

No. 16-3003 [Consolidated with 16-3052]

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

—
RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

—
Appeal From The United States District Court
For The Eastern District Of Wisconsin, No. 2:11-CV-1128,
The Honorable Lynn Adelman, Presiding

—
**REPLY AND RESPONSE BRIEF OF
DEFENDANTS-APPELLANTS, CROSS-APPELLEES**

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Oral Argument Requested

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INTRODUCTION AND SUMMARY OF ARGUMENT

Because Wisconsin's law already provides a mandatory procedure under which any eligible voter will receive a free ID with "reasonable effort," *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"), Plaintiffs spend much of their brief attacking Defendants for enacting this voter-protective regime, worrying that this will help Defendants "evad[e] liability." *See* Pls. Opening Br. 58.

Plaintiffs' focus on "liability" has caused them to overlook the legally relevant fact: *all* of the changes that Defendants made have, step by step, helped the ever-shrinking number of citizens having difficulties under Wisconsin's photo ID law. Defendants first enacted a free photo ID program, under which DMV has given out over 420,000 free IDs to eligible Wisconsin voters. A.120.¹ Next, in 2014, Defendants improved this free ID program by adding the ID Petition Process (IDPP) to help those lacking certain documents. This robust system proved insufficient for only an extremely small number of people; roughly 52, or .0124% of the 420,000 who have gotten free IDs from DMV. A.151. To address these few concerns, in May 2016, Defendants enacted another salutary change to the law, which ensures that all those who initiate the IDPP are issued a free ID promptly. The comprehensive nature of these provisions is why the district court could not identify *any* "situation[] in which the state's procedures fall short" of *Frank II*'s "reasonable effort" standard. A.186–87.

¹ Citations to Defendants' Separate Appendix are "A.__"; citations to Plaintiffs' Short Appendix are "SA__"; citations to Defendants' Supplemental Appendix are "RSA.__"; citations to the district court docket are "R.[ECF Number]:[Page Number]."

Beyond attacking Defendants for proactively solving the few problems that arose under Wisconsin's photo ID law, Plaintiffs make a series of meritless arguments.

With regard to the overbreadth of the preliminary injunction, Plaintiffs implausibly argue that the injunction will be used only by those who cannot obtain ID with reasonable effort. Plaintiffs' argument violates the requirement that any equitable relief must be crafted to address the "situations in which the state's procedures fall short." A.187. The district court's affidavit informs voters that reasons such as "Family responsibilities" or "Work schedule" are good enough justifications to avoid Wisconsin's photo ID law, even though this is plainly contrary to the requirements of binding caselaw. In all, the affidavit regime will be regularly used "even if by objective standards the effort needed [to get free ID] would be reasonable (and would succeed)." A.187.

Turning to likelihood of success on the merits, Plaintiffs argue that Wisconsin's current law still contains gaps, but they are simply wrong. Virtually all of Plaintiffs' arguments on this score involve novel attempts to narrow the plain terms of Wisconsin's voter-friendly laws, including what constitutes sufficient proof of identity and the breadth of the "indefinitely confined" statutory exemption. While Defendants strongly believe that Wisconsin's laws are unambiguous in voters' favor on each issue that Plaintiffs have identified—and thus there are no gaps left to address—if this Court believes that Plaintiffs' arguments create any doubt on these important issues, this Court could certify any such questions of state law to the Wisconsin Supreme

Court. Relatedly, these same state law provisions clearly provide that each Plaintiff would easily be able to vote, after expending reasonable effort, giving an additional reason why Plaintiffs have no likelihood of success on the merits. And the preliminary injunction fails on numerous other merits grounds, including because Plaintiffs have no answer to the argument that the injunction is based upon a fail-safe class.

Plaintiffs' efforts to bolster the district court's indefensible injunction by introducing new evidence for the first time on appeal are improper under binding caselaw. *See Berwick Grain Co., Inc. v. Ill. Dep't of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997). But if this Court were inclined to consider post-injunction developments, then it should take into account the fact that since Wisconsin issued its current law five months ago, every single person who has submitted an application under the IDPP has been mailed a free photo ID within six business days. This strongly supports Defendants' position that no judicial intervention is warranted.

Finally, Plaintiffs' cross-appeal—asking this Court to overturn *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*")—is jurisdictionally improper and wrong on the merits. This case involves an interlocutory appeal from a district court order giving Plaintiffs just what they asked for: a preliminary injunction requiring an affidavit procedure. Plaintiffs cannot shoehorn into a preliminary appeal the broader issue of whether Wisconsin's photo ID law must be invalidated on its face. In any event, there is no reason to reconsider *Frank I*, which is consistent with binding Supreme Court caselaw. Plaintiffs' arguments rely primarily upon out-of-circuit cases that deal either with intentional racial discrimination not at issue here, voting laws

having nothing to do with photo ID, or as-applied challenges under the Voting Rights Act. There is no court of appeals reaching a contrary conclusion to *Frank I*'s core holding: that a photo ID law withstands facial attack under the Fourteenth Amendment and Section 2 of the Voting Rights Act.

ARGUMENT

I. The District Court's Injunction Is Overbroad And Inequitable

The district court's preliminary injunction requires that a subjective affidavit must be available at the polls to anyone without photo ID, including those who have not "tried to secure [a photo ID], and even if by objective standards the effort needed would be reasonable (and would succeed)." A.187. In their opening brief, Defendants demonstrated that this relief "exceed[s] the extent of the plaintiff[s]' protectible rights," *Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1094 (7th Cir. 1988), is broader "than necessary to provide complete relief to plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and invites every person to "become a law unto himself." *Somlo v. C. A. B.*, 367 F.2d 791, 793 (7th Cir. 1966); Defs. Opening Br. 18–21. This relief also harms both the Defendants and the public by, *inter alia*, undermining the basic purposes of the photo ID law: "the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections." *Frank I*, 768 F.3d at 745. The public will easily understand that anyone can simply sign the district court's affidavit, and DMV will have little practical ability to verify that person's eligibility to vote. Defs. Opening Br. 35.

Plaintiffs respond with four categories of meritless arguments.

First, Plaintiffs assert that *some* sort of equitable relief was warranted because, allegedly, Defendants “do not even dispute the district court’s finding that Plaintiffs are likely to succeed on the merits with respect to establishing liability.” Pls. Opening Br. 27. This misrepresents Defendants’ position, as Plaintiffs later acknowledge. *See* Pls. Opening Br. 46 (conceding that Defendants’ position is that “no voter will be unable to obtain ID with reasonable effort”); *accord* Defs. Opening Br. 25 (“neither Plaintiffs nor the district court have identified even a single individual who” cannot obtain photo ID with reasonable effort). In any event, even if Plaintiffs had shown that some voters cannot obtain photo ID with reasonable effort, *but see* Defs. Opening Br. 25; *infra* pp. 9–19, *Frank II* and principles of equity require that relief must be tailored to “situations in which the state’s procedures fall short.” A.187; *see Frank II*, 819 F.3d at 386–87. The district court’s regime violates this requirement, and is thus a clear abuse of discretion. Defs. Opening Br. 20–21.

Second, when Plaintiffs turn to defending the injunction that the district court issued, they make three points that all have the same fundamental flaw. They praise the district court for “[h]ewing to the language in *Frank II*” by including the phrase “reasonable effort” in the affidavit. Pls. Opening Br. 28–29. They chide Defendants for “speculat[ing] that the affidavit will cause voters brazenly to swear under oath that they have reasonable impediments because they spent a ‘single minute’ trying to obtain ID.” Pls. Opening Br. 32.² And they argue that an injunction can incidentally

² Plaintiffs appear to be unaware that the “single minute” language is taken directly from this Court’s order. *See* A.187 (*Frank v. Walker*, No. 16-3003, Dkt. 24, Order of Aug. 10, 2016).

benefit non-class members. Pls. Opening Br. 35 (citing *Brown v. Plata*, 563 U.S. 493, 531 (2011)).

These points all miss the mark for the same reason: the district court's affidavit, *by design*, applies largely—and, in Defendants' view, *entirely*, Defs. Opening Br. 20, 25—to people who can vote after employing reasonable effort. The affidavit asks each person without ID to indicate whether they meet the reasonable-effort standard. But since “reasonable effort” is a *legal* rule that no lay voter can fairly be asked to apply unguided, the affidavit then provides a list of options to check, such as “Family responsibilities,” “Work schedule,” or “Lack of birth certificate.” A.172. This list of options signals to voters that these reasons are categorically sufficient. But, fatal to the injunction, even Plaintiffs do not argue that any of the listed options satisfy *Frank II*'s legal rule in all, or even most, circumstances. Instead, Plaintiffs merely assert that some of the listed reasons could be sufficient in some, specialized instances. Pls. Opening Br. 30. Accordingly, the broad categories of people who can be expected to use the unaccountable affidavit far exceed the nonexistent—or, even under Plaintiffs' erroneous view, extremely small—number of voters who, objectively, cannot obtain photo ID with reasonable effort.

Just a couple of the affidavit's listed options suffice to make the point. Most everyone would honestly say that they were attending to “Family” or “Work” duties instead of making one trip to the DMV to get a free ID. Accordingly, almost every voter without a photo ID can show up without such ID on election day and honestly check either of those two options, “even if by objective standards the effort [needed to

get free ID] would be reasonable (and would succeed).” A.187. Similarly, people lacking birth certificates would fairly interpret the “birth certificate” option as permitting them to vote without photo ID, even though Wisconsin’s law will provide them a free photo ID with just one trip to the DMV. A.235. In addition, some people—including Plaintiffs themselves—believe that the photo ID law serves no beneficial purpose, and thus could honestly answer that they believe that making one trip to DMV is an “[un]reasonable effort” and could so indicate after checking “Other.” And, of course, as the district court previously recognized, “a person willing to commit voter-impersonation fraud could submit a false affidavit.” *Frank v. Walker*, 141 F. Supp. 3d 932, 935 n.2 (E.D. Wis. 2015).

Contrary to Plaintiffs’ intimations, Pls. Opening Br. 32, Defendants have no interest in putting busy election officials in the difficult situation of testing voters’ honest, subjective beliefs against the legal, objective “reasonable effort” standard or attempting to ferret out knowingly false affidavits on election day. That is why any lawful remedy must be tailored to “situations in which the state’s procedures fall short.” A.187. While Defendants believe that there are no longer any situations where the State’s procedures are inadequate under its current law, if such situations are proven to exist, only a properly tailored remedy would be lawful.³

³ On October 21, 2016, Plaintiffs filed a notice of supplemental authority concerning *Fish v. Kobach*, __ F.3d __, No. 16-3147, 2016 WL 6093990 (10th Cir. Oct. 19, 2016). *Frank v. Walker*, No. 16-3003, Dkt. 57. *Fish* does not support Plaintiffs’ position because while the injunction in that case involved only a “negligible risk” of overbreadth, 2016 WL 6093990, at *33, the preliminary injunction in the present case is designed to be used either entirely or primarily by those who can obtain ID with reasonable effort. In addition, while the voter

Third, Plaintiffs argue that the district court’s remedy is permissible because other States have adopted “some kind of affidavit exception” and because certain election officials that oppose the photo ID law support the district court’s remedy. Pls. Opening Br. 30–31. But it is the people of Wisconsin—not other States or self-selected local officials—who have the sovereign right to determine Wisconsin’s election laws. The limited role of the federal courts is to identify “situations in which the state’s procedures fall short” and to craft a remedy tailored to addressing those situations, if any are found to exist. A.187. The people of Wisconsin were well within their rights to conclude that the comprehensive regime their representatives enacted better serves the goals of the photo ID law than an affidavit-based system, which can be easily evaded and would provide little confidence in election integrity.

Finally, Plaintiffs wrongly speculate that Defendants’ interests would be achieved by accepting “proof of identity *at the polling place*.” Pls. Opening Br. 36. This misunderstands how Wisconsin’s law protects every voter’s right to vote, while also forwarding “both the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections.” *Frank I*, 768 F.3d at 745. The vast majority of eligible voters who lack photo ID have ready access to all documents needed to definitively establish their eligibility, including proof of birth name, date, and U.S. citizenship. *See* A.120. Wisconsin reasonably asks these voters to make just one trip to DMV to get their free ID card. *See Crawford v. Marion Cnty.*

registration provision at issue in *Fish* involved a “near certainty . . . [that] over 18,000 U.S. citizens in Kansas will be disenfranchised,” *id.*, Plaintiffs have not identified a single voter who cannot obtain free photo ID under Wisconsin law with reasonable effort.

Election Bd., 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). Over 420,000 eligible voters in Wisconsin have done just that. A.120. For the few voters who do not have such documents readily available, Defendants have created a comprehensive procedure under which applicants come to DMV with the documents that every eligible voter has and then DMV *automatically* mails to each applicant, within six business days, either a permanent photo ID (if eligibility can be determined quickly) or a temporary photo ID (if more time for verification is needed). 725A3 Wis. Admin. Reg. EmR1618, § 10(a) (May 16, 2016) (“Wis. EmR1618”); A.126. The practical efficacy of this verification procedure begins with the paperwork that the applicants submit to initiate the process. Plaintiffs’ proof-of-identity-at-the-polls bypass would severely undermine this verification procedure, since DMV investigators would be left with little to work with.

II. No Injunction Should Have Issued Because Plaintiffs Have No Likelihood Of Success On The Merits

A. Plaintiffs Failed To Show That There Are Any Voters—including Plaintiffs Themselves—who Cannot Vote After “Reasonable Effort”

The primary factual dispute on the merits of this class-based action turns on whether Plaintiffs have shown that there are eligible Wisconsin voters who cannot vote with “reasonable effort.” *Frank II*, 819 F.3d at 386–87. In order to prevail on the merits of their class-based claim, Plaintiffs would need to show that there are “numerous” such voters, Fed. R. Civ. P. 23(a)(1), and that Plaintiffs themselves fall within this category. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Plaintiffs have failed to make these showings, meaning they have no likelihood of success on the merits.

1. Plaintiffs' attempts to identify gaps in Wisconsin's comprehensive photo ID program fail, and certainly fall short of establishing their burden to "demonstrat[e]" that any gaps are sufficiently widespread to satisfy Rule 23's "numerosity" standard. *Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990); see Fed. R. Civ. P. 23(a)(1).

Name mismatches. In their opening brief, Defendants explained that any ID applicant with a name different from the name reflected on supporting documentation may sign a name-change affidavit under Wis. EmR1618, §§ 1–3, to address this issue. Defs. Opening Br. 25–26. Plaintiffs respond that it is "unclear" how this process works for those who have errors on their birth certificates or voters with "mismatched documents." Pls. Opening Br. 16. But the process is clear and comprehensive. State law provides how someone can "establish a name *other than the name that appears on a supporting document.*" Wis. EmR1618, § 1 (emphasis added). If an applicant brings a supporting document with a name mismatch to DMV—whether the mismatch is the result of a purposeful name change (such as after a marriage) or to correct an error in a supporting document (such as a person who has a typographical error on a birth certificate but whose other documents have the error corrected)—then the applicant can just sign an affidavit attesting to their correct name, A.125, which would satisfy the criterion of "evidence acceptable to the administrator" to establish the individual's accurate name. Wis. EmR1618, §§ 1, 3.⁴

⁴ If the discrepancy in the applicant's documents is minor, such as a single letter difference, then this can be handled at a field office as an administrative matter. A.125.

Plaintiffs’ point that this procedure does not involve an “unavailable” document, as that term is used in the IDPP, Pls. Opening Br. 16, is irrelevant because this process is not part of the IDPP. After all, if an eligible voter brings in all of the proofs required for a free ID card, but one or more of these proofs has a name mismatch, that person would get a free ID *card* by signing an affidavit—consistent with Wis. EmR1618, §§ 1, 3—without ever entering the IDPP’s verification process. Tellingly, Plaintiffs have not identified *a single applicant* who has been denied a free ID under current law because of issues with “name mismatches or other errors in birth certificates or other necessary documents.” *Frank II*, 819 F.3d at 386.⁵

Proof of identity. Plaintiffs fail to point to *any* eligible voter who does not have ready access to at least one “supporting document identifying the person by name and bearing the person’s signature, a reproduction of the person’s signature, or a photograph of the person.” Wis. Admin. Code § Trans 102.15(4). This controlling definition indisputably covers documents such as social security cards, state-issued food assistance cards, many tax forms, Medicare cards and the like, any one of which is sufficient. Defs. Opening Br. 23–24.

Plaintiffs’ argument that this Court should ignore this definition as an “introductory preface,” Pls. Opening Br. 42, misunderstands state law. Section 102.15(4) first provides this definition, *then* explains that “[a]cceptable supporting

⁵ Plaintiffs’ claim that “DMV refused to issue ID through the IDPP in the voter’s correct name as recently as September 2016 because birth certificate contained misspelling,” Pls. Opening Br. 17–18, is thus deeply misleading. The voter referenced did not need to use the IDPP, and was issued an ID *card* in his correct name. RSA.51–53.

documents *include . . .*,” and then offers a non-exhaustive list. Wis. Admin. Code § Trans 102.15(4) (emphasis added). Under Wisconsin law, “generally, the word ‘includes’ is to be given an expansive meaning, indicating that which follows is but a part of the whole. While courts may sometimes read the word ‘includes’ as a term of limitation or enumeration under the doctrine of *expressio unius est exclusio alterius*, there must be some textual evidence that the legislature intended this doctrine to apply.” *In re Chezron M.*, 698 N.W.2d 95, 102 (Wis. 2005) (citations omitted); accord *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Here, the only “textual evidence” supports the conclusion that Section 102.15(4)’s definition is controlling, and that the list that follows is merely exemplary.⁶ Specifically, Section 102.15 defines the documents acceptable for proof of name, date of birth, and citizenship by simply providing a list of acceptable proofs, without any broad definition or the word “include” before the list. *See, e.g.*, Wis. Admin. Code §§ Trans 102.15(3), (3m). The fact that Section 102.15(4) takes an entirely different approach—providing a capacious definition, using the expansive term “include,” and then providing a list—reinforces the conclusion that this Section uses the term “include[]” in its “generally” accepted manner, such that the broad definition is controlling and

⁶ Because Wisconsin law requires a “textual” indication to forgo the “generally” accepted meaning of the term “include[],” *In re Chezron M.*, 698 N.W.2d at 102, Plaintiffs’ citation to regulatory history adjusting the non-exhaustive list is irrelevant. *See id.* at 104.

the list that follows is merely “part of the [definitional] whole.” *In re Chezron M.*, 698 N.W.2d at 102.⁷

Plaintiffs also complain that DMV has recently updated its website to add a couple more examples of documents that satisfy the proof-of-identity requirement, Pls. Opening Br. 40–43, suggesting that it is this “very recent change to the DMV website” that Defendants are relying upon. Pls. Opening Br. 41. But the identity list on DMV’s website is “non-exhaustive,” Wisconsin Department of Transportation, *Acceptable documents for proof of identity* (last visited Oct. 26, 2016),⁸ just as the list in Section 102.15(4) is non-exhaustive. Accordingly, Section 102.15(4) and the website are entirely consistent. DMV will continue to update its website if it identifies more commonly used documents that meet Section 102.15(4)’s definition. At all times, it is the regulatory definition in Section 102.15(4)—not the website’s non-exhaustive list—that is legally controlling.

Finally, Plaintiffs observe that social security cards, which some voters lack, “are the most common form of proof of identity.” Pls. Opening Br. 15, 40 n.16. A social security card is a particularly convenient document for establishing proof of identity for many eligible voters precisely because it also serves as proof of social security number. Wis. Admin. Code § Trans 102.15(5). But proof of social security number is

⁷ Plaintiffs point to a colloquy during the initial trial in this case, Pls. Opening Br. 43, but that exchange only supports the point that Section 102.15(4)’s list is, in fact, non-exhaustive, just as the term “include” plainly provides. *See* SA54.

⁸ <http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/identity.aspx>.

not necessary under the IDPP. Wis. EmR1618, § 4. That means the lack of a social security card will not stop any eligible voter from getting a free photo ID.⁹

Birth certificates. Plaintiffs do not dispute that, under current law, no one needs to produce a birth certificate to obtain a free photo ID. Defs. Opening Br. 27. Instead, they worry that this may not “give them a *permanent* ID if the DMV is unable to unearth a birth certificate or secondary documentation of birth.” Pls. Opening Br. 18 (emphasis added). As a threshold matter, this argument is legally irrelevant to the present appeal, which involves only a *preliminary* injunction. See Defs. Opening Br. 29 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). In any event, Plaintiffs are wrong on the law. If the applicant responds once to multiple DMV inquiries every six months, their temporary ID will be renewed for as long as the verification process takes. Wis. EmR1618, § 8; A.126–27. The only other way that the applicant will lose their free ID is if DMV determines, *at the end of the verification process*, that the applicant is ineligible to vote or committed fraud (or the applicant voluntarily cancels the process). Wis. EmR1618, § 8; A.126–27. While Plaintiffs worry that DMV may—for some unspecified reason—deem an applicant’s response inadequate to continue the verification process, Pls. Opening Br. 18 & n.7, that concern is entirely baseless.

Those too ill or infirm to travel to DMV. Plaintiffs’ claim that there are some voters who are too ill or infirm to travel to DMV to get their free ID, Pls. Opening Br.

⁹ For the same reason, Plaintiffs’ claim that “1,640 eligible voters in Milwaukee County alone lack both ID and a Social Security card,” Pls. Opening Br. 15, is irrelevant.

19–20, is irrelevant because those individuals are statutorily exempt from the photo ID law under Wis. Stat. §§ 6.86 (2)(a) & 6.87(4)(b)2. Defs. Opening Br. 27–28.

Plaintiffs’ assertion that this exception does not protect all ill or infirm individuals who are unable to travel without unreasonable effort, Pls. Opening Br. 21, is contrary to Wisconsin law. The exception applies to anyone who is “indefinitely confined.” Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)2. This phrase—read in context—most naturally means “limited, restricted, restrained” “[w]ithout . . . limitation to a particular . . . time.” 3 *Oxford English Dictionary* 709 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); 7 *Oxford English Dictionary* 842; see generally *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004) (“statutory language is interpreted in the context in which it is used”). A narrower construction—such as one that would limit the exception to those forever confined to their apartments—would be unreasonable given the statute’s context: providing an exemption for those who cannot reasonably vote in person. Anyone who cannot reach a polling place without unreasonable effort because of their health or age is entitled to use this exception to the photo ID law as well. That is how this statute is understood by the Wisconsin Elections Commission, which is the body charged with “the responsibility for the administration of . . . laws relating to elections.” Wis. Stat. § 5.05(1); see *Bring it to the Ballot, Are There Exceptions to the New Law*¹⁰ (“Indefinitely confined’ voters are

¹⁰ <http://www.bringitwisconsin.com/are-there-exceptions-new-law> (last visited Oct. 25, 2016).

persons who, because of age, physical illness, infirmity or disability, may have difficulty traveling to the polling place.”).¹¹

Plaintiffs’ further argument that there are fully healthy voters who nevertheless qualify as voters unable to obtain ID with reasonable effort because of transportation or work difficulties, Pls. Opening Br. 19–21, is based upon an erroneous understanding of the law. Under *Crawford*, *Frank I*, and *Frank II*, it is reasonable for a State to ask *every* able-bodied person to come down to DMV to obtain their free photo ID, just as they would come to the polls to cast a ballot.

Number of registered voters without photo ID. Unable to produce any record example of eligible voters who cannot obtain a photo ID after reasonable effort—let alone “numerous” such voters—Plaintiffs fall back on the claim that, at the time of the original trial in 2013, one of their experts estimated that there were “[t]hree hundred thousand *registered* voters lack[ing] acceptable ID” in Wisconsin. Pls. Opening Br. 46. But Plaintiffs leave out the critical facts about this dated figure: since trial, DMV has issued hundreds of thousands of free IDs for voting purposes only, A.120, added additional categories of acceptable photo ID, A.131; 2015 Wis. Act 261, § 2, and then implemented, A.120, and improved, A.126, the IDPP.¹²

¹¹ Plaintiffs’ assertion that “Defendants conceded below, ‘making that trip [to the DMV] is [still] an undue burden on some voters,’” is entirely misleading. Pls. Opening Br. 19. What Defendants actually said below was that these voters are statutorily exempt from the photo ID law, which is the critical point. R.285:19–20.

¹² Plaintiffs’ claim of an “error rate,” Pls. Opening Br. 9, 21, 47, misrepresents the nature of the errors tracked by DMV, which include errors made by applicants. *See* R.280-47:2. Of all the error types included, most were resolved in an hour or less, with the vast majority of the remainder being resolved within the next business day. A.124–25.

* * *

Finally, it is worth noting that most of the disagreements between the parties discussed above now appear to turn on Plaintiffs' novel efforts to narrow Wisconsin's voter-friendly laws, as a matter of state law. While Defendants believe that state law unambiguously favors their position in all instances, if this Court thinks that there is doubt on these important state law disputes, it could certify these questions to the Wisconsin Supreme Court. *See* 7th Cir. R. 52; Wis. Stat. § 821.01; *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 660–61 (7th Cir. 2008).

2. Plaintiffs themselves would be able to vote with reasonable effort. Importantly, even if this Court concludes that Wisconsin's law still has some small gaps, Plaintiffs have no likelihood of success on the merits if Plaintiffs themselves do not fall into those gaps. *See Sosna*, 419 U.S. at 403.

Plaintiffs argue that four of them are members of the class they seek to represent, but their arguments are wrong.

Ruthelle Frank. Plaintiffs argue that Frank is not "guaranteed" a free photo ID, given her "erroneous birth documents." Pls. Opening Br. 37–38. As a threshold matter, Plaintiffs do not claim that Frank will ever need photo ID given that she qualifies for the "indefinitely confined" exemption. Defs. Opening Br. 12–13. Plaintiffs' argument that Frank did not need to be able to represent the class at the time of class certification, but only at the time of filing of the complaint, Pls. Opening Br. 38, is contrary to binding caselaw, which mandates that class representatives be

“member[s] of the class which [they] seek[] to represent at the time the class action is certified by the district court.” *Sosna*, 419 U.S. at 403.¹³

Even if this Court were to reach the question of whether Frank would obtain a free ID if she were no longer “indefinitely confined,” it is plain that she would. Frank has a marriage certificate, baptismal certificate, Social Security card, proof of residency, and a birth certificate. RSA.76–77. Even assuming that there is a different name on the birth certificate, Frank could sign a simple affidavit at DMV to address this concern. *See supra* pp. 10–11.

Leroy Switlick and James Green. Plaintiffs make only one record-based argument with regard to Switlick and Green: they allegedly lack proof of identity because they have no “Social Security cards.” Pls. Opening Br. 40.¹⁴ Plaintiffs do not dispute that the record establishes that both Switlick and Green have documents that fit within the definition for proof of identity: “[a] supporting document identifying the person by name and bearing the person’s signature, a reproduction of the person’s signature, or a photograph of the person.” Wis. Admin. Code § Trans 102.15(4). Instead, Plaintiffs rely upon their meritless argument that this definition is irrelevant. Pls. Opening Br. 40. Plaintiffs thus concede that if this Court agrees with

¹³ There is an exception for when “the issue would [otherwise] evade review.” *Sosna*, 419 U.S. at 402 n.11. Plaintiffs have not argued that this exception applies here, nor could they, given that voters need to present photo ID at every election. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1018–19 (7th Cir. 2014), relied upon by Plaintiffs, Pls. Opening Br. 38, deals with the separate issue of when a plaintiff’s suit is mooted by an offer of settlement.

¹⁴ Plaintiffs also make a non-record based argument with regard to Switlick in particular, which Defendants address *infra* p. 24.

Defendants' argument that the Section 102.15(4) definition is controlling, *see supra* pp. 11–13, Switlick and Green have no authority to represent this class.

Melvin Robertson. Plaintiffs argue that Robertson cannot vote without unreasonable effort because he is elderly and lacks a photo ID. Pls. Opening Br. 43–44. As a threshold matter, if Robertson's advanced age is such that he cannot travel without unreasonable effort, he is statutorily exempt from the photo ID law. *See* Wis. Stat. §§ 6.86(2)(a) & 6.87(4)(b)2. If, instead, Robertson can travel without unreasonable difficulty, all he has to do is come to DMV, present the documents he has, and apply under the IDPP. Defs. Opening Br. 22. DMV will then mail him his free ID within six business days. A.126. That Robertson has previously tried to obtain photo ID from DMV, under prior law, is legally irrelevant because a class representative must be a "member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Sosna*, 419 U.S. at 403.

B. Plaintiffs' Claims Are Neither Common Nor Typical

Plaintiffs cannot establish commonality or typicality because they do not claim to have "suffered the same injury," but instead suffered an alleged deprivation based on "the same provision of law." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (citation omitted); Defs. Opening Br. 30–32. Plaintiffs do not join Defendants' arguments on this point, but merely assert that any "differences do not prove the *absence* of any common question capable of class-wide resolution." Pls. Opening Br. 48. This is no response, especially since Plaintiffs bear the "burden of showing that a proposed class satisfies the Rule 23 requirements." *Messner v.*

Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012). And Plaintiffs may not simply argue that all potential class members are impacted solely by “the voter ID law and the DMV procedures.” Pls. Opening Br. 49. A class cannot be certified by a plaintiff simply alleging that all putative members suffered a deprivation resulting from “the same provision of law.” *Dukes*, 564 U.S. at 350.

C. The Putative Class Is An Unascertainable, Fail-Safe Class

Plaintiffs fail Rule 23 because the class is “defined too vaguely,” *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), and is a “fail safe class.” *Messner*, 669 F.3d at 825; see Defs. Opening Br. 33. Plaintiffs ask this Court to “relax[] or eliminate[]” the ascertainability requirement. Pls. Opening Br. 50. The reason that Plaintiffs request a change of law is they cannot prevail under this Court’s caselaw, which requires a class plaintiff to “identify a particular group, harmed during a particular time frame, in a particular location, in a particular way.” *Mullins*, 795 F.3d at 660. Plaintiffs argue that this part of the ascertainability requirement should not apply to this type of case, which will not be a class action requiring the mailing of notices. Pls. Opening Br. 50. But this Court has never imposed such a limitation, and instead has held that the vagueness test is a critical requirement of any class action: “There can be no class action if the proposed class is amorphous or imprecise.” *Mullins*, 795 F.3d at 659 (citation omitted).

Plaintiffs’ attempt to explain why this is not a fail-safe class similarly fails. Plaintiffs claim they have not identified a fail-safe class because their class “consists of voters who cannot obtain ID with reasonable effort.” Pls. Opening Br. 51. But this

is precisely the definition of a fail-safe class: “whether a person qualifies as a member depends on whether the person has a valid claim.” *Messner*, 669 F.3d at 825. If someone can obtain an ID with reasonable effort, they are out of the class, and if they cannot obtain an ID with reasonable effort, then they are in the class. This is a “classic example of a fail-safe class,” where the class consists solely of those individuals “wrongfully harmed by the defendant.” Sarah R. Cansler, *An “Insurmountable Hurdle” to Class Action Certification? The Heightened Ascertainability Requirement’s Effect on Small Consumer Claims*, 94 N.C. L. Rev. 1382, 1389 n.57 (May 2016) (citation omitted).

III. Plaintiffs Defaulted On The Issue Of Irreparable Harm

In their opening brief, Defendants explained that Plaintiffs failed to establish irreparable harm absent preliminary relief because, contrary to the district court’s speculation, no Plaintiff will be “unable to vote” under the legal status quo. Defs. Opening Br. 34 (quoting A.142). Plaintiffs ignore this issue, which is fatal to their attempt to defend the injunction. *See East St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 708 (7th Cir. 2005).

IV. Developments After The District Court’s Injunction Are Legally Irrelevant To This Appeal But, In Any Event, Support The Conclusion That No Further Relief Is Warranted

A. This appeal involves two types of extra-record materials. First, both Defendants and Plaintiffs have cited publicly available governmental websites. Defs. Opening Br. 6, 7, 22, 23, 24, 26, 31; SA 60–65, 70–78. These are unquestionably judicially noticeable and properly considered as part of this appeal. *See Denius v.*

Dunlap, 330 F.3d 919, 926 (7th Cir. 2003). Second, Plaintiffs and their *amici* have sought to introduce new information—including declarations never submitted to the district court—which details certain disputed events occurring after the district court issued the preliminary injunction at issue in this appeal. Pls. Opening Br. 17–18, 20–22, 40–41; SA 79–93; Amicus Br. 4–16. This new, non-record evidence is not judicially noticeable and cannot be considered in this appeal. See *Berwick Grain Co., Inc. v. Ill. Dep’t of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997) (“The appellate stage of the litigation process is not the place to introduce new evidentiary materials.”); *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990) (“An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.”).

B. If this Court disagrees with Defendants that developments that occurred after the district court’s decision should not be considered as part of this appeal, then—in all fairness—Defendants must be permitted to update this Court as to what has actually happened under Wisconsin’s current law. The operation of this law supports the Defendants’ position that no judicial intervention is warranted.

Most importantly, since the current law was put in place in mid-May, DMV has mailed a free ID—either a renewing receipt or a permanent card—to *every single* person who has applied under the IDPP, within six business days. RSA.42–43. All told, the total of free IDs issued by DMV for voting purposes is now over 500,000. RSA.43. Under current law, no IDPP applicants have been denied a free ID for the reasons that concerned this Court in *Frank II*, 819 F.3d at 386, or the judges that

dissented from the denial of the *Frank I en banc* petition. 773 F.3d 783, 786–87 (7th Cir. 2014); *see generally* RSA.43. This strongly supports Defendants’ point that no judicial intervention is warranted.

Also since the preliminary injunction, DMV has chosen—as a matter of transitional administrative discretion—to permit initiation of the IDPP by anyone who submits an IDPP application, even those who do not bring in proof of residency and identity. RSA.33, 56; *One Wisconsin Institute v. Thomsen*, No. 15-cv-324 (W.D. Wis. 2016) (hereafter “OWI Dkt. ___”), Dkt. 273:Ex. N. In light of Plaintiffs’ repeated mischaracterization of this issue, Pls. Opening Br. 14–15; *Frank v. Walker*, No. 16-3003, Dkt. 45; Dkt. 53:4–6, Defendants again emphasize that they are not defending the legality of the photo ID law by reliance on this transitional discretion, which Defendants do not believe to be constitutionally required. *See Frank v. Walker*, No. 16-3003, Dkt. 46; Dkt. 54:1–2. Proof of residency and identity—which the record reflects that all eligible voters have ready access to, *see* Defs. Opening Br. 26—are very useful materials for DMV investigators to have as part of the verification process. It would be entirely reasonable for DMV to ask applicants to simply not forget these proofs at home. But if this Court were to hold that the Constitution requires permitting initiation of the IDPP without these proofs, this could be accommodated, as this would just make permanent the current transitional policy.

C. The new information that Plaintiffs and their *amici* have improperly attempted to introduce into this appeal would not support any relief.

Plaintiff Switlick and one of the employees of Plaintiffs' counsel submit two new declarations, recounting a trip that Switlick took to the Chase Avenue DMV in Milwaukee on September 2, 2016. SA79; SA80–82. Because these declarations have not been subjected to adversarial proceedings, Defendants can only surmise that the most probable explanation for this trip is that, after Plaintiffs' counsel found out about a computer outage at one DMV location, they drove Switlick over to that specific location. This sequence is most consistent with the fact Plaintiffs' counsel have been instructing Switlick not to cooperate with DMV, lest he be sent the free ID. A.249–50. This apparently manufactured journey does nothing to refute Defendants' argument that Switlick would obtain a free ID by making a typical trip to the DMV with the documents he already has on hand. *See* Defs. Opening Br. 23–24 & n.10.

Plaintiffs and their *amici* also submit new information relating to an undercover investigation conducted by a lawyer—Molly McGrath—who sought to elicit inaccurate information from DMV personnel about the particulars of the IDPP and then released certain recordings to the press. *See* SA83–93; Amicus Br. 4–14. It is unclear whether Plaintiffs or others have conducted many similar sting operations, but decided not to release those tapes because they would not support their arguments against the photo ID law. And while McGrath was able to elicit some inaccurate or incomplete information from certain DMV personnel, neither McGrath nor Plaintiffs point to a single example of any *actual voter* who does not have a free ID because of an inaccurate or incomplete communication given by DMV personnel. For example, the four voters highlighted by McGrath have, in fact, been mailed or

given free IDs already. *OWI Dkt. RSA.51–53, 59–61; <https://goo.gl/rgeZXE>.* Accordingly, Plaintiffs’ claim that “evidence has already surfaced *in the last month* that DMV continues to make errors that disenfranchise voters,” is false. Pls. Opening Br. 21.

In addition and notably, DMV responded quickly and comprehensively once it learned that McGrath had elicited incomplete or inaccurate information from some DMV personnel. Upon hearing McGrath’s tapes, DMV implemented new queuing procedures at DMV centers, updated customer handouts relating to the IDPP, and provided hotlines for customers and staff. *See RSA.2–3.* DMV then confirmed that its procedures were sufficient by sending undercover state troopers to 31 DMV service centers to conduct quality checks by posing as citizens interested in the IDPP. *RSA.24–25.* These quality checks proved successful, meaning that DMV personnel are sufficiently communicating about the IDPP to interested voters. *RSA.24–25.*¹⁵

V. Plaintiffs’ Cross-Appeal—Seeking To Overturn *Frank I* In An Interlocutory Posture—Is Jurisdictionally Improper And Meritless

In their cross-appeal, Plaintiffs ask this Court to overturn *Frank I* and “enjoin enforcement of Wisconsin’s voter ID law.” Pls. Opening Br. 51–60. This argument is made in a procedurally improper posture and is meritless in any event.

¹⁵ On October 13, 2016, the Western District in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324, found that Defendants had not complied with the unstayed portion of its injunction by not sufficiently training its personnel and promoting the IDPP leading up to the McGrath tapes. *RSA.62–69.* The court then ordered Defendants to undertake new publicity and training measures. *RSA.68–69.* Although Defendants believe that the steps they voluntarily took upon learning about the McGrath tapes fully addressed any concerns, they have complied with the Western District’s order by undertaking the additional measures that the court ordered. *See RSA.69–72; OWI Dkt. 294, 295-1, 295-2.*

A. This Court Lacks Jurisdiction Over Plaintiffs' Cross-Appeal

In their opposition to Plaintiffs' Petition For Initial Hearing *En Banc*, Defendants explained why Plaintiffs' cross-appeal is jurisdictionally defective. *Frank v. Walker*, No. 16-3003, Dkt. 38:13–15. Plaintiffs offer no meaningful response, confining their answer to a conclusory footnote. Pls. Opening Br. 52 n.17.

This Court lacks jurisdiction over the cross-appeal because this appeal is based entirely upon this Court's authority over non-final "[i]nterlocutory orders" "granting . . . [or] refusing" an "injunction[.]" 28 U.S.C. § 1292(a)(1); *see* R.296:5; R.307. That is the provision that Plaintiffs cited as the basis for their cross-appeal. R.307:1. But Plaintiffs did not request—and thus the district court did not "refus[e]"—any facial injunctive relief. Plaintiffs' "motion for a preliminary injunction s[ought] an order requiring the defendants to offer voters who . . . cannot obtain [an ID] with reasonable effort the option of receiving a ballot by executing an affidavit to that effect." A.131. Agreeing that Plaintiffs' request was "sensible," the court "grant[ed]" the motion and "order[ed] the defendants to implement [the] affidavit option." A.132. Since Plaintiffs were not "injured by the terms of [this injunction, they are not] entitled to appeal." *Grinnell Mut. Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995); *accord Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir. 1992).

Had Plaintiffs sought facial relief below, Defendants would have trained their submissions not just on the issues that Plaintiffs sought to identify to justify limited relief, R.285, but would have developed a record on the validity of the entire law, as it now stands. Plaintiffs' conclusory footnote below that they were "preserv[ing] their

argument that *Frank I* was wrongly decided for purposes of appeal,” R.279:6 n.4, was insufficient to put either Defendants or the district court on notice that the law’s facial validity was at issue in this preliminary posture.

B. There Is No Reason To Reconsider *Frank I*

Even if Plaintiffs’ cross-appeal was jurisdictionally appropriate, they offer no basis for this Court to overrule *Frank I*, either by invoking Circuit Rule 40(e) or through *en banc* procedures. *Frank I* was carefully reasoned and its conclusion followed necessarily from the Supreme Court’s binding precedent in *Crawford*. The reasons that Plaintiffs now offer for overturning *Frank I* are meritless.

First, Plaintiffs argue that Wisconsin’s photo ID law should be facially invalidated because “*Frank I* is now an outlier among the circuits, conflicting with decisions issued by the Fourth, Fifth, and Sixth Circuits.” Pls. Opening Br. 52. This is simply wrong. The Fourth Circuit considered North Carolina’s photo ID law and ordered facial relief *only* because it found that the law was enacted with racially discriminatory intent under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), see *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233–35, 237–38, 241–42 (4th Cir. 2016), an argument not at issue in this case. As to the Sixth Circuit, that court did not rule on any photo ID law, and made a decision dealing with “Ohio’s particular circumstances,” such that there was “no reason to think [the] decision here compels any conclusion about . . . practices in other states.” *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 532, 559–60 (6th Cir. 2014). Subsequent Sixth Circuit authority further reinforces *Frank I*’s

central holding. *Ne. Ohio Coalition for the Homeless v. Husted*, __ F.3d __, No. 16-3603/3691, 2016 WL 4761326 (6th Cir. Sept. 13, 2016).

Plaintiffs' focus on the Fifth Circuit's *en banc* decision is similarly unavailing. That decision involved an as-applied claim based on the Voting Rights Act. *See Veasey v. Abbott*, 830 F.3d 216, 243, 248–50, 271–72 (5th Cir. 2016) (*en banc*) (specifically relying upon *Frank II*). This appeal does not involve the VRA, a claim which Plaintiffs did not raise on remand following *Frank I*. *See* A.012–43. Furthermore, the *Veasey* court specifically explained that “the Seventh Circuit’s approach in *Frank* is not inconsistent with our own,” noting that “[u]nlike in *Frank*, the district court in this case found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributed SB 14’s disparate impact, in part, to the lasting effects of that State-sponsored discrimination.” *Veasey*, 830 F.3d at 248. Contrary to Plaintiffs’ arguments, Pls. Opening Br. 53–54, the district court in this case did not find historical and contemporary examples of *state-sponsored* discrimination. The district court in *Frank I* noted a history of segregation in the City of Milwaukee, *see* R.195:65–66, but no evidence of state sponsorship. Furthermore, there is no daylight between this Court’s discussion of “legislative facts” and the Supreme Court’s rule (applied by the Fifth Circuit) regarding legislative facts, which is that they may be accepted if “considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (cited at *Frank I*, 768 F.3d at 750).

Second, Plaintiffs claim that *Frank I* has been “undermined” by *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), asserting that the Supreme Court’s decision “rejected the proposition that a district court is bound by ‘legislative findings’” and adopted a facial “burden” analysis inconsistent with *Frank I*. Pls. Opening Br. 56. But the law regarding legislative facts remains the same as it was when *Crawford* and *Frank I* were decided. See *Armour*, 132 S. Ct. at 2080. As for the facial issue, *Whole Woman’s Health* applied an approach to facial invalidation that is unique to the abortion context. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (“[I]n a large fraction of the cases in which [the requirement] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”); see also *Cincinnati Women’s Servs., Inc. v. Taft*, 468 F.3d 361, 367–69 (6th Cir. 2006); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662, 667–68 (8th Cir. 2011); *Isaacson v. Horne*, 716 F.3d 1213, 1230–31 (9th Cir. 2013). *Frank I* merely followed *Crawford* regarding the “burden” that a plaintiff needs to carry to obtain facial invalidation of a photo ID law. *Frank I*, 773 F.3d at 745–46. And whether some logic in *Whole Woman’s Health* could be read as inconsistent with *Crawford*’s articulation of some issues is “not for [this Court] to decide.” *United States v. Browning*, 436 F.3d 780, 781–82 (7th Cir. 2006).

Third, Plaintiffs contend that the adjustments that Defendants have made to their free ID program—all making it easier for voters—somehow require overturning *Frank I* and invalidating the entire photo ID law. Pls. Opening Br. 57–59. Plaintiffs’ position appears to be that if Defendants had *not* taken steps to address the limited

difficulties that came to light for .0124% of over 420,000 free ID applicants, Wisconsin's photo ID law would be on stronger constitutional footing. This is plainly wrong. A photo ID law is not subject to facial invalidation even if "some voters would be unable, as a practical matter, to get photo IDs." *Frank I*, 768 F.3d at 748. Defendants' changes to make sure that *no* Wisconsin voters are in this situation cannot possibly render the law facially invalid. To the contrary, that Wisconsin has voluntarily fixed the few difficulties that once existed in its regime demonstrates that no relief, even on an as-applied basis, is warranted. *See supra* pp. 9–16.

Plaintiffs' comparison of Wisconsin's photo ID program to a "literacy test," Pls. Opening Br. 58, is risible. Literacy tests are specifically prohibited by the Voting Rights Act, 52 U.S.C. § 10501, because Congress was addressing "a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.). On the other hand, Wisconsin adopted its photo ID law in light of the Supreme Court's upholding Indiana's law as facially lawful and following the recommendations of the bipartisan "Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III," which cogently explained that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Crawford*, 553 U.S. at 193–94 (opinion of Stevens, J.) (quoting *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005)).

Again, Plaintiffs' attack on Defendants' voter-friendly regime as creating "pointless ritual pilgrimage to the DMV," Pls. Opening Br. 58, misunderstands how Wisconsin's photo ID law functions. To establish eligibility to vote, an elector must generally offer five proofs: (1) name and date of birth; (2) identity; (3) residency; (4) U.S. citizenship; and (5) a social security number. Wis. Admin. Code § Trans 102.15. The vast majority of eligible voters have these proofs handy and will get a free ID card with one trip to DMV. *See* A.119–20. For the extremely small number of individuals who have difficulty providing these proofs, DMV will issue (at minimum) an ID receipt within six business days, which will renew as long as the verification process takes. A.126–27. The process ends when DMV determines that the applicant either is an eligible elector (in which case an ID card is issued), or is not an eligible elector (in which case the ID receipt is canceled). *See* A.126–27.¹⁶ The critical point is that Wisconsin's process allows DMV to conduct a meaningful verification of *all* five proofs, whereas Plaintiffs' unaccountable affidavit regime does not. A procedure that makes verification of voters' credentials impossible would not serve the vital functions that this Court, the Supreme Court, and the Carter/Baker Commission have all recognized that photo ID laws serve.

CONCLUSION

The preliminary injunction should be vacated.

¹⁶ The free receipt is not renewed if the applicant undermines the verification process by committing fraud in the application, not responding to multiple DMV inquires for six successive months, or voluntarily asking to cancel the process. Wis. EmR1618, § 8; A.126–27.

Dated: October 31, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,862 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: October 31, 2016

s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2016, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 31, 2016

s/ Misha Tseytlin

MISHA TSEYTLIN

No. 16-3003 [Consolidated with 16-3052]

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

—
RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

—
Appeal From The United States District Court
For The Eastern District Of Wisconsin, No. 2:11-CV-1128,
The Honorable Lynn Adelman, Presiding

—
**DEFENDANTS-APPELLANTS, CROSS-APPELLEES'
SUPPLEMENTAL APPENDIX**

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

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs,

v.

Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

**DEFENDANTS' REPORT ON INVESTIGATIONS INTO IDPP
COMMUNICATIONS, CORRECTIVE MEASURES TAKEN, AND
RESPONSE TO PLAINTIFFS' MOTION FOR RELIEF**

INTRODUCTION

Recent media reports have suggested that there have been problems in how DMV communicated with some customers about the IDPP. DMV takes these reports and allegations very seriously. In response to the concerns raised by these media reports, this Court's order, and the plaintiffs' motion (Dkt. 261; 262), DMV has conducted a comprehensive investigation and addressed the issues raised by the recordings discussed in the media reports. In doing so, DMV has taken significant measures to assure the public and this Court that the agency takes seriously its constitutional, statutory, and court-ordered obligations. These measures include investigating the alleged incidents at various DMV service centers; identifying any gaps in procedures, trainings, and forms; establishing an action plan to address these recent

concerns; and implementing this action plan. Notably, DMV has also conducted quality assurance checks at 31 service centers across the state. In these checks, undercover state troopers presented themselves as customers inquiring about obtaining an ID for voting without all of the required documents. And in these instances, DMV employees provided accurate information about obtaining an ID through the IDPP. During these checks, employees did not tell the “customers” that they needed a birth certificate for a voting ID, that they would not be able to get an ID for voting with the documents they had, or that they would not have an ID in time for the election.

In total, DMV has undertaken a concerted effort to ensure that DMV customers are provided accurate information about the IDPP, and that no customer leaves DMV believing that he will not be able to obtain an ID in time to vote. Briefly, some measures that DMV has put in place over the past week include the following:

- Updated IDPP training requirements for field staff, including verification that employees and supervisors have completed the training;
- Updated queuing procedures for all Wisconsin ID applications at every five-day DMV service center so that anyone seeking an ID will be sent to a specialist trained in IDPP procedures;

- Updated customer handouts, provided to any applicant for a Wisconsin ID, including a handout that offers customers a direct contact line for any ID problems;
- Hotlines for staff and customers for any questions or concerns with the IDPP; and
- Conducting quality assurance checks at 31 DMV service centers.

There should be no doubt: DMV acknowledges that some recordings show that some DMV employees communicated inaccurate or incomplete information about the IDPP. But it bears emphasizing that the situations portrayed in the media reports—involving “volunteers” trying to trip-up DMV employees—were not typical customer encounters, and do not in fact establish any real difficulties for actual IDPP applicants or potential applicants. Rather, the objective data show that the IDPP is functioning as this Court and the DMV previously understood: 100% of individuals who have entered the IDPP since May 2016 have been mailed temporary IDs valid for voting. And although one media report indicated that a customer who could have used the IDPP left without entering the process, the recording of that event suggested that the customer would be able to retrieve his birth certificate and then easily obtain a permanent ID. In fact, other than that situation, there is no indication that anyone has, in fact, been dissuaded from

pursuing an ID as a result of any mistaken information that might have been provided by DMV personnel.

Thus, DMV reasonably believed it acted appropriately and that its procedures were functioning to ensure that eligible voters could obtain an ID with one trip to the DMV.

Nonetheless, DMV is entirely committed to its updated procedures in light of the recent media reports. After conducting its comprehensive review to improve its procedures over the past week, DMV is confident that it has addressed the concerns raised in media reports and by this Court's order, that customers seeking a Wisconsin ID will receive accurate and complete information about how to obtain an ID, and that he or she will be able to do so in just one visit, making the IDPP the "safety net" this Court contemplated. But DMV stands ready and willing to provide additional training and outreach, or submit further reports, if this Court so directs.

As to Plaintiffs' motion, the core issues raised there already have been addressed by the measures implemented. Plaintiffs' requests for additional relief should therefore be denied. That is especially true where the Plaintiffs seek broad injunctive relief as to the voter ID law in its entirety: that relief is not available. There are no credible allegations that support an order addressing anything beyond training and outreach. Further, the request for a broad injunction is barred by *Frank I*, *Frank II*, and the Seventh Circuit's

recent orders denying initial hearing en banc and staying the affidavit exception. In short, Plaintiffs' motion should be denied, and in no event should relief address anything beyond training and outreach that relates to voters' "reasonable efforts," which are the only topics properly at issue.

BACKGROUND AND REPORT

I. Since May 2016, the IDPP has functioned as DMV and this Court contemplated.

Since the implementation of the Emergency Rule on May 13, 2016, there have been 304 individuals who have received temporary IDs through the IDPP. (Boardman Decl. ¶ 8.) This includes individuals who previously entered the IDPP and individuals who have applied since the rule was adopted. (*Id.* ¶¶ 8–10.) For every eligible person who has entered the IDPP, an ID has issued and been mailed. (*Id.* ¶ 11.) Those temporary IDs were issued by mail within six days of the customer's application. (*Id.* ¶¶ 7, 11.) These simple facts show that the process works.

Further, some applicants have received permanent IDs, and the rest have received continual renewals, pursuant to the Emergency Rule, or have chosen to cancel their application. (*Id.* ¶ 10.) Also, 339 new IDPP applications have been submitted since the adoption of the Emergency Rule. Of those new applicants, 159 have received temporary IDs. (*Id.*) The remaining 180 applicants have either received their eight-year ID credential or they

withdrew from the petition process (*i.e.*, they cancelled their petition).
(*Id.*)

Additionally, in the months since the adoption of the Emergency Rule, DMV has conducted multiple trainings for field staff about processing IDPP applications. (*Id.* ¶¶ 3–6.) These trainings were sent out on May 12 and 16, and on September 6 and 23. (*Id.* ¶ 5.)

At the time of those trainings, DMV believed that they were sufficient to ensure that customers would receive accurate, timely information about the IDPP. (*Id.* ¶ 6.) To illustrate, other than the situation involving Zack Moore, discussed below, DMV is not aware of any evidence of an actual customer who lacked necessary documents, came to the DMV after the emergency rule was implemented and entered the IDPP, but was not mailed a product valid for voting. (*Id.* ¶ 12.)

II. Following media reports of inaccurate information, DMV immediately investigated its customer communication practices relating to the IDPP.

Beginning on September 29, 2016, DMV learned about reports stating that customers at DMV service centers had received inaccurate or incomplete

information about the IDPP.¹ (*Id.* ¶¶ 70–72.) The reports included specific references to two DMV customers who had visited DMV service centers and had difficulties obtaining an ID. (*Id.* ¶¶ 75, 90.) With the specific reports about those individuals, DMV officials were able to quickly identify involved staff members and assess what errors might have occurred during the transaction. (*Id.* ¶¶ 74, 76–85, 91–102.)

Subsequent media reports also referred to similar accounts from DMV service centers. The reports suggested that employees were providing customers with inaccurate or incomplete information about the IDPP. Of note, many instances of “customers” making requests actually involved volunteers with interest groups, not bona fide applicants actually seeking an ID. (*See* Dkt. 263; 264 (declarations of Molly McGrath and Susan McGrath).) These “customers” confronted DMV staff with in-depth, hypothetical questions about the functioning of the IDPP, and were regularly far more probing than would be a typical ID applicant. (*See, e.g.*, Dkt. 263-2:7 (in-depth questioning about the IDPP’s functioning, asking whether employee

¹ Ari Berman, *Wisconsin is Systematically Failing to Provide the Photo IDs Required to Vote in November*, *The Nation*, Sept. 29, 2016, <https://www.thenation.com/article/wisconsin-is-systematically-failing-to-provide-the-photo-ids-required-to-vote-in-november/>; Patrick Marley, *DMV gives wrong information on voter ID*, *Milwaukee Journal Sentinel*, Sept. 30, 2016, <http://www.jsonline.com/story/news/politics/elections/2016/09/29/dmv-gives-wrong-information-voter-id/91283462/>.

can “promise” that applicant would be able to vote); *see also* Boardman Decl. ¶¶ 114–15 (discussing “typical” customer interactions.) DMV has no way of knowing whether (or how many) other interest groups have sent in similar probes but have chosen not to report what occurred because all information provided was proper.

In the days following the media reports, DMV officials conducted a division-wide investigation into how customers were being informed about the IDPP.

A. Investigation into individual customer accounts.

1. [REDACTED].

The investigation into one of the individuals subject to a media report— [REDACTED]—has revealed that his concerns are not in fact related to the IDPP, *per se*. Most important, his concerns have been addressed and he has proper identification for voting in the November election.

On July 29, 2016, [REDACTED] was issued a Wisconsin ID card in the name “[REDACTED].” (Boardman Decl. ¶ 77.) That card corresponded to the spelling of his name on his birth certificate and his ID application. (*Id.*) After Mr. [REDACTED] received his ID in the name “[REDACTED],” he returned to the Madison West DMV service center, seeking to change the name on his ID card to “[REDACTED],” which was the spelling he had used his entire life. (Boardman Decl. ¶ 78.) DMV field staff told him that he could not use the

IDPP to correct that error, and that he needed to change his name on his birth certificate or passport to obtain a corrected ID card. (*Id.* ¶ 79.) He was not informed that he could use the common-law name change procedure to make that change. (*Id.*)

As discussed at trial, the common-law name change procedure allows someone who has used one name his entire life to obtain an ID in that name, when a source document proving name and date of birth (*e.g.*, a birth certificate) includes a misspelling of that name. (*Id.* ¶ 81.) The proper DMV procedure for someone in Mr. ██████ situation is to use a common-law name change form, not the IDPP. (*Id.* ¶ 80.)

After DMV officials learned about Mr. ██████ situation, officials at DMV central office directed staff at the Madison West DMV to review the common-law name change procedure, and to reissue Mr. ██████ ID in the name “██████.” (*Id.* ¶ 82–83.) Mr. ██████ has been mailed an updated receipt, and his ID card has been processed for printing and mailing. (*Id.* ¶ 83.) Mr. ██████ should have an ID that is valid for voting in the November 2016 election, in his chosen name of “██████.” (*Id.* ¶ 84.)

In light of Mr. ██████ experience, DMV officials have directed supervisors at every DMV service center to instruct all staff about the proper procedure for correcting a misspelling, as occurred in Mr. ██████ situation. (*Id.* ¶ 85.) Staff also have been instructed on the distinction between

this situation and a situation where the customer is actually missing documents: only in the latter situation would the customer need to be entered into the IDPP. (*Id.* ¶ 86–88.) Thus, although Mr. ██████ case did not involve mistaken information about the IDPP, DMV has now taken corrective measures to ensure that staff are properly informed about processing ID applications involving a misspelled name on a document. (*Id.* ¶ 85.)

2. Zack Moore.

The other individual specifically mentioned in the media reports, Zack Moore, presented at the Madison East DMV to obtain a Wisconsin ID. (*Id.* ¶ 91.) Mr. Moore possessed all the necessary documents to obtain a permanent ID, except that his birth certificate was with his sister in Illinois. (*Id.* ¶ 95; *see also* Johnson-Karp Decl., Ex. A, 2:22–23; 5:13–14, 23–24; 7:1–2, 5.) Based on that information, staff encouraged Mr. Moore to contact his sister to obtain his birth certificate. (Johnson-Karp Decl., Ex. A, 2:22–23; 5:13–14, 23–24; 7:1–2, 5.) From the recording and transcript of the interaction, Mr. Moore seemed agreeable to the suggestion of getting his birth certificate from his sister. (Boardman Decl. ¶ 96.)

Nonetheless, following review of Mr. Moore’s transaction, there can be no dispute that DMV employees provided some inaccurate information to Mr. Moore on that visit. (*Id.* ¶ 103.) Mr. Moore should have been told that a photo receipt is mailed to IDPP clients within six days. (*Id.* ¶ 7.) Instead, he

was told that it would take six to eight weeks, an indeterminate amount of time, or that it may not arrive in time to vote. (Johnson-Karp Decl., Ex. A, 4:17–13; 8.) DMV’s investigation, however, reveals that the media accounts of Mr. Moore’s transaction misrepresent what actually occurred. In particular, the accounts mischaracterize how the employees responded to Mr. Moore’s inquiries (as the actual customer) versus how those employees responded to the inquiries posed by the volunteer accompanying him. Three inaccuracies are notable.

First, The Nation reported that Mr. Moore’s birth certificate “had been misplaced by his sister in Illinois.”² If that were actually true, then the IDPP would have been Mr. Moore’s only option. But that is not what Mr. Moore said, meaning other options were available. Mr. Moore told staff that, “my birth certificate is in Illinois;” “I think I’ll try to call and get my birth certificate sent up;” “Yeah, I’m gonna call my sister and have her send my birth certificate;” “I’ll just have my sister mail it;” and “[t]hat will be better.” (*Id.* at 2:22–23; 5:13–14, 23–24; 7:1–2, 5.) Mr. Moore affirmed that his sister had his birth certificate “for sure” and clearly stated his intent was to “just have her mail it out. That will be easier.” (*Id.* at 9:8–14.)

² The Nation, *supra* n.1.

The information Mr. Moore provided to DMV staff regarding access to his birth certificate affected the advice they provided him. Staff believed he had easy access to his birth certificate, and preferred using it. (Schoebel Decl., 3:¶ 10; Kvammen Decl., 3:¶ 10; Krohn Decl., 3:¶ 7.) If he had brought his birth certificate in, staff could have issued him a photo ID on the spot—he would not have had to wait to get a voting ID, and he would have been able to participate in early voting that same day. (See Kvammen Decl., 3–4:¶ 11; Krohn Decl., 3–4:¶¶ 10, 12.) And his birth certificate would be entered into the system, which would make it easy for him to obtain any other identification product in the future, like a driver license or Real ID card. (Kvammen Decl., 3–4:¶ 11; Krohn Decl., 4:¶ 12.) So these DMV staff members believed they were providing the best advice and customer service to Mr. Moore, given the concerns he raised. (Kvammen Decl., 3–4:¶ 11; Krohn Decl., 4:¶ 12.)

Second, in comparing the employee accounts with those in *The Nation* and the *Milwaukee Journal Sentinel*, DMV was able to determine that those articles misrepresent that Mr. Moore initially requested an ID for voting.³ Voting was not even mentioned during the September 22 exchange until the Vote Riders volunteer accompanying him, Molly McGrath, interjected herself

³ *The Nation*, *supra* n.1; *Milwaukee Journal Sentinel*, *supra* n.2.

in the conversation. (Johnson-Karp Decl., Ex. A, 6:8.) And this occurred after Mr. Moore already indicated his intent to get his birth certificate from his sister. (*Id.* at 6:8.) Generally, DMV employees issue several different types of products on any given day, including driver licenses, driver permits, Wisconsin IDs, registrations, and titles—each having different requirements. (Kvammen Decl., 1–2:¶ 2; Krohn Decl., 1–2:¶ 2; Schoebel Decl., 1–2:¶ 2.) The IDPP only applies to individuals who need the ID to vote, and Mr. Moore did not indicate that this was his purpose when he first asked for assistance. (Johnson-Karp Decl., Ex. A, 2:1–3; 3.) So the DMV employee’s initial advice to Mr. Moore on the required documents for getting a Wisconsin ID was accurate. The DMV employees also correctly explained that they could not issue Mr. Moore a photo ID that day, even if he entered the IDPP. (*Id.* at 8:15–16; Kvammen Decl., 4–5:¶ 14.)

Third, The Nation incorrectly reported that a DMV employee “told” Mr. Moore to drive to Illinois and pay for his birth certificate.⁴ Mr. Moore was told that it was preferable to have his birth certificate, and these DMV employees all believed he had easy access to that birth certificate. (Johnson-Karp Decl., Ex. A, 4:9–14; 18; Schoebel Decl., 3:¶ 10; Kvammen Decl., 3:¶ 10; Krohn Decl., 3:¶ 7.) The information regarding the cost of an

⁴ The Nation, *supra* n.1.

Illinois birth certificate was provided because Ms. McGrath requested it. (Johnson-Karp Decl., Ex. A, 13:21–15; 16.)

In all, the DMV employees working with Mr. Moore believed they were providing him with the best customer service they could give, in light of his specific situation—seemingly easy access to a birth certificate that Mr. Moore could obtain in a matter of days. They believed he could more quickly obtain a Wisconsin ID, which would ultimately help him should he desire any other identification product in the future. In any event, to the extent the employees also gave some inaccurate responses, DMV’s new measures and training address that flaw, as discussed more below.

B. Investigation into reports from other DMV service centers.

Plaintiffs also have presented transcripts and recordings from 12 additional DMV interactions. Only two involve bona fide attempts by an individual to obtain an ID. Both individuals were successful.

The two bona fide attempts to obtain an ID were by Juanita Carr and Noreen Glover, both of whom visited the Madison–Sheboygan Avenue location. (*See* Dkt. 263:4–5.)⁵ The remainder of the recordings involved a volunteer (Susan McGrath) posing hypothetical questions about an absent

⁵ State law requires DMV to redact personally identifying information derived from DMV records; however where the information is derived from Plaintiffs’ filings or publically available information, no redaction is required.

relative interested in obtaining an ID. Those recordings are from Wisconsin Rapids, Stevens Point, Rice Lake, Eau Claire, Black River Falls, Menomonie, Adams, Hudson, Neillsville, and Amery. (Dkt. 263-2; 264-1; 264-2; 264-3; 264-4; 264-5; 264-6; 264-7; 264-8; 264-9; 264-10; 265-4.) Ms. [REDACTED] and Ms. [REDACTED] visits resulted in the issuance of valid photo IDs. (Dkt. 265-4, Ex. D (second Glover recording); Dkt. 263:4 ¶ 21; Boardman Decl., ¶ 107–08.) And while some slices of information provided in response to Ms. McGrath’s hypothetical “friend” or “relative” were incomplete or inaccurate, none of these errors affected an actual customer, nor would they have prevented an actual customer from entering the IDPP and having a valid ID in time to vote.

Most of the DMV locations targeted by Ms. McGrath have fielded very few IDPP inquires. (See Dkt. 264-1:10 (“[h]ere and there”); 264-3:3 (“[n]ot very often”); 264-4:5 (“doesn’t come up every day”); 264-7:4 (“hadn’t done any”); 264-8:3 (“very unusual”); 264-9:7 (“don’t have this happen very often.”)) Some inaccurate or incomplete explanations were provided at these DMV locations. For example, in some instances, Ms. McGrath was encouraged to obtain a birth certificate and/or social security card, since there was still time to do so. (Dkt. 264-1:1–4, 12, 16; 264-2:2; 264-4:2–5; 264-7:2; 264-9:1–3.) Some of these field offices also failed to tell her definitively when a photo ID receipt would be mailed after entering the IDPP. (Dkt. 264-1:6, 13; 264-3:3–5;

264-5:2–4; 264-8:4–5; 264-9:4, 9; 264-10:4.) And she was told at two locations that she would receive a photo ID receipt from the DMV service center, versus through the mail. (Dkt. 264-6:2; 264-7:7.)

However, the twelve DMV encounters submitted by the Plaintiffs also demonstrate that *real* customers presenting to the DMV *have* received an ID. After Ms. Glover presented her documents to a second DMV employee—including her birth certificate—she was issued an ID photo receipt on the spot. (Dkt. 265-4, Ex. D (second Glover recording at minute 24:05); Dkt. 263:4 ¶ 21. As indicated on the recording, Ms. Glover obtained her ID after her one visit to the DMV. (Dkt. 265-4, Ex. D (second Glover recording at minute 24:18); Dkt. 263:4 ¶ 21. And during Ms. Carr’s visit to the Madison–Sheboygan Avenue Service Center, she was directed to the IDPP process and assured that she will have an ID to vote: “we were just told last week that even if it’s the same week they will you know make sure you’re able to vote,” and “they told us that if they need it, they will overnight that document so you will have it by the time you are able to vote.” (Dkt. 263-2:7.) Ms. [REDACTED] was subsequently entered into the IDPP and will be issued a photo ID receipt by October 10, 2016. (Boardman Decl., ¶ 108.) Presenting these individuals’ stories as DMV failures is simply inaccurate.

Even for Ms. McGrath’s hypothetical “friend” or “relative,” she was provided the proper ID and IDPP application forms on all but one occasion.

(See Dkt. 264-1:8; 264-3:2; 264-4:6; 264-5:1–2; 264-6:1; 264-7:7; 264-8:2–3; 264-9:3, 8; 264-10:3, 5.) Only the Stevens Point location failed to provide her with the IDPP application form, but that was because Ms. McGrath affirmed that a birth certificate was “with the family member that they could send it to her.” (Dkt. 264-2:2.) This presents a scenario similar to Mr. Moore where the IDPP would not be needed. (See Kvammen Decl., 3–4:¶¶ 9–12.)

Ms. McGrath’s experience supports that individuals needing the IDPP would have received the proper application forms. Upon submission of those forms, it is undisputed that they would have received a photo ID mailed within six days or sooner. (Dkt. 259-1:1.) And the Madison–Sheboygan Avenue, Eau Claire, Menomonie, Adams, and Amery locations specifically assured an immediate or timely voter ID. (Dkt. 263-2:6; 264-4:2–4; 264-6:2; 264-7:7; 264-10:3–4.) Any inaccuracies Ms. McGrath received regarding the finer workings of the IDPP would have been inconsequential for any real customer submitting the forms she was provided—the IDPP *would have* been initiated, and those customers *would have* been provided a photo ID in time to vote.

III. DMV has implemented updated procedures to ensure that any customer interested in a Wisconsin ID will receive accurate and complete information about how to obtain an ID through the IDPP.

As explained, the only bona fide critique from the media reports and recordings is that, in some instances, some people have been told inaccurate information about the IDPP. That is a training issue, and it has been addressed in at least three ways: (1) new mandatory training that must be affirmatively confirmed; (2) updated handouts with information that has been verified as correct; (3) new DMV line-routing so that ID-related customers will always be directed to a specialist trained on the IDPP.

A. Field staff have received—and confirmed—updated training on processing IDPP applications.

All field staff are being retrained on proper IDPP procedures to head off any future miscommunications by any staff. (Boardman Decl. ¶ 17–20.) For example, starting the week of October 3, 2016, employees have been given an updated training module via the online learning management system about how and when to enroll customers in the IDPP process. (*Id.* ¶ 21.) This training assignment is tracked, and employees who have not completed the module by October 7, 2016, will be contacted for immediate review with their supervisor. (*Id.*) To be clear, all field staff will be required to complete this training, although only specialists will be processing ID customers, as described below. (*Id.* ¶ 20–22.) This more general training is intended to

ensure that field staff has the correct basic understanding of the IDPP, regardless of whether they will be processing the requests. (*Id.* ¶¶ 17–22.)

To ensure that employees understand these updates, supervisors will have one-on-one discussions with every DMV service center employee about the expectations for IDPP processing. (*Id.* ¶ 22.) DMV has developed a checklist that employees and supervisors will be required to complete and sign upon completion of the discussion. (*Id.* ¶ 23 and Ex. B.) As of October 7, 2016, 374 employees had completed the training and 357 had completed the one-on-one discussion with their supervisors. (Boardman Decl., ¶ 26 and Ex. O.)

The chief of DMV's Technical Training Section, Glenn Green, worked with his staff to develop the updated training module for all DMV field staff. (*Id.* ¶ 32.) Additionally, Mr. Green addressed all Field Supervisors at an in-person meeting on October 4, 2016, on the topic of IDPP communications, and has participated in conference calls with DMV Regional Managers on the topic. (*Id.* ¶ 32.)

To emphasize the importance of accurate IDPP communications, Administrator Boardman sent an email to all DMV field staff on September 30, 2016. (*Id.* ¶ 28 and Ex. C.) The email reminded staff that anyone seeking an ID for voting will be able to receive that ID before the election. (*Id.* ¶ 28.) Boardman also emphasized that no one should leave a

DMV service center believing that he or she might not be able to get an ID to vote in time for the election. (*Id.* ¶ 29.) Staff were further encouraged to direct any questions about IDs for voting to their supervisors or the DMV's Technical Training Section. (*Id.* ¶ 30.)

B. DMV has updated printed materials to clearly convey IDPP procedures and timelines.

Also starting the week of October 3, 2016, all DMV service centers will be implementing a procedure to provide every ID-card applicant with IDPP application materials, regardless of whether the applicant will use the IDPP. (*Id.* ¶ 33.) These materials include the ID card application (MV3004) and the IDPP petition (MV3012). (*Id.*) Also, as part of its action plan, DMV has developed an intake handout that will be provided along with the other IDPP application materials. (*Id.* ¶¶ 33–37 and Exs. D, E.)

The intake handout indicates that “DMV is committed to providing free identification to all eligible Wisconsin voters in time to have one’s vote counted.” (*Id.* ¶ 36 and Exs. D, E.) The handout also includes a hotline number for customers to call if they have any questions about the process of obtaining an ID to vote, or if they feel that they are not going to receive the identification needed to vote. (*Id.* ¶ 37.)

DMV has also updated the takeaway letter that will be provided to every customer who actually submits an application for an ID through the

IDPP. (*Id.* ¶¶ 50–58 and Exs. H, I.) This updated letter includes a sample image of a “Voting Purposes Only” receipt, as well as notification that a receipt similar to the sample shown will be printed on secure paper and mailed to the customer within five days of application. (*Id.* ¶ 51.) The letter will also inform customers that the temporary ID will be sent via overnight mail for all applications made between October 31 and November 10. (*Id.* ¶ 52.)

This updated takeaway letter replaced a previous takeaway letter for IDPP applicants. (*Id.* ¶ 55 and Ex. J.) During the course of its investigation into how staff was conveying IDPP information, DMV determined that the old takeaway letter did not provide the most accurate or complete information about how the petition process works and what applicants could expect from the process (*e.g.*, that the temporary ID would be mailed to them within six days). (*Id.* ¶ 57.) The updated takeaway letter is intended as another means of addressing possible misperceptions about how the IDPP works. (*Id.* ¶ 58.)

C. Updated queuing procedures ensure that ID applicants are served by employees specially trained to handle IDPP applications.

Additionally, in response to its investigation, DMV has modified its processing for “queuing” all customers seeking Wisconsin IDs. (*Id.* ¶ 38–41.) At all five-day DMV offices (of which there are 30) all ID applicants will be

queued to dedicated staff persons identified as “Wisconsin ID card processing experts.” (*Id.* ¶ 38 and Ex. A (directive from Secretary Gottlieb).) This dedicated procedure for processing Wisconsin ID applications is intended to capture any customer seeking a Wisconsin ID, regardless of whether he tells staff that he needs the ID for voting. (*Id.* ¶ 41 and Ex. A.)

The local processing experts are field staff who have received additional training in IDPP procedures, and who are best suited to answer questions about applications for Wisconsin IDs. (*Id.* ¶ 39.) These local experts will also have access (as will all DMV staff) to the IDPP staff hotline for any questions about which the expert is unsure, as well as a job-aid walking through the IDPP procedures. (*Id.* ¶¶ 40, 42–43 and Ex. F.)

In addition to updated processing procedures at the thirty five-day centers, DMV has implemented updated procedures for the part-time service centers (of which there are 62). (*Id.* ¶ 45–49.) Because some of those part-time service centers are staffed by one individual (with a single supervisor covering multiple offices in the region), it is not possible to dedicate one individual at each office to handle all Wisconsin ID applications, whether through the IDPP or otherwise. (*Id.* ¶ 47.)

Instead, staff at part-time service centers will be instructed to contact the internal IDPP hotline for assistance in processing all IDPP applicants. (*Id.* ¶ 48.) Staff at those part-time centers also will have materials on-hand to

provide ID applicants accurate and consistent information about the IDPP. (*Id.* ¶ 49.) This includes the ID applications (MV3004 and MV3012), the intake handout, and the takeaway letter. (*Id.* ¶ 33, 50.) Staff at part-time centers also have access to a job-aid specific to those centers. (*Id.* ¶ 45 and Ex. G.)

D. Recent website and computer updates will facilitate accurate and timely IDPP communications.

The available processing resources for staff also includes a “corkboard” on the home screen of every field staff member’s monitor, with a large IDPP icon at the center of the corkboard. (*Id.* ¶ 59 and Ex. K.) By clicking on the IDPP icon, staff are directed to available IDPP resources, including an IDPP checklist for staff, necessary forms for IDPP applications, a “Q&A” document, and the takeaway letter, as well as other relevant resources. (*Id.* ¶ 60.)

Also starting the week of October 3, 2016, the DMV website will include a prominently displayed telephone number for anyone who has any questions about obtaining an ID for the purpose of voting. (*Id.* ¶ 61 and Exs. L, M.) This hotline will be staffed by individuals specially trained in handling IDPP issues. (*Id.* ¶ 66.) A separate hotline has been established for field staff to call with any questions about the IDPP. (*Id.* ¶ 67.)

IV. Quality assurance checks conducted by the Wisconsin State Patrol have confirmed the functioning of DMV's IDPP procedures at numerous field service centers.

On October 4 and 5, 2016, DMV developed a plan to send out Wisconsin undercover state troopers to engage in IDPP quality assurance checks on DMV field offices. (*Id.* ¶¶ 11–17.) The checks occurred at 31 DMV locations throughout the state.⁶ (*Id.* ¶ 113.)

At all 31 locations, the undercover troopers asked about getting a voting ID for a relative who did not have all the required documentation—namely, a birth certificate. The troopers did not engage in probing inquiries into the nuances of the IDPP, but instead posed questions that were intended to mimic a typical customer interaction with DMV field staff. (*Id.* ¶ 115.) The troopers were routinely directed to the Voter ID Hotline,⁷ given

⁶ Checks were conducted at the following locations: Appleton, Baraboo, Beaver Dam, Beloit, Darlington, Elkhorn, Fond du Lac, Green Bay, Madison West–Hill Farms, Janesville, Madison–Odana, Madison East, Manitowoc, Milwaukee Central, Milwaukee Downtown, Milwaukee Northeast, Milwaukee Northwest, Milwaukee Southeast, Milwaukee Southwest, Oshkosh, Pewaukee, Platteville, Portage, Wisconsin Rapids, Reedsburg, Richland Center, Sheboygan, Stevens Point, Watertown, Wautoma, and West Bend. (*See* Johnson-Karp Decl., Ex. B; Jenswold Decl., Ex. 101; 103; 107; 110; 112; 114; 118; 124; 125; 127; 130; Fish Decl., Ex. 102; 106; 111; 115; 116; 119; 121; 126; 129; Lindgren Decl., Ex. 104; 105; 108; 109; 113; 117; 120; 122; 123; 128; 131.)

⁷ (Jenswold Decl., Ex. 103:3; 110:3; 112:3; 113:2–3; 114:3; 124:3; 125:4; Fish Decl., Ex. 102:1–2; 115:2; 119:3; 121:1–2; 129:3; Lindgren Decl., Ex. 108:3; 117:3; 121:1–2; 128:1–2; 131:1, 3.)

application forms for the IDPP,⁸ and reassured that that they would have an ID in time to vote.⁹ None of the undercover troopers were turned away.¹⁰ None were told that they needed to retrieve a birth certificate or other document to get a voting ID.¹¹ And none were told that they could not get a voting ID with the documents they did possess.¹² The DMV workers consistently referenced the IDPP both expressly and through the materials provided.¹³

V. In addition to recent updates, Defendants have developed a robust outreach campaign to inform the public about the IDPP.

As set forth in Defendants' recent report about their outreach efforts (Dkt. 258), "[i]nformation about the IDPP and availability of IDs has been widely distributed, and will continue to be advertised through the election."

⁸ (Jenswold Decl., Ex. 107:2–3; 112:3; 124:3; 125:4; Fish Decl., Ex. 116:1; 126:3; 129:3; Lindgren Decl., Ex. 105:3; 108:3; 113:2; 117:3; 123:4.)

⁹ (Jenswold Decl., Ex. 101:2; 103:2; 114:3; 125:3; Fish Decl., Ex. 102:2; 106:2; 115:2; 116:2; 119:2–3; 121:2; 126:2; 129:2–3; Lindgren Decl., Ex. 120:1–3; 122:2; 123:2; 131:2–3.)

¹⁰ (See Johnson-Karp Decl., Ex. B; Jenswold Decl., Ex. 101; 103; 107; 110; 112; 114; 118; 124; 125; 127; 130; Fish Decl., Ex. 102; 106; 111; 115; 116; 119; 121; 126; 129; Lindgren Decl., Ex. 104; 105; 108; 109; 113; 117; 120; 122; 123; 128; 131.)

¹¹ (*Id.*)

¹² (*Id.*)

¹³ (*Id.*)

(Dkt. 258:25.) To briefly reiterate, these outreach efforts by both DMV and the Wisconsin Elections Commission have included the following:

- Press releases and earned media campaigns (Dkt. 258:2–7);
- Television and radio advertising (Dkt. 258:8–9);
- Online advertising (Dkt. 258:9–10);
- Pre-show advertising at movie theaters (Dkt. 258:10–11);
- Interior bus advertising (Dkt. 258:11);
- Personal outreach to voter groups (Dkt. 258:11–13);
- Social media posts (Dkt. 258:13–16); and
- Agency websites posts and signage at DMV service centers

(Dkt. 258:16–20.)

Additionally, WEC has coordinated with Milwaukee County in conducting voter outreach efforts. (Haas Decl. ¶ 2–3.) At the time WEC created its outreach campaign with its media vendor KW2, they discussed efforts that Milwaukee County would be undertaking. (*Id.* ¶¶ 2–3.) Based on that understanding of Milwaukee’s outreach efforts, WEC decided not to target certain media platforms in Milwaukee, given the County’s targeting of those venues. (*Id.* ¶ 3 and Ex. A.) For example, WEC decided not to target movie theatres in the City of Milwaukee for distributing WEC advertising, on the understanding that the County would target pre-show advertising in the city and county. (*Id.* ¶ 4 and Ex. A.) Notably, Milwaukee County planned to

use many of WEC's outreach materials in connection with this campaign. (*Id.* ¶ 5.)

WEC also coordinated with Milwaukee County to avoid overlap between WEC advertising and Milwaukee County advertising on bus stop ads in Milwaukee. (*Id.* ¶ 7.) So while only Milwaukee County placed ads targeting bus stops in Milwaukee County, WEC nonetheless placed some "on bus" advertising in Milwaukee to support repetitive awareness by individuals using the public bus system. (*Id.* ¶¶ 7–8.)

Additionally, WEC outreach materials will be used in numerous large establishments in Milwaukee County, including several large churches and health care facilities. (*Id.* ¶ 10.) These establishments have agreed, at Milwaukee County's request, to play a Photo ID video for their members and visitors to their facilities. (*Id.* ¶ 10.) The participating locations include Christ the King Church, Parklawn Assembly of God, Holy Redeemer, Christian Faith Fellowship Church, Northside Church of God, Greater New Birth Baptist Church, Columbia–St. Mary's (and affiliated hospitals statewide), and Dental Associates Corporate Office. (*Id.* ¶ 10.)

All of these outreach efforts, combined with DMV's recent updates, demonstrate Defendants' commitment to ensuring that Wisconsin voters are properly informed about the availability of the IDPP. Therefore, as discussed

infra, Plaintiffs' requests for additional relief is unnecessary and unjustified under the controlling law.

ARGUMENT IN RESPONSE TO PLAINTIFFS' MOTION FOR RELIEF

I. Because any relief pertaining to Wisconsin's voter ID law must be limited to "situations in which the State's procedures fall short," Plaintiffs are not entitled to the broad injunctive relief they seek.

Plaintiffs' broad request to enjoin the entire voter ID law is a non-starter. This Court has already rejected such a request, in proper deference to the Seventh Circuit in *Frank* and *Crawford*. (See Dkt. 234:3 (recognizing that "plaintiffs' effort to get me to toss out the whole voter ID law fails").) See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) ("*Frank I*"). It should do so again, since additional Seventh Circuit guidance has underscored that injunctive relief in the context of voter ID must narrowly target "situations in which the state's procedures fall short" and impose a "substantial obstacle to voting." *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016).

Plaintiffs' request for sweeping relief regarding the voter ID law is completely inapt. Other than eligible voters without an ID (see, e.g., Dkt. 262:2), Plaintiffs have failed to identify any applicable group for whom relief would be appropriate. Any relief this Court orders must be

tailored to those voters who are actually having difficulty obtaining an ID despite “reasonable efforts,” namely, those who have received some inaccurate information about the IDPP. Further, any relief must be limited to training and outreach. Thus, Plaintiffs’ motion is flawed for multiple reasons.

First, Plaintiffs’ motion fails because it seeks an improper end-run around this Court’s holding that “voter ID laws are not facially unconstitutional.” (Dkt. 234:3.) Despite its facial validity, Plaintiffs now request “an injunction that bars the State from enforcing the voter ID law,” apparently in its entirety. (Dkt. 262:1–2, 10–11.) But such overbroad relief is barred by Seventh Circuit precedent in the *Frank* cases, which already led this Court to hold that “plaintiffs’ effort to get me to toss out the whole voter ID law fails.” (Dkt. 234:3.)

As this Court is aware (*see* Dkt. 234:3–4, 29), *Frank I* and *Crawford* make clear that this Court was correct in rejecting any broad constitutional challenge to Wisconsin’s voter ID law. *See Crawford*, 553 U.S. at 202–03; *Frank I*, 768 F.3d at 751. These decisions limit a court’s remedial authority “to ending the illegal conduct,” so that an injunction that goes beyond “the problem identified by the district court,” is improper. *Frank I*, 768 F.3d at 755.

The Seventh Circuit reaffirmed these remedial principles in *Frank II*, recognizing that an “across-the-board injunction would be improper” because

“the burden some voters faced [in obtaining photo ID] could not prevent the state from applying the law generally.” *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (“*Frank II*”).

And even more recently, the Seventh Circuit reemphasized that any voter ID remedy must be narrowly tailored to the wrong. After the district court in *Frank* granted the plaintiffs’ requested relief of an affidavit-at-the-polls exception to the voter ID law, *Frank v. Walker*, No. 11-C-1128, 2016 WL 3948068 (E.D. Wis. July 19, 2016), the Seventh Circuit quickly stayed that relief. *Frank*, 2016 WL 4224616, at *1. The court reasoned that because the district court’s overbroad injunction did not attempt to identify the voters for whom the ID requirement actually imposed a substantial burden, the relief granted did not sufficiently target those “situations in which the state’s [voting] procedures fall short.” *Id.* Without targeting a “substantial obstacle to voting,” the Seventh Circuit held that the affidavit procedure was overbroad and thus improper. *Id.*

These decisions establish a simple rule: any injunction must address only citizens who cannot get a voter ID with a “reasonable effort,” not those who refuse to spend a “single minute” to obtain one. *Id.* An “across-the-board” injunction of the kind Plaintiffs now request—and that the Seventh Circuit already rejected in *Frank I*—is clearly improper.

II. Plaintiffs' alternative requested relief is unwarranted; any relief must be tailored to training and outreach.

A. Plaintiffs' focus on DMV staff interactions does not support the relief requested.

Plaintiffs point to the media reports and transcripts discussed above, and they propose that DMV is not up to the task of administering the IDPP. However, as outlined in Defendants' report, *supra*, any issues have been addressed by new training and procedures, and there has been a wide variety of public outreach. Further, once laid bare, none of the media reports actually shows an eligible voter losing out on proper access to the IDPP.

Thus, Plaintiffs cannot connect the observations from the field to their requests for relief here. At a minimum, and as a matter of law, no broad relief is available. As the Seventh Circuit's precedent makes clear, any relief must be tailored to actual problems related to the actual issues—at most, training and outreach related to proper functioning of the IDPP—and nothing more. DMV believes that any outstanding training and communication issues have been adequately addressed, but stands ready to take further training, outreach, or reporting steps if so directed by this Court, or if the need becomes apparent.

B. Plaintiffs' allegations of errors within CAFU do not support the relief they seek.

Beyond the training and outreach topic, Plaintiffs point to an error report from DMV's Compliance Audit and Fraud Unit (CAFU), relating to the various types of processing errors that might occur in the IDPP. Plaintiffs also point to the fact that DMV has been unable to locate some IDPP applicants, despite trying to use the contact information supplied—meaning that a small group of people have not received IDs (or renewals), even though the IDPP credentials have issued. Nothing about these allegations remotely supports the broad relief requested; nor does it support the more narrow relief proposed in the alternative.

As to the error report, Plaintiffs suggest that the IDPP is “a trap for the unwary” because the CAFU error report showed that individuals who lacked proof of identity or residence were required to return with those documents. (*See* Dkt. 262:7.) For one thing, this Court's decision plainly demonstrates an understanding of what is required to “enter” the IDPP: an applicant must bring proof of residence and identity, and fill out the ID application and petition. (*See* Dkt. 234:24–26 (recognizing that IDPP's function was primarily to assist in locating birth records).) And the Seventh Circuit recently confirmed that simply showing up at the DMV does not entitle one to an ID; rather, an applicant must “submit[] materials sufficient to initiate the IDPP”

to be entitled to a credential for voting. *Frank v. Walker*, Nos. 16-3003, 16-3052, slip op. at 3 (7th Cir. Aug. 26, 2016). Thus, any alleged “errors” relating to an individual required to return with proof of identity or residence are not errors at all, and do not amount to failures of the IDPP.

Moreover, DMV’s efforts to facilitate a “one trip” procedure for IDs is an additional accommodation, beyond what was contemplated either by this Court’s stay order (*see* Dkt. 255:12) or by the Seventh Circuit when it denied the petition for an initial hearing en banc. Therefore, the fact that Plaintiffs can point to some individuals who might have had to return to the DMV does not demonstrate that DMV is not complying with this Court’s order.

In any event, since the preparation of the CAFU error report on which Plaintiffs rely, DMV has adopted procedures to achieve its “one trip” goal, even though they are not legally required to do so. This updated procedure provides that individuals lacking identity and proof of residence documents will nonetheless be entered into the IDPP and will receive a temporary ID by mail. (*See* Boardman Decl. ¶ 109 and Ex. N.) Therefore, to the extent that the “errors” Plaintiffs point to were errors at all, DMV has taken steps to address those issues.

Next, Plaintiffs suggest that DMV should have done more to contact individuals whose renewal IDs were returned as undeliverable, and that failure to do so illustrates that the IDPP is not working. As a remedy,

Plaintiffs suggest that DMV obtain *additional* CLEAR reports. Putting aside for a moment the idea that additional contacts are required, the proposed remedy is a non-starter: this Court concluded that obtaining *one* CLEAR report “imposes a substantial burden on the right to vote.” (Dkt. 234:25 n.5.)

But more importantly, there is no basis for Plaintiffs’ argument that DMV must do more than use its on-hand resources to contact these individuals. Applicants are informed that they must provide updated contact information during the petition process, and applicants’ failure to do so does not impose an additional obligation on DMV to track down these individuals.

Because there is no question that these individuals would be issued an ID within six days of contacting the DMV, Plaintiffs fail to show that DMV’s procedure for handling undeliverable IDs is unreasonable, or that it violates this Court’s order.

C. Because any relief must be tailored to training and advertising, and Defendants have already undertaken significant steps in those areas, none of Plaintiffs’ requested remedies is justified.

Even before Plaintiffs’ request for relief, DMV undertook aggressive, proactive measures to address the issues regarding IDPP communications by DMV staff. Following the implementation of these measures over the course of the past week, even the narrower relief that Plaintiffs seek is unwarranted. Specifically, Plaintiffs provide this Court a menu of options to

choose from if the Court declines to take the drastic step of enjoining the voter ID law. None of Plaintiffs' requests are supported by fact or law. Further, underlying consideration of any relief must be the recognition that any change in the electoral process at this stage threatens severe disruption and is therefore disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). As noted in *Purcell*, “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Id.* at 4–5.

First, Plaintiffs suggest that the Court order the state to “count[] all no-ID provisional ballots unless [the State] can demonstrate that a particular ballot was cast by a voter who is not qualified.” (Dkt. 262:2.) This familiar-sounding remedy is nearly identical to the untailed relief that the Seventh Circuit has already rejected. *Frank*, 2016 WL 4224616, at *1. Such relief would fail “to distinguish genuine difficulties . . . from any given voter’s unwillingness to make the effort that the Supreme Court has held that a state can require.” *Id.* This relief would be improper, and would face a substantial likelihood of being reversed on appeal. *Id.*

Plaintiffs’ second request simply asks the Court to order Defendants to continue what they are already doing, with the addition of immediately providing eight-year IDs for anyone who enters the

IDPP. (*See* Dkt. 262:2, 11.) This Court rightly stayed its decision on this point two months ago, when it recognized that “the state’s emergency measures already in place will allow anyone who enters the IDPP to get a receipt that will serve as a valid ID for the November 2016 election.” (Dkt. 255:2.) To reverse course now is unnecessary, and would cause extreme disruption to the state’s already operative election process.

This would occur, most importantly, in the form of voter confusion, in that voters with current, temporary IDs might be unsure about the continuing validity of those products, and might question whether they need to now return to DMV for the newly ordered product. Additional confusion could attend the process of checking IDs for voting, where poll workers (and observers) might also be unsure of the continuing validity of temporary IDs. Further, as Defendants have previously submitted, the administrative and security concerns surrounding the issuance of such unverified, permanent IDs counsels strongly against creating such a product. (*See* Dkt. 241:8.) Plaintiffs have provided no reason why this Court should change course now—five weeks before the election—when there has been no showing of how such a change would help anyone.

Next, Plaintiffs request that the Court order DMV to issue temporary IDs “in person and at the DMV field office (rather than through the mail six days later).” (Dkt. 262:11.) This request, however, is a solution seeking a

problem. There is no evidence that the six-day mailing procedure has caused any problem for voters obtaining IDs for voting. And DMV has already instituted a policy that will ensure that IDs are issued by overnight mail between October 31 and November 10. (*See* Dkt. 258:4–5, 25.) Requiring DMV to change course now would be unduly burdensome, with no apparent benefit to voters.

Further, Plaintiffs’ request that DMV “conduct additional emergency training on the IDPP for DMV employees and to adopt monitoring and reporting mechanisms that ensure that DMV employees are properly implementing the State’s policies” (Dkt. 262:11), has now been mooted by the significant measures DMV has implemented over the past week. As discussed at length herein, DMV has already instituted multiple procedures for training, monitoring, and reporting about IDPP processing and communication. There is no support for additional measures now. Having said that, if this Court believes that additional training is warranted, DMV is happy to comply.

Plaintiffs next suggest that the Court order Defendants to “adopt and implement a far more robust [advertising] program . . . targeted to voters who are most likely to need to make use of the IDPP.” (Dkt. 262:11.) This request also fails for a lack of proof, as well as a lack of manageability.

With regard to proof, Plaintiffs' sole evidence on the alleged shortcomings of Defendants' existing advertising efforts is the declaration of one member of an interest group, who in turn proffers hearsay statements from "members of the League of Women Voters, family members, and friends." (Dkt. 263:5 (M. McGrath Decl. ¶ 25).) This sole account, even accepting the hearsay, is hardly sufficient to show that the Defendants' efforts come up short. Plaintiffs proffer no evidence to suggest that additional expenditures, in different locations or media, would be more effective at informing the general public about the IDPP.

But perhaps more importantly, the relief that Plaintiffs seek would be hugely burdensome for this Court and the parties. What Plaintiffs request would require this Court signing off on the locations of signs, the timing of advertising, the type of media used, or even the particular platform used (*e.g.*, are posts on Twitter more effective than ads on YouTube?). That is not a proper role for the courts.

Defendants have unquestionably undertaken a robust campaign to inform the public, including paid advertising (television, radio, movie theaters), earned media campaigns, and wide-reaching social media posting. (*See* Dkt. 258:2–16.) Coupled with the lack of any proof that Defendants' chosen methods have actually been ineffective in reaching those who might

use the IDPP, this Court should decline Plaintiffs' request to wade into the field of managing an advertising campaign.

Finally, Plaintiffs ask this Court to require Defendants "to report back to this Court on October 17, October 31, and November 21, 2016." (Dkt. 262:11.) Defendants have no objection to this request to the extent the Court desires such reports. This possibility already is contemplated by the Court's earlier order that "additional reports will be ordered as needed." (Dkt. 257:2.)

CONCLUSION

DMV has taken very seriously the reports in recent media accounts about inaccurate communications about the IDPP. Through a swift and comprehensive investigation, DMV identified how best to address these communication concerns, and the agency has now implemented top-to-bottom corrective measures. These measures include updating language in application materials, altering how DMV service centers conduct intake for all ID applicants, requiring additional IDPP training for field staff, and making clear through agency-wide communications that the proper functioning of the IDPP is a priority.

These efforts should demonstrate that DMV is committed to fulfilling its obligations to its customers, and to the Court, by ensuring that all IDPP applicants are able to obtain an ID in time to vote.

Finally, the additional measures that Plaintiffs seek are unnecessary and unsupported under clear precedent. This Court should deny Plaintiffs' motion for relief. To the extent that the Court would like DMV to submit additional reports, DMV would readily do so.

Dated this 7th day of October, 2016.

Respectfully submitted,

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

ONE WISCONSIN INSTITUTE, *et al.*,

Plaintiffs,

v.

Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

**DECLARATION OF KRISTINA BOARDMAN
REGARDING REPORT OF DMV'S INVESTIGATIONS
INTO IDPP COMPLIANCE**

I, Kristina Boardman, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Administrator of the Wisconsin Department of Transportation, Division of Motor Vehicles (DMV). I have held this position since February of 2016.

2. I am aware of recent reports about DMV service center staff providing customers with inaccurate or incomplete information about the IDPP.

3. Before these reports about inaccurate IDPP communications, DMV provided training updates about the IDPP procedures, including the operation of the Emergency Rule.

4. These training updates included information about the IDPP, including the fact that temporary IDs would be mailed directly to customers who were waiting more than 6 days for verification by CAFU.

5. These trainings were sent out on May 12, May 16, September 6, and September 23.

6. At the time of those trainings, DMV believed that the trainings we had provided were sufficient to ensure that customers would receive accurate, timely information about the IDPP.

7. In the months since the first training under the Emergency Rule, every IDPP applicant was mailed (at least) a receipt within six business days of his or her application.

8. Since the implementation of the Emergency Rule on May 13, 2016, 304 individuals have received temporary IDs through the IDPP.

9. Following the initial issuance of temporary IDs for previously submitted IDPP applications, 339 new applications have been submitted (*i.e.*, between May 14 and October 5, 2016).

10. From May 14, 2016, through October 5, 2016, 159 of the 339 new applicants have received temporary IDs. The remaining 180 applicants have

either received their eight-year ID credential or they withdrew from the petition process (cancelled).

11. I am not aware of any applicant who has entered the IDPP who has not been sent a temporary ID within the required five working days.

12. Aside from Zack Moore, I am not aware of any actual customer who lacks ready access to necessary documents, who has come into DMV after the emergency rule was implemented, but was not mailed a product valid for voting.

13. Since July 1, 2011, DMV has issued 504,054 free IDs for voting.

14. Since learning about the recent reports of inaccurate information about the IDPP, DMV has conducted a comprehensive evaluation and restructuring of our IDPP procedures and materials.

15. Many of these updates to procedures and materials were instituted pursuant to a directive issued by DOT Secretary Mark Gottlieb.

16. A true and correct copy of Secretary Gottlieb's directive is attached as Exhibit A.

17. Starting the week of October 3, 2016, DMV service centers implemented procedures to ensure that any applicant for a Wisconsin ID will be accurately informed about the IDPP, regardless of whether the customer informs staff that he needs the ID for voting, and regardless of what other documents the customer has.

18. These procedures are also intended to avoid any situation in which DMV field staff would make any judgment call about whether a particular customer should enter the IDPP to obtain an ID.

19. To implement these procedures, I began by contacting key DMV managers to communicate the importance of providing accurate information about the IDPP, and to establish an action plan to prevent communication errors in the future.

20. As part of my investigation, my staff and I have reviewed the materials about IDPP procedures that have been provided to field staff.

21. Starting the week of October 3, 2016, employees have been given an updated training module via the online learning management system, about how and when to enroll customers in the IDPP process. This training assignment is tracked, and employees who have not completed the module by October 7, 2016, will be contacted for immediate review with their supervisor.

22. Supervisors will also have one-on-one discussions with every DMV service center employee about the expectations for IDPP processing.

23. A checklist has been produced for employees and supervisors to complete and sign at the conclusion of the discussion.

24. A true and correct copy of this checklist is attached as Exhibit B.

25. On October 7, 2016, I received a report of how many employees had completed the required training and signed off on the checklist.

26. As of October 7, 2016, 374 employees out of 403 had completed the required training, and 357 employees had completed the one-to-one discussion with their supervisors.

27. A true and correct copy of that report is attached as Exhibit O.

28. On the morning of Friday, September 30, I sent an email to all DMV field staff, reminding them that anyone seeking an ID for voting will be able to receive that ID before the election.

29. In that same email, I emphasized that no one should leave a DMV service center believing that he or she will not be able to get an ID to vote in time for the election.

30. I also instructed staff to direct any questions about IDs for voting to their supervisors or the DMV's Technical Training Section.

31. A true and correct copy of that email is attached as Exhibit C.

32. The chief of the Technical Training Section, Glenn Green, has worked with his staff to develop the updated training module for all DMV field staff. Mr. Green has also participated in conference calls with DMV Regional Managers on this topic, and has addressed all Field Supervisors at an in-person meeting on October 4, 2016, on this same topic.

33. Starting the week of October 3, 2016, all DMV service centers have implemented a procedure that will provide every applicant for a

Wisconsin ID card with an ID card application (MV3004), an IDPP petition (MV3012), and an intake handout.

34. A true and correct copy of the intake handout is attached as Exhibit D.

35. A true and correct copy of the intake handout in Spanish is attached as Exhibit E.

36. The intake handout indicates that “DMV is committed to providing free identification to all eligible Wisconsin voters in time to have one’s vote counted.”

37. This intake handout also includes a hotline number for customers to call if they have any questions about the process of obtaining an ID to vote, or if they feel that they are not going to receive the identification needed to vote.

38. Additionally, all five-day offices (of which there are 30) have been instructed to queue ID card applicants to dedicated staff persons identified as Wisconsin ID card processing experts.

39. These local processing experts are field staff who have received additional training in IDPP procedures, and who are best suited to answer questions about applications for Wisconsin IDs.

40. These local experts also have access (as do all DMV staff) to the IDPP staff hotline for any questions of which the specialist is unsure.

41. This dedicated procedure for processing Wisconsin ID applications is intended to capture any customer seeking a Wisconsin ID, regardless of whether he tells staff that he needs the ID for voting.

42. Staff at five-day service centers have also been provided a specific “job-aid.”

43. The job-aid guides staff step-by-step through the ID application process, both at the information desk and at the processing counter.

44. A true and correct copy of that job-aid is attached as Exhibit F.

45. Also starting the week of October 3, 2016, DMV provided staff at part-time service centers (of which there are 62) with a separate job-aid to address the experience of customers not working through an “information desk.”

46. A true and correct copy of the 20-hour job-aid is attached as Exhibit G.

47. Because some of the part-time service centers are staffed with as little as one individual, with a single supervisor covering multiple offices in the region, it is not possible with current staffing to dedicate an individual at each office to handle applications for Wisconsin IDs, whether through the IDPP or otherwise.

48. Instead, staff at part-time service centers have been instructed to contact the internal IDPP hotline for assistance in processing all IDPP applicants.

49. Staff at those part-time centers also have on hand consistent materials that they can give to ID applicants about the IDPP.

50. This includes a takeaway letter that is provided to every customer who makes application via the petition process.

51. This letter includes a sample image of a “Voting Purposes Only” receipt, as well as notification that a receipt similar to the sample shown will be printed on secure paper and mailed to the customer within five days of application.

52. The letter also informs customers that the temporary ID will be sent via overnight mail for all applications made between October 31 and November 10.

53. A true and correct copy of the updated takeaway letter is attached as Exhibit H.

54. A true and correct copy of the updated takeaway letter in Spanish is attached as Exhibit I.

55. The takeaway letter at Exhibit H replaced a previous takeaway letter for IDPP applicants.

56. A true and correct copy of that takeaway letter is attached as Exhibit J.

57. As part of the investigation into how staff was conveying IDPP information, DMV learned that the previous takeaway letter (Exhibit J) did not provide accurate and complete information about the IDPP procedures.

58. DMV has developed the updated takeaway letter to correct any possible misperceptions about how the IDPP works.

59. The available processing resources for staff also includes a “corkboard” on the home screen of every field staff member’s monitor, with a large IDPP icon at the center of the corkboard.

60. By clicking on the IDPP icon, staff are directed to the available IDPP resources, including an IDPP checklist for staff, necessary forms for IDPP applications, a “Q&A” document, and the takeaway letter in Exhibit H, as well as other relevant resources. A screen-shot of the corkboard and IDPP resources is attached as Exhibit K.

61. Also starting the week of October 3, 2016, the DMV website pages entitled, “Obtaining an identification (ID) card” and “Wisconsin ID card for voting purposes – petition process” have been updated. Those pages now include language at the top regarding DMV’s commitment to providing free identification to all eligible Wisconsin voters in time to have one’s vote counted. These pages also include information regarding the public voter ID

hotline for anyone who has any questions about obtaining an ID for the purpose of voting.

62. The DMV's ID application page is available at <http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/id-card.aspx>.

63. The DMV's petition process page is available at <http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx>.

64. A true and correct copy of a screenshot of the DMV ID application page is attached as Exhibit L.

65. A true and correct copy of a screenshot of the DMV petition process page is attached as Exhibit M.

66. This public voter ID hotline is staffed by individuals specially trained in handling IDPP issues.

67. A hotline has also been established for field staff to call with any questions about the IDPP.

68. On Tuesday, October 4, 2016, DMV held a meeting for all field supervisors.

69. At that meeting, all field supervisors were instructed that any customer requesting an ID for voting should be guided through the new protocols put in place. This means that in addition to advising customers of the documentation requirements for obtaining a state ID, that every

interaction must include details about receiving an ID receipt that is good for voting. All field supervisors were reminded that anyone entering the petition process will be mailed a receipt from central office within five working days.

70. On September 29, 2016, I learned about a story in *The Nation*, which discussed instances of some individuals having difficulty obtaining IDs at some DMV service centers.

71. The following day, I also learned about a follow-up story in the *Milwaukee Journal Sentinel*, discussing the same incidents as *The Nation* story.

72. I have since learned about reports relating to ten other DMV service centers, in which inaccurate or incomplete information about the IDPP was provided to customers or volunteers with the group *Vote Riders*.

73. On September 29, 2016, after learning about the events raised in *The Nation* story, I immediately began investigating the allegations in that story, and also began a Division-wide investigation into how DMV field staff were informing customers about IDPP procedures.

74. This investigation included identifying staff involved in the transactions and assessing what errors might have occurred.

75. One of the situations discussed in *The Nation* story involved a man named Claudell Boyd, and occurred at the Madison West DMV service center.

76. Mr. [REDACTED] initial ID application listed his name as “[REDACTED],” which corresponded to the spelling of his name on his birth certificate.

77. On July 29, 2016, Mr. [REDACTED] was issued a Wisconsin ID card in the name “[REDACTED],” corresponding to the spelling of his name on his birth certificate and his ID application.

78. After Mr. [REDACTED] received his ID in the name “[REDACTED],” he returned to the DMV service center, seeking to change the name on his ID card to “[REDACTED],” which is the name he has used his entire life.

79. When Mr. [REDACTED] attempted to obtain an ID with the proper spelling of his name, he was told he could not use the IDPP to correct that error, and instead needed to change his name on his birth certificate to obtain a corrected ID card. He was not told that he could use the common-law name change procedure.

80. The proper DMV procedure for someone in Mr. [REDACTED] situation is to use a common-law name change form.

81. The common-law name change procedure allows someone who has used one name his entire life to obtain an ID in that name, when his document proving name and date of birth (*e.g.*, birth certificate) includes a misspelling of that name.

82. After I learned about Mr. [REDACTED] situation, I directed staff at the Madison West DMV location to review the common-law name change procedure.

83. On September 29, 2016, I directed staff to reissue Mr. [REDACTED] product with the name "[REDACTED]." Mr. [REDACTED] was mailed an updated receipt, and his ID card has been processed for printing and mailing.

84. Mr. [REDACTED] should now have the necessary ID to vote in the November 2016 election.

85. I have also directed supervisors at every other DMV service center to instruct all staff about the proper procedure for correcting a misspelling, as in Mr. [REDACTED] situation.

86. If a customer uses the common-law name change procedure to correct a misspelling in an identity document (as occurred with Mr. [REDACTED]), the customer would not need to enter the IDPP.

87. The IDPP is intended to allow people to obtain an ID valid for voting when they are unable to obtain the documents necessary to prove name and date of birth, or citizenship.

88. DMV service center staff have been trained to inform customers about the IDPP when the customer does not have all the necessary documents for an ID.

89. Where a customer tells DMV service center staff that the customer has all the necessary documents, but simply did not bring them with him to the DMV, the staff member might conclude that the documents are not “unavailable,” as required to submit an IDPP application.

90. It is my understanding that this is what occurred in another situation discussed in The Nation and the Milwaukee Journal Sentinel, involving an individual named Zack Moore.

91. Mr. Moore presented at the Madison East DMV to obtain a Wisconsin ID.

92. It is my understanding that Mr. Moore possessed all the necessary documents for a Wisconsin ID, but had not brought one of the documents (his birth certificate) with him to the service center.

93. I have listened to the recording of Mr. Moore’s interaction with DMV service center staff.

94. A transcript of that recording is attached to the Declaration of Gabe Johnson-Karp as Exhibit A.

95. Mr. Moore told staff that his birth certificate was with his sister in Illinois.

96. It is my understanding of that interaction that Mr. Moore seemed agreeable to collecting his birth certificate from his sister and proceeding

with an ID application using his birth certificate as his proof of name and date of birth.

97. For example, on the recording, Mr. Moore can be heard saying “I think I’ll try to call and get my birth certificate sent up,” “Yeah, I’m gonna call my sister and have her send my birth certificate,” and “So I’ll just have her mail it out. That will be easier.” (See Johnson-Karp Decl., Ex. A, 5:13–14, 23–24; 9:13–14.)

98. It is also my understanding of that interaction that Mr. Moore did not initially tell the service center staff that Mr. Moore was seeking an ID for the purpose of voting.

99. DMV staff have been trained to guide customers into the IDPP when the customer states that he needs an ID for voting.

100. Because the Wisconsin ID card is the second most widely used identification document in Wisconsin, a customer might want an ID card for any number of reasons unrelated to voting.

101. Since learning about the issues raised in The Nation story, regarding DMV counter staff providing inaccurate or incomplete information about the IDPP, I have undertaken multiple measures to ensure that DMV staff are able to accurately inform customers about the IDPP.

102. One goal of these measures is to address situations like that involving Mr. Moore, in which the individual does not immediately inform staff that he needs the ID for voting.

103. DMV does not dispute that the recordings indicate that some DMV employees conveyed inaccurate information about IDPP procedures.

104. On October 6, 2016, I contacted Molly McGrath, via VoteRiders, in an attempt to help Mr. Moore obtain an ID.

105. On that same day Ms. McGrath responded to me.

106. My understanding is that while Mr. Moore has difficulty traveling due to not having ready access to a car, Ms. McGrath would try to locate Mr. Moore so that DMV could work with him to obtain an ID.

107. [REDACTED] was issued a Wisconsin ID on September 21, 2016.

108. [REDACTED] was entered into the IDPP on October 3, 2016, and will be issued at least a temporary ID by October 10, 2016.

109. The Bureau of Field Services' (BFS) recent updates for processing ID petitions provide that an individual who presents at the service center without proof of residence or identity will nonetheless be entered into the IDPP.

110. A true and correct copy of BFS's procedures for processing applications without proof of residence or identity is attached as Exhibit N.

111. On October 4 and 5, 2016, I developed a plan to send out Wisconsin state troopers to engage in IDPP quality assurance checks at DMV field offices.

112. Working with DOT leadership, I developed a geographically diverse plan for the troopers to follow, including which DMV locations to target.

113. These 31 locations were intended to provide a statewide sample of DMV employees' understanding of the IDPP procedures at both five-day and part-time offices.

114. Working with the Division of State Patrol, I cooperated in the development of hypothetical questions that were intended to capture whether field staff were properly implementing the IDPP procedures under typical customer interactions.

115. Due to time constraints for this court filing and the wide geographical area to cover, the troopers were not instructed to engage in in-depth probing about various hypothetical situations. Instead, the questions were intended to mimic, based upon my experience, the typical customer interaction with DMV field staff.

116. The troopers were instructed to remain "undercover," so as not to indicate the nature of the investigation to field staff.

117. I am not aware of anyone within the Bureau of Field Services who knew about these efforts ahead of time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 7th day of October, 2016.

/s/ Kristina Boardman
KRISTINA BOARDMAN

1 immediately.

2 Q As part of that immediate investigation, what did
3 you learn about Noreen Glover's situation?

4 A Noreen Glover was not referenced in the *Nation*
5 article. Her name was brought to me subsequently and I
6 don't remember exactly what day.

7 Q Okay. What did you learn about her situation as
8 part of the DMV internal investigation?

9 A We looked up her record and we found that she had an
10 ID.

11 Q What type of ID did she have?

12 A I believe that she walked out with a receipt. It
13 was maybe September 21st. She had all of her
14 documentation, so she walked out with the receipt and
15 should have received her card in the mail by now.

16 Q When you say walked out, you mean of her visit?

17 A When you have all documentation at the DMV service
18 center and you complete your transaction there, you are
19 walking way from the service center with a 45-day receipt
20 that covers you while your plastic card is being printed
21 and mailed to you.

22 Q And that's a 45-day receipt as distinguished from
23 the IDPP temporary ID?

24 A Correct.

25 Q Was the ID that she left the service center with

KRISTINA BOARDMAN - DIRECT

1 A REAL ID meets the federal standards for verification
2 of all documentation shown. So there's -- I could go on
3 for quite some time about the REAL ID process, but there
4 are federal standards for the issuance of both driver's
5 licenses and ID cards.

6 Q Did the REAL ID card have the name spelled
7 consistent with the application?

8 A Yes.

9 Q Was the REAL ID card a valid ID for voting?

10 A Yes.

11 Q If someone wants their -- wants an ID with the name
12 spelled differently than a birth certificate or an
13 application, is that an IDPP process?

14 A No.

15 Q What process is that?

16 A That is the common law name change process and we
17 have a form for that and a procedure to follow. This was
18 actually just one letter difference, so the affidavit
19 really didn't even need to be presented for that. We
20 could have just made that adjustment.

21 Q Has that been done?

22 A It has.

23 Q What did you learn about Juanita Carr's situation?

24 A It's my understanding that she has come to a service
25 center and that she entered the petition process and her

KRISTINA BOARDMAN - DIRECT

1 receipt was mailed to her on Monday, the 10th.

2 Q And that's the normal IDPP temporary ID receipt?

3 A Correct.

4 Q Okay. Thank you. Since the VoteRiders allegations,
5 has DMV made changes to its processes?

6 A Absolutely.

7 Q Those are described in detail in your declarations
8 and I'm not going to ask you to fully describe
9 everything, but let's talk about some categories. What
10 training changes have been made?

11 A As I talked about, the training that we provided
12 before was pushed out via the technical training updates.
13 So for --

14 THE COURT: Could you describe those to me a
15 little bit? Just tell me what they look like. Is it
16 like a 40-page manual? Is it a memo? Sounds like a memo
17 to me, but maybe it's more substantial than that. How --

18 THE WITNESS: No, it looks a little bit more
19 professional than a memo. It's not just an email. In
20 fact, we probably have copies of those technical updates
21 that went out. There was an IDPP special edition
22 technical update that went out. It was four pages in
23 length. It started with the emergency rule and it was
24 specifically targeted to the field.

25 THE COURT: Did it start with an explanation of

KRISTINA BOARDMAN - DIRECT

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

ONE WISCONSIN INSTITUTE, INC.,
CITIZEN ACTION OF WISCONSIN EDUCATION
FUND, INC., RENEE M. GAGNER,
ANITA JOHNSON, CODY R. NELSON,
JENNIFER S. TASSE, SCOTT T. TRINDL,
MICHAEL R. WILDER, JOHNNY M. RANDLE,
DAVID WALKER, DAVID APONTE, and
CASSANDRA M. SILAS,

Plaintiffs,

v.

OPINION & ORDER

15-cv-324-jdp

MARK L. THOMSEN, ANN S. JACOBS,
BEVERLY R. GILL, JULIE M. GLANCEY,
STEVE KING, DON M. MILLS,
MICHAEL HAAS, MARK GOTTLIEB, and
KRISTINA BOARDMAN,
all in their official capacities,

Defendants.

Plaintiffs contend that defendants have not complied with the court's final order as it relates to the ID Petition Process (IDPP), and they ask the court to impose appropriate remedies. Based on the parties' written submissions, and a full-day hearing, the court finds that defendants have not complied with the court's order concerning the IDPP, because the public has not been adequately informed about the IDPP and DMV staff had not been adequately trained to administer it. The court will order remedies targeted to these problems.

BACKGROUND

After trial, the court held that Wisconsin's ID Petition Process is unconstitutional and must be reformed, and the court issued an injunction requiring that reform. Dkt. 234.

Defendants requested a stay of the injunction pending appeal, which the court granted only in part. The court stayed the part of the order requiring comprehensive reform of the IDPP until after the appeal, because in the short term the most egregious deficiencies of the IDPP were ameliorated by an emergency rule issued just prior to trial in this case. The court's order, issued July 29, 2016, required the state to honor its commitment to the emergency rule and also to take some additional steps ensure that the IDPP would serve its purpose. Specifically, the court ordered defendants to:

- a. Promptly issue a credential valid as a voting ID to any person who enters the IDPP or who has a petition pending;
- b. Provide that any such credential has a term of expiration equivalent to that of a Wisconsin driver license or photo ID and will not be cancelled without cause;
- c. Inform the general public that credentials valid for voting will be issued to persons who enter the IDPP[.]

Id. at 118-19.

Both parties have appealed the court's order to the Seventh Circuit, and the appeal remains pending. In addition, plaintiffs sought immediate en banc review, and defendants sought a stay of the court's injunction. In large part, this matter is now within the jurisdiction of the appellate court, but this court has not been entirely divested of jurisdiction. In the order denying the request for en banc review and a stay of the injunction, the Seventh Circuit made clear that it expected this court to enforce its injunction through the November election. The court quotes the pertinent paragraph in full, because that paragraph informs the court's understanding of the scope of its authority, and of the importance of enforcing its injunction:

Given the State's representation that "initiation" of the IDPP means only that the voter must show up at a DMV with as much as he or she has, and that the State will not refuse to recognize the "initiation" of the process because a birth certificate, proof of citizenship, Social Security card, or other particular document is missing, we conclude that the urgency needed to justify an initial en banc hearing has not been shown. Our conclusion depends also on the State's compliance with the district court's second criterion, namely, that the State adequately inform the general public that those who enter the IDPP will promptly receive a credential for voting, unless it is plain that they are not qualified. The Western District has the authority to monitor compliance with its injunction, and we trust that it will do so conscientiously between now and the November 2016 election.

Frank v. Walker, No. 16-3003, 2016 WL 4524468, at *2 (7th Cir. Aug. 29, 2016). In other words, the Seventh Circuit forestalled immediate intervention in reliance on both the state's representations about the effectiveness of the IDPP and this court's enforcement of the injunction concerning public education about the IDPP.

FINDINGS OF FACT

The court finds that defendants have not complied with the court's injunction in the following ways.

On September 22, 2016, defendants submitted a report to the court indicating that the IDPP was working as required and that they had adequately informed the public about it.

VoteRiders is an organization that educates voters about voter ID requirements and helps individual voters acquire voting credentials. Between September 16 and September 28, 2016, Molly McGrath, a VoteRiders employee, and her mother, Susan McGrath, recorded several interactions in which DMV employees were asked about how electors could get a voting credential if they lacked the documentation needed for a traditional Wisconsin ID.

The DMV personnel failed to inform the McGraths or the voters that Molly was assisting at the time that a credential valid as a voting ID would be promptly provided to any person who enters the IDPP. The information provided by DMV employees varied greatly; some DMV employees indicated that a voter who entered the IDPP would not necessarily have a voting credential for the November election. The DMV employees were at all time courteous, and there is no evidence that any of them intentionally mislead any prospective voter. At the hearing, Kristina Boardman, administrator of the DMV, conceded that DMV personnel gave incomplete and inaccurate information about the IDPP.

DMV employees who handled requests for IDs were not adequately trained on IDPP procedures. On May 12, May 16, September 6, and September 23, 2016, DMV employees received technical training bulletins, essentially a few pages of written instructions, which they were expected to read. In DMV offices open five days a week, the technical training bulletin received on a particular day was supposed to be discussed in a 20-30 minute staff meeting. Employees of smaller DMV offices were expected to call if they had questions. There was no procedure to ensure that DMV employees read or understood the technical training bulletins.

News reports of the McGraths' investigation prompted Boardman to initiate retraining on the IDPP. An online training module was distributed to all DMV employees. The module contained accurate information about the IDPP and required DMV employees to correctly answer questions about the IDPP. At the time of the October 12, 2016, hearing, 98 percent of DMV employees had completed the training module. The DMV also changed IDPP intake procedures. In five-day offices, ID applicants are now handled by an employee who specializes in IDPP processing. In 20-hour offices, where IDPP specialists are not

available, DMV employees processing an IDPP application do so with a specialist from the DMV employee hotline on the phone. The retraining and process improvements substantially reduce the likelihood that DMV employees will give incorrect information about the IDPP.

The DMV and the WEC have done little to inform the general public that credentials valid for voting will be issued to persons who enter the IDPP. The WEC's public education and outreach efforts since the court's July 29 order have largely been a continuation of the planned campaign concerning voter ID in general. The DMV's efforts have consisted primarily of press releases which indicate the existence of the IDPP as a means of acquiring a Wisconsin ID. Neither the DMV nor the WEC have undertaken significant efforts to inform the public that those who enter the IDPP will promptly get a receipt valid for voting even if the applicant does not promptly receive a regular Wisconsin ID.

Neither the DMV nor the WEC have clearly explained to the public what it takes to initiate an ID petition. The DMV's materials, as of the date of the hearing, are not clear because they make it appear that an applicant must have some undefined set of documents. In fact, as established at the hearing, one does not need any documents to initiate the IDPP. The IDPP is initiated if one goes to a DMV office, has a photo taken, and completes two forms: the MV3004 application for a Wisconsin ID, and the MV3012 application for the ID Petition Process itself. If an applicant has not already been issued a Wisconsin driver's license or ID, then the applicant will receive a receipt valid as a voting ID by mail within six days. In the week before the election, the receipts will be sent by overnight mail. The requirements for initiation are admirably simple, but they have not been clearly communicated to the public.

DISCUSSION

As the court explained during the October 12 and 13 hearings, the court does not believe that it has the authority to suspend Wisconsin's voter ID law for the November election. While this case is on appeal, the court's authority is limited to enforcing the current injunction, not entering a new one. Even if the court did have the authority to reverse course at this point, the court would not do so for several reasons. Voting is already underway, and for reasons explained in the court's July 29 order, Dkt. 234, the court intends to respect Wisconsin's decision to implement a strict voter ID law. But most important, the problems with the IDPP are amenable to a targeted solution: better training of DMV employees and better communication to the public.

To be clear yet again: the IDPP is deeply flawed, and the emergency rule that provides the receipts valid for voting is not a perfect solution. But with better training and public communication, the IDPP and the emergency rule will provide reasonable assurance that those without an acceptable voting ID can get one without undue burden (under current constitutional standards).

As discussed at the hearing, the court-ordered improvements will come in two phases. First, the area in need of immediate reform: the information voters are receiving from the DMV about the IDPP. By 12:00 p.m. tomorrow, October 14, 2016, the parties will file: (1) a proposed one-page information sheet or "palm card" that clearly and succinctly explains how a voter enters the IDPP and what the voter can expect after initiating the process; (2) a proposed takeaway letter that applicants will receive immediately after entering the IDPP that explains when they should expect their receipt valid for voting and that shows what the receipt will look like; (3) a revised page on the DMV website that explains the IDPP. The

court intends to approve the forms of these documents and plans on October 14, so that the state may implement them on Monday, October 17, 2016. That implementation will include distributing the revised documents (or links to them as appropriate) to the DMV contact list and the WEC municipal clerk distribution list.

Phase two will require the parties to propose additional reforms next week. The court expects the parties to propose quality assurance measures, including follow-up training and competency checks for DMV employees and “secret shopper” efforts similar to those that the state has already employed with the help of undercover state troopers; revisions to the checklist to assist DMV employees as they guide customers to and through the IDPP; and a public information campaign.

The parties will submit their joint phase two proposal (noting where the parties diverge in their recommendations) by Friday, October 21, 2016. The state will also file status reports with the court on October 21; October 28; November 4; and November 11. The court will be particularly interested in hearing about the state’s quality assurance and outreach efforts.

Also, beginning immediately, the IDPP receipts valid for voting will expire 180 days— as opposed to 60 days—after issuance.

ORDER

IT IS ORDERED that:

1. Plaintiffs’ motion for relief relating to the voter ID law, Dkt. 262, is GRANTED in part and DENIED in part. The court will not enjoin enforcement of Wisconsin’s voter ID law, but, as set forth here, the court will direct the state to continue to reform the IDPP between now and the November election.

2. By 12:00 p.m. on October 14, 2016, the parties will file: (1) a proposed one-page information sheet or “palm card” that clearly and succinctly explains how a voter enters the IDPP and what the voter can expect after initiating the process; (2) a proposed takeaway letter that applicants will receive immediately after entering the IDPP that explains when they should expect their receipt valid for voting and that shows what the receipt will look like; (3) a revised page on the DMV website that explains the IDPP. The court intends to approve the forms of these documents and plans on October 14, so that the state may implement them on Monday, October 17, 2016.
3. The parties will file their joint phase two proposal by Friday, October 21, 2016.
4. The state will file weekly status reports with the court on October 21; October 28; November 4; and November 11.
5. Beginning immediately, the IDPP receipts valid for voting will expire 180 days—as opposed to 60 days—after issuance.

Entered October 13, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

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

ONE WISCONSIN INSTITUTE, *et al.*,

Plaintiffs,

v.

Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

**DECLARATION OF KRISTINA BOARDMAN
REGARDING DMV'S REPORT ON IDPP QUALITY ASSURANCE AND
OUTREACH EFFORTS FOR THE WEEK OF OCTOBER 17, 2016**

I, Kristina Boardman, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Administrator of the Wisconsin Department of Transportation, Division of Motor Vehicles (DMV). I make this declaration in support of the Defendants' weekly report about IDPP quality assurance and outreach efforts, in accordance with this Court's October 13, 2016, order.

DISTRIBUTION OF UPDATED IDPP MATERIALS

2. Starting Monday, October 17, DMV has placed the approved palm cards in all DMV service centers. These cards, printed in black and

white, are now being used as the intake handout for all ID card applicants (along with the MV3004 and MV3012).

3. DMV has created Spanish-language versions of the updated intake handout and takeaway letters.

4. A true and correct copy of the Spanish-language intake handout is attached as Exhibit 1.

5. A true and correct copy of the Spanish-language takeaway letter is attached as Exhibit 2.

6. DMV has distributed updated job aids to service centers. The new job aids indicate that staff are to instruct customers that “in about a week, they will receive either a Wisconsin ID card or a paper receipt in the mail. Either one can be used to vote.” This language is consistent with that on the updated IDPP intake and takeaway documents.

7. A true and correct copy of the five-day centers’ job aid is attached as Exhibit 3.

8. A true and correct copy of the twenty-hour centers’ job aid is attached as Exhibit 4.

9. DMV also created a poster that consists of the information on the left side of the palm card, which will be distributed to DMV service centers.

10. A true and correct copy of the poster in English is attached as Exhibit 5; a true and correct copy of the poster in Spanish is attached as Exhibit 6.

11. All IDPP receipts are now being issued as valid for 180 days, and relevant documents have been updated to reflect this.

IDPP-SPECIFIC TRAINING

12. New online IDPP training went out to all DMV field employees on October 19, 2016. Employees were asked to complete the training by Tuesday, October 25. Completion reports will be tracked.

13. A true and correct copy of a screenshot of the trainings is attached as Exhibit 7.

14. DMV will distribute another online IDPP training course the week of October 31. That training will focus on the same-day-production and overnight mailing of voting receipts for IDPP applicants. The training will also provide information to field staff regarding the provisional ballot process, as it pertains to obtaining an ID to resolve a provisional ballot.

15. DMV has produced an updated IDPP checklist for all field staff. This checklist includes a notation (step #15) that the employee needs to discuss with the customer that a receipt or ID card will be received in about a week. The checklist also notes that the receipt will be valid for 180 days and

is acceptable for voting. From October 31 to November 10, receipts will be produced the same day as application and sent via overnight mail.

16. A true and correct copy of the updated checklist is attached as Exhibit 8.

IDPP-SPECIFIC OUTREACH EFFORTS

17. On Monday, October 17, DMV distributed a press release to its media list, publicizing the updated IDPP takeaway sheet, palm card, and streamlined web page. The press release included hyperlinks to all three, as well as PDFs of both the takeaway sheet and palm card.

18. DMV's media list has 580 recipients.

19. A true and correct copy of that press release is attached as Exhibit 9, which is also available at <http://wisconsindot.gov/Pages/about-wisdot/newsroom/news-rel/167a-co-exec-dmv.aspx>.

20. During the week of October 17, DMV released five tweets relating to the IDPP, as well as one Facebook post.

21. Also on Monday, October 17, DMV public affairs staff communicated with Reid Magney, the public information officer at WEC, about sharing the IDPP takeaway sheet and palm card with local elections officials and voter advocacy groups (such as VoterRiders and League of Women Voters).

UPDATES TO DMV WEBSITES

22. Over the past week, DMV has also updated four separate pages within the DMV website.¹

23. True and correct copies of screenshots of these four pages are attached as Exhibit 10.

24. DMV created a toll-free telephone number for the IDPP hotline.

25. DMV webpages and the updated documents were modified to include that toll-free number.

IDPP QUALITY ASSURANCE EFFORTS

26. DMV plans to deploy staff members to conduct quality assurance audits at various service centers statewide.

27. DMV is currently planning to conduct 10 visits each week for the weeks of October 24, October 31, and November 7.

28. These audits will be conducted by a diverse group of DMV staff, who will be unknown to the offices they visit.

29. The visits will be recorded.

¹<http://wisconsin.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx>

<http://wisconsin.gov/Pages/home.aspx>

<http://wisconsin.gov/Pages/online-srvcs/external/dmv.aspx>

<http://wisconsin.gov/Pages/dmv/license-drvs/how-to-apply/id-card.aspx>

30. In addition to these external quality assurance checks, DMV continues to monitor all calls to the public Voter ID hotline.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 21st day of October, 2016.

/s/Kristina Boardman
KRISTINA BOARDMAN

1 THE COURT: Okay.

2 BY MR. KAWSKI:

3 Q. Could you tell me what you did when you reviewed the birth
4 certificate?

12:31 5 A. I believe the objection of Mrs. Frank was that she -- the
6 name was misspelled on the birth certificate. So I reviewed
7 that, looked at that particular area.

8 Q. Prior to that did you speak with her?

9 A. I did. I had a phone conversation with her and we talked
10 about -- she had written a letter to our director indicating
11 that she was dissatisfied that she could not get an
12 identification card for voting. And she indicated her birth
13 certificate had a misspelling in it so we wouldn't be able to
14 accept it, but she had a marriage certificate, a baptismal
12:32 15 certificate, I believe a Social Security card. I don't think
16 there was any question as far as proof of residency or anything
17 like that. So it was basically dealing with the birth
18 certificate.

19 Q. What was she trying to obtain from the DMV?

12:32 20 A. She was trying to obtain an identification card from us.

21 Q. Okay. And was she able to do that?

22 A. When I had the conversation with her after reviewing her
23 letter and her telling me what the problem was on the birth
24 certificate, I had encouraged her to get a copy of the birth
12:32 25 certificate and take it in with the other documents that she had

1 mentioned that had the correct spelling on – that being the
2 marriage certificate, the baptismal certificate, and the Social
3 Security card – to take it into one of our offices and have it
4 reviewed by a supervisor, that I felt that there was probably
5 enough there that we could issue the ID card.

12:33

6 Q. And so did you ever actually view the birth certificate?

7 A. I did not review the birth certificate until you presented
8 it to me.

9 Q. Okay. Let's take a look at Exhibit 1087 then. What is this
10 document?

12:33

11 A. This is a uncertified copy of Ruthelle's birth certificate.

12 Q. And looking at it, does this look like the one that you
13 looked at in 2012?

14 A. Yes.

12:33

15 Q. Do you have any reason to believe that it's not the same as
16 the one you looked at in 2012?

17 A. No, I do not.

18 MR. KAWSKI: I would move that this be admitted into
19 evidence, Your Honor.

12:33

20 MR. DUPUIS: No objection.

21 THE COURT: So ordered.

22 BY MR. KAWSKI:

23 Q. Let's take a look at the birth certificate where it says
24 "full name of child." Do you see that?

12:34

25 A. Yes.