferential to the decisions of government," and their claim fails because they are trying to apply the test "as if it were a more exacting standard, insisting on a degree of consistency that the Equal Protection Clause does not require." *Id.* Plaintiffs' claim as to VA ID fails, and their motions should be denied.

### C. GAB is promulgating administrative rules to permit technical college ID cards for voting; therefore, Plaintiffs claim as to putative class 4 will soon be moot.

Plaintiffs assert that the voter ID law violates the Equal Protection Clause because Wisconsin technical college students cannot use their student ID cards to vote. (*See* Dkt. 223:10.) As a preliminary matter, no Plaintiff in this case has standing to pursue this claim, as explained in the Argument section above regarding class certification.

Setting aside the crucial fact that no Plaintiff has standing, the GAB is in the process of promulgating emergency and permanent administrative rules that will interpret the language of the voter ID law to permit voters to use technical college ID cards as a form of qualifying ID. Plaintiffs' putative class 4 claim will soon be moot; therefore, it does not make sense for the Court to enter an injunction and judgment as to this claim. Plaintiffs' motion as to putative class 4 should be denied.

On April 3, 2015, Governor Walker approved GAB's statement of scope for administrative rulemaking regarding permitting technical college ID cards for voting. (*See* Declaration of Kevin J. Kennedy, ¶¶ 13-15, filed herewith; *id.*, Exs. A, B, C.) GAB plans to meet on April 29, 2015, to approve the published scope statement. (*Id.*, ¶ 19.) The emergency rules are expected to be in effect before May 19, 2015. (*Id.*, ¶ 21.)

GAB is also in the process of promulgating permanent rules that will permit voters to use technical college ID cards at the polls. (Kennedy Decl., ¶¶ 13, 22, 23; *id.*, Exs. A, B, C.) The permanent rules are expected to be in effect by about October 1, 2015. (*Id.*, ¶ 23.)

The Court should reject Plaintiffs' claim regarding technical college ID cards. The claim will soon be mooted by GAB rulemaking; therefore, the Court should deny Plaintiffs' motion.

### D. The voter ID law does not impose an unconstitutional poll tax on those who want to use out-of-state driver licenses to vote.

Act 23 does not impose an unconstitutional poll tax under either the Fourteenth or Twenty-fourth Amendments as applied to voters who would like to use their out-of-state driver licenses to vote. (*See* Dkt. 222:13-16.) Plaintiffs argue that Wisconsin voters who have out-of-state driver licenses should be permitted to use them to vote. (Dkt. 223:13.) They argue that

failing to permit the use of such IDs "imposes an unconstitutional poll tax." (*Id.*) Plaintiffs' theory of what constitutes a poll tax is novel, but it is ultimately inconsistent with the law regarding poll taxes.

As a preliminary matter, no Plaintiff in this case has standing to assert this claim. As noted above, all class representative Plaintiffs for putative class 3 either presented no evidence at trial or have qualifying ID. Setting aside the fact that no Plaintiff has standing, the claim fails.

The Twenty-fourth Amendment prohibits assessing a tax to vote:

> 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 held, in evaluating Indiana's voter ID law, that a requirement of photo ID for purposes of voting is not an unconstitutional poll tax. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). The 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.*

Although obtaining qualifying ID may come at some inconvenience to voters who must abandon their out-of-state driver licenses for a Wisconsin driver license or state ID card, this circumstance 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 the voter ID law, as the Seventh Circuit held in *Crawford*.

This conclusion is consistent with *Harman v. Foressnius*, 380 U.S. 528 (1965), the only Supreme Court case that considered the

Twenty-fourth Amendment's ban on poll taxes. In *Harman*, the Supreme Court considered a statute that required voters to either pay a $1.50 poll tax on an annual basis or go through "plainly a 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. The only question before the Supreme Court was whether a 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." *Harman*, 380 U.S. at 541. Applying this rule, the Court determined that the 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. 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.

Wisconsin's photo ID requirement is not analogous to the requirement in *Harman*; it is not a poll tax. Voters need only verify their eligibility by showing ID at the polls, which does not constitute a tax. Nor does Act 23's photo ID 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 ID; all voters are required to present ID at the polling place. *Cf. id.* at 541-42. Thus, Act 23 does not constitute an unconstitutional poll tax in violation of the Twenty-fourth Amendment.

Nor is Wisconsin's voter ID law a poll tax under the Equal Protection Clause of the Fourteenth Amendment. *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.

In *Harper,* the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals exercising their right to vote was unconstitutional under the Equal Protection Clause. 383 U.S. at 665-66 and 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.

A photo ID 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. The requirement that individuals show an ID proving their identity is not based on impermissible standards of wealth or affluence, even if some individuals have to sacrifice their out-of-state driver licenses to get a Wisconsin equivalent. On the contrary, requiring individuals to show ID falls squarely within the State's power to administer elections. Photo ID 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' position that Wisconsin's photo ID requirement results in an unconstitutional poll tax is inconsistent with *Crawford. Crawford* involved Indiana's requirement that a citizen voting in person or at the office of the circuit court clerk before Election Day present a photo ID 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.

Although the Supreme Court was unable to agree on the rationale for upholding Indiana's photo ID requirement, neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied to Indiana's photo ID 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 ID requirement. *Id*.

Although the *Crawford* Court noted that charging a tax or a fee in order to obtain a photo ID 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 Wisconsin's photo ID requirement is invalid under *Harper*. (*See* Dkt. 223:13.)

As Defendants argued in their post-trial brief, Plaintiffs' claim regarding the use of out-of-state driver licenses to vote makes no sense. One cannot be a resident of Wisconsin for purposes of voting and a resident of another state for purposes of having a driver license. (*See* Dkt. 176:112-14.) While the criteria for determining residency for voting are not *identical* to those for determining residency for driving, they are materially indistinct. *Compare* Wis. Stat. § 6.10(1) (elector residence) *with* Wis. Stat. § 343.01(2)(g) (defining residence for purposes of driver licenses). Out-of-state persons who intend to reside in Wisconsin and drive here must surrender their out-of-state driver licenses when they take up residence in Wisconsin. Wis. Stat. § 343.05(3)(a).

Plaintiffs' poll-tax claim as to out-of-state driver licenses should be rejected. It asks this Court to re-write the voter ID law to allow another form of ID because of a non-existent constitutional deficiency. The Court should reject the request and deny Plaintiffs' motions.

## III. The Court should deny all of the relief that Plaintiffs have requested.

Finally, the Court should deny all of the relief that Plaintiffs have requested. The relief requested includes: (1) additional forms of ID; (2) an affidavit exception procedure; (3) requiring Defendants to mail notices to registered voters in the Statewide Voter Registration System (SVRS) about the voter ID law and how to obtain ID; and (4) requiring Defendants to mail similar notices to registered voters who are on permanent absentee lists. (Dkt. 222:1-2.) Items (3) and (4) seem to have nothing to do with remedying

Plaintiffs' claims. In any event, none of these forms of relief is warranted because Plaintiffs' claims all fail, as argued above.

## CONCLUSION

The Court should deny Plaintiffs' motions, Dkt. 222. The motions ask this Court to rewrite the voter ID law to allow for forms of ID or exceptions to the voter ID law that the Legislature did not authorize. The Court has no authority to rewrite the law; it is not a lawmaking body.

The Court should deny class certification under Rule 23. The putative classes are not certifiable. They are vague, ill-defined, do not have common facts or legal issues, are not sufficiently numerous, and lack representative Plaintiffs.

Plaintiffs' as-applied claims fail. The Fourteenth Amendment claim as to putative class 1 is precluded by the Seventh Circuit's judgment or fails in light of the DMV's petition exception procedures. The other class claims fail as a matter of law or, in the case of the claim as to technical college ID cards, will soon be moot. For all of these reasons, Plaintiffs' motions should be denied.

Dated this 24th day of April, 2015.

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