

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN**

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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.

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Civil Action No. 2:11-cv-01128 (LA)

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

## INTRODUCTION

The named Plaintiffs in this case (“Plaintiffs”) respectfully submit this memorandum of law in support of their motion to certify Classes 1 through 7 as defined in the First Amended Complaint (“FAC”). FAC (Doc. 31) ¶¶ 106-132. Each of these seven classes comprises eligible Wisconsin voters who lack an accepted form of photo ID (“accepted photo ID”) under 2011 Wisconsin Act 23 (“the photo ID law” or “Act 23”) and thus are unable to vote.<sup>1</sup> The photo ID law deprives Plaintiffs and the class members they represent of their fundamental right to vote in violation of the United States Constitution and the Voting Rights Act. Accordingly, Plaintiffs seek injunctive and declaratory relief to prevent enforcement of Act 23 as applied to these classes.

Adjudicating this case on a class-wide basis will serve the interests of justice and efficiency. Eligible Wisconsin voters who lack acceptable forms of photo ID under Act 23 number in the tens, if not hundreds, of thousands, and many of these class members are difficult to identify and/or contact. Joinder simply could not occur, and it would place significant and unnecessary burdens on the Court to adjudicate the class members’ cases on an individual basis. Moreover, there is little to be gained by separately adjudicating the class members’ claims when the requested injunctive and declaratory relief sought by Plaintiffs will be sufficient to protect their voting rights.

Plaintiffs will adequately and fairly represent the class members, because their claims are typical of the other class members’ claims and because Plaintiffs have both the means and incentives to vindicate the rights of the class members. Indeed, if not for this

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<sup>1</sup> Although technical college ID cards (Class and Claim 4) are currently being accepted as ID for voting purposes, their exclusion is still threatened under the administrative rule review process. *See* Doc. 31 ¶¶ 46-48, 54.

class action, many eligible Wisconsin voters “might never receive any redress for the wrong done them.” *Eggleston v. Chicago Journeymen Plumbers’ Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981).

It is also fair and efficient to adjudicate this action on a class-wide basis because eligible Wisconsin voters in each class are similarly situated. Within each class, the class members are harmed in common ways. Eligible Wisconsin voters in Class 1 lack accepted photo ID and face common legal and/or systemic practical barriers to voting imposed by Act 23, which requires Plaintiffs to interact with, and subjects them to, complex rules and burdensome requirements of the Wisconsin Department of Transportation, Division of Motor Vehicles (“DMV”) Defendants. Eligible Wisconsin voters in Class 2 lack accepted photo ID and face financial barriers to voting, also imposed because Act 23 subjects them to DMV’s requirements. The photo ID law imposes a poll tax on the eligible Wisconsin voters in Classes 3 and 5. Eligible Wisconsin voters in Classes 4 and 6 possess forms of photo ID that are indistinguishable in all material respects from those acceptable under the Act, but are arbitrarily denied the right to vote because these forms of photo ID are deemed unacceptable for voting purposes. Finally, Act 23 has a disproportionate negative impact on minority voters in the State of Wisconsin (Class 7) and in Milwaukee County (Subclass 7.1), in violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973.

For each of the above classes, there is at least one common question of law or fact that, when determined by this Court, “will resolve an issue that is central to the validity of each one of the [class members’] claims.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.

2541, 2551 (2011). Thus, the interests of judicial efficiency and consistency are served by resolving those common questions on a class-wide basis.

Finally, it is beneficial to proceed as a class action because the relief sought by Plaintiffs is declaratory and injunctive in nature and because, for each class, a “single injunction or declaratory judgment would provide relief to each member of the class.” *Id.* at 2557. Individual adjudications of the class members’ claims may result in the parties facing inconsistent holdings on the lawfulness of Act 23, the impracticability of applying the law differently for similarly situated voters, and/or the impossibility of complying with inconsistent injunctions.

## **ARGUMENT**

### **I. LEGAL STANDARD FOR CERTIFYING CLASS ACTIONS**

Under Rule 23(a) of the Federal Rules of Civil Procedure, the Court should certify a proposed class where, as here, the plaintiff shows: (1) numerosity – that the class is so numerous that joinder of all members is impracticable; (2) commonality – that there are questions of law or fact common to the class; (3) typicality – that the named plaintiffs’ claims or defenses are typical of the class; and (4) adequacy of representation – that the named plaintiffs fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). And under Rule 23(b), the Court should certify a class if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual

adjudications or would substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

FED. R. CIV. P. 23(b).

Civil rights cases such as this one are particularly appropriate for class certification. *See* Advisory Committee Notes on Fed. R. Civ. P. 23(b)(2) (“Illustrative of [cases appropriate for class certification under 23(b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”). Indeed, federal courts must “construe liberally the requirements for class actions in civil rights cases” because such actions often seek to end violations that specifically affect certain classes of citizens. *Long v. Thornton Tp. High Sch. Dist.* 205, 82 F.R.D. 186, 189 (D.C. Ill. 1979) (citing *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1967)). As discussed below, each of Plaintiffs’ proposed classes satisfies each of the requirements of Rule 23(a) and at least one of the Rule 23(b) requirements.

## **II. THE COURT SHOULD CERTIFY PROPOSED CLASSES ONE, TWO, AND FIVE.**

As set forth in the FAC, Classes 1, 2, and 5 each involve impairment of the right to vote by DMV’s policies and practices. Act 23, which requires voters to interact with DMV and subjects them to DMV’s policies and practices, places significant hurdles between voters and their ability to vote. Class 1 includes “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 systemic practical barriers to completing the process of obtaining an ID.” Doc. 31 ¶ 106. Among the Class 1 members

are eligible Wisconsin voters who were never issued birth certificates, voters who lack accurate birth certificates, voters who are unable to obtain certified birth certificates from the state in which they were born, and voters who lack and cannot obtain other forms of proof that DMV requires them to produce to obtain the photo ID they need to vote. *Id.* ¶ 107. DMV’s unreasonably stringent and byzantine rules, policies, and procedures impair the ability of Class 1 members to obtain accepted photo ID. *Id.* ¶¶ 133-37; *see also* Memorandum in Support of Pltfs.’ Mot. for Prelim. Inj. (“PI Brief”) (Doc. 50) (filed Apr. 23, 2012), at Secs. II.B.1.b.i, II.B.4.

Class 2 includes “all eligible Wisconsin voters who lack accepted photo ID and for whom the costs incurred in obtaining a Wisconsin ID card, including but not limited to the cost 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.

Class 5 comprises “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, including but not limited to certified and accurate copies of birth, marriage, and name change certificates or records [] of the non-existence thereof, and will be required to pay one or more fees to obtain these documents.” *Id.* ¶ 123. Because these voters cannot obtain the photo ID they need to vote without paying fees for supporting documents, Defendants have imposed a poll tax on these class members.

**A. Classes One, Two, and Five Are So Numerous That Joinder of Class Members is Impracticable.**

Under Federal Rule of Civil Procedure 23(a)(1), a class must be so numerous that joinder of all its members is impracticable. As the Supreme Court has explained,

determining whether numerosity is satisfied “requires examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). Indeed, the Seventh Circuit has recognized that a class with as few as 40 members easily satisfies the numerosity requirement. *See Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969); *Bailiff v. Village of Downers Grove*, No. 11 C 3355, 2011 WL 6318953, at \*3 (N.D. Ill. Dec. 16, 2011) (“A class including more than 40 members is generally believed to be sufficient.”). And Courts in this Circuit regularly certify classes with even fewer members. *See, e.g., Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56-57 (N.D. Ill. 1996) (18 class members); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (29 class members).

Plaintiffs “are not required to specify the exact number of persons in the class.” *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (internal citations omitted); *see also Leist v. Shawano County*, 91 F.R.D. 64, 67 (D.C. Wis. 1981) (there is no “requirement that the size of the class be precisely calculated.”). Indeed, the “lack of ready identifiability supports rather than detracts from, the impracticability of joinder.” *Leist*, 91 F.R.D. at 67. “Especially where the relief sought is declaratory and injunctive, even speculative and conclusory representations as to the size of the class have been held adequate to meet the numerosity requirement.” *Id.*; *see also Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001) (citing *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993)) (numerosity requirement is “relaxed . . . where the putative class seeks injunctive and declaratory relief pursuant to Rule 23(b)(2)”). Therefore, a “court is entitled to make common sense assumptions in order to support a finding of numerosity.” *Stawski v.*

*Secured Funding Corp.*, No. 06-CV-918, 2008 WL 647024, at \*1 (E.D. Wis. Mar. 6, 2008) (quoting *Patrykus v. Gomilla*, 121 F.R.D. 357, 360 (N.D. Ill. 1988)).

Class 1 satisfies the numerosity requirement. To obtain an original Wisconsin photo ID, an eligible voter must provide proof of citizenship, proof of name and date of birth, proof of identity, and proof of Wisconsin residency. Doc. 31 ¶ 68; Wis. Admin. Code Trans § 102.15(2). As shown by the expert report of Professor Matt Barreto and consulting expert Professor Gabriel Sanchez<sup>2</sup> (“Barreto/Sanchez”), in *Milwaukee County alone*,<sup>3</sup> there are over 63,000 eligible Wisconsin voters who lack accepted photo ID and over 21,500 of these voters also lack at least one of the documents DMV requires to obtain a Wisconsin state ID card. Barreto/Sanchez, Tables 2 & 8. Due to DMV’s unreasonably stringent and complicated rules, policies, and procedures, a large number of these eligible voters face legal or systemic practical barriers to completing the process of obtaining an ID.

For example, in Milwaukee County alone, there are at least 20,000 eligible Wisconsin voters who do not have accepted photo ID and who also lack a birth certificate or any other accepted form of documentary proof of U.S. citizenship necessary to obtain a Wisconsin state ID card. *Id.* at Table 8. Many members of Class 1 will face additional

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<sup>2</sup> Matt A. Barreto, Gabriel R. Sanchez, *Rates of Possession of Accepted Photo Identification Among Different Subgroups in the Eligible Voter Population, Milwaukee County, Wisconsin* (April 23, 2012) (Doc. 62-10).

<sup>3</sup> Several of the numerosity figures in this brief are based on examples from Milwaukee County. With the exception of Proposed Subclass 7.1, Plaintiffs do not intend any Proposed Class to be limited to eligible Wisconsin voters in Milwaukee County. But if the number of class members in Milwaukee County alone is too numerous to make joinder practicable, it follows that the number of class members in all of Wisconsin (which necessarily will be an equal or higher number) is also sufficiently numerous.

practical barriers to completing the process of obtaining a photo ID. The team leader in just one of DMV's 92 statewide offices sees one case every month or two of voters with birth certificate variations, JT 36:18-25,<sup>4</sup> a frequency that confirms that the significant systemic barriers to acquiring an accepted photo ID are not uncommon and not limited to Plaintiffs Frank, Holloway, and Wilde. PI Brief (Doc. 50) Secs. II.B.1.b.i, II.B.4. Many voters, like Plaintiffs Bulmer and Ginorio, need to apply to other jurisdictions to obtain proof of citizenship.<sup>5</sup> Doc. 33 at 8-9. And many voters also lack one or more of the other documents DMV requires to issue ID. *See* JT 80:18-81:9 (testifying that she sees about one case per month just in Waukesha DMV office of persons lacking Social Security Cards to prove identity). Certifying a class would avoid the practical problems of trying to join all the 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 systemic practical barriers to completing the process of obtaining an ID. *See Eggleston*, 657 F.2d at 895.

With respect to Class 2, publicly available data demonstrates that there are many eligible Wisconsin voters who lack the financial resources to obtain a Wisconsin state ID card. While the Wisconsin state ID is itself free, securing it can involve, for example, the monetary costs of obtaining the required documents, such as a correct and certified copy of one's birth certificate, Doc. 31 ¶¶ 72, 82-84, and the costs of transportation to DMV

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<sup>4</sup> Deposition of Janet Turja, Team Leader, DMV Waukesha Customer Service Center (Attach. A). Other depositions cited are of Michael Haas (MH), GAB Counsel (Attach. B), and GAB Elections Supervisor Ross Hein (RH) (Attach. C).

<sup>5</sup> Of the 20,000 eligible voters in Milwaukee County who lack accepted photo ID and documentary proof of U.S. citizenship, an estimated 34.2% were born in a U.S. state or territory other than Wisconsin (including Puerto Rico, which accounts for 4.1%). Another estimated 12.7% are naturalized citizens. Barreto/Sanchez at 22.

Customer Service Centers (“CSCs”) and other locations to obtain required documents. Like Plaintiffs Dukes, Ellis, Holloway, Ginorio, and Bulmer, there are many Wisconsin voters for whom these costs are simply unaffordable or otherwise burdensome.<sup>6</sup> For example, in Milwaukee County alone, there are between approximately 20,494 and approximately 40,511 eligible Wisconsin voters making less than \$20,000 per year who lack accepted photo ID and would be required to expend scarce resources to obtain a state ID card. Barreto/Sanchez (Doc. 62-10) at 31. Moreover, those voters with incomes below \$20,000 per year are far more likely to lack accepted photo ID and the documents they need to obtain ID. *Id.*, Table 21 (54.8% of eligible voters with incomes below \$20,000 per year lack accepted photo ID and one or more of the underlying documents required to obtain a Wisconsin ID, while for the \$20,000-40,000 income bracket, only 9.7% of eligible voters lack accepted photo ID and one or more underlying documents). The impracticability of joinder for Class 2 is further supported by the fact that the number of financially insecure eligible Wisconsin voters fluctuates. The difficulty of identifying the members of Class 2, especially future members, indicates that joinder is impracticable. *Marcial*, 880 F.2d at 957.

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<sup>6</sup> According to the 2006-2010 American Community Survey (“ACS”) 5-Year Estimates, approximately 429,482 individuals had incomes below the FPL over the preceding 12 months. U.S. Census Bureau, 2006-2010 ACS 5-Year Estimates, Poverty Status in the Past 12 Months [S1701] (calculation includes both population 18 to 64 and 65 years and over). And according to a study conducted by the Wisconsin Department of Children and Families, in November 2008 there were 12,608 families who were receiving food stamps in the State of Wisconsin but had zero earned or unearned income. Wisconsin Department of Children and Families, Office of Performance and Quality Assurance, Bureau of Program Evaluation and Research, *W-2 Take-up Study Final Report*, at 3, available at: [http://dcf.wisconsin.gov/w2/pdf/w2\\_takeup\\_study.pdf](http://dcf.wisconsin.gov/w2/pdf/w2_takeup_study.pdf).

Class 5, which includes eligible Wisconsin voters who are effectively forced to pay a poll tax or incur a material burden to obtain a Wisconsin photo ID, also satisfies the numerosity requirement. Of the 63,000 eligible Wisconsin voters in Milwaukee County who lack accepted photo ID, at least 20,000 also lack a certified birth certificate, which typically can only be obtained by paying an application fee. Doc. 31 ¶¶ 82-84; Mem. in Supp. of Pltfs.’ Mot. for Prelim. Inj. (Doc. 50) Sec. II.B.1.b.ii.; Barreto/Sanchez, Table 8. Therefore, Class 5 is also sufficiently numerous to warrant class certification.

**B. There Are Common Questions of Law And/Or Fact For Each of Classes One, Two, and Five.**

Under Rule 23(a)(2), there must be questions of law or fact common to the class. As the Supreme Court recently explained in *Wal-Mart Stores, Inc. v. Dukes*, to satisfy Rule 23(a)(2) commonality, Plaintiffs need only show that their “claims . . . depend upon a common contention” that “is capable of classwide resolution.” 131 S. Ct. 2541, 2551 (2011). As the *Dukes* Court further explained, “[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury,” and that certifying the class will permit the litigation to “generate common *answers* apt to drive the resolution of the litigation.” *Id.* at 2551 (citation omitted; emphasis in original). As Justice Scalia noted in the majority’s opinion, “even a single common question will do.” *Id.* at 2556 (quotation marks, alterations, and citations omitted). For this reason, “[t]he commonality requirement has been referred to as a low hurdle that is easily surmounted.” *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 244 F.R.D. 469, 476 (N.D. Ill. 2007) (citations omitted). Commonality is often easy to establish where, as here, Defendants applied the same policies to all class members. *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (although class members viewed different versions of

defendants' allegedly deceptive advertisements, common questions existed as to defendant's duty to disclose and whether the allegedly omitted facts were material or misleading). *Edmondson v. Simon* is also instructive:

Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common. There need be only a single issue common to all members of the class. Therefore, when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected. [citations omitted] . . . . Where an across-the-board or permeating policy . . . is alleged in a class action, the requirement under rule 23(a)(2) of commonality is satisfied.

86 F.R.D. 375, 380 (N.D. Ill. 1980).<sup>7</sup>

With respect to Class 1, the common legal question for resolution centers upon Defendants' decision to make DMV its gatekeeper to the ballot box and to force eligible voters without accepted photo ID to comply with DMV's complex rules and policies, a number of which are unwritten or otherwise not disclosed to the public. Voters in that position must obtain and produce at least three separate documents – many of which themselves require money, identification, and/or other documentation to obtain – in order to acquire an accepted photo ID.<sup>8</sup> This regulatory scheme for the issuance of state ID

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<sup>7</sup> Because Plaintiffs seek certification under Rules 23(b)(1) & (b)(2), not Rule 23(b)(3), Plaintiffs need not meet the “far more demanding” test that any common factual or legal questions “predominate over any questions affecting only individual members.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609, 614, 623-24 (1997); *Vodak v. City of Chicago*, No. 03 C 2463, 2006 WL 1037151, at \*5 (N.D. Ill. Apr. 17, 2006) (“All of Defendants' arguments regarding the purportedly distinct factual bases for the class members' claims are more relevant to predominance [under Rule 23(b)(3)—] the commonality analysis of Rule 23(a)(2) focuses on Defendants' conduct and Plaintiffs' legal theories.”).

<sup>8</sup> Eligible Wisconsin voters who lack accepted photo ID can obtain a “free” Wisconsin ID only if (1) voters who have never had a Wisconsin license or ID, or have not had one for the past eight years, produce at least 3 separate documents, one of which (birth certificate) requires payment of a fee, and two of which often cannot be obtained

cards has rendered the exercise of the fundamental right to vote an unreasonably complicated and burdensome task for the members of Class 1, who do not possess accepted photo ID, do not have one of the three documents required by the DMV, and who are forced by DMV to navigate through complex regulations and interact with multiple local, state, and federal bureaucracies to complete the process. *See, e.g.*, Brown Decl. (Doc. 35) ¶¶ 3-7; Wilde Decl. (Doc. 59) ¶¶ 9-17; Ginorio Decl. (Doc. 33-6) ¶¶ 4-7; Frank Decl. (Doc. 33-5) ¶¶ 8-15; Bulmer Decl. (Doc. 33-2) ¶¶ 7-11; Holloway Decl. (Doc. 33-8) ¶¶ 7-12); Althof Decl. (Doc. 51) ¶¶ 8-14; Oden Decl. (Doc. 33-9) ¶¶ 3-6; Smith Decl. (Doc. 33-10) ¶¶ 9-14; Judd Decl. (attached)<sup>9</sup> ¶¶ 9-10. Whether DMV’s complex and burdensome regulatory scheme, particularly its stringent documentary proof requirements, is justified by the State’s asserted interests is a question common to all members of Class 1 and will “generate common *answers* apt to drive the resolution of the litigation.” *Dukes*, 131 S. Ct. at 2551 (emphasis in original); *see also Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012) (commonality satisfied when a common question about defendant’s policies was apt to drive the resolution of the litigation).

The common questions for Class 2 also involves Defendants’ decision to make DMV the gatekeeper to the ballot box, but focus on whether the financial burdens imposed by the regulatory scheme can be justified by the State’s asserted interests.

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without presenting secondary identification (e.g., birth certificates and Social Security Cards); (2) they have a residence street address; and (3) they appear at one of only 92 DMV offices – not all of which are on transit routes – during weekday, daytime hours. Wis. Admin. Code Trans § 102.15; *see also* PI Brief (Doc. 50), Sec. I.C.

<sup>9</sup> Plaintiffs have not resubmitted declarations and other exhibits already filed on the docket. Where new declarations are filed with this brief, Plaintiffs have noted that the new exhibits are “attached.” Additional exhibits that are not self-authenticating are attached to an attorney declaration that is filed contemporaneously with this brief.

Members of Class 2 are low-income voters who face financial barriers to obtaining a state ID card, such as paying for birth certificates and for transportation to a DMV CSC. *See, e.g.,* Dukes Decl. (Doc. 33-3) ¶¶ 3-6; Ginorio Decl. (Doc. 33-6) ¶¶ 5-6; Bulmer Decl. (Doc. 33-2) ¶¶ 7-11; Holloway Decl. (Doc. 33-8) ¶¶ 7-12; Ellis Decl. (Doc. 33-4) ¶¶ 8-9. Whether or not requiring voters to pay for various forms of documentary proof, the costs of transportation for agency interactions, and other expenses can be justified by the state's asserted interests is a common legal question for this Court's resolution.

Commonality is also readily established for Class 5. The common question of fact is whether voters who lack accepted photo ID are required to pay a fee to acquire the specified forms of documentary proof, such as certified birth certificates, marriage certificates, or naturalization papers, that are necessary to obtain an accepted photo ID. This issue involves Plaintiffs Frank and Wilde, as well as the other Plaintiffs who are members of Class 2. The common question of law is whether such fees constitute a poll tax in violation of the Twenty-Fourth and Fourteenth Amendments.

The existence of commonality under Federal Rule Civil Procedure 23(a)(2) is further evidenced by the existence of a common remedy for these classes. For example, an injunction allowing class members to sign an affidavit of identity at the polls as an alternative to the presentation of photo ID will cure the violations as to the members within each of Classes 1, 2, and 5, and will in fact provide a common remedy across all three classes. For each of these classes, the class members' interests are "cohesive and homogenous," reinforcing the propriety of certifying Classes 1, 2, and 5. *Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the presumption that the interests of the class

members are cohesive and homogeneous such that the case will not . . . require a remedy that differentiates materially among class members.”); *see also Dukes*, 131 S. Ct. at 2557 (class certification is appropriate when “a single injunction or declaratory judgment would provide relief to each member of the class.”); *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

**C. Plaintiffs’ Claims Are Typical of Classes One, Two, and Five.**

Rule 23(a)(3) requires that the named plaintiffs’ claims or defenses be typical of the class. “[A] ‘plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.’” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993) (quoting *De La Fuente v. Stokely–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). “This simply requires a showing . . . that others suffer from similar alleged grievances.” *Eggleston*, 657 F.2d at 896. This analysis largely tracks the commonality discussion because the two requirements “tend to merge.” *Gen. Tel. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Each of the Proposed Class 1 representatives faces legal and/or systemic practical barriers to obtaining a state ID card. Notwithstanding any minor factual variances, their claims arise out of the same “nucleus of operative fact” as the other class members, and the resolution of the common legal questions as to the named plaintiffs would resolve the claims of the similarly situated class members. *See Rosario*, 963 F.2d at 1017-18. Each of the Proposed Class 1 Representatives lacks at least one of the required documents for a Wisconsin state ID card and has encountered barriers to obtaining it. *See Brown Decl.* (Doc. 35) ¶¶ 3-7; *Wilde Decl.* (Doc. 59) ¶¶ 9-13; *Ginorio Decl.* (Doc. 33-6) ¶¶ 4-7; *Frank*

Decl. (Doc. 33-5) ¶¶ 8-15; Bulmer Decl. (Doc. 33-2) ¶¶ 7-11; Holloway (Doc. 33-8) Decl. ¶¶ 7-12; Oden Decl. (Doc. 33-9) ¶¶ 3-6; Smith Decl. (Doc. 33-10) ¶¶ 9-14.<sup>10</sup>

Each of the Proposed Class 2 representatives faces financial barriers to obtaining a state ID card, whether due to the costs of obtaining required documentation, the costs of transportation, or both. *See* Dukes Decl. (Doc. 33-3) ¶¶ 3-6; Ginorio Decl. (Doc. 33-6) ¶¶ 5-6; Bulmer Decl. (Doc. 33-2) ¶¶ 7-11; Holloway Decl. (Doc. 33-8) ¶¶ 7-12; Ellis Decl. (Doc. 33-4) ¶¶ 8-9. Their claims are thus typical of the claims of the class.

Each of the Proposed Class 5 representatives is unable to obtain an accepted photo ID for voting without payment of monetary costs for required documents. *See* Frank Decl. (Doc. 33-5) ¶¶ 8-13; Brown Decl. (Doc. 35) ¶¶ 3-7; Wilde Decl. (Doc. 59) ¶¶ 7-13; Holloway Decl. (Doc. 33-8) ¶¶ 7-12; Ginorio Decl. (Doc. 33-6) ¶¶ 4-6; Bulmer Decl. (Doc. 33-2) ¶¶ 7-9, 11; Ellis Decl. (Doc. 33-4) ¶¶ 8-9; Dukes Decl. (Doc. 33-3) ¶¶ 3-6. Their claims are also typical of the claims of the class.

**D. Plaintiffs Will Adequately Represent Classes One, Two, and Five.**

Class 1, 2, and 5's counsel and proposed class representatives will fairly and adequately protect class members' interests. There are two prongs to the test for adequacy of representation under Rule 23(a)(1): (1) "the adequacy of the named plaintiff's counsel;" and (2) the absence of "antagonistic or conflicting interests" between the class members and the named plaintiffs. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (internal quotation marks omitted); *Secretary of*

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<sup>10</sup> *See also* Brown Interrog. Resp. (Doc. 40-16) at 4-8; Wilde Interrog. Resp. (Doc. 40-15) at 4-7; Frank Interrog. Resp. (Doc. 40-9) at 4-8; Bulmer Interrog. Resp. (Doc. 40-6) at 4-7; Holloway Interrog. Resp. (Doc. 40-12) at 4-7; Oden Interrog. Resp. (Doc. 40-13) at 4-7; Smith Interrog. Resp. (Doc. 40-14) at 4-7; Ginorio Interrog. Resp. (Doc. 40-10) at 4-7.

*Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986). Here, the first prong is satisfied, because class counsel have many years of experience in civil rights and class action litigation. Plaintiffs' attorneys, the American Civil Liberties Union Foundation, Inc. ("ACLU"), ACLU of Wisconsin Foundation, the National Law Center on Homelessness and Poverty, and Dechert LLP, have between them decades of legal experience and knowledge and adequate financial resources to litigate this matter. The ACLU Voting Rights Project in particular has litigated voting rights cases under the U.S. Constitution and the Voting Rights Act for more than four decades. *See, e.g., McCain v. Lybrand*, 465 U.S. 236 (1984) (reversing judgment below and compelling submission of voting change to Department of Justice for preclearance, vindicating Section 5 of the Voting Rights Act ("VRA")); *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (upholding finding of VRA violation); *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010) (finding county's at-large method of electing commissioners diluted Native American voting strength in violation of Section 2 of the VRA). Class counsel have demonstrated a commitment to securing the voting rights of all people and a willingness to litigate voting rights cases vigorously.

Moreover, the named Plaintiffs' interests – securing their rights to vote under the U.S. Constitution – are identical to those of proposed Classes 1, 2, and 5's members. There is no probability of a conflict, because class members have a common interest in obtaining the same declaratory and injunctive relief permitting them to vote despite their lack of accepted photo ID. The equitable relief sought is not contrary to the interest of proposed class members.

**E. Classes One, Two, and Five Should Be Certified under Rules 23(b)(1)-(2).**

Class certification for Classes 1, 2, and 5 is warranted under Rules 23(b)(1) and 23(b)(2). Class certification is proper under Rule 23(b)(2), because Defendants have “acted . . . on grounds that apply generally to the class, so that final injunctive relief [and] corresponding declaratory relief is appropriate respecting the class as a whole.” FED. R. CIV. P. 23(b)(2). Act 23 imposes the same requirements on all eligible Wisconsin voters, and the DMV’s rules and policies apply to all applicants for a free state ID card for voting purposes. The right to vote of each member of Class 1 is severely burdened by the legal or systemic practical difficulties of complying with Defendants’ unreasonably stringent documentary proof requirements for an acceptable photo ID. The right to vote of each member of Class 2 is substantially, if not severely, burdened by the costs of complying with Defendant’s documentation requirements for an acceptable photo ID. The cost of complying with these same requirements amounts to a poll tax on members of Class 5.

The injunctive and declaratory relief sought by Plaintiffs would remove the burdens on the right to vote faced by Class 1 and Class 2 members and eliminate the poll tax for Class 5. The remedies sought by Plaintiffs will not only redress the harm to all class members within a class, but the same injunctive or declaratory relief is also likely to redress harms across multiple classes. *See Lemon*, 216 F.3d at 580 (“Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not . . . require a remedy that differentiates materially among class members.”); *Jefferson*, 195 F.3d at 897 (“an injunction [that] affects everyone alike [is] the domain of Rule 23(b)(2)”); *Patterson v. Gen. Motors*

*Corp.*, 631 F.2d 476, 481 (7th Cir. 1980) (holding that a class should be certified when it arises “out of the same legal or remedial theory. . . .”)

Class certification is also appropriate here because prosecuting separate actions by the individual members of Classes 1, 2, and 5 would “create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for [Defendants.]” FED. R. CIV. P. 23(b)(1)(A). Whereas the members of Classes 1, 2, and 5 are similarly situated and face common burdens on their rights to vote or poll taxes imposed by Act 23 and the DMV rules, it would be impracticable if individual suits resulted in inconsistent declaratory judgments that Act 23 is or is not unlawful with respect to the same groups of voters. Moreover, it would be impracticable for Defendants to comply with inconsistent injunctions requiring them to treat similarly situated voters differently, depending on their individual identities. This factor further supports both the appropriateness and the necessity of class-wide adjudication of this action.

### **III. THE COURT SHOULD CERTIFY PROPOSED CLASS THREE.**

Wisconsin law, Wis. Stat. § 343.50 (1)(b), prohibits persons with out-of-state driver’s licenses from obtaining a state ID card unless the out-of-state license is surrendered. Class 3 is defined as all Wisconsin voters who are residents of Wisconsin for voting purposes, who lack any accepted photo ID, and who would be forced to surrender an out-of-state driver’s license in order to obtain a free Wisconsin ID card for voting purposes. Doc. 31 ¶ 115. Because members of Class 3 are forced to either pay for a driver’s license or surrender their out-of-state driver’s licenses before obtaining a free state ID card, the photo ID law imposes an unconstitutional poll tax or material requirement.

Class 3 is sufficiently numerous that joinder of all members is impracticable. A single election official employed by the GAB Defendants testified that he alone has personally spoken to between 10 and 50 “snowbirds” who spend part of each year in Wisconsin and part in another state, who have out-of-state licenses, but who are Wisconsin residents for voting purposes. RH 74:15-76:3. In addition, another GAB official produced an exhibit in his deposition showing that there are no less than 34 colleges or university campuses in Wisconsin whose student IDs have not been approved by GAB. MH 155:10-165:19, Ex. 111 (Attachment D). If only one student at each school lacks all forms of accepted photo ID and possess an out-of-state driver’s license, these students combined with the number of snowbirds with similar problems, demonstrate that the numerosity requirement is clearly satisfied. *See Eggleston*, 657 F.2d at 895. Common sense compels the conclusion that the actual number of class members is even greater and more than sufficient to satisfy numerosity requirements.

Commonality is easily established for Class 3 because there is a common question of law: whether requiring eligible Wisconsin voters to surrender an out-of-state driver’s license in order to obtain a state ID card constitutes a poll tax or imposes a material burden. The claims of Plaintiffs Meszaros, Kvasnicka, Kligman, and Shea, who hold out-of-state licenses, and are Wisconsin residents for voting purposes, are typical of the claims of the class. *See Meszaros Decl.* (Doc. 54) ¶¶ 3-12; *Kvasnicka Decl.* (attached) ¶¶ 3-9; *Kligman Decl.* (attached) ¶¶ 3-10; *Shea Decl.* (attached) ¶¶ 3-10. Further, for the reasons discussed above, the Plaintiffs will adequately represent the interests of the class. The Plaintiffs also seek common relief: either the ability to vote by affidavit or the ability

to obtain a free Wisconsin photo ID for voting without having to satisfy the material requirement of surrendering a driver's license from another state.

Class 3 should be certified under Rule 23(b)(1)-(2) because the controversies are suitable for injunctive and declaratory relief and it would be impracticable to subject Defendants to the risk of inconsistent injunctions regarding the surrender requirement.

#### **IV. THE COURT SHOULD CERTIFY PROPOSED CLASSES FOUR AND SIX.**

Proposed Classes 4 and 6 involve voters who have photo IDs that Defendants do not accept for voting purposes, but which are materially indistinguishable from forms of accepted photo ID under Act 23. Class 4 is comprised of “all enrolled students at accredited Wisconsin technical colleges who lack any form of accepted photo ID other than technical college ID cards.” Doc. 31 ¶ 120. Members of Class 4 are arbitrarily denied the right to vote because ID cards from other colleges and universities constitute accepted photo ID if amended to comply with the statutory specifications in Wis. Stat. § 5.02(6m), but efforts are being made to block the use of technical college ID cards for voting even if they otherwise comply with Wis. Stat. § 5.02(6m).<sup>11</sup> Class 4 is sufficiently numerous such that joinder is impracticable. There were 382,006 students enrolled in the technical college system in the 2010-2011 academic year, or 8.8% of Wisconsin's total voting-age population.<sup>12</sup> Common sense dictates that at least 40 – or about one-

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<sup>11</sup> Although the GAB is currently accepting photo IDs from technical colleges if they meet the requirements of Wis. Stat. § 5.02(6m), the decision to accept such IDs was made in opposition to a GAB staff recommendation and the rule is not yet final. See Doc. 31 ¶¶ 46-48, 54.

<sup>12</sup> See Wisconsin Technical College System, *An Overview of the Wisconsin Technical College System*, <http://www.witc.edu/boardcontent/pdfs/overview2012.pdf>. The 2010 Census dataset labeled “2010 Redistricting Data SF (PL 94-171)” was used to calculate the percentage figure.

hundredth of one percent - of these students will, like Plaintiff Hogan, have no photo ID other than their technical college IDs. For example, the Madison campus at the University of Wisconsin created new IDs compliant with Act 23 and issued those IDs on as-needed basis. Somers Decl. (attached) ¶¶ 6-8. That campus has already issued these updated IDs to 344 of the 42,441 students currently enrolled. *Id.* ¶¶ 9-10. Applying this same ratio to the much greater population of 382,006 students in the Wisconsin technical college system, common sense dictates that the class is — at a minimum — sufficiently numerous to make joinder impracticable.

Commonality is also readily established for Class 4. The common question is whether there is any meaningful difference between technical college IDs and the forms of photo ID acceptable for voting, including IDs from all other colleges and universities, or whether the threatened rejection of technical college ID cards is arbitrary and unreasonable. This question is susceptible to adjudication by common evidence and it would serve the interests of efficiency and consistency to resolve this common question on a class-wide basis. The claim of Plaintiff Hogan, who has a technical college ID card but no other form of accepted photo ID, is identical to and coterminous with that of the class members. Hogan Decl. (attached) ¶¶ 6-11. As noted above, Plaintiffs have experienced counsel, and the injunctive and declaratory relief they seek will not create any conflicts within the class.

Class 6 includes all veterans of a uniformed service of the United States who are eligible Wisconsin voters, lack accepted photo ID, and possess a Veterans Identification Card (“VIC”) issued by the U.S. Department of Veterans Affairs. Doc. 31 ¶ 126. Members of Class 6 are arbitrarily denied the right to vote, because a VIC is issued by an

agency of the federal government and is in all material respects identical to other forms of accepted photo ID, but cannot be used as photo ID for voting in Wisconsin.

Class 6 is so numerous that joinder is impracticable. For example, there are more than 600 homeless veterans in Wisconsin, many of whom – including Plaintiffs Bulmer, Ellis and Harmon – lack any accepted photo ID, but do have VICs, which the VA routinely issues to veterans.<sup>13</sup> Under the conservative assumption that these voters lack accepted photo ID at the same 9.5% rate as the general population in Milwaukee County, there would be at least 50 members in this class. *See* Barreto/Sanchez, Table 1. And that estimate would exclude all *non-homeless* veterans who have a VIC, but no accepted photo ID.

The common legal question with respect to Class 6 is whether there is any meaningful difference between the VIC and the accepted forms of photo ID. This question is susceptible of proof by common evidence, and it would serve the interests of efficiency and consistency to resolve this common question on a class-wide basis. The claims of Plaintiffs Bulmer, Ellis, and Harmon are typical of the claims of the class. Counsel will adequately represent their interests.

Classes 4 and 6 should be certified under Rule 23(b)(1)-(2) because the controversies are suitable for injunctive and declaratory relief. In particular, these class members seek either to be allowed to vote by affidavit at the polls, or to be allowed to use

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<sup>13</sup> The 2010 HUD-VA point-in-time count identified 609 homeless veterans in Wisconsin. U.S. Dep't of Veterans Affairs and U.S. Dep't of Housing and Urban Development, *Veteran Homelessness: A Supplemental Report to 2010 Annual Homeless Assessment Report to Congress*, at 56, available at: [http://www.va.gov/HOMELESS/docs/Center/AHAR\\_Veterans\\_Report\\_2010.pdf](http://www.va.gov/HOMELESS/docs/Center/AHAR_Veterans_Report_2010.pdf).

the form of photo ID they possess – technical college ID cards and VICs – to vote. It would be impracticable to subject Defendants to the risk of inconsistent injunctions.

**V. THE COURT SHOULD CERTIFY PROPOSED CLASSES SEVEN, and SEVEN -ONE.**

Voting Rights Act cases regularly proceed as class actions. *See, e.g., Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000) (class action on behalf of black voters challenging at-large system for electing city council members and park district board); *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1370 (N.D. Ill. 1997), *vacated and remanded in relevant part*, 141 F.3d 699 (7th Cir. 1998) (class action challenging city ward map under Section 2 of the Voting Rights Act); *Ramos v. State of Ill.*, 781 F. Supp. 1353 (N.D. Ill. 1991) (class action challenging aldermanic election/redistricting schedule); *Hernandez v. Woodard*, 714 F. Supp. 963 (N.D. Ill. 1989) (class certified in Voting Rights Act suit against fixed limit on appointments of registrars from civic organizations); *Ashe v. Bd. of Elections in City of New York*, 124 F.R.D. 45, 46-52 (E.D.N.Y. 1989) (certifying broad class of minority voters in challenge under Voting Rights Act); *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd in part*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Class 7 is defined as “all eligible African-American and Hispanic/Latino voters in the State of Wisconsin who lack accepted photo ID.” Doc. 31 ¶ 129. Plaintiffs also move for the certification of Subclass 7.1, which is the same as Class 7 but geographically restricted to Milwaukee County: “all eligible African-American and Hispanic/Latino voters in Milwaukee County, Wisconsin who lack accepted photo ID.” Doc. 31 ¶ 130.

The class and subclass are sufficiently numerous such that joinder is impracticable. There are approximately 21,000 eligible African-American voters and over 7,400 eligible Latino voters in Milwaukee County alone who lack accepted photo ID. Barreto/Sanchez, Table 2. Of those eligible voters, over 7,000 African-American voters and approximately 3,000 Latino voters also lack the underlying documents needed to obtain a Wisconsin state ID. *Id.* at Table 8.

There is *at least* one common legal question for the Court's resolution, whether the photo ID law has diluted Class 7 members and Subclass 7.1 members' rights to vote in violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973(a). "[V]ote dilution challenges involve practices that diminish minorities' political influence, such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak." *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (citations and quotation marks omitted). Section 1973(b) makes clear that what is harmed by vote dilution is minority voters' "opportunity . . . to participate in the political process" on equal terms with other voters and their *collective* power "to elect representatives of their choice." As the leading case of *Thornburg v. Gingles*, 478 U.S. 30 (1986) makes clear, vote dilution is by its very nature a class-wide harm held in common: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

Additionally, the Proposed Class 7 and Subclass 7.1 Representatives Brown, Holloway, Ginorio, Oden, Ellis, Harmon, Dukes, and Smith are typical of the class in that they are all African-American or Latino voters who live in Milwaukee County, who lack

accepted photo ID under Act 23 and who wish to vote in upcoming elections. Their interests are aligned, as they seek to enjoin the law as a violation of the African-American and Latino communities' right to a political process that is equally open to all groups and to an equal opportunity to elect representatives of their choice. Doc. 31 ¶¶ 182-95. As discussed above, the adequacy of representation is established since there are no intra-class conflicts and Plaintiffs' counsel is well-qualified to litigate this matter.

Finally, Rule 23(b) is satisfied as well. This class must be adjudicated on a class-wide basis to avoid the risk of inconsistent or varying adjudications as to whether Act 23 denies and abridges African-American and Latino residents' right to vote in the State of Wisconsin and Milwaukee County, Wisconsin. Moreover, since Plaintiffs seek declaratory and injunctive relief respecting liability under the Voting Rights Act, it is proper to adjudicate this claim as a class action.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court certify proposed Classes 1, 2, 3, 4, 5, 6, and 7, as well as proposed Subclass 7.1, approve Plaintiffs' undersigned counsel as class counsel, and certify certain named plaintiffs as class representatives as detailed in Plaintiffs' Motion for Class Certification.

Dated this 23rd day of April, 2012.

Respectfully submitted,

/s/ Craig Falls

CRAIG FALLS  
Dechert LLP  
1775 I Street, NW  
Washington, DC 20006-2401  
Phone: (202) 261-3373  
Fax: (202) 261-3333  
craig.falls@dechert.com

KARYN L. ROTKER  
State Bar No. 1007719  
LAURENCE J. DUPUIS  
State Bar No. 1029261  
American Civil Liberties Union of Wisconsin  
Foundation  
207 East Buffalo Street, Suite 325  
Milwaukee, WI 53202  
(414) 272-4032  
(414) 272-0182 (fax)  
krotker@aclu-wi.org  
ldupuis@aclu-wi.org

M. LAUGHLIN MCDONALD  
JON SHERMAN  
NANCY ABUDU  
American Civil Liberties Union Foundation, Inc.  
230 Peachtree Street, Suite 1440  
Atlanta, GA 30303  
Phone: (404) 523-2721  
Fax: (404) 653-0331  
lmcdonald@aclu.org  
jsherman@aclu.org  
nabudu@aclu.org

HEATHER MARIA JOHNSON  
KAREN E. CUNNINGHAM  
National Law Center on Homelessness & Poverty  
1411 K Street NW, Suite 1400  
Washington, DC 20005  
Phone: (202) 638-2535  
Fax: (202) 628-2737  
hjohnson@nlchp.org  
kcunningham@nlchp.org

NEIL STEINER  
DIANE PRINC  
Dechert LLP  
1095 Avenue of the Americas  
New York, NY 10036-6797  
Phone: (212) 698-3822  
Fax: (212) 698-3599  
neil.steiner@dechert.com  
diane.princ@dechert.com

Attorneys for Plaintiffs.