UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al., Defendants.	Civil Action No. 2:11-cv-01128 (LA) **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, LEAVE TO FILE SUPPLEMENTAL PLEADING, AND CLASS CERTIFICATION

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The core argument in Defendants' opposition brief essentially boils down to: "Trust us, we'll get it right this time." Defendants essentially concede that over the last five years, the DMV bureaucracy has proven utterly incapable of removing the unreasonable obstacles faced by vulnerable voters who seek to exercise their fundamental right to vote under the voter ID law. Defendants nonetheless argue that *this time*—using brand-new, untested, *ad hoc* procedures described in a last-minute June 16, 2016 declaration from Kristina Boardman (hereinafter the "Boardman Procedures"), Dkt. #287—they will get it right. Of course, Defendants have adopted new procedures and made similar claims before in desperate attempts to evade liability, often on the eve of court proceedings. There was the May 2016 emergency rule (at the time of the *One Wisconsin Institute* ("*OWI*") trial in Madison), which replaced the September 2014 emergency rule (promulgated on the eve of appellate oral arguments in this case), which replaced the MV3002 form (seldom used, but touted at the November 2013 trial in this Court), which replaced the DMV's random exceptions procedure (most commonly used to try to dispose of complaints from legislators on behalf of constituents). Defendants now claim that, notwithstanding DMV's poor track record, *see* P.Br. at 7, 15-16,[1] the DMV will now not only get it right, but get it right *immediately*—and without having had any information campaign by DMV or any serious voter education at all—just in the nick of time for this year's elections.

Such circumstances necessitate a preliminary injunction. This Court should not allow another vulnerable voter to be disenfranchised while the DMV continues to endlessly experiment with cumbersome bureaucratic procedures that voters must subject themselves to in order to obtain an ID. The undisputed evidence of the DMV's five-year track record establishes

[1] "P.Br." refers to Plaintiffs' moving brief, Dkt. #279. "D.Br." refers to Defendants' opposition brief, Dkt. #285. "Ex." 1 through 75 refers to the exhibits attached to Plaintiffs' moving papers. "Ex." 1001 through 1021 refers to the exhibits attached to the Murphy and Boardman Declarations, Dkt. ##287-288. "Tr." refers to the trial transcript in this case.

Plaintiffs' likelihood of success in demonstrating that these new Boardman Procedures will not remove the unreasonable burdens faced by Plaintiff class members, much less immediately. Furthermore, like every other ill-conceived half-measure tried by Defendants, the Boardman Procedures are insufficient on their face. *See infra* Part I. The remaining preliminary injunction factors support Plaintiffs' proposed affidavit remedy. *See infra* Part II. And Defendants' remaining arguments concerning standing, supplemental pleading, and class certification are also without merit. *See infra* Parts III.-V.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AND FACE IMMINENT IRREPARABLE HARM

Plaintiffs are likely to succeed on the merits and are likely to face imminent irreparable harm.[2] Defendants do not dispute that voters who are unable to obtain acceptable ID with reasonable effort are entitled to relief under the flexible *Anderson-Burdick* framework. P.Br. at 5. Instead, Defendants trumpet their most recently-passed emergency rule—hastily modified by Boardman's June 12, 2016 declaration altering that rule, Dkt. #287—as *the* bureaucratic mechanism that will finally cure all of the unreasonable burdens faced by the Plaintiff class, and will allegedly do so in time for this year's elections.[3] But the last-minute implementation of these

[2] Contrary to Defendants' suggestion, *see* D.Br. at 16, "the threshold for demonstrating a likelihood of success on the merits is low," and "need only be better than negligible," *D.U. v. Rhoades*, --- F.3d ----, No. 15-1243, 2016 WL 3126263, at *5 (7th Cir. June 3, 2016), and "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The parties will have an opportunity to test these last-minute procedures in proceedings for permanent relief after the upcoming elections have passed.

[3] Defendants repeatedly disparage Plaintiffs' evidence as "stale." D.Br. at 2, 15, 16, 18, 29. But Plaintiffs have provided evidence of DMV's continued ineffectiveness through the April 2016 elections. Apparently, Defendants' primary strategy is to enact eleventh-hour rule changes, and then complain when Plaintiffs proffer evidence of how poorly these eleventh-hour rule changes are working. And Defendants know full well that Plaintiffs did not cite the *OWI* trial transcripts

new rules itself demonstrates that Plaintiff class members are likely to succeed on the merits and face imminent, irreparable harm in upcoming elections given the DMV's five-year track record of constant failures. Initially, providing IDs for "free" was supposed to fix the problem. *But see* Dkt. #195 at 26-29. Then informal and secret arrangements for tough cases and an obscure MV3002 form were supposed to fix the problem. *But see id.* at 32 n.17. Then a September 2014 emergency rule providing free birth certificates was supposed to fix the problem. *But see* P.Br. at 7-17. Then *another* emergency rule promulgated less than two months ago was supposed to fix the problem. *But see id.* And yet already, in an apparent concession that their recent emergency rule will fail, Defendants proffer Boardman's last-minute June 2016 declaration, which alters the May 2016 emergency rule by adding more and different procedures. *See* Dkt. #287. Defendants provide no reason to believe that this last-minute scramble will fix everything in the short time between now and this year's elections, when the last several iterations have failed to do so.

This is especially the case where, as here, there has not been and will not be enough time to let voters know this new process exists, *see* Ex. 70 (suggesting *a year* is required for effective outreach on petition procedures), and neither the newest emergency rule nor the Boardman Procedures have been put into meaningful practice—indeed, DMV still hasn't even figured out how to implement properly and uniformly the *last* emergency rule passed almost two years ago, P.Br. at 7, 15 & n.9.[4] Demand is also rising with no proportionate increase in the resources

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in their opening brief because they were not even available in full until June 23, 2016. As explained below, the *OWI* transcript confirms the ineffectiveness of the Boardman Procedures.

[4] Defendants dismiss DMV's 27% error rate in processing petition applications (a year into the implementation process), *see* P.Br. at 15, arguing that most of the errors were "completely internal." D.Br. at 18 n.10. That is precisely what is so frightening about it. What Defendants dismiss as internal "office efficiency" issues, *id.*, threaten the fundamental right to vote. Defendants then boast that the error rate includes "errors made by *applicants* that have nothing to do with the investigators' work." *Id.* That vulnerable voters are unable to pass the DMV's literacy test is hardly a cause for celebration.

needed to handle it. *Id.* at 15-16. These ever-changing rules simply will not eliminate the unreasonable burdens faced by voters, much less eliminate them in time for this year's elections.

A. Plaintiffs Are Likely to Succeed on the Merits Regardless of Any Last-Minute Changes to DMV Procedures

Plaintiffs are furthermore likely to succeed on the merits because even the Boardman Procedures on their face do not eliminate the unreasonable burdens faced by voters.

1. Voters with name mismatches

As Plaintiffs established in their opening brief, voters with name mismatches continue to be subject to DMV's standardless discretion; and if discretion does not favor them, they must undergo extreme efforts to correct misspellings in underlying documents. P.Br. at 7-8. Defendants counter that the last-minute Boardman Procedures now provide that "simple name and spelling discrepancies do not require any special processing," D.Br. at 5, and that "name inconsistencies do not result in denial of an ID card application," *id.* at 15. This is misleading at best. As Boardman's own declaration actually says, this supposed new exception applies only to "*single letter* discrepanc[ies]," Dkt. #287 ¶ 36 (emphasis added), hardly the magic bullet that Defendants portray it to be. Many name mismatches are off by more than one letter; indeed, *every* witness who testified at the trial in this case about a name mismatch had mismatches of more than one letter. *See* Dkt. #195 at 34 n.19; *see also* Exs. 10, 11, 16.

There are still more problems with this supposed one-letter policy. (1) This alleged procedure does not address name mismatches with Social Security records. *See* Ex. 1018:2 (only addressing discrepancies on "Passport or BC"); Ex. 1006:9; Ex. 1004:4-P-85; *see, e.g.*, Tr. 1796 (mismatch with Social Security office). (2) The policy is confusing, as not even DMV employees are sure exactly how it works. *See, e.g.*, Ex. 1004:4-P-78 to 79 ("[A. W]as it one letter in each name—first, middle, last—or is it one letter in the composition? . . . I think that we decided it

was one letter in either or both. . . . Q. . . . I find this very confusing. A. I know."). (3) It is not clear whether the policy is discretionary or mandatory: although Boardman's declaration suggests it is mandatory, Dkt. #287 ¶ 36, the written policy and the testimony of other DMV employees suggest discretion, Ex. 1018:2 (one-letter discrepancy "*may* be processed . . . after team leader or region management *approval* has been granted" (emphasis added)); Ex. 1004:4-P-79 (application of policy "could be at the discretion of the supervisor in the field service station"). Even Boardman had difficulty giving a straight answer on this point in the face of repeated questioning from the district judge. *See* Ex. 1006:112-114, 146-47. (4) The legal basis of this supposed one-letter policy is dubious, as it is not reflected in the actual emergency rule. *See* Ex. 24 at 15 (having a "name other than the name that appears on a supporting document" requires further evidence, with no exceptions identified). (5) Because the policy is not enshrined in law or rule, this *ad hoc* one-letter policy can also change at any time, continuing to leave voters at the mercy of standardless discretion. *Cf. Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (GAB's "inconsistent and shifting positions do not give us much confidence" that it will do what it represents it will do in litigation).

Defendants also argue that the Boardman Procedures allow voters with name mismatches to obtain ID by signing boilerplate "common law name change" affidavits. D.Br. at 5-6, 15-16. Again, there are several problems with this procedure. (1) This procedure is only available to those whose names have changed "through consistent and continuous use" and *not* "by an order of a court." Ex. 1019:2-3. Thus, the affidavit does not apply to voters whose names were changed through "court procedures," *e.g.*, through marriage, unreasonably burdening those voters who are unable to track down and pay for those legal documents. *Id.*; *see also* Ex. 1018:3 (affidavit only applies if "there is no court order"); *see, e.g.*, Tr. 121, Ex. 11 ¶ 7 (paying fees for

marriage certificate); Ex. 1007:7-P-114 to 115 (voter could not obtain marriage certificate). (2) The form affidavit is confusing, in that it requires applicants to falsely swear that the incorrect name on a birth document was their "old name," even if they have *never* used that name at all during their lifetimes, *see* Ex. 1006:95-97; Ex. 1008:8-P-191 to 192; Ex. 1001:1-A-116 to 121, and any error subjects the vulnerable voter to "a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both," Ex. 1019. (3) Allowing one document to satisfy categorically the amorphous common law name change standard is at odds with the May 2016 emergency rule's case-by-case emphasis. Ex. 24 at 15. (4) What is deemed "acceptable" today may not be deemed "acceptable" tomorrow, *id.*, especially when the DMV keeps changing its procedures and forms. *Cf. Wis. Right to Life*, 751 F.3d at 831. Thus, Plaintiffs are likely to succeed in demonstrating that voters with name mismatches continue to face unreasonable burdens.

2. Voters who must contend with multiple agencies

With respect to voters who must contend with multiple agencies, Defendants do not dispute that the new emergency rule does not help voters who must obtain a Social Security card as proof of identity. P.Br. at 8-10. And they do not dispute that such voters generally need a photo ID to obtain a Social Security card. D.Br. at 16. Instead, Defendants assert that "applicants have a valid photo receipt while they are in the IDPP process of getting an ID where they have unavailable documentation," *id.*, which they can supposedly use to get a Social Security card. But this is nonsensical because Defendants do not dispute that voters *lacking proof of identity do not qualify for the IDPP process* are *not* entitled to the receipt in the first place, and are thus stuck in a Catch-22. P.Br. at 9. In any event, it is unclear whether the Social Security office would even accept this receipt, *id.* at 8-9, and this still requires voters who cannot drive to travel to multiple agencies to resolve the problem, *id.* at 9.

Defendants do not dispute that voters who are stuck on Election Day without ID and the documents DMV requires to issue ID, including birth certificates, face unreasonable difficulties obtaining a valid document for voting in three short days. *See* P.Br. at 9-10.[5] Indeed, Defendants acknowledge that the emergency rule does not require mailing of temporary receipts until *the sixth* working day after the application. Yet Defendants now point to the last-minute Boardman Procedures, which promise that "[d]uring election weeks, photo receipts will be issued the same day as an application." D.Br. at 17. But they fail to mention that these photo receipts will be issued "*by mail*," Dkt. #287 ¶ 44 (emphasis added), and thus will not be *received* the same day as an application. So even if the voter is able to rush from the polling place to a DMV office that happens to be open on Election Day via paid public transportation, *but see, e.g.*, Exs. 12, 14, 22, and the receipt is mailed that day, there is no guarantee that the voter will receive the receipt for voting by the Friday deadline. And if the voter is homeless or transient, *see, e.g.*, Tr. 132, 358, they are unlikely to get it at all, Tr. 1889-90; Ex. 1002:339; Ex. 1001:1-P-164. That Defendants impose this pointless obstacle on vulnerable voters is all the more galling because the DMV is capable of printing out a receipt and handing it to the voter *on the spot*. *See* Ex. 1004:4-P-111 to 112 ("Unfortunately the emergency rule says 'U.S. mail,' where if it didn't, . . . we might be able to email the completed receipt to the service center and they could print it out and hand it to them. We have to do what the rule says."). Lastly, nothing in the text of the emergency rule *requires* this same day receipt mailing procedure, and Boardman's own declaration suggests it is discretionary. Dkt. #287 ¶ 19 ("DMV *can* issue an identification card" (emphasis added) on the

[5] Many voters will not be aware of the voter ID requirement this year until they get to the polls because of Defendants' anemic outreach efforts, *see* P.Br. at 22, and because many eligible voters decide to register and vote on Election Day as permitted under Wisconsin law. There will also likely be many voters in this year's high-turnout November election who did not vote in this year's primaries, and so were not made aware of the law through those primaries.

same day). These voters are thus again subject to DMV's standardless and shifting discretion. *Cf. Wis. Right to Life*, 751 F.3d at 831.[6] Plaintiffs are therefore likely to succeed in demonstrating that voters who must contend with multiple agencies continue to face unreasonable burdens.

3. Voters with nonexistent or unavailable birth records

Plaintiffs have also demonstrated that voters with nonexistent or unavailable birth records continue to face unreasonable burdens, as they are subject to unguided whims and numerous other factors outside of their control. *See* P.Br. at 11-17. Defendants do not dispute that this process remains fundamentally discretionary in nature even under the new rules. *See* D.Br. at 17-19. Indeed, DMV employees admitted at the *OWI* trial that the May 2016 emergency rule establishes the *same discretionary standard* that they have been "using all along." Ex. 1008:8-P-190 to 191; *see also* Ex. 1007:7-P-145 to 146. As for the receipts, Defendants do not dispute that these are temporary and can be *permanently* revoked if the voter is unable to help locate ancient records from institutions that may no longer exist. *See* P.Br. at 17.

Defendants finally argue that "not every applicant is entitled to an ID." D.Br. at 19. But failure to "meet the criteria for having an ID," *id.* at 20 n.11, is not the same as ineligibility to vote. The Constitution does not allow the DMV to use its amorphous, constantly-changing bureaucracy-navigation test to decide which eligible Wisconsin voters are or are not worthy of exercising their fundamental right to vote. "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145,

[6] Defendants argue that the five voters who faced the multiple-agency problem, P.Br. at 10, will now be able to vote under the Boardman Procedures, D.Br. at 17. Defendants miss the point. These five voters *were already disenfranchised* in this year's elections because they could not reach multiple agencies in three short days. Plaintiffs seek class certification so that voters who will inevitably face this situation in the future will not be disenfranchised.

153 (1965). Plaintiffs are likely to succeed in demonstrating that voters with nonexistent or unavailable birth records face unreasonable burdens.

4. Lack of transportation continues to be an unreasonable obstacle

Finally, Defendants concede that voters who cannot drive face substantial transportation difficulties in getting to the DMV (or other agencies), admitting that "making that trip is an undue burden on some voters." D.Br. at 19. Instead, Defendants now belatedly claim that voters facing transportation difficulties "*are exempt from the voter ID law*," D.Br. at 19 (emphasis added), because of the "indefinitely confined" provision of Wis. Stat. § 6.86(2)(a). However, the statute refers to being "confined"—an inability to leave the home—not to people who can leave home but have difficulties reaching the DMV. *See, e.g.*, Ex. 12. The statute also requires that the confinement be "because of age, physical illness or infirmity or [disability]," Wis. Stat. § 6.86(2)(a), and thus does not apply to many voters who have transportation barriers for reasons related to poverty or homelessness, *see* Dkt. #194 at 10-12; Dkt. #195 at 30-31; Ex. 14. Defendants' novel interpretation appears to suggest that these voters should fraudulently claim to be indefinitely confined when that is not in fact the case. Lastly, designating oneself as "indefinitely confined" requires a voter to vote absentee by mail, which precludes voters like Ruthelle Frank and Melvin Robertson from voting in person; makes their votes less likely to be counted, Ex. 28 at 47-48; and subjects them to the whims of local clerks who sometimes unilaterally remove voters from the indefinitely confined list without notice if they subjectively believe the voters are not indefinitely confined, Ex. 33 at 77-78. The indefinitely confined exception does not eliminate the unreasonable transportation barriers faced by many voters.

B. Plaintiffs Are Likely to Face Imminent Irreparable Harm Given DMV's Long Track Record of Inadequate Implementation

Plaintiff class members are also likely to face imminent irreparable harm. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). Defendants argue that their new policy of issuing temporary receipts will forestall any harm this year, because if every voter without ID rushes to the nearest DMV now, they will get temporary receipts that will last 180 days. D.Br. at 20. But the receipt itself confusingly says that it will only last for 60 days unless the voter satisfies some unarticulated requirement. *See* Ex. 1020; Ex. 1006:12-15. Temporary receipts are also only issued to voters who undergo the petition process, Ex. 24 at 20, which is unavailable to the first two categories of Plaintiffs' class, including the many voters who will be stuck without ID on Election Day, P.Br. at 7-10. Moreover, Defendants have failed to set up any mechanism to ensure that voters without ID are even aware that these new (and changing) processes exist, nor is it possible to effectively do so. *See* Ex. 70 (suggesting a year is necessary for DMV outreach). And, even if these deficiencies were all addressed, Defendants' argument presupposes that the new procedures will actually be implemented in a quick, uniform, effective, and accessible manner for all affected voters in the little time that is left before this year's elections. Given DMV's track record, such a leap of faith is unwarranted. A preliminary injunction is sorely needed to prevent imminent, irreparable harm.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS FAVOR PLAINTIFFS' PROPOSED REMEDY

The remaining preliminary injunction factors also support Plaintiffs' requested relief. *See* P.Br. at 17-22. Defendants' arguments to the contrary are unavailing.

First, Defendants argue that Plaintiffs' preliminary injunction is unwarranted because they ask to "*change*, not preserve" the "status quo." *See* D.Br. at 13-14, 21. But the Seventh

Circuit has moved away from any requirement that a preliminary injunction must "preserve" the "status quo." *See Chi. United Indus., Ltd., v. City of Chi.*, 445 F.3d 940, 944 (7th Cir. 2006).

Second, Defendants rehash their stale argument that the State's interest in "preventing fraud, promoting orderly election administration [and] accurate recordkeeping, and safeguarding public confidence" automatically trumps any kind of relief for voters. D.Br. at 20. But as *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*") confirmed, such interests are outweighed with respect to voters who cannot obtain ID with reasonable effort.

Third, Defendants argue that "mandating an affidavit exception would . . . be extremely difficult to implement." D.Br. at 23. Yet in the same breath, they acknowledge that "[m]unicipal clerks, not Defendants, have 'charge and supervision of elections.'" *Id.* (quoting Wis. Stat. § 7.15(1)). Here, actual *municipal clerks*—the clerks of the two largest municipalities in Wisconsin—have submitted declarations confirming that the affidavit remedy *can* be implemented this year, and confirming that Plaintiffs' proposed remedy can even *reduce* the burdens on elections officials, which Defendants do not dispute. Exs. 8, 9.

Fourth, Defendants complain that an affidavit remedy may run "contrary to state law." D.Br. at 23. But that is the whole point of a preliminary injunction in this case—to *enjoin* state law because it violates the United States Constitution.

Fifth, Defendants protest that they would have to go through the trouble of promulgating rules for municipal clerks to follow in response to any court order (while also claiming on the same page that they have no authority over municipal clerks), D.Br. at 23, but Defendants seem to have no difficulty quickly promulgating last-minute "emergency" rules whenever it suits them in litigation, or indeed, in response to court decisions. To the extent that promulgation is required or imposes any burden on elections administrators, such "burdens" are only a fraction of the kind

of crushing burdens that vulnerable voters have faced for years. The balance of harms tilts clearly in the voters' favor. *See, e.g.*, *Fish v. Kobach*, --- F. Supp. 3d ----, No. 16-2105, 2016 WL 2866195, at *31 (D. Kan. May 17, 2016) ("real and imminent threat of disenfranchisement" outweighs the "administrative burdens" imposed on elections officials).

Sixth, Defendants criticize Plaintiffs' proposed affidavit for allowing voters to list any burden that the voter subjectively deems to be a reasonable impediment. D.Br. at 21, 24. But Defendants do not dispute the finding, by two separate courts, that this component is critical for ensuring that the affidavit is not a "trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters." *South Carolina v. United States*, 898 F. Supp. 2d 30, 40-41 (D.D.C. 2012); *see N.C. State Conf. of NAACP v. McCrory*, --- F. Supp. 3d ----, No. 1:13CV658, 2016 WL 1650774, at *120 (M.D.N.C. Apr. 25, 2016). Certainly this is superior to allowing DMV employees to disenfranchise voters based on *their* subjective determinations.

Seventh, Defendants note that this Court's prior decision found that an affidavit remedy would not be proper, and argue that "Plaintiffs offer no explanation as to why this Court should reverse itself." D.Br. at 22. The "explanation" is *Frank II*, which confirmed that a court-ordered affidavit remedy modelled on other states' would be permissible. *Frank II*, 819 F.3d at 387. Thus, contrary to Defendants' assertions, D.Br. at 22-23, the fact that Plaintiffs point to the examples of North Carolina and South Carolina *favors* their proposed remedy.

Lastly, Defendants oppose Plaintiffs' request for an individualized mailing because it might incidentally reach some voters who have compliant ID. *See* D.Br. at 24. But it is unclear why it is harmful to inform more voters, rather than fewer, about how their fundamental right to vote may be protected. Plaintiffs' request for a preliminary injunction should be granted.

III. THE PROPOSED CLASS REPRESENTATIVES HAVE STANDING

Plaintiffs Ruthelle Frank, Shirley Brown, and DeWayne Smith, and proposed Plaintiffs Melvin Robertson, Leroy Switlick,[7] and James Green all have standing as class representatives to bring this action. Defendants argue that these Plaintiffs lack standing because none of them has taken advantage of "DMV's current procedure." D.Br. at 12-13. But Plaintiffs have standing because they are *subject* to these procedures—their claim is that they *should not have to* go through these unreasonable procedures just to vote. And Defendants do not dispute the other independent bases for standing that Plaintiffs have noted, such as the fact that all Plaintiffs must present photo ID at the polls, *see* P.Br. at 27, and the fact that the Plaintiffs who now have ID did not have ID at the time that Plaintiffs moved diligently for class certification, *see id.* at 27-28.

Defendants' argument only highlights the significance of Plaintiffs' standing as class representatives. Plaintiffs are not guinea pigs who must subject themselves to DMV's endless experiments with the fundamental right to vote every time DMV comes out with yet another "current procedure" in response to litigation. This is especially where, as here, Defendants are tracking the Plaintiffs in a seeming effort to moot them out of this case. *See* Exs. 57, 58. The proposed class representatives have faced, or are facing, the same kinds of unreasonable burdens that unnamed class members will face, and Defendants' apparent gamesmanship is precisely why Plaintiffs have standing as class representatives, and why class certification is so important.

[7] Defendants fault Plaintiffs' attorneys for instructing DMV not to contact Switlick directly, but Defendants are well aware that it is unethical for them to contact parties who are represented by counsel, *see* Wisconsin Supreme Court Rule (SCR) 20:4.2, and Switlick had already gone to the DMV "a number of times," Ex. 1003:3-A-138. Defendants furthermore do not dispute that the petition process is unavailable for voters like Switlick who lack proof of identity.

IV. THIS COURT SHOULD GRANT PLAINTIFFS LEAVE TO FILE A SUPPLEMENTAL PLEADING

This Court should further grant Plaintiffs leave to file a supplemental pleading. Defendants do not, because they cannot, dispute that adding new parties in a supplemental pleading is permitted when such parties have been recently harmed. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964). Leave is necessary because Defendants continue to argue, erroneously, that longstanding proposed class representatives Frank, Brown, and Smith lack standing solely because some of them obtained ID well after Plaintiffs filed their original class certification motion, while the new proposed Plaintiffs currently lack ID. The factual issues raised by the new proposed Plaintiffs are straightforward and will not unduly prejudice Defendants, and none of them are plaintiffs who have brought claims in other cases.

V. PLAINTIFFS SATISFY THE PREREQUISITES FOR CLASS CERTIFICATION

Finally, Plaintiffs have satisfied the prerequisites for class certification. Defendants feign ignorance about which of the three categories the new proposed Plaintiffs fall into, D.Br. at 27-28, but Plaintiffs explicitly addressed this in their opening brief, P.Br. at 26-27. They next argue that Plaintiffs' proposed class is "too vague, indefinite, and unmanageable" for the sole reason that "Plaintiffs fail to define name mismatch." D.Br. at 28. The answer is simple: a name mismatch occurs when the names do not match. And the string of questions sarcastically posed by Defendants ("Is one letter wrong sufficient? Do the first and last names have to be swapped? Who decides? This Court? DMV? A local election official?") is ironic, because they illustrate perfectly the inevitable discretionary problems that will be caused by Boardman's last-minute and confusing one-letter policy—the very same problems that require relief for this class.

Defendants next argue that the class lacks commonality because the class members do not suffer the same injury. But all class members are injured by the same unreasonable DMV

procedures, and all class members have a "common contention that is capable of class-wide resolution," *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015), namely, that DMV's procedures—which subject class members to standardless discretion pursuant to DMV policy (categories 1, 3) or issue no ID at all (categories 1, 2)—do not alleviate the unreasonable burdens faced by the class. *See, e.g., Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 436-40 (7th Cir. 2015). Typicality is satisfied because the types of burdens faced by the proposed class representatives fairly reflect the burdens imposed on the remaining class members. As for numerosity, Defendants barely engage with the evidence Plaintiffs have provided in support, D.Br. at 29, which is based on hard survey data and testimony *from DMV officials themselves* about the frequency with which they have encountered voters in Plaintiffs' proposed class, P.Br. at 24-25; *see also* Ex. 1017 (over 100 petitions pending, suspended, or denied). And Defendants' conclusory arguments about the Rule 23(b)(1) and (b)(2) prerequisites simply rehash their failed vagueness argument. D.Br. at 29-30.

CONCLUSION

Defendants' repeated characterization of DMV's efforts as "heroic," D.Br. at 1, 18, is deeply ironic since Defendants have crowed for years about how supposedly easy it is for everyone to get ID. Vulnerable voters should not have to exert Herculean efforts to exercise their fundamental right to vote, and the DMV's Sisyphean attempts to manage this process have been futile. For the above reasons, this Court should grant Plaintiffs' motion for a preliminary injunction, leave to file a supplemental pleading, and class certification.

Dated this 6th day of July 2016,

Respectfully submitted,

/s/ Sean J. Young

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