UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

REPLY IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs showed in their opening brief that it would be fair and efficient to decide this case on a classwide basis and that each proposed class in the First Amended Complaint satisfies the requirements for certification under Rule 23. Forcing each class member to pursue an individual lawsuit and seek an individual remedy would place undue burdens on the class members, the Court, *and the Defendants.* It would also present the risk that common questions are decided inconsistently across similarly situated voters and that Defendants are subjected to incompatible injunctions. The benefits of adjudicating this case as a class action are evident.

Defendants, however, oppose class certification. But it is not clear why. Defendants primarily argue that Plaintiffs' proposed classes are diverse and unmanageable, yet Defendants admit that the class members' interests, the relief sought, and the questions presented in this case are sufficiently homogenous that "there are no individualized claims which would *not* be adequately addressed in this case even without this being a class action," and that "[i]f there is relief granted by this Court at all, it can be fashioned to cover all of these putative class members." Opp. Br. [Doc. 83] at 8 (emphasis original). Defendants thus reveal that they expect the Court, even absent class certification, to apply the very classwide treatment of claims and remedies that Defendants argue is unmanageable.

If Defendants do not oppose the Court addressing, through adjudication of the named Plaintiffs' claims, the claims of non-plaintiff class members and fashioning remedies to cover non-plaintiff class members, Defendants do not actually oppose class certification. Defendants have not argued that adjudicating this case as a class action would be unfair or inefficient or that they would be prejudiced in any way. Indeed, Defendants bemoan the fact that there are already three other cases challenging Act 23. *Id*. It is hard to understand how it would be in the interest of Defendants, the Court, or anyone else to resolve the class members' claims through hundreds,

if not thousands, of additional individual suits. Not surprisingly, Defendants' arguments with respect to the Rule 23 requirements for certification are devoid of substance. As more fully discussed below, the Court should certify each of Plaintiffs' proposed classes.

ARGUMENT

I. CLASS CERTIFICATION IS NECESSARY.

After recognizing that "relief granted by this Court . . . can be fashioned to cover all of the putative class members" and asserting that claims of the class members will be "adequately addressed" because "there are no individualized claims," Defendants argue that class certification is not "necessary" in this case. Doc. 83 at 8. However, the law does not require that Plaintiffs show "necessity;" rather, class certification must be granted if the requirements of Rule 23 are met. *See, e.g.*, *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978) ("[T]he rule in this circuit is that class certification may not be denied on the ground of lack of 'need' if the prerequisites of Rule 23 are met."); *see also Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979).

Moreover, class certification is necessary in this case. Defendants seem not to recognize that this case challenges Act 23 *as applied* to the class members. The remedies that Plaintiffs seek for class-based Claims 1 through 6 will not entirely invalidate Act 23, but will determine how Defendants apply it.[1] Absent class certification, the Court could fashion remedies that restore the voting rights of the named Plaintiffs but not the many similarly situated eligible Wisconsin voters in the proposed classes. *See Alliance to End Repression v. Rochford*, 565 F.2d

[1] Class 7 asserts claims under the Voting Rights Act that could, but will not necessarily, invalidate Act 23 in its entirety. In addition, the claims asserted by Class 7 concern the effect of Act 23 on the class as a whole, not just the effect on the named plaintiffs. Class certification is thus proper for Class 7. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977).

975, 980 (7th Cir. 1977) (rejecting an argument that class certification was unnecessary when plaintiffs in that case challenged the constitutionality of a statute *as applied*).

It is also possible that certain class representatives' individual claims could become moot (such as by Defendants' making exceptions for named Plaintiffs[2]), or some Plaintiffs (such as the homeless Plaintiffs) could become difficult to locate, thus depriving the absent class members of a remedy if a class action is not certified. *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391-92 (S.D.N.Y. 2000) (certification under Rule 23(b)(2) necessary because danger of mootness was high due to fluid nature of class); *Riverside v. McLaughlin*, 500 US 44, 51 (1991) ("[T]he termination of a class representative's claim does not moot the claims of the unnamed members of the class."). Thus, contrary to Defendants' arguments, class certification is necessary to address adequately the claims of absent class members and to ensure that the remedies cover all their injuries, and not just those of the named Plaintiffs.

II. THE PROPOSED CLASSES ARE MANAGEABLE.

Despite admitting that the Court can adequately address the claims of the class members and fashion relief to prevent their injuries, Defendants argue that Plaintiffs' proposed classes are "unmanageable." Doc. 83 at 8, 12-13. In support of this assertion, Defendants raise a number of concerns about how the Court will notify class members and deal with class members "opting-out." Defendants also argue that the proposed classes are not sufficiently definite or ascertainable because, according to Defendants, the Court must make individual inquiries into each class members' subjective state of mind to determine whether he or she is in the class. *Id*. Each of these arguments is inapposite.

[2] This is not just a theoretical concern. Defendants have changed rules and policies to issue IDs to voters who complain to officials. *See* Doc. 95 at 21.

A. Defendants' Ascertainability and Manageability Concerns Are Misplaced.

Rule 23 contains no express requirement that a class be definite or ascertainable. *See* Fed. R. Civ. P. 23. Some courts, however, have considered the definiteness or ascertainability of a proposed class when determining whether or not to certify it.[3] Typically, the consideration of ascertainability is important only in Rule 23(b)(3) class actions where the court is required to direct notice to the class members, including providing individual notice to all members who can be identified through reasonable effort and informing them of their ability to opt out of the class. *See* Fed. R. Civ. P. 23(c)(2)(B). Courts, however, are not required to direct notice to class members when the proposed classes seek only injunctive or declaratory relief under Rule 23(b)(1) or Rule 23(b)(2). *See* Fed. R. Civ. P. 23(c)(2)(A). Thus courts do not view ascertainability as a strict requirement in cases like this one, where notice and opt-out requirements do not apply. *See Haynes v. Dart*, No. 08 C 4834, 2009 WL 2355393, at *4 (N.D. Ill., July 29, 2009) ("The ascertainability requirement can be applied more flexibly in situations where individual notice to class members is not required, such as suits for equitable relief.") Defendants' concerns about how the Court will direct notice to individual class members and deal with opt-outs are thus entirely misplaced.

Although courts have at times raised concerns about the ascertainability of a proposed class seeking only injunctive relief, those cases involved remedies that had to be specifically tailored to each class member. For example, in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), plaintiffs sought injunctive relief to cure defendant's failures to identify children with disabilities and "develop individualized education programs . . . tailored to each student's specific needs." *Id*. at 485. The court held that classwide treatment would be

[3] Courts use the terms "definiteness" and 'ascertainability" interchangeably and not as distinct concepts. For the sake of simplicity, this brief will use the term "ascertainability."

unmanageable because "each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Id*. at 499 (emphasis in original). The court thus rejected an "intricate remedial scheme . . . which requires thousands of individual determinations of class membership, liability, and appropriate remedies." *Id*. In contrast, if injunctive relief can be directed at Defendants' conduct with respect to the class as a whole, a precise class definition is not a prerequisite to certification. *See Westefer v. Snyder*, Nos. 00-162-GPM, 00-708-GPM, 2006 WL 2639972, at *10 (N.D. Ill. Sept. 12, 2006) ("[The] precise definition of the class is not as important as it may be under other class certification rules, given that relief sought is predominantly equitable relief against a defendant's allegedly unlawful conduct directed to the class as a whole.")

Plaintiffs in this case seek relief that can be addressed to Defendants' conduct as directed to the classes as a whole. For example, requiring Defendants to offer an affidavit of identity at the polls for any eligible Wisconsin voter who lacks accepted photo ID would remedy Defendants' violations as to each class member *across all seven* of Plaintiffs' proposed classes. As Defendants admit, "[i]f there is relief granted by this Court at all, it can be fashioned to cover all of [Plaintiffs'] putative class members." Doc. 83 at 8. There are thus no manageability or ascertainability concerns implicated by the equitable relief that Plaintiffs seek.

B. Plaintiffs' Proposed Classes Are Ascertainable.

Moreover, even if ascertainability were relevant in this case, Plaintiffs' proposed classes are ascertainable. "In those cases in which class certification has been denied on account of indefiniteness, the primary defect in the class definition has been that membership in the class was contingent on the state of mind of the prospective class members." *Rochford*, 565 F.2d at 978. In contrast, the Seventh Circuit "has made it clear that a class that satisfies all of the other

requirements of Rule 23 will not be rejected as indefinite when its contours are defined by the defendants' own conduct." *Id.*[4] Each of Plaintiffs' proposed classes is defined by reference to Defendants' own conduct in applying Act 23. Class 1 is defined by the legal and systemic practical barriers Defendants have erected in Act 23 by requiring those without ID to interact with DMV and its rules. Class 2 is defined by financial barriers Defendants have created in applying Act 23. Classes 3 and 5 are defined by the poll taxes Defendants have created in applying Act 23. Classes 4 and 6 are defined by arbitrary decisions Defendants have made in choosing to accept one form of ID but not other comparable forms of ID. And Class 7 and Sub-Class 7.1 are defined by the disparate impact of Defendants' policies on minority voters.

Defendants' assertions that Plaintiffs' proposed classes require the Court to assess the subjective state of mind of individual class members reveals that Defendants fundamentally misunderstand the law on which Plaintiffs' claims are based. *See* Doc. 83 at 12-13, 16. The relevant question is not whether voters *perceive* that Defendants' policies as burdensome, but whether Defendants' implementation of Act 23 has, in fact, placed excessive burdens on class members' fundamental rights to vote (Classes 1-2); has created a poll tax (Classes 3, 5); is arbitrary (Classes 4, 6); or disparately impacts minority voters (Class 7, Sub-Class 7.1). None of these questions require any assessment of the class members' subjective states of mind.[5]

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[4] *Jamie S.* questioned the *Rochford* court's ascertainability analysis under limited circumstances. However, it did *not* question *Rochford*'s application to those cases where, as here, the proposed class meets the other requirements of Rule 23, the class is defined by the defendant's affirmative conduct as opposed to defendant's failure to act, and the requested injunctive relief does not require an "elaborate scheme" to identify and develop member-specific relief. *Jamie S.*, 668 F.3d at 497.

[5] Whether an eligible Wisconsin voter possesses accepted photo ID or all the documents necessary to obtain accepted photo ID is an objective question. Whether certain eligible Wisconsin voters face legal or systemic practical barriers to obtaining accepted photo ID is an objective question. Whether the costs of obtaining accepted photo ID are burdensome for an

III. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING THAT CLASS 1 SHOULD BE CERTIFIED.

Proposed Class 1 consists of: "all eligible Wisconsin voters who lack accepted photo ID, lack one or more of the documents DMV accepts to obtain a Wisconsin ID card for voting purposes, and face legal or systematic practical barriers to completing the process of obtaining an ID." Doc. 31 ¶ 106. Defendants oppose certification of Class 1 on grounds of numerosity and commonality; challenge the typicality of proposed class representatives Frank, Wilde, and Brown; and challenge the adequacy of proposed class representatives Frank and Wilde.[6]

A. Defendants Failed to Rebut Plaintiffs' Showing that Class 1 is So Numerous that Joinder is Impracticable.

Defendants do not dispute that Class 1 is, in fact, numerous or that joinder of all Class 1 representatives is impracticable. Rather, Defendants seek to defeat Plaintiffs' numerosity showing by asking the Court, without a properly filed motion to strike or motion *in limine*, to "ban" the report of Plaintiffs' experts Matt Barreto and Gabriel Sanchez. Doc. 83 at 9-12. In seeking this "drastic" and unwarranted sanction, *Allstate Ins. Co. v. Electrolux Home Prod., Inc.*, No. 09 C 6379, 2012 WL 13512, at *5 (N.D. Ill. Jan. 4, 2012), Defendants make two arguments.

First, Defendants argue that Plaintiffs' expert report should be banned because, although the report disclosed the survey data considered by the expert witness and described the

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eligible Wisconsin voter with a given level of income is also an objective question. Just as whether a negligence defendant acted "unreasonably" is an objective question, so the question of whether Act 23 imposes a burden that is excessive in relation to the state's justifications is an objective question for the Court to decide. Whether an eligible Wisconsin voter must pay a fee or sacrifice an out-of-state driver license to obtain accepted photo ID is also an objective question. The same applies to the remaining proposed classes. Membership in each class is ascertainable by objectively verifiable characteristics, not by reference to the particular class member's subjective state of mind.

[6] Defendants also challenge the typicality and adequacy of Plaintiff Judd, but Judd is not a proposed representative for Class 1 or any other class.

methodology used to obtain it, Plaintiffs did not produce a copy of the underlying survey responses until three days later, when Defendants first requested it. Doc. 83 at 9-10. Rule 26(a)(2)(B) requires an expert disclosure to contain a written report that must contain, *inter alia*, "a complete statement of all opinions the witness will express and the basis and reasons for them [and] the facts or data considered by the witnesses in forming them." Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii). Defendants argue that the Rule requires the report itself to physically produce, as opposed to disclose, all the facts and data that the expert considered. But, the expert disclosure requirement does not require an expert to "produce" data. It requires that the "report *disclose* the data and other information considered by the expert." Fed. R. Civ. P. 26 advisory committee's note (1993) (emphasis added). Defendants' interpretation of the Rule is unreasonable. There are many facts that are not evidenced by documents and cannot physically be produced in a report. Even with respect to documents, expert reports often cite to documents, rather than containing appendices of every document considered or cited. Data sets are often voluminous and not capable of being physically contained within a report (*e.g.*, multiple medical records), and expert witnesses often rely on data sets that exist entirely on third-party servers (*e.g.*, Census data) and cannot be physically copied and produced in a report.

The purpose of the expert disclosure rule is to give the opposing party fair notice of the expert's opinions and the bases for them, so the party may prepare for further expert discovery and trial. *See Muldrow ex rel. Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167-68 (D.C. Cir. 2007) (purpose of rule is to prevent "unfair surprise;" no unfair surprise where opposing party has opportunity to depose prior to trial); Fed. R. Civ. P. 26 advisory committee's notes (1993) ("This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable time to prepare for

effective cross examination and perhaps arrange for expert testimony from other witnesses.").[7] Plaintiffs disclosed the data in the report and produced the raw survey response data three days later when Defendants asked for it. Thus, this is not a case like *Olson v. Montana Rail Link, Inc.*, 227 F.R.D. 550, 552 (D. Mont. 2005), cited by Defendants, in which the sanctioned party willfully tried to "game" the rules in repeatedly failing to disclose data after requests and court orders. Plaintiffs' disclosure here has satisfied their obligations under the Rules. Defendants have taken and may take appropriate additional expert discovery to obtain the information they need to rebut the expert, including taking any further deposition testimony they deem necessary to ask questions about the raw survey response data.

Defendants also argue that the first copy of the expert report was not signed by the expert. Such a technical failure does not warrant exclusion of the expert's evidence. *See Jenkins v. Bartlett*, 487 F.3d 482, 488 (7th Cir. 2007) (letter from defendants' attorney, identifying experts and substance of their testimony, even though not signed by experts, substantially complied with expert disclosure requirement). Moreover, any technical error was cured when Plaintiffs produced a signed copy the next day. (Sherman Decl. In Supp. Of Reply Br. In Supp. Of Pltfs.' Mot. for Class Cert., Attachs. A & B.) Most importantly, Defendants have not shown how they have been prejudiced by receiving a signed copy of the report one day later and the underlying data set three days later, especially since Plaintiffs agreed to give Defendants six weeks to file opposition briefs. *See* Doc. 74. Absent a showing of harm, Defendants are not entitled to "ban" Plaintiffs' expert report. Fed. R. Civ. P. 37.

[7] Plaintiffs do not dispute that underlying raw survey response data must be disclosed upon request. *See, generally*, Shari S. Diamond, *Reference Guide on Survey Research*, in *Reference Manual on Scientific Evidence* (Fed. Jud. Ctr & Nat'l Academies Press 3d. 2011).

B. There is at Least One Common Question Central to the Class 1 Members' Claims.

In opposing certification of Class 1, Defendants focus solely on the differences between putative class members, but the proper question is whether, despite any differences, there is at least one common question of fact or law central to their claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011) ("[E]ven a single common question will do."). Where a defendant's violations of the law are the result of individual decisions the defendant made with respect to each class member, commonality is not established even if each separate decision violates the same law. *See id*. at 2552 (victims of individual employment discrimination decisions lacked commonality because there was no "glue holding the alleged reasons for all those decisions together"); *see also Jamie S.*, 668 F.3d at 498 (defendants' failure to identify disabled children was not "systemic" failure absent proof that violations were result of *policies* that violated law.) In contrast, commonality does exist where, as in this case, the violations are result of defendants' policies that apply to all class members. *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir. 2012) (distinguishing *Dukes* on basis that defendants in *McReynolds* did have a company-wide policy that could have caused alleged discrimination); *N.B. ex rel. Buchanan v. Hamos*, No. 11 C 6866, 2012 WL 1953146, at *9 (N.D. Ill. May 30, 2012) ("As the Seventh Circuit has recognized, the holding in *Dukes* does not apply where discrimination results from a defendant's standardized conduct toward proposed class members.").

Even where the defendant's policy does not affect each class member in the exact same way, there can still be common questions that are more efficiently and consistently decided on a classwide basis. *See, e.g.*, *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2012 WL 1868637, at *2 (S.D.N.Y. May 16, 2012) (despite many differences in how each police stop and

frisk was conducted, the class met the commonality requirement because each stop was made according to centralized policies); *Gray v. Golden Gate Nat'l Recreational Area*, No. C-08-00722-EDL, 2011 WL 7710257, at **10-16 (N.D. Cal. Aug. 30, 2011) (although defendant park's violations of its obligations to provide access to disabled citizens varied based on the types of barriers to access and the types of disabilities, the court did not need to undertake a "barrier-by-barrier, accommodation-by-accommodation evaluation" because the class members "have all been denied access to the [park] on the basis of [defendant's] common failure of policies and practices").

There are multiple common questions with respect to Class 1 that, despite any differences among class members, would be more efficiently and consistently decided on a classwide basis. For example, in determining whether Defendants' implementation of the photo ID law violates the Fourteenth Amendment, the Court will have to decide: (1) the nature of Wisconsin's interest in the photo ID law; (2) whether the photo ID law and Defendants' policies for implementation are "narrowly drawn" to achieve that interest; and (3) whether the state's interest is "sufficiently weighty" to justify the limitations on the voting rights of the class members. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008). These questions require no individualized determinations, and they will produce answers apt to drive the resolution of the litigation. *Dukes*, 131 S. Ct. at 2551. To the extent that there may be other questions that cannot be answered on a classwide basis, that does not change the conclusion that the above questions should be decided with respect to the entire class.[8] *See McReynolds*, 672 F.3d at 491 (even if

[8] The Court also has the option of certifying sub-classes or maintaining the class action with respect to particular issues. *See* Fed. R. Civ. P. 23(c)(4)-(5). Any remaining questions, if not common to the class, can be handled on a subclass basis.

additional trials are necessary to determine how each class member was affected by defendant's employment policies, those trials would not separately consider central question of liability).

C. Defendants Have Not Rebutted Plaintiffs' Showings of Typicality and Adequacy.

As Defendants acknowledge, typicality is satisfied if the proposed representative's claim arises from the same event or practice or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. Doc. 83 at 6 (citing *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Defendants also acknowledge that adequacy is satisfied if the proposed representative has interests aligned with the other class members and has adequate counsel. Doc. 83 at 7. Defendants challenge the typicality and adequacy of Plaintiffs Wilde, Brown, and Frank, but do not argue that their injuries stem from a different course of conduct or practice, that their interests are in conflict with other class members, or that they lack adequate counsel. Rather, Defendants argue that these representatives are not typical or adequate because, in Defendants' view, these Plaintiffs have no claim. Defendants' merits arguments are inappropriate in this context and should be disregarded. *See Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (holding that the merits of a claim may be considered only insofar as the merits "affect the decisions essential under Rule 23").[9]

IV. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING FOR CLASS 2.

Proposed Class 2 consists of: "all eligible Wisconsin voters who lack accepted photo ID and for whom the costs incurred in obtaining a Wisconsin state ID card, including but not limited

[9] Defendants repeatedly make inappropriate merits arguments in their brief, such as: "Plaintiffs have not established that there are *indeed* legal hurdles and systemic barriers to the members of Class 1;" and "[Plaintiffs] have not shown that [the class] members are actually . . . unable to obtain such documentation." Doc. 83 at 16, 18 (emphasis in original). The question here is whether the Court should decide the questions presented on a classwide basis, not whether those questions should be decided in Plaintiffs' favor. For a discussion of why Plaintiffs are likely to succeed on their claims, see Plaintiffs' motions for preliminary injunction. Docs. 32, 41, 50, 95.

to the costs of obtaining certified and accurate copies of birth certificates or any other documentary proof accepted by the Wisconsin DMV or the cost of traveling to the nearest Wisconsin DMV office, would constitute a financial burden." Doc. 31, ¶ 110. Defendants oppose certification of Class 2 on nearly identical grounds as Class 1. Thus, for the reasons discussed in Section III above, Defendants' opposition is without merit. Defendants' only unique argument with respect to Class 2 is that the extent of the financial burdens will vary among class members depending on their income. Doc. 83 at 16-17. This difference is not a valid reason to reject the benefits of classwide treatment. There are questions common to all Class 2 members regarding the nature of the state's interest in Act 23, whether Defendants' implementation of Act 23 is "narrowly drawn" to advance that interest, and whether that interest is "sufficiently weighty" to limit the voting rights of the class members. In addition, to the extent that financial burdens differ among the members of the class, the Court can address those differences by reference to income level. For example, the Court could use a percentage of the federal poverty level to analyze whether Act 23 is constitutional as applied to class members under that income level.[10] The Court need not make individualized determinations regarding each class member.

V. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING FOR CLASS 5.

Proposed Class 5 consists of: "all eligible Wisconsin voters who lack accepted photo ID, must obtain one or more primary documents that DMV accepts to obtain a Wisconsin state ID card, . . . and will be required to pay one or more fees to obtain these documents." Doc. 31 ¶

[10]For example, Wisconsin's Badgercare health insurance program has an income limit of 200% of the federal poverty level for families with children. Wis. Stat. 49.471(3)(a)(4). The Milwaukee Parental Choice Program, intended to provide vouchers for low income families to attend private schools, is open to families with incomes up to 300% of the federal poverty level. Wis. Stat. 118.60(2)(a)1.a.

123. Defendants challenge Class 5 on numerosity and commonality grounds. With respect to numerosity, Defendants argue that Plaintiffs have not shown "how many potential [class] members lack all forms of acceptable identification." Doc. 83 at 17. But Plaintiffs quite clearly demonstrated that in Milwaukee County alone, there are an estimated 63,000 eligible Wisconsin voters who lack accepted photo ID and at least one of the documents required to obtain accepted photo ID, and that more than 20,000 of these voters lack a certified birth certificate, which typically can be obtained only by paying a fee. Doc. 64 at 10. Defendants' objection to commonality is also without merit. The obvious common question for Class 5 is whether the fees required to obtain documents necessary to obtain accepted photo ID constitute a poll tax. No individualized inquiries are required to answer that question.

VI. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING FOR CLASSES 3 AND 4.

In arguing against certification of proposed classes 3 and 4, Defendants make only inappropriate merits arguments. With respect to Class 3, Defendants argue that the class is non-existent because class members – eligible Wisconsin voters who must sacrifice an out-of-state driver's license to obtain accepted photo ID – are not entitled to relief. Doc. 83 at 21-22. Defendants cannot avoid class certification by arguing that the proposed class members have no claim. *Miller v. Mackey Int'l.*, 452 F.2d 424, 427 (5th Cir. 1971) ("In determining the propriety of a class action, the question is not whether . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."). Similarly, with respect to Class 4 – eligible Wisconsin voters who lack accepted photo ID, but have photo ID from a Wisconsin technical college – Defendants argue that the class members have not suffered a common injury because, in Defendants' view, they have no injury at all. Doc. 83 at 23. Again,

Defendants cannot avoid class certification by arguing that the proposed class members have no claim.[11]

VII. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING FOR CLASS 6.

Class 6 consists of eligible Wisconsin voters who do not possess accepted photo ID but possess a Veterans Identification Card. Defendants challenge this class solely on the basis of numerosity. In particular, Defendants complain that Plaintiffs estimated the size of the class by applying the 9.5% rate identified in the Baretto report to the population of homeless veterans in Wisconsin. Doc. 83 at 23-24. Courts, however, regularly certify classes based on estimates that extrapolate a sample set to a larger population. *See, e.g.*, *Phipps v. Sheriff of Cook Cnty.*, 249 F.R.D. 298, 300 (N.D. Ill. 2008) (finding estimate reasonable when based on "the number of wheelchair bound inmates identified thus far, the size of the [prison], and the time period for which [the plaintiffs] seek to certify a class"); *Block v. Abbott Labs.*, No. 99 C 7457, 2002 U.S. Dist. LEXIS 5453, at *7 (N.D. Ill. Mar. 28, 2002) (finding estimate reasonable when based on 20 identified victims extrapolated to the total number of products sold). Moreover, Plaintiffs' estimate is conservative because the homeless veterans population on which the estimate is based is a small subset of the total veterans population in Wisconsin. And, the estimate is corroborated by the fact that Plaintiffs have already identified the three proposed class representatives and an additional four class members that Plaintiffs were able to find in a single visit to a charity serving

[11] But even if the Court were to consider Defendants' inappropriate merits arguments, Defendants are incorrect, because Wisconsin law does not bar holders of out-of-state drivers' licenses (Class 3) from voting. The definitions of residency for driver licensing and voting purposes, especially for college students and others who may spend part of each year in different locations, are different. *Compare* Wis. Stat. §§ 6.10(1), (4), *with* Wis. Stat. § 343.01(2)(g). Some persons who have established Wisconsin residency for voting purposes do not have cars or drive in Wisconsin, and thus need not obtain a Wisconsin driver's license, but might drive in their state of origin or state where they spend part of the year. With respect to Class 4, the class members do have a live claim because the GAB policy to accept technical college IDs is not final.

homeless veterans. (M. Wedgewood Decl., June 29, 2012, Attachs. A-D.) This showing is more than sufficient to warrant certification of a class seeking injunctive relief. *See Leist v. Shawano County*, 91 F.R.D. 64, 67 (D.C. Wis. 1981); *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993).

VIII. DEFENDANTS FAILED TO REBUT PLAINTIFFS' SHOWING FOR CLASS 7 AND SUBCLASS 7.1

Defendants do not dispute that proposed Class 7 and proposed Sub-Class 7.1 meet the requirements for certification under Rule 23. Nor do Defendants raise any concerns with certifying this class and subclass. Rather, Defendants argue that Plaintiffs have not proved the existence of barriers facing minority voters and that such barriers are different compared to barriers faced by white voters. Doc. 83 at 24. This argument is a merits argument divorced from any consideration of the Rule 23 factors and thus should be disregarded. Defendants also argue that certification of this class is not necessary. As described in Section I, *supra*, "necessity" is irrelevant to whether a class should be certified. In any event, class certification is necessary because the claims asserted by Class 7 will not necessarily result in invalidation of Act 23 and because the nature of the claims concern the effect of Act 23 on the class as a whole, not just on the named Plaintiffs. *See Rochford*, 565 F.2d at 980. For these reasons, many Voting Rights Acts ("VRA") claims proceed as class actions. *See* Doc. 64 at 23 (citing VRA class actions).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should certify each of Plaintiffs' proposed classes.

Dated this 29th day of June, 2012

Respectfully submitted,

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