# Multiple Documents

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| 2 | Attachment A - Transcript of Oral Argument held 6-30-16 |
| 3 | Attachment B - IDPP Renewal Cover Letter |
| 4 | Attachment C - IDPP Newly-issued Cover Letter |

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July 8, 2016

**VIA ECF**

The Honorable Lynn Adelman
362 United States District Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: *Frank, et al. v. Walker, et al.* Case No. 11-cv-1128
Updates to parallel litigation and photo receipt renewals

Dear Judge Adelman:

I represent the Defendants in the above-referenced case, and I am writing with updates regarding the parallel *One Wisconsin*[1] litigation pending in the Western District of Wisconsin and the photo ID receipt process. I also reiterate my request that this Court stay its preliminary injunction decision pending the *One Wisconsin* decision later this month.

Post-trial oral argument in *One Wisconsin* was held last week. The plaintiffs explained that they are seeking "an affidavit of identity at the polls . . . that would permit someone to cast a regular ballot"[2] which is the same type of relief sought by the plaintiffs in this *Frank v. Walker* litigation. The two cases therefore involve a challenge to the same law, under the same legal theories, and both request an affidavit exception. And *One Wisconsin* has already held a nine-day final trial this year on the ID issuance process. Accordingly, this Court should refrain from ruling until *One Wisconsin* is decided to avoid inconsistent results. Judge Peterson plans to rule in *One Wisconsin* by the end of July.[3]

[1] *One Wisconsin Institute, Inc. et al. v. Nichol et al.*, 15-CV-324 (W.D. Wis.)

[2] *One Wisconsin* Tr. 6-30-16 at 93. A copy of the oral argument transcript is attached as "Attachment A."

[3] *One Wisconsin* Tr. 6-30-16 at 99.

Also, as the Court is aware, photo receipts for the ID Petition Process are valid for 60 days and are automatically renewed. Renewal receipts are mailed to petitioners 10 days before expiration of the previous receipt. Petitioners who received their initial receipts upon implementation of the May 13, 2016 rule are now getting their renewals. The renewed receipts include instructional cover letters. I have attached to this letter a copy of the renewed-receipt cover letter as "Attachment B." Also, a copy of the cover letter that accompanies non-renewal, newly-issued photo receipts is attached as "Attachment C."

Sincerely,

***/s/S. Michael Murphy***
S. Michael Murphy
Assistant Attorney General
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SMM:mlk

Enclosures

c: All counsel of record (via ECF)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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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 and MICHAEL R. WILDER,

Plaintiffs,

-vs- Case No. 15-CV-324-JDP

JUDGE GERALD NICHOL, JUDGE ELSA LAMELAS, JUDGE THOMAS BARLAND, JUDGE HAROLD V. FROEHLICH, JUDGE TIMOTHY VOCKE, JUDGE JOHN FRANKE, KEVIN J. KENNEDY and MICHAEL HASS, all in their official capacities,

Defendants.

Madison, Wisconsin
June 30, 2016
9:05 a.m.

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STENOGRAPHIC TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE THE HONORABLE JAMES D. PETERSON,

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* * * * *

(Proceedings called to order.)

THE CLERK: Case Number 15-CV-324-JDP. *One Wisconsin Institute, et al. v. Gerald Nichol, et al.* Court is called for oral argument. May we have the appearances, please.

MR. SPIVA: Good morning, Your Honor. Good to see you again. Bruce Spiva for the plaintiffs. With me is Bobbie Wilson, my partner, and Josh Kaul.

THE COURT: Good morning to all of you.

MR. KAUL: Morning, Your Honor.

THE COURT: On behalf of the defendants.

MR. KAWSKI: Morning, Your Honor. Assistant Attorney General Clay Kawski. With me this morning is Assistant Attorney General Jody Schmelzer. It's good to

see you again.

THE COURT: Good to see you again. So welcome. So you got my little text message that suggested we begin with some opening statements that are kind of stand-ins for your rebuttal briefs. So why don't we just step into those. We don't have to be excessively formal here today. I really -- I appreciated the briefing. It was well done; not succinct by any stretch of the interpretation of that word, but I appreciated it. I really do. And so it prompts a few questions for me and so really our purpose today is really to allow me to explore any areas that I think warrant a little further explanation or inquiry.

But I may not be aware of things you want to say with respect to each other's brief, so why don't we just begin with that. So I suggested 20 minutes as an opportunity, so let's have the plaintiffs' -- I won't call it an opening statement, but next-to-last word.

MR. SPIVA: Okay. Thank you, Your Honor. And if it's all right with Your Honor, I may -- when in Rome, do as the Romans do and stay seated today.

THE COURT: I think that would be perfectly fine. I see there's no podium -- well, it's off to the side. It's there if needed. But you can do that. And feel free to put up whatever documents you want me to

look at.

MR. SPIVA: Okay. Terrific. I prepared a statement, Your Honor, but of course to the extent things that I say raise questions, I'm more than happy not to follow through my --

THE COURT: I may blurt them right if they occur to me as we go through.

MR. SPIVA: Your Honor, I'd like to start the discussion today talking about intentional discrimination, our claim -- and really it's three claims of intentional discrimination. We have a claim that the state has intentionally discriminated against minorities, African Americans and Latinos in violation of the Fifteenth Amendment and the Fourteenth Amendment. We also have a claim that they have discriminated against young people in violation of the Twenty-sixth Amendment.

And then we have a partisan fencing claim, which as Your Honor has kind of noted, sits somewhere in the Fourteenth Amendment. Whether one articulates it as a *Anderson/Burdick*-type claim or a First Amendment claim, unlike Justice Kennedy's concurrence in *Vieth*, but that is also an intentional discrimination claim. And -- although if you situate it, and I'll get into this more later, if you situate it in the *Anderson/Burdick* analysis, you don't necessarily have to find

intentionality to find that it's unlawful.

I want to start there, Your Honor, partly because I think that if Your Honor rules for the plaintiffs on really any of their intentional discrimination claims, that that also obviates the need in some ways or it resolves a lot of issues that are perhaps, I don't want to call them hard issues, but more -- require more detailed debate over the law I think in terms of the scope of Section 2 and some of the other claims.

THE COURT: Just to make it clear, in other words, if I find that the 2011 to 2014 election laws were motivated by intentional racial discrimination, the law is unconstitutional from root to branch and we get rid of it.

MR. SPIVA: That's correct, Your Honor. That's our position. There wouldn't be -- the state couldn't tweak at the edges to try to correct them. If they were passed with discriminatory intent, they would have to be enjoined in their entirety. And so I'll start there. And I think there are really four basic points that I want to cover with respect to intentional discrimination.

First, I don't think they really -- the defense really contests our core point concerning motivation and opportunity here. And I'll talk about that more in a minute, but this notion I think set forth by Dr. Lichtman

in a lot of statistics of a declining nonwhite -- nonHispanic, white vote share combined with Republican control over the Legislature and the governorship.

Secondly, I don't think they really contest, in at least a serious way, that there were broad sweeping changes started with Act 23 and carrying through to 2014 to the election and registration laws of Wisconsin. I also think it's probably fair to say that they don't contest that there was some great need for a sweeping overhaul, that Wisconsin's election system was essentially a model election system when these laws were passed.

They do articulate some interests for some of the changes. Some they don't. But I would submit to Your Honor that the interest, and this is the third topic I'll cover, the interest that they articulate are really paper thin at best, and in some instances they're really nonexistence -- existent, and I think that really these changes and certainly the suite of changes only makes sense if explained by an intent to gain political advantage by disadvantaging racial minorities, disadvantaging young people.

And then the fourth --

THE COURT: Just to make sure I have the inventory of the four points.

MR. SPIVA: Sure.

THE COURT: Have we hit the four points?

MR. SPIVA: The fourth one is going to be the direct statements that were made that I'll also cover and I'll probably start with those.

THE COURT: Okay. Good.

MR. SPIVA: So just the inventory, Your Honor, would be motivation and opportunity, no need for these sweeping changes, articulated interests are paper thin, and then the fourth is that there are -- this is that unusual case where you have a fair number of direct statements evidencing discriminatory intent. And then I guess what I would call a 4A or maybe it's a 5 would be the predictable discriminatory effects and the discriminatory implementation of it as evidenced probably most clearly by the IDPP program.

So let me start with the statements that we believe clearly show that the state intended to discriminate. Your Honor heard the testimony, and I think it was really quite stunning, of Mr. Todd Allbaugh who was, with respects to Hamilton, in the room where it happened, in the Republican caucus room right before Act 23 was passed, final to the meetings -- final meeting prior to its passage. And Your Honor, of course, heard his testimony that the defendants' only attack, as I can see

it on Mr. Allbaugh's credibility, is that he can't remember the specific date on which he heard these statements. And that's almost, I think, as close as you can get to a concession that they have no basis really to challenge the accuracy of what he said. And you certainly heard no testimony from anyone else who was in that room contradicting the testimony.

So the unrebutted uncontroverted Allbaugh testimony establishes that in the last meeting of the Republican caucus prior to the passage of Act 23, Senator Lazich, who was the chair of the Senate Committee on Transportation and Elections, and I'm quoting from Mr. Allbaugh's testimony, "got up out of her chair and she hit her fist or her finger on the table and she said 'hey, we've got to think about what this could mean for the neighborhoods around Milwaukee and the college campuses across this state'."

Senator Schultz, according to Mr. Allbaugh, responded that the Senator should consider what they were talking about "not just for our party but for the people of this state."

But then Senator Grothman, now Congressman Grothman, who was the Senate leader cut him off and said "Well, you know what? What I'm concerned about here is winning. And that's what really matters here. And you know as

well as I do the Democrats would do this if they had the ability to use everything in their power to get things done. So we better get this done quickly while we still have the opportunity."

Now, Allbaugh may clear that the senators were "not only implicitly talking about suppressing people's voting rights, it was their intent to do so and they were happy to do so for political purposes."

Now, the defendants --

THE COURT: Now, that's the part, if I may, there may not be a challenge to what Lazich and Grothman said, but I'm quite confident that Mr. Kawski would object to my having to accept as established fact Mr. Allbaugh's interpretation of what they meant.

MR. SPIVA: They may very well contest his characterization, but I do think that is for Your Honor to decide whether you found him credible. It clearly had an impact on him as he testified. Really, there's really no reason for him to make this up. And --

THE COURT: Well, we're not talking about making it up, but it's score settling. I'm not doubting his real sincerity, but his perspective is antagonistic to his former party because he feels betrayed and disagrees with what they did. So, and again, I'll wait to hear from Mr. Kawski about whether there's a dispute about

what was said at that meeting, but I'm a long way from feeling that I need to accept Mr. Allbaugh's interpretation of the significance of those events.

MR. SPIVA: Sure. And I don't think -- it's more the characterization that I think -- you know, obviously Your Honor will have to judge his credibility and his characterization, but I think one thing that you have in making that judgment is that there were a lot of people in that room and I think he even conceded that some of them appeared to be ashen face, appeared to not be so happy about what was being said and about this idea of suppressing the vote. But at the end of the day, all 19 Republicans voted for this, including all the ones that were in that room that day. That's a ratification, Your Honor. I mean if you're sitting in a room with fellow legislators and somebody is making statements that they want to take action that will have a discriminatory effect -- with the intentions of having a discriminatory effect on the neighborhoods in Milwaukee and college campuses and you say nothing and, in fact, you do more than say nothing, you take action based on that, I mean it's kind of akin to a law firm where you might have a managing partner at a meeting of partners who says look, you know, we've got to fire this associate. Let's say it's a black law firm and the person says "well, we have

one white associate. We've got to fire this associate because" -- they may not even have any animus towards the associate in terms of race -- "but our clients doesn't like dealing with that person so we've got to get rid of them." And the others are horrified, but they vote to fire them. I think this is at least as bad as that. It's not a stray comment, it's the leadership in a meeting doing business and action -- and they took action based on those statements and I think that should probably inform Your Honor's decision-making that it was ratification.

Now, they also say that Grothman's statement is unrelated to race whatsoever and that Lazich's is almost certainly unrelated to race and instead related to the likely partisan-voting patterns of "neighborhoods around Milwaukee."

Well, Your Honor, again, Your Honor will have to judge credibility, but this is code, Your Honor, I would submit, and it isn't even very thinly disguised code at that. I mean I don't think that explanation is really plausible in the context of the statements. It's clearly a response to this and it's about race, and of course, Lazich also makes an explicit reference -- not me, Your Honor. Senator Lazich also makes an explicit reference to young voters in terms of college towns. So there's no

question there that she's talking about disadvantaging young voters. And even if the state were correct and that this was really about gaining partisan advantage by suppressing the votes of people who vote Democratic, that does not render it constitutional, and for a couple of reasons, Your Honor.

First of all, they're still using race and they're still using age to achieve these partisan ends, and we've cited the case law in our brief that that is impermissible; that you can't -- in a so-called mixed motive case or in some ways it's not even really mixed motive, it's the use of race as a proxy, that if it's a factor in the decision it's unconstitutional.

The second reason I think it doesn't matter even if what I view is an implausible interpretation of these statements is correct is that we do have this partisan fencing claim, and so it's either a clear statement that they're using race and youth improperly, that they intended to discriminate based on that or it's a clear statement that they're trying to suppress the votes of Democrats. And no matter what uncertainty is left in that area of the law -- and I confess that there's not a lot of law on this. There's the *Carrington v. Rash* case about the military and then there's -- there are others, but there's also Justice Kennedy's concurrence in *Vieth*

where he, in the redistricting context, he says that if you target a political party here or people because of their political beliefs, that that very well may spell or make out a First Amendment claim under the Constitution. And Justice Scalia, by the way, just last -- I guess now it's this past term before he passed, in the Maryland redistricting decision, noted that there had never been a majority of the court that had actually disavowed the position that Justice Kennedy had set forth in his concurrence.

Now, I'd submit to Your Honor that the partisan fencing doctrine should have more vibrancy here in the vote-denial context than it does -- it doesn't pose the same difficulties as the redistricting context where the Supreme Court has said well, if there's not a standard for determining how much partisanship is too much, that there's always going to be some partisanship in drawing these district lines. And I know there's another case about this in Wisconsin, but we haven't seen a standard that would help us judge how much is too much. But here where you're talking about trying to keep people from voting to suppress their actual vote, that's a step much further. People who are drawn into one district or another, they can still vote. They can still participate. They can still call --

THE COURT: Right. And I will say this, and this is one line of inquiry I will expect to explore it a little bit more in depth, but you've raised it here and that is doctrinally I understand your position which is that in a redistricting case there is deep divisions in the Supreme Court about whether partisanship in the redistricting context is even justiciable and the standards that would be applicable because partisanship -- redistricting is an exercise of partisanship and to a large degree it's just part of the game and we accept it. There's a line under the law as it currently stands despite these divisions that the current law is that there's -- the standard is hard to articulate, but there's a line that gets crossed in the redistricting context that despite the inherently partisan nature of the process, there's an amount that is too much.

Now, in the voter qualification realm, I think that the law is that partisanship should play no part in it. And so I understand very well that we just don't expect that voter qualification will in any way be driven by partisan concerns.

MR. SPIVA: No, I agree with that.

THE COURT: And it's very coherent and makes an awful lot of sense, but there is really no case that holds that. So I understand it perfectly well and it

makes perfect sense and I understand a lot of the law that we're applying to this case really evolved in the context of redistricting, and if it works there, it should work here because voter qualification should not be a matter of partisanship. But why aren't there cases that really guide me in this way? I gather this is a case that's going to break new ground in this partisan fencing concept, and as I said, doctrinally it really makes perfect sense to me, but there's no easy template for me to follow.

MR. SPIVA: Right. And I agree with that, Your Honor, that there's not a case that squarely addresses this. There are cases though that I think very substantially inform it, starting with *Anderson* itself. I mean in that case, although it articulates this sliding scale balancing test, there's a line where they say if you are targeting groups, you know, because of their beliefs, that that essentially ups the amount of scrutiny that it should receive.

I think also *Vieth*, and I think, you know, I'm not overstating it to say that Justice Kennedy said that if you could make out a case where they were making it more difficult for Democrats or somebody of a political party, could be Republicans, to vote, that that would clearly violate the First Amendment. And he didn't articulate

what you would have to show exactly, but I don't think it was a question of if. I mean it was if you could make that showing, that would be a violation. And of course *Carrington v. Rash*, although somewhat different I acknowledge, was a case where the military was essentially fenced out of voting because of the way they were presumably going to vote.

THE COURT: And the defense has distinguished that case on the grounds that that was an absolute bar and that the provisions at issue here never actually stopped anyone from voting based on their position or partisanship. You would say they increased the burden, but nobody is actually prevented from voting, leaving the IDPP petition to the side for the moment, but the voting regime that has been adopted is a permeable barrier, unlike the one in *Carrington* where military voters were just categorially prohibited from voting in the district where they lived.

MR. SPIVA: Right, unless they were from, I think, Texas originally they could vote. But yeah, I definitely hear that. But I don't think there's anything in *Carrington* or in any case subsequently that suggests that it's okay to merely burden, you know, somebody's right to vote based on the way you think they're going to vote.

THE COURT: Let me follow up on this. This is -- one of my questions is whether the partisan fencing claim is just a variety of analysis under the *Anderson/Burdick* framework in which we conduct a sensitive balancing between the interest that is enhanced by the regulation and the burdens that were imposed or whether it's a different species of analysis. So that -- for example, what I thought at times your position is that even if the provisions that are challenged here could pass muster under an *Anderson/Burdick* framework in that each of the burdens -- each of the provisions analyzed separately passes muster because they serve enough of an interest and they impose a relatively modest burden, nevertheless despite success on the *Anderson/Burdick* framework for the defense if the Court were to determine that the regime was designed to impose relatively modest burdens on Democratic voters for the purpose of securing a partisan advantage in an election, it would be unconstitutional for that reason.

MR. SPIVA: Yes, Your Honor, that is our position. I want to say kind of yes to both parts though, and this is why --

THE COURT: Safer position for you is you can do it under *Anderson/Burdick* and you've got a set of precedent that you can follow and so I don't have to make

any -- I don't have to extrapolate from precedent, I just follow the *Anderson/Burdick* framework and do my job there.

MR. SPIVA: Right.

THE COURT: The second version of it is that even if it passed *Anderson/Burdick*, it might still be unconstitutional because it's done for the purpose of securing a partisan advantage. That's where I have to extrapolate a bit from some of the precedent rather than just following the relatively well-established *Anderson/Burdick* framework.

MR. SPIVA: Yeah, I think that's right. And I think with respect to the *Anderson/Burdick* part of that, it does, and there's language in *Anderson* itself, it does ratchet up the scrutiny. I think if you find -- whether it's intentional or not, if you find that this burdens the rights of Democrats or the voting -- the ability of Democrats to vote, that that's targeting a particular group. Just as if it were targeting the homeless, for instance, that that is -- I would suggest ratchets it up to strict scrutiny so you end up in the same place, I think, because the partisan fencing claim, as we've articulated in our complaint, and I think as we conceive of it, is an intentional discrimination claim. So it involves us showing that yes, they're doing this and they

intend to do this. They intend to burden -- to deny the right to vote to Democrats.

THE COURT: Okay. All right.

MR. SPIVA: I do want to mention one other thing about Mr. Allbaugh's statements in that he named names, not only Senator Grothman and Senator Lazich, but we were told in the opening that he wouldn't be able to do that and he actually did. He named a number of senators who again, whether Your Honor decides to accept his characterization, but who he said, you know, were happy about it. Senators Vukmir and Senator Hopper and others.

Now, beyond Mr. Allbaugh's testimony, and as I mentioned before, I don't think these could in any way be conceived of as stray remarks, they were made in the leadership meeting by the leadership, they were acted upon, and there are other statements by -- that evidenced discriminatory intent.

The one other thing I would say, I guess, about Mr. Allbaugh's statement before moving on to those other statements is that if this isn't intentional race and age discrimination, it's really hard to conceive of what would constitute that. Neighborhoods in Milwaukee, we submit, and I think I made this clear before, Your Honor, but we submit that that is code for black people basically, that that's what she was saying.

And then we have subsequent to the enactment of the voter ID bill, we have two state senators who supported it, who confirmed that they believed that it would help Republicans politically. That was Senator Alberta Darling and again Senator Grothman. Again, this was later. This is actually just this past April that Senator Grothman made his statement about we've got photo ID and I think it's going to make a little bit of a difference as well in terms of being able to defeat Secretary Clinton in Wisconsin.

And it isn't just statements about voter ID, Your Honor. There were statements regarding the bill eliminating evening and weekend in-person absentee voting that really go to the central purpose of those bills and show that it was, like the voter ID, it was to make it more difficult to vote for residents of Milwaukee, which as Your Honor knows, is a city in which two-thirds of Wisconsin's African-American residents reside and a significantly disproportionate share of Wisconsin's Latino residents as well. And there's evidence of statements that they wanted to make it more difficult for people in Madison as well.

Senator Grothman, the author of the bill, repeatedly made this point in committee and on the Senate floor. And this is the bill that reined in the weekend and

evening in-person absentee voting and he literally made statements about "reining in weekend and in-person absentee voting in Milwaukee and other big cities." He talked about Madison as well and he said "I want," and this is a quote, "I want to nip this in the bud before too many other cities get on board."

Now, the other side dismisses Grothman's other statements about Kwanza and his refusal to give his staff the day off for Martin Luther King Day because it would be an insult to taxpayers. They dismissed those as being far afield from the question presented. And these statements I think are at best racially insensitive, but I think they betray a mindset, Your Honor, about the black community by Senator Grothman that should not be ignored. These are statements from a leader, again, of the Republican caucus, who was one of the leaders who was attempting to cut back, and in fact, succeeded in cutting back access to voting for black people.

And Mr. Grothman -- Senator Grothman and Senator Lazich were not the only ones. Senate Majority Leader Scott Fitzgerald similarly made clear that there was simply too much voting in Milwaukee. We've quoted it in our brief and so I won't read the whole thing, but these were the statements about people, his constituents, coming up to him and saying "Hey, what's going on in

Milwaukee. I always see these long lines for early in-person voting in Milwaukee. And I can't do that."

THE COURT: Well, that comparison, I think, raises what I expect the defense will say is that there was a problem in consistency of the hours available for early -- for in-person absentee voting and that people in smaller towns where the clerk's office couldn't afford or elected not to have weekend and evening hours, it seemed unfair to citizens there that Milwaukee residents and Madison residents had the convenience of being able to votes whenever they wanted. And so it wasn't arguably -- there are more statements than this one, but the fact that constituents are saying hey, what's going on, I can't vote, when Milwaukee and Madison residents are voting, why isn't that just a consistency argument?

MR. SPIVA: Well, I guess a couple responses, Your Honor. First of all, it's interesting in Senator Fitzgerald's statement that he talks about somebody saying hey, I see this long line in Milwaukee. And I think that's a big part of the answer is, in fact, there has been a history of long lines in Milwaukee and so there's a greater need there and cutting back on the in-person weekend and evening hours has only made that worse.

There's a greater need also because of economic

factors and racial factors that you heard lots of testimony about from Mr. Albrecht and Reverend Ellwanger and many others. Anita Johnson. And so there's a greater need there. And so the clerks in Madison and in Milwaukee made a choice to do that, to try to meet the needs of their citizens and try to protect their rights to vote. Other localities did not have a similar need and made a different choice.

It's interesting to me though that the way to meet these concerns that supposedly were articulated is to cut back on voting for Milwaukee, to cut back on voting for Madison and the other college areas, not to try to expand it elsewhere. I mean I think it was pretty telling. One of the witnesses they brought in here, Ms. Novak from Waukesha -- I think I can pronounce it now, I've been practicing with Mr. Kaul -- but she talked about, out of the blue, talked about there's too much access. There's over access, if you will, to voting. I don't think that can be a legitimate state interest to cut back on people's access to voting, and again, this is kind of a quote, "to level the playing field." I mean if there was a need in the small towns, and we haven't seen any evidence of that, but if there was a need, it seems like the solution would be to extend, not to cut back in Milwaukee. And they had evidence of long lines in

Milwaukee. There was evidence put before, I think at each of these junctures, put before the Legislature about long lines, about the need for these extended hours and they chose not to do anything about it.

In particular, one of our claims, of course as Your Honor knows, is the fact that Milwaukee is limited to one -- all municipalities are limited to one location for early in-person absentee voting. And that has a clear disparate impact on bigger cities and then cutting back on the hours and the days available only exacerbates that. There was a bill that would have allowed discretion to open up multiple locations and that was blocked. And I'd submit that that also goes to intent.

Now, the interest that the clerks they brought to testify, aside from talking about leveling the playing field and too much access, there's a theme about making in-person absentee voting more uniform even though I think each of those clerks admitted, which is obviously true, that it's not uniform now. I mean there's still a choice about the type -- what has been eliminated is the thing that people in Milwaukee, and African Americans in particular and Latinos really need is the weekend hours and the evening hours. And there's more evidence in our brief concerning documents that were produced by Speaker Voss's office and other legislators, clearly evidencing

an intent to rein in Milwaukee and Madison and finding ways to prevent them from "getting around the new restrictions that they were putting in place." I won't go through all of that, but it is cited at length in our brief.

In his trial testimony, I will note that Director Kennedy confirmed his view at least that the recent reductions in the in-person absentee voting appeared to be designed to make it harder for residents of Milwaukee to vote and he noted that Milwaukee had remained open on Memorial Day during the recall election, and as he testified, and this is a quote from his testimony, "that did not sit well with the Republican majority. They thought that was designed purposely to allow more Democratic voters even though it could also be said it was designed to facilitate the needs of the unique voters in Milwaukee. But that was not lost on the Legislature that the largest city made that choice whereas other municipalities wouldn't make that choice."

And then there's the Schultz interview which we played in court and Your Honor is familiar with and the other side -- my colleagues on the other side said that wasn't contemporaneous, a contemporaneous statement. But I think that misunderstands this part of the *Arlington Heights* test. First of all, I think it was clear from

his statement that he was talking about the entire course of conduct, really this whole suite of legislative program that went into place around 2011 and continued through 2014 or continued -- this whole suite of laws involving restrictions and cut backs on registration and voting.

Further, former Senator Schultz said it immediately in the wake of the passage of the bill that eliminated weekend and evening in-person absentee voting. Senator Schultz made clear that he was fed up and that his colleagues were trying to suppress voting, and here I'll quote. "We should be pitching as political parties our ideas for improving things in the future." And he goes on to say "rather than looking around at the mechanics and making it more confrontational at our voting sites and trying to suppress the vote." He also says "I have come to the conclusion that this is far less noble."

And then in reference to his Republican colleagues, Mr. Schultz says I'm not willing to defend them anymore, I'm embarrassed by this. Now, these are highly credible statements I would submit, Your Honor, from a member of the Senate Republican caucus who had previously served as the Senate Majority Leader and worked with other members of the Republican caucus for years and there's really no, I don't think, explanation on the other side of why he

would say these things if he didn't -- he at least didn't believe them to be true.

I believe at a certain point in their brief, they kind of accuse Senator Schultz of being a hypocrite because he had previously voted for some voter ID bills, but I think, Your Honor, that doesn't really undermine his credibility. If anything, it bolsters his credibility that he was not, you know, some mole or somebody who was from the other side secretly or just someone who was adamantly against voter ID all together, but that he really came to see this whole course of conduct as vote suppression.

Taken together and particularly in light of the statements of Senator Lazich and Senator Grothman in the final Senate Republican caucus meeting, the contemporaneous statements of the decision-makers I think Your Honor will likely find dispositive, that this whole program was established with the purpose of suppressing the African American, Latino and young vote.

But there's more, Your Honor, as you know. The sequence of events surrounding the enactment of the challenged provisions provide strong evidence of discriminatory intent. I won't -- again, I don't want to repeat too much of what's in the brief, but there were the two major developments that are significant: The

declining voting strength of nonHispanic whites relative to African Americans and Hispanics over the past several years, particularly since 2004, and that's set forth in Dr. Lichtman's report, Plaintiffs' Exhibit 36. And that shift had a clear partisan effect that surely was not lost on the Republican politicians.

Moreover, minority voters in Wisconsin have also become increasingly Democratic in recent years, which can be seen by the statistics that we cite on trends and minority vote share, presidential candidates between 2004 and 2012. And again, that's in our brief. And then the other important recent political development is the introduction and enactment -- prior to the introduction and enactment of these laws was the major political fallout from Act 10, the union -- the bill limiting collective bargaining for public employees.

And, of course, Your Honor heard testimony about and I'm sure is familiar about all the protests in the Capitol around that time and that it was soon thereafter that there started to become this pressure and, in fact, enactment of a series of laws and there were a series of recall petitions and one Republican Senator actually was, in fact, recalled. Following that, there were further laws restricting the ability to register and to vote.

In each of these developments, the demographic

shifts in Wisconsin and the unprecedented events following the introduction of the bill that became Act 10, I think, provide critical context because they show that the Republicans had a powerful motive for suppressing minority voting and they were plainly in the minds of the Legislature and the Governor at the time the challenge provisions were enacted because they were passed in the midst of all that. So this, I think, this factor further supports a finding of discriminatory intent.

There were also procedural and substantive deviations from the normal decision-making process that we discussed in our brief and I won't repeat here. The only thing I'll note is just that again, the sheer magnitude of the number of acts, eight acts, some 15 measures, all limiting access to registration and voting. As Dr. Lichtman testified, that's unprecedented really nationwide.

And I think that Director Kennedy actually characterized these as pretty sweeping changes. He referred to it as a sea change. And of course, Senator Schultz, also in the interview that we talked about, referred to the fact that there had been like 25 bills to deal with elections in voting.

The next thing I want to talk about in terms of

intent is the impact and the IDPP. I just want to briefly touch on that. The racially disproportionate impacts of Wisconsin's Voter ID Law and its IDPP safety net, put that in quotes, are staggering and I think this is something that really the *Frank* court didn't have before it obviously at all because these are developments that have happened over the last two years since then. But when 87 percent of all IDPP denials are of minorities, there really can be no other reasonable conclusion than that the state has engaged, I think, and targeted purposeful racial discrimination.

And as we've noted in our brief, and again I won't go through all of this, but as you go through the IDPP process, the disproportionality just kind of escalates. You know, even Dr. Hood concedes that 55 percent of all voters who have actually gotten free IDs are African American, way disproportionate to their percentage as part --

THE COURT: I --

MR. SPIVA: Don't need to hear all that.

THE COURT: We had a lot of testimony and it was vividly clear in a lot of ways. But in the broader context, I guess -- let me put it to you this way: There were a number of voters who were acutely burdened by the IDPP process. Some were -- sometimes we talk about

disenfranchisement in sort of a metaphorical sense when we talk about increasing burdens, but there were some voters that I think were quite literally disenfranchised in which there was really no reason to believe they were anything other than fully qualified Wisconsin electors who simply could not get an ID. But it was a very small number. Not to say that it's insignificant because if there's somebody who's disenfranchised and their right to vote was denied, obviously that is a very grave problem for the state.

But the number was so small of the people who had difficulty within the confines. If we're looking at it in the scope of the -- of an attempt to achieve a partisan advantage, the burdens were acute but they were not really widespread. The numbers of people who lacked ID were small to begin with. The numbers of people who failed to get through the free ID process were even smaller. And so you are absolutely right that the racial disparity in the IDPP process is appalling. But it's an important number from that perspective on its own because of the acute violation of their right to vote. But if you're looking for evidence that the system was designed to secure a partisan advantage or sway voters, the numbers aren't enough to make a difference in an election. So that's what I'm looking at. And these were

things that were the subject of *Frank* and *Crawford* as well and that is that they were trying to look at the numbers of people that would be -- that face the extraordinary burdens of not having a driver's license and then not having a state ID and then not having the credentials that would allow you to get one. And as we work our way down, racial disparity is quite apparent, but also the numbers become really quite small.

MR. SPIVA: I guess, Your Honor, I would answer, I guess, in a couple ways focusing on the intent part and I have more to say in terms of *Anderson/Burdick* on this, but focusing on the intent, I would say a couple things. One, that although the numbers of people who actually went through the process and were actually denied, and I think Your Honor is exactly right with respect to those 60 or 61 people who were denied a free ID, they were literally disenfranchised. They were not able to vote in April and in February and their votes can never be given back. And it still isn't fixed with respect to the future. So that's a small number. But it's an absolute disenfranchisement. And it is largely racially disproportionate, it's hugely racially disproportionate. And so whether that goes to discriminatory intent at the inception of when the law was passed, I would suggest it does because it was perfectly predictable, and in fact,

was predicted, but it certainly goes to discriminatory intent in terms of the implementation. Because I think our claim, our intentional discrimination claim really encompasses both the enactment and the implementation, and I think we have a clear case here of -- statistically it's discriminatory in the way it's resulting.

The other thing I would say about the numbers is that in terms of the number of people who went into the process, it was somewhere between 988 to 1,300 that we know about. We don't have data on some of those people, we have data on 988. And those people, even if they got an ID, I think the evidence and the testimony you heard is clear went through incredible burdens and that was racially disproportionate as well. I'm trying to focus on the intent piece because I think if we switch to *Anderson/Burdick* for a minute, nobody should have to go through the types of burdens --

THE COURT: And I'm not really challenging that.

MR. SPIVA: Sure.

THE COURT: And I admit the possibility that there are many people who got an ID who had to sustain an unconstitutional burden to get it --

MR. SPIVA: Yeah.

THE COURT: -- so they were not literally disenfranchised, but they did have to surmount an

unconstitutional burden to get access to the polls. It's the person who paid the poll tax, nevertheless even though they voted, their rights were violated.

MR. SPIVA: Yes.

THE COURT: But again, I'm looking at it in sort of from two perspectives. There's the more atomistic view and we look at the voters that were subjected to the extraordinary proof process and dealing with those people and the burdens that they sustained on an individual basis. But when we step back and look at the broader scope of the case in which plaintiffs' theory is that these laws were designed to have a partisan impact on the election, those thousand votes, even if those people's rights were violated, a thousand votes is not enough to sway an election. And so there are sort of two different problems here.

MR. SPIVA: Well, that brings me -- my next point would be, and again, you've heard us say a lot *tip of the iceberg* during the trial and we heard testimony on that, one thing we don't know, we have some statistical evidence in terms of decreased voting among people who voted in 2010, but one thing we don't know, I don't think, is how many people didn't even bother to -- they found out what they have to go through and were deterred from attempting to go through it, how many people don't

even know that there's a process. We've had lots of testimony there hasn't been any funding. You know, we had yet another emergency funding request during the trial for a very small amount of money at this late date. And so I think what -- these numbers are small compared to the population or even the voting population of Wisconsin, but I think they really -- it's direct evidence of a systemic problem. Clearly there's a systemic problem in terms of the free IDs and I think it points to, although I can't give you a number, a systemic problem in terms of people being deterred because while the *Frank* court suggested that look, if you just don't bother to walk down the street and go to the DMV, we're not going to find that that's sufficient. There's way more --

THE COURT: There's some force to that. I mean you've got -- in a sense you've got to try. There are some people -- I agree there's a number of people who, looking at the system, would say I'm not going to try because I don't have my birth certificate and I don't want to sustain the kind of back and forth that we heard about that you have to go through to get through the process, through the extraordinary proof process. So that's well taken. But there's nothing that suggests to me -- I gather there's some unquantified number of people

who are dissuaded from entering the process because of the burden it imposes, but I don't know what that number is. And even if it's a meaningful multiple of a thousand people thereabouts that went into the extraordinary proof process, it's still not at a scale that you would think would be a productive means of swaying an election. Again, I'm not at all saying that these -- the rights of those thousand people are of no consequences. It's really not at all what I'm saying. But I'm trying to square the vision of the overall case in which it was an effort to secure partisan advantage and then the relatively small number of people who face that really acute burden in the ID petition process.

MR. SPIVA: Right. And what I would say, Your Honor, is that we know -- one thing we do know is that there are hundreds of thousands of people that don't match. Whether you take Dr. Hood's methodology or Dr. Mayer's methodology, there are hundreds of thousands of people who don't have a DMV-type of ID. Maybe some portion of them have some other ID that could be used, but it's a large -- a very substantial number of people who would need an ID to vote. And this was intended to deter those people.

THE COURT: Again, here is my reaction, and I want to hear this from both sides, but one reaction I

have is that both the Democratic side and the Republican side probably overstated or overpredicted the impact that the Voter ID Law would have on elections and that I don't -- and again, the ID petition process is its own unique problem, but when I look back at all the statistical evidence that we saw, and again not to take away from your direct statements about the purpose that the Republican majority might have had, the statistical evidence that we have so far doesn't really point to a very dramatic impact on elections.

Now, the defense position has been kind of resolutely tied to kind of overall turnout numbers and because of the problems with -- I think with what the experts would call ecological inference in that turnout is driven by such a broad range of factors, just looking at the raw turnout numbers and the fact that there was extraordinary high turnout in the April 2016 election certainly doesn't support the plaintiffs' case. But I can't infer very much from that because we had a very extraordinary primary in April with keenly contested races on both the Republican side and the Democratic side. So I'd be shocked if there weren't extraordinarily high turnout. So I draw no inference from that that the laws did not have an impact on turnout.

But when I look for the statistical evidence that

there really was a big impact on turnout, I don't see that either. And so the evidence is maybe yet to be developed. But looking at the statistical evidence that I have to this point in the case, I don't see anything really compelling that shows that the Voter ID Law or any of the other changes really had a powerful impact on any elections.

MR. SPIVA: I guess --

THE COURT: Glenn Grothman thought it really would. It's going to help in the fall. And the Democrats thought that it was a catastrophe for minorities and Democrats, but I guess I don't see anything powerful either way. Not totally nonexistent, because I think probably the best statistical evidence is Dr. Mayer's regression analysis which is suggestive, but again, it's not a landslide worth of evidence.

MR. SPIVA: I respectfully disagree, Your Honor. I think it's pretty powerful. But there's more. I mean you have the GAO study. You have other studies that have been cited by Dr. Lichtman and others that suggest that this -- this is not Wisconsin-specific statistics, but that show a pretty powerful effect on, not aggregate turnout, but turnout by the types of people who were targeted by this law: African Americans, Latinos, the poor, et cetera. And that's, I think, all in the record

and I think really hasn't been rebutted. I mean you have the case of the district in Texas where so many people didn't vote because they thought they didn't have the right ID and that's something I think that came out since the *Frank* decision. I may be wrong about that, but I'm pretty sure that study -- there definitely have been other political science studies, or I guess I wouldn't characterize the GAO as a political science study, but other data.

THE COURT: Well, and I'm also looking at -- I think Mr. Kawski has made this point in his opening statements and the numbers bear it out that an awful lot of people got IDs after the law was passed. The number of people who applied and the proportion of people who applied for an ID that got them is extraordinary. I mean most people got their IDs.

MR. SPIVA: I don't know that I would go as far -- I agree that the number is large, although there's something with that data because a lot of those are duplicates and the like. But the fact that most people who needed them got them, I don't think there's any evidence that supports that, Your Honor.

I would mention one other thing is that Dr. Hood in his Georgia study found that 24,000 people were deterred. Now, I do want to say though even if Your Honor is not

convinced that there is evidence of impact --

THE COURT: I don't mean to say that there's not evidence of impact. There's sort of a relentless logic to it, if you will, that -- and I think this is -- I think Dr. Burden is persuasive on this. I'm still trying to digest what I make of this, but I don't know that the defense really would quibble with this. And that is if you look -- adopt the calculus of voting framework and from that framework, it's kind of -- I think this is a very unsurprising conclusion, that whatever burdens you impose on the system will cause some people not to vote. Bearing in mind that we're talking already even before any of these laws passed, there were extraordinary numbers of people who don't vote. 30 percent of the people already think it's too burdensome to vote or not worth it. And so -- some people don't vote if it's raining. So certainly there are, when you impose burdens, it will decrease the number of people who vote.

But those burdens might themselves be entirely constitutional in that they're such modest burdens and maybe justified, but nevertheless they will have an impact. So even if I see statistics that show that some change in voting law decreases turnout by an identifiable amount, that doesn't tell me in the constitutional framework which I have to examine the regulation, that

the burden is to a particular extent or whatever. They're just -- I think Dr. Burden makes the point that many Democratic voters are ones with a modest voting history and are vulnerable voters and those are the ones that are most susceptible to even modest burdens.

So the statistical evidence -- I guess my overall question is what is the role of the statistical evidence. Because just because I can detect an impact from the statistical evidence tells me really nothing about the constitutional import of the burdens that produced that result.

MR. SPIVA: Well, I think on the intent side, Your Honor, if Your Honor finds that the decision-makers thought this would impose a burden on people based on race or party or age, that even if it, in fact, did not, the result is still unconstitutional. I think shifting to the *Anderson/Burdick* framework for a minute, that you really look to the group of people who are impacted. I think that *League of Women Voters* says that quite clearly. It's a Fourth Circuit case, but I don't think there's anything in the Seventh Circuit that disavows that or disagrees with that. And you don't judge it based on kind of is it a high enough percentage of the population as a whole. You look at the group that it's impacting, how big of a burden is it for them and then

what's the justification on the other side. And I think on the one hand, and I think you're absolutely right, Dr. Burden and others testified that yeah, for people who maybe aren't as habituated to voting who are in poverty, have less education, these barriers are actually more than a modest burden for them, they're actually a severe burden. And more, I think the evidence about the IDPP and really the DMV in general, it's not just the IDPP, is that whatever one might have thought back when *Frank* was decided, this process is not a modest burden on somebody who doesn't have a birth certificate, for instance. So in that category of person, it's a severe burden.

And so on the one hand, I think you have a substantial burden, I would say even a severe burden, but even modest burdens require a substantial justification from the state and I think there's very little, at least in terms of the voter ID, I think we've shown and I think it's been shown again and again that there is no real fraud, at least voter impersonation fraud. If you're concerned about fraud, you probably ought to be concerned about mail-in absentee ballots, and that seems to be where they're trying to push people. There's public confidence rationale. You know --

THE COURT: I think I've kind of successfully derailed you from your original presentation.

MR. SPIVA: No, I would prefer to answer the questions that Your Honor has. So -- I guess that's all I was going to say. I think in the *Anderson/Burdick* context, you look to the group that's affected, and it's a large group.

THE COURT: Let me tie this to a comment in the *Frank* decision. I think it's the main *Frank* decision, not the post-remand one, but I think the Seventh Circuit, I think picking up Judge Adelman's observation, was that the Voter ID Law didn't decrease the opportunities for people to vote but it ended up being that more people didn't take advantage of the opportunities that they had.

MR. SPIVA: Right.

THE COURT: The import of that being that there's some, within the *Frank* framework, I'm not sure I understand what really was meant by this distinction, but there's a distinction between the opportunity to vote and then taking advantage of the opportunity to vote and it seems to me that that is a suggestion to look at the -- not so much the statistical evidence but the actual requirements that people face and that indeed it may be an undue burden for someone who doesn't have a car to get to a DMV that's a long way away. But that if there were public transportation available, but that might be a pain in the butt, but it was something that you could do to

get there. So I guess what I'm trying to figure out is the role of the statistical evidence versus the role of the actual analysis of what the requirement is. And I think that *Frank* seems to endorse that view of analyzing the burdens rather than just looking at just the statistics about the impact on turnout.

MR. SPIVA: I agree, Your Honor. I think *Frank II even* says voting is personal and so you have to look how easy is it for people to actually get these free IDs. And in terms of the distinction between not taking advantage of the opportunity or using the opportunity as opposed to being denied I guess the opportunity, one thing the IDPP has shown, I think, is that disproportionately African Americans and Latinos are actually trying to use the opportunity. The problem is the system is -- I think we've shown really a systemic problem here and I think it shows two things: One, racial minorities are people who are disproportionately in need of an ID. But more, I think, that it's not that people aren't just bothering to kind of walk across the street when they could easily do it, it's some extraordinary burdens are being placed in their way and that affects them obviously, and for some people it completely disenfranchises them, but it also deters others and there's lots of social -- I think it would be

fair to say the social science research on this is unanimous that there's a deterrent effect beyond the people who actually try to use the opportunity as the *Frank* case talked about.

THE COURT: All right.

MR. SPIVA: The other aspect of this is the repeated use of emergency rules issued during litigation. The IDPP itself was the result of an emergency rule issued in response to the Milwaukee NAACP litigation. But I think through this litigation that was exposed as insufficient, and so we saw even during trial, you know, right before trial the issuance of a new emergency rule and then changes to that rule as we went through the trial.

THE COURT: I'll anticipate Mr. Kawski's rejoinder which is that as problems came to the forefront, the state addressed them.

MR. SPIVA: And what I would say to that rejoinder, Your Honor, is that all of these problems were predictable and predicted and the fact that you had people going through this process, and in this process for 18 months a couple died while they were in this process, but even with respect to those that lived, in it for 18 months and then all of a sudden the state says well, we're going to issue your receipt, that that

actually I think goes to discriminatory intent, at least in implementation of the rule. And it's not fixed yet because --

THE COURT: Yeah, I think I see the problem. And I think these are really problems that Mr. Kawski is going to have to address.

MR. SPIVA: Okay. And then the other emergency rule, of course, that was announced and then, I guess, was adopted a little bit after trial was this funding campaign for limited public informational campaign. I guess one thing I would want to say about both the receipt emergency rule and the public funding is they both contain what I think are essentially admissions that the system is broken, not working. Statements that qualified voters "may not be able to obtain acceptable IDs for voting purposes without reasonable effort." And of course there has been no real public information campaign until now and now here we are six months before the election and we're talking about $250,000.

And the one other, I guess, statement that I would highlight is the Governor's recent statements basically blaming these lawsuits challenging the law as the reason for failure to implement them appropriately.

The other thing I would mention in terms of substantive deviations is the Food Share ID Program that

was proposed. This program was going to have a photo ID requirement. There was an amendment to allow that ID to be used, proposed amendment to allow that to be used for voting purposes and that was voted down. The defense says well, the Food Share Program was never put into place. But that was definitely not the point of our raising that issue.

THE COURT: I think I understand your point on that.

MR. SPIVA: Okay. Let me move on to the Voting Rights Act and briefly address that. We address it at length on pages 171 through 220 of our brief, so again I'll be brief, Your Honor.

First thing I would say, and this may be an obvious point, but if Your Honor finds that there has been intentional racial discrimination here, that that, of course, would also make out a Section 2 violation. We oftentimes talk about discriminatory effects because oftentimes people rely on Section 2 to prove a violation even if there is no proof of intentional discrimination. But of course it's also illegal under Section 2 to potentially discriminate.

THE COURT: Right.

MR. SPIVA: And if I understand the state's argument here, it's that we have to show an objective

benchmark; that you don't look at what was in place in terms of the effects test. You don't look at what was in place and say well, how are -- how is the African-American community or Latino community faring under the new rule or procedure. And what I would say, if you just look at the language of Section 2 and certainly the case law interpreting it, it doesn't make any sense to talk in terms of abridging the right to vote language right out of Section 2 without comparing it with what came before it. I think a lot of the cases that they cite are cases where the Justice Department, when Section 5 was still operative, maybe tried to go beyond their Section 5 authority, because Section 2, of course, can reach practices that are completely new. But under Section 5, the Justice Department did not have the authority to challenge. They only could challenge the practices in comparison with what had come before to see whether there was a regression. But those decisions say nothing about whether in a Section 2 case, which has very similar language, you can look back to the previous practice. The question really is, you know, no voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or applied by any state in a manner which results in a denial or abridgment of the right to vote of any citizens of the United States

on account of race. And a violation is established if based on the totality of the circumstances it is shown that the political processes in the state are not equally open to participation by members of a particular racial group. Again, right out of the statute itself.

And there are two elements that courts have followed, including the *Frank* court, but this is clearly stated in the *League of Women Voters* and in the *NAACP v. Husted*, a Sixth Circuit case, that there's a practice that imposes a discriminatory burden and there must be some linkage. The burden must link -- or caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

And it's true that *Frank* said you can't condemn a voting practice just because it has a disparate effect and we don't -- that's not the basis or the sole basis of our challenge here. But that is certainly one of the prongs of the test. Does it have a discriminatory effect. It's a critical factor.

And then the second question is is it connected to some of these conditions, these Senate factors. And I guess I would point -- many courts have emphasized the central role of assessing effects. I'd point again to Justice Scalia in *Chisom v. Roemer* where he gave the

example that if a county permitted voter registration for only three hours, one day a week, and that had a disparate effect, that made it more difficult for blacks, say, to register than whites. Blacks would have less of an opportunity to participate in the political process.

THE COURT: In the Voting Rights Act, the biggest conundrum that I have is the suggestion in the *Frank* decision that the disparate impact has to be tied to a history of governmental discrimination and that seems to be the biggest problem in the voting rights context here in the Seventh Circuit. I agree with you in some kind of more national view just looking at the text of the language it would seem that if a government were to enact a voting regime that took advantage of highly segregated conditions in Milwaukee, that would offend one's sensibilities. But I'm not sure it meets the criteria under *Frank* in which it has to not just take advantage of segregation, but it actually has to take advantage of government-sanctioned discrimination and that particularly on the very narrow view of that requirement in *Frank*, that it would have to be discrimination by the State of Wisconsin seems to be a high hurdle, at least on the one view of what *Frank* requires. I gather it's not enough to say that all discrimination ultimately traces back to slavery or the

requirement would always be met. So I think Judge Easterbrook has something much more pointed in mind and I wonder whether that is really shown here because I'm not sure that I see a history of racial discrimination by the state that is linked to the disparate impact of the voting regime that we're talking about here.

MR. SPIVA: And I read Judge Easterbrook's --

THE COURT: To my sensibility it seems like an excessively narrow view of the Voting Rights Act.

MR. SPIVA: Right.

THE COURT: I will say that. But nevertheless it's suggested in *Frank*.

MR. SPIVA: I have think -- I agree that it could be his -- his statement could be read that way. I think there's another way to read it, because frankly -- and obviously we preserved our challenge to that and I think it's inconsistent with the *Gingles* case and many other cases. But I think the way I read Judge Easterbrook's statements was that the state is not responsible for redressing private discrimination. But I didn't read it to foreclose an inquiry as to whether a voting practice that the state puts into place interacts with discrimination, whether it's caused by the state or by a subdivision of the state, which we would argue should be treated the same, or private actors for that

matter if those things interact in a way that makes voting less accessible to African Americans or Latinos. I don't think the *Frank 1* decision forecloses that kind of a finding. I totally acknowledge that there's language in there that says that the state is not responsible for redressing private housing discrimination, but that's not what we're asking the state -- we're not asking the Court to require the state to do that. What we're saying is that -- well, first I should say I think we have put forward evidence of state discrimination, including subdivisions, which is set forth in our brief. I won't repeat that here. But it would include like, for instance, the 5,000 -- the Rule of 5,000 in terms of allowing anybody in a town of 5,000 --

THE COURT: I recall your --

MR. SPIVA: You recall that, yeah.

THE COURT: I recall that evidence based on that.

MR. SPIVA: Sure. So I think we put that forward. But I also think that if the Court finds that having, let's say, fewer weekend and evening hours or not having evening and weekend hours, period, and having fewer days of in-person absentee voting burdens, disproportionately burdens minorities because they

disproportionately are poor and have fewer resources to be able to take off in the middle of the day and that that is, in part, caused by the social conditions which were at least in part caused by private factors, that *Frank* doesn't foreclose you from finding a violation. In fact, I think Section 2 compels a finding of a violation there. I think that's exactly what the Supreme Court was articulating in *Gingles* and other cases.

THE COURT: Okay. Your 20 minutes has extended.

MR. SPIVA: Sure. And I'm happy to just go into the question mode. I mean I kind of assumed --

THE COURT: We have substantially done that as well, but what I'd like to do is if you have anything else that you want to say just for a couple minutes before we pivot over to the defense side. And maybe -- we've been going an hour-and-a-half, so maybe we'll just take a five-minute break before we switch over to the defense. But if there's anything else, and in particular, if there's anything in the government's brief that you wanted to respond to.

And again, I have -- I think I have a good idea of what your brief says, but I want to know if there's anything else that you think that you want to respond to the government and then we'll pivot it over to hear from the defense side. And again, I expect that will be kind

of question and answer as well.

MR. SPIVA: Sure. Did you want to take a break now and then --

THE COURT: No. I'll give you a couple minutes to just kind of hit on anything that you think should be addressed in the defense brief and then we'll take a break. Then we'll come back and start with the defense side. I've been inferring it will be Mr. Kawski but --

MR. KAWSKI: That's right, Your Honor.

THE COURT: Okay. Good.

MR. SPIVA: And I've been kind of covering that as I've gone along on the topics that I've covered. Let me just take a minute to glance ahead.

THE COURT: It's not your last word. We'll give you a chance to -- I'll probably have more questions for you anyway, but I will give you a chance if anything else comes up.

MR. SPIVA: Why don't we just preserve if that's okay with Your Honor.

THE COURT: That's fine. Let's come back at 10:35 and then we'll start on the defense side. All right? Thank you.

(Recess 10:27-10:36 a.m.)

THE COURT: All right. You may begin your 20 minutes.

MR. KAWSKI: Thank you. I really intend to be direct. I have some specific things to address.

THE COURT: Good. That'll help us.

MR. KAWSKI: I'll start off by being kind of presumptuous and I want to tell the Court how to do its job. So the first thing that I would do if I were you is I would reread *Crawford* and I would reread *Frank 1* and that should form a starting point for many of these claims. In particular, we're talking about the undue burden claims and the Section 2 claims. Those are your guiding lights. You've probably read them a few times already and you've shown again and again, Your Honor, how you're well versed in *Frank*.

So now we have the *Frank II* decision and it talks about using reasonable efforts and how it's important to use reasonable efforts and that's -- you know, you need to do that if you're going to comply with the Voter ID Law. So you have those three decisions. If you want to talk in depth about those, those are the ones I actually brought printed out. I didn't bring any other decisions printed out except for those three because I think those three are the most relevant precedence for you.

The first thing I want to talk about where I think every federal court has to start is standing and I think the plaintiffs have done a sloppy job in their brief with

regard to standing. The Court needs to ask plaintiffs' counsel two questions as to each challenged law. First, which plaintiff has standing to challenge that particular law. You need to have a plaintiff. It can't just be some -- a witness that testified about some guy that had this problem. You need to have a plaintiff in this case to have jurisdiction.

Second question is what trial evidence supports that particular plaintiffs' standing to challenge this law. Let's start with one of the laws that I just don't know which plaintiff we're talking about here. The challenge as to elimination of SRDs, Special Registration Deputies, at high schools. Which plaintiff has standing to challenge that? Which evidence from trial showed that some plaintiff has standing to challenge that law?

Ask the same two questions with regard to the change in the law with regard to dorm lists. Ask it with regard to the change in the law with regard to landlords distributing voter registration forms. Ask those questions with regard to the rules regarding where election observers can stand. Ask those questions with regard to the circumstances under which absentee ballots can be returned to correct mistakes. Which plaintiffs, not just some person out there in the ether, which plaintiffs were shown at trial to have standing to

challenge those laws?

You've already read our briefs about the other standing issues we raise. We really hone in on voter ID. I'm not going to repeat those arguments. And then you'll see sprinkled throughout the brief reference to no standing for this one and the Court lacks jurisdiction for that same claim. I'm not going to repeat those. That's the plaintiffs' burden. And the plaintiffs have done a poor job, and they've made the Court's job harder. Because now if the Court wants to find it has jurisdiction to hear these claims, it has to go sifting through this enormous record.

We had nine days of testimony. There were thousands of pages of documentary evidence. And it's the plaintiffs' burden to show you that you have jurisdiction. Some of these claims, it's going to be easy for the Court to dismiss them because the plaintiffs haven't done their job. So that's the first point.

Second point is the plaintiffs' emphasis and focus on the IDPP and the Court is acutely attune to the IDPP and very familiar with the facts where you talked about it at length this morning. Frankly from the beginning of when the IDPP reared its head in the case about March, maybe February when the plaintiffs tried to reinstate these claims, I found this approach bizarre. The remedy

they're asking for is facial invalidation of the law. We're talking about -- in their example they're using 1,000 people. How does that get them to where they need to go with these facial claims? It doesn't. It also doesn't get them anywhere on the Section 2 claims. And I think we outlined in our brief how this is just cherry picking.

If you wanted to ask in Wisconsin how physically fit are people throughout the state, you wouldn't look -- you wouldn't ask the question and look to the population of the Green Bay Packers because you would see a group of people that are very physically fit. Would you look to a representative sample. And our position is the IDPP, if you're looking at a thousand people who clearly are the people that need the most help, that's not the population you look to.

The state can't dispute these numbers. The numbers are what they are as far as the breakdowns of who was using the IDPP. But the focus, the plaintiffs' focus on the IDPP as a factual matter was to me bizarre. They spent dozens of pages in their post-trial brief on it and then they spent, I would estimate, about half their trial time on it. It doesn't move the needle. It doesn't move the needle on the constitutional side; it doesn't move the needle on the Section 2 side for voter ID. So that's

the state's position.

The position the plaintiffs took virtually ignored 99 percent of Wisconsinites. And the Court's task, and I'm going to get to another point that -- again, I just want to raise the points that in reading the plaintiffs' brief that caused me to raise an eyebrow, one of which was when we get to the *Anderson/Burdick* analysis, I heard Mr. Spiva say this morning that we're looking at these little pockets of populations and that's how the test is applied. Again, start with *Crawford*. (IV) of the *Crawford* decision talks about how that was a facial challenge, just like this one. And it talks about how a facial challenge works under *Anderson/Burdick*. You're not looking at these little pockets of people with specific problems, you're looking at everyone. That's how the *Anderson/Burdick* test applies in a facial challenge. We don't have an *as applied* or class-based challenge here. That was the *Frank* case. And, in fact, the case is back on remand before Judge Adelman and the plaintiffs are asking Judge Adelman for a specific form of relief, an affidavit. But that's a class action.

Plaintiffs here make it abundantly clear they're not going for that kind of relief. That's going to be my last point and I'll jump right to it now. Several months ago the Court had a status conference with the parties on

the phone and I think the way the Court put it was there's the home-run relief and then there's something less. Maybe the something less deals with the IDPP in particular, but the home-run relief is facial invalidation and then injunction enjoining all these laws.

The plaintiffs have doubled down on that in their brief. There's five to ten pages at the end about remedy. The only alternative that they're asked for is for the Court to temporarily enjoin on its face all these laws and then to have the state come back and justify that we're doing a good enough job that they should be put back into place. They're not asking for anything less than that, they're going for the home run. They just haven't shown that. And I think Your Honor has already made the point so I won't make it again with regard to the facts that the statistics just don't get them there. The statistical evidence, it could be that we haven't had enough elections under these laws to have a robust enough set of statistics, but that's sort of plaintiffs' problem and not the State's.

Based on the actual evidence empirically analyzed by experts, it doesn't meet these claims. So again, the plaintiffs haven't asked for anything less, they haven't asked for any as-applied relief, which I would

characterize as as applied to the plaintiffs only. There's some debate in scholarship about whether having statewide injunctions is a form of getting around Rule 23. So they haven't gone there, but that's what some cases like this involve which is asking to enjoin defendants who enforce laws statewide as a way to skirt Rule 23. Fortunately these plaintiffs haven't done that, but they also haven't asked for anything less than facial invalidation. I think that's a very glaring problem with their case because the evidence doesn't support that kind of relief.

When we get to talking about intentional race discrimination, as I read the brief, again, I read a lot about the IDPP. I read a lot in their brief about emergencies, emergency rules, and it's not a fair characterization to characterize the $250,000 education funding as an emergency rule. That's not at all what it is. It's the Legislature releasing money to be used for that purpose.

So in analyzing the intentional discrimination claims, I read a lot in their brief about persons other than the Legislature I'll say, so read a lot about the DMV, which is very confusing to me because where the Court's focus should be there is what was in the Legislature's collective mind at the time the law was

passed in May of 2011, if you're talking about Act 23.

You heard today Mr. Spiva emphasize a number of statements. One thing that I didn't hear him mention with regard to Act 23 is how Democrats, in fact, voted for it. That hasn't been really responded to at all other than Dr. Lichtman I think at trial saying that that doesn't evidence bipartisan support. It needs to be something more. Nonetheless there were two Democrats on the Assembly side who voted for Act 23 and the plaintiffs really have no response for that. How can that add up to intentional partisan discrimination for one?

With regard to their emphasis on all these statements, we're talking about a few individuals. If you talk about the meeting where Mr. Allbaugh was present, I'm not sure how many people actually spoke. I think we count four perhaps. There were 19 legislators there, all on the Senate side. Yet the plaintiffs are ascribing these offhand remarks to the entire Legislature. The entire Legislature had this improper purpose in their mind when they passed Act 23.

Basically what they're doing is cherry picking --

THE COURT: Let me -- let me address that because I don't think I'm quite prepared to just embrace all of the set of comments that Mr. Spiva reviewed and say that reflects the intent of the Legislature. And

even, you know, I can look at Mr. Grothman and say he made racially insensitive comments, and if I think they were racially incentive, I still don't think I would be ready to just automatically ascribe all of Mr. Grothman's personal views to the Legislature.

But that's not to say that I really think it's cherry picking because I didn't hear any evidence of, with the exception of Mr. Schultz's kind of after-the-fact regret and abandonment, I didn't hear comments going the other way. And so one of my concerns here as I look at questions of legislative intent, I think I would like to see or I would have liked to have seen some fair debate in which somebody on the majority side would have said we disagree. These are not going to be racially disparate. Or we have a way of redressing the most disproportionate effects of the law. And I see the discussion as being essentially one-sided.

I do have a set of comments from the legislators, but I don't hear the thoughtful counterresponse that really disputes the disparate impact allegations. And then when I look -- kind of broadening the discussion a little bit here, I just don't see in the legislative record that I have reviewed so far, and there's more for us to look at, but I just don't see the response from the majority side really offering robust justifications for

the changes to the law.

MR. KAWSKI: I think there's a very good reason for that. We had the *Crawford* decision in 2008. *Crawford* probably couldn't lay it out any better in terms of the state's interests.

THE COURT: That might address voter ID, but does it explain why you can have a more or less wholesale reform to the state's election law between 2011 and 2014 without a further word of discussion?

MR. KAWSKI: I think that you do have some statements though. Keep in mind -- so two things with regard to what Senator Grothman said. When we heard today about Mr. Allbaugh's comments, we can't forget that Mr. Allbaugh also testified that Representative Grothman called him up and said "Mr. Allbaugh, you're mischaracterizing what was going on in that meeting." And he disagreed with how Mr. Allbaugh was characterizing it.

Now, this is not with regard to voter ID, but Mr. Grothman, as we pointed out in our brief, did explain changes with regard to seeking uniformity statewide for absentee voting. Those same statements were made by Senator Fitzgerald, and this is in plaintiffs' brief, describing how there is an interest. And I would characterize it as an interest in fairness; fairness

across the state that there are options for when you can have absentee voting that are the same for everyone. It doesn't mean absolute uniformity obviously, but it means it's fair across the state. I think Senator Fitzgerald's quote in their brief points out how people perceive what was going on in Milwaukee as unfair. People from smaller communities. We can't forget that many of the municipalities -- the majority of the municipalities in the state are small municipalities. So it's odd for them to have so much focus on Madison and Milwaukee when they actually make up the majority of the state.

So there's always this interest, I think, that has been expressed by some legislators of an interest in fairness and uniformity. If you looked at the legislative record, you would see legislators like Representative Jeff Stone, Senator Joe Leibham that did explain why they thought voter ID was a good idea. So I think the main point is *Crawford* makes all these points, all the points that are necessary as to why we have an interest in the Voter ID Law.

As to some of these other changes, I will say yeah, I think for some of them it became incumbent upon the state at trial to have witnesses explain these because the Legislature for whatever reason did not at the time, which makes the Court's job more difficult because it

would have been I think easier if there were easy statements to point to in the legislative record. But certainly the state has, we feel, put forward evidence as to each of these laws why there's a justification for them. So that is the point I want to make with regard to intentional race discrimination.

Again, we're hearing a lot about the wrong things from the plaintiffs, which are things that occurred way after the fact, for one, and from actors who were not in the Legislature. And that's where the Court's focus should be is on the legislators.

I think I already made the point with regard to how the *Anderson/Burdick* test works, but I just want to refer the Court to some particular quotes in *Crawford* from under IV. At page 200 of the *Crawford* decision, the Court stated "Petitioners ask this court in effect to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weigh their burdens against the state's broad interest in protecting election integrity."

And then at pages 202, 203, the court in rejecting that says "When we consider only the statute's broad application to all Indiana voters, we conclude that it imposes only a limited burden on voters' rights." This

is as to the type of remedy, the Court on page 203 then said "Finally we note that petitioners have not demonstrated that the proper remedy, even assuming an unjustified burden on some voters, would be to invalidate the entire statute." So again, the plaintiffs are seeking the home-run remedy. They have kind of fallen right into what *Crawford* was talking about in that section.

The plaintiffs haven't talked about it yet, but I'm sure they're going to get there, talking about cumulative effects. And Your Honor in your summary judgment decision talked about how there's a way to distinguish this case from *Frank* and *Crawford* because we're talking about the cumulative effects of a bunch of different laws, not just voter ID. I would submit that the plaintiffs have really not proven this cumulative effects theory at all in a few different ways.

Number one, they haven't cited any controlling authority that says that that is such a theory.

Number two, they haven't submitted any evidence that would allow you to quantify these so-called cumulative burdens. So think about how you would analyze that. For example, under the *Anderson/Burdick* test, you would have to determine the number of people who are cumulatively burdened and in what way, and then weigh it against the

State's interests. But we didn't hear any expert testimony saying cumulatively there were 10,000 people affected by all these laws together. Again, the Court could try and cobble together a bunch of different statistics, but it would require a lot of speculation. So this cumulative theory is not something that's really going to again move the needle because it's just not proven. It's a way to distinguish this case from Crawford, but I think it fails based on what was actually presented at trial.

THE COURT: Well, let me give you an example of where the cumulative effect analysis might work or -- for example: Some of the justifications for the individual provisions kind of overlap so that, for example, if you have a durational residency requirement, the evil that that redresses is colonization. So extending the residential residency requirement makes it harder for somebody to bus themselves up from Illinois, camp out briefly in Wisconsin, and then affect the Wisconsin election.

But at the same time, the proof-of-residency requirement addresses the same issue and so that if the Legislature imposes both of those Acts, changes both of those regulations so we have not only a durational residency requirement but also a proof-of-residency

requirement, it's such overkill that it exceeds the need to -- that would justify either one of them individually, but taken together the conclusion would be, so the plaintiffs would suggest, when you take them together, there's no other explanation for why they both got passed other than as part of a campaign to suppress the vote.

MR. KAWSKI: And I think going back to the *Anderson/Burdick* test, I'm not sure using that particular example, we would have any data to piece that together. Plaintiffs just didn't present it that way, didn't present their case that way. They could have. They could have had experts saying some kind of, almost like I think of it as overlapping concentric circles. You could have people who were burdened here and they're burdened here and they overlap like this and there's this many people in the overlap.

THE COURT: Well, they weren't completely empty-handed about that because I have evidence about how many people have moved within the last year and I know that that is a higher number of African Americans than it is white voters, so there's some evidence that way. And again, it goes to my overall question about the need for and the value of the statistical evidence. Because again, whenever I see statistical evidence that shows that a particular voting law depresses turnout, I still

don't know whether it does it because it imposes an unconstitutional burden. The burden -- the evaluation on the burden seems much more tied to the kind of almost atomistic but sort of not statistical approach to how many people did it actually interfere with their voting, but actually does it impose a burden on voters that is justifiable in light of its purpose.

MR. KAWSKI: I think it is challenged because the benefit side is not quantifiable as the burden side sort of is quantifiable. You can't say that there were a million people who -- maybe in some cases you could say that there a million people that felt that this law benefited the State of Wisconsin. We submitted evidence like that, so we submitted two Marquette Law School polls of registered and likely voters. I don't recall the exhibit numbers off the top of my head, but it did show that about 60 percent of Wisconsinites polled between October 23 and 26, 2014, favored a photo ID requirement. So the requirement is popular among Wisconsinites, the majority of Wisconsinites.

Plaintiffs' experts acknowledge that nationwide the vast majority of people favor these laws. So you can at least see that. It supports the benefit of confidence in election. That's about as close as you can get though to quantifying, I think, that benefit.

It's not --

THE COURT: But I don't know that when I look at the *Anderson/Burdick* framework, I don't know that I -- that it tells me to look for quantitative evidence to evaluate the burdens and benefits.

MR. KAWSKI: You see courts doing that. You always see them looking. And I think about *Crawford* in particular. They pointed out how Judge Barker simply didn't have the number of people who lacked ID in Indiana and how that would have been helpful. In the *Frank* decision from 2014, the Court was interested in knowing how turnout had changed and the plaintiffs hadn't presented that evidence. So I mean now we have some of those numbers in the record, but as you've already pointed out, Your Honor, it doesn't seem to be probative of these constitutional claims as showing there's a clear violation. I think -- I feel that -- if you look at the cases, they're always looking at some data evidence, whether it's -- it's usually raw data evidence like empirically observable statistics turnout, not so much model regressions and things like that.

So again, with regard to the cumulative effects, the state's position is the plaintiffs haven't really even tried to present their case that way, although they could have. And so they haven't met any burden to show that

that's a way to distinguish this case from *Frank* and *Crawford* and therefore they should get the home-run relief that they're seeking.

I think that this is a point the Court may disagreement with, but I'll make it anyway, I made it before, is that the Senate factors do not apply in the Section 2 analysis. The state was able to convince Judge Adelman of that in the voter ID case in *Frank*. We feel that those factors are not relevant to the analysis. They are proper in a vote-dilution context, not a vote denial-type claim context. You saw how the *Frank* Seventh Circuit decision says they're unhelpful.

I think the Court's next question would be, like, where do I start then. You always start with the statutory language which talks about totality of circumstances, equal opportunity, and then you read *Frank* and the *Frank* decision says equal opportunity, not equal outcomes, should be how we should read Section 2. So again, the state is taking the position in this case that the Senate factors --

THE COURT: I don't think anybody is advocating for an equal outcome kind of approach here; so...

MR. KAWSKI: Right. I think that the point though with --

THE COURT: Here is my response on the *Gingles*

factors is really when I'm directed to evaluate the totality of the circumstances, I would at least appreciate an agenda. And so the *Gingles* factors, the chart themselves, are a list of mandatory factors or an exhaustive list, at least I have that agenda. And so I agree with you that people have said they're unhelpful, but people have said many times that any multi-factor tests are unhelpful and I agree with that to a degree. But again, an inventory of factors to think about is just kind of a checklist to provide some guidance for what we might consider.

So in a sense I agree with you both in that I do think there's precedent that says the *Gingles* factors aren't what you look at, but since I have to look at the totality of the circumstances, I see that's as good a starting inventory as any.

MR. KAWSKI: I think that really the only test the Court needs is the test from *Frank*, which is the two-part test. The Court should be very careful in -- it's a very minor point, but a specific one. At pages 174 and 175 of the plaintiffs' brief, they try and direct the Court to the Sixth Circuit's recent statement of the two-part test. The Sixth Circuit actually has different verbiage than the Seven Circuit. In the first part of the test, the words *less opportunity* don't appear. So

the Court -- I just want to remind the Court the Seventh Circuit test is what controls here. We don't want to be shifting to what the Fourth and Sixth Circuits have done recently, and I think what the plaintiffs cite at pages 174 and 175 is from the very recent case out of Ohio.

Those are the main points I wanted to make. And I have a number probably that arose from today's arguments. Let me just take a look at my notes. So the Court had a question earlier about the role that -- the difference in the role that partisanship would play in a vote-dilution case versus a voter-qualification case, and the plaintiffs have tried to make the point that their constitutional claims under the First and Fourteenth Amendment are significantly different than the *Anderson/Burdick* claims and we've argued no, they should be analyzed the same. The only real add-on is that if there are any differing associational interests that are impacted, and I think the Court is already keen to that from your writings in this case.

The plaintiffs have -- several plaintiffs throughout the country have tried this partisan fencing theory under the First and Fourteenth Amendments. No court has bit at that yet as something that's new or different. And I don't think this Court is in a position, given the state of the case law or the Constitution itself, to

distinguish or make some new theory here.

THE COURT: Yeah, and I see the plaintiffs as really trying to argue kind of two ways. There's the safe way, which it's really just a variation of the *Anderson/Burdick* type of analysis. But then as I articulated it before, even if the provisions individually pass muster under the *Anderson/Burdick* framework, if you were to -- the Court were to determine that, in fact, this was a campaign to achieve partisan advantage, that that would be constitutionally objectionable.

So let me just ask you that straight out. If I conclude that, in fact, from 2011 to 2014 the Republican majority engaged in a campaign to reform Wisconsin's election laws for the purpose of securing a Republican advantage in elections, would that pass constitutional muster?

MR. KAWSKI: It could. I think it still could. Because again, when you're talking -- now we're getting into more First Amendment land, I think, with the Fourteenth Amendment.

THE COURT: I think it really is, yeah.

MR. KAWSKI: I don't think that there's case law to support that theory out there. So again, the Court would be writing on its own slate. It wouldn't be

consistent with the Constitution plain language for one or the text. So the Court would have to be kind of out on its own. The state's position is the Court shouldn't do that.

In the *Anderson/Burdick* analysis, again, I heard Mr. Spiva this morning talk about getting to different levels of scrutiny, whether it's strict scrutiny or some kind of heightened scrutiny. The only way that you get there in a facial claim is when you first conclude that the burden on voting is severe. So you have to find that this particular law creates a severe burden on the right of all Wisconsinites to vote.

So I think that's an important point. Because again, it illustrates that the facial claim is unique. Again, I think *Burdick* is the case, between *Anderson* and *Burdick*, that talks about this. I would be happy to answer the Court's question.

THE COURT: Let me run through my inventory. I think you really have -- I think you've done your best at answering this, but it seems to me that there really was a fairly robust presentation to the Legislature that the Voter ID Law, and then the other changes to the voting regime in Wisconsin, there's a robust presentation to the Legislature that this really would have a racially disparate impact and that it would also burden newer

voters. And I would think that if such an allegation were made, this concern were raised, that a thoughtful legislator would want to respond to it either by saying no, we disagree that that information is wrong. Or we recognize that it has the potential and so we are going to redress that racial imbalance by having what I think we've ended up kind of referring to sometimes as a safety valve. And I simply don't see anything in the record where the Legislature really engaged that seriously.

MR. KAWSKI: I think they did though because if you recall, the voter ID was passed in May of '11. The free ID program by statute was enacted to go into effect in July '11. My recollection, I don't have the bills, I could be wrong, but I think there were actually two separate bills. When the Voter ID Law was passed, there was no free ID program. Then the Legislature separately acted to create the free ID program. So this shows that they were paying attention, that this was an issue.

More recently, and again this is this year, so it's different, but we have the addition of veterans' ID cards as a reform to the Voter ID Law showing that there's a population of people the Legislature was paying attention to and wants to help out. So I think it's not fair to say that --

THE COURT: So the response is the free ID

program.

MR. KAWSKI: Right. And the free ID program, as the Court already pointed out this morning, does appear to be an enormous success. We're talking about hundreds of thousands of people that have used the free ID program, hundreds of thousands of new products issued, not just renewals and duplicates. So that is alleviating the burden on --

THE COURT: But it wasn't enough. Then the Wisconsin Supreme Court says no, that's not -- we need yet a further safety valve.

MR. KAWSKI: Right. Right. I think that is what happened. And again, it wasn't the Legislature, but it was the DOT that responded to that by enacting a rule. When we drill down to the level of the emergency rule of May 2016, we're moving far away from where we started, which was looking at all voters and who is burdened. Then we looked at well, who needs a free ID? Then we looked at well, who needs the IDPP? And even buried within IDPP is extraordinary proofs, people who are using baptismal certificates and the like to get ID cards.

So the Legislature, yes, was presented with studies like the 2005 Pawasarat study. The plaintiffs' brief talks about that. You're right, I don't think that you could say that there is a legislator who stood up and

said you're just wrong. That's just dead wrong. But I don't think that the state has a burden to show that there was such a thing said either. It could have been that the Legislature just believed that that was wrong.

THE COURT: Well, when I'm doing this sensitive *Arlington Heights* analysis, I have to look at what evidence I have and I think that the two things that are important to me as I'm looking at this is what legislative record was made that suggests that the Legislature was thoughtful about it rather than just said -- and the plaintiffs' view of it is there's a ring of plausibility to a certain amount of it which is that the Republican Legislature didn't have to deviate from any of the established rules of procedure because they have a robust majority and they can do what they wanted to. And so presented with concerns about the racial impact of the voting regulations that they were contemplating, they gave people a chance to voice their concerns and then said, you know, to heck with you. We're doing this anyway.

And so as I'm looking at that situation, if I see expressions from the Legislature that either puts into dispute the factual underpinning of the concern about the racial impact or the end of partisan impact, that at least gives me some counterbalance to the plaintiffs'

accusations. But I really don't -- I just don't see that there. So then what I have to do, it seems to me the other thing that becomes important is well, let's just look at the -- if I don't have any counterstatement, maybe I have some statement about the purpose of the acts themselves. And I find little meager statements about the purpose as well. We have -- and again, I think Mr. Grothman's statements are kind of ambiguous and both sides want to use them. I do think that he articulates it in a way that's kind of a fairness argument about reining in the excessive hours that Milwaukee had, not for suppression purposes, but for fairness purposes. But again, you know, he didn't lift up the low end of the accessibility, he was interested in bringing down the high, which is why I think his statements are ambiguous about that. But on the whole, I see meager statements from the Legislature about the purposes of the changes in the voting law.

MR. KAWSKI: I think that I would take a step back at the legislative task in general. You have legislative committees that heard oodles of testimony and were presented with lots of documents. The legislative task is to weigh these policies and approve or disapprove of them by getting them through the committee, getting them through that house of the legislature. It doesn't

always result in debate and there is no requirement that a legislator respond to a law professor or a U.W. professor, for example, who's presenting something at a hearing. The Legislature can do its job by weighing these policies, considering the available facts in evidence and then making a vote. And that's what they do all the time. It doesn't indicate any improper purpose because of their silence.

THE COURT: Well, in the ordinary case you're completely right. How the Legislature does its job is of no interest to a federal court except when the regulations that they pass burden the fundamental right and then the Court takes notice and I've got then the obligation to evaluate the action of the Legislature because it's alleged to be burdening a fundamental right. And so that's when I have to look under the hood a little bit and see what went on. And so when I have the allegation about the fact that this was motivated either by racial discrimination or by partisan purpose, I want to start to look and see what the legislative response was and so I want -- now I do want to hear what they have to say.

Ultimately if I don't hear that they disputed the factual underpinnings and that they don't say what the purpose of the legislation was, then I'm going to do what

I think you tried to do in your brief, which was I'm going to actually look at what the purpose and benefits of the changes in the voting regime was to try to figure out why they tried to do it. And I think one reasonable view of the evidence here is that much of these changes were motivated by an interest in securing partisan advantage in the election. I mean it's -- I don't know if I would quite go so far as to say it's an irresistible conclusion, but there's a pretty decent case made that securing partisan advantage was a primary focus of the Legislature in enacting the provisions that are challenged here.

MR. KAWSKI: Doesn't play out in the evidence from trial though. I think what we saw from the experts was that if that was the purpose, which the state does not concede that that was the purpose, it was not very effective in accomplishing that.

I would add to that that as Your Honor was talking about justifications given, certainly legislators were putting out press releases at the time of the enactment of the Voter ID Law. I think if we went back and tried to do a search of the Wheeler Report from 2011, we'd probably find a good number of press releases explaining why we're doing this. I think in our brief or at the trial presentation we didn't feel it incumbent upon the

state to be putting into the record that kind of thing. Like I said to start off in my responses, *Crawford* really says it all. So we need to start there. Legislators could always point to *Crawford* and say this is the U.S. Supreme Court that said this. So that's pretty good authority.

THE COURT: Well, and I don't think they were really on superthin ice with the Voter ID Law in light of *Crawford*. But they didn't stop there. And so it's the other 14 provisions that begin to appear like a campaign to accomplish something partisan.

MR. KAWSKI: And I think there are other states. I believe in North Carolina the challenge to that Voter ID Law was also an omnibus -- it was actually an omnibus bill that made a whole host of changes at one time. Here we do have the fact that these were spread out a little differently, which shows some other type of thought process. It's not as if we have voter ID, absentee balloting, straight ticket, all these in one bill at one time coming down.

I'll also say that we presented evidence at trial with regard to the fact that the Voter ID Law was debated for a decade or more in Wisconsin. There were versions of the bill that were, in fact, enacted into law or almost enacted into law and vetoed. So to say that this

wasn't given a fulsome legislative consideration and public vetting is not accurate.

THE COURT: And again that all goes to voter ID, but then we have the other provisions as well.

MR. KAWSKI: Right. I think that in our brief we've pointed out the justifications that were given publicly. Again, I think if you did go back and look at press releases and things like that, which we didn't feel a need to put that in the brief, I think you would have legislators responding to the criticisms. So I think that's the state's response. First of all, the legislative process doesn't require legislators to respond publicly to every piece of evidence or fact that's put forward by members of the public who might appear at a hearing, for example. And I understand the Court's concern with how serious and different this type of legislation is.

THE COURT: Yeah. Let me ask a little bit more about the $250,000. One of the concerns I have, and again, this is -- I take your point about the scope of the IDPP within the scope of the whole case, but nevertheless some problems have arisen in the ID petition process. One of them is that the receipts that have been distributed to the petitioners under the most recent emergency rules are not well explained to the voters.

And it leads me to the broader question of whether the Legislature has done an adequate job in explaining changes to the election law. And I think this didn't show up at trial, there was a lot of talk about the $250,000 and how that got hung up. But in one of the briefs I think it was pointed out that North Carolina allocated $2 million to support voter education in connection with its changes to the --

MR. KAWSKI: Wisconsin did as well in 2011.

THE COURT: $2 million?

MR. KAWSKI: Yes.

THE COURT: So we have that.

MR. KAWSKI: I mean I think what you had happen there is the law was enjoined for a significant period of time, so if it had not been enjoined, that $2 million would have been used. But instead it lapsed back into the state's coffers. I think that we face the unique situation here where the law just came back into effect statewide for a couple of elections. There is a big presidential election coming up. It's debatable whether the $250,000 is enough. The state feels that it is a good amount of money to make a good campaign and this law has had a tremendous amount of publicity. You'd have to be, I think, living under a rock to not know it exists. Whether that means you're following procedures to get an

ID isn't a question for us. But certainly we feel that the $250,000 will go a long way towards educating the public about the requirement.

THE COURT: Because the reason that I think it's of import in the case is that -- and again, this is -- the Court is now doing -- examining many legislative actions that in the ordinary run of the Legislature business would be -- you know, we're just two blocks off the Capitol square. We don't pay any attention to what goes on up at the Capitol. But in extraordinary cases we do, and the reason that I think public education is of some significance in this case is that it supports the idea that the impact on voter turnout will be negative if people aren't informed about the Act and about the requirements of voting, which are pretty dramatically changed. And I know that much of the evidence is anecdotal, but I think frankly both sides really relied a lot on anecdotes and I'm not terribly sure that the anecdotes aren't the best evidence of the kind of burdens that are actually imposed. I think a lot of people didn't know what they had to show up with at the polls in terms of residency requirements, and it also seemed like there was a lot of kind of working around the regulation by the clerks to figure out how you could get, to take one example, a homeless person a document that says that

they have -- that they're a resident of an area. So that lack of education makes whatever impact the law has worse.

MR. KAWSKI: Wisconsin does have a decentralized election administration. As you heard, there are 1,850 some municipal clerks and they are the boots on the ground that administer the election. So the state can do so much to educate the local population that administers the election, but ultimately if local election officials are not listening, it becomes more difficult. So the state does its best to make sure local election officials do the job they're supposed to.

The state provides training. The state provides webinars. You heard about all these things during the trial testimony.

THE COURT: Yeah.

MR. KAWSKI: The state also reaches out to the public. It tries to promote knowledge about all of these laws. I think the Voter ID Law gets so much attention. It's not like you're seeing ads about the 28-day durational residency requirement. So that does fall I think more upon the local election official to make sure that the people they're working with one-on-one are able to comply with those laws.

THE COURT: This is a very poignant question and

I don't -- I don't know if you're in a position to answer it. But the receipts to the petitioners, let me just step back and provide this little bit of a framework from what it means to me at this point is that the GAB had, as part of its mission and outreach, to educate people about voting and they were pretty good at it. The Department of Transportation and the Division of Motor Vehicles, that's not their main lane. And so insofar as they're administering the IDPP petition process and then under the most -- one of the most recent emergency rules sent the receipts out to the petitioners, the communication and explanation there was deficient, didn't really explain to people what those things meant and how they would be used.

So what is the state of communication to the petitioners? Is there something in the works that's going to communicate to the petitioners what those receipts mean; whether they're going to get new ones; that the letter that the DMV sent just doesn't do the job that I'm sure the GAB would have done had they been sending the letter. It would have been appropriately explained, but it has not been.

MR. KAWSKI: I don't know if I'm in a position to answer it. Again, it might be going outside the trial record in trying to -- I just don't know the answer. I

do know that these receipts will be issued so that folks can vote in August and November. So that's something I do know.

THE COURT: All right. And then let me ask you this: Is there -- is there anything that is going to communicate to the public that a petitioner in the process will get such a receipt so that people who aren't already in the process would know that this is an opportunity that they would have?

MR. KAWSKI: I mean I think that it is part of the rule itself which is very public. As far as -- I don't know off the top of my head if you go on like DMV's website if it says anything about that. It could, but I just don't know off the top of my head.

THE COURT: All right. Okay. Let me pivot back to the plaintiffs here and ask for a brief response. We've got some briefing on this, but let me just ask a portion of the standing issue. It's brief, so I have a lot of material on it. But I don't know that you have an individual plaintiff who is prepared or who is suffering under each of the regulations that you're challenging?

MR. SPIVA: I don't know that we have an individual plaintiff. We have One Wisconsin Institute divert the resources with respect to every single one of these provisions and we did put on evidence of that and

we do have plaintiffs with respect to, I think, most of the provisions. When you say individual, I assume you mean like a person as opposed to --

THE COURT: Yes, a person. And I understand your theory about One Wisconsin, which I think in an earlier -- in the motion to dismiss or in the summary judgment, I can't remember, I'll confess I can't remember which order I addressed it in, but I know that I've addressed the standing issue. I think it was the summary judgment motion. So I don't know if you've got anything to add to that.

So you've got organizational standing and I know that you said you were prepared to make an associational standing argument, which I wasn't especially open to because you don't really have members. But on the basis of your organization's standing, you have addressed that. But you don't have individual plaintiffs who are suffering under each of the regulations that are challenged. So, for example, you don't have a student who is suffering from the lack of a Special Registration Deputy at a high school.

MR. SPIVA: We don't. But it does affect the outreach that our individuals do and so you heard from students about that and I think Anita Johnson testified about that as well.

THE COURT: All right. Okay. I think we have covered that adequately.

One more question for you, Mr. Spiva. The defendants in their briefing complain that they don't know what you have in mind by a young voter and so I'm not entirely sure that I do either. I have -- usually I think a young voter is anybody younger than me, but I think you probably have a more focused definition of that. And I suppose under the Twenty-sixth Amendment is a young voter a voter older than 18 but under the age of 21? Or is there a different definition of young voter that you have in mind?

MR. SPIVA: Yeah, I mean the statistics that we have, oftentimes they gather those different ways. You know, I think generally we've kind of focused on the 18-to-24 or 18-to-29 group. It obviously would be unconstitutional with respect to either group to target them because of age to try to abridge their right to vote. But 18-to-24 is usually the category that we're looking at. And there's lots of evidence in the record about, for instance, abridgment of students, the requirements with the -- in terms of the dorm lists, having to provide citizenship status and the like and not being able to use the regular IDs and that type of thing.

THE COURT: And then if we can, let's just talk

a little bit about remedy. Mr. Kawski (sic), I think it's all very clear that really your first wish would be for me to find that the set of laws that are challenged are racially motivated and that for that reason they're all unconstitutional and I enjoin them all. But guide me otherwise. If I weren't to go that way, what's available in terms of a remedy? It is, after all, a facial challenge, so what -- I do feel like I have not been extremely thoroughly briefed about the remedy issues that would be presented here.

MR. SPIVA: And we bring both, of course, and it has applied to a facial challenge here. I mean I think our view is that we've presented evidence that the system is basically, you know, broken and really can't be fixed.

Going back to the issue of statistical evidence, we point in our brief to a number of studies that show this has substantial impact on the turnout of the voters. So we're asking obviously for an injunction of the whole -- in terms -- I assume this question is focused on the voter ID issue?

THE COURT: Well, I really mean it to be everything. For example, let's just say that I think I really am bound by *Crawford* and by *Frank* to uphold the constitutionality of the Voter ID Law itself, but that I recognize infirmities in the ID petition process. What

then?

MR. SPIVA: Okay. So let me put the ID aside one second and say I don't think you're at all constrained in terms of any of the other provisions that we've challenged; you know, that those can be enjoined in their entirety and that there's nothing in *Crawford* or *Frank* that would prevent you from doing that.

With respect to the ID process and noting what I said a minute ago, clearly the IDPP process needs to be enjoined and, you know, a better process of free IDs would need to be put in place. I think probably the only solution, and I think we said this in the brief, that could work for this coming election short of a total injunction would be something like an affidavit of identity at the polls, you know, that would permit someone to cast a regular ballot. And so the state could still -- it wouldn't require the Court to enjoin the state from asking for an ID, but -- and requiring someone to present it if they had it, but that they should -- if they didn't have it, they should be permitted to vote nonetheless based on an affidavit of identity. That would be our preference if the Court were not inclined to enjoin the whole law.

And I draw a distinction between an affidavit of identity and an affidavit of reasonable impediment, which

is something that North Carolina, for instance, by law put into place right before the trial in that case. They have had incredible problems with it. It adds confusion.

THE COURT: And so that's where you go to the DMV and you fill out the affidavit of reasonable impediment and then you get the ID and then at the polls you still have the receipt. Am I understanding it correctly?

MR. SPIVA: Well, actually not the way it works with North Carolina. With North Carolina, you go to the polls and you fill out an affidavit of reasonable impediment. I couldn't get an ID because of reason X, Y, Z and there's another reason and as long as the other reason isn't because I hate the Voter ID Law, basically it has to be accepted. But it creates a lot of confusion both from the poll workers and from the public, and so we view that as problematic. It's obviously better than a regime that completely disenfranchises the person if they don't have that option, but that's why I say an affidavit of identity because essentially you wouldn't have to say well, I couldn't get an ID because of X, Y, Z.

The one thing I would note is that a lot of these -- the studies that I'm referring to, and I won't belabor this because I think I mentioned this initially, show that there is a deterrent effect, again, like a 2 percent

dropoff between states that have strict ID laws and non -- either no ID law or nonstrict ID laws in terms of turnout. And so that's why we view it -- a complete injunction is really the right remedy.

THE COURT: Then as far as the rest of the regulations go, do I pick and choose from the ones that pass the *Anderson/Burdick* test? And again, assuming I don't jettison the whole program as discriminatory, do I pick and choice: Say that one looks okay, that one doesn't look okay based on my *Anderson/Burdick* analysis?

MR. SPIVA: Can I say one more thing because I think this was clear, the reason why the affidavit of identity be at the polls as opposed to say at the DMV, going back to Your Honor's earlier question, is that otherwise there's no -- you're essentially imposing this burden, a two-step burden, the first half go to DMV and then to the polls and there's actually no real reason for that because if they are going to be allowed to vote based on an affidavit of identity, why require them to go to the DMV to do it and then separately to the polls.

Now, going back to the question that you just asked, I mean we think that we have shown with respect to each provision and cumulatively, and there is lots of evidence in the record about the cumulative burdens from Dr. Burden's testimony to Dr. Mayer's regression analysis

showing the impact on the likelihood of voting between 2014 to 2010 among people who were voters, so -- but so we think we've met our burden with respect to each of those and that each of them should be enjoined in their entirety. There's not -- I can't think of any of them that is really comparable to voter ID in the sense that you could maybe do something short of the injunction.

I mean you take corroboration, either somebody can corroborate somebody else's residence at the polls or they can't.

THE COURT: Well, let me give you one example. It seemed to me that there was reasonably robust evidence supporting the decision not to have voting on the Monday before the election, largely because the clerks asked for it and the GAB supported it and so I don't think that there's any really much countervailing evidence other than a general desire to have more time to vote that suggested that the Monday before the election was a time that is unfair or discriminatory or any such thing. I mean the GAB asked for it and that one seems to be amply justified.

MR. SPIVA: Well, it was always a choice. Like the hours, the municipality didn't have to have in-person absentee voting on the Monday before and we have evidence in the record, testimony from the clerks in Madison and

Milwaukee and also documentary evidence about the thousands of people, particularly African Americans and Latinos who voted and registered on that Monday. So I respectfully disagree on that point. I do think there's lots of evidence that it would have -- it is having an impact, a severe impact on minorities in particular. And it was a choice and so what we're asking is that the choice --

THE COURT: I understand your point. And again, let's not lose track of the larger point which is, just as an example, perhaps in that 15 provisions, there's one that's justified enough to survive the *Anderson/Burdick* framework and if that comes down to being decisive, I just craft whatever relief to suit whatever the ruling is on the legality of the individual provisions.

MR. SPIVA: Right. And we've only asked for choice to be restored essentially so no clerk that felt that they couldn't do it would be required at least under the injunction we're asking for to do that. But the clerks in Madison and Milwaukee want to do that and believe that it's necessary to protect the rights of the voters in their cities.

THE COURT: Okay. I've really covered my questions so if you want to take just a minute. It's your last chance to speak to the Court on the subject.

MR. KAWSKI: Your Honor, before we do kind of a closing, could I respond to the remedy questions?

THE COURT: Yes.

MR. KAWSKI: So I heard Mr. Spiva say that the IDPP needs to be enjoined. I don't think that's the solution. IDPP is supposed to help people. There are people that are struggling to get an ID. To enjoin it would take away an option for those people and that would not be the answer to the problem.

THE COURT: All right. Well, let's just clarify that. Were you suggesting just the wholesale enjoining of the IDPP and just replace it with an affidavit of identity?

MR. SPIVA: What I was suggesting, yes, is a replacement with -- I mean obviously all this preserving, I think the whole thing should be enjoined, but yes, a far better solution would be allowing an affidavit of identity. I think if the IDPP is going to continue or something like it, I mean basically our view is the Court kind of needs to take over the system. I'm sure you're probably not thrilled about this, but the state has had years to get this together and to get it right and they have proven they're either incapable or unwilling to do that. And so if there is to be a Voter ID Law going forward that has some kind of process, it's got to be

something that's way less burdensome than what they've had up until now. I think an affidavit of identity would be far preferable.

THE COURT: Short answer is you were right, that's what he wants.

MR. KAWSKI: And then the affidavit of identity, there's a very nice summary of why that's a bad idea in Judge Adelman's April 29, 2014, decision, the one that was reversed. If there's any part of that decision the state agrees with, it is the part about how it would be "judicial legislation to enact an identity at the polls" by judicial fiat essentially. First of all, what would that look like. This is the first time we're hearing about how this is a great idea during this entire proceeding. There are lots of reasons why the Legislature should be the body that weighs the interests and the options for that kind of alternative. So I would --

THE COURT: Well, let me just say this: I completely agree the Legislature is the body that should do it. But I will tell you my plan is that by the end of this month, I'll have a decision here and I don't know that there is time for a really finely crafted judicial remedy here. And I'm not eager to manage Wisconsin's election system. But I feel like I'm caught between two

competing tendencies or principles, both valid, which is I have to decide the case -- maybe it's three competing principles. I have to decide this case quickly so it can get in shape for an appeal to the Seventh Circuit as quickly as possible and so I don't have time for subsequent briefing on the fine points of an injunction. And so I recognize the possibility that there might need to be some relief on the ID petition process. But I don't know that I have time to really craft the perfect solution here and I really don't think that only in the most extraordinary circumstances the Court is the body to do it anyway. But under the circumstances, we might need a patch that gets us through the next election or two while a better solution comes up.

MR. SPIVA: I just want to clarify, Your Honor, I wasn't saying an affidavit of identity is some great solution. Again, I think the whole thing should be enjoined. And probably what Your Honor just said is another reason why, if you find liability here, that at least temporarily the whole ID process ought to be -- the whole ID requirement ought to be suspended. We obviously think it should be permanently enjoined, you know, but there is certainly time to put in place -- to remove the requirement that one must show an ID.

THE COURT: Well, I know that Mr. Kawski will

say the solution is already there. I have my misgivings about how effectively it has been communicated, but at least the people who are stuck in the ID petition process have their receipts and their patch that gets them -- those individuals through the next two elections is in place. They may not know it yet, but it's there for them.

MR. SPIVA: Yeah, and I think maybe in some ways that whole process speaks for itself. I mean that's the fix.

THE COURT: It's not the fix. I'll be clear about that. It's not the fix. But it might be the temporary patch. Because I think those individuals are entitled to vote as a matter of right, not as a matter of grace extended to them by the state. But the fact is it is kind of a patch that would allow them to vote in the next couple of elections, and again, assuming that the communication is clear enough that they understand what they have doesn't necessarily address people who are not participating in the ID petition process because they don't yet know that it would work for them and they would find their way to the polls if they were to do it. But nevertheless it is something of a short-term fix. So go ahead, Mr. Kawski.

MR. KAWSKI: So I think the bottom line is we do

not think an affidavit at the polls is a viable remedy here. We think it would be judicial legislation. As the Court already said, there really isn't time to be monkeying around with what an affidavit looks like. And the plaintiffs in their brief make it clear that as to all of these various legislative programs that are challenged, that they're seeking an injunction. So we disagree with that. We think there should be no injunction.

THE COURT: Okay. All right. Okay. So time for your last words. So Mr. Spiva.

MR. SPIVA: I'm going to try to keep it brief, Your Honor.

THE COURT: I'm going to require that.

MR. SPIVA: I think that the basic questions that the Court is left with in coming to a decision on intentional discrimination is why. Starting with Act 23, which is really not just voter ID, we often focus in on voter ID when we talk about Act 23, but there are, like, eight other provisions, including cutting back on early voting days, and corroboration -- eliminating corroboration, and then it was followed rapidly by seven other acts that made similarly big changes. Nobody was asking for it. Nobody said this was necessary for election administration purposes. In fact, I submit to

you that the most credible witnesses we had of the clerks said that most of these things had the opposite effect.

Wisconsin had an exemplary system in a lot of ways. And so when you're left with a question -- and what you were getting at with some of your questions, why are they doing this, sure the Legislature typically can do whatever it wants, except it can't racially discriminate. It can't discriminate against young people. It can't discriminate on the basis of someone's political beliefs. The only answer that really makes sense here, because each of these provisions cuts back in some way, it cuts back in people's ability to vote, it cuts back in people's ability to register. The only -- even apart from all the overt statements that we pointed to, the only, I think, real reason it makes any sense is in order to achieve partisan advantage through these discriminatory means that I've mentioned.

And if there were some other great reason that wasn't strained, and some of the reasons we've heard I think are really, I think charitably, are really strained, it's not uniform to have a city of 500,000 people have one location, a city of 500 people have one location to vote in person. And they can select the hours and days even now. So there are strained reasons that are provided. You would expect if there were other

reasons, better reasons, that those would be on the record; that people would say no, I'm not doing this to racially discriminate. How dare you accuse me of that. That's not what I'm doing. None of that. You can search the legislative record and you're not going to find -- you're not going to find that.

And obviously these press releases that are, you know, that Mr. Kawski alluded to, none of that is in the record and I think we would have heard about that if that were the case if that would even be sufficient and I submit it's not. I think this is the clearest evidence based on the direct statements, based on the legislative record, based on the fact that there was no real reason to do this except to suppress the vote of intentional discrimination that I've seen presented to any court. If this is not sufficient to withstand or to compel a finding of potential discrimination, I don't know what kind of a record in this day and age in the modern era would be.

THE COURT: And the thing that really raises this one above the other cases around the country are the statements by the legislators themselves. The bottom line is that what really makes this one stand out?

MR. SPIVA: I think that it is -- yes, is the answer to your question, Your Honor. But it's also the

combination of that given the sheer scope of acts with no reason for implementing them, you know. I want to be careful about saying that there's nothing similar because certainly North Carolina, there was a sweeping act and we obviously contend that that was discriminatory as well and there were statements there. There weren't nearly as many statements as we have here and testimony from somebody who was on the inside of the room that's very credible and I suggest it hasn't really been damaged in terms of the credibility of that statement.

Maybe I'll just say a word about statistics because we talked about that a little bit. You know, I think *Anderson* and *Burdick* are clear. I think even *Crawford* is clear that the way that you measure the burden is not to say what percentage of Wisconsinites have been affected by this. I think we have shown that it's a significant percentage and certainly the people affected have been affected significantly. But I think *Anderson/Burdick* and the cases that interpreted it, including cases that the *Frank* case cites like the *League of Women Voters* in the Fourth Circuit and the *NAACP/Husted* case in the Sixth Circuit recognize that you look at the group that's affected and that even a small group, even the League of Women Voters says even one voter, you have more than that here, but you look at the group that's affected and look

at the type of burden imposed on them, and disenfranchisement, you can't get to a higher burden than that, where the statistical evidence that we have presented, and there is evidence in our brief, the GAO study I mentioned and others, I would submit the Mayer report as well, showing the impacts of voter ID in particular and cumulative impacts of some of these other provisions, I think that goes largely to intent, Your Honor, because these things were known, well known, and the legislators stated their belief that these statistics actually were true. That's what they were hoping for. And so I think that's where the statistics really play out the most.

What we've been calling anecdotal evidence is really direct evidence, and I think Your Honor was correct in saying in some ways that's the best evidence of burden. People coming in and saying I can't do this. You know, I'm having to run back to my ex-husband's house two times to get into his safe to get some document they told me I didn't need the first time. Your Honor understands the point.

The other point, overarching point I think to make about cumulative burden is -- and this also goes to intent too because the one -- the one thing that we've heard in terms of justification for cutting back on the

early voting, in-person voting is fairness; somehow this is fairness to the smaller localities. But the problem with all these provisions, the Voter ID Law, the cutting back on the hours, proof of residency, all of them is it's going to make a problem that existed, and that's long lines, even worse. And that problem existed in Milwaukee and we've got evidence in the record of that. It existed in Madison. And other of the bigger cities.

And so -- and that's going to disproportionately burden African Americans and Latinos and younger voters as well. And so -- and when given the chance to do something about that, the Legislature has chosen not to. So when they say they care about uniformity, they only care about it when it takes away the votes of certain people. But when it's something like allowing more than one location to do something about the long lines in Milwaukee, it gets rejected. And so I think that's another reason these have to -- these rationales have to be rejected.

One last thing, Your Honor, and I'll close with this and that's -- I want to just go back to that room, to the Republican caucus room and the Allbaugh testimony. I just want to say again the point is not counting legislators, how many of them said or how many explicitly stated they agreed. One of my favorite quotes, if you'll

just indulge me, Your Honor, is from Martin Luther King. We'll have to repent in this generation not only for the evil deeds of the bad people, but for the appalling silence of the good people.

And where were the people in that caucus who were speaking up? Who came out publicly and told Schultz to say no, I won't do this. And they went further than that, Your Honor. They didn't just stay silent, they acted, and that is a ratification, Your Honor. I think that allows you to really compel a finding of intent here. Thank you very much.

THE COURT: Thank you. Mr. Kawski.

MR. KAWSKI: I heard the plaintiff say that Wisconsin had an exemplary election system. Wisconsin has an exemplary election system. Wisconsin elections are fair, easy to navigate and open to all. I think I opened in my opening statement with that and I said it again in the post-trial brief and I would stand by that statement. The plaintiffs have failed to meet their burden in this case and the Court should enter judgment for the defendants. Thank you.

THE COURT: Thank you, Mr. Kawski. Thank you all. As I indicated, before the end of July we'll have a decision. I thank counsel again for their arguments and presentation of the case. So if I need anything else, I

know how to get in touch with you and ask for it. So thank you very much.

MR. SPIVA: Thank you.

MR. KAWSKI: Thank you, Your Honor.

(Proceedings concluded at 12:00 p.m.)

* * * * *

I, LYNETTE SWENSON, Certified Realtime and Merit Reporter in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 30th day of June 2016 before the Honorable James D. Peterson, District Judge for the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 1st day of July 2016.

___/s/_____

Lynette Swenson, RMR, CRR, CRC
Federal Court Reporter

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**Wisconsin Department of Transportation**
www.dot.wisconsin.gov

Scott Walker
Governor

Mark Gottlieb, P.E.
Secretary

Division of Motor Vehicles
4802 Sheboygan Ave.
P O Box 7911
Madison, WI 53707-7911

DMV2 1/2003

Date

CUSTOMER NAME
ADDRESS LINE 1
ADDRESS LINE 2

RE: Free Wisconsin ID card for voting purposes

Dear Customer,

Enclosed is a renewal of your Wisconsin Identification "ID" Card receipt. This receipt is valid for 60 days. This receipt satisfies Wisconsin's Voter Photo ID Law and thus can be used for voting purposes in this State.

The automated renewal process will ensure that you possess a valid identification receipt up to a total of 180 days beyond notice suspension (if applicable). Additional receipts to extend this time period will be provided as you exercise reasonable efforts to contact DMV staff to discuss your petition application or provide new information to assist in validating your birth record information. If you wish to discuss your petition application, please contact the DMV compliance team directly at (608) 261-5684.

Thank you,

[SIGNATURE]

Kristina H. Boardman
DMV Administrator

Division of Motor Vehicles
DMV
wisconsindmv.gov

**Wisconsin Department of Transportation**
www.dot.wisconsin.gov

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Dear Customer,

Enclosed is a receipt for your Wisconsin Identification "ID" Card. This receipt satisfies Wisconsin's Voter Photo ID Law and thus can be used for voting purposes in this State.

Wisconsin DMV is continuing to validate the information you provided on your petition application and may be in contact with you for more information.

If your petition application is not resolved prior to the expiration date of the receipt, another receipt (valid for an additional 60 days) will be mailed to you. This automatic renewal process will ensure that you possess a valid identification receipt up to a total of 180 days. Additional receipts to extend this time period will be provided as you exercise reasonable efforts to provide new information to assist DMV staff in validating your birth record information. If you wish to discuss your petition application, please contact the DMV compliance team directly at (608) 261-5684.

Thank you,

[SIGNATURE]

Kristina H. Boardman
DMV Administrator

Division of Motor Vehicles
DMV
wisconsindmv.gov



Attachment C

# General Information

| | |
|---|---|
| **Court** | United States District Court for the Eastern District of Wisconsin; United States District Court for the Eastern District of Wisconsin |
| **Federal Nature of Suit** | Civil Rights - Voting[441] |
| **Docket Number** | 2:11-cv-01128 |