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

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

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

Plaintiffs did not prove their dozens of legal claims challenging a host of election laws enacted since 2011. The trial evidence showed that Wisconsin elections are fair, easy to navigate, and open to all. The Court should enter judgment in Defendants' favor as to all pending claims.

To start, Plaintiffs did not prove that they have standing to challenge the voter photo ID law, 2011 Wisconsin Act 23 ("Act 23"). Of the Plaintiffs who testified at trial, all have a qualifying ID (and in some cases, multiple forms of qualifying ID). When even the testifying Plaintiffs cannot prove they will be injured by the law, how can they credibly argue that it should be struck down? They are not burdened by a photo ID requirement—they just need to remember to bring their qualifying IDs to the polls. The Court lacks jurisdiction over claims against the voter photo ID law when no Plaintiff has proven he has standing to challenge it.

Jurisdictional issues aside, Plaintiffs have not proven that the voter photo ID law, changes to absentee voting, changes to voter registration and residency requirements, and other miscellaneous election administration laws violate the U.S. Constitution or Section 2 the Voting Rights Act of 1965. The trial evidence proved that voter turnout in Wisconsin has climbed—to historic levels in April 2016—even after implementation of the challenged laws. The use of absentee voting has continued to increase across the demographic

groups relevant for purposes of analyzing Plaintiffs' claims. Plaintiffs' apparent argument is that voter turnout and absentee-voting rates would have increased *more* if the challenged laws were not enacted. The lack of proof for such untestable claims was confirmed at trial.

As the Court sifts through and winnows the trial evidence, a theme will emerge: Plaintiffs' trial proof is primarily anecdotes. An individual voter may have experienced a problem. A witness may have observed a relatively small number of voters who experienced another problem. Or a state legislator may have made an off-hand or silly remark. These strands of evidence, really isolated blips on the radar, are insufficient to prove Plaintiffs' allegations of widespread constitutional and statutory violations that would justify that the challenged laws be struck down on their face, as to *all* voters. An anecdote is not evidence of a systemic burden on voters. It is not the type of proof that satisfies Plaintiffs' burden to obtain facial invalidation of these laws.

Wisconsin continues to be a national leader in election administration and voter turnout. Plaintiffs' multitude of constitutional and statutory claims buckle under the weight of the trial evidence, which proved that the challenged election laws are both constitutional and consistent with the Voting Rights Act. The Court should enter judgment in Defendants' favor.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In Count 1 of the Second Amended Complaint, Plaintiffs raised a series of claims under Section 2 of the Voting Rights Act of 1965. Section 2(a) of the Voting Rights Act states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

52 U.S.C. § 10301(a).

A violation of Section 2(a) of the Voting Rights Act is established "if, based upon the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

In Counts 2, 3, 4, 5, and 6 of the Second Amended Complaint, Plaintiffs raised a series of claims under the First, Fourteenth, Fifteenth, and Twenty-sixth Amendments to the U.S. Constitution. Those Amendments state, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. Const. amend. XV, § 1.

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

U.S. Const. amend. XXVI, § 1.

FACTUAL BACKGROUND

Consistent with this Court's order, Defendants will not submit proposed findings of fact. (May 27, 2016, order, Dkt. 198:1.) Salient facts for the Court to find will be described in the Argument section below.

ARGUMENT

I. Jurisdiction and standing

Article III of the U.S. Constitution confines the federal courts to adjudicating actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1.

"[T]he requirements of Article III case-or-controversy standing are threefold: (1) an injury in-fact; (2) fairly traceable to the defendant's action; and (3) capable of being redressed by a favorable decision from the court." *Parvati Corp. v. City of Oak Forest*, 630 F.3d 512, 516 (7th Cir. 2010) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)).

A. Plaintiffs did not prove that they have standing to challenge the voter photo ID law.

No testifying Plaintiff lacks a form of Act 23 qualifying ID. There are no Plaintiffs who proved at trial that they have Article III standing to challenge the voter photo ID law. Accordingly, the Court lacks jurisdiction over claims challenging the voter photo ID law.

A voter who is not injured cannot show "that the challenged action of the defendant caused an 'injury in fact' that is likely to be redressed by a favorable decision." *Judge v. Quinn*, 612 F.3d 537, 544 (7th Cir. 2010), *opinion amended on denial of reh'g*, 387 F. App'x 629 (7th Cir. 2010). Such an individual has no Article III standing.

Four voter Plaintiffs testified at trial: Renee M. Gagner, Anita Johnson, Cassandra M. Silas, and Jennifer S. Tasse. No other individual voter Plaintiffs testified, but Plaintiff Scott T. Trindl filed deposition designations with the Court. In his deposition, Mr. Trindl confirmed that he has a form of qualifying ID, a Wisconsin driver license. (Trindl Depo., Dkt. 180:80.) Plaintiffs Cody R.

Nelson, Michael R. Wilder, Johnny M. Randle, David Walker, and David Aponte did not testify to prove they lack qualifying ID.

All individual voter Plaintiffs have a qualifying ID. Defendants' exhibit 22 is a copy of certified driver records from the Wisconsin DMV showing the qualifying IDs issued to Plaintiffs Gagner, Johnson, Nelson, Tasse, Trindl, and Wilder. (DX22:1–13.) Likewise, Defendants' exhibit 130 contains interrogatory responses in which Plaintiffs Gagner, Johnson, Nelson, Tasse, Trindl, and Wilder stated that they have forms of qualifying ID to vote. (DX130, Response to Interrogatory No. 10.)

Plaintiffs Aponte, Randle, Silas, and Walker have a state ID card receipt that was issued after the Wisconsin DOT promulgated administrative rules on May 13, 2016, that are applicable to ID petition process ("IDPP") petitioners. (DX272–DX275; PX445:1–8.) While the receipt expires in 60 days, it will be renewed. (DX268:20–21 (May 13, 2016, emergency rule).) DMV will continue to re-issue receipts without the petitioner needing to apply for a renewal. (Tr. 05-23-16 at 9 (Boardman testimony).)[1] Even if these four Plaintiffs do not receive their plastic state ID cards in time for the November 2016 general election, renewals of their state ID card receipts will permit them to prove their

[1] Citations are to the draft trial transcripts. The following citation formats are used in this brief: "Tr. [date], [day of trial]-['A' for a.m., 'P' for p.m.]-[page number]" and "Tr. [date] at [page number]."

identities to vote on Election Day. They are not threatened with an injury by the voter photo ID requirement.

The corporate Plaintiffs, One Wisconsin Institute, Inc. ("One Wisconsin") and Citizen Action of Wisconsin Education Fund, Inc. ("Citizen Action"), have no right to vote. They are not injured by a requirement that voters show a qualifying ID to vote. Likewise, these Plaintiffs offered no evidence to prove they have standing to assert their members' rights. These Plaintiffs have no members. (DX130, Response to Interrogatory Nos. 18–20 (stating that One Wisconsin and Citizen Action do not have members).) The corporate Plaintiffs did not prove that their members lack qualifying ID.

This Court was wrong when it held that voters who have a qualifying ID have Article III standing to challenge the voter photo ID law. (*See* May 12, 2016, opinion and order, Dkt. 185:10.)

A voter is not injured by a photo ID requirement when he has ID, even if the ID will expire in the future.

No Plaintiff proved an injury that confers Article III standing to challenge the voter photo ID law. Accordingly, the Court lacks jurisdiction over claims challenging the voter photo ID law, the claims should be dismissed, and judgment should be entered in Defendants' favor.

Finally, additional standing arguments are raised in the Argument sections below. There are several claims for which no Plaintiff proved an injury to establish Article III standing and this Court's jurisdiction.

B. No Plaintiff is an "aggrieved person" under the Voting Rights Act to challenge the voter photo ID law.

Related to (but legally different from) the Article III standing issue is the fact that no Plaintiff proved he is an "aggrieved person" under the Voting Rights Act to challenge the voter photo ID law.

Only an "aggrieved person" or the U.S. Attorney General may sue to enforce the guarantees of the Voting Rights Act. 52 U.S.C. § 10302(a), (b). Therefore, statutory standing under the Voting Rights Act for private litigants is limited to an "aggrieved person" seeking to enforce his or her right to vote. 52 U.S.C. § 10302(a), (b); *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). "Aggrieved persons" are those persons who claim that their right to vote has been infringed because of their race. *Id.*

No individual voter Plaintiff proved he or she is an "aggrieved person" because Plaintiffs have a form of Act 23 qualifying ID, in particular an ID that can be used in upcoming 2016 elections. The individual voter Plaintiffs who testified at trial or otherwise lodged evidence in the trial record cannot maintain a Voting Rights Act claim against the voter photo ID law because they have not proven that they will be aggrieved by it.

Standing under the text of the Voting Rights Act does not extend to non-persons like the two corporation Plaintiffs, which have no race and no right to vote. *See Roberts*, 883 F.2d at 621. They cannot be an "aggrieved person" under the plain language of the Voting Rights Act. 52 U.S.C. § 10302(a), (b). One Wisconsin and Citizen Action cannot assert a Section 2 claim to challenge the voter photo ID law.

There are no Plaintiffs who proved at trial that they are an "aggrieved person" who can enforce a claim to challenge the voter photo ID law under the Voting Rights Act. The Court should dismiss Plaintiffs' Section 2 claim challenging the voter photo ID law and enter judgment in Defendants' favor.

II. "Undue burden" claims under the First and Fourteenth Amendments (Count 2)

Whether considered individually or cumulatively, none of the challenged laws creates an undue burden on the right to vote in violation of the First and Fourteenth Amendments. Plaintiffs challenge a host of laws in Count 2 of the Second Amended Complaint, including the voter photo ID law, absentee voting laws, voter registration laws, and other miscellaneous election laws. For the Court's reference, Dkt. 79-1:2 is a chart Defendants filed with their summary judgment papers showing all of the claims and legal theories Plaintiffs raised.

A. Legal standard for "undue burden" claims under the First and Fourteenth Amendments

The U.S. Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," but this right "is not absolute." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "[T]he States have the power to impose voter qualifications and to regulate access to the franchise in other ways." *Id.* When the Supreme Court considers a challenge to a voting regulation under the First and Fourteenth Amendments, it thus applies "more than one test, depending upon the interest affected or the classification involved." *Id.* at 335.

The Supreme Court has rejected a "litmus-paper test" for "[c]onstitutional challenges to specific provisions of a State's election laws" and instead has applied a "flexible standard." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008) (opinion of Stevens, J.). Under the *Anderson*/*Burdick* test, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190.

The Seventh Circuit stated the applicable test in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d

913 (7th Cir. 2015). When considering a constitutional challenge to a state election law, the Court must weigh:

> "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. at 917 (quoting *Burdick*, 504 U.S. at 434). "This balance means that, if the regulation severely burdens the First and Fourteenth Amendment rights of voters, the regulation 'must be narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Burdick*, 504 U.S. at 434). "When the state election law 'imposes only reasonable, nondiscriminatory restrictions upon the rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434).

B. Voter photo ID does not impose an "undue burden" on the right to vote.

Plaintiffs ask the Court to strike the voter photo ID law down as unconstitutional on its face. (Second Am. Compl., Dkt. 141:70 (prayer for relief).) Applying the *Anderson/Burdick* test, the U.S. Supreme Court's decision in *Crawford*, and the Seventh Circuit's decision in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), this Court should conclude that the voter photo ID law is constitutional.

Frank held that the voter photo ID law is constitutional under the same legal theory advanced here, and this Court is bound by *Frank*. The trial evidence proved that, as time has passed, fewer and fewer Wisconsin voters are without qualifying ID. The evidence in *Frank* was insufficient to prove that the law is unconstitutional. Based upon the more current data since *Frank*, Plaintiffs' trial evidence was even less convincing, so the result should be the same under the *Anderson/Burdick* test. The law should be upheld.

1. The State has legitimate and important interests supporting a voter photo ID requirement.

The State has legitimate and important interests supporting a voter photo ID requirement:

- a voter photo ID requirement helps detect, deter, and prevent in-person voter impersonation fraud;
- a voter photo ID requirement deters and helps detect other types of voter fraud because a voter intending to commit fraud will have to identify himself with an ID card at the polls;
- a voter photo ID requirement promotes public confidence in the integrity of the election process; and
- a voter photo ID requirement promotes orderly election administration and accurate recordkeeping.

The U.S. Supreme Court has recognized these compelling State interests. In *Crawford*, the Court recognized the legitimacy and importance of the State's interests in preventing fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of the election process. *Crawford*, 553 U.S. at 191–97 (opinion of Stevens, J.). The Court did not require the State to present evidence to justify those interests, but rather said:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 196; *see also Burson v. Freeman*, 504 U.S. 191, 199 (1992) (observing that an important component of a State's compelling interest in regulating elections is "ensuring that an individual's right to vote is not undermined by fraud"). The Court has readily acknowledged the independent importance of the State's interest in promoting public confidence in the integrity of the electoral process. *Id.* at 197; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel

disenfranchised."); *Eu v. S.F. Cty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process").

Other post-*Crawford* decisions in voter photo ID cases have recognized the same state interests with equal readiness. *See*, *e.g.*, *Frank*, 768 F.3d at 750–51; *City of Memphis v. Hargett*, 414 S.W.3d 88, 103–05 (Tenn. 2013); *South Carolina v. United States*, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011); *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 767–69 (Ind. 2010); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353–54 (11th Cir. 2009). After *Crawford*, the State's interests are not subject to debate.

Plaintiffs will argue that the State's interest in preventing voter fraud is not legitimate enough to justify a voter photo ID requirement because there is scant evidence of recent instances of voter impersonation fraud in Wisconsin. That argument fails.

First, the argument has been specifically rejected in *Crawford* and *Common Cause/Georgia*. *See Crawford*, 553 U.S. at 191–97; *Common Cause/Georgia*, 554 F.3d at 1353–54. The Seventh Circuit's decision in *Crawford* pointed out that, in the absence of effective voter ID procedures, voter impersonation fraud is very difficult to detect. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 953–54 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008).

The trial evidence confirmed the difficulty in detecting this kind of fraud. Referring to instances of so-called "stolen votes" (also known as voter impersonation fraud), Milwaukee County Assistant District Attorney Bruce Landgraf testified that in 2008 his office received approximately ten referrals for "stolen votes," in 2012 approximately ten referrals, and in 2014 one referral. (Tr. 05-25-16, 8-A-186–87.) Eighty to ninety percent of these referrals "are resolved with innocent explanations." (Tr. 05-25-16, 8-A-187.) But for the 2012 and 2014 elections, "one or two would remain unexplained. There was—there normally is never an explanation that can be determined and they remain unexplained and unresolved." (Tr. 05-25-16, 8-A-187–88.) "It's very difficult to make an identification of a person who would come in and cast a ballot in the name of another individual." (Tr. 05-25-16, 8-A-188.) Thus, some impersonation fraud cases cannot be investigated and prosecuted.

Plaintiffs' expert, Dr. Lorraine Minnite, agreed that voter fraud "has happened occasionally." (Tr. 05-20-16 at 61.) She agreed that the existence of fraudulent votes could affect the outcome of a close election, "theoretically." (Tr. 05-20-16 at 61–62.) While her admission that voter fraud is real was tepid, Dr. Minnite was familiar with at least one recent Wisconsin case of fraud that met her definition of "voter fraud." (Tr. 05-20-16 at 62–64 (discussing the case of Robert D. Monroe).)

Assistant District Attorney Landgraf detailed at trial the case of Robert D. Monroe of Shorewood, who committed voter impersonation fraud by using absentee ballots. (Tr. 05-25-16, 8-A-184–86; *see also* DX149–153.) Mr. Monroe filled out absentee ballot applications using the names of his son and stepson, voting using the ballots sent to him. (Tr. 05-25-16, 8-A-184–85.) At the time he committed these crimes, the voter photo ID law was not in place, so Mr. Monroe was not required to submit copies of qualifying ID with the absentee ballot applications. (Tr. 05-25-16, 8-A-185.)

The infrequency of such prosecutions, without more, is insufficient to confirm that such fraud does not exist or that there is no legitimate and important interest in preventing potential fraud. Notably, the Supreme Court deemed such an interest valid despite the fact that the *Crawford* "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194.

Moreover, even if voter impersonation fraud could be affirmatively shown to be rare in Wisconsin at the present time, history nonetheless shows such fraud to be a real and significant danger. The Supreme Court has expressly recognized that danger and has held that states have a legitimate and important interest in addressing it by imposing reasonable photo identification requirements that will prevent such fraud. *Crawford*, 553 U.S. at 195 (noting that "flagrant examples of such fraud in other parts of

the country have been documented throughout this Nation's history by respected historians and journalists" (footnote omitted)).

Constitutional principles do not require a state to wait until a particular type of voter fraud has become an unmanageable problem before it takes reasonable affirmative steps to prevent such fraud. The Supreme Court has held that legislatures may be proactive in their efforts to prevent fraud. In *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986), the Supreme Court held that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." As James Madison noted, men are not angels, and sound government must be structured in light of that realistic understanding. *See* The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). Elections provide the means to acquire political power, and history teaches that some people are willing to violate the law for such ends. States need not wait until after they have been robbed before locking the door.

Additionally, it is not true that voter photo ID requirements protect against *only* the type of fraud in which a would-be voter tries to impersonate another individual on the poll list. Photo ID requirements also provide protections against unlawful voting under invalid voter registrations. For example, photo ID requirements will make it easier to identify and prevent

unlawful voting by a registered voter who has subsequently been convicted of a felony or by a person who is not a U.S. citizen, but who has established residency in Wisconsin and has managed to register to vote in the past. Similarly, photo ID requirements will help to deter and prevent: (1) unlawful voting by registered Wisconsin voters who no longer maintain residency in this State but have not yet been removed from the poll list; and (2) unlawful double voting by individuals who register to vote in more than one state.

Voter fraud occurs in Wisconsin, and Act 23's voter photo ID requirement helps detect, deter, and prevent it. Assistant District Attorney Landgraf testified about other forms of election fraud that he has investigated and prosecuted, including voting by disqualified persons and multiple voting. (Tr. 05-25-16, 8-A-174–75.) Copies of the criminal complaints and related documents from Milwaukee voter fraud cases were admitted into the trial record as Defendants' exhibits 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, and 160. (*See also* DX288 (e-mail detailing voter fraud prosecutions); DX289 (spreadsheet detailing voter fraud prosecutions).) Some of these cases might have been deterred by Act 23's voter photo ID requirement, had it been in effect. Requiring voters to show a photo ID provides valuable evidence to election officials that a voter was at the polling place. Someone who is required to identify himself to election officials is less likely to attempt fraud.

The State also has a legitimate and important interest in promoting public confidence in. *Crawford*, 553 U.S. at 197. The Supreme Court noted:

> public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Id. (quoting National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 1618 (2002)); *see also Purcell*, 549 U.S. at 4 ("A State indisputably has a compelling interest in preserving the integrity of its election process").

Voter photo ID requirements are favored by the public. Marquette Law School Polls conducted October 23 through 26, 2014, showed that, in Wisconsin, 60.4% of likely voters and 59.8% of registered voters favor a photo ID requirement to vote. (DX142:13; DX254:13.) A 2012 Pew Research Center poll showed that, by a margin of "77% to 20%, voters favor a requirement that those voting be required to show photo ID." (DX143:1.) The same poll found that "95% of Republican voters say a photo ID should be required to vote, as do 83% of independents. By comparison, 61% of Democrats who say photo identification should be required; 34% say it should not." (*Id.* at 2.) These numbers suggest that voter photo ID requirements are preferred and instill voter confidence in elections.

2. Alleged burdens of a voter photo ID requirement

The next step in the *Anderson/Burdick* test is to identify the burdens that the challenged law could place on voters. The Court received evidence at trial regarding the alleged burdens of the voter photo ID law. A starting point in the analysis is the number of registered Wisconsin voters who lack either of the two most common forms of qualifying ID: a state ID card or a Wisconsin driver license, both issued by the Wisconsin DMV.

a. Possession rates of qualifying ID and the mitigating impact of the free state ID card program

Approximately 4.2 million people have a Wisconsin driver license. (Tr. 05-23-16 at 93 (Boardman testimony).) That is about 95 percent of the people over age 18 in the State, based upon a rough estimate that there are 4.4 million people in Wisconsin over age 18. (Tr. 05-23-16 at 93.)

The State's expert, Dr. M.V. Hood III of the University of Georgia, testified at trial and submitted a report stating his estimate of the number of registered voters who lack either a Wisconsin driver license or state ID card issued by the Wisconsin DMV. Pages 23 through 31 of his report walk through the analysis that he completed, and that analysis will not be repeated here. (DX1:24–32.)

It is important to note that Dr. Hood went one step beyond Plaintiffs' expert, Dr. Kenneth Mayer, in completing a "matching" analysis that merged

the DMV customer databases for state ID cards and driver licenses with the Wisconsin Government Accountability Board's ("GAB's") Statewide Voter Registration System (SVRS) database. Whereas Dr. Mayer stopped once his matching analysis was complete, Dr. Hood found that, after he could no longer match records, he was nonetheless left with a large number of SVRS records that had unique state identification numbers, suggesting that these individuals might also have DMV products. Dr. Hood sent this list back to DMV to determine if the records could be matched to the SVRS data. (DX1:30.) This was the DOT "secondary match" that Dr. Hood incorporated into his ultimate findings. (*Id.*)

Wisconsin DOT computer programmer Fred Eckhardt described how the "secondary match" was completed. (Tr. 05-19-16, 4-P-189–211.) Mr. Eckhardt received a file that included approximately 119,000 entries from the SVRS database. (Tr. 05-19-16, 4-P-192.) He was asked to determine whether any of the entries had a Wisconsin driver license or state ID card that was valid on November 4, 2014. (Tr. 05-19-16, 4-P-192.) He ran a program that used the unique state identification number for the individual records to try to link the 119,000 entries to a historical entry in DMV's database. (Tr. 05-19-16, 4-P-192–94.) A common instance of such a match would occur when an individual changes his or her last name—the individual's unique state identification number would not change, but he or she would be issued a new

driver license or Wisconsin state ID card number. (Tr. 05-19-16, 4-P-194.) By using the DMV database that showed each customer's unique state identification number, Mr. Eckhardt was able to determine if any of the 119,000 unmatched individuals from SVRS possessed a valid driver license or state ID card as of November 4, 2014. (Tr. 05-19-16, 4-P-192–94, 198–99.)

DOT's secondary match identified an additional 89,077 records that were a voter with qualifying ID. (DX1:31.) Mr. Eckhardt also identified 23,740 of the 119,000 records that had no qualifying ID for voting, and 6,604 records with no record of any DMV product. (Tr. 05-19-16, 4-P-192–94.)

In Table 9 from his report, reproduced below, Dr. Hood summarized his findings with regard to how many registered voters lack a Wisconsin driver license or state ID card:

Table 9. Final Results of DMV Record Match

	Number of Records	Percent of Total Registrants
Initial Record Match	3,137,939	92.83%
DOT Secondary Match	89,077	2.64%
Total Matches	3,227,016	95.46%
No Match	153,316	**4.54%**
Total Registrants	3,380,332	----

(DX1:32.) Dr. Hood concluded that 153,316, or 4.54% of Wisconsin registered voters, lack either a state ID card or a driver license, based upon an analysis

of GAB and DMV data current as of fall 2015. (*Id.*) This compares to Dr. Mayer's findings of 283,346 voters and 8.38%, respectively. (*Id.*)

In *Frank*, the Seventh Circuit accepted for purposes of review the district judge's finding of fact that there were 300,000 voters (roughly 9% of all registered voters) who lacked qualifying ID. *Frank*, 768 F.3d at 746, 748. Even based upon Dr. Mayer's findings here, there is a downward trend in non-possession rates from *Frank* to now. Based upon Dr. Hood's findings—which should be adopted—the trend is starkly downward and suggests that the population lacking qualifying ID is dwindling rapidly.

Of course, there are other forms of Act 23 qualifying ID in addition to Wisconsin driver licenses and state ID cards. The list of qualifying IDs now includes (1) a Wisconsin driver license; (2) a Wisconsin state identification card; (3) a U.S. military identification card; (4) a U.S. passport; (5) a certificate of U.S. nationalization issued not earlier than two years before the date of the election; (6) an unexpired Wisconsin driver license receipt; (7) an unexpired Wisconsin identification card receipt; (8) an identification card issued by a federally recognized Indian tribe; (9) an unexpired identification card issued by an accredited college or university in Wisconsin, if it meets certain criteria; and (10) an unexpired veterans ID card issued by the federal department of veterans affairs. Wis. Stat. § 5.02(6m)(a)–(g). Veterans ID cards were added to the list by the Legislature in March 2016. *See* 2015 Wis. Act 261, § 2. As of

February 2016, technical college ID cards were recognized as a form of qualifying ID by a permanent GAB administrative rule. *See* Wis. Admin. Code ch. GAB 10.

Dr. Hood could not provide an estimate of the number of Wisconsin voters who have, for example, a U.S. passport or a military ID but no other qualifying ID. Nonetheless, it was his opinion that the estimates he and Dr. Mayer made necessarily overstate the number of voters who lack a qualifying ID because some voters have these other forms of qualifying ID. (*See* Tr. 05-24-16, 7-P-172; *see also* DX1:27–28, 31.)

Dr. Hood opined that the Wisconsin DMV's free state ID card program has been a mitigating factor that decreases the burden of the voter photo ID law for many voters. (Tr. 05-24-16, 7-P-186; *see also* DX1:32.) He analyzed DMV data current through April 2016 and produced a demonstrative exhibit that shows the number of free state ID cards issued by DMV, with a breakdown of IDs issued by type and race of the customer:

Racial/Ethnic Breakdown for No-Fee State ID Cards Issued by Wisconsin DMV, July 2011-April 2016

Race/Ethnicity	Original	Duplicate	Renewal	Other	Total	% CVAP
White	58.3%	34.8%	55.0%	30.0%	45.3%	88.0%
	[74,615]	[77,518]	[37,813]	[160]	[190,106]	
Black	**28.1%**	52.6%	33.5%	57.6%	**42.0%**	5.6%
	[35,934]	[117,155]	[23,018]	[307]	[176,414]	
Hispanic	**9.2%**	8.8%	7.3%	8.8%	**8.7%**	3.2%
	[11,761]	[19,516]	[5,034]	[47]	[36,358]	
Asian	2.4%	0.8%	1.1%	0.8%	1.3%	1.4%
	[3,002]	[1,867]	[773]	[4]	[5,646]	
American Indian	2.1%	3.0%	3.1%	2.8%	2.8%	0.8%
	[2,626]	[6,743]	[2,153]	[15]	[11,537]	
Minority	41.7%	65.2%	45.0%	70.0%	54.7%	11.0%
	53,323	[145,281]	[30,978]	[373]	229,955	
Total	**127,938**	222,799	68,791	533	**420,061**	

Sources: Wisconsin Department of Transportation. 2010-2014 ACS Survey, U.S. Census Bureau.
Notes: The *Other* category includes reissuances and reinstatements.

(DX265.) From July 2011 through April 2016, DMV issued over 420,000 free state ID cards for voting, including almost 128,000 original cards. (*Id.*; *see also* Tr. 05-23-16 at 128–29 (Boardman testimony); DX168.)

To obtain a free state ID card, a customer can visit a DMV customer service center. The Wisconsin DMV has 91 field offices throughout the state, with roughly 350 to 370 people staffing those locations. (Tr. 05-23-16 at 91, 98.) Someone who wants to initiate the process of obtaining a free state ID card for voting does not need to go to a particular location. (Tr. 05-23-16 at 98.) By statute, each county in Wisconsin must have at least 20 hours per week of DMV field service. (Tr. 05-23-16 at 97). Many counties have more than that. (Tr. 05-23-16 at 97.) Milwaukee, for example, has six locations, most of which are open

from 8:30 a.m. to 4:45 p.m., Monday through Friday. (Tr. 05-23-16 at 97–98.) Defendants' exhibit 54 is a map showing the locations of DMV customer service centers. (DX54.)

DMV's website includes a wealth of information regarding how to obtain a state ID card or driver license, the hours and locations of customer service centers, related forms, etc. (DX25–34, 39–52.) Defendants' exhibit 31 is a website excerpt showing a search to find the nearest DMV. (DX31.)

The vast majority of customers who obtain a free state ID card for voting complete the standard MV3004 form. (DX28, 29 (Spanish version).) The form includes a box to check for a customer who is requesting a Wisconsin state ID card for free for the purpose of voting. (*Id.*) To obtain an ID card, an applicant must prove: name and date of birth, legal presence, residency, identity, and social security number. (Tr. 05-23-16 at 100); *see also* Wis. Admin. Code § Trans 102.15(3), (3m), (4), (4m), and (5).

Customers who lack necessary documents to obtain a free state ID card using the standard MV3004 form can initiate an ID petition by completing form MV3012. (DX51, 52 (Spanish version).) This is the ID petition process.

b. Plaintiffs' attack on the IDPP, a program established to help voters get free state ID cards for voting

Plaintiffs mounted a peculiar attack at trial, not on the voter photo ID law itself, or on the free state ID card program per se, but on the IDPP, a

process intended to mitigate some of the documentary burdens of getting a free state ID card. (*See* DX1:33 (Hood report).) The IDPP has been a resounding success that continues to assist the "tiny fraction of the voting population"—in the Court's words, Tr. 05-24-16, 7-P-193—who have confounding vital records issues.

The available data regarding the IDPP show the small number of DMV customers who have been impacted. From September 15, 2014, when the IDPP started, through May 12, 2016, there were a total of 1389 IDPP petitions filed. (DX280; *see also* Tr. 05-23-16 at 132.) Of those petitions, 1,132 were resolved by the issuance of a free state ID card, and 230 of those issuances were resolved by "adjudication" in the Wisconsin DMV's Compliance, Audit and Fraud Unit (CAFU). (DX280; *see also* Tr. 05-23-16 at 132.) As of May 12, 2016, 98 petitions were cancelled by the customer, 67 were pending, and 40 were suspended due to no response from the customer. (DX280.) There were a total of only 52 denials. (*Id.*) This does not mean that those 52 IDPP petitioners will not get a plastic free state ID card. (Tr. 05-23-16 at 134.) Those customers can re-engage the IDPP at any time and continue working toward getting a permanent state ID card. (Tr. 05-23-16 at 134.) Of the free state ID cards issued via the IDPP through May 12, 2016, only 62 required the use of "extraordinary proof," documents like family Bibles or hospital birth records. (DX280.)

During trial, the Court described the IDPP-related efforts of Wisconsin DMV's CAFU employees as "almost heroic" and then "heroic." (Tr. 05-19-15 at 4-A-104; Tr. 05-24-16, 7-P-192.) Those descriptions are on-point. CAFU employees Susan Schilz, Leah Fix, and Becky Beck testified at trial about the zealous measures that CAFU will pursue to track down documentation for customers so that a free state IDs can be issued.

CAFU investigators engage in varied efforts to help petitioners obtain ID. Ms. Beck testified about these efforts, including poring over ancient documents and forms, searching various databases, examining whatever personal documents a petitioner might provide, and following up with petitioners on each possible lead. (Tr. 05-25-16, 8-P-151–57.) IDPP investigations include acts like searching 1930s census information for evidence of birth. (Tr. 05-19-16, 4-A-103.) And these kinds of efforts are typical. (Tr. 05-19-16, 4-A-104.)

When investigating possible leads for obtaining needed documents, CAFU investigators will occasionally rely upon a CLEAR report, which provides comprehensive background information about an individual, including previous residences, names, aliases, known family members, and other potentially identifying information. (Tr. 05-24-16, 7-P-84; *see, e.g.*, DX290 (example of a CLEAR report).) Although CLEAR reports include criminal history, where available, CAFU never uses the criminal history information

when processing an IDPP petition. (Tr. 05-24-16, 7-P-94–95.) Information in a CLEAR report is never used as a basis to deny a petition, only as a lead to find helpful information. (Tr. 05-24-16, 7-P-94–95.)

For CAFU investigators, the goal of the IDPP is "[t]o get an ID issued for the petitioner." (Tr. 05-25-16, 8-P-146 (Beck testimony); *see also* Tr. 05-24-16, 7-P-65 (Fix testimony; same); Tr. 05-23-16 at 115 (Boardman testimony; same).) Ms. Beck testified about her efforts to assist Plaintiff Johnny M. Randle in getting an ID. Mr. Randle's situation is indicative of the kind of back-and-forth that CAFU will engage in with an IDPP petitioner, and sometimes the petitioner's friends or family.

In attempting to assist Mr. Randle with his IDPP petition, Ms. Beck contacted Mr. Randle multiple times, and ultimately informed him that he could obtain an ID by simply filling out a common-law-name-change affidavit. (Tr. 05-25-16, 8-P-158–59.) Mr. Randle's daughter, Nanette Mayze, filled out the affidavit once, but there were multiple errors on the form that prevented it from being processed. (Tr. 05-25-16, 8-P-160.) Thereafter, Ms. Beck sent Mr. Randle and his daughter a pre-filled form, with a stamped return envelope, which required only that either Mr. Randle sign it, or that his daughter sign as a valid power-of-attorney. (Tr. 05-25-16, 8-P-160–61.) Mr. Randle's daughter never expressed any confusion regarding what she was required to submit to show a valid power-of-attorney. (Tr. 05-25-16, 8-P-161.)

Neither Mr. Randle nor his daughter returned the form, and neither one responded to Ms. Beck's attempts to contact them regarding the final step before an ID could be issued. (Tr. 05-25-16, 8-P-160–61.) Kristina Boardman, DMV's Administrator, testified that if Mr. Randle had signed and returned the mostly completed common-law-name-change form that DMV sent, that Mr. Randle would get a free state ID card. (Tr. 05-23-16 at 134–35.)

Mr. Randle's daughter, Ms. Mayze, also testified at trial. Mr. Randle started the process of getting a Wisconsin state ID card in 2011. At that time, his motivation for getting the ID was not to vote—it was for another purpose. (Tr. 05-16-16, 1-A-135–36.) The motivation was the same in 2015, as Mr. Randle has never voted in Wisconsin. The voter ID process was just another way of getting a Wisconsin state ID card. (Tr. 05-16-16, 1-A-137.)

Even though Mr. Randle has had a copy of his birth certificate since 2011, he did not provide it to DMV right away or use it to fill out his IDPP petition. This caused inaccuracies on Mr. Randle's IDPP petition, including an incorrect county of birth, mother's maiden name, and father's first name. These inaccuracies also delayed the process because DMV was trying to find out the correct information. (Tr. 05-16-16, 1-A-139–41; *see also* DX211:1.)

Mr. Randle is unable to obtain a Wisconsin state ID card because the name on his birth certificate—Johnnie Marton Randall—is sufficiently different from the name on his social security card—Johnny Martin Randle.

(PX367:12, 14.) Mr. Randle's daughter, Ms. Mayze, was agreeable to filling out a common-law-name-change affidavit to cure this discrepancy, but she filled out the form incorrectly. (Tr. 05-16-16, 1-A-114–15; DX211:3.) When Ms. Beck assisted Ms. Mayze by typing in the correct information and mailing the form back to Ms. Mayze to complete, Ms. Mayze did not even look at the letter or attached common-law-name-change affidavit—she just set it aside. (Tr. 05-16-16, 1-A-116, 143; PX367:19–21.)

While Ms. Mayze claims she did not understand the common-law-name-change affidavit process, she did read the form's instructions before she signed it and had it notarized. (Tr. 05-16-16, 1-A-141; DX211:3.) She did not think to call Ms. Beck or anyone else at DMV to have them further explain the form. (Tr. 05-16-16, 1-A-143.)

Mr. Randle is agreeable to signing a document that says he wants to use the name he has always been known as, "J-O-H-N-N-Y M. R-A-N-D-L-E." He is willing to continue to work with DMV to complete that process through use of the common-law-name-change affidavit. (Tr. 05-16-16, 1-A-143–44.)

Ms. Schilz supervises the CAFU at Wisconsin DMV. (Tr. 05-19-16, 4-A-55–56.) CAFU became involved in the IDPP in September 2014. (Tr. 05-19-16, 4-A-56–57.) In addition to processing some IDPP petitions, CAFU investigates "internal and external fraud [at Wisconsin DMV], internal is employee

behavior and external is customers who misrepresent themselves or jump title or that sort of thing." (Tr. 05-19-16, 4-A-56.)

IDPP petitions involve unavailable birth certificates. That said, many IDPP petitions are resolved by the Wisconsin Department of Health Services (DHS) by locating a customer's vital record; these never reach CAFU. (Tr. 05-19-16, 4-A-62.) DHS processes a search for Wisconsin vital records very quickly. (Tr. 05-19-16, 4-P-30.) Vital records searches from other states are done through a database called EVVE, or by looking through records if the other state does not participate in EVVE. (Tr. 05-19-16, 4-P-29–30.)

Ms. Schilz was not aware of the races of IDPP petitioners, petitioners who were denied, or the proportion of IDPP petitioners who were born in states in the South where there used to be slavery. (Tr. 05-19-16, 4-A-65–68, 73, 100–01.) Ms. Boardman also testified that she was not familiar with the racial make-up of IDPP denials. (Tr. 05-23-16 at 61–62.)

Ms. Schilz testified about how she and her CAFU colleagues are personally invested in resolving IDPP petitions, but she and her colleagues still follow established procedures and DMV rules:

> One, I don't decide whether [IDPP petitions] are denied or suspended. The process that we've defined does. And these are the rules that we've been operating under. This is what DMV does. We authenticate people before we proceed to give them a product. So I believe it is a little personal. We get involved with these people, yes, but we've set up these guidelines and the unit that I supervise I expect them to follow the guidelines until they change or until we learn something new.

(Tr. 05-19-16, 4-A-88–89.) To establish a match for ID issuance purposes, CAFU must determine that the information a petitioner is providing matches with a birth record or some other secondary information. (Tr. 05-19-16, 4-A-87.) Ms. Schilz testified: "And there are no discrepancies so that you know, to maintain integrity in our database and in our functions that we don't allow a second identity to be developed. So we really want to get to what that individual wants and needs and still maintain that integrity." (Tr. 05-19-16, 4-A-87.) "The identity verification requirements are important to prevent someone from creating multiple identities, and also to protect the integrity of DMV's databases." (Tr. 05-19-16, 4-P-49.)

Cancelled IDPP petitions are canceled by a petitioner, who initiates the cancellation. (Tr. 05-19-16, 4-A-63.) Petitioners who die during the IDPP are put into cancelled status because it is the only category where there will be no further DMV action on the file. (Tr. 05-23-16 at 64–65.) A petition that is in "suspended" status becomes active again if there is any activity initiated by the customer. (Tr. 05-19-16, 4-A-90.) If a petition is categorized as "denied," and then the petitioner goes to a DMV customer service center with a birth certificate and gets an ID, the petition is removed from the denied category. (Tr. 05-19-16, 4-A-98.)

An application categorized as denied can become re-active if the customer communicates with CAFU and provides additional information. (Tr.

05-19-16, 4-A-91.) The application does not start over from scratch; all of the pre-denial information is retained and used by CAFU. (Tr. 05-19-16, 4-A-91.) An applicant who previously worked with CAFU does not need to re-start the process. CAFU will pick up the investigation again. (Tr. 05-19-16, 4-A-91–92.)

CAFU sometimes makes a recommendation to DMV to issue an ID, and that recommendation is declined. (Tr. 05-19-16, 4-A-89.) When that happens, CAFU continues to work on the case to get to "yes"—issuing an ID. (Tr. 05-19-16, 4-A-90.) There have been instances where a recommended issuance was declined, then returned to CAFU for further investigation, and ultimately, an ID was issued to the customer after more information was located. (Tr. 05-19-16, 4-P-99.)

Ms. Fix is a lead worker in CAFU and is responsible for managing and coordinating the workload of CAFU investigators, as well as developing training materials for CAFU investigators and other DMV workers involved in processing IDPP petitions. (05-24-16, 7-P-53–54.) CAFU team members meet at least twice per week to discuss IDPP petitions—once as a one-on-one with Ms. Fix, and once as the entire CAFU team. (Tr. 05-24-16, 7-P-55.) During these meetings, as well as in other informal meetings, CAFU team members collaborate and share ideas, with the goal of helping petitioners obtain IDs. (Tr. 05-24-16, 7-P-56.)

At the outset of the IDPP, CAFU investigators did not have any particular guidance about how best to help petitioners obtain IDs. (Tr. 05-24-16, 7-P-57.) Over the course of the past two years, the process has constantly evolved, and comprehensive procedures have been developed to better aid investigators in helping petitioners obtain IDs. (Tr. 05-24-16, 7-P-57–60.) The primary resource for processing ID petitions is a handbook that is continually updated, and is regularly used by all members of the CAFU team. (Tr. 05-24-16, 7-P-59–60; *see* DX 294.) Defendants' exhibit 294 shows CAFU's process for IDPP petitions, as of May 23, 2016. (DX294.) It directs CAFU staff:

> Note: Do not direct the customer to spend money in order to obtain additional documents. Remember the entire premise for this process is to not require a customer to pay for documents in order to obtain a free voter identification card.

(*Id.* at 7.)

Ms. Fix is responsible for monitoring errors that occur in the IDPP. (Tr. 05-24-16, 7-P-65.) Errors in the IDPP are tracked in a semi-annual error report. (Tr. 05-24-16, 7-P-67–68; *see* DX61 (August 2015 through January 2016 error report).) Of all the errors included in the error report, most are resolved in one hour or less, with the vast majority of the remainder being resolved within the next business day. (Tr. 05-24-16, 7-P-69–79.) Of those errors that might delay the petition process longer than one day, all involve an "error" in which the DMV service center did not receive necessary documents from the

petitioner, so any delay related to those errors will depend on how long it takes the petitioner to provide necessary documents. (Tr. 05-24-16, 7-P-69–79.) Likewise, the only way that one of these errors would result in non-issuance of an ID is if the customer does not return to a service center to provide necessary information. (Tr. 05-24-16, 7-P-79.)

The list of errors reported not only serves as a measure of which steps in the ID process are causing difficulty, but also as a training tool for DMV service center staff to better address the initial steps in the ID petition process. (Tr. 05-24-16, 7-P-69–80, 81.) The highest accuracy rate (*i.e.*, the lowest error rate) for DMV regions occurs in the region including Milwaukee. (Tr. 05-24-16, 7-P-81; DX61:2.) Ms. Fix believes that the current reporting period for errors indicates a downward trend in IDPP processing errors. (Tr. 05-24-16, 7-P-81.)

Ms. Fix testified about Plaintiff Cassandra Silas's IDPP petition. Ms. Fix noted the multiple contacts that CAFU investigators had with Ms. Silas. (Tr. 05-24-16, 7-P-83–84.) Ms. Fix also noted that Ms. Silas has not contacted anyone in CAFU since she was issued a free state ID card receipt. (Tr. 05-24-16, 7-P-86.) If Ms. Silas were to contact CAFU, her IDPP petition would be reactivated, and CAFU investigators could contact officials in Cook County, to obtain the documents needed to issue Ms. Silas an ID. (Tr. 05-24-16, 7-P-86.)

Ms. Silas also testified at trial. Ms. Silas wants a Wisconsin state ID card for several reasons—not just to vote. (Tr. 05-16-16, 1-A-175.) She had a copy of her birth certificate in the past, but she misplaced it. (Tr. 05-16-16, 1-A-167.) She may have also gotten a copy of her birth certificate herself while she was in Chicago. (Tr. 05-16-16, 1-A-168.) The IDPP petition Ms. Silas filled out contained inaccurate information, including an incorrect county of birth and mother's maiden name. (Tr. 05-16-16, 1-A-169.) Ms. Silas knew that her mother's maiden name was incorrect, but she does not know if she ever corrected that information with DMV. (Tr. 05-16-16, 1-A-170–71.) Ms. Silas also requested her school records with an incorrect spelling of her first name, *i.e.*, "C-A-S-S-A-N-D-E-R-A." (Tr. 05-16-16, 1-A-172–73.) These inaccuracies delayed the IDPP process. (Tr. 05-16-16, 1-A-173.)

On February 20, 2015, DMV staff contacted Cook County (Illinois) Hospital on Ms. Silas's behalf to try to get verification of a birth record. They were informed that the hospital could only release information to Ms. Silas. DMV relayed this information to Ms. Silas on March 2, 2015, and Ms. Silas said she would contact Cook County Hospital herself. (Tr. 05-16-16, 1-A-174; *see also* PX354:1.) But Ms. Silas never did try to contact Cook County Hospital. (Tr. 05-16-16, 1-A-175.) Ms. Silas is willing to continue to work with DMV and the IDPP to try to find her birth record. (Tr. 05-16-16, 1-A-176.)

On May 13, 2016, the Wisconsin DOT promulgated administrative rules relating to the IDPP. (DX268.) Significantly, the rules provide temporary free state ID card receipts to IDPP petitioners to be used for voting. (*Id.* at 20.) On May 13, 2016, DMV issued 146 such receipts to IDPP petitioners by U.S. Mail. (Tr. 05-19-16 at 4-A-93.) IDPP petitioners in pending, suspended, and denied statuses as of May 13, 2016, were issued state ID card receipts for voting. (Tr. 05-19-16, 4-A-96.) The only petitioners who did not get a receipt are those who were not eligible and those who initiated their own cancellations. (Tr. 05-19-16, 4-A-96.)

Under the rules, receipts are issued after five days because DMV has found that 60 percent of IDPP petitioners received their free state ID cards within five days or less, and the receipt timing was designed to give time for the majority of IDPP petitioners to get a permanent card before a temporary receipt is issued. (Tr. 05-23-16 at 72–73.) Ms. Boardman testified that, near an Election Day, DMV will issue a photo receipt by mail on the day that the customer submits an IDPP petition. This is not required by the rules, but it is permitted. (Tr. 05-23-16 at 73–74, 89.)

In sum, the IDPP should be viewed as a mitigating factor for the alleged burdens of the voter photo ID law. The IDPP itself, and the dedicated public servants at the Wisconsin DMV who administer the IDPP, should not be

heaped with scorn. The IDPP is not a problem; it is a solution that blunts the burdens faced by a tiny fraction of voters.

c. Another mitigating factor: GAB's voter photo ID education and outreach efforts

Those voters who already possess a form of Act 23 qualifying ID are not significantly burdened by the law.[2] They simply need to remember to bring their IDs to the polls on Election Day. The extensive training and education efforts made by GAB mitigate the minimal burden of remembering by ensuring that Wisconsin voters are educated about the law. *See* 2011 Wis. Act 23, § 144(1); Wis. Stat. § 7.08(12).

The Court heard testimony and received documentary evidence regarding the Bring It to the Ballot public information campaign. GAB witnesses Michael Haas, Elections Division Administrator, and Meagan Wolfe, Public Outreach Coordinator-Elections Specialist, testified about the extensive efforts that GAB has made since 2011 to educate voters and election officials throughout the State about the voter photo ID law (and other changes in the law). (Tr. 05-25-16, 8-P-25–31 (Haas testimony); Tr. 05-25-16, 8-P-79–94 (Wolfe testimony).)

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[2] The available scholarship finds that voter photo ID requirements have not been shown to discourage or deny many people from voting. Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: Political Science & Politics 127, 128–29 (Jan. 2009), found in the trial record at DX8.

With the assistance of a third-party contractor, GAB developed the Bring It to the Ballot campaign and revised its election official training materials in response to the Legislature's requirements. Ms. Wolfe testified at trial how GAB's public information campaign educates prospective voters and election officials about the voter photo identification requirement. (Tr. 05-25-16, 8-P-79–94.)

Ms. Wolfe and Allison Coakley, Elections Training Coordinator at GAB, described examples of some of the training and outreach media and materials that GAB produced, such as:

- The Bring It to the Ballot website, http://bringit.wisconsin.gov/, (excerpts at DX81–DX83; DX104 (Spanish language example));
- A series of informational videos (one was played at trial, Tr. 05-25-16, 8-P-83), TV ads, radio ads, posters, and Bring It to the Ballot brochures, (DX84 includes links to all of these materials);
- A toll-free hotline for voters, 1-866-VOTE-WIS, (Tr. 05-25-16, 8-P-74–76);
- E-mail addresses that voters and clerks can use to communicate their questions and other issues to GAB, (Tr. 05-25-16, 8-P-76);
- A Bring It to the Ballot resource guide, (DX87);
- A video, "Complete Guide to Voting and Photo ID in Wisconsin," (DX88), and related PowerPoint presentation, (DX89);
- Press releases regarding the voter photo ID law, (DX94–DX96; DX106);
- Election day manuals for Wisconsin election officials, (DX222; DX223);
- Webinars and related training materials and announcements sent to local election officials, (DX242–DX244); and

- FAQs regarding the voter photo ID law from a Webinar presentation, (DX245);

The GAB-witness trial testimony and exhibits illustrate the wide-ranging public information and education campaign that GAB created and implemented in 2011 through March 2012, when the law was enjoined until April 2015 (with a limited window of the law being un-enjoined in 2014), and that was reinstated with the voter photo ID law in force after the April 2015 election.

GAB requested $250,000 in additional funding on May 10, 2016. (DX266; Tr. 05-25-16, 8-P-31–33.) That request was approved by a unanimous vote of the Legislature's budget committee on June 13, 2016. Jason Stein, *Budget Panel Oks funds for voter ID education*, Milwaukee Journal Sentinel, June 13, 2016, available at http://tinyurl.com/hdp5nnp; *see also* http://tinyurl.com/jo5wrqu (Joint Committee on Finance meeting minutes). The GAB's successor agency can use this funding to run statewide TV, radio, and online public service announcements about the voter photo ID law. (*See* DX266:2.)

3. Voter turnout and provisional ballot usage show that the burden created by voter photo ID is minimal.

There have been three elections in which the voter photo ID law was enforced: February 2012, February 2016, and April 2016. The April 2016 election saw historic turnout. Plaintiffs' expert, Dr. Barry Burden, described

the aggregate turnout number for April 2016 as "astounding." (Tr. 05-17-16 at 39.) GAB estimated turnout at 47.5%, and it was the highest April primary turnout in 40 years. (DX171; Tr. 05-25-16, 8-A-26.) As Dr. Hood acknowledged, many factors drive voter turnout, and the competitive Democratic and Republican presidential primaries in April were certainly drivers of turnout. (Tr. 05-25-16, 8-A-27.) Nonetheless, Dr. Hood opined that "[t]his is the first I guess pretty major statewide election where the voter ID law was again in effect and it's hard to see the overall at least the negative consequences." (Tr. 05-25-16, 8-A-26.)

Provisional ballots cast are also a relevant measure of whether voters were burdened by the voter photo ID law. Under the voter photo ID law, a voter who does not possess a qualifying ID can vote a provisional ballot on Election Day and then must produce qualifying proof of identification no later than 4 p.m. on the Friday after the election for his ballot to be counted. Wis. Stat. § 6.97(3)(b).

Dr. Hood analyzed elections in which the voter photo law was implemented, and he found that the number of voters who voted provisionally because of the voter photo ID law was very small. (*See* Tr. 05-25-16, 8-A-20–26.) In the February 2016 non-partisan primary, there were a total of 91 provisional ballots cast for ID reasons out of 567,038 total ballots cast, or 0.016%. (DX170.) Of the provisional ballots, 62 were not counted. (*Id.*) In the

April 2016 presidential primary, there were a total of 375 provisional ballots cast for ID reasons out of 2,113,544 total ballots cast, or 0.018%. (DX170.) Of the provisional ballots, 278 were not counted. (*Id.*) Defendants' exhibit 169 is a chart prepared by Dr. Hood that demonstrates the very small numbers of provisional ballots cast in comparison to the total votes cast.

Defendants' exhibits 123 and 124 include data from GAB regarding provisional ballots cast by individual voter and municipality for the April 2016 election. The City of Madison saw 123 total provisional ballots cast; Milwaukee had 58. (DX124:1.)

Aggregate turnout and provisional ballots are relevant metrics of the potential burden that a voter photo ID requirement places on voters. And they show that voters are turning out in droves after implementation of the voter photo ID law and that very few voters used the provisional ballot option on Election Day.

4. Application of the *Anderson/Burdick* test

The last step in the *Anderson/Burdick* test is to determine whether the State's legitimate interests in the voter photo ID law are weighty enough, on balance, to justify the burdens on voters. The answer is yes.

The trial evidence proved that the voter photo ID law is even less burdensome on voters now than it was when *Frank* was decided. And the State's interests are no less important now than they were in *Frank*. On

balance, the Court should conclude that the voter photo ID law is constitutional under the *Anderson/Burdick* test and *Frank*.

Finally, there is no reason for the Court to enter "as applied" relief in this case as to the voter photo ID law. All the named Plaintiffs have qualifying ID, so there is no as-applied relief available to them. Furthermore, even if certain Plaintiffs could be viewed as unconstitutionally burdened by the voter photo ID law, this case is not a Rule 23 class action (unlike *Frank*, which was and is on remand). This Court has not been presented with evidence to show that Plaintiffs' particular circumstances would, pursuant to a proper showing under Rule 23, allow the Court to certify a class or classes to enter class-specific relief. There is simply no vehicle for the Court to fashion as-applied relief.

C. The challenged absentee voting laws do not create an "undue burden" on the right to vote.

Plaintiffs level a series of constitutional challenges to the Legislature's determination of when and where in-person absentee voting can occur in Wisconsin. But absentee voting is not constitutionally mandated. The Legislature authorized "no excuse" absentee voting as a privilege for voters; it is not a right.

As an initial matter, no Plaintiff has shown he is injured by the challenged absentee voting laws and, therefore, has Article III standing to challenge them. The Court lacks jurisdiction over these claims. Beyond

standing, Plaintiffs' trial proof as to their claims about absentee voting changes falls short. The data show that usage of absentee voting in Wisconsin continues to climb, even after implementation of these laws. Plaintiffs believe that absentee usage would climb *more* without the challenged laws, but that claim is unproven and unprovable.

1. Background on Wisconsin's permissive absentee voting system

Plaintiffs describe their absentee-voting claims in terms of "early" voting, which does not exist in Wisconsin. The legislative acts and corresponding statutes Plaintiffs challenge concern in-person absentee voting, which is distinct from "early" voting. *Compare* Wis. Stat. §§ 6.84–6.89, *with* Fla. Stat. § 101.657, *and* Alaska Stat. § 15.20.064. Wisconsin does not have "early" voting in the sense that there is an alternate time to cast a ballot than on Election Day. Instead, Wisconsin has liberal absentee voting procedures for electors who cannot vote in their ward's polling place on Election Day, or who are "unwilling" to do so. Wis. Stat. § 6.85(1).

Wisconsin's in-person absentee voting regime is highly permissive. An elector may vote absentee if he or she is unable or unwilling to appear at a polling place on Election Day "for any reason," and also for electors who move from one ward to another within 28 days of an election. Wis. Stat. §§ 6.85(1), (2). The elector does not even need to explain any necessity for absentee voting.

This type of no-questions-asked, "no excuse" absentee voting is common and is used by 27 states and the District of Columbia.[3]

Wisconsin's absentee voting laws are designed to encourage voting and to balance reasonable regulations with protections to ensure efficient and trustworthy elections. The Wisconsin Legislature enacted a policy statement that clarifies that absentee voting is a privilege, not a right:

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat § 6.84(1).

Consistent with the legislature's policy statement, there is no constitutionally protected right to vote absentee. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969) ("absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise."); *see also Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (affirming dismissal where "[i]n essence the plaintiffs [were] claiming a

[3] National Conference of State Legislatures, Absentee and Early Voting, http://tinyurl.com/k6faxfw (last visited June 16, 2016).

blanket right of registered voters to vote by absentee ballot"); *McDonald v. Bd. of Election Comm'rs of Chicago*, 277 F. Supp. 14, 17 (N.D. Ill. 1967), *aff'd* 394 U.S. 802 (1969) ("the privilege of absentee voting is one within the legislative power to grant or withhold"); *Snyder v. King*, 958 N.E.2d 764, 785 (Ind. 2011) (interpreting Indiana state law and concluding, "we perceive no state constitutional requirement that the General Assembly extend the absentee ballot to convicted prisoners"); *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963) (interpreting Kentucky law, holding "to vote by absentee ballot is a privilege extended by the Legislature and not an absolute right").

Plaintiffs' claims that electors' voting rights are being unconstitutionally usurped because of Wisconsin's absentee voting procedures fail. Plaintiffs do not contend that they are prohibited from voting by these rules. Instead, they suggest that certain reasonable changes to absentee voting since 2011 are unconstitutional. But each of the changes was prudent, nondiscriminatory, and within the scope of permissible management of elections that States conduct consistent with the Constitution.

Plaintiffs request that the Court micro-manage the ordinary and necessary logistics of the election process. As the Seventh Circuit stated, "it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting." *Griffin*, 385 F.3d at 1130. Wisconsin's absentee voting procedures are lawful and appropriate. They make

it easy for absentee voters to obtain, cast, and correct absentee ballots that are damaged or have certifications that contain technical defects. Plaintiffs' contrary arguments are meritless.

An elector who wishes to vote absentee has several ways to obtain a ballot. He or she may apply for an absentee ballot by mail, in person, by e-mail, or by fax. Wis. Stat. § 6.86(1)(a). An elector can even mail, fax, or e-mail a single application at the beginning of the year to get an absentee ballot for every election for the entire year. Wis. Stat. § 6.86(2m)(a). A disabled voter can apply to receive absentee ballots for all elections in the year of the application, plus all future elections in perpetuity. Wis. Stat. § 6.86(2). Mailed and electronic applications must be received by 5 p.m. on the fifth day preceding the election. Wis. Stat. § 6.86(1)(b). Defendants' exhibits 97 through 99 are GAB form 121, the Wisconsin Application for Absentee Ballot, in English, Spanish, and Hmong.

In-person applications for an absentee ballot may be submitted Monday through Friday, except legal holidays, between 8 a.m. on the third Monday preceding the election and 7 p.m. on the Friday preceding the election. Wis. Stat. § 6.86(b). In other words, electors have from 8 a.m. to 7 p.m. on weekdays for the two weeks prior to the election, excluding legal holidays, to obtain and vote an in-person absentee ballot.

A voter can receive an absentee ballot several ways. The clerk will mail a ballot or give it to the elector in person, unless otherwise requested by the elector. Wis. Stat. § 6.87(3)(a). A hospitalized elector may obtain a ballot through an agent. Wis. Stat. § 6.86(3)(a)1. An elector who is in the military or who lives overseas permanently can receive an absentee ballot by fax or electronic transmission. Wis. Stat. § 6.87(3)(d). Residents of certain residential care facilitate and retirement homes may receive an absentee ballot via a special registration deputy. Wis. Stat. § 6.875(6)(c)(1). Sequestered jurors may vote at court during a recess. Wis. Stat. § 6.86(1)(b). Most relevant here, when a voter applies in-person for an absentee ballot, an election official can hand that person a ballot on the spot, and the voter can immediately complete and return the absentee ballot.

Each absentee ballot contains a certificate indicating that the elector voted and met certain voting requirements. Wis. Stat. § 6.87(2). It is filled out partially by the elector and partially by the local election official for in-person applications. Wis. Stat. § 6.87(2). Overseas and military voters who return a ballot by mail fill out the certificate. Wis. Stat. §§ 6.24(4)(d), 6.87(3)(d).

2. Expert evidence regarding absentee voting showed that absentee voting rates continue to rise in Wisconsin.

The State presented expert testimony and expert reports that demonstrate that absentee voting in Wisconsin has continued to increase.

Dr. Hood analyzed in-person absentee voting turnout in Wisconsin at the statewide level and for the cities of Madison and Milwaukee, based upon GAB data. (DX1:9–14.) His findings, including Figures 2 through 5 of his expert report, show a marked up-tick in absentee voting usage statewide, in Milwaukee, and in Madison by comparing the 2008 presidential November election to the 2012 presidential November election, and by comparing the 2010 mid-term November election to the 2014 mid-term November election. The 2010-to-2014 comparison is particularly helpful to the constitutional analysis because the 2010 election was conducted before the challenged in-person absentee voting laws were enacted, and the 2014 election was conducted after the challenges in-person absentee voting laws were implemented. Dr. Hood's findings do not support a conclusion that the changes in the law reflect unconstitutional burdens on the right to vote.

Dr. Hood's findings from pages 12 through 14 of his report can be summarized by the following table:

Jurisdiction	**Change in in-person absentee turnout from 2008 presidential to 2012 presidential election**	**Change in in-person absentee turnout from 2010 mid-term to 2014 mid-term election**
Wisconsin (statewide)	+0.80%	+5.24%
City of Milwaukee	+0.94%	+3.73%
City of Madison	+0.24%	+2.08%

(DX1:12–14, Figures 3 through 5; Tr. 05-25-16, 8-A-32–41; *see also* Tr. 05-25-16, 8-A-34 (addressing a typo in Dr. Hood's report regarding the words "Midterm" and "Presidential" being swapped in Figure 3).)

Plaintiffs will argue that in-person absentee voting rates would have increased *more* were it not for the challenged laws. As Dr. Hood testified, it is not possible to test that hypothesis. (Tr. 05-25-16, 8-A-41–42.) "We can't go back in time and rerun the election under different rules, which is what would have to happen to study that question, in my opinion." (Tr. 05-25-16, 8-A-42; *see also* Tr. 05-26-16, 9-A-77 (McCarty testimony).)

The State's expert Dr. Nolan McCarty of Princeton University also analyzed absentee voting rates, and his conclusions are found at pages 23 through 25 of his report. (DX5:23–25.) Rather than analyze aggregate absentee turnout rates by jurisdiction, Dr. McCarty analyzed absentee turnout rates statewide by demographic groups, including white, black, and Hispanic voters. (DX5:24.) He concluded that absentee voting rates increased across these demographic groups between 2010 and 2014, with the increase among African Americans and Hispanic voters as high or higher than the increase observed for white voters, depending upon whether the percentage rate differential or "odds ratio" is used. (Tr. 05-26-16, 9-73–77; DX5:23–24.) When measured as a share of registrants, African American voters were about twice as likely to vote

absentee in 2014 as in 2010. (Tr. 05-26-16, 9-75–77; DX5:24.) Tables 4 and 5 from Dr. McCarty's report, reproduced below, summarize his findings:

Table 4: Absentee Voting Rates (Registrants)				
	2014	2010	Diff	Odds Ratio
White	11.2%	6.1%	5.1%	1.85
Black	7.6%	3.8%	3.8%	2.02
Hispanic	4.0%	2.1%	1.9%	1.89

Table 5: Absentee Voting Rates (Voters)				
	2014	2010	Diff	Odds Ratio
White	15.4%	9.3%	6.1%	1.66
Black	12.3%	6.7%	5.6%	1.82
Hispanic	8.0%	5.0%	3.0%	1.61

(DX5:24.)

Dr. Hood also studied whether there is a correlation between in-person absentee voting turnout and the number of registered voters using a single in-person absentee voting site in a municipality. (DX1:14–19.) He noted that "there are a total of 88 in-person absentee voting sites in Ohio, compared with 1,853 sites in Wisconsin." (DX1:14.) The ratio of registrants to in-person absentee sites in Ohio is 1:88,048. (*Id.*) In Wisconsin, the ratio is 1:1,883. (*Id.*) A federal district judge in Ohio recently rejected a challenge to the number of locations for early in-person absentee voting. *See The Ohio Org. Collaborative v. Husted*, No. 15-CV-1802, 2016 WL 3248030, at *23–24 (S.D. Ohio May 24, 2016) (upholding Ohio Revised Code § 3501.10(C)).

Analyzing municipal-level data from GAB for the 2010, 2012, and 2014 general elections, Dr. Hood found that "[m]unicipalities with greater in-person absentee access, as defined by fewer registrants per site, actually have lower rates of in-person absentee turnout." (DX1:16.) "[T]he statistical analyses presented clearly refute the idea that simply increasing in-person absentee sites in a given municipality will increase in-person absentee turnout." (*Id.*) "An examination of the last three general elections indicates that convenience (density) is actually inversely related with the percentage of voters in a given municipality choosing to cast an in-person absentee ballot." (*Id.*)

3. Application of the *Anderson/Burdick* test

Wisconsin's time and location rules for voting in-person absentee do not unduly burden the right to vote in violation of the First and Fourteenth Amendments, as Plaintiffs allege in Count 2. (Second Am. Compl., Dkt. 141 ¶¶ 88–98, 186–88.) Plaintiffs have failed to prove their claims when Wisconsin's laws minimally burden the right to vote and are supported by significant State interests in orderly and efficient election administration.

The first step in the analysis is to determine whether Wisconsin's laws create a "severe" burden on the right to vote. Wisconsin's timeframe and location rule for voting in-person absentee is robust and accommodating. And voters can always vote on Election Day, in person. There is no constitutional right to vote an absentee ballot. Accordingly, Wisconsin's timeframe and

location rule for in-person absentee voting does not severely burden the right to vote. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

The next step in the constitutional analysis is to determine whether the State's asserted interests justify the challenged laws. *See Burdick*, 504 U.S. at 434. They do.

Wisconsin's regulation of election timing is necessary to conduct an orderly election. *See* U.S. Const. art. I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 730 (1974). The current in-person absentee voting times and locations are beneficial to local election officials. The Court heard testimony from four defense fact witness who are municipal and county clerks, the "boots on the ground" who administer elections. Diane Hermann-Brown, Clerk for Sun Prairie, Susan Westerbeke, Clerk for Port Washington, Constance McHugh, Clerk for Cedarburg, and Kathleen Novack, Clerk for Waukesha County, testified for the State.

Clerk Hermann-Brown is a member of and has held leadership roles with the Wisconsin Municipal Clerks Association (WMCA), including president. (Tr. 05-19-16, 4-P-111.) She is the chair of WMCA's Elections Communications

Committee. (Tr. 05-19-16, 4-P-112.) WMCA is Wisconsin's municipal clerks association. (Tr. 05-19-16, 4-P-109.) As Clerk Hermann-Brown testified, WMCA "tr[ies] to be the voice of the majority" of the more than 1,800 municipal clerks in the state. (Tr. 05-19-16, 4-P-123.)

WMCA supported limiting the period for in-person absentee voting to the 12 days before an election. Limiting the period allows clerks to have better control over the process and to support funding for extra staff, which is more difficult to plan for if the period is extended. It also ensures that clerks will always have ballots during this defined period of time. Before the law change, clerks did not always have ballots three or four weeks before the election, which is hard to explain to voters. (Tr. 05-19-16, 4-P-116.) The structure of the two-week, or ten-business-day, period for in-person absentee voting also makes it easier for voters to be certain when they are allowed to vote in-person absentee. (Tr. 05-24-16, 7-A-155.)

The time period from when municipal clerks receive ballots to when in-person absentee voting starts is a very busy time for clerks. They are conducting voting at residential care facilities, mailing absentee ballots, entering voter registrations, and their normal licensing and budget duties typically arise during some of the scheduled elections. (Tr. 05-19-16, 4-P-117–18.) When in-person absentee voting starts, clerks are unable to do these other duties because in-person absentee voting takes up most of their time. (Tr. 05-

24-16, 7-A-111.) Clerk Westerbeke is not able to get much of anything else done during that two-week period because voters are coming in consistently all day, registering and voting, and so none of the other work is able to get done. Her work requires weekends and evenings during that time, on top of setting up the election. (Tr. 05-24-16, 7-A-155.)

WMCA advocated very strongly to eliminate the Monday before the election for in-person absentee voting. Without this change, clerks had no time to reconcile absentee ballots, print the poll books and supplemental poll books, prepare the polls for Election Day, provide customer service, answer phone calls from voters with questions, etc. (Tr. 05-19-16, 4-P-119; Tr. 05-24-16, 7-A-156–57; Tr. 05-24-16, 7-A-113.) Clerk Hermann-Brown recalled that, during one presidential election, her office had a line for absentee voting at 5 p.m. requiring that the location remain open until 6:30 p.m. to allow the last person to vote. And then she had to reconcile the ballots, make sure everything was signed on the ballots/certificates, finalize the poll books, and then set up the polling facilities. She got home after 10 p.m. and was back at 5:30 a.m., working a 20-hour day. All in-person absentee ballots must also be logged in the poll books before Election Day. (05-19-16, 4-P-119–20.)

Clerk Westerbeke testified that she must spend the entire Monday before Election Day preparing and packing election materials to move to poll locations. The street department must come and move all of the materials to

the locations to be set up. She also has to complete all the data entry that has to occur before Election Day, including registration forms and marking absentee ballots that are received. (Tr. 05-24-16, 7-A-156.) If in-person absentee voting included the Monday before the election, Clerk Westerbeke would have problems entering all this data before the poll books were printed. The longer the process goes on, the later and more delayed a clerk is in preparing, so then she may find herself working late in the night the night before an election, which is how it used to be. (Tr. 05-24-16, 7-A-157.)

WMCA also advocated for the law change restricting the hours of in-person voting and eliminating in-person absentee voting on weekends. This eliminates some voter confusion because there is consistency across the state: no clerks are open on weekends, holidays, or the Monday before the election for in-person absentee voting. (Tr. 05-19-16, 4-P-120–21.)

Limiting in-person absentee voting to one location per municipality is an advantage for most municipalities because it costs less, gives clerks better control over the process, allows better training and centralization for staff, and ensures better security. (Tr. 05-19-16, 4-P-114; Tr. 05-24-16, 7-A-109.) Clerks can better reconcile the ballots according to the absentee logs and generally better ensure that ballots are properly taken care of and accounted for. (Tr. 05-19-16, 4-P-115.) More than one location for in-person absentee voting requires

more staff, supplies, setting up, securing of the ballots and documents—all at a cost that some municipalities cannot bear. (Tr. 05-24-16, Tr. 7-A-154.)

From a municipal clerk's perspective, limiting in-person absentee voting to one location also causes less confusion for voters. Multiple locations increase the risk of voter confusion about the correct polling locations on Election Day. Voters are already confused sometimes about whether they can vote at city hall on Election Day. The more locations you add, the more likely voters will confuse those locations with polling locations on Election Day. (Tr. 05-19-16, 4-P-115; Tr. 05-24-16, 7-A-110.)

From a county clerk's perspective, Clerk Novack testified that there is an advantage to having only one location per municipality for in-person absentee voting. For example, the City of Waukesha has 39 wards, which means that, at a minimum, clerks are providing as many as 40 to 45 different types of ballots for that municipality. For in-person absentee voting, the City of Waukesha has to maintain a file by individual ballot style for each ballot to have enough for everyone. If there were two in-person absentee voting sites in the City of Waukesha, the cost of ballots would increase because each site would want to have almost a virtually identical number of ballots available to ensure they do not run out. In Waukesha County, the cost of a single ballot is 16 cents. That cost is significant when multiplied by the 290,000 ballots ordered for the April 2016 election. A county pays for all ballots for county,

state, and federal elections. If it miscalculates and has to order more ballots, it could cost as much as one dollar per ballot (Tr. 05-24-16, 7-P-13–15.) Clerk Novack also testified that it would be confusing to figure out where an individual would go to actually vote in-person absentee if municipalities started splitting up the municipality into multiple voting locations. (Tr. 05-24-16, 7-P-13.)

Prior to the challenged laws, in-person absentee voting started once the clerks had the ballots. (Tr. 05-19-16, 4-P-148; Tr. 05-24-16, 7-A-111.) In February 2016, for example, Waukesha County had approximately 203 different ballot styles that the county clerk had to program. (Tr. 05-24-16, 7-P-6.) For the February 2016 election, the municipal clerks had the ballots 21 days before the election. (Tr. 05-24-16, 7-P-8.) For the April 2016 election, the municipal clerks had the ballots about 36 days before the election. (Tr. 05-24-16, 7-P-9–10.) For the August 2016 election, the municipal clerks will have the ballots 48 days before the election. (Tr. 05-24-16, 7-P-10.) Thus, there would be no consistency for voters if in-person absentee voting was extended to when municipalities received the ballots. (Tr. 05-24-16, 7-P-10–11.)

The current schedule for in-person absentee voting provides a set date when in-person absentee voting begins. (Tr. 05-24-16, 7-A-112.) There is uniformity in the in-person absentee voting period and in the hours the clerks

can keep, but municipalities can still choose within statutory parameters. (Tr. 05-19-16, 4-P-148.)

Allowing larger municipalities the option to have different in-person absentee voting hours would impact smaller surrounding municipalities. For example, voters in Port Washington obtain a lot of their information from the Milwaukee media. It would confuse voters in Port Washington if Milwaukee has different in-person absentee voting times. There is an advantage to having some uniformity and consistency with the period available for in-person absentee voting. (Tr. 05-24-16, 7-A-157–58, 176–77.)

As the preceding evidence shows, Wisconsin has significant interests in its current system of where and when in-person absentee voting occurs. The testimony from four local election officials demonstrates that the system, as it stands, is favorable to efficient election administration. The expert evidence shows that the challenged laws have not negatively impacted absentee balloting. Considering all of the evidence, Wisconsin's legitimate interests in promoting orderly election administration and in controlling the costs of elections are more than enough to justify the slight burdens that are placed on voting by the challenged laws governing the time frame and location for in-person absentee voting. Plaintiffs have failed to prove their Count 2 claims, and judgment should be entered in Defendants' favor.

D. The 28-day durational residency requirement does not create an "undue burden" on the right to vote.

In May 2011, Wisconsin enacted a 28-day durational residency requirement for voting, which increased from a previous 10-day requirement. 2011 Wis. Act 23, §§ 10–12 (amending Wis. Stat. §§ 6.02(1)–(2), 6.10(3)). Even many of the legislators who opposed the change supported retaining a durational residency requirement of some length. *See, e.g.*, 2013 S.B. 173 (bill to amend from 28 to 10 days). Plaintiffs do not suggest that there is a problem with the previous 10-day requirement. (*See* Second Am. Compl., Dkt. 141 ¶¶ 129–34.) Instead, they assert that the additional 18 days "severely burdens those voters who move shortly before an election." (Dkt. 141 ¶ 130.)

Plaintiffs' "undue burden" claim challenging Wisconsin's 28-day durational residency requirement fails. No individual voter Plaintiff has proven he has Article III standing to challenge the law, and One Wisconsin and Citizen Action have no standing, either. No Plaintiff proved he will be injured by a 28-day durational residency requirement. The Court lacks jurisdiction over a challenge to the requirement.

Aside from standing, as the trial evidence proved, the duration of Wisconsin's residency requirement is consistent with other states that require voters to reside in one location for a period of time prior to voting there. Wisconsin has election administration interests in voters residing for at least

28 days where they plan to vote, including interests in voters familiarizing themselves with local races and in having adequate time to obtain a current proof of residence document.

The requirement is not unique. Dr. Hood's January 2016 report analyzed whether Wisconsin's 28-day durational residency requirement is unusual. (DX1:23–24.) Twenty-five states and the District of Columbia indicate a specific number of days required to establish residency. (*Id.* at 23.) The average number of days is 28.8. (*Id.*) The most frequently occurring number of days is 30, and 77% of the jurisdictions that have a specific day requirement use 30 days. (*Id.*) "Viewed in this context the twenty-eight day residency requirement is certainly not out of line with most other states." (*Id.*)

Plaintiffs allege that the increase in Wisconsin's durational residency requirement by 18 days unduly burdens the right to vote under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. (Second Am. Compl., Dkt. 141 ¶¶ 186–88.) Plaintiffs cite to *Anderson*, 460 U.S. 780, and *Burdick*, 504 U.S. 428, for support. (Second Am. Compl., Dkt. 141 ¶ 187.) But Plaintiffs' claim fails under the *Anderson/Burdick* test.

The character and magnitude of the alleged injury at issue—an increase of Wisconsin's durational residency requirement by 18 days—creates only a minimal risk of injury to a small number of voters who might move. The

Supreme Court already has upheld durational residency requirements of a similar character to Wisconsin's 28-day requirement. *Burns v. Fortson*, 410 U.S. 636, 687 (1973) (per curiam) (50-day requirement); *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam) (50-day requirement); *Dunn*, 405 U.S. at 363 (Blackmun, J., concurring) (30-day requirement).

The magnitude of the modest 18-day increase is small. Plaintiffs did not prove at trial the number of moving voters potentially impacted by the 28-day requirement, but they concede it impacts only those who move shortly before an election (Second Am. Compl., Dkt. 141 ¶ 130.) Plaintiffs were not able to establish through trial evidence whether or to what extent voters will be unduly burdened by a 28-day durational residency requirement. In other words, Plaintiffs could not quantify through trial evidence the number of voters who will be burdened by this change in the law. Plaintiffs' evidence of any burdens is purely anecdotal and did not prove that there are systemic, statewide burdens on voters created by the 28-day durational residency requirement.

Clerk Westerbeke testified that she has seen only "a few individuals, not a great amount," who fell into the window between ten and 28 days of residency. (Tr. 05-24-16, 7-A-169–70.) Clerk McHugh testified that in the last couple of years she has only seen "a handful of people" who fell into the

ten-to-28-day window, "maybe three or four or five or six that have come in." (Tr. 05-24-16, 7-A-119–20.)

There may be a small number of moving voters who will be impacted by the additional 18 days. But an intra-state mover may vote by mail-in absentee ballot if he or she does not want to drive back to his or her previous ward to vote. Likewise, a voter who moves to Wisconsin from out-of-state may vote in presidential and vice presidential elections in Wisconsin. The burden on these voters is minimal, and Plaintiffs did not prove otherwise.

Wisconsin's interests in the 28-day durational residency requirement are sufficient to justify these limited burdens. Wisconsin's durational residency requirement serves compelling state interests. It preserves the integrity of the election process by maintaining a stable political system, insuring the purity of the ballot box, safeguarding voter confidence, and avoiding voter confusion. *See Crawford*, 553 U.S. at 197 (voter confidence); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (integrity of process); *Dunn*, 405 U.S. at 345 (purity of ballot box); *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (stable system, integrity of process, voter confusion). The residency requirement serves these legitimate state interests by inhibiting voter colonization, party raiding, and voter fraud. *See Crawford*, 553 U.S. at 194–97 (fraud); *Rosario*, 410 U.S. at 760 (raiding); *Dunn*, 405 U.S. at 345 (colonization); *Swamp*, 950 F.2d at 386 (raiding). As a state with both an open primary and same-day voter

registration, Wisconsin is particularly at risk for colonization, raiding, and fraud. The 28-day requirement serves all of these important state interests.

GAB witness Michael Haas testified at trial about the justifications for a 28-day residency requirement: "I believe the justification put forward to support the 28-day residency is partly that it was maybe more consistent with what some other states had and again to possibly require a more – longer term connection for the voter that particular location where they were voting." (Tr. 05-25-16, 8-P-38.) "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson*, 460 U.S. at 796.

Municipal clerk witnesses also testified about the benefits of a 28-day requirement. Clerk Hermann-Brown testified that a 28-day requirement would give voters who recently moved more time to get their absentee ballot from a previous municipality if they were required to vote there. (Tr. 05-19-16, 4-P-133.) She also highlighted that voters would have more time to obtain a proof of residence document, such as a utility bill, under a 28-day requirement. (Tr. 05-19-16, 4-P-134.) Clerk Westerbeke testified that increasing the residency requirement gives voters more time to obtain proof of residence documents like a bank statement, utility bill, or cable bill. (Tr. 05-24-16, 7-A-170.) Clerk McHugh also testified that "going from 10 to 28 days gives people

a few more weeks of cushion to get the adequate proof of residence they need to register." (Tr. 05-24-16, 7-A-119.)

Considering the State's legitimate election administration interests in a 28-day durational residency requirement, and weighing them against the minimal burdens that will be experienced by some undetermined number of voters, the law does not unconstitutionally burden the right to vote.

E. The challenged voter registration laws

"Registering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748. The Seventh Circuit made that observation in an October 6, 2014, opinion that was published *after* the challenged voter registration laws in this case were enacted. To start, no Plaintiff has Article III standing to challenge the voter registration laws because they have not shown that they will be injured by them. They are registered to vote or, in the case of One Wisconsin and Citizen Action, they have no right to vote. The Court lacks jurisdiction over these claims. Beyond standing concerns, Plaintiffs' claims fail.

1. Background regarding voter registration in Wisconsin

Wisconsin requires every qualified elector to register in order to cast a ballot. Wis. Stat. § 6.27. There are some narrow exceptions required by federal law: voters who do not meet residency requirements can vote for president and

vice president, Wis. Stat. §§ 6.15 and 6.18, and military electors are not required to register. Wis. Stat. § 6.22.

a. Wisconsin provides four different ways to register to vote.

In registering to vote, an elector needs to fill out a form containing information showing that he or she meets the qualifications for voting in Wis. Stat. § 6.02 and submit proof of the elector's residence per Wis. Stat. § 6.34.

There are several different ways to register to vote in Wisconsin. Wisconsin is at the forefront of making registration simple and easy because voters can register at their polling place on Election Day. Prior to Election Day, voters can register in three different ways: (1) by mailing the form and proof of residence to the appropriate local official; (2) in person at the office of the municipal clerk, the municipal board of elections, or at another location authorized by the municipality; or (3) through a special registration deputy authorized to accept voter registration forms by a municipality.

(1) Election Day registration (EDR) and same-day registration (SDR)

Wisconsin allows all qualified electors to register at the polling place on Election Day, even if elector is a new registration or was previously registered at another address but needs to change the registration to his or her current address. Wis. Stat. § 6.55(2)(a)1.

Wisconsin's voter registration scheme is relatively easy because it is one of only seven states that offer both same-day registration during the in-person absentee voting period *and* Election Day registration. (DX1:4.) Dr. Hood found that "[t]wo-thirds of states (65%) do not offer SDR, EDR, or a combination of the two. Offering both SDR and EDR, therefore, places Wisconsin within a fairly small minority of states." (*Id.*)

(2) Registration by mail

Wisconsin allows voters to register by mail by using a form prescribed by the Government Accountability Board. Wis. Stat. § 6.30(4). Defendants' exhibits 101 through 103 are GAB form 131, the Wisconsin Voter Registration Application, in English, Spanish, and Hmong. Voters can access this form in several ways. A voter can complete the voter registration form electronically on the website http://myvote.wi.gov, print the completed form, and then mail it to the appropriate municipal clerk's office, which the website provides when the individual enters his or her address.

The GAB also has a copy of the voter registration form on its website, which can be completed electronically and then printed, or it can be printed in hard copy, filled out by hand, and then mailed to the appropriate local elections official. GAB's forms are found at the following website link: http://www.gab.wi.gov/forms/voters. GAB's website also includes a current and

updated list of all addresses for the State's hundreds of municipal clerks: http://www.gab.wi.gov/clerks/directory.

Many local elections offices also have the voter registration form on their websites. For example, the City of Milwaukee Election Commission has an electronic version of the form on its website, http://city.milwaukee.gov/election, under the "Voter Information" drop-down menu: http://tinyurl.com/h6qvl2u. Likewise, the City of Madison website provides a link to both the voter registration form on the GAB's website and the myvote.wi.gov website, along with instructions on how to register to vote: http://www.cityofmadison.com/election/voter/pre.cfm.

(3) Registering in person

Voters can also register in person. Wis. Stat. § 6.30(1). Voters can register at the municipal clerk's office until the close of business on the Friday before an election. Wis. Stat. § 6.29(2)(a).

Voters can also register in person at the board of elections commissioners and the office of the county clerk and at any other registration location approved by a municipality, such as fire houses, police stations, public libraries, or any other facility. Wis. Stat. § 6.28(1). For example, the Cities of Madison and Milwaukee allow registration at all of the public libraries in the city. *See* http://www.cityofmadison.com/election/voter/pre.cfm (Madison); http://city.milwaukee.gov/vote#.VoLjfvkrJ1M (Milwaukee). These in-person

registrations need to be completed by the third Wednesday preceding the election (which equates to 20 days prior to the election). Wis. Stat. § 6.28(1).

(4) Special registration deputies

Wisconsin also allows municipalities to appoint qualified electors as special registration deputies who can accept voter registration forms. Wis. Stat. § 6.26(2)(a). The special registration deputy collects the forms and then turns them in to the municipal clerk. *Id.* Applicants are appointed by municipalities, but they can be appointed as a deputy by more than one municipality. *Id.*

2. Documentary proof of residence

Every voter who is not a permanent overseas or military elector must "provide an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2). Following the enactment of 2013 Wisconsin Act 182, this requirement applies to all voters. 2013 Wis. Act. 182, § 2h. In August 2012, the Government Accountability Board authorized the use of electronic versions of the documents accepted as proof of residence. (*See* DX86, 105.)

Wisconsin law allows many different types of documents to serve as proof of residence. Any document used to establish residency must contain the voter's current first and last name and current address. Wis. Stat. § 6.34(3)(b). The law recognizes thirteen different types of documents that can be used to prove residence:

(1) A Wisconsin driver license;
(2) A Wisconsin state identification card;
(3) Any other official identification card or license issued by a Wisconsin governmental body or unit;
(4) An official picture identification card of license issued by an employer;
(5) A real property tax bill or receipt for the current or prior year;
(6) A residential lease (although this cannot be used to register by mail);
(7) A university, college, or technical college photo identification card, together with a fee payment receipt issued within the past nine months;
(8) A university, college, or technical college photo identification card if the school provides a certified list of students that are U.S. citizens to the municipal clerk;
(9) A utility bill for a period commencing not earlier than ninety days before registration;
(10) A bank statement;
(11) A paycheck;
(12) A check or other document provided by a unit of government; and
(13) A contract or intake document prepared by a residential care facility.

Wis. Stat. § 6.34(3)(a). Residential care facility documents were added to the list in March 2016. (*See* DX96.)

Against this backdrop of an easy voter registration system, Plaintiffs challenge the documentary proof or residence requirement, the elimination of high school and statewide SRDs, changes to the use of certified dorm lists, and a law relating to a Madison ordinance by which landlords distributed voter registration applications to new tenants.

3. The documentary proof of residence requirement creates no "undue burden" on the right to vote.

Plaintiffs challenge the Legislature's expansion of the documentary proof of residence requirement as unconstitutionally burdensome. If the voter photo ID requirement in *Frank* was found constitutional under the *Anderson/Burdick* test, a documentary proof of residence requirement is also constitutional. The options for documentary proof under Wis. Stat. § 6.34(3)(a) are even more expansive than the voter photo ID options under Wis. Stat. § 5.02(6m).

Moreover, Plaintiffs offered no evidence regarding how many voters lacks necessary proof of residence documents and relied instead upon scattered anecdotes of voters who could not register because they did not have documentary proof in hand. Those anecdotes do not explain whether those voters had proof at home, at work, in their cars, or could access it online.

For example, Plaintiffs' fact witness Donna Richards testified about seven voters she witnessed in Fond du Lac on Election Day in April 2016 who did not have proof of residence in hand when they came to register. (Tr. 05-20-16, 5-P-45.) But on cross-examination, Ms. Richards testified: "I don't know that they didn't have proof of residence at home." (Tr. 05-20-16, 5-P-56.) She also confirmed that someone who presented to her earlier in the day on Election Day may have had time that same day to either go home and

get a proof of registration document or make a change to some account to have a proof of registration document. (Tr. 05-20-16, 5-P-58.) With even a minimal amount of advance preparation, a voter can easily comply with the documentary proof requirement.

Plaintiffs have failed to prove the extent of the burdens, if any, that voters are experiencing because of the documentary proof requirement. The voter registration law includes many, many options for voters to prove their residency with a document, making it very unlikely that any large number of voters cannot meet the requirement. Plaintiffs have not been able to quantify through trial evidence the number of voters who are experiencing a problem—aside from some anecdotes—making it virtually impossible to substantiate their constitutional claim.

With regard to the State's justifications for a documentary proof of residence requirement, Michael Haas, Election Division Administrator at GAB explained that "the theory supporting that requirement is to insure that individuals who register to vote have established a residency in the ward that they are voting in and for the officials who represent that particular area." (Tr. 05-25-16, 8-P-37–38.) Showing a document with your name and address on it helps prove that you currently reside there. If the residency requirement and voter registrations laws are to be meaningful, it makes sense for voters to

provide some concrete proof of their current residence. A documentary proof of residence law accomplishes that legitimate election administration goal.

Additionally, a documentary proof of residence requirement makes it more difficult for a voter to commit fraud in registering to vote. A person would have to a forge a proof document, procure one through misrepresentation, or make a false statement on the voter registration form regarding his current residence. Relatedly, requiring documentary proof of residence can bolster voter confidence in the integrity of the election process because it makes fraud more difficult.

On balance, and applying the *Anderson/Burdick* test, the State's legitimate justifications for a documentary proof of residence requirement outweigh any minimal burdens on the right to vote. Plaintiffs have not proven that the law is unconstitutionally burdensome. The Court should enter judgment in Defendants' favor.

4. The elimination of corroboration creates no "undue burden" on the right to vote.

Plaintiffs challenge the elimination of the option for registering voters to prove their residence by a corroborating witness. No Plaintiff has proved he has Article III standing to make this claim, and the Court lacks jurisdiction over the claim. Furthermore, Plaintiffs have failed to prove this claim.

Dr. Mayer's December 2015 expert report pinpoints the lack-of-proof problem with Plaintiffs' "undue burden" claim as to corroboration: "I do not have specific data on how many people were unable to register because they were no longer permitted to use corroborating witnesses to prove residency." (PX38:39.) Plaintiffs were not able to substantiate at trial how burdensome eliminating corroboration is on voters, or how many voters were even impacted by the change. While Plaintiffs may point to anecdotal evidence of voters who lacked proof of residency documents, these limited examples do not show a widespread burden. They have not proven their claim.

Municipal clerk witnesses confirmed that eliminating corroboration is not problematic. Clerk Constance McHugh testified that corroboration was "rarely" used in places like Cedarburg and Fox Point. (Tr. 05-24-16, 7-A-116.) She also testified that corroboration can lead individuals to pressure others to corroborate for them. Clerk McHugh witnessed such an incident when she worked in Fox Point. An individual came in to register to vote without proof of residence, and he went around asking voters at the polling location to corroborate for him, even though they did not know his residence. The voters felt pressured to corroborate for the man, though none did. (Tr. 05-24-16, 7-A-117.) Since the elimination of corroboration, there have been no instances in Cedarburg where Clerk McHugh was unable to register a voter because they did not obtain proof of residence. (Tr. 05-24-16, 7-A-117.)

Likewise, since the elimination of corroboration, there have been no instances in Sun Prairie where Clerk Hermann-Brown was unable to register voters because they could not obtain proof of residency. (Tr. 05-19-16, 4-P-124.) Clerk Westerbeke has not seen any effect on voters' ability to register since corroboration has been eliminated. (Tr. 05-24-16, 7-A-159.) While corroboration was a convenient option for some, there remain robust options for voters to prove their residence using the expansive list of documents found in Wis. Stat. § 6.34(3)(a).

The Legislature made the rational choice that it prefers voters to show documentary proof of residence to register rather than to allow for corroborating witnesses. While the threat of fraud by corroborating witnesses is likely not very great, it is nonetheless possible for a voter to register and vote unlawfully if no documentary proof of residence is required.

Plaintiffs have not proven that the benefits of requiring documentary proof of residence are outweighed by the very minimal burdens on the right to vote. They have not proven that corroboration was widely used, or even that it was used much at all. They also have not shown what percentage of voters lack documentary proof of residence. If the voter photo ID law in *Frank* was found to be constitutional, then surely eliminating the corroboration option creates no unconstitutional burden. Under the *Anderson/Burdick* test, this change in

the law passes constitutional muster. The Court should enter judgment in Defendants' favor.

5. The elimination of statewide and high school special registration deputies creates no "undue burden" on the right to vote.

Plaintiffs challenge that Wisconsin no longer has special registration deputies at high schools and that GAB can no longer certify statewide special registration deputies. No Plaintiff proved he has Article III standing to make this claim. The Court lacks jurisdiction. Beyond standing, under the *Anderson/Burdick* test, these changes in the law pass constitutional muster. The State's election administration interests in determining who can be certified to register voters outweigh any minimal burden on voters' options to register. The options remain robust.

With regard to statewide SRDs, the Court heard testimony from local election officials and the GAB regarding how statewide SRDs did not do their jobs very well. Clerk Hermann-Brown testified that WMCA supported the elimination of statewide SRDs. (Tr. 05-19-16, 4-P-127–28.) Clerks had issues with statewide SRDs not getting the registration forms submitted in a timely manner, the forms being sent to the wrong municipalities, using the wrong SRD number on the form, and including incorrect driver license numbers. These problems with statewide SRDs were continuous and coming from across the State. (Tr. 05-19-16, 4-P-128–29.)

Prior to the elimination of statewide SRDs, Clerk Constance McHugh would see them return many registration forms incomplete, lacking information, perhaps not signed, missing driver license numbers or birth dates, errors which complicated things and required follow up on the clerk's part. (05-24-16, 7-A-118.)

Clerk Westerbeke had many of these same issues with statewide SRDs. They would register individuals in the wrong municipality, and the individuals would show up at the wrong municipality thinking they were registered. (Tr. 05-24-16, 7-A-167.) These mistakes took time for clerks to address and correct, especially when the forms came in shortly before the election.

Allison Coakley of GAB testified about how she audited voter registration forms that statewide SRDs submitted to GAB. (Tr. 05-25-16, 8-P-128.) She noticed problems with the legibility of forms and missing information like required dates of birth, signatures, and addresses. (Tr. 05-25-16, 8-P-128.)

With statewide SRDs, it was more difficult for municipal clerks to disqualify or revoke an SRD because the State had control. (Tr. 05-19-16, 4-P-128.) Now, if there are repeated issues with a municipal SRD, the municipalities either work with that SRD or revoke his or her status. (Tr. 05-19-16, 4-P-129.) Even without statewide SRDs, voters can register with municipal SRDs, on Election Day, in the clerk's office, or they can register themselves using the guidance on MyVote.WI.gov. (Tr. 05-24-16, 7-A-119.)

With regard to high school SRDs, Clerk Hermann-Brown testified that she had "no concerns" about eliminating them. (Tr. 05-19-16, 4-P-126.) She voiced several issues with these SRDs. It was hard to keep track of the change in personnel where staff SRDs would come and go; the schools would not always allow that staff member to come to training and learn how to register; and the high school SRDs did not always send back their forms in a timely manner. Sometimes the registration forms were not received until after an election, and sometimes they would be sent to the wrong municipality, since high schools can cover multiple municipalities. High school SRD were seldom used. (Tr. 05-19-16, 4-P-126.)

Clerk Hermann-Brown also testified that it takes additional time for clerks to train high school SRDs. For example, in Sun Prairie, SRD training was normally done on nights and weekends, but school staff members would not attend then, so the clerk would have to go to the high school specially to train that SRD. (Tr. 05-19-16, 4-P-179.) In Port Washington, Clerk Westerbeke trained the high school vice principal to be an SRD, but nobody utilized him to register. Nobody complained when high school SRDs were eliminated in the high school. (Tr. 05-19-16, 7-A-166.) High school students like to register on Election Day, or they come to the clerk's office to register because it is a "Facebook picture taking time." (Tr. 05-19-16, 4-P-127.)

Applying the *Anderson/Burdick* test, the Court should conclude that the State's legitimate interests in efficient election administration outweigh any minimal burdens on the right to vote of not having statewide SRDs and SRDs at high schools. As discussed above, voters have robust options to register to vote including by SDR during absentee voting, on Election Day (EDR), by mail, and by municipal SRDs. Plaintiffs have not proven that the changes to the law are unconstitutionally burdensome on the right to vote; therefore, the Court should enter judgment in Defendants' favor.

6. Changes to the use of "dorm lists" create no "undue burden" on the right to vote.

Plaintiffs alleged in their Second Amended Complaint that Act 23 unconstitutionally burdens the right to vote because it:

> made it harder for students to use a college ID as proof of residence for the purpose of registration by permitting "dorm lists" provided to municipal clerks to be used in connection with college IDs to prove residence for the purpose of voter registration only if the colleges or universities providing those dorm lists verify the citizenship status of the students on the list.

(Second Am. Compl., Dkt. 141 ¶ 62.) No Plaintiff has Article III standing to make this claim, and the Court lacks jurisdiction. Further, Plaintiffs have failed to prove at trial the extent to which "dorm lists" were even used for registration purposes, let alone that the right to vote is significantly burdened by this change in the law. As can be said of many of the challenges to voter registration laws, under *Frank*, if the voter photo ID law is constitutional, so

is this law. The documents available to prove one's residence to register to voter are expansive, and dorm lists are only one option.

Diane Lowe of the GAB confirmed that college students do not have to use their student ID cards to register to vote. (Tr. 05-20-16, 5-P-129.) "They can use any of the approved acceptable forms of proof of residence." (Tr. 05-20-16, 5-P-129.) In other words, a certified dorm list is "one of many options" to register to vote, and "a college student does not have to use that method as proof of residence." (Tr. 05-20-16, 5-P-129.) Plaintiffs cannot point to trial evidence proving how many students used student ID cards (or "dorm lists") to register to vote. The so-called burden they identified here cannot be measured, making it very difficult to show that the purported burden is an unconstitutional one. Again, their proof is merely anecdotal.

The Legislature legitimately required that colleges confirm the citizenship status of students on "dorm lists." U.S. citizenship is a qualification to vote, so it makes sense to confirm it. Wis. Const. art. III, § 1. This is a legitimate election administration interest. Likewise, the Legislature sensibly provided a long list of documentary options to prove residence, and student IDs, coupled with certified "dorm lists," are one of the many documentary proof options available to students. Again, Wisconsin has a legitimate election administration interest in the expansive list of options that the Legislature provided to prove residency.

Students at public universities can use documents issued to them by their school to register to vote. *See* Wis. Stat. § 6.34(3)(a)(12). That would include documents like tuition statements. Plaintiff Jennifer Tasse testified that UW-Madison students can even use the option of going to the school's website and updating their current residential address on the site, and then use the electronic version as their proof of residence document. (Tr. 05-18-16, 3-A-32; *see also* Tr. 05-16-16, 1-P-174 (Gosey testimony), Tr. 05-17-16, 2-A-7–8 (Gosey testimony).)

On balance, and applying the *Anderson/Burdick* test, the State's legitimate interests outweigh any minimal burden on the right to vote that Plaintiffs have shown. The Court should enter judgment in the State's favor.

7. 2013 Wisconsin Act 76, relating to landlords providing voter registration applications to new tenants, creates no "undue burden" on the right to vote.

Plaintiffs challenge 2013 Wisconsin Act 76, which they allege "burdens the voting rights of Madison's citizens who rent and move frequently by prohibiting a means of facilitating their ability to register to vote or to keep their registration form up to date." (Second Am. Compl., Dkt. 141 ¶ 123.) Act 76 provides that "No city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law. 2013 Wis.

Act 76, § 2. Act 76 effectively overturned a Madison ordinance requiring landlords to distribute voter registration forms to new tenants.

No Plaintiff proved he has Article III standing to challenge Act 76, and the Court lacks jurisdiction. Beyond standing, Plaintiffs have failed to prove that Act 76 unconstitutionally burdens the right to vote. While voter registration forms distributed by landlords to new tenants were sometimes used by voters to register in the City of Madison, the trial evidence did not prove that these same voters would have been *unable* to register without the forms they received from their landlords. The forms were just a convenience. It is not possible to show that these voters were *burdened* by the change in the law, only that they will now have to use the same robust and expansive options for registering to vote that all voters have in Wisconsin. The burden on the right to vote—which is limited to the City of Madison—is minimal.

Requiring landlords to distribute voter registration forms does not make sense from an election administration standpoint. Sun Prairie Clerk Hermann-Brown testified that it would be difficult to require landlords to distribute voter registration forms because there would be a risk that they would hand out the wrong form or an outdated form. (Tr. 05-19-16, 4-P-132.) Waukesha County Clerk Novack testified that it would not be a good idea to require landlords to distribute voter registration forms to tenants. It would be putting landlords in a situation that they are not trained for, as it could invite questions when the

forms are distributed. It would also be a difficult system for a county or municipal clerk to monitor. (Tr. 05-24-16, 7-P-17–18.) By enacting Act 76, the Legislature made a uniform, statewide practice and avoided these types of concerns.

Considering the State's legitimate election administration interests in a uniform, statewide system of voter registration, and weighing those interests against the minimal (if any) burden on the right to vote, the law is constitutional. The Court should enter judgment in Defendants' favor.

F. Wisconsin's election observer rules create no "undue burden" on the right to vote.

Plaintiffs challenge 2013 Wisconsin Act 177, which amended Wis. Stat. § 7.41, a statute concerning election observers. Wisconsin Stat. § 7.41(1) permits members of the public to be present at a polling place or municipal clerk's office where ballots are being cast and counted "for the purpose of observ[ing the] election and the absentee ballot voting process." The chief election inspector or municipal clerk in charge may reasonably limit the number of observers representing the same organization at the same location. *Id.* Observers are required to print their names and sign a log maintained by the chief election inspector or municipal clerk. *Id.*

The portion of Wis. Stat. § 7.41 that Plaintiffs challenge is Wis. Stat. § 7.41(2), which addresses the designated observation area for election observers. It states:

> (2) The chief inspector or municipal clerk may restrict the location of any individual exercising the right under sub. (1) to certain areas within a polling place, the clerk's office, or alternate site under s. 6.855. The chief inspector or municipal clerk shall clearly designate observation areas for election observers under sub. (1). *The observation areas shall be not less than 3 feet from nor more than 8 feet from the table at which electors announce their name and address to be issued a voter number at the polling place, office, or alternate site and not less than 3 feet from nor more than 8 feet from the table at which a person may register to vote at the polling place, office, or alternate site.* The observation areas shall be so positioned to permit any election observer to readily observe all public aspects of the voting process.

The chief inspector or municipal clerk is authorized to order the removal of any observer who "commits an overt act which": (1) "[d]isrupts the operation of the polling place, clerk's office, or alternate site under s. 6.855" or (2) "[v]iolates s. 12.03 (2) or 12.035." Wis. Stat. § 7.41(3).

Plaintiffs' complain that election observers could be permitted to stand as close as three feet from voters. (*See* Second Am. Compl., Dkt. 141 ¶ 135.) They allege that, prior to 2013 Wisconsin Act 177, "observers were required, pursuant to GAB policy, to maintain a six-foot distance from voters." (Dkt. 141 ¶ 135.) Plaintiffs claim that by "*reducing* the buffer zone" between voters and election observers "the State legislature facilitated, and even encouraged, voter intimidation by election observers and will cause wait times to increase for

voters at polling locations at which aggressive observers are present." (Dkt. 141 ¶ 138.)

No Plaintiff proved he has Article III standing to challenge this law, and the Court lacks jurisdiction. Beyond standing, Plaintiffs fundamentally misunderstand how the law operates.

1. Plaintiffs misunderstand how the law works.

2013 Wisconsin Act 177 and Wis. Stat. § 7.41(2) do not violate the Constitution. First, Plaintiffs misunderstand how Wis. Stat. § 7.41(2) works. The law puts discretion in the hands of *local* election officials to set an observer area that is as close as three feet from voters and as far as eight feet from voters. Local election officials (namely, the chief election inspector or municipal clerk) control where election observers can stand within the established zone. Wis. Stat. § 7.41(2); *see also* Tr. 05-16-16, 1-P-38. The State officials who are named Defendants in this case do not control where election observers stand at a polling place. *See* Wis. Stat. § 7.41(2) If a chief election inspector or municipal clerk wants election observers to stand no closer than six, seven, or eight feet from voters, she can require that space, consistent with Wis. Stat. § 7.41(2).

Thus, Plaintiffs misunderstand what the Legislature did in enacting 2013 Wisconsin Act 177. It did not give State officials, particularly the named

Defendants, the authority to control precisely where election observers stand at a polling place.

In addition to their authority to tell election observers where to stand, local election officials can kick out election observers who are being disruptive. Wis. Stat. § 7.41(3). Thus, an election observer who is harassing voters, election officials, or other observers would be subject to removal by the chief election inspector or municipal clerk, regardless of where the harassing observer is standing. *Id.*

2. Wisconsin Stat. § 7.41(2) does not unduly burden the right to vote.

Wisconsin. Stat. § 7.41(2) does not unduly burden the right to vote. Step one in the "undue burden" analysis is to analyze the character and magnitude of the asserted injury to the right to vote. *See Anderson*, 460 U.S. at 789.

Wisconsin Stat. § 7.41(2) is not a regulation that could reasonably be said to impose a "severe" burden on voting rights. *See Burdick*, 504 U.S. at 434. It does not directly impact the process of registering to vote, proving one's identity, or any other aspect of casting a ballot. It cannot be characterized as a limitation on the right to vote. It is instead a law that addresses the conduct of election observers and election officials at the polling place, and one that ensures that peace and order is maintained. It is a "reasonable, nondiscriminatory restriction[]" that imposes a minimal burden on voting, if

any, that is warranted by Wisconsin's "important regulatory interests." *Anderson*, 460 U.S. at 788.

In contrast to that minimal burden, the State has legitimate and important interests in orderly election administration that are furthered by the law. Wisconsin Stat. § 7.41 gives local election officials the authority to tell election observers precisely where to stand *and* the authority to eject them from the polling place for being unruly. Wis. Stat. § 7.41(2), (3). The statute promotes orderly election administration by giving local election officials the tools they need to maintain stability and calm at the polling place on Election Day if election observers get out of line.

The fact that the law gives local election officials some discretion to determine precisely where election observers stand does not discount the State's important interest in orderly election administration. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Discretion is an essential component of the State's "interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Id.* at 364. Here, the Legislature has given local election officials some control over where election observers stand by creating a reasonable default zone of three-to-eight feet in which local election officials can choose to place observers.

It is important to note that the appropriate distance for election observers to stand from voters and election officials could vary by polling place, and the variation might also depend upon the observers themselves. Some observers might have difficulty hearing or seeing, and placing them up to six feet away might cause more potential disruption for voters and election officials than if they were placed closer. Elderly election observers might have difficulty hearing or seeing if they are six feet away from voter registration tables, which could result in more interruptions and questions from the observers for election officials, the chief election inspector, or the municipal clerk. Not all polling places have the space to move election observers farther away from voters. Accordingly, it makes sense to grant the chief election inspector and municipal clerk discretion to place election observers in a location that is tailored to the space needs of the polling place and the sensory needs of the election observers themselves. Wisconsin Stat. § 7.41(2) serves those needs.

Wisconsin Stat. § 7.41(2) also furthers the State's legitimate interest in promoting voter confidence in the integrity of the election process. *See Crawford*, 553 U.S. at 197; *Rosario*, 410 U.S. at 761. The statute gives local election officials the authority to manage the physical set-up of a polling place, which is important to give the appearance and actuality of propriety in the conduct of an election.

Plaintiffs relied at trial upon the testimony of election official fact witnesses like Neil Albrecht and Maribeth Witzel-Behl, Andrea Kaminski of the League of Women Voters, or Diane Lowe of the GAB, to attempt to substantiate their claim that the election observer law unduly burden the right to vote. Plaintiffs also rely upon evidence regarding a particular election observer, Ardis Cerny, who has been accused of inappropriate behavior while observing. The fact remains that, as Mr. Albrecht confirmed, "99.5% of elections observers respect the State's election observer rules." (Tr. 05-16-16, 1-P-108.) Thus, what Plaintiffs' trial evidence amounts to is a series of disjointed anecdotes that show no systemic pattern of abuse and intimidation by election observers, or an inability of local election officials to maintain order at their polling places. Local election officials have always had the authority to maintain order at the polling place and kick out election observers who disobey lawful orders. (*See* Tr. 05-25-16, 8-P-36 (Haas testimony).) The three-to-eight-foot rule did not change that authority.

In sum, weighing the slight burdens that the law creates against the promotion of significant State interests that the Supreme Court has recognized, this Court should conclude that Wis. Stat. § 7.41(2) imposes no undue burden on the right to vote. Plaintiffs failed to prove their Count 2 claim, so judgment should be entered in Defendants' favor.

G. Changes to when absentee ballots can be faxed and e-mailed create no "undue burden" on the right to vote.

Plaintiffs allege that 2011 Wisconsin Act 75, § 50 imposed an unconstitutional burden on the right to vote. (Second Am. Compl., Dkt. 141 ¶ 147.) This law, Wis. Stat. § 6.87(3)(d), provides that a municipal clerk can transmit a ballot by fax or e-mail only to a military elector, as defined in Wis. Stat. § 6.34(1)(a), or an overseas elector, as defined in Wis. Stat. § 6.34(1)(b). Any elector may still request an absentee ballot from his municipal clerk via fax or e-mail. The practical effect of Act 75 is that temporary overseas voters can no longer receive absentee ballots by fax or e-mail. No Plaintiff proved that he has Article III standing to challenge the law, and the Court lacks jurisdiction. Beyond standing, Plaintiffs failed to prove their claim.

There are good election administration reasons to limit the number of absentee ballots that are transmitted electronically, including the practical reason that electronic ballots, whether they are faxed or e-mailed, cannot be run through vote-tabulating machines without being recreated on an official paper ballot at the polling place. This leaves room for human error in the process of recreating the ballot, and it can compromise the secrecy of the ballot. It also creates extra work for municipal clerks and their staff. The Court heard testimony regarding these issues.

Clerk Hermann-Brown and Clerk McHugh testified that it is more work for clerks to scan and e-mail a ballot because, once returned by the voter, the paper ballot has to be opened and re-created onto an official ballot, which is completed by two election inspectors on Election Day at the polling place. This process lends itself to human error and loss of privacy for the voter. (Tr. 05-19-16, 4-P-137–38; Tr. 05-24-16, 7-A-115.)

Clerk Hermann-Brown testified that e-mailing ballots was "more time consuming and it was a challenge." (Tr. 05-19-16, 4-P-162.) She testified that she supported the change in the law regarding electronic transmission of absentee ballots. (Tr. 05-24-16, 7-A-114.) It is very time-consuming to fax and e-mail ballots, especially trying to juggle it with people coming to vote in-person absentee. Clerks would have to devote a lot of resources to stand at a fax machine or to stand at a copier and scan ballots and then hope that they get to the person on the other end. Clerk McHugh has had problems e-mailing ballots where the recipient did not have sufficient Internet bandwidth to download the ballot. Many times it required emailing or faxing two or three or four times. (Tr. 05-24-16, 7-A-114.)

Clerk McHugh also testified to the security concerns associated with e-mailing and faxing ballots. For example, in Cedarburg an absentee ballot was forwarded to another person who did not request the ballot. At the end of the night on Election Day, the ballot was rejected because the person who cast the

ballot did not have a written request on file for the ballot. (Tr. 05-24-16, 7-A-114–15.)

Dr. Hood also gave his opinion regarding the use of e-mail and fax to transmit absentee ballots. He identified in his report "a number of common sense reasons for no longer allowing the transmission of absentee ballots via fax or e-mail." (DX1:19.) First, there is the problem that an e-mailed or faxed ballot "cannot be read into the tabulation machine." (*Id.*) "An employee in the municipal clerk's office, therefore, has to take the voter's preferences and record these on a regulation ballot." (*Id.*) "This process can lead to the introduction of unintended errors and also reduces voter privacy." (*Id.*)

Dr. Hood also identified the problem of voters forwarding fax and e-mail ballots to others. (DX1:19.) "[B]allots can sometimes vary greatly, even within the same municipality. For example, voters living in Milwaukee are not all in the same state legislative districts." (*Id.*) "[L]imiting the transmission of ballots to voters through the mail helps to reduce errors associated with the process of absentee voting or even the possibility of having their absentee ballot altogether disqualified." (*Id.*)

E-mailed ballots do not solve the timing needs of temporary overseas voters. Clerk McHugh testified about an occasion when a temporary overseas voter in Canada was mailed an absentee ballot form, but it was not returned in time to be counted. However, the voter did not make the request for an

absentee ballot until less than one a week before the election. There was no way of knowing whether even an e-mailed ballot would have been received in time to be counted. (Tr. 05-24-16, 7-A-142–43.)

Plaintiffs have pointed to anecdotal examples about transmitting ballots overseas. It is not clear from the trial record what number of ballots are transmitted to temporary overseas voters, making analyzing the burden difficult. While individual, isolated examples may seem particularly burdensome, Plaintiffs' anecdotal evidence does not prove that there is anything other than a minimal, scattered impact on Wisconsinites' right to vote due to Act 75.

For example, Plaintiffs' fact witness Jessica Garrels testified at her trial deposition about her difficulties in transmitting an absentee ballot in September 2014. If she had been e-mailed a ballot after she returned to Mali, she would have still had a question about whether it would have arrived back in Wisconsin in time to be counted because of the unreliability of the Mali mail. (PX491 (transcript), *hereinafter* "Garrels Trial Tr.," 14–15.) She would have had to use a commercial carrier like DHL to ensure the ballot returned in time to be counted. (Garrels Trial Tr. 15.)

Even as to Ms. Garrels' example, she failed to show that the lack of e-mail transmission was a significant burden. She testified that she did not vote in the February 2016 election because she suspected that an absentee ballot

by mail would not arrive in Laos, where she now lives, in time. (Garrels Trial Tr. 17.) But it was possible to get mail in Laos in about two weeks through her staff, and Ms. Garrels had no reason to believe the ballot would not be returned to Marshfield within two weeks. (Garrels Trial Tr. 30.)

Ms. Garrels is able to vote in future elections while she lives in Laos because she has made arrangements to have her absentee ballots mailed to the diplomatic pouch at the U.S. Embassy in Vientiane. When the ballot arrives, the embassy will contact Ms. Garrels via e-mail so that she can travel to Vientiane, fill out the ballot, and return it using the diplomatic pouch. (Garrels Trial Tr. 18–22.) Ms. Garrels travels to Vientiane every six to eight weeks for work, and it is possible that she could combine her trip to complete her absentee ballot with a work trip. (Garrels Trial Tr. 31.)

Finally, Internet service in Laos is not always dependable, especially in the rainy season. Downloading large attachments can also be problematic. (Garrels Trial Tr. 35.) E-mail transmission of an absentee ballot may not be a viable or reliable option for Ms. Garrels.

With proper planning, even someone in Ms. Garrels' unique situation could make arrangements to receive and return an absentee ballot in time for it to be counted. The election administration benefits of faxing and e-mailing absentee ballots to temporary overseas voters are limited, and they are outweighed by the potential inefficiencies and risks of error, loss of privacy,

and administrative burdens created by there being more of these ballots for municipal clerks and their staff to process.

In sum, applying the *Anderson/Burdick* test, the State's legitimate interests in Act 75 outweigh the minimal burdens that a select and limited number of voters experience due to the change in the law. The law is constitutional, and the Court should enter judgment in Defendants' favor.

H. The elimination of straight-ticket voting creates no "undue burden" on the right to vote.

2011 Wisconsin Act 23, § 6 eliminated straight-ticket voting, except as to military and overseas voters in certain elections. Act 23 repealed Wis. Stat. § 5.64(1)(ar)1.a. (2009–10), which stated: "The ballot shall permit an elector to . . . vote a straight party ticket for president and vice president, whenever those offices are contested, and for all statewide, congressional, legislative, and county offices." Plaintiffs believe this change is unconstitutional, and they are wrong. No Plaintiff proved he has Article III standing to challenge the law, and the Court lacks jurisdiction. Beyond standing, the claim fails.

The prevailing trend nationally is away from providing a straight-ticket option on the ballot. Wisconsin is part of the large majority of states that do not have straight-ticket voting. According to the National Conference of State Legislatures, as of January 8, 2016, only nine states offered a form of straight-ticket voting: Alabama, Indiana, Iowa, Kentucky, Oklahoma, Pennsylvania,

South Carolina, Texas, and Utah. *See* National Conference of State Legislatures, *Straight Ticket Voting States*, http://tinyurl.com/z4pkjno. Michigan's legislature recently voted to eliminate straight-ticket voting. Kathleen Gray, "Michigan Senate, House OK end to straight ticket voting," Detroit Free Press, Dec. 16, 2015, http://tinyurl.com/hdm6623. If federal courts accept Plaintiffs' theories about the supposed illegality of States not having a straight-ticket option on the ballot, about forty States' laws could be subject to constitutional and Voting Rights Act challenges.

Plaintiffs can point to no decision that holds that there is a constitutional right to vote a straight-ticket, or any decision that holds that it is unconstitutional to eliminate straight-ticket voting. As with their other "undue burden" claims under the First and Fourteenth Amendments, the analysis is under the *Anderson/Burdick* test.

Here, the burden on the right to vote of not having a straight-ticket option on the ballot is minimal. It cannot be reasonably characterized as a "severe" burden. Voters have access to ballots the same as before the change, and the only difference is that the ballot no longer includes a straight-ticket option. 2011 Wisconsin Act 23, § 6 imposes "reasonable, non-discriminatory restrictions" on the rights of voters. *See Burdick*, 504 U.S. at 434. The next step in the analysis is to determine the State's interests.

Straight-ticket voting was not an option on all ballots, like presidential primary ballots, which confused voters. (Tr. 05-19-16, 4-P-136.) Likewise, with straight-ticket voting, there was more of a chance that voters would not see the non-partisan offices or referendum questions lower on the ballot. (Tr. 05-24-16, 7-P-19.) The State has legitimate interests in preventing "confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). 2011 Wisconsin Act 23, § 6 advances the State's interest in avoiding voter confusion by eliminating a potentially befuddling ballot configuration for voters.

Eliminating the straight-ticket option decreases the possibility of voters marking the straight-ticket box on the ballot and then proceeding to vote for candidates on the remainder of the ballot anyway. "When an elector casts more votes for any office or measure than he or she is entitled to cast at an election, all the elector's votes for that office or measure are invalid and the elector is deemed to have voted for none of them." Wis. Stat. § 7.50(1)(b). A voter who does not understand the straight-ticket option might engage in this type of "over-voting." 2011 Wisconsin Act 23, § 6 eliminates this potential confusion by requiring a vote by candidate, not by party.

Additionally, eliminating the straight-ticket option from the general election ballot avoids the confusion that some voters might experience due to the fact that a partisan primary election ballot is limited to voting for one

party's candidates. A voter who voted in a partisan primary might be confused if the general election ballot has an analogous, partisan-only, straight-ticket option. Similarly, some voters who only vote at general elections might be confused to see a straight-ticket option on the general election ballot when they believed that a party-only option is available only for a partisan primary. 2011 Wisconsin Act 23, § 6 furthers the State's legitimate interest in avoiding voter confusion regarding the ballot.

2011 Wisconsin Act 23, § 6 also promotes a legitimate State interest in a more-informed and less-polarized voting populace. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson*, 460 U.S. at 796. Eliminating a straight-ticket option from the ballot encourages voters to pay attention to who they are voting for rather than only paying attention to the political parties listed on the ballot. Eliminating a straight-ticket option could increase the likelihood that a voter will consider the candidate and her specific views, not just the political party's platform, thereby promoting the State's interest in a more-informed electorate.

In sum, weighing the minimal burden that 2011 Wisconsin Act 23, § 6 places on the right to vote against the State's specific and legitimate interests, on balance the law creates no undue burden on the right to vote in violation of

the First and Fourteenth Amendments. Accordingly, the Court should dismiss Plaintiffs' Count 2 as to 2011 Wisconsin Act 23, § 6.

I. Changes to when absentee ballots can be returned to a voter to correct "mistakes" create no "undue burden" on the right to vote.

Plaintiffs have alleged that 2011 Wisconsin Act 227, § 4 "severely burdens" voting rights by "prohibit[ing] municipal clerks from returning absentee ballots to voters to correct mistakes (such as errors in marking the ballot) unless the ballots are spoiled or damaged or there was no certificate or an improperly completed certificate." (Second Am. Compl., Dkt. 141 ¶¶ 151, 150.) This claim does not make practical sense in terms of how absentee ballots are processed, on Election Day, by local election officials. Furthermore, no Plaintiff proved he has Article III standing to challenge the law, and the Court lacks jurisdiction. Plaintiffs failed to prove their claim at trial, and the Court should enter judgment in Defendants' favor.

Plaintiffs' claim does not make sense in light of how municipal clerks process absentee ballots. The State's municipal clerk witnesses testified about how absentee ballots are handled. Clerk Hermann-Brown testified that, when an absentee ballot is returned, it is put in the appropriate district (or ward) box and sent to the polling place on Election Day. (Tr. 05-19-16, 4-P-137–38.) Clerk McHugh testified that absentee ballots are filed in a secure room until

Election Day. (Tr. 05-24-16, 7-A-115.) On Election Day, they are fed through the voting equipment. (Tr. 05-24-16, 7-A-115.)

Clerk Westerbeke testified that when an absentee ballot comes back to the municipal clerk's office with deficiencies on the certification—like a missing witness signature—the voter is contacted. (Tr. 05-24-16, 7-A-192.) In most cases this is not a problem because the ballot can be sent back to the voter in time to correct the deficiency. (Tr. 05-24-16, 7-A-192.)

Absentee ballot envelopes are not opened until Election Day, when they are then run through vote tabulating machines at the polling place in the ward where the voter resides. Since absentee ballots are not actually seen by local election officials until Election Day, it does not make sense that municipal clerks would be in a position to return a ballot to a voter to correct an "error" in how the ballot was marked. There would be no time to do so on Election Day, when municipal clerks and election inspectors are very busy administering the election.

Additionally, there is the question of what is an "error" or "mistake." What constitutes an error under Plaintiffs' rule? Plaintiffs' rule would be unworkable and burdensome for local election officials. It would require an election official to determine whether every absentee ballot contains a "mistake" in voter intent, which is impractical. For example, suppose a voter marks a selection for a candidate for judge, but not for county treasurer, a

permissible and countable ballot. Is the local election official to guess as to whether omitting a vote for treasurer was intentional or a mistake? There is simply no practical way for a municipal clerk is to know if an absentee ballot contains that type of unintentional error. Asking local election officials to determine whether a particular ballot contains a "mistake" is an unworkable task, which would be piled on top of the already hectic schedule of an election.

The bottom line is that absentee ballots are not counted until Election Day when they are run through the vote-tabulating machine and end up in the ballot box. Wis. Stat. §§ 6.88(1), (3), 7.52. Returning ballots with "mistakes" would require a review of every absentee ballot when it comes in, and some rapid system of returning the ballots to the elector and obtaining a ballot, all while administering the normal Election Day process. If a ballot is rejected because of an error, that voter would have to come in to the municipal clerk's office because there would not be time to mail the ballot, get it fixed, and then mail the ballot back. This is unworkable.

Likewise, Plaintiffs have not been able to provide evidence of the so-called "severe burden" on the right to vote created by this law, perhaps other than some miscellaneous anecdotes. It is not clear whether this is a problem or just something that Plaintiffs are hypothesizing. That said, the burden part of the analysis is hard to pin down.

The State has legitimate election administration interests in establishing when municipal clerks can contact voters regarding errors relating to absentee ballots. It is sensible to limit those contacts to errors regarding the certification of the absentee ballot envelope, which can be easily seen by the municipal clerk or the clerks' staff when the envelopes are returned and sorted by ward for later distribution on Election Day.

Given the State's legitimate interests, and weighing them against the non-existent or unproven "burdens" on the right to vote, the law regarding when municipal clerks can send back absentee ballots to voters passes constitutional muster under the *Anderson/Burdick* test.

III. Section 2 of the Voting Rights Act claims (Count 1)

Whether considered individually or cumulatively, the challenged laws do not violate Section 2. The Court can reference Defendants' claim chart, Dkt. 79-1:2, to see the laws challenged under Section 2. The Court's guiding light on the Section 2 claims is the Seventh Circuit's decision in *Frank*. Under *Frank*, Plaintiffs failed at trial to prove their Section 2 claims.

A. Legal standard for Section 2 claims

Sections 2(a) and 2(b) of the Voting Rights Act are quoted above and need not be repeated. Plaintiffs' specific claims arise under Section 2(a) and are vote denial claims, as described below.

1. This case involves vote denial claims under Section 2, not vote dilution claims.

There are two types of claims under Section 2(a) of the Voting Rights Act: vote denial claims and vote dilution claims. Professor Daniel Tokaji has described these distinct claims:

> [I]t is important to distinguish two analytically distinct types of V[oting] R[ights] A[ct] cases: those involving vote denial and those involving vote dilution. "Vote denial" refers to practices that prevent people from voting or having their votes counted. Historically, examples of practices resulting in vote denial include literacy tests, poll taxes, all-white primaries, and English-only ballots. "Vote dilution," on the other hand, refers to practices that diminish minorities' political influence in places where they are allowed to vote. Chief examples of vote-dilution practices include at-large elections and redistricting plans that keep minorities' voting strength weak.

Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691–92 (Summer 2006); *see also id.* at 718; *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (distinguishing vote denial from vote dilution claims and indicating that the former "refers to practices that prevent people from having their vote counted").

Plaintiffs' claims in the Second Amended Complaint are properly characterized as vote denial claims because they challenge laws that go to one's eligibility to vote, rather than a districting plan or at-large election scheme that is alleged to dilute minorities' voting strength.

In the vote denial context, Section 2 prohibits States from imposing voting practices that cause minority voters to be disproportionately excluded

from the political process, even if the disproportionate exclusion is not motivated by a racial purpose. But the law goes no further. Section 2's plain language prohibits only voting practices "imposed" by States that "result[]" in, or cause, minority voters to have "less opportunity" to vote than non-minorities because the system is not "equally open" to them. 52 U.S.C § 10301(a), (b). The law does not require states to maximize minority opportunities by eliminating the usual burdens of voting to overcome underlying socio-economic disparities among racial groups. Nor does it invalidate voting practices simply because they "ha[ve] a disparate effect on minorities." *Frank*, 768 F.3d at 753. Section 2 is "an equal-treatment requirement," not "an equal-outcome command." *Id.* at 754.

To prove their vote denial claims, Plaintiffs are required to establish causation. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (citations omitted). "[A] plaintiff can prevail in a section 2 claim only if, based on the totality of the circumstances, . . . the challenged voting practice results in discrimination on account of race." *Id.* (citations omitted). "Although, proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, . . . proof of a 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial."

Id. (citations omitted; quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)).

"[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Smith*, 109 F.3d at 595.[4] A Section 2 claim "based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes the disparity, will be rejected." *Gonzalez*, 677 F.3d at 405 (citation omitted).

2. *Frank v. Walker* established the applicable standard.[5]

In *Frank v. Walker*, the Seventh Circuit held that "a Section 2 vote-denial claim consists of two elements:"

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[4] *See also Ortiz v. City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 315 (3d Cir. 1994) (rejecting the contention that Pennsylvania's voter-purge statute violated Section 2 simply because more minority members than whites were inactive voters); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358–59 (4th Cir. 1989) (upholding Virginia's appointment-based school board system against a Section 2 challenge despite a statistical disparity between the percentage of blacks in the population and the percentage of blacks on the school board); *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting a Section 2 challenge to an at-large voting system based exclusively on a statistical difference between Hispanic and white voter turnout); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting a Section 2 challenge to Tennessee's felon-disenfranchisement law that rested primarily on the statistical difference between minority and white felony-conviction rates).

[5] On April 12, 2016, the Seventh Circuit decided *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) ("*Frank II*"). *Frank II* did not address a Section 2 claim. Instead, *Frank II* remanded the case to the district court to consider a claim that the voter photo ID law violates the Equal Protection Clause as applied to classes of voters who would be unable to obtain qualifying ID with reasonable effort. *Id.*

- First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Husted,* 768 F.3d at 553, 2014 WL 4724703, at *24 (quoting [52 U.S.C. § 10301(a)-(b), formerly] 42 U.S.C. § 1973(a)-(b));

- Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting *Gingles,* 478 U.S. at 47, 106 S.Ct. 2752).

768 F.3d at 754–55 (brackets in original). The Seventh Circuit is "skeptical about the second of these steps, because it does not distinguish discrimination by the [State] from other persons' discrimination." *Id.* at 755.

The Seventh Circuit held that Wisconsin's voter photo ID requirement complied with Section 2 because the law "[did] not draw any line by race" and because it "extend[ed] to every citizen an equal opportunity to get a photo ID." *Frank*, 768 F.3d at 753. It was beside the point that "Blacks and Latinos are disproportionately likely to lack an ID," because "[Section 2] does not condemn a voting practice just because it has a disparate impact on minorities." *Id.* It was also beside the point that disparities in the rates at which minorities get photo IDs are ultimately "traceable to the effects of discrimination in areas such as education, employment, and housing," because "Section 2 forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.*

The Seventh Circuit observed that such factors are sometimes considered in Section 2 cases that address "claims that racial gerrymandering has been employed to dilute the votes or racial or ethnic groups." *Frank*, 768 F.3d at 752 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991)). "In *Gingles* the Justices borrowed nine factors from a Senate committee report (often called the '*Gingles* factors') as the standard for applying § 2." *Id.* The Seventh Circuit expressly rejected the *Gingles* factors as "unhelpful" to resolving Section 2 claims in "voter-qualification cases." *Frank*, 768 F.3d at 754. This Court is bound by *Frank*. Accordingly, the Court should not consider the *Gingles* factors because they are irrelevant to resolving Plaintiffs' Section 2 vote denial claims.

3. Section 2 plaintiffs must establish that the challenged law results in less minority opportunity to vote as compared to an objective benchmark.

Section 2 plaintiffs must establish that the challenged practice results in less minority opportunity to vote compared to what would result from an objective benchmark, not to what would result from a plaintiff's preferred minority-maximizing alternative. *See Holder v. Hall*, 512 U.S. 874, 881 (1994) (opinion of Kennedy, J.). This rule follows from Section 2's plain language: the statute prohibits practices that "deny or abridge" the right to vote. 52 U.S.C. § 10301(a). Since time, place, and manner regulations (unlike, for example, literacy tests) do not "deny" anyone the vote, challenges to such practices must

show that they "abridge" minority voting rights. The concept of "abridgement" in turn "necessarily entails a comparison" with "what the right to vote *ought to be*." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*").

Since Section 2 does not require a system that maximizes minority opportunities, but only one that provides an "equal opportunity," the benchmark for what "ought to be" cannot simply be an alternative that enhances minority voter convenience compared to the challenged practice. For example, Plaintiffs claim that Section 2 requires a 30-day in-person absentee voting period, but they offer no reason why 30 days constitutes an objective benchmark, as opposed to 5, 10, or 20 days of in-person absentee voting. (Second Am. Compl., Dkt. 141 ¶¶ 62, 89.)

Nor does Section 2 impose an "anti-retrogression" standard like Section 5 of the Voting Right Act, which compares a State's current voting laws to the prior status quo. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state once had a particular practice in place does not make it the benchmark for a § 2 challenge. *Holder*, 512 U.S. at 884 (opinion of Kennedy,

J.). Rather, the measure of "abridgement" under Section 2 must be a nationwide, objective benchmark that the federal judiciary can rely on without comparison to the prior status quo, and without simply imposing the maximization preferences of Section 2 plaintiffs on state officials.

Since Plaintiffs do not and cannot point to any "benchmark" of voting practices that are objectively superior to the challenged laws, but instead propose alternatives that are purportedly superior only because they enhance minority participation, they have not alleged violations of Section 2.

4. Plaintiffs' interpretation of Section 2 would violate the Constitution.

If Plaintiffs' interpretation of Section 2 is accepted, the statute would exceed Congress's power to enforce the Fifteenth Amendment. Notably, the Fifteenth Amendment prohibits only "purposeful discrimination," and does not prohibit laws simply because they "result[] in a racially disproportionate impact." *City of Mobile v. Bolden*, 446 U.S. 55, 63, 70 (1980) (opinion of Stewart, J.) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)); *cf. Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment). Congress has power to "enforce" that provision "by appropriate legislation," U.S. Const. amend. XV, § 2, which allows Congress to "remedy or prevent" instances of intentional discrimination, so long as there is "a congruence and proportionality between the injury to be prevented or remedied

and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). The enforcement power does not, however, allow Congress to "alte[r] the meaning" of the Fifteenth Amendment's protections. *Id.* at 519.

To fall within the enforcement power, Section 2 must be a "congruent and proportional" effort to prevent purposeful race discrimination. This does not mean that congressional enactments are strictly limited to banning only "purposeful discrimination." They may bar actions with discriminatory effects, but only insofar as they are a genuine prophylactic effort to eliminate intentional discrimination. If the statute is not a congruent and proportional effort to weed out purposeful discrimination, it is not a legitimate effort to "enforce" the Constitution, but a forbidden "attempt [to enact] a substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532. If Section 2 were not an effort to prohibit unconstitutional discrimination, it would impermissibly "chang[e]" the Fifteenth Amendment from a ban on purposeful discrimination to a ban on disparate effects. *Id.*

Properly interpreted, the Section 2 "results" test is appropriate enforcement legislation. As established above, the test prohibits only practices that depart from an objective benchmark in a manner that proximately causes minorities to have less opportunity to vote than non-minorities. If a State departs from an objective benchmark practice and adopts a practice that causes minorities to have less voting opportunity, such departure can be

banned as a prophylactic effort to prohibit intentional discrimination. Such departures from the norm are "actions . . . from which one can infer, if [they] remain unexplained, that it is more likely than not that such actions were [purposefully] discriminatory." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (addressing the standard for establishing intentional discrimination). By ensuring that Section 2 is "limited to those cases in which constitutional violations [are] most likely," the Section 2 "results" test stays within the bounds of Congress's enforcement power. *City of Boerne*, 521 U.S. at 533.

In addition to exceeding the enforcement power, interpreting Section 2 to require States to boost minority voting participation would affirmatively violate the Constitution's equal-treatment guarantee. The U.S. Supreme Court has expressly held that abandoning "traditional districting principles" for the purpose of enhancing minority voting strength violates the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 919 (1996) (a state may not subordinate neutral principles to create a majority-minority district). Section 2 cannot require States to abandon traditional electoral practices such as, for example, Election Day and advance registration, for the purpose of maximizing minority voter participation. In short, "race" cannot be the "predominant factor" in electoral decisions. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Requiring States to adjust their race-neutral laws to enhance minority participation rates would require exactly that—the "sordid business" of "divvying us up by race" through deliberate race-based decision-making. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.). Under Plaintiffs' interpretation of Section 2, any failure to enhance minority voting opportunity constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," regardless of how strong or compelling the State's justification for the practice. *See Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Because Plaintiffs' interpretation raises "serious constitutional question[s]" concerning Congress' enforcement powers and the Equal Protection Clause, it must be rejected if it is "fairly possible" to interpret Section 2 as outlined above. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Plaintiffs' interpretation rearranges "the usual constitutional balance of federal and state powers," and must be rejected unless Congress' intent to achieve this result has been made "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). The Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 authorized the federal judiciary to override state election laws as Plaintiffs claim, Congress would have said so clearly.

B. Voter photo ID does not violate Section 2.

In *Frank*, the Seventh Circuit concluded that the voter photo ID law does not violate Section 2. *Frank*, 768 F.3d at 755. Here, Plaintiffs have not proven that the result should be different. In fact, Plaintiffs were unable to muster the same type and quantum of racially disparate impact evidence at trial that the *Frank* Plaintiffs did, making their Section 2 case even weaker than the case presented in *Frank*. The result: the law is valid under Section 2.

Plaintiffs focused their Section 2 attack squarely on the IDPP and whether individuals in that program are mostly minorities. (*See, e.g.*, PX474, 475, 476, 477.) While it is true that minorities use the IDPP more frequently than whites, that fact does not show a Section 2 violation. All it shows is that the IDPP is working to get free IDs to those who need them.

Obviously, the IDPP involves only a tiny fraction of Wisconsin's voting population and is not representative of all who must comply with the voter photo ID law. The IDPP encompasses a very small percentage of voters seeking a free state ID card from DMV, and data regarding the IDPP do not prove how *all* minorities are impacted by the voter photo ID law. Looking to the IDPP alone is a misguided way of cherry picking evidence that does not paint a complete picture of the voter photo ID law. Disparate impact evidence pertaining to the IDPP is not enough to establish a Section 2 violation, and it

certainly is not enough to overcome *Frank*, which virtually mandates judgment for the State on the Section 2 claim.

Plaintiffs here were not able to avoid some essential findings in *Frank*. The Seventh Circuit stated that the *Frank* district judge: "found that in Milwaukee County (which the judge took as a proxy for the whole state) 97.6% of white eligible voters have a qualifying photo ID or the documents they need to get one. That figure is 95.5% for black eligible voters and 94.1% for Latino eligible voters." *Frank*, 768 F.3d at 746. These numbers did not convince the Seventh Circuit as to the Section 2 claim.

Plaintiffs here did not even try to present evidence showing this type of analysis and racial disparity, leaving a gaping hole in their Section 2 case. While Plaintiffs offered trial evidence regarding non-possession rates of ID cards by race, they did not offer evidence comparing whether or to what extent voters of different races lack underlying documents to obtain free state ID cards. Plaintiffs did not go as far as the *Frank* Plaintiffs to show this disparity, which is key to the Section 2 analysis because it informs to what extent races are burdened differently in obtaining free state ID cards.

Dr. Mayer, for example, offered an opinion in his December 2015 report regarding non-possession rates of Wisconsin driver licenses and state ID cards, by race. He concluded that whites do not possess these IDs at a rate of 8.4%,

blacks at a rate of 9.8%, and Hispanics at a rate of 11.1%. (PX38:20 (Table 3).) But non-possession rates of IDs are only one half of the analysis.

Dr. Mayer did *not* opine upon whether minorities, either statewide or in Milwaukee, possess birth certificates or other underlying documents necessary to obtain a free state ID card at rates that differ from whites. In *Frank*, evidence of such disparities was in the trial record, although it ultimately did not convince the Seventh Circuit. *See Frank*, 768 F.3d at 746, 755. Here, Plaintiffs failed to offer *any* evidence regarding racial disparities, either statewide or in Milwaukee, in possession rates for birth certificates and other documents necessary to obtain free state ID cards.

The evidence Plaintiffs offered at trial to address whether minorities possess documents necessary to obtain free state ID cards at rates different from whites was data showing that IDPP petitioners were largely born in states, including those in the South, where obtaining some documents appears to be more difficult. (*See* PX478, 479.) But this evidence analyzes *only* the IDPP petitioners when there are *millions* of eligible voters in Wisconsin. If Plaintiffs are staking their entire Section 2 claim upon a plainly non-representative sample of about 1,000 IDPP petitioners, *see, e.g.*, PX340 and PX474, the claim is indeed weak and utterly unsubstantiated. IDPP petitioners are not a valid proxy to measure the statewide impact, if any, of the voter photo ID law on

minorities. The only thing *that* evidence measures is the racial make-up of IDPP petitioners.

Plaintiffs' focus on the "Senate Factors" is, as the *Frank* court found, "unhelpful." *Frank*, 768 F.3d at 754. Plaintiffs' expert, Dr. Barry Burden, devoted a substantial number of the pages in his December 2015 report to an analysis of the Senate Factors. (PX37:9–23.) In particular, in his analysis of Senate Factor Five he delved into private discrimination by non-State actors. (PX37:11–17.) This analysis is irrelevant when "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753.

The Senate Factors are irrelevant to vote denial claims and should not be applied. The Seventh Circuit finds these factors "unhelpful" in voter-qualification cases. *Frank*, 768 F.3d at 754. Even the *Frank* district judge refused to apply the Senate Factors because they were "legal standards developed for vote-dilution cases," such as challenges to "at-large elections, redistricting plans, and the like." *Frank v. Walker*, 17 F. Supp. 3d 837, 869 (E.D. Wis. 2014).

Even if this Court applies the Senate Factors, Plaintiffs' Section 2 claims still fail. A Section 2 claim is analyzed in light of "the totality of circumstances." 52 U.S.C. § 10301(a). Considering the totality of circumstances and every piece

of trial evidence, Plaintiffs' Section 2 claims as to the voter photo ID law (and all the challenged laws) fail under *Frank*.

Vote denial claims like those here turn on a showing of whether the challenged laws afford minority voters "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). Minorities' opportunity to vote remains the same in Wisconsin under the voter photo ID law, as the Seventh Circuit held in *Frank*. *See Frank*, 768 F.3d at 755. Under Plaintiffs' interpretation of Section 2, the fact that Wisconsin minorities may have experienced effects of past discrimination, entirely unrelated to the challenged laws, means that the voter photo ID law is illegal. This theory is refuted by the Seventh Circuit in *Frank*, which found the consideration of such private-party discrimination irrelevant. *See id.* at 753.

Plaintiffs' trial evidence offers no direct cause-and-effect relationship establishing that the voter photo ID law "results in discrimination on account of race." *Gonzales v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). "[P]roof of a 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." *Id.* (citations omitted; quoting *Smith*, 109 F.3d at 595).

None of the evidence Plaintiffs submitted at trial can show that the voter photo ID law violates Section 2 when one considers the evidence presented to

the Seventh Circuit in *Frank* that was deemed legally insufficient to show a violation of Section 2. Plaintiffs here have not shown through any of their trial evidence that they can approach even the level of empirical support that unequivocally failed to show a Section 2 violation in *Frank*. This Court is bound to apply *Frank* and, in doing so, should conclude that Plaintiffs' Section 2 claim as to the voter photo ID law fails.

C. The challenged absentee voting laws do not violate Section 2.

Under Section 2, Plaintiffs challenge the one-location rule for in-person absentee voting and the available days and times for such voting. (Second Am. Compl., Dkt. 141 ¶ 180.) These challenges fail because Plaintiffs did not prove that the laws cause a prohibited discriminatory impact on minority voters. On the contrary, a pre- and post-implementation comparison showed increased minority turnout for absentee voting. Plaintiffs offered no contrary evidence.

Dr. McCarty's conclusions regarding minorities' use of absentee voting are summarized on pages 23 through 25 of his report, and that analysis was described in this brief in the section above regarding Count 2 constitutional challenges to absentee voting laws.

Dr. McCarty's conclusions show that minority voters increased their use of absentee voting from 2010 to 2014, *i.e.*, pre- and post-implementation of the challenged laws. (DX5:23–25; Tr. 05-26-16, 9-A-77.) The findings also show

(based upon the odds ratio), that black registered voters were more than twice as likely to vote absentee in 2014 than in 2010, and Hispanic registered voters were 89% more likely to vote absentee in 2014 than in 2010. (DX5:24, Table 4.) These data do not show a negative impact on minority absentee voting turnout.

Plaintiffs can point to no contrary evidence to prove their Section 2 claims. For example, they can point to no expert testimony or reports to rebut Dr. McCarty's findings regarding minorities' use of absentee voting. Likewise, Plaintiffs can point to no evidence that, without the challenged laws, minority absentee voting rates would have increased *more*. As Dr. McCarty wrote in his report, "[w]hile [the] plaintiffs' might argue that the increase would have been even larger absent the reforms, such a claim is hard to square with the historical pattern of absentee voting in Wisconsin." (DX5:24.)

Plaintiffs have not shown that Wisconsin's one-location rule for in-person absentee voting or the changes to available days and times for such voting have caused minority voters to have "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). Plaintiffs' Section 2 claim fails, and the Court should grant judgment to Defendants.

D. The 28-day durational residency requirement does not violate Section 2.

Plaintiffs have failed to prove that the 28-day durational residency requirement will have cause a prohibited discriminatory impact on minority voters. Their Section 2 claim fails.

A state may impose reasonable voter residence-related restrictions. *Crawford*, 553 U.S. at 189. In the Voting Rights Act Amendments of 1970, Congress permitted states to close registration 30 days before elections for president and vice-president. *Dunn*, 405 U.S. at 334 (citing 42 U.S.C. § 1973aa–1).

In *Dunn*, the Supreme Court determined that a 30–day durational residency requirement passed constitutional muster. *Dunn*, 405 U.S. at 363 (Blackmun, J., concurring). The Court later found that a 50-day period "approaches the outer constitutional limits in this area." *Burns*, 410 U.S. at 687. But the Court still identified a 50-day durational residency requirement as reasonable and a justifiable exercise of legislative judgment. *Marston*, 410 U.S. at 680–81. Thus, this Court must start from that premise when analyzing Plaintiffs' claims.

Plaintiffs allege that the 28-day durational residency requirement violates Section 2 of the Voting Rights Act. But they fail to recognize that the Voting Rights Act itself permits states to have an even longer 30-day

durational residency requirement in presidential elections. *See* 52 U.S.C. § 10502(d) (30-day requirement); *see also Dunn*, 405 U.S. at 334 (Voting Rights Act Amendments of 1970). And the Supreme Court has permitted non-presidential elections to exceed even the Voting Rights Act's 30-day restriction. *Burns*, 410 U.S. 686; *Marston*, 410 U.S. 679. The Court's durational residency requirement cases cut directly against Plaintiffs' Voting Rights Act claim. The claim fails in light of the facts that the Voting Rights Act itself permits a longer durational residency requirement for certain federal elections than Wisconsin's 28-day requirement, and that the Supreme Court has found no problems with even longer requirements.

E. The challenged voter registration laws do not violate Section 2.

1. The elimination of corroboration does not violate Section 2.

Plaintiffs did not prove at trial that minority voters will be disparately impacted by the elimination of corroboration because they are more likely than whites to use corroboration as an option to register to vote. In fact, the evidence submitted on this point confirmed that the available data do not allow for a direct analysis of that salient question. Plaintiffs did not prove that the elimination of corroboration makes it "needlessly hard" to register vote or results in minority voters having "less opportunity" to vote than whites. *Frank*, 768 F.3d at 753; 52 U.S.C. § 10301(b). Minority voters, like all voters, still have

robust options to prove their residency to vote using documents like a driver license, utility bill, letter from a government agency, etc. Plaintiffs' Section 2 claim as to corroboration fails.

Dr. Lichtman testified at trial and wrote in his December 2015 expert report that, based upon available GAB data, 35,332 Wisconsin voters registered using corroboration between 2006 and October 2012. (Tr. 05-24-16, 7-A-35; PX36:40.) Dr. Lichtman did not know the total number of registrants for that time period, but testified that it "wouldn't surprise" him if there were millions. (Tr. 05-24-16, 7-A-35.) Dr. Mayer also detailed in his December 2015 report that 19,464 active voters used corroboration as of October 2012. (PX38:39.) He was not aware, however, of any individual voter who was unable to register based upon the elimination of corroboration as a method of verifying residence. (Tr. 05-19-16, 4-A-47.)

Importantly, Dr. Lichtman could not say how many of the registrants who used corroboration were minorities. He stated in his report: "Although *statistics are not available by race*, corroboration is most likely to benefit homeless persons and persons who recently moved and may not yet have the documentation necessary to prove residence." (PX36:40 (emphasis added).) Dr. Lichtman then went on to cite data regarding how homelessness is correlated with socio-economic status, which is, in turn, correlated with race. (PX36:40.) Next, he cited data showing that African Americans and Hispanics are more

likely than whites to have lived in a different house the prior year. (PX36:40–41.)

Dr. Lichtman's attenuated, step-wise analysis regarding minorities' use of corroboration to register are insufficient to prove Plaintiffs' Section 2 claim. He cited no data whatsoever regarding whether or how frequently minorities used corroboration. He relied only upon unrelated data regarding homelessness, socio-economic status, and relative mobility. Plaintiffs did not prove a direct causal connection between the elimination of corroboration and minority voters having "less opportunity" to register and vote. 52 U.S.C. § 10301(b). Their Section 2 claim as to corroboration fails.

2. The elimination of statewide special registration deputies does not violate Section 2.

Plaintiffs failed to prove their claim that the elimination of statewide special registration deputies violates Section 2. They can point to no trial evidence showing that minority voters were more likely than whites to register to vote with the assistance of a statewide special registration deputy. That said, they can show no relevant racial disparity caused by the law. The Court should grant judgment to Defendants.

None of Plaintiffs' expert witnesses analyzed the specific question whether minority voters are disparately burdened by the elimination of statewide special registration deputies. Dr. Lichtman analyzed only whether

the elimination of special registration deputies *at high schools* has a disparate impact on African American and Hispanic voters. (*See* PX36:41.) He did no analysis that pertains to the Section 2 challenge to the elimination of GAB's ability to certify *statewide* SRDs, other than a single paragraph in his report and Table 15. (PX36:40–41, Table 15.) His analysis does not carry the day, however, as he failed to show through any data that minorities have experienced disparate burdens compared to whites due to this change.

Plaintiffs can point to no trial evidence other than perhaps scattered anecdotal evidence of when minorities used statewide special registration deputies, or that statewide SRDs did most of their work in areas with predominantly minority populations. But these are only anecdotes, and no hard data was presented to quantify the impact, if any, on minority voters' ability to register to vote. All voters in Wisconsin are impacted the same by the elimination of statewide SRDs, and there remain robust options to register to vote. Minority voters do not have less opportunity to vote because there are no longer statewide SRDS. Plaintiffs have failed to prove their Section 2 claim, and the Court should enter judgment in Defendants' favor.

3. The documentary proof of residence requirement does not violate Section 2.

Plaintiffs' claim under Section 2 challenging the documentary proof of residence requirement fares slightly better than their claim as to the

elimination of statewide SRDs, but not much. Plaintiffs offered virtually no trial evidence to substantiate this claim, and they were unable to prove that the change in the law creates a prohibited discriminatory impact on minority voters. The Court should grant judgment to Defendants.

The entirety of Plaintiffs' experts' analysis of this claim is found in Dr. Lichtman's report. His analysis was:

> Act 182 passed in 2013 makes more onerous the elimination of corroboration by expanding the universe of potential voters required to present proof of residence when voting. As explained by the Wisconsin Legislative Council, this Act "eliminates the exemption for voters who register prior to the close of registration from having to provide proof of residence. Under prior law, a voter who registered before the close of registration (third Wednesday preceding an election) generally was not required to provide proof of residence when registering to vote. Act 182 requires all voters, except a military or overseas voter, to provide such proof of residence when registering. Under the Act, the requirement to provide proof of residence no longer depends upon the date an individual registers to vote."

(PX36:41.) Dr. Lichtman's analysis does not address whether there were racially disparate impacts caused by the expansion of the documentary proof of residence requirement. Thus, he does not begin to address the Section 2 question.

Plaintiffs will probably argue that minorities are more likely to be poor, more likely to be homeless, less educated, less healthy, more likely to change residences, and more likely to be unemployed; therefore, they are less likely than whites to have one of the many documents that satisfy the documentary proof of residence requirement. (*See* PX36:40.) But Plaintiffs have not shown

through any data that minorities actually lack proof of residence documents at rates that exceed whites. They have not proven their claim. Accordingly, the Court should enter judgment in Defendants' favor.

F. The election observer laws do not violate Section 2.

Plaintiffs' Section 2 claim as to election observer positioning rules fails because they have not shown that a three-to-eight-foot rule will cause a prohibited discriminatory result that abridges minority voters' right to vote. The fact that some, limited, anecdotal examples of unruly election observers occurred years ago in Milwaukee, Racine, or other minority-heavy areas of the State does not show a Section 2 violation. Plaintiffs did not prove any recent examples—under the *current* statutory rule for positioning election observers—to demonstrate that minorities are being intimidated by election observers. The anecdotes addressed at trial are from years ago, before the current rules were in place. Really, Plaintiffs are only speculating about the current rules and have no evidence of any problem.

Wisconsin Stat. § 7.41(2) does not "impose a discriminatory burden on members of a protected class" that would violate Section 2. *Frank*, 768 F.3d at 754–55. The "three-to-eight feet" rule in Wis. Stat. § 7.41(2) is not a "qualification or prerequisite to voting" or a "standard, practice, or procedure" relating *to voting*. 52 U.S.C. § 10301(a). It is about positioning observers and what they can and cannot do based upon what local election officials require.

Wis. Stat. § 7.41. It is not a barrier to or regulation of the process of voters casting a ballot on Election Day.

Wisconsin Stat. § 7.41(2) does not "draw any line by race." *Frank*, 768 F.3d at 753. It applies equally to voters, election officials, and election observers regardless of their races. Plaintiffs did not prove that, because local election officials possess the authority to require election observers to stand no closer three feet from voters, the result is that "members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* at 755 (citation omitted).

Where election observers stand does not impact minorities' "opportunity" to cast a ballot whatsoever, let alone give them "less opportunity" to vote. 52 U.S.C. § 10301(b). Even if it could be argued that Plaintiffs proved at trial that Wis. Stat. § 7.41(2) has *some* impact on minority voters in Milwaukee or other minority-heavy areas, Plaintiffs cannot overcome the Seventh Circuit's holding that Section 2 "does not condemn a voting practice just because it has a disparate impact on minorities" *Frank*, 768 F.3d at 753. They have failed to prove their Section 2 claim as to 2013 Wisconsin Act 177.

G. The elimination of straight-ticket voting does not violate Section 2.

Plaintiffs offered virtually no evidence at trial to prove that minorities are more likely than whites to use a straight-ticket option, making them disparately impacted by eliminating that option. Plaintiffs offered almost no expert testimony or evidence about straight-ticket voting. They did not prove their Section 2 claim.

2011 Wisconsin Act 23, § 6 does not "draw any line by race." *Frank*, 768 F.3d at 753. Plaintiffs did not prove that eliminating straight-ticket voting causes minority voters to have less "opportunity" than other members of the electorate to vote. *See id.* Minority voters use the same ballot as non-minority voters and have the same opportunity to elect candidates of their choice regardless of whether there is a straight-ticket option on the ballot. The lack of a straight-ticket option impacts all voters the same.

Plaintiffs did not prove that racial minorities are or were more likely to vote straight-ticket than non-minority voters. The available data do not allow for that type of analysis and, even if they did, the analysis would not show a violation because Section 2 "does not condemn a voting practice just because it has a disparate impact on minorities." *Frank*, 768 F.3d at 753. It is not enough to show that minorities are or were more likely than non-minorities to vote a straight-ticket.

Plaintiffs did not prove that eliminating straight-ticket voting causes longer lines in places where there are high concentrations of minority voters. (*See* Second Am. Compl., Dkt. 141 ¶ 143.) The available data do not support that allegation, and the reasons for long lines at a polling place could be due to many factors, including: unexpectedly high voter turnout, insufficient staff at the polling place, poor bottleneck management, technical glitches with vote-tabulating machines, and numerous other logistical issues that arise during almost every election. Dr. Lichtman opined regarding the elimination of straight-ticket voting having an "adverse impact on waiting times since it makes voting lengthier for those would otherwise use this option." (PX36:44.) He offered no further analysis on the subject and did no further research or study of whether no straight-ticket voting led to longer lines in Milwaukee. (*Id.*) He showed no causal connection between the change to the law and longer lines.

One cannot blame long lines on the fact that there is no straight-ticket option on the ballot. Plaintiffs' Section 2 claim fails because the factual premise for it—long lines in the City of Milwaukee—is not verifiable by data and, even if it were, it would not provide a basis for a Section 2 claim because disparate impact is never enough to prove a Section 2 claim. *See Frank*, 768 F.3d at 753. The Court should grant judgment to Defendants.

IV. Intentional race discrimination claims under the Fourteenth and Fifteenth Amendments (Count 5)

A. Legal standard for intentional race discrimination claims under the Fourteenth and Fifteenth Amendments

To prevail on their Count 5 claims, Plaintiffs must prove that the Legislature intentionally discriminated on the basis of race when it enacted the challenged laws.

The Fifteenth Amendment prohibits only "purposeful discrimination," and does not prohibit laws simply because they "result[] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (opinion of Stewart, J.) (quoting *Vill. of Arlington Heights*, 429 U.S. at 265); *cf. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment). Likewise, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights*, 429 U.S. at 265; *see also Davis*, 426 U.S. at 239; *City of Mobile*, 446 U.S. at 66; *Dunnet Bay Const. Co. v. Borggren*, 799 F.3d 676, 696 (7th Cir. 2015). "[O]fficial action will not be held unconstitutional solely because it results in a racially discriminatory impact." *Vill. of Arlington Heights*, 429 U.S. at 264–65.

To determine whether the Fourteenth Amendment's Equal Protection Clause has been violated by official action, the Supreme Court has stated that several factors may be relevant:

- "The impact of the official action whether it 'bears more heavily on one race than another,'" *Vill. of Arlington Heights*, 429 U.S. at 266 (quoting *Davis*, 426 U.S. at 242);
- "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267;
- "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Id.*;
- "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Id.*; and
- "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268.

B. The challenged laws do not violate the Fourteenth or Fifteenth Amendments.

Plaintiffs challenged several laws as motivated by a racially discriminatory purpose:

> The limitation on early voting to single location per municipality, the reductions in early voting, the elimination of corroboration, the expansion of the proof-of-residence requirement, the removal of authority from GAB to appoint statewide special registration deputies, the changes to the residency requirements, the provision requiring that election observers be permitted to stand within 3-8 feet of voters, the elimination of straight-ticket voting on the official ballot, and the voter ID law.

(Second Am. Compl., Dkt. 141 ¶ 180; *id.* ¶ 204 (alleging that "[t]he provisions challenged under Section 2" are also challenged in Count 5).)

Plaintiffs failed to prove their intentional race discrimination claims at trial. Their principal evidence was the testimony and December 2015 report of Dr. Allan Lichtman.

Dr. Lichtman's December 2015 report and testimony regarding purported to apply the *Arlington Heights* factors that are outlined above. (*See* PX36:4–5; Tr. 05-23-16 at 228.) Application of the factors to the trial evidence, however, does not show that the Legislature intended to discriminate on the basis of race when it enacted the challenged laws.

As an initial matter, Dr. Lichtman's analysis in his report and testimony is not very helpful in analyzing the legal question. The Court was correct to observe during trial that Dr. Lichtman's work on legislative intent "doesn't sound like the realm of expert testimony to me," (Tr. 05-19-16, 4-P-221), and that, while Dr. Lichtman disclaimed that his opinions were legal conclusions, "they look an awful lot like the conclusions that I'm going to have to draw." (Tr. 05-23-16 at 232.)

Dr. Lichtman's work attempted to decide the ultimate issue for the Court, namely, whether the Legislature intended to discriminate on the basis of race. The same criticism that was leveled against Dr. Lichtman's work by a U.S. district judge in North Carolina is applicable here:

> Dr. Lichtman's ultimate opinions on legislative intent, like those of Plaintiffs' other two experts on legislative intent, Drs. Steven Lawson and Morgan Kousser, constituted nothing more than his attempt to decide the ultimate issue for the court, rather than assisting the trier of fact in understanding the evidence or any fact at issue. See Fed. R. Evid. 702(a). Basically, all of these experts gathered evidence, principally from newspaper and magazine articles, that they believed fit under each Arlington Heights factor. Then, they opined on how the Arlington Heights analysis, (or their variant of it) ought to be performed, but contended they were doing so to determine intent "as historians."

> The court doubts seriously that this is the proper role for expert testimony. . . .

N.C. State Conference of the NAACP v. McCrory, Nos. 13-CV-658, 13-CV-660, 13-CV-861, 2016 WL 1650774, at *140–41 (M.D. N.C. Apr. 25, 2016) (footnotes omitted); *see also Lee v. Va. State Bd. of Elections*, No. 15-CV-357-HEH, 2016 WL 294181, at *27 (E.D. Va. May 19, 2016) (declining to adopt Dr. Lichtman's opinions on intentional race discrimination as to the Virginia voter photo ID law).

Dr. Lichtman's opinion regarding intentional race discrimination was not credible and should not be adopted. He testified about what he believed were contemporaneous statements made by Wisconsin legislators, which allegedly showed a racially discriminatory motive. (Tr. 05-23-16 at 287–88; PX36:51–52.) These statements did not prove that motive and served only to the undercut Dr. Lichtman's credibility as a witness.

One statement was a radio interview by former-State Senator Dale Schultz played during trial. (Tr. 05-16-16, 1-A-98; *see also* PX66 (audio recording).) The interview, given in March 2014, is ambiguous as to what race-related motive the Wisconsin Legislature had, if any, when it enacted the voter photo ID law in May 2011. These were the statements of a single legislator made *years* later on a talk-radio program. Their relevance to the question presented is specious, at best.

When Dr. Lichtman was cross-examined about the so-called "contemporaneous" nature of the March 2014 Schultz interview as it related to the voter photo ID law enacted in May 2011, he confirmed that the interview was not "contemporaneous," (Tr. 05-24-16, 7-A-89), but that he did not "think contemporaneous has to be limited to that very narrow slice of time." (Tr. 05-24-16, 7-A-89.) Dr. Lichtman's concept of time does not square with "contemporary statements by members of the decisionmaking body." *Vill. of Arlington Heights*, 429 U.S. at 269.

Related to the Schultz interview was the trial testimony of Todd Allbaugh, a former staffer to Schultz. Mr. Allbaugh worked for Schultz when Schultz sponsored and voted for a voter photo ID bill that passed the Legislature in 2005, but that was later vetoed by Governor James Doyle. (Tr. 05-16-16, 1-A-78.) That bill, 2005 Assembly Bill 63, was more restrictive than Act 23 in terms of the qualifying IDs permitted. *See* 2005 Assembly Bill 63, § 12, *available at* http://tinyurl.com/zaod6l7; (Tr. 05-24-16, 7-A-46–47.)

Schultz also sponsored a voter photo ID bill in 2001, 2001 Assembly Bill 12. (*See* Tr. 05-24-16, 7-A-43.) That bill would have permitted only three forms of qualifying ID: a Wisconsin driver license, a Wisconsin state ID card, or a copy of the voter's birth certificate. *See* 2001 Assembly Bill 12, § 1, *available at* http://tinyurl.com/h5khjto; (Tr. 05-24-16, 7-A-44.) Either former-Senator

Schultz executed a 180-degree turn by the time of the March 2014 radio interview, or his positions on voter photo ID are irreconcilable.

Mr. Allbaugh testified to hearsay statements purportedly made by State Senator Mary Lazich and former-State Senator Glenn Grothman during a closed Republican caucus that was held on an unidentified date prior to the passage of the bill that became Act 23. (Tr. 05-16-16, 1-A-81–89.) While that day "changed [his] life," Mr. Allbaugh could not remember the date when he heard the statements. (Tr. 05-16-16, 1-A-89.)

Mr. Allbaugh offered hearsay testimony about alleged statements of Senator Lazich regarding voters in neighborhoods around Milwaukee and on college campuses, (Tr. 05-16-16, 1-A-82), and of former-Senator Grothman about his concern for winning elections. (Tr. 05-16-16, 1-A-83.)

What can the Court glean from these hearsay statements about to the collective intent of the entire Wisconsin Legislature when it enacted Act 23? Not much. These statements are either, in the case of former-Senator Grothman, unrelated to race whatsoever or, in the case of Senator Lazich, almost-certainly unrelated to race and instead related to the likely partisan voting patterns of "neighborhoods around Milwaukee." These statements do not inform the Court's application of *Arlington Heights* to the intentional race discrimination claims. They do more to titillate than persuade.

Dr. Lichtman also relied in his trial testimony and report upon a statement made by former-Senator Grothman that he wanted to "nip this in the bud before too many other cities get on board." (PX22:2, 6 (transcript of March 11, 2014, Wisconsin State Senate Floor Session); *see also* PX36:59; Tr. 05-23-16 at 288.) This statement by former-Senator Grothman referred to establishing statewide uniformity for the range of times in which in-person absentee voting may take place. (*See* PX22:2 ("We are getting to the gist of the bill which is some uniformity."); PX22:6 ("Make the time somewhat uniform. . . . And around the state, I think it is fair if, to the degree possible, people who live, say, in the Town of Forest or the Town of Wayne or some of my rural townships, that it's about as easy for them to vote as it is in areas with big municipal staffs.").)

Similarly, Plaintiffs point to evidence of statements made by U.S. Representative Grothman, including a recent interview on WTMJ that was played at trial on May 16, 2016. (Tr. 05-16-16, 1-A-97; PX68 (video), 69 (transcript).) The statements were not contemporaneous with the passage of the voter photo ID law, and they do not allude to race at all.

Plaintiffs will also point to former-Senator Grothman's positions on the holidays Kwanzaa and Martin Luther King, Jr. Day as evidence of the Legislature's alleged racially discriminatory intentions in enacting the voter photo ID law and the other challenged laws. (*See* PX75 (*The Atlantic* article);

PX78 (*Wisconsin State Journal* article).) This evidence is far afield from the question presented. These are not the only instances of Plaintiffs relying upon evidence with an attenuated relationship to the pertinent issues.

Peculiarly, Dr. Lichtman pointed to a Wisconsin FoodShare-related photo ID bill that failed to pass in 2015 as evidence of the Legislature's supposed racially discriminatory intent to pass the voter photo ID law in May 2011. (*See* PX36:36, 59–60; Tr. 05-23-16 at 233–35.) When cross-examined about whether he thought that a bill that failed to pass in 2015 informs the legislative intent analysis for a law enacted in 2011, Dr. Lichtman doubled down, stating: "Absolutely, for the reasons that I laid out in my direct testimony." (Tr. 05-24-16, 7-A-35.)

Dr. Lichtman attempted to analyze whether there were any of what he called "procedural or substantive deviations" in the Legislature's enactment of the challenged laws. (PX36:48–52.) On cross-examination, he agreed that the way to summarize these factors would be "bills were introduced late, the sheer magnitude of the number of bills, and that the Republicans had unified control of state government." (Tr. 05-24-16, 7-A-41.) None of these so-called "deviations" shows an improper racial motivation on the part of the Legislature. Dr. Lichtman agreed that the Legislature complied with all of its own procedural rules when it enacted the challenged laws. (Tr. 05-24-16,

7-A-40.) He also agreed that voter photo ID had been debated publicly in Wisconsin for over one decade when it passed in 2011. (Tr. 05-24-16, 7-A-41.)

With regard to whether the "historical background . . . reveals a series of official actions taken for invidious purposes," *Vill. of Arlington Heights*, 429 U.S. at 267, Dr. Lichtman and Dr. Burden could point to scant evidence of the State of Wisconsin engaging in any sort of official, state-sponsored discrimination in its history. Dr. Burden testified: "I won't be able to identify for you a law that was enacted by the Legislature and connected directly to some discriminatory or disparate outcome." (Tr. 05-17-16 at 147–48.) When cross-examined about whether Wisconsin's history of discrimination compares in any way to a state like Virginia, Dr. Lichtman stated that he did not analyze that question, "[b]ut certainly, you know, states in the south would have more of a longer and more virulent history of racial discrimination. No doubt about that." (Tr. 05-24-16, 7-A-16.) Dr. Lichtman relied entirely upon Dr. Burden's analysis of state-sponsored discrimination in forming his opinion. (Tr. 05-24-16, 7-A-16.)

Dr. Burden's analysis of Wisconsin's official discrimination for Senate Factors One and Three pointed to only two examples: (1) blacks obtained the right to vote in 1866, based upon a 1849 referendum vote that was ruled upon by the Wisconsin Supreme Court; and (2) the "5,000 rule" that was in place until 2006 regarding which municipalities had to register voters. (PX37:10–

11.) Contrasting Wisconsin's move to black suffrage in 1866 (based, again, upon an affirmative 1849 referendum vote) with the unfortunate racial history of Virginia, which seceded from the United States of America and allowed slavery, shows that Wisconsin is not even in the same ballpark as far as a historical background of official, state-sponsored race discrimination is concerned.

The other examples of official discrimination that Dr. Burden cited were from the Cities of Milwaukee, Beloit, and Kenosha, and Rock and Kenosha Counties, all relating to the non-provision of Spanish-language ballots and other voting materials, such as voter registration forms. (PX37:10–11.) These are not examples of actions by the State of Wisconsin. It is not alleged discrimination by the State; therefore, it is irrelevant under *Frank*. *See Frank*, 768 F.3d at 753. Plaintiffs' evidence is unconvincing.

While under *Arlington Heights* there need not be "smoking gun"-type statements made by legislators evincing racially discriminatory intent, the trial evidence here is not sufficient to establish that the Legislature intended to disparately burden minorities' voting rights when it enacted Act 23 and the other provisions challenged in Count 5. The Court should enter judgment in Defendants' favor as to all Count 5 claims.

V. Intentional discrimination claims under the Twenty-sixth Amendment (Count 6)

A. Legal standard for under the Twenty-sixth Amendment

To understand the purpose of the Twenty-sixth Amendment, the starting point is the historical context and constitutional text.

"***You're old enough to kill, but not for votin'.***"

Barry McGuire, *Eve of Destruction, on Eve of Destruction* (Dunhill Records 1965). This Vietnam War protest lyric sums up the sentiment that fomented in the mid-1960s on college campuses across the Nation. That sentiment ultimately led to the ratification of the Twenty-sixth Amendment on July 1, 1971. 18-, 19-, and 20-year-old American soldiers were fighting in Southeast Asia and dying for their country, but they had no constitutional right to vote.

In extending the Voting Rights Act of 1965 in 1970, Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to age 18. Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb. "The legislative history of title III of the Voting Rights Act of 1970 and the Twenty-Sixth Amendment reveals a rare consensus of concerns and objectives among Senators and Representatives who engaged in debate." *Jolicoeur v. Mihaly*, 488 P.2d 1, 5 (Cal. 1971). Congress stressed three consistent themes:

> [F]irst, that today's youth is better informed and more mature than any other generation in the nation's history. Second, Congress was influenced by the fact that over half the deaths in Vietnam have been of men in the 18–20 age group. Third, and perhaps of paramount immediate importance, Congressmen uniformly expressed distress at

> the alienation felt by some youths, and expressed hope that youth's idealism could be channe[l]ed within the political system.

Id. (footnotes omitted).

Congress' efforts in 1970 to enfranchise all 18- to 20-year-olds were not entirely successful. In a divided decision, the U.S. Supreme Court held in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power. *Id.* at 118 (Opinion of Black, J.).

Confronted with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum qualification of age 18 for all elections, and ratified it promptly. S. Rep. No. 26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 37, 92d Cong., 1st Sess. (1971); *see also* Cong. Research Serv., *The Constitution of the United States of America—Analysis and Interpretation* 2273 (2013), at 2273, http://tinyurl.com/j8644ws (last visited June 20, 2016).

The complete text of the Twenty-sixth Amendment states:

> Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. amend. XXVI.

The Twenty-sixth Amendment "simply bans age qualifications above 18." *Gaunt*, 341 F. Supp. at 1191, *aff'd* 409 U.S. 809 (1972). The Amendment does not forbid all age-based discrimination in voting. None of the laws Plaintiffs challenge create any qualification on voting that is based upon a voter's age—the laws do not prevent 18-, 19-, or 20-year-olds from voting because they are 18, 19, or 20. The laws treat 18-year-old voters exactly the same as 80-year-old voters. The challenged laws, therefore, do not discriminate against voters "on account of age." U.S. Const. amend. XXVI, § 1.

In alleging that the Wisconsin Legislature acted "in part" with the intent "to suppress the vote of young voters" (Second Am. Compl., Dkt. 141 ¶ 210), Plaintiffs invoke the "motivating factor" test for intentional discrimination established in *Village of Arlington Heights*, 429 U.S. at 265–66. Yet "no court has ever applied *Arlington Heights* to a claim of intentional age discrimination in voting." *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 365 (M.D.N.C.), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224 (4th Cir. 2014). "Nor has any court considered the application of the Twenty-Sixth Amendment to the regulation of voting procedure." *Id.*

B. The challenged laws do not violate the Twenty-sixth Amendment.

In the Second Amended Complaint, Plaintiffs challenged the following laws under the Twenty-sixth Amendment in Count 6:

> the limitation on early voting to single location per municipality, the reductions in early voting, the elimination of corroboration, the expansion of the proof-of-residence requirement, the rule permitting dorm lists to be used in connection with voter registration only if college administrators certify that the students on the list are U.S. citizens, the elimination of the requirement that special registration deputies be appointed at public high schools and, in certain circumstances, be appointed at or sent to private high schools and tribal schools, the elimination of the requirement that applications for registration by enrolled students and high school staff be accepted at high schools, the law prohibiting local governments from requiring landlords to distribute voter-registration forms to new tenants, the removal of authority from GAB to appoint statewide special registration deputies, the changes to the residency requirements, the provision requiring that election observers be permitted to stand within 3-8 feet of voters, the elimination of straight-ticket voting on the official ballot, the elimination of the option to receive absentee ballots by fax or email, and the voter ID law.

(Second Am. Compl., Dkt. 141 ¶ 210.) Plaintiffs made allegations about these laws' impact on "young voters" and "the youth vote" without defining those terms. (Dkt. 141 ¶¶ 5, 53, 56, 57, 60, 63, 65, 66, 70, 84, 87, 94, 118, 119, 141, 160, 188, 210.)

Plaintiffs failed to prove at trial that the Legislature intentionally discriminated against "young voters" when it enacted the above list of challenged laws. The Court should enter judgment as to all of these claims in Defendants' favor.

First, the laws above apply to all voters, not just so-called "young voters." None of the laws are targeted specifically at a particular group of voters who are "eighteen years of age or older." U.S. Const. amend. XXVI, § 1. The laws do not discriminate "on account of age." *Id.* Voters affected by the challenged laws *must* be 18 years of age or older, as that is a requirement to be a Wisconsin qualified elector. *See* Wis. Const. art. III, § 1.

Second, it is not clear, even after trial, what Plaintiffs mean by "young voters." The Court heard testimony at trial from undeniably young voters, some of whom are attending college, some of whom are not. But that does not help define Plaintiffs' Count 6 claims.

This is not a mere "quibble," as the Court phrased it in its May 12, 2016, decision. (*See* May 12, 2016, opinion and order, Dkt. 185:29 n.8.) It is a fundamental problem with Plaintiffs' Count 6 claims—they are undefined and ambiguous, and, accordingly, difficult to pin down and respond to. It is not enough to say that the "age discrimination claims principally concern how the challenged provisions affect high school and college students," *id.*, because some high school students are not qualified electors (*i.e.*, they are not 18 years old), and some college students are 70 years old and not "young" by anyone's definition except perhaps those who consider themselves "young at heart." "Young voters" is a meaningless category unless defined, and definition is important when the text of the Twenty-sixth Amendment addresses the rights

of those "eighteen years of age or older" and the right to vote being denied or abridged "on account of age." U.S. Const. amend. XXVI, § 1.

Setting aside the fundamental problems with the allegations underlying the Count 6 claims, the claims fail. Plaintiffs have not proven that any of the laws challenged in Count 6 violate the Twenty-sixth Amendment.

With regard to the voter photo ID law, Plaintiffs are likely to focus on aspects of the law that are specific to university and college students using their institutions' student ID cards to vote. But the fact that the Legislature created different requirements for these qualifying IDs does not show a violation of the Twenty-sixth Amendment. "Young voters" still have a myriad of qualifying ID options under Act 23 and are not limited to student IDs.

Dr. Hood noted that, of states he studied with more-stringent voter photo ID laws, Wisconsin and Georgia are the only two that authorize ID cards issued by state universities or colleges. (*See* DX1:37–38.) North Carolina, Texas, and South Carolina do not authorize the use of such cards for voting. (*Id.* at 37.) The fact that Wisconsin authorized certain student ID cards as qualifying is itself significant proof that the Legislature was *not* targeting "young voters."

Unexpired university and college ID cards are qualifying ID if they contain the date of issuance, a signature, and an expiration date indicating that the card expires no later than two years after the date of issuance. Wis. Stat. § 5.02(6m)(f). The student must also show proof of enrollment. *See id.*

GAB has also promulgated an administrative rule, Wis. Admin. Code ch. GAB 10, that interprets Wis. Stat. § 5.02(6m)(f) to allow for the use of technical college ID cards.

Plaintiffs will argue that the Legislature targeted "young voters" because none of the university or college ID cards that existed at the time of Act 23's enactment would have complied with Wis. Stat. § 5.02(6m)(f), thereby providing these IDs no utility as qualifying ID. Plaintiffs did not actually prove this allegation at trial with evidence about the format of any of the UW System institution or Wisconsin private college ID cards in May 2011 (when Act 23 was enacted). And institutions have since brought their student ID cards into compliance with Act 23 or issued voting-specific student ID cards. (*See* Tr. 05-18-16, 3-A-44.)

For example, Plaintiffs' fact witness Carmen Gosey testified at that UW-Madison issued Act-23 compliant student ID cards on campus both before and on Election Day. (Tr. 05-16-16, 1-P-188–89.) She also testified that UW-Madison students are offered a compliant student ID card during freshman orientation. (Tr. 05-16-16, 1-P-18.) Plaintiff Jennifer Tasse testified that UW-Madison was issuing free Act-23 complaint student ID cards leading up to the April 2016 election, both at Union South and Gordon Commons. (Tr. 05-18-16, 3-A-49–51.) UW-Madison even extended hours at the "Wiscard" student ID office in Union South beyond normal office hours in the lead-up to

the election. (Tr. 05-18-16, 3-A-50.) At least at UW-Madison, student IDs are Act 23-compliant.

Plaintiffs also relied upon expert evidence. Dr. Mayer attempted to show that, as of November 2014, registered voters who reside in what he termed "student wards" are less likely to possess the most common forms of qualifying ID, a Wisconsin driver license or state ID card. (*See* PX38:20, Table 3.) But Dr. Mayer's analysis of so-called "student wards" was fraught with methodological problems. As Dr. Hood pointed out, Dr. Mayer did this analysis not by identifying the registered voters who were college students, "but by locating younger registrants (18-24 years of age) in wards that are in geographic proximity to college campuses." (DX1:44.) "Professor Mayer's average student ward contains less than a majority of 18 to 24 year olds." (*Id.*) "On the low end, a ward whose population comprised only 7% of 18 to 24 year olds was classified as a *student ward* simply on the basis of geographic location." (*Id.*)

Dr. Nolan McCarty also criticized Dr. Mayer's methods. Dr. Mayer's analyses of "student ward" turnout and ID possession rates were plagued by measurement errors related to using a 2015 SVRS "snapshot" to measure the state of affairs years earlier. (Tr. 05-26-16, 9-63–66; DX5:18–19.) There is no certain relationship that would suggest a person's possession of (or lack thereof) an ID at the time of the snapshot would hold true in 2010 or 2014. (Tr. 05-26-16, 9-64; DX5:18–19.)

On cross-examination, Dr. Mayer confirmed the limitations of his "student ward" analysis. The "student ward" definition did not measure voting by 18 to 24-year-olds, was based only on geography or proximity to a university, required only that ten percent of registrants in the population of the ward be age 18 to 24, and would have counted a 50-year-old in a "student ward" as a "student ward" non-voter. (Tr. 05-19-16 at 42–43.) Dr. Mayer's analysis of "student wards" and qualifying ID possession rates does not bolster Plaintiffs' Twenty-sixth Amendment claims as to voter photo ID.

The only other trial evidence offered by Plaintiffs is anecdotal examples of "young voters" or students who experienced issues relating to qualifying ID. For example, Andrea Kaminski of the League of Women Voters testified about her group's observations of long lines for voting at polling sites with larger student populations after the voter photo ID law was in place. But, as the Court has recognized, this type of evidence is "anecdotal, they are stories of individual circumstances and sometimes you tally up the number of events like that for the time that your observers happen to be at the polls." (Tr. 05-18-16, 3-A-105.)

Strung-together anecdotes are not data. The testimony of fact witnesses like Ms. Kaminski does not prove that there is a widespread problem in Wisconsin for "young voters" trying to comply with the voter photo ID requirement.

With regard to Plaintiffs' Count 6 challenges to absentee voting laws, Plaintiffs offered little evidence geared toward proving that the challenged absentee voting laws impact "young voters" any differently than any other group of voters. The times and locations of in-person absentee voting impact students and "young voters" the same as other "busy" voters. And while faxing or e-mailing absentee ballots to students temporarily abroad is a convenient option, Plaintiffs did not prove that the current lack of this option amounts to a targeting of "young voters" that would violate the Twenty-sixth Amendment.

As for other voters, in-person absentee voting would benefit *some* student voters, certainly, but that is not evidence of a Twenty-sixth Amendment violation. In-person absentee voting is a convenience option, not a right. Students are no "busier" than other voters, and the relative "busyness" of a voter is not a criteria for evaluating whether a law violates the Constitution. The alternatives for those who cannot find the time to vote in-person absentee are mail-in absentee voting and voting on Election Day.

Plaintiffs presented only anecdotal evidence of "young voters" experiencing difficulty because of the limitation placed on when absentee ballots can be faxed or e-mailed to voters. This change in the law impacts not only "young voters" or students studying abroad, but also older voters who are temporarily overseas on vacation or for work. To say that the law "targets" "young voters" is not accurate because the change applies across the board to

all temporary overseas voters who must transmit their ballots by mail or another reliable carrier while abroad. Plaintiffs did not prove at trial that the use of fax and e-mail for absentee ballots in the past was predominated by students or young voters. There is no Twenty-sixth Amendment violation when "older" voters are impacted the same as "young" voters—neither group can transmit ballots by fax or e-mail when they are only temporarily abroad.

With regard to voter registration and residency laws, Plaintiffs presented some anecdotal evidence at trial about how changes to the use of certified dorm lists, the elimination of high school SRDs, and the impact of the law effectively outlawing a Madison ordinance about landlords giving new tenants voter registration forms *could* impact "young voters." Plaintiffs did not present evidence (other than anecdotes) to prove how often "young voters" used corroboration or statewide SRDs to register, or that "young voters" are categorically more burdened by a 28-day durational residency requirement.

The evidence Plaintiffs produced is only anecdotal, and the options for voter registration in Wisconsin remain robust, even for students and "young voters." Voters can still complete a paper voter registration application and submit it to their municipal clerk, or even register on Election Day at the poll or during in-person absentee voting. Likewise, the options for documentary proof of residence are still, as explained above, extensive and varied. Plaintiffs have failed to prove through admissible evidence that the Legislature targeted

"young voters" when the various changes to voter registration and residency were enacted.

With regard to the remaining challenges to the three-to-eight-foot rule for election observers and the elimination of straight-ticket voting, Plaintiffs have not proven these Twenty-sixth Amendment claims, either. These laws apply equally to all voters. There is nothing unique about how a "young voter" is impacted by where election observers stand at a polling place, or whether there is a straight-ticket option on the ballot. And Plaintiffs offered absolutely no evidence that these laws targeted young voters.

In sum, Plaintiffs' Twenty-sixth Amendment claims fail. If the Court adopts Plaintiffs' theory of the Twenty-sixth Amendment, the result will be an expansion of the Amendment that goes beyond the constitutional text, historical context, and meaning of the law. The Court should enter judgment in Defendants' favor as to all Count 6 claims.

VI. "Partisan fencing" claims under the First and Fourteenth Amendments (Count 4)

A. Legal standard for "partisan fencing" claims under the First and Fourteenth Amendments

Plaintiffs' "partisan fencing" claims in Count 4 arise under the First Amendment and the Fourteenth Amendment's Equal Protection Clause. (Second Am. Compl., Dkt. 141 ¶ 199.) These are the same constitutional provisions that Plaintiffs cite to challenge laws in Count 2. (Dkt. 141 ¶ 188.)

As the Court has already recognized, there is significant (perhaps complete) overlap between how the Court should analyze the Count 2 and Count 4 claims.

As the Court observed in addressing Defendants' motion to dismiss the Count 4 claims, "the Equal Protection Clause is the mechanism through which to guard against" impermissible voting restrictions, and "the level of scrutiny that the court will eventually apply to these regulations will turn on how severely they burden the right to vote. *Burdick*, 504 U.S. at 434." (Dec. 17, 2015, opinion and order, Dkt. 66:10.) It is, therefore, unclear whether or to what extent, if any, Plaintiffs' claims in Count 2 are analyzed differently than their claims in Count 4. Both sets of claims arise under the same constitutional provisions. Courts apply the *Anderson/Burdick* test to analyze these claims. *Common Cause Ind.*, 800 F.3d at 917.

In its May 12, 2016, opinion and order on summary judgment, the Court agreed with Defendants that the Count 4 claims should be analyzed essentially like the Count 2 claims. "Defendants' approach is consistent with the limited case law that exists on this issue, and it incorporates the First Amendment principles that are necessary to evaluate plaintiffs' partisan fencing claims." (May 12, 2016, opinion and order, Dkt. 185:25.) As the Court cited on page 26 of its May 12 decision, "[w]hen a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'"

Clingman v. Beaver, 544 U.S. 581, 593 (2005) (quoting *Timmons*, 520 U.S. at 358).

B. The challenged laws do not amount to "partisan fencing" in violation of the First and Fourteenth Amendments.

In the Second Amended Complaint, Plaintiffs allege that all the challenged laws violate the First and Fourteenth Amendments because they amount to "partisan fencing." (Second Am. Compl., Dkt. 141 ¶ 199.)

Plaintiffs failed to meet their burden to prove their Count 4 constitutional claims. As explained above, their claims in Count 2 fail. Those claims arose under the First and Fourteenth Amendments. Because the legal standards for the Count 2 "undue burden" claims are effectively the same as those for Count 4 "partisan fencing" claims, the result should be the same. The Court need not engage in further analysis of the Count 4 claims. If it feels a need to engage further to explore whether the Legislature had a partisan motive to infringe upon protected associational interests, the evidence showed that such "partisan fencing" claims are unsubstantiated.

As an initial matter, some of the Count 4 claims are hard to fathom. Plaintiffs alleged that the challenged laws were passed with the intent to "suppress the vote of Democratic voters." (Second Am. Compl., Dkt. 141 ¶ 199.) Yet Democratic legislators voted to enact challenged laws. The following table shows the laws passed with the support of Democratic legislators.

Legislative Act	Legislative Bill	Bipartisan Votes
2011 Wis. Act 23	2011 Assembly Bill 7	●Rep. Peggy Krusick (D), 7th Assembly District; ●Rep. Anthony J. Staskunas (D), 15th Assembly District; and ●Rep. Bob Ziegelbauer (I), 25th Assembly District
2011 Wis. Act 75	2011 Senate Bill 116	●Rep. JoCasta Zamarripa (D), 8th Assembly District; ●Rep. Leon D. Young (D), 16th Assembly District; ●Rep. Christine Sinicki (D), 20th Assembly District; ●Rep. Gordon Hintz (D), 54th Assembly District; ●Rep. Robert L. Turner (D), 61st Assembly District; ●Rep. Cory Mason (D), 62nd Assembly District; and ●Rep. Amy Sue Vruwink (D), 70th Assembly District
2011 Wis. Act 227	2011 Senate Bill 271	●Rep. Peggy Krusick (D), 7th Assembly District; and ●Rep. Bob Ziegelbauer (I), 25th Assembly District
2013 Wis. Act 76	2013 Senate Bill 179	●Rep. Andy Jorgensen (D), 43rd Assembly District

(DX145:E through DX145:K (excerpts from the Wisconsin Blue Book, http://docs.legis.wisconsin.gov/misc/lrb/blue_book, and the legislative journals showing votes on the various bills, from the Wisconsin Legislative Reference Bureau's website, https://legis.wisconsin.gov/lrb/.)

To put these legislative acts in context with the challenged laws, 2011 Wisconsin Act 23 created the voter photo ID law, limited in-person absentee voting to 12 days, eliminated the use of corroboration for registering to vote, made changes to the use of "dorm lists" for registration, created the 28-day

durational residency requirement, eliminated straight-ticket voting, and eliminated statewide special registration deputies. 2011 Wisconsin Act 75 limited when absentee ballots can be faxed or e-mailed to voters. 2011 Wisconsin Act 227 required a copy of a photo ID for absentee ballots submitted by mail and limited the circumstances in which municipal clerks can return absentee ballots to voters to correct mistakes. 2013 Wisconsin Act 76 effectively overturned a Madison ordinance that required landlords to provide voter registration forms to new tenants.

Plaintiffs' expert recognized that there was some limited bipartisan support for Act 23. Dr. Lichtman observed in his December 2015 expert report that three Democratic legislators voted for Act 23. (PX36:25.) When asked at trial whether these legislators were committing "political suicide," Dr. Lichtman testified that they were not and that "You never know why an individual might break from the rule. . . . I don't know what deals were made. I don't know what were promised to these folks. But there are exceptions to the rule." (Tr. 05-24-16, 7-A-30.) He testified that, in his experience of "watching state legislators for 50 years . . . all kinds of backroom deals are made." (Tr. 05-24-16, 7-A-30.) But he did not know if any such "deals" were made as to Act 23 or any of the other challenged laws that Democratic legislators voted to enact. (Tr. 05-24-16, 7-A-30.)

Instead of hypothesizing about "backroom deals," Dr. McCarty evaluated whether the challenged laws actually had a disparate impact on the turnout of Democratic voters between 2010 (pre-implementation) and 2014 (post-implementation), and he concluded they did not. (DX5:19–22.) Dr. McCarty compared turnout at the municipal level for the 2010 and 2014 Wisconsin gubernatorial elections. (DX5:20.) His bottom-line conclusion was that "[g]iven that the distribution of 2014 Republican vote shares is almost identical to that of 2010 and there was no systematic drop in turnout in Democratic municipalities, it is difficult to identify any partisan advantage obtained by the changes in electoral laws that occurred between 2010 and 2014." (DX5:22.) If "partisan fencing" was afoot, it was wildly unsuccessful.

Dr. Hood also evaluated whether the voter photo ID law would have a disparate impact on Democratic voters, and he concluded it would not. (DX1:34–36.) Specifically, Dr. Hood concluded that Plaintiffs' experts provided no empirical support for Plaintiffs' claim that Democratic voters are disproportionately likely not to have a qualifying ID. (DX1:34.)

Dr. Hood estimated the number of Wisconsin partisans without a qualifying ID by analyzing data from the Cooperative Congressional Election Study (CCES) to construct a hypothetical electorate of 1,000 voters, by partisan and racial groups. (DX1:34–35.) Then, he used Dr. Mayer's estimates of non-possession rates for Wisconsin driver license and state ID cards to determine

who in those groups are likely to lack a qualifying ID. (DX1:36; *id.* n.73.) Table 15 in Dr. Hood's report summarized his findings:

Table 15. Estimating the Number of Wisconsin Partisans without Identification

Race/Ethnicity	Non-Possession Rate[73]	Democrat	Republican
White	.083	27.7	32.1
Black	.098	3.2	1.3
Hispanic	.111	2.6	0.5
Total without ID		**33.5**	**33.9**

(DX1:36.) With regard to the hypothetical electorate of 1,000 voters, and based upon the CCES data, Dr. Hood concluded: "In the end, 33.9 Republicans versus 33.5 Democrats are estimated to lack identification—a virtual wash." (*Id.*) "This exercise demonstrates that Act 23 will not necessarily lead to a partisan advantage for the Republican Party in Wisconsin." (*Id.*)

Setting aside the factual evidence, as a legal matter, Plaintiffs' novel theory finds no support in the decisions Plaintiffs rely upon. Plaintiffs cite *Carrington v. Rash*, 380 U.S. 89 (1965), and Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), but neither case involved challenges to laws like the laws here. (Second Am. Compl., Dkt. 141 ¶ 198.)

In *Carrington*, the Supreme Court considered an Equal Protection Clause challenge to a Texas constitutional provision that prohibited any armed forces member of the United States who moves to Texas during the course of his military service from voting in a Texas election as long he was a member

of the armed forces. *Carrington*, 380 U.S. at 89–90, 89 n.1. The law uniquely disenfranchised an entire class of voters based upon a group in which they were members. *See id.* "[O]nly where military personnel [were] involved [was Texas] unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote." *Id.* at 95. Accordingly, the Court found that any "remote administrative benefit" to Texas in singling-out service members could not justify disenfranchising those voters. *Id.* at 96.

The challenged laws here are nothing like the Texas constitutional provision at issue in *Carrington*. Wisconsin's laws governing the time and location for in-person absentee voting, for example, do not "fence out" any sector of the voting population other than those voters who do not want to show up at the designated time and place to cast their absentee ballots. Wisconsin's challenged laws do not target or uniquely impact Democrats—they necessarily apply to *all* voters, regardless of party affiliation.[6]

Vieth is similarly irrelevant. *Vieth* involved an Equal Protection Clause challenge alleging that Pennsylvania's congressional districts constituted an "unconstitutional political gerrymander." *Vieth*, 541 U.S. at 271. The Supreme Court had decided in *Davis v. Bandemer*, 478 U.S. 109 (1986), that political

[6] *Carrington* applied a test under that does not apply now; *Anderson/Burdick* is the analysis courts apply today. *See Common Cause Ind.*, 800 F.3d at 917.

gerrymandering claims are justiciable, but the Court could not agree upon a standard to adjudicate them. *Vieth*, 541 U.S. at 271–72. *Vieth*, therefore, involved "the questions whether [the Court's] decision in *Bandemer* was in error, and, if not, what the standard should be." *Id.* at 272.

Four Justices in *Vieth* held that political gerrymandering claims are not justiciable and would have overruled *Bandemer*. *Vieth*, 541 U.S. at 305–06 (Opinion of Scalia, J.). Justice Kennedy wrote that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 307 (Kennedy, J., concurring in the judgment). Justice Kennedy also wrote that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* at 314.

Justice Kennedy's concurring opinion in *Vieth* does not provide support for Plaintiffs' "partisan fencing" claims. Even if Justice Kennedy's reading of the First Amendment were controlling, Plaintiffs have not proven that the challenged laws have the "purpose and effect" of subjecting Democrat voters "to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

In conclusion, both factually and legally, Plaintiffs' "partisan fencing" claims in Count 4 fail. The claims are legally indistinct from the First

Amendment and Fourteenth Amendment Equal Protection Clause claims in Count 2. To the extent it could be argued that there is a distinction between Count 2 and Count 4 claims, the evidence at trial failed to prove that there was partisan motivation on the part of the Legislature to harm the voting prospects of Democrats. Plaintiffs' Count 4 claims should be dismissed, and the Court should enter judgment in Defendants' favor.

VII. Fourteenth Amendment rational basis claims (Count 3)

A. Legal standard for Fourteenth Amendment rational basis claims

"[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). "Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* (quoting *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam)).

"[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller*, 509 U.S. at 319; *see also Beach Commc'ns*, 508 U.S. at 314–15 ("On rational-basis review, a classification in a statute . . . comes to [the Court] bearing a strong

presumption of validity . . . and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Equal Protection Clause is not violated "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320.

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. "[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. "Thus, the absence of 'legislative facts' explaining the distinction 'on the record,' has no significance in rational-basis analysis." *Id.* (citation and brackets omitted). "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*

B. The Legislature's decision not to include expired college or university ID cards was rational.

The only remaining Count 3 claim is that it was irrational for the State not to include expired college and university IDs as forms of qualifying ID. (*See* May 12, 2016, opinion and order, Dkt. 185:23–24.) In its May 12, 2016,

decision, the Court noted that it had dismissed Plaintiffs' Count 3 claims relating to the 28-day durational residency requirement and straight-ticket voting. (Dkt. 185:20.) Plaintiffs dropped their Count 3 claim as to the use of technical college ID cards as a form of ID to vote. (Dkt. 185:20.) The Court concluded that the State has a rational basis to exclude out-of-state driver licenses, expired driver license receipts issued under Wis. Stat. § 343.11, and expired state ID card receipts issued under Wis. Stat. § 343.50 from the list of qualifying IDs. (Dkt. 185:20–21.)

Plaintiffs failed to prove their remaining rational basis claim at trial. No Plaintiff proved she has standing to make the claim. Likewise, Plaintiffs presented no specific evidence regarding the efficacy or rationality of using an expired college or university IDs to prove one's identity to vote. For example, they did not present a witness who possessed an expired college or university ID card and wanted to use it to prove her identity to vote.

Ms. Tasse testified about the fact that her Wiscard does not meet the requirements of a qualifying ID because "[i]t doesn't have an expiration date with two years or less on it," and "it does not have a signature on it of the individual who is on the card." (Tr. 05-18-16, 3-A-41.) She testified that her driver license does not expire for seven or eight years. (Tr. 05-18-16, 3-A-42.) Finally, she testified that UW-Madison issued special student ID cards that are compliant with the requirements of the voter photo ID law. (*See* Tr. 05-18-

16, 3-A-42–44.) Ms. Tasse's testimony was not that she would *prefer* to use an expired Wiscard to vote. She had other forms of qualifying ID, including a driver license and passport. (Tr. 05-18-16, 3-A-46.)

Clerk Witzel-Behl, testified that UW-Madison's student ID cards are not compliant with the voter photo ID law and that the cards expire four or five years after they were issued. (Tr. 05-18-16, 3-A-156.) But Ms. Witzel-Behl did not testify that UW students *should* be able to use their expired student ID cards to vote. Plaintiffs' evidence did not explain whether or why expired college or university ID cards *should* have been included in the list of qualifying IDs that the Legislature enacted.

It would not have been rational for the Legislature to include expired college and university ID cards as qualifying ID. An individual with a five-year-old Wiscard is very likely no longer enrolled at UW-Madison. Ms. Tasse is a good example of this—she graduated in four years and is no longer enrolled. (Tr. 05-18-16, 3-A-18.) Thus, even if Ms. Tasse wanted to use her expired Wiscard to vote, she could not meet the requirement under Wis. Stat. § 5.02(6m)(f) that she "establish[] that . . . she is enrolled as a student at the university or college on the date that the card is presented."

It would have been irrational for the Legislature to include expired forms of college or university ID as qualifying ID when the law also requires that a student presenting such an ID establish her current enrollment at the

institution. Wis. Stat. § 5.02(6m)(f). Accordingly, Plaintiffs' remaining Count 3 rational basis claim as to expired student ID cards fails.

CONCLUSION

For the reasons argued above, the Court should enter judgment in Defendants' favor.

Dated this 20th day of June, 2016.

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