UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTION, CLASS CERTIFICATION AND JUDGMENT ON AS-APPLIED CLAIMS

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Plaintiffs file this reply in further support of their motion requesting judgment in favor of Plaintiffs on their remaining as-applied claims.[1] Defendants' opposition boils down to two main arguments. They first argue that the Seventh Circuit's opinion, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank II*"), precludes the Court from considering the merits of the undecided claims. But *Frank II* plainly did not address Plaintiffs' claims on behalf of veterans, technical college students, and voters with out-of-state driver's licenses (Claims 6, 4, 3). And *Frank II*'s holding that the burdens imposed by Act 23 are not sufficiently *widespread* to warrant complete invalidation does not preclude a finding as to whether *certain individuals or discrete classes of voters*, even if not the vast majority of voters, are unjustifiably harmed by the law and entitled to relief tailored to them (Claim 1 as-applied). With respect to the merits, the post-*NAACP* procedure does not address the burdens that Plaintiffs continue to face, and Defendants' other arguments are otherwise unavailing. Thus, at a minimum, this Court should enter relief for the individual named Plaintiffs. *See infra* Parts I., II.

Second, Defendants argue that the claims of the proposed classes are moot because some of the proposed class representatives subsequently obtained ID. But where, as here, plaintiffs diligently move for class certification after filing a lawsuit, the question of class mootness relates back to the original filing of the class certification motion. And here, there is no dispute that the class representatives lacked acceptable ID at the time of that filing over three years ago. Should the Court have any concern about the continued representation of the classes by voters who subsequently obtained ID (often through arduous efforts to overcome Defendants' violations),

[1] The following citations will be used in this brief: "Pls.' Br." refers to Plaintiffs' moving brief (Dkt. #223). "Defs.' Br." refers to Defendants' opposition brief (Dkt. #228). "Decision" refers to this Court's April 29, 2014 Decision and Order (Dkt. #195). "Pls.' PTBr." refers to Plaintiffs' Amended Post-Trial Brief (Dkt. #194). "Defs.' PTBr." refers to Defendants' Post-Trial Brief (Dkt. #176). "Young Decl." refers to the Declaration of Sean J. Young (Dkt. #238), filed in support of this reply brief.

there are multiple other class members who continue to lack ID and stand ready to be substituted as class representatives, as demonstrated by the numerous attached declarations. (Young Decl. Exs. 1-5.) Forcing these and other class members to bring individual follow-on suits to challenge the same law to obtain the same injunctive relief would impose needless costs on the Court and litigants while adding no unique substance to the existing trial record, which is precisely why Rule 23(b) class devices are permitted. The Court should thus proceed to certify the classes (and subclasses, if necessary)—all of which comply with Rule 23—and enter injunctive relief accordingly. *See infra* Parts III., IV.

ARGUMENT

I. ACT 23 IS UNCONSTITUTIONAL AS APPLIED TO VETERANS, TECHNICAL COLLEGE STUDENTS, AND VOTERS WITH OUT-OF-STATE DRIVER'S LICENSES

Defendants do not dispute that the Seventh Circuit's mandate does not preclude Plaintiffs' as-applied claims on behalf of veterans, technical college students, and voters with out-of-state driver's licenses. They argue instead that Plaintiffs lack standing, but as explained separately *infra* Part III.A., these class representatives continue to be harmed by Defendant's violations. With respect to the merits, Defendants abandon many of the failed arguments asserted in their Post-Trial Brief, but, as explained below, their new arguments fail as well. Thus, Defendants are liable on Plaintiffs' as-applied Claims 6, 4, and 3.

A. Defendants Concede that Veterans' ID Cards Are As Secure As Other Forms of ID Acceptable Under Act 23 (Claim 6)

Act 23 arbitrarily excludes photo ID cards issued by the United States Department of Veterans Affairs ("VA IDs"), and thereby transforms the "uniform of our country" into a "badge of disfranchisement." *Carrington v. Rash*, 380 U.S. 89, 97 (1965). After presenting no evidence at trial supporting the state's refusal to accept VA IDs, Defendants hypothesized in their Post-

Trial Brief that VA IDs "do not serve as a good proxy to confirm a voter's identity at the polls," because VA IDs lack an expiration date and therefore in some cases might not bear "a relatively current photograph." (Defs.' PTBr. at 123.) Defendants have now abandoned that argument and concede that other Act 23-acceptable forms of ID, such as some active-duty military IDs and tribal IDs, "also contain no expiration date" and may similarly bear a relatively old photo, and that a driver's license may bear "a picture that [i]s [up to] 16 years old." (Defs.' Br. at 19.) Furthermore, newly-issued VA IDs *now contain expiration dates*. (*See* Young Decl. Ex. 14 (U.S. Veterans Affairs website), Ex. 4 ¶ 7, Ex. 8 ¶ 2.) VA IDs are just as secure as uniformed services and tribal IDs, and are thus just as effective at preventing in-person voter impersonation fraud. Indeed, every other state that has a "strict" photo voter ID law permits the use of VA IDs. (*See* Young Decl. ¶¶ 15-16; Tr. 871:17-22).

In light of that concession, Defendants now rely primarily on the general argument that legislatures necessarily have to engage in line-drawing and that "the State needs to put some limit on the acceptable forms of ID." (Defs.' Br. at 18.)[2] But the fact that a line must be drawn somewhere does not justify arbitrary exclusions. For example, in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), the Seventh Circuit ordered that secular humanists be allowed to solemnize marriages, concluding that they were "irrational[ly]" and "arbitrarily" excluded, *id.* at 874-75, from an Indiana statute that included no less than *ten* types of people or religions who could solemnize marriage, *id.* at 871 (quoting Ind. Code § 31-

[2] Defendants are wrong to suggest that the rational basis framework applies to laws that restrict the fundamental right to vote, when a balancing test is appropriate. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 428-36 (6th Cir. 2012) (applying balancing test to determine whether distinction between military and non-military voters was justified under the Equal Protection Clause). In any event, excluding VA IDs is unjustifiable regardless of the standard of review.

11-6-1).[3] *See also, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (ordinance unconstitutionally excluded group home for people with cognitive disabilities, when it allowed apartments, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged, private clubs and fraternal orders).

Defendants next assert, for the very first time, that Act 23 allows uniformed service IDs because military personnel purportedly frequently relocate[4] and tribal IDs because American Indians have a unique status. (Defs.' Br. at 20.) But the Equal Protection question here is not whether there might be a valid basis for *permitting* particular forms of ID, but whether there is a valid basis for *discrimination*—that is, *excluding* VA IDs. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 655, 660 (7th Cir. 2014) ("the issue is not whether heterosexual marriage is a socially beneficial institution," but whether there is a valid basis for "discriminating against same-sex couples"); *Ctr. for Inquiry*, 758 F.3d at 872, 874-75 (though marriage solemnization statute is designed to "accommodate" religious groups, statute's *exclusion* of secular humanists from the list "is irrational," "discriminates arbitrarily among religious and ethical beliefs," and "violates the Equal Protection Clause of the Fourteenth Amendment"); *City of Cleburne*, 473 U.S. at 450

[3] Defendants argue that "add[ing] a tenth form of acceptable ID to the statute would open the door for even further additions" (Defs.' Br. at 19), but do not identify any other IDs that would be implicated by a favorable ruling for Plaintiffs. In any event, such vague concerns did not stop the Seventh Circuit from adding secular humanists to the list of proper celebrants in *Center for Inquiry*, even after *explicitly acknowledging that further additions probably were necessary*. *See* 758 F.3d. at 872-74 (statute also seemed to unconstitutionally exclude members of Buddhism, Rastafarianism, Jainism, and other religions that lack formal clergy). The fact that there may be additional applications of the Equal Protection Clause does not mean the Clause should not be applied in this case.

[4] Defendants ignore the fact that uniformed services ID is held by many voters other than the active duty service members at risk of deployment or relocation, including family members, retirees, and reserve and national guard members. (*See* Young Decl. Ex. 17 (U.S. Department of Defense website).)

(framing the question as whether the "characteristics of the intended occupants of the Featherston home rationally justify *denying* to those occupants what would be permitted to groups occupying the same site for different purposes" (emphasis added)).

Making it easier for holders of uniformed services and tribal IDs to vote does not require excluding VA IDs. *Cf. Baskin*, 766 F.3d at 668 ("allowing same-sex marriage has no effect on the heterosexual marriage rate"); *Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990) ("point[ing] to the existence of an exemption in order to demonstrate the irrationality of a prohibition . . . is a common way of making an equal protection challenge"). Furthermore, the purpose of Act 23—at least as Defendants have claimed throughout this litigation—is to prevent in-person voter impersonation fraud, but military relocation and tribal membership have nothing to do with whether VA IDs are less effective at preventing purported fraud (*i.e.*, are less secure) than uniformed services or tribal IDs. *See City of Cleburne*, 473 U.S. at 447 (government's proffered "difference[s are] largely irrelevant unless" inclusion of the group "would threaten legitimate interests of the [state]" in a way the inclusion of a comparable group "would not"). And to the extent it is relevant that some holders of military ID may relocate, it is equally true that "any voter could be suddenly called away," and thus "[t]here is no reason to provide these voters with fewer opportunities to vote than military voters." *Obama for Am.*, 697 F.3d at 435.[5]

The state has utterly failed to justify the exclusion of VA IDs under any standard of review. *Cf. Baskin*, 766 F.3d at 654 ("We hasten to add that even when the group discriminated against is not a 'suspect class,' courts examine, and sometimes reject, the rationale offered by

[5] Defendants' remaining arguments also fail. They assert, without basis, that "[m]ost veterans will also have another form of ID." (Defs.' Br. at 19.) It is clear, however, that many do not. *See infra* Part III.C. Further, that fact would not explain how *excluding* VA IDs would serve Act 23's fraud prevention purposes. Defendants also ask whether "the benefit of adding VA ID to the list outweigh[s] the cost of making the voter ID law harder to implement?" (Defs.' Br. at 19), but do not explain how accepting VA ID would make "the voter ID law harder to implement."

government for the challenged discrimination."). Defendants have therefore violated the Equal Protection Clause by excluding VA ID from the list of IDs deemed acceptable for voting.

B. Defendants Concede that Act 23 Excludes Technical College ID Cards in Violation of the Equal Protection Clause (Claim 4)

Defendants do not dispute that Act 23's exclusion of technical college IDs violates the Equal Protection Clause. Rather, they argue that this claim "will soon be mooted by GAB rulemaking." (Defs.' Br. at 21; *see also* Ltr. from Clayton Kawski to Court, May 18, 2015, Dkt. #235.) This emergency rule, however, is not sufficient to render the claim moot.

"[A] shift in position by the agency is analogous to the voluntary cessation of illegal activity by a defendant. Such voluntary cessation renders a case moot *only* if the defendant can prove that there is *no reasonable likelihood* that the wrong will be repeated." *Brown-El v. Brennan*, 929 F.2d 703, 1991 WL 43959, at *2 (7th Cir. 1991) (unpublished) (emphases added; citation omitted). "[A] case does not become moot merely because the defendants have stopped engaging in unlawful activity. '[A] defendant claiming that its voluntary compliance moots a case bears the *formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (emphases added; citation omitted). Otherwise, "dismissal of the suit [would] leave the defendant free to resume the conduct the next day." *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 724 F.3d 854, 864 (7th Cir. 2013) (internal quotation marks and citations omitted).

Defendants have failed to satisfy their "formidable burden." The GAB emergency rules that recently went into effect will only last for 150 days. (*See* Kennedy Decl., Dkt. #230, ¶ 22; GAB Emergency Rule, Dkt. #235-2, at 5.) And even if GAB promulgates "permanent" rules by October 2015 (Dkt. #230 ¶ 23), those rules could *still* be blocked by the legislature or the

governor because, under a statute enacted in 2011, their approval is required before any rule becomes permanent (Fr. Ex. 372 (Young Decl. Ex. 9)[6] at 5; Tr. 882:8-883:14.) Indeed, the Wisconsin legislature's Joint Committee for the Review of Administrative Rules previously balked at the GAB's position to allow technical college IDs and forced GAB to undertake this bureaucratic effort in the first place, considering the GAB's interpretation to be a "policy" decision. (Tr. 1957:4-13.) Defendants offer no assurances making it "absolutely clear" that the legislature and the governor will agree with the GAB's "policy" decision and allow the promulgation process to proceed to a final rule. *See, e.g.*, *Wis. Right to Life*, 751 F.3d at 831 ("[The Board's] inconsistent and shifting positions do not give us much confidence in its representation that it will not enforce the statute. By not fully disclaiming the right to enforce this facially invalid statute, the Board's halfhearted concession leaves us with no assurance that it will continue to recognize its unconstitutionality."). Because Defendants have failed to demonstrate that this claim is moot and do not dispute that failing to accept technical college IDs violates the Equal Protection Clause, this Court should find Defendants liable on that claim.

C. Defendants Concede that Eligible Voters with Out-of-State Driver's Licenses Must Choose Among Driving, Paying Money, or Voting (Claim 3)

Defendants do not dispute that eligible voters with out-of-state driver's licenses are forced to choose among: (1) surrendering their driving privileges; (2) paying money; and (3) giving up their right to vote. (Pls.' Br. at 14.) Given that concession, none of Defendants' arguments undermine the conclusion that such voters are subject to "a poll or other tax" in violation of the Constitution. U.S. Const. amend. XXIV.

[6] For the Court's convenience, Plaintiffs have attached copies of the relevant *Frank* trial exhibits to the attorney declaration filed in support of this reply brief.

Defendants initially argue that this choice imposes only an "inconvenience." (Defs.' Br. at 22.) But nowhere do Defendants explain how completely surrendering driving privileges in exchange for a "free" Wisconsin state identification card is simply "inconvenient." Sacrificing such an integral part of one's life is clearly a "material requirement" that cannot be imposed on those seeking to exercise the right to vote. *See Harman v. Forssenius*, 380 U.S. 528, 541 (1965). And Defendants certainly cannot argue that requiring voters to pay a fee to exchange an out-of-state driver's license for a Wisconsin driver's license in order to vote is acceptable. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

Next, Defendants focus myopically on the fact that voters are not asked to do anything *at the polls* other than show ID. (Defs.' Br. at 23.) But if being able to vote at the polls requires obtaining ID in the first place, and *obtaining ID* imposes a fee or a "material requirement" to avoid payment of a fee, then voters are still subject to an illegal poll tax in order to vote. *See, e.g., Harman*, 380 U.S. at 541-42 (forcing voters to obtain a certificate of residence prior to voting is unconstitutional); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) (requiring execution of indigency affidavit was a "material requirement"); *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) (requiring voters to obtain document from sheriff violated Twenty-Fourth Amendment); *cf., e.g., Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262, 277 (Wis. 2014) ("it would be . . . a severe burden on the right to vote if an elector were obligated to pay a fee to a government agency in order to obtain documents required for a DOT photo identification card to vote"). Such a material requirement is unconstitutional even if, as Defendants argue, "requiring individuals to show ID" to verify their eligibility to vote satisfies the State's interest in confirming "that individuals seeking to cast a ballot are who they purport to be." (Defs.' Br. at 24.) *See Harman*, 380 U.S. at 541-43

(acknowledging State's interest in "insuring that the electorate is limited to bona fide residents" but finding certificate of residency requirement unconstitutional when there were "numerous" other ways to "enforce valid" requirements).[7] And contrary to Defendants' suggestion, neither the Supreme Court nor the Seventh Circuit decisions in *Crawford* squarely held that payments incurred by voters to satisfy a voter ID requirement cannot constitute a poll tax.[8]

Finally, Defendants reprise their inaccurate refrain that residency for voting purposes is same as residency for driving purposes. But Defendants also concede that "the criteria for determining residency for voting are not identical to those for determining residency for driving." (Defs.' Br. at 25 (emphasis removed).) Defendants nonchalantly assert that the differences are "materially indistinct" (*id.*), but they do not explain how—and they also do not dispute that some eligible Wisconsin voters, including students and snowbirds, may legitimately retain their out-of-state driver's licenses while residing in Wisconsin (Pls.' Br. at 15). Nor does the Constitution permit States to use crude and inaccurate proxies, such as the mere possession of an out-of-state driver's license, to preclude state residents from voting. *See Carrington*, 380 U.S. at 94-95; *cf. Guare v. New Hampshire*, No. 2014-558, 2015 WL 2340003 (N.H. May 15, 2015) (violation of New Hampshire Constitution to falsely tell all newly registered voters that they were also residents for driving purposes and must obtain in-state driver's licenses).

[7] Defendants do not, because they cannot, argue that excluding out-of-state driver's licenses ensures that voters satisfy residency requirements. Act 23 does not require that the address on the ID match the address in the poll book, Wis. Stat. § 6.79(2)(a) (Tr. 910:15-24, 912:23-913:1); other forms of Act 23-acceptable IDs, such as uniformed services IDs, do not indicate Wisconsin residence at all; and all Wisconsin voters must submit proof of Wisconsin residency every time they register or change their voting addresses. Wis. Stat. §§ 6.34, 6.40.

[8] Unlike Wisconsin, Indiana does not require voters to surrender out-of-state licenses to obtain a free Indiana ID card for voting. (Young Decl. Ex. 18 (Indiana BMV website).) And Kansas's voter ID law permits use of out-of-state driver's licenses. Kan. Stat. Ann. § 25-2908(h)(1)(A).

Defendants further argue that the poll tax claim should be rejected because it is "novel" (Defs.' Br. at 22), but so are strict voter ID laws. "Constitutional rights would be of little value if they could be . . . indirectly denied or manipulated out of existence. . . . [T]he Twenty-[F]ourth [Amendment] nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed. It hits onerous procedural requirements which effectively handicap exercise of the franchise by those claiming the constitutional immunity." *Harman*, 380 U.S. at 540-41 (internal quotation marks and citations omitted). Act 23 thus imposes an unconstitutional poll tax on eligible Wisconsin voters with out-of-state driver's licenses.

II. ACT 23 IS UNCONSTITUTIONAL AS APPLIED TO VOTERS FACING LEGAL AND SYSTEMIC BARRIERS TO OBTAINING ID

This Court should also find Act 23 to be unconstitutional as applied to voters who face legal and systemic barriers to obtaining acceptable ID. As shown at trial, these legal and systemic barriers are the following:

(a) The underlying documents required by DMV to obtain ID contain name mismatches or other errors that must be amended before DMV will issue accepted ID;

(b) The underlying documents required by DMV to obtain accepted ID cannot be obtained unless the voter interacts with an agency other than the DMV; and

(c) The underlying documents required by DMV to obtain accepted ID do not exist.

Crawford stated that, "[f]or *most* voters who need them, the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (emphasis added). But the members of Class 1 are not "most voters." Those who must overcome

any one of the three legal and systemic barriers to obtain accepted ID face far more substantial burdens.

Voters with name mismatches often must pay court costs and legal fees to correct records; travel long distances to contend with out-of-state vital records offices to correct those records; know which politicians or high-ranking DMV officials to contact; or otherwise gamble that DMV discretion will favor them on any particular day. (Pls.' PTBr. at 16-18.) Voters who must contend with multiple agencies, such as the DMV and the Social Security Administration ("SSA"), because they lack proof of identity, must often make multiple trips (which requires taking a substantial amount of time off of work in addition to paying for transportation), identify the often-confusing requirements of each agency, and potentially obtain yet *more* secondary documents to satisfy those other agencies. (*Id.* at 20-22.) Voters whose underlying documents do not exist are subject to the discretionary whims of DMV staff, who may or may not inform them of the secret MV3002 procedure or the newly-minted MV3012 procedure. *See infra* Part II.B. Weeks later, after learning that the underlying document does not exist, the voter must make another trip to the DMV, and even then, ID is not guaranteed. The voter is *again* subject to the discretion of the DMV employee on duty that day, because whatever secondary documents that voter was able to gather may not satisfy the requirements for a new ID. This unpredictable process continues to be a severe burden. (Pls.' PTBr. at 18-19.)[9]

Defendants advance two principal arguments in opposition: (1) that *Frank II* "specifically addressed these individuals in its decision" (Defs.' Br. at 13-15); and (2) that the

[9] All of these voters must also make trips to DMV offices, most of which are open only during regular office hours, necessitating time off work; and some of which are not accessible by public transit. (Pls.' PTBr. at 10-12.) These voters also face inevitable delays of several weeks or more in obtaining ID (*id.* at 14) even if they fully understand Act 23's requirements and its confusing exemptions (Pls.' Br. at 19).

post-trial petition process created by DMV after *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014) (hereinafter "post-*NAACP* procedure") resolves all of these burdens (Defs.' Br. at 16-17). Defendants are wrong on each count.

A. *Frank II* Did Not "Specifically Address" These Voters In Its Facial Ruling

Frank II did not "specifically address" the burdens faced by class member voters facing any one of the three legal or systemic barriers because it did not need to. *Frank II* addressed what it deemed the facial invalidation of Act 23 before the law was fully implemented. Thus the Seventh Circuit's primary focus was on whether the *number of individuals* facing significant burdens was sufficiently high to justify this pre-enforcement remedy. That is why the Seventh Circuit explicitly characterized the claim as a "facial" attack, the same type of challenge at issue in *Crawford*. *See Frank II*, 768 F.3d at 747 ("This suit, like *Crawford*, therefore is a challenge to Act 23 as written ('on its face'), rather than to its effects ('as applied')."); *Crawford*, 553 U.S. at 200, 202-04 (characterizing plaintiffs' claim as "facial" challenge).

As *Crawford* teaches, facial challenges "advance[] a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications." Plaintiffs in such cases bear a "heavy burden" to show that the "magnitude" of the burdens imposed are sufficiently widespread to justify completely invalidating a law. *Crawford*, 553 U.S. at 200. If plaintiffs cannot demonstrate that a sufficiently large number of voters are affected, then the statute has a "plainly legitimate sweep" and is thus facially valid, *id.* at 202 (citation and internal quotation marks omitted). Accordingly, in *Crawford*, the plurality examined "only the [Indiana voter ID] statute's broad application to *all* Indiana voters," *id.* at 202-03 (emphasis added), and found that it was "not possible to quantify . . . the magnitude of the burden" because "the evidence in the record does not provide us with the number of registered voters without photo identification," *id.* at 200. The plurality concluded that the "application of the statute *to the vast*

majority of Indiana voters is amply justified," and therefore "reject[ed] petitioners' facial attack on the statute." *Id.* at 204 (emphasis added). *Frank II* similarly focused on numbers, noting that this Court "did not find that *substantial numbers of persons* eligible to vote have tried to get a photo ID but been unable to do so," *Frank II*, 768 F.3d at 746 (emphasis added), and that "a need for photo ID is [not] an obstacle to a *significant number of persons* who otherwise would cast ballots," *id.* at 749 (emphasis added). Thus, *Frank II* also concluded that the application of Act 23 to the "vast majority" of Wisconsin voters was "amply justified." *Id.* at 755 (quoting *Crawford*, 553 U.S. at 204).

Plaintiffs bringing an as-applied challenge under the *Anderson-Burdick* framework, on the other hand, need only demonstrate that the voting restriction unjustifiably harms the *plaintiffs themselves* (and other class members similarly situated), even if they do not constitute the "vast majority" or even a "large fraction" of voters.[10] *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (facial challenge to abortion statute requires showing that a "large fraction" of women are unjustifiably burdened, while as-applied challenges seeking individualized exemptions can be brought in "a discrete case"). This is especially the case when the plaintiffs seek nothing more than relief tailored to the plaintiff (or the plaintiff classes) themselves. *Cf., e.g., Stewart v. Marion Cnty.*, No. 1:08-CV-586-LJM-TAB, 2008 WL 4690984 (S.D. Ind. Oct. 21, 2008) (analyzing post-*Crawford* challenge to voter ID law on behalf of single voter by examining burdens faced by that individual); *Gonsalves v. N.Y. State Bd. of Elections*, 974 F. Supp. 2d 191

[10] Though the number of voters in these subclasses do not constitute the "vast majority" of Wisconsin voters, the number is high enough for joinder to be impracticable, thus warranting class certification. *See infra* Part III.C. Even if this Court were to find that only 40 voters comprised each class thus satisfying numerosity (and the numbers are far higher), and such voters would comprise *less than 0.001%* of the Wisconsin registered voter population (Decision at 73 (3,395,688 registered voters)), as-applied liability and relief would *still* be warranted, and would not run afoul of *Frank II*.

(E.D.N.Y. 2013) (as-applied *Anderson-Burdick* challenge on behalf of specific voters). Defendants suggest that the Seventh Circuit's facial ruling was related to "the pre-enforcement nature of the challenge" and the absence of any findings about turnout by this Court (Defs.' Br. at 15), but an as-applied challenge is now ripe because Act 23 is *now* in effect.[11]

Frank II also did not hold that the State's interests in implementing voter ID *always* outweigh whatever burdens it might impose on discrete subclasses of voters (*see* Defs.' Br. at 14-15)—and for good reason, as that would improperly adopt Justice Scalia's more sweeping *Crawford* concurrence as the law. For instance, a voter ID law that only permitted U.S. passports as identification would obviously be unconstitutional as applied to voters without them. Under *Crawford*, the State's interests may be sufficient to sustain the general validity of the law, but not necessarily its application to every class of individuals affected by it. *See, e.g., Green Party of Pa. v. Aichele*, --- F. Supp. 3d ---, Civ. No. 14-3299, 2015 WL 871150, at *23 (E.D. Pa. Mar. 2, 2015) (state's interests did not justify application of election regulation on Green Party plaintiffs). This Court is not foreclosed by *Frank II* from making as-applied determinations about how the voters in the proposed classes will be impacted by Act 23, which is now in effect.[12]

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[11] Defendants' expert admitted that Georgia's voter ID law had "the effect of suppressing turnout" to the tune of about 20,000 voters (Tr. 1473:8-1475:24), and he agreed "as a matter of [his] professional opinion that the Wisconsin voter ID law . . . is likely to suppress voter turnout in the State of Wisconsin" (Tr. 1476:11-1477:22). Plaintiffs' expert also testified about numerous academic studies finding that "photo voter ID requirements appeared to exert a vote suppression effect along socioeconomic lines." (Tr. 1238:6-1239:3-7.) *Cf.* U.S. Government Accountability Office, *Issues Related to State Voter ID Laws*, Sept. 2014, http://tinyurl.com/lgkz8gb (last visited May 21, 2015) (concluding that voter ID laws in four states suppressed turnout). Indeed, in the low-turnout February 2012 election, 28 Madison voters lacked ID and left without voting at all (Tr. 2063:8-11, 2063:21-23), 16 voters without ID filled out provisional ballots (Tr. 2062:18-2063:11), and only six voters returned by Friday with compliant ID (Tr. 2063:12-23).

[12] Should this Court believe that *Frank II* forecloses these claims, Plaintiffs respectfully submit that *Frank II* was wrongly decided largely for the reasons set forth in Judge Posner's opinion in *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc), in order to preserve this argument.

B. The Post-*NAACP* Procedure Does Not Cure The Burdens Faced By These Voters

Defendants also argue that the post-*NAACP* procedure removes all of the burdens faced by these voters. (Defs.' Br. at 16-17.) Defendants appear to improperly invite a one-sided credibility finding by this Court in submitting an affidavit from Kristina Boardman. But this Court need not assess Boardman's credibility because the text of the emergency rule itself (Young Decl. Ex. 19), as well as the new "MV3012 form" (Dkt. #229-1), establish that Defendants have not met their "formidable burden" of showing that they have remedied their violations with respect to the Class 1 voters.

First, the procedure does not help voters with name mismatches. While Section 12 of the new procedure addresses some name *changes*—and only if those changes have been made in Social Security records (Young Decl. Ex. 19 (Emergency Rule) at 8)—it does not address name misspellings or other errors, or name changes that are not in SSA's records for whatever reason. Accordingly, the MV3012 form obtains verification of name, date of birth and/or citizenship, but says nothing about what would occur if the records contain misspellings or other errors. In fact, the form specifically requires the voter to list their name "as it appears on the birth certificate." (Dkt. #229-1.) Second, the procedure does not help voters who must contend with multiple agencies because they are missing proof of identity documents such as a Social Security card or proof of residence, since the MV3012 form addresses neither document. (Dkt. #229-1.)

Third, the new MV3012 process does not address the situations of voters whose underlying documents do not exist at all. To the extent the MV3012 process replicates the MV3002 process, the same inadequacies this Court has already found (Order Denying Stay, Dkt. #212, at 7-8) continue to exist, subjecting applicants to the same unpredictable DMV discretion that made MV3002 inadequate. DMV has set up a process that vests verification of

information in the hands of other government bureaucracies: vital records offices around the country, the SSA, and immigration offices, a process that can take weeks or longer. (*See* Boardman Decl., Dkt. #229, ¶¶ 9, 12.)[13] If those bureaucracies do not provide what DMV determines to be adequate verification, DMV's rules force the voter to obtain secondary documentation (if any such documents exist (*see, e.g.*, Tr. 400:20-402:10)), make another trip to DMV, and hope that whatever secondary documents he or she was able to muster *might* satisfy the frontline DMV employee or supervisor who happens to be on duty that day. (*See* Young Decl. Ex. 19 (Emergency Rule) at 7 ("The department *may* thereafter issue an identification card . . . [if] the department receives other supporting documentation *deemed acceptable* to the administrator." (emphasis added))).[14] "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

For these reasons, neither *Frank II* nor the post-*NAACP* procedure precludes this Court from finding Defendants liable for unjustifiably burdening Class 1 voters in violation of the Fourteenth Amendment.

[13] The voter, who cannot control the time within which third-party bureaucracies respond to DMV, also cannot vote during this time because DMV will not issue any ID until the verification process is completed. (Dkt. #229 ¶ 11.)

[14] Further, there is serious doubt about whether DMV is making the new MV3012 procedure any more transparent or accessible than the old MV3002 procedure. (*See, e.g.*, Decls. of Samuel Baker and Genard Davis (Young Decl. Exs. 3, 6) (both told by DMV, post-*NAACP*, that they needed to obtain and pay for birth certificates *themselves* to obtain "free" ID for voting).) Indeed, GAB has recently admitted that adequate outreach efforts are *not* in the GAB's current budget, and that "the DMV's new procedure to help people without birth certificates get a free state ID for voting is not well known." (Young Decl. Ex. 20 at 1-2.) *Cf. Frank II*, 768 F.3d at 747 n.1.

III. THE COURT SHOULD DECIDE THE UNDECIDED CLAIMS ON BEHALF OF ALL CLASS MEMBERS, NOT JUST NAMED PLAINTIFFS

This Court should also certify Plaintiffs' proposed classes to enter consistent class-wide decisions and consistent injunctive relief. Otherwise, similarly-situated voters will be forced to seek remedies on an individual basis in numerous, separate follow-on suits. Such follow-on suits would impose needless costs on the voters and the Court, and would add nothing unique to the well-developed record already before this Court. Avoiding these inefficiencies and the risks of judicial inconsistency is the precise reason why class actions are authorized, especially civil rights class actions for injunctive relief brought under Rule 23(b)(1) and 23(b)(2). *See Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) ("handling equitable issues on a class-wide basis would solve a problem sure to bedevil individual proceedings: How is it feasible to draft and enforce an injunction that will bear on these 27 plaintiffs alone, and *not* on the other 323 black employees?"); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999) ("Rule 23(b)(2) is designed for all-or-none cases in which final relief of an injunctive nature . . . settling the legality of the behavior with respect to the class as a whole, is appropriate." (internal quotation marks omitted)). Defendants oppose this common-sense outcome by raising numerous objections to class certification. None are availing.

A. The Classes Are Not Moot: The Class Representatives' Claims Were Live When Plaintiffs Diligently Moved For Class Certification, and Unnamed Class Members Stand Ready to Substitute as Representatives

Defendants first argue that because named Plaintiffs from Classes 3 (Matthew Dearing and Samantha Meszaros), 4 (Domonique Whitehurst), and 6 (Carl Ellis) eventually obtained ID, they now lack standing, and that this precludes class certification. (Defs.' Br. at 9-10.) Defendants misunderstand the basis for Plaintiffs' standing, which is that they continue to be unable to vote with the arbitrarily-excluded forms of ID (*e.g.*, VA IDs, technical college IDs, and

out-of-state driver's licenses) that they possess, an injury suffered by everyone in the classes and which persists even if some class members later obtain acceptable ID. *Cf., e.g., Ctr. for Inquiry*, 758 F.3d at 873 (secular humanists still injured even if they can still get married through alternative procedure); *Doe v. Cnty. of Montgomery, Ill.*, 41 F.3d 1156, 1158 (7th Cir. 1994) (plaintiffs had standing to challenge courthouse sign reading, "THE WORLD NEEDS GOD," even when there were "several other entrances to the courthouse"). Indeed, "an identifiable trifle is enough [for standing] to fight out a question of principle; the trifle is the basis for standing and the principle provides the motivation." *Richards v. NLRB*, 702 F.3d 1010, 1015 (7th Cir. 2012) (citation and internal quotation marks omitted).[15]

But even assuming *arguendo* that Defendants are correct that the individual claim of a plaintiff who subsequently obtains an alternative form of accepted ID is rendered moot, it is "well-established" that the claims of a plaintiff *class* do not become moot just because the claims of a named plaintiff become moot. *Richards*, 702 F.3d at 1017. Where, as here, the named plaintiffs moved promptly for class certification prior to their individual claims becoming moot, the claims of the absent class members can remain live, even if the named plaintiff's claim becomes moot while the class certification motion is pending. *See, e.g., McMahon v. LVNV Funding*, 744 F.3d 1010, 1019 (7th Cir. 2014); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 897

[15] And the evidence shows that several class representatives are subjected to more than "an identifiable trifle." Voters such as Carl Ellis embarked on a two-year odyssey just to obtain an ID to vote, and others in these classes overcame Defendants' violations through expenditure of their own time and/or resources to obtain another form of ID. In voter ID cases where plaintiffs have been denied equal protection, courts have held that the plaintiffs retain standing even when they overcome a barrier imposed by defendants. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("For purposes of standing, a denial of equal treatment is an actual injury even when complainant is able to overcome the challenged barrier. . . . The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). In addition, IDs can expire or be lost or stolen. (Decision at 44 n.24; Pls.' PTBr. at 32 n.16; Munson Decl. (Young Decl. Ex. 4) ¶ 6.).

(7th Cir. 2011); *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003). This is especially the case here, where Plaintiffs' class certification motion remained pending for more than three years due to circumstances unique to this case and outside of Plaintiffs' control. (*See, e.g.*, Dkt. ##107, 113, 123, 195.) To hold otherwise would leave the mootness of Plaintiffs' classes entirely at the mercy of the timing of a class certification decision, all while Defendants' civil rights violations against affected class members continue. *See, e.g.*, *Comer v. Cisneros*, 37 F.3d 775, 798-799 (2d Cir. 1994) (where court did not rule on promptly filed class certification motion for two years, class certification relates back to original filing of the class complaint).

Plaintiffs instituted this suit on December 13, 2011 (Dkt. #1) and diligently moved for class certification on April 23, 2012 (Dkt. #63). The trial record establishes that as of April 2012, *all* of the proffered class representatives lacked acceptable forms of ID:

Class	**Class representative Plaintiffs**
Class 1	Ruthelle Frank, Eddie Lee Holloway, Jr., Shirley Brown, DeWayne Smith (Fr. Ex. 606 (Young Decl. Ex. 10); Tr. 51:12-52:1; 207:21-209:1; 860:6-7)
Subclass 1A	Ruthelle Frank, Eddie Lee Holloway, Jr.
Subclass 1B	Ruthelle Frank, Eddie Lee Holloway, Jr., Shirley Brown, DeWayne Smith
Subclass 1C	Shirley Brown
Class 3	Matthew Dearing, Samantha Meszaros (Tr. 973:18-974:3; 977:11-21; 696:3-17)
Class 4	Domonique Whitehurst (Tr. 390:11-14)
Class 6	Carl Ellis (Tr. 567:9-12)

Because each of these class representatives undeniably had a live claim at the time that Plaintiffs diligently moved for class certification, the claims of the classes are not moot.

Furthermore, should the Court find that Plaintiffs lack standing because they obtained ID, even though they did so well after moving diligently for class certification, there are other class members who continue to lack ID and stand ready to be substituted. *See Phillips*, 435 F.3d at 787 ("Substitution of unnamed class members for named plaintiffs who fall out of the case . . . is a common and normally an unexceptional ('routine') feature of class action litigation"); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 826-27 (7th Cir. 2011). Unnamed class member Brittney Frederick is available to substitute as Class 3 representative. (Young Decl. Ex. 1.) Unnamed class member and technical college student Dan Duerst is available to substitute as Class 4 representatives. (Young Decl. Ex. 2.) And unnamed class member veterans Samuel Baker, Emmanuel Qualls, and Keenan Munson are available to substitute as Class 6 representatives. (Young Decl. Exs. 3-5.) *Cf. Espenschied v. DirectSat USA, LLC*, 688 F.3d 872, 877-78 (7th Cir. 2012) ("if appeals such as this were held to be precluded on standing grounds, there would no judicial economies, since if the named plaintiffs . . . exit the scene another member of the class can step forward and take [their] place."); *Randall*, 637 F.3d at 827 (discouraging "constant interruptions of the proceeding—procedural hiccups— . . . tr[ying] to add new class representatives every time the defendants raised an objection to certification").

B. The Named Plaintiffs Satisfy the Adequacy and Typicality Requirements of Rule 23

When a named plaintiff's individual claims become moot after the motion for class certification has been diligently filed, the only question is whether the named plaintiff remains an adequate representative of a class whose claims remain live. *See Weismueller v. Kosobocki*, 513 F.3d 784, 786 (7th Cir. 2008) ("[t]he named plaintiff who no longer has a stake may not be a suitable class representative, but that is not a matter of jurisdiction and would not disqualify him from continuing as a class representative").

Defendants argue that the named class members for Classes 3, 4, and 6 can no longer represent the class because having another form of acceptable ID makes their claim no longer typical of the class or an adequate representative. (Defs.' Br. at 11.) But Dearing, Meszaros, Whitehurst, and Ellis each testified capably about the primary experience common to everyone in each class: they had arbitrarily excluded forms of ID but not Act 23-acceptable ID, and thus would not have been able to vote. It is difficult to imagine what more is needed for them to articulate the straightforward claims of those classes: that Act 23 unjustifiably excludes such alternative IDs. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1080 (7th Cir. 2013) ("To question her adequacy [just because her individual claim may be barred by the statute of limitations] is to be unrealistic about the role of the class representative in a class action suit. The role is nominal."). Indeed, the substitute class representatives all currently lack acceptable forms of ID and are thus "adequate" under Defendants' cramped definition, but their testimony adds nothing material to the testimony given by the existing representatives. And Defendants' concerns about adequacy are trivial now that the trial is concluded.

With respect to Class 1, Defendants argue that the testimony of Frank is not typical of other class members only because Defendants are now willing to offer an individualized exception to provide Frank with ID, whereas they had refused to provide her with ID prior to her filing this lawsuit. This experience, however, *is* in fact typical of other voters with mismatches, who are offered special exceptions only after they seek the intervention of the Governor or state legislators. (Pls.' PTBr. at 16-18.) And the fact that Frank has declined to act on the exception is immaterial to her adequacy as a class representative. *Cf. McMahon*, 744 F.3d at 1019. Defendants argue that Holloway's experience is not typical of Class 1 members for whom the underlying documentation does not exist. (Defs.' Br. at 8.) But Holloway's experience, including

his hunt for secondary documentation (school and vaccination records) (Tr. 48:4-49:4) and the unpredictable treatment he received from Illinois vital records (Tr. 47:17-50:3), is not unlike the experiences of those whose underlying documents do not exist, who must also gather secondary documentation and hope that unpredictable DMV discretion will deem it acceptable (Young Decl. Ex. 19 (Emergency Rule) at 7-8).[16] In any event, Shirley Brown, whose underlying documents do not exist, is also typical of such voters. Though Defendants argue that she is an inadequate class representative because she obtained ID after trial,[17] she indisputably had a live claim at trial and so there is nothing more Brown needs to do at this point to adequately represent the class.[18] Defendants also do not contend that the experiences of Frank or Holloway, or DeWayne Smith for that matter, are not representative of those who must contend with multiple agencies to obtain ID. And Defendants certainly do not suggest any conflict of interest that might raise adequacy concerns with respect to any of the Plaintiffs. *See, e.g.*, *Johnson v. Meriter Health Servs. Emp. Retirement Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Lastly, because Class 1

[16] Holloway's experience is also typical of voters with name mismatches and voters who must contend with multiple agencies. Though they assert that Holloway "could likely" use DMV's petition process to obtain ID (Defs.' Br. at 8), they cannot even give a straight answer as to whether Holloway can or cannot get ID. (*Compare, e.g.*, Defs.' Br. at 8 (Holloway "could likely" obtain ID), *with* Boardman Decl., Dkt. #229, ¶ 23 (Holloway "would be able to obtain" ID) *and* Tr. 1844:3-9 (Miller testifying that "there is a possibility" Holloway would obtain ID).) This inconsistency perfectly illustrates the unpredictable system that *all* voters in Holloway's position must face, a system in which even high-level officials and lawyers cannot agree as to whether any particular individual should get ID.

[17] It is notable that DMV discretion happened to favor Brown after she testified at trial, even though Brown's previous efforts at the DMV were unsuccessful. Similarly, after Rose Thompson testified to trying to obtain ID at the DMV four or five times (Tr. 704:7-10), DMV *sua sponte* offered ID to Rose Thompson post-trial (*see* Decl. of Rose Thompson (Young Decl. Ex. 7)). *See also McMahon*, 744 F.3d at 1017 ("allowing defendants to pick off party plaintiffs . . . would frustrate the objectives of class actions" (citation and internal quotation marks omitted)).

[18] Should the Court have any concerns about Brown's adequacy, trial witnesses such as Melvin Robertson, whose underlying documents do not exist (Tr. 400:20-402:10), could also potentially serve as a class or subclass representative for such voters. Plaintiffs also request leave to identify any substitute class members that this Court believes are necessary to represent the class.

members are all subject to the same DMV process that imposes these burdens, typicality is amply satisfied here. *See CE Design Ltd. V. King Architectural Metals, Inc.*, 637 F.3d 721, 724-75 (7th Cir. 2011) (typicality determined "with reference to the [defendant's] actions").

C. The Classes and Subclasses Are Sufficiently Numerous Such That Joinder is Impracticable

Defendants also attack the proposed classes on general numerosity grounds, but do not actually argue that identifying and joining all absent class members is practicable. Rather, Defendants fixate on the exact number of the absent class members, as if showing a precise number was a talismanic requirement for certification. But as explained in prior briefing, no magic number is required because the difficulty of identifying other class members militates in *favor* of class certification, and numerosity is usually satisfied when classes are simply found to contain more than 40 members. (*See* Pls.' Class Certification Mem., Dkt. #64, at 5-7 (citing cases)); *see also Chapman v. Wagener Equities, Inc*., 747 F.3d 489, 492 (7th Cir. 2014) ("a class can be certified without determination of its size, so long as it's reasonable to believe it large enough to make joinder impracticable").

Class 3 is sufficiently numerous such that joinder is impracticable, although Defendants argue otherwise. (Defs.' Br. at 10.) The fact that there are at least 40—and probably far more—eligible Wisconsin voters who must surrender their out-of-state driver's licenses in order to vote is amply supported by the trial record, as well as common sense. Dearing specifically testified to encountering 40 or 50 out-of-state students *who would face difficulties under Act 23*, identified several by name and the specific out-of-state IDs that they possessed, and testified that they lacked passports and were disenfranchised as a result of Act 23. (Tr. 977-8; 983-4.) Meszaros specifically testified not only that there were more than 100 out-of-state Carthage students, but also that they possessed out-of-state driver's licenses. (Tr. 692:15-20; *see also* Tr. 1965:19-25

(Haas personally estimating that there are probably more than 50 Wisconsin students with out-of-state driver's licenses).) Moreover, Kevin Kennedy specifically informed the legislature that there were out-of-state students attending Wisconsin schools who "may want to keep their out-of-state license because they may return to their home state for vacations or summer employment" (Fr. Ex. 1 (Young Decl. Ex. 11) at 3), a statement that was carefully prepared by GAB based on "research" and "experience[]" (Tr. 874:13-19). And some Wisconsin colleges would not have developed stickers in an attempt to make their student IDs acceptable for voting (Tr. 1952:23-1953:3; 1966:12-1967:9)[19] if all their students were already able to vote with other forms of ID.[20] And Hein testified that each of the 10 snowbirds that he personally knew of contacted GAB precisely because they would be unable to vote under Act 23. (Tr. 1687:14-22.)

Class 4 is also sufficiently numerous such that joinder is impracticable. There are hundreds of thousands of technical college students in Wisconsin.[21] Barreto's survey established that 5.7% of eligible voters with "Some College / Technical School" education (Fr. Ex. 600 (Young Decl. Ex. 12) at 40 (Table 14), 49 (survey instrument)) lack acceptable forms of ID, and it is reasonable to conclude that a comparable percentage of hundreds of thousands of students

[19] This attempt may well be futile. The rule permitting stickers is not yet final (Tr. 1954:2-1955:12), and the use of stickers does not always resolve the requirement that the issuance and expiration dates be within two years (*see, e.g.*, Young Decl. Ex. 1 (stickers on Frederick's student ID exceeding two-year limitation)).

[20] The poll tax problem faced by these students, as well as snowbirds, was so prevalent that it was repeatedly brought to GAB's attention (Tr. 1687:14-1688:25), and forced GAB to have conversations with the Department of Transportation just to get their arms around the issue (Tr. 873:19-875:2).

[21] Pursuant to Fed. R. Evid. 201(b)(2), (c)(2), Plaintiffs request that the Court take judicial notice of a Wisconsin Technical College System report stating that there were 341,802 technical college students in Wisconsin during the 2012-13 fiscal period. (Young Decl. Ex. 21 at 2; *see also* Tr. 880:1-3 ("several thousand" students)). A court "may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d). Plaintiffs also request that the Court take judicial notice of any public websites referenced in this brief which this Court deems material to its decision.

makes identification and joinder of all such class members impracticable. It certainly provides a reasonable basis to infer there are at least 40, and likely thousands, of technical college students without other ID. Numerosity is corroborated by testimony that, when the GAB staff initially recommended interpreting Act 23 to exclude technical college IDs for voting, "[t]here was quite a bit of feedback, . . . to put it mildly, from students and administrators in the technical colleges" (Tr. 1956:20-21), of which there are 16 in Wisconsin (Tr. 879:22-23). The recommendation "caught representatives of the [Wisconsin Technical College System] . . . by surprise[, because] many technical colleges were investing significant resources to ensure their student ID cards met statutory criteria." (Fr. Ex. 5 (Young Decl. Ex. 13) at 2.) This reaction is consistent with there being substantial numbers of technical college students who lacked acceptable ID for voting.

The record also shows that Class 6 is sufficiently numerous such that joinder is impracticable. In addition to three trial witnesses (Ellis, Davis, and Newcomb), the accompanying declarations (Young Decl. Exs. 3-5) show that there are many more. Ellis testified that he personally encountered "at least 15 or 20 other veterans who did not have DMV-issued ID." (Tr. at 568:5-7.)[22] Defendants complain about Plaintiffs' citation to a government document indicating that there are numerous homeless veterans in Wisconsin, because it was not part of the trial record (Defs.' Br. at 11), but the trial record itself establishes that homelessness in the veteran population is pervasive: GAB conceded at trial that "there [are] a lot of veterans who [are] homeless or marginally housed" (Tr. 1637:1-7); and the record showed that homelessness is

[22] Defendants argue that technically, one who lacks "DMV-issued ID" may also have other forms of Act 23-acceptable ID, but they do not dispute that "[d]rivers' licenses and state ID cards are the two most common forms of Act-23 identification." (Decision at 72.) And while Defendants now call Ellis's testimony "hearsay" (Defs.' Br. at 11), they made no such objection at trial. *See Christmas v. City of Chi.*, 682 F.3d 632, 639-40 (7th Cir. 2012) (failure to object to witness testimony during trial precludes post-trial objection (citing Fed. R. Evid. 103(a))); *Cefalu v. Rocuskie*, No. 12 C 5995, 2014 WL 1563804, at *5 (N.D. Ill. Apr. 17, 2014).

such a problem in the Wisconsin veteran population that there are organizations such as Dryhootch and VETS Place Central who are dedicated to helping them, including helping them obtain ID (Tr. 565:15-17; 567:20-568:2). Nor do Defendants dispute that the lack of ID possession is common among homeless persons: GAB conceded as much (Tr. at 1649:17-1650:3; 1652:22-24; 1663:10-21), Defendants' own witness noting that 5 or 6 out of 25 homeless persons at one food pantry lacked ID (Tr. 1988:3-8) (Spindell); and Ray Ciszewski testified to helping more than 600 low-income and homeless people acquire birth certificates for the purpose of obtaining ID (Decision at 32; *see also* Decl. of Mark Flower (Young Decl. Ex. 8) ¶¶ 3-4). Any suggestion that it is practicable to identify and join all members of Class 6, especially given the substantial number of class members who are homeless veterans, is simply impracticable.

Lastly, voters facing any of the three Class 1 legal and systemic barriers are sufficiently numerous such that joinder is impracticable. Defendants have long argued that the Class 1 voters represented a dwindling number of "unique" or "bizarre" cases, but they now admit that 677 voters have applied for the MV3012 procedure in the few short months that it has been in existence (despite inconsistent publicity, *see supra* Part II.B.), and that 96 of these voters have still been unable to obtain ID while another 36 applications were "cancelled," purportedly at the customer's request. (Boardman Decl., Dkt. #229, ¶ 13.) That so many voters need exceptions to the DMV's documentation requirements—and that so many voters still have been unable to obtain ID—shows that joinder is impracticable.[23] And this is in addition to the wealth of trial evidence showing numerosity of Class 1. DMV officials testified about routinely encountering voters with name mismatches or other errors. (Decision at 34 n.18, 36-37 n.20; Tr. 1104:1-20; 1865:19-21; 1884:3-7; *see also* Tr. 65:25-66:4.) As for voters who must contend with multiple

[23] Moreover, this assumes the doubtful proposition that DMV is even consistently offering this procedure to voters without birth certificates. *See supra* Part II.B.

agencies to obtain ID, "1,640 eligible voters in Milwaukee County alone do not have qualifying IDs and do not have any of the documents the DMV accepts to prove identity, including Social Security cards." (Decision at 28.) In addition, "homeless voters who do not have a relationship with a social-service agency will be unable to prove residency" (*id.* at 29), and those with a relationship still must obtain a formal letter from an agency willing to provide one, in addition to going to DMV (Tr. 474:23-475:2). Defendants can hardly dispute that there are more than 40 homeless people in Wisconsin. (*See, e.g.*, Tr. 445:17-19 (100 to 150 homeless people visiting day shelter a day).)[24] Lastly, this Court already found that there are many eligible Wisconsin voters for whom underlying documents do not exist. (*See* Decision at 32 n.17.)

D. Defendants' Remaining Concerns About Class 1 Are Meritless

Defendants argue that Class 1 is "unmanageable," but discovery and the trial have long been concluded, and the only manageability question is whether it is manageable for the Court to issue a decision and craft relief for Class 1 members. Here, Defendants do not dispute the practicability of implementing the affidavit relief that Plaintiffs request, for good reason, since Defendants have long admitted that "relief granted by this Court . . . can be fashioned to cover all of the putative class members." (Defs.' Opp'n to Class Certification Mot., Dkt. #83, at 8.)

Defendants attempt to manufacture an issue of indefiniteness by speculating about a wide variety of burdens that might fall under the definition of "legal or systemic practical barriers" (Defs.' Br. at 6),[25] but there is no need for such speculation now that the trial is concluded. The

[24] These documentation burdens are even less reasonable or defensible since state law requires *only* documentary proof of citizenship. Wis. Stat. § 343.14(2)(es). The decision to demand documentary proof of identity and residency is only due to DMV's own rules.

[25] Rule 23 does not require that a class be definite or ascertainable. Where courts have expressed concerns about definiteness or ascertainability, it is typically in Rule 23(b)(3) class actions for damages where the court is required to direct individualized notice to class members. *See* Fed. R. Civ. P. 23(c)(2)(B). Indefiniteness is far less relevant in suits for injunctive relief such as this

record evidence showed that the "legal or systemic practical barriers" to obtaining accepted ID fall into three definite, ascertainable, and regularly repeating types that each apply to numerous voters: (a) the voter's underlying documents have errors that must be amended; (b) the voter must contend with an agency other than DMV to obtain the underlying documents; and/or (c) the voter's underlying documents do not exist. The existence of each of these barriers is objectively verifiable, requiring no application of judgment of the Court.

For that same reason, Defendants' arguments about the impropriety of Rule 23(b)(1) and (b)(2) certification—all premised on supposed indefiniteness (Defs.' Br. at 6, 8-9)—fail as well. Piecemeal lawsuits by different voters facing the same identifiable barrier could result in inconsistent rulings, warranting (b)(1) certification. As for (b)(2) certification, the burdens imposed on the Class 1 subclasses are the result of Act 23 and the DMV rules and procedures, not individualized decisions, and a single form of injunctive relief in the form of an affidavit will remedy Defendant's violations with respect to all Class 1 members by allowing voters to easily self-identify their inclusion in the class through the affidavit itself.[26]

Defendants also suggest that there is no commonality (Defs.' Br. at 7), but the Court need only answer one question to resolve Claim 1 with respect to all Class 1 members: "Does the State's interest in Act 23, as demonstrated at trial, justify the burdens imposed on voters that face any of the three legal or systemic practical barriers to obtaining ID as demonstrated at trial?" As

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one. *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.").

[26] Defendants continue to cite the inapposite case *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), but as Plaintiffs explained in prior briefing, that case is inapplicable. (Reply in Supp. of Class Certification Mot., Dkt. #99, at 4-5.) In contrast to *Jamie S.*, Plaintiffs in this case propose a single affidavit that would remedy Defendants' violations with respect to all members of Class 1 without need for any individualized determinations, remedies, or other involvement of the Court.

discussed *supra* Part II., the answer is no. And if the Court's conclusion depends on which of the three legal or systemic practical barriers is being weighed against the State's interest, the Court should not deny class certification, but certify subclasses to address the question separately for each barrier, as each separately satisfies Rule 23. *See* Fed. R. Civ. P. 23(c)(4)-(5).

E. Plaintiffs Have Not Waived Their Right to Seek Class Certification

Defendants argue, citing Rule 23(f), that this Court is precluded from considering Plaintiffs' motion for class certification because Plaintiffs did not appeal this Court's denial of that motion as moot. (Defs.' Br. at 12.) Rule 23(f), however, relates to the Court of Appeals' power to hear non-mandatory, interlocutory appeals of class certification determinations. It does not address the District Court's power to revisit a class certification determination, which is instead governed by Rule 23(c)(1)(C), which states that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The Seventh Circuit has accordingly held that "rulings on certification in class action suits are tentative and can be revisited by the district court as changed circumstances require." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) (citing Rule 23(c)(1)(C)), *cert. denied*, 134 S. Ct. 1277 (2014).

IV. THE COURT HAS THE POWER TO GRANT PLAINTIFFS' REQUESTED RELIEF

Finally, Defendants raise only two arguments against Plaintiffs' requested relief: (1) that creating an affidavit exception procedure amounts to "judicial legislation" (Defs.' Br. at 1 (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995))); and (2) that individualized notice is unrelated to Plaintiffs' claims. The affidavit exception procedure, however, is simply a practical mechanism that ensures that Act 23 does not apply to the members of Class 1, by allowing Class 1 members to self-identify under penalty of perjury. Enjoining the application of

a law to the plaintiffs of a class action lawsuit is not "judicial legislation." *See, e.g.*, *Nat'l Treasury*, 513 U.S. at 478 (enjoining the law as applied to plaintiff class of Executive Branch employees below GS-16); *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force."); *see also Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011) ("the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." (citation and internal quotation marks omitted)). Importantly, Defendants proffer no other alternative to the procedure, which need not be complex. (*See, e.g.*, Young Decl. Ex. 22 (South Carolina affidavit) at Appendix 11.) *See Ayotte*, 546 U.S. at 329 (judicial remedy appropriate when "easily" "articulate[d]"). As for Plaintiffs' request for individualized notice, Defendants do not dispute that the lack of such notice results in confusion further exacerbating the burdens faced by those in Class 1 (Pls.' Br. at 19), especially in light of GAB's recent admission that Act 23's requirements and exemptions are inadequately publicized (Young Decl. Ex. 20 at 2). Individualized notice is thus entirely appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for class certification and enter judgment in favor of Plaintiffs on their as-applied claims. In addition, the Court should enter injunctive relief not only for the named Plaintiffs, but also for the Plaintiff classes as set forth in the proposed order attached to the motion. Lastly, Plaintiffs respectfully reiterate their request for an oral argument to address any outstanding questions that this Court may have.

Dated this 22nd day of May, 2015.

Respectfully submitted,

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General Information

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