

Nos. 16-3003, 16-3052

In the
United States Court of Appeals
for the Seventh Circuit

RUTHELLE FRANK, et al.,

*Plaintiffs-Appellees/
Cross-Appellants,*

v.

SCOTT WALKER, in his official capacity as
Governor of State of Wisconsin, et al.,

*Defendants-Appellants/
Cross-Appellees.*

On Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 2:11-cv-01128-LA.
The Honorable **Lynn S. Adelman**, Judge Presiding.

**BRIEF AND SHORT APPENDIX OF
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS**

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Appellate Court No: 16-3003

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Sean J. Young

Date: August 11, 2016

Attorney's Printed Name: Sean J. Young

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Attorney's Signature: s/ Dale E. Ho Date: August 11, 2016

Attorney's Printed Name: Dale E. Ho

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Attorney's Signature: s/ Sophia Lin Lakin

Date: August 11, 2016

Attorney's Printed Name: Sophia Lin Lakin

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Attorney's Signature: s/ Laurence J. Dupuis

Date: August 11, 2016

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Attorney's Signature: s/ Neil A. Steiner Date: August 11, 2016

Attorney's Printed Name: Neil A. Steiner

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Attorney's Signature: s/ Craig G. Falls Date: August 11, 2016

Attorney's Printed Name: Craig G. Falls

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Attorney's Signature: s/ Angela M. Liu Date: August 11, 2016

Attorney's Printed Name: Angela M. Liu

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Attorney's Signature: s/ Tristia Bauman

Date: August 11, 2016

Attorney's Printed Name: Tristia Bauman

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Defendants-Appellants-Cross-Appellees' ("Defendants") brief is not complete and correct, because it does not describe the basis of jurisdiction for the cross-appeal by Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs").

The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4) and 52 U.S.C. § 10101(d), over this action brought pursuant to 42 U.S.C. § 1983 for alleged violations of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution and Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301.

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) over Defendants' appeal and Plaintiffs' cross-appeal of the district court's July 19, 2016 Decision and Order entering a preliminary injunction. SA.1-44.¹ Defendants filed a timely notice of appeal on July 22, 2016, and Plaintiffs timely filed a notice of cross-appeal on July 28, 2016. Plaintiffs' claims remain in the district court for final judgment.

¹ In this brief, "Dkt." refers to the docket entries in the district court proceedings. "ECF No." refers to the docket entries in the appellate proceedings. "D.Br." refers to Defendants' opening brief, ECF No. 41-1. For docket entries, where the pagination of the pdf does not match the pagination in the document, this brief refers to the pagination of the document. "A." refers to Defendants' separate appendix. "S.A." refers to the Short Appendix attached to Defendants' opening brief (from pages 1-44), and to the Short Appendix attached to this brief (from pages 45 onward), *see* 7th Cir. R. 30(b)(7).

STATEMENT OF THE ISSUES

1. Did the district court reasonably exercise its discretion in balancing the preliminary injunction factors to craft an affidavit remedy virtually identical to the affidavits adopted by other strict voter ID states in response to litigation?
2. Did the district court reasonably exercise its discretion in certifying a Rule 23(b)(2) class?
3. In light of intervening authority from the Supreme Court and from other circuits, should this Court overrule *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (“*Frank I*”), and invalidate Wisconsin’s strict voter ID law, which imposes undue burdens on the right to vote?

INTRODUCTION

Wisconsin’s strict voter ID law imposes unnecessary obstacles on hundreds of thousands of voters without ID—obstacles that are particularly high for voters of lesser means, and that disproportionately affect racial and ethnic minorities—all in the name of combatting non-existent, in-person voter impersonation fraud. In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (“*Frank I*”), a panel of this Court held that the State’s mere invocation of the threat of in-person voter impersonation is sufficient to justify this law, even where there is no evidence to support that interest. This Court, however, subsequently held that the State cannot make it “unreasonably difficult” for a voter to obtain ID under this strict voter ID regime. *Frank v. Walker*, --- F.3d ---, 2016 WL 4524468, at *2 (7th Cir. Aug. 29, 2016) (en banc) (citing *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (“*Frank II*”). That ruling

requires that any eligible voter who can reach a DMV office with “as much as he or she has” *must* be given ID, and the DMV *cannot* “refuse” to issue ID because any “particular document is missing.” *Id.*

In reality, this is not the case. Defendants point to no rule or regulation that enshrines the *en banc* Court’s requirement. DMV does *not* automatically give permanent ID to voters lacking proof of identity, voters with documents containing name mismatches, voters whose birth documentation cannot be found, and voters who cannot readily get to a DMV office in the first place. Statement of the Case (“SOC”) II.A.-D. The injunction entered (and subsequently stayed) in *One Wisconsin Institute, Inc. v. Thomsen*, --- F. Supp. 3d ---, 2016 WL 4059222 (W.D. Wis. July 29, 2016) (“*One Wisconsin Institute*”) also will not help many of these voters. SOC II.E.

Because many Wisconsin voters remain unable to obtain ID with reasonable effort, and in light of this Court’s holding that any such voters are entitled to some kind of relief, *see Frank II*, 819 F.3d at 386-87, the district court entered a preliminary injunction that created a safety net, at the polling place, for voters unable to obtain permanent ID from the DMV with the documents that they have. In doing so, the district court entered relief that is virtually identical to the affidavit fail-safes created in response to litigation in other strict voter ID states, like South Carolina and Texas. ECF No. 36-2, 36-3. Defendants want to shred this safety net on procedural grounds, but they have failed to demonstrate any abuse of discretion either in the nature of the relief or in the district court’s certification of a class. *See*

Parts I., II. The district court's injunction should be affirmed as a reasonable remedy within the confines of current precedent.

More fundamentally, pursuant to Plaintiffs' cross-appeal, *Frank I* should be overruled. That decision's atextual interpretation of the legal standard for claims under Section 2 of the Voting Rights Act now conflicts with the decisions of three other Courts of Appeals, and its uncritical acceptance of the State's alleged interests as "legislative fact" has been subsequently undermined by the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). See Part III. If *Frank I* is overruled, then the district court's July 2016 injunction should be vacated and the case remanded with instructions to enjoin the enforcement of Wisconsin's voter ID law in its entirety.

STATEMENT OF THE CASE

This is the third appeal involving Plaintiffs' challenge to 2011 Wisconsin Act 23, which requires eligible Wisconsin voters to provide one of a limited number of forms of photographic identification in order to exercise their fundamental right to vote, most commonly a Wisconsin driver's license or state ID card (hereinafter "ID") issued by the Wisconsin Department of Transportation, Division of Motor Vehicles ("DMV"). Wis. Stat. §§ 6.79(2), 5.02(6m). Unlike many other states with voter ID laws, Wisconsin does not provide a fail-safe affidavit option at the polls for voters unable to obtain ID with reasonable effort. SA.34.

I. DMV Has Failed to Effectively Implement Its Own Procedures Throughout the Life of this Five-Year Litigation

A bureaucracy designed to regulate driving is simply unequipped to be the gatekeeper of our democracy. Throughout the life of this five-year litigation, the DMV has consistently failed to implement effectively its ever-changing series of rules and policies, which continues to disenfranchise voters who cannot obtain ID despite reasonable effort. *See, e.g.*, Dkt. 280-64 at 1 (DMV officials admitting that the ID Petition Process was “forced on [DMV] [and was] not something anybody asked for”); Dkt. 280-37 at 84 (ID Petition Process uses “a lot of resources that we don’t have a lot of”).

A. While the case was initially before the district court, Defendants created an *ad hoc* exemptions procedure that it implemented inconsistently and ineffectively (Dec. 2011 – Sept. 2014)

Plaintiffs filed their class complaint in this action in December 2011.

Initially, Defendants argued that obtaining ID was easy because it was technically “free.” Dkt. 85 at 13-14. But to get ID, voters were required to produce at least three underlying documents: (1) proof of citizenship, name, and date of birth (e.g., a U.S. birth certificate),² (2) proof of identity (e.g., a Social Security card), and (3) proof of residence (e.g., a utility bill). *See generally* Wis. Admin. Code § Trans. 102.15. Thus Defendants were compelled to concede in early 2012 that making IDs “free” failed to

² Though citizenship and name/date of birth are technically distinct requirements, most voters satisfy both requirements with a U.S. birth certificate. Wis. Admin Code § Trans. 102.15(3), (3m). For the sake of simplicity, this brief refers to this requirement as “proof of citizenship.”

help voters such as Plaintiffs, who have difficulty obtaining the underlying documents needed to obtain “free” ID. Dkt. 38 at 3.

In April 2012, Plaintiffs filed their class certification motion, Dkt. 64, proposing as class representatives Ruthelle Frank, who had already tried and failed to get ID, Dkt. 33-5, and other voters who lacked ID and could not obtain it with reasonable effort. Defendants opposed class certification in part because, they asserted, “[i]f there is relief granted by th[e] [c]ourt at all, it can be fashioned to cover all of these putative class members” without having to certify a class. Dkt. 83 at 8.

In January 2013, the DMV created an *ad hoc* exceptions process for voters who lacked the underlying documents needed to obtain ID. Dkt. 176 at 127-128. But during a two-week trial in November 2013, Plaintiffs provided example after example of voters being disenfranchised or unreasonably burdened notwithstanding this exceptions process. Once again, Defendants were forced to concede that their processes failed to ensure that all eligible voters could obtain ID with reasonable effort. *Id.* at 116-17, 127-28.

In April 2014, the district court issued its decision, concluding that Wisconsin’s strict voter ID law violated the Fourteenth Amendment and Section 2 of the Voting Rights Act, and enjoined the law in its entirety. Dkt. 195. The district court found that the State failed to provide evidence to justify the need for a strict voter ID law. *Id.* at 11-22. It further found that the law imposed burdens on “a substantial number of the 300,000 plus eligible voters who lack a photo ID [who] are

low-income individuals who either do not require a photo ID to navigate their daily lives or who have encountered obstacles that have prevented or deterred them from obtaining a photo ID,” *id.* at 24, and that these burdens fell disproportionately on racial and ethnic minorities, who are approximately twice as likely to lack ID as white voters, *id.* at 62. The court made extensive factual findings describing how barriers related to education, poverty, transportation, work schedules, and time, all made it unreasonably difficult for many lower-income voters to obtain ID. *Id.* at 29-38.

As for DMV’s *ad hoc* exceptions process, the district court found that it was ineffective because it was not made known to the public and was devoid of any standards, resulting in inconsistent and arbitrary application that often depended on whether a voter was able to get the attention of a particular legislator. Dkt. 195 at 35-36.

Defendants appealed. In July 2014, while the appeal was pending, the Wisconsin Supreme Court held that the voter ID law imposed a “severe burden on the right to vote” in violation of the state constitution because it required voters to pay for the documents needed to obtain ID. *Milw. Branch of NAACP v. Walker*, 851 N.W.2d 262, 499-500 (Wis. 2014). The high court then ordered the State to make IDs available without requiring voters to pay for underlying documents. *Id.* at 500-04, 07.

B. During the first appeal, Defendants passed an emergency rule creating the ID Petition Process (Sept. 2014 – March 2015)

On September 11, 2014, on the eve of oral argument in the first appeal, the State passed an “emergency rule,” which amended Wis. Admin. Code § Trans. 102.15 by creating the ID Petition Process (“IDPP”), purportedly designed help voters without birth certificates. *See Letter, Frank v. Walker*, No. 14-2058 (7th Cir. Sept. 12, 2014), ECF Nos. 61-1, 61-2. The original IDPP was not designed for *every* voter who has difficulty obtaining ID, but rather *only* for voters whose birth documents were “unavailable.” *Id.* It offered no assistance to voters lacking proof of identity or voters whose birth documentation contained name mismatches. It also did not ensure that everyone who initiated the process would get ID. *Id.*

On the same day that oral argument was held, the panel granted a stay of the district court’s injunction. *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014). Subsequently the full Court split 5-5 on whether to rehear the stay decision *en banc*, notwithstanding the State’s “shocking” concession that “10% of a state’s registered voters” would be disenfranchised. *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*). The Supreme Court then vacated that stay, preventing the voter ID law from going into effect for the November 2014 election. *Frank v. Walker*, 135 S. Ct. 7 (2014).

Meanwhile, on the merits, the panel held, based in part on the last-minute IDPP rule, that Plaintiffs could not demonstrate that the burdens imposed on the “vast majority” of Wisconsin voters justified the invalidation of the law under the

Fourteenth Amendment or Section 2 of the Voting Rights Act. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (“*Frank I*”). The full Court again split 5-5 on whether to rehear the case *en banc*. *See Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014). The Supreme Court ultimately denied certiorari.

C. Following remand and during the second appeal, Defendants implemented the IDPP inconsistently and ineffectively (March 2015 – May 2016)

Following the remand of this case in March 2015, Plaintiffs sought relief in the district court for voters with significant barriers to obtaining voter ID, in the form of an affidavit that such voters could sign at the polling place instead of showing ID. Dkt. 223. Plaintiffs also preserved their argument that *Frank I* was wrongly decided. *Id.* at 17 n.6. In response, Defendants trumpeted the September 2014 emergency rule as “successful,” clung to *Frank I*’s reliance on that rule, and dismissed the burdens faced by those with transportation difficulties as being irrelevant under *Crawford*. Dkt. 228 at 16-17.

But while Defendants were telling the court that the emergency rule was a “success,” behind the scenes the implementation of that rule was a disaster. Indeed, one DMV employee confessed in July 2015, “We seem to really be struggling with a process that should not be that difficult.” Dkt. 280-73. From March to August 2015, DMV’s implementation of the IDPP had a 27% error rate, Dkt. 280-47; 280-30 at 99-100, routinely forcing voters to make additional trips to the DMV and to provide additional documentation, Dkt. 280-48 at 1; *see also, e.g.*, Dkt. 280-65; 280-68; 280-72; 280-73. DMV failed to tell some applicants, including Plaintiff Frank’s daughter

who had called on her mother's behalf, that the petition process existed, even after it took effect. *See, e.g.*, Dkt. 280-57, 280-40, 280-20 ¶ 6, 280-22 ¶¶12-13. DMV told Plaintiff Leroy Switlick that he needed "photo ID" to satisfy the proof of identity requirement, A.061-63, which is patently incorrect, Wis. Admin. Code § Trans 102.15(4). And DMV did not issue ID through the IDPP to numerous voters, even after they had provided DMV with all the birth-related information that they had. SA.23-27.

However, in October 2015, the district court denied Plaintiffs' request for relief on behalf of voters unable to obtain ID with reasonable effort, believing such individual relief to be barred by *Frank I*. Dkt. 250. Plaintiffs appealed, and in April 2016, this Court reversed, and held that *Frank I* did not preclude the district court from providing a "safety net" for voters who could not obtain ID with "reasonable effort." *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016) ("*Frank II*"). This Court explained that "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily," and that Plaintiffs' requested relief "is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort." *Id.*

D. Following a second remand, Defendants passed another emergency rule, followed by additional interpretive guidelines (May – July 2016)

On May 10, 2016, six days after this Court's remand in *Frank II*, Defendants implicitly conceded that the September 2014 emergency rule creating the original IDPP had been a failure, and passed a second emergency rule amending the

regulations, Dkt. 280-23 (amending Wis. Admin. Code § Trans. 102.15). The May 2016 emergency rule provided for issuance of a temporary ID receipt by mail within six business days of application to all voters who initiate this new version of the IDPP, Dkt. 280-24 at 16-22 (Sections 6-10); and it created a separate, vague procedure for voters whose birth documentation contains name mismatches, Dkt. 280-24 at 15-16 (Sections 1-3).

On June 10, 2016, after receiving limited discovery from Defendants, and in light of the impending November elections, Plaintiffs promptly filed their motion for a preliminary injunction, class certification, and leave to file a supplemental complaint. A.012-43. Defendants filed an opposition brief on June 29, 2016, which cited to *ad hoc* guidelines not part of the May 2016 emergency rule, in the form of a June 2016 declaration from the DMV Administrator (the “June 2016 guidelines”). A.118-19. These informal guidelines were not enshrined in any regulations. Nonetheless, Defendants’ opposition brief relied extensively on them to argue that all voters would now be able to obtain ID with reasonable effort. A.074-107. Then, on July 8, 2016, Defendants issued *another* set of guidelines changes that changed the expiration date for the temporary IDs that DMV promised to issue. Dkt. 293-2; 293-3. Given the last-minute timing and the proximity of the elections, Plaintiffs had no meaningful opportunity to obtain discovery of how these ever-changing policies would be implemented. It was nonetheless clear from the very text of the May 2016 emergency rule and the June 2016 guidelines that many voters would still be unable to obtain ID with reasonable effort. Dkt. 291.

E. In the decision below, the district court found that “some” voters will still be unable to obtain ID with reasonable effort notwithstanding the recent changes (July 19, 2016)

On July 19, 2016, the district court granted Plaintiffs’ motion for a preliminary injunction, class certification, and leave to file a supplemental complaint, and ordered the State to provide an affidavit that would allow voters who cannot obtain ID with reasonable effort to vote without having to show ID. SA.42-44. At the heart of the district court’s decision was its factual finding that “although many individuals who need qualifying ID will be able to obtain one with reasonable effort under [the DMV] procedures, there will still be some who will not,” SA.22, a finding which Defendants do not challenge on appeal. The district court also granted Plaintiffs’ motion to supplement their complaint and motion for class certification—versions of which had been pending for more than four years, Dkt. 63, 222, 278—and appointed Plaintiff Frank, and new Plaintiffs Leroy Switlick, James Green, and Melvin Robertson, as class representatives. The district court further recognized that Plaintiffs had preserved, for purposes of appeal, the argument that Wisconsin’s voter ID law should be facially invalidated because *Frank I* was wrongly decided. SA.05; *see also* A.019 n.4 (preserving argument). Both parties appealed, giving rise to this third appeal. A panel of this Court subsequently stayed the district court’s decision. ECF No. 24.

F. During this third appeal, Defendants claimed for the first time that everyone who goes to the DMV will get ID with whatever documents they have (Aug. 2016)

On July 29, 2016, Plaintiffs filed a petition for an initial hearing *en banc*, ECF No. 14, and the Court called for an answer, ECF No. 23. Then on August 22, Defendants suggested in their *en banc* opposition brief—for the first time in five years of litigation—that *everyone* who goes to the DMV with whatever documents they have will get ID that is valid for voting. ECF No. 38 at 1. On August 26, the Court denied the *en banc* petition because “the urgency needed to justify an initial *en banc* hearing has not been shown,” *Frank v. Walker*, --- F.3d ---, 2016 WL 4524468, at *2 (7th Cir. Aug. 29, 2016) (*en banc*), based on the “State’s representation that ‘initiation’ of the IDPP means only that the voter must show up at a DMV with as much as he or she has, and that the State will not refuse to recognize the ‘initiation’ of the process because [any] particular document is missing,” *id.*

Having secured a denial of Plaintiffs’ *en banc* petition for an initial hearing, Defendants filed their opening brief the following week, and backtracked from their promise to the *en banc* Court that everyone would get ID with whatever they had. *See, e.g.*, D.Br. at 3. Defendants also stated that on August 30, 2016, the State had introduced yet another guidelines change to have the DMV issue temporary IDs by overnight mail if voters initiated the IDPP during an election week. ECF No. 41-1

at 7 n.5.³ But Defendants have never explained why DMV will not simply issue these temporary ID receipts over the counter, as they do for all other ID applicants. SA.65.

II. Many Wisconsin Voters Still Cannot Obtain Permanent ID With Whatever Documents They Have

Despite five years of effort, two emergency rules, and multiple informal guidelines, many voters still *cannot* obtain even a temporary ID receipt, much less a permanent ID, with “as much as he or she has.” *Frank*, 2016 WL 4524468, at *2. To this day, there remains no rule or regulation that enshrines the *en banc* Court’s requirement. To the contrary, DMV continues to require or allow denial of ID because a “particular document is missing.” *Id.*⁴

A. DMV denies ID to voters lacking proof of identity

First, even though the *en banc* order from this Court prohibits the State from denying ID because “any particular document is missing,” *Frank v. Walker*, 2016 WL 4524468, at *2, Defendants *will not let* voters lacking proof of identity or proof of residence obtain *any* ID. D.Br. at 3-4. DMV says that a voter who initiates the IDPP will automatically receive a temporary ID, but DMV does not allow voters lacking proof of identity or proof of residence to initiate the IDPP to begin with. *See*

³ This was in apparent response to the district court’s finding that the May 2016 emergency rule allowing DMV to delay the mailing by six business days, Dkt. 280-24 at 20, will disenfranchise voters, SA.29-30.

⁴ Defendants’ arguments to the contrary are largely contained in their numerosity discussion, D.Br. at 24-29, to which Plaintiffs respond here.

id. at 3-4. Thus, voters lacking proof of identity (or proof of residence) will not obtain ID, temporary or otherwise. SA.17.

The DMV regulation sets forth a limited number of specific documents that are accepted as proof of identity, such as a Social Security card. *See* Wis. Admin. Code § Trans. 102.15(4). As DMV has acknowledged, Social Security cards are the most common form of proof of identity for voters who lack photo ID, but up to 1,640 eligible voters in Milwaukee County alone lack both ID and a Social Security card. Dkt. 195 at 28 (citing DMV testimony); SA.28. Such voters remain trapped in the gastonette of needing a Social Security card to obtain photo ID, which is needed to obtain a Social Security card. *Id.* & n.8; *see also* Dkt. 280-17. It is for that reason that Plaintiff class representatives Switlick and Green, who lack Social Security cards, have been unable to obtain ID. A.061-64.

Sometime between August 5 and August 31, 2016, after the district court issued the injunction and while this third appeal was pending, Defendants quietly added the following item to the list of acceptable proof of identity documents listed on the DMV website: “A government-issued product from a federal, state, county or city agency with the applicant’s name and signature.” *Compare* SA.60-61 (August 5 version of website) *with* SA.62-63 (August 31 version of website). Defendants, however, did not amend their rules to encompass this purported broadening of the proof of identity standard.

B. DMV can deny ID to voters whose documents contain misspellings or mismatches

Second, DMV can deny ID to voters whose underlying documentation, e.g., birth certificates, contains name misspellings or mismatches, such as Plaintiff Frank. Dkt. 195 at 33-36. Defendants point to the IDPP, suggesting that such voters can simply “fill out a form at the start of the IDPP” to get temporary ID, D.Br. at 25, but this is wrong. As the actual text of the May 2016 emergency rule states, the IDPP can only be initiated by voters whose documentation is “unavailable.” Dkt. 280-24 at 16. The IDPP does not apply to voters who *already have* birth documents that prove citizenship, even if those documents contain errors, because the purported purpose of the IDPP is to help people who *lack* birth documentation, not to correct birth records. This omission leaves many voters out in the cold: DMV officials have testified about routinely encountering voters with name mismatches on their birth documents, with one DMV employee in a suburban location testifying that she encountered such errors once or twice a week. Dkt. 195 at 34 n.18, 36-37 n.20.

Defendants cite to Sections 1-3 of the May 2016 emergency rule, D.Br. at 25 (citing Dkt. 280-24 at 15-16), which allows DMV to accept evidence of a “name change” as, purportedly, a method to resolve the problem. But these provisions are unclear about how a voter with mismatched documents can definitively secure ID. Sections 1-3 say nothing about the IDPP, which is set forth separately in Sections 6-10 of the rule. Dkt. 280-24 at 16-22. Furthermore, the procedure only applies to

voters who have “changed” their names, e.g., because of marriage, not to voters like Ruthelle Frank, who have never used the misspelled names on their documents. *Id.* at 15. They also exclude voters whose social security records are erroneous and voters who cannot obtain confirmation of a name “change” from Social Security. *Id.* Rather, Sections 1-3 create a vague case-by-case procedure (the voter “may” provide unspecified evidence “acceptable to the administrator”). *Id.* This still allows the DMV to deny ID to voters because some unspecified name-change “document is missing.” *Frank*, 2016 WL 4524468, at *2.⁵

Defendants also assert that “a name mismatch is *not* one of the permissible bases for denying a free photo ID,” D.Br. at 25 (citing A.125-26), but this is misleading. According to the June 2016 guidelines themselves, that supposed principle only applies to voters who *initiate* the IDPP, but as discussed above, voters who have birth documentation, even documents with errors, *cannot initiate the IDPP*. Moreover, for voters who do initiate the IDPP, DMV does *not* overlook or correct name mismatches or errors that may turn up in any birth documentation that is found. *See, e.g.*, SA.24-26; *see also* SA.85-86 (DMV refused to issue ID

⁵ Defendants argued below that the June 2016 guidelines would fix the problem by allowing voters with name mismatches to obtain ID by signing an “affidavit of common law name change,” A. 125-26, but Defendants wisely abandon this argument on appeal. Their affidavit requires voters to swear that the misspelled name on their birth certificate was their “old name,” when many voters like Ruthelle Frank have never used the misspelled name. Dkt. 288-6 at 95-97 (DMV Administrator agreeing that such voters may be not be able to sign this affidavit). Defendants have also pointed to nothing “in the record that explains when an ID will be issued after a person submits an Affidavit of Common Law Name Change.” SA.22.

through the IDPP in the voter's correct name as recently as September 2016 because birth certificate contained misspelling).⁶

C. DMV will deny permanent ID to voters whose birth documentation cannot be found

Third, voters whose birth documentation cannot be found, such as Plaintiff Melvin Robertson, cannot obtain a permanent ID with whatever "he or she has." *Frank*, 2016 WL 4524468, at *2. Though DMV may issue a temporary ID to voters allowed to initiate the IDPP, it will not give them a permanent ID if the DMV is unable to unearth a birth certificate or secondary documentation of birth with whatever information the voter is able to provide. The only way for a voter to renew the temporary ID is if that voter provides *new information* to the DMV "that can advance the [DMV's] investigation," A.127, SA.19-20, a critical point that Defendants leave out of their brief.⁷ But there is no provision for voters who have already provided all the information they have, and DMV has frequently refused to issue them permanent ID. SA.23-27; Dkt. 311 at 2-5. This is a common occurrence: as DMV employees have explained, vital records offices from other states and cities

⁶ The declarations introduced in Plaintiffs' Short Appendix are submitted in response to Defendants' promise to the *en banc* Court, made for the first time on appeal after the district court's decision, that anyone can obtain ID from the DMV with whatever documents they have. This Court should not accept that promise at face value on this appeal posture.

⁷ Instead, Defendants paper over this important detail by saying that all a voter has to do to extend the life of the temporary ID is to "respond to DMV inquiries." D.Br. at 4; *see also id.* at 29 ("voters will stop receiving free IDs only because of . . . failure to respond for 180 days"). But it is entirely unclear how a voter can meaningfully "respond to DMV inquiries" when the voter has already provided DMV all the information he or she has, much less provide new "information that can advance the investigation." A.127. Moreover, Defendants do not dispute DMV's admission that it is often difficult to keep in touch with applicants. SA.27 (citing Dkt. 280-37 at 34-35).

such as Chicago frequently ignore DMV's inquiries, A.025-26 (citing several record examples), and DMV has had special "difficulty finding records from the south . . . during [the] Jim Crow era." Dkt. 280-31 at 94.

And even if ancient secondary documentation is ultimately found, the DMV's Director of the Bureau of Field Service can still deny ID if he believes, based on unspecified criteria, "that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct." S.A.19 (quoting Dkt. 280-24 at 19). Thus, the Director can still deny ID because some unspecified "document is missing," contrary to Defendants' promise to the *en banc* Court. *Frank*, 2016 WL 4524468, at *2.

D. DMV will not issue ID to voters who cannot reasonably get to a DMV office during limited business hours

"Most voters" do not have difficulty getting to the DMV. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008). But as Defendants conceded below, "making that trip [to the DMV] is [still] an undue burden on some voters," A.095; *see also* Dkt. 195 at 31 (elections officials received "a lot of complaints" from voters "having a hard time getting to the DMV" and not all of the DMV's service centers are accessible by public transit). This includes voters like Rachel Fon, who is disabled and who has substantial difficulty getting to a remote DMV office, SA.29; and Plaintiff Switlick, who is disabled, cannot drive, and has had to pay out of

pocket for the cab rides he needs to reach the DMV, A.061-63.⁸ As the district court found, many lower-income voters cannot reasonably get to a DMV office because they cannot drive, cannot take time off work, or cannot otherwise obtain transportation to one of the only 92 DMV offices in the state during the limited business hours that these offices are open. SA.29; Dkt. 195 at 30.

For these voters, getting to the DMV is not as easy as getting to a polling place. In contrast to the 92 DMV offices scattered across the state almost all of which are only open during regular business hours, Dkt. 195 at 30; there are more than 2,800 polling places throughout Wisconsin, SA.67 at 2, all of which are open from 7 a.m. to 8 p.m., Wis. Stat. § 6.78, and municipalities may also provide extended early voting hours on evenings and weekends, *One Wisconsin Institute*, 2016 WL 4059222, at *20-*21. That is why voters like Fon and Switlick are able to walk to their nearby polling places but face unreasonable difficulties getting to the DMV. A.068-69; Dkt. 288-3 at 3-A-131. Furthermore, although every working voter is entitled by law to be given up to three hours off work to vote, Wis. Stat. § 6.76, no such protection exists for workers who need time off from work to get to the DMV, *see, e.g.*, Dkt. 280-14 (voter disenfranchised because unable to take time off work to go to DMV); Dkt. 195 at 30 (voter unable to take paid time off to get to DMV).

Defendants argue that voters with transportation barriers can vote absentee by mail without photo ID, D.Br. at 27-28 (citing Wis. Stat. §§ 6.86(2)(1);

⁸ Eventually, Switlick was able to get a ride for his third trip to the DMV because of his connections with counsel, by virtue of his status as a Plaintiff and class representative (though even then, he was unable to get ID). SA.79-82. Not all class members are so lucky.

6.87(4)(b)2)), but the cited statute applies only to those who are “indefinitely confined because of age, physical illness or infirmity.” As the district court correctly found, this exception does not apply to those who cannot reasonably reach the DMV, but “whose health problems do not result in ‘confinement,’” SA.29, and on its face it does not apply to voters who have barriers other than age or disability that keep them from getting to DMV.

E. DMV routinely fails to effectively or consistently implement procedures related to voter ID

Many voters who do not fall into the above categories will also continue to face unreasonable burdens in obtaining ID. As discussed *supra* SOC I.C., it cannot be assumed that the DMV’s *ad hoc* and ever-changing procedures, can reliably get ID into the hands of all voters who need it, as exemplified by DMV’s 27% error rate in implementing the IDPP, which is hardly “[a] couple of inadvertent errors” as Defendants claim, D.Br. at 29; *see also* SA.26-27. Furthermore, this Court should not accept at face value Defendants’ gauzy assurances that everything will now be fine in light of whatever procedural changes were introduced after the district court’s decision. Instead, consistent with DMV’s failed five-year track record, evidence has already surfaced *in the last month* that DMV continues to make errors that disenfranchise voters. *See* SA.83-93 (DMV violating its own rules as recently as September 2016);⁹ SA.79-82 (Switlick could not get ID on third trip to DMV because

⁹ *See also* Ari Berman, *Wisconsin Is Systematically Failing to Provide the Photo IDs Required to Vote in November*, THE NATION, Sept. 29, 2016, available at goo.gl/Bdu4Pz.

DMV's computers were down, a problem which a DMV employee said happens "all the time.").

F. The One Wisconsin Institute remedy will not help many voters in the above categories

In the *One Wisconsin Institute* case, which also challenged Wisconsin's voter ID law, the district court found that the DMV's implementation of the IDPP was unlawful and a "wretched failure." 2016 WL 4059222, at *14. As a result, the court ordered the DMV to "[p]romptly issue a credential valid as a voting ID to any person who enters the IDPP or who has a petition pending." *Id.* at *56. It further ordered that the ID cannot be a temporary ID, but must "ha[ve] a term equivalent to that of a Wisconsin driver license or Wisconsin ID," and it ordered the DMV to publicize this reformed IDPP process. *Id.* This aspect of the injunction has been challenged, and it has also been stayed pending appeal. *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324-JDP, 2016 WL 4250508, at *1 (W.D. Wis. Aug. 11, 2016).

The *One Wisconsin Institute* remedy does not help many voters who are members of the plaintiff class in this case. It dealt with voters who initiate the IDPP, but did *not* ensure that ID gets to voters unable to initiate the IDPP in the first place, such as voters lacking proof of identity and voters with birth documents containing mismatches, SOC II.A.-B., or voters who cannot reasonably find transportation to DMV offices during limited business hours, SOC II.D.

SUMMARY OF ARGUMENT

I. If Wisconsin's strict voter ID law is to remain in place, the preliminary injunction should be affirmed as a reasonable exercise of the district court's discretion, providing an effective safety net that ensures that no vulnerable voter will fall through the cracks.

A. The district court did not abuse its discretion in balancing the preliminary injunction factors of irreparable harm, balance of the equities, and the public interest, to craft a preliminary remedy. In doing so, the district court carefully balanced preventing irreparable harm to voters, preserving the State's interests, and mitigating the threat of voter intimidation. This Court should not reverse simply because it would have balanced these interests differently.

B. The injunction does not exceed the scope of the Plaintiff class's protectable rights, because it gives the class members nothing more than the right to vote. To the extent Defendants suggest that district courts are prohibited from entering an injunction that might incidentally help someone who is not formally in the plaintiff class, the Supreme Court has squarely rejected that proposition. *See Brown v. Plata*, 563 U.S. 493, 531 (2011).

C. This Court should not preclude the district court from crafting a narrower affidavit remedy if necessary. Furthermore, in light of Defendants' recent purported expansion of non-photo identification documents which they claim DMV will now accept as "proof of identity," *see supra* SOC II.A., this Court should not preclude the district court from ordering Defendants to accept these same non-photo

identification documents *at the polling place* in addition to the limited forms of photo identification.

II. The district court did not abuse its discretion in certifying a class, pursuant to Rule 23(b)(2), of “all those eligible to vote in Wisconsin who cannot with reasonable effort obtain a qualifying photo ID.” SA.07.

A. Each class representative has standing to bring this class action.

Ruthelle Frank has standing because, under current emergency rules and guidelines, DMV can still deny her ID with the documents that she has, because her birth document contains multiple errors. Leroy Switlick and James Green have standing because they have been unable to satisfy DMV’s “proof of identity” requirement with the documents that they have, and Defendants’ attempts to moot them out of this case do not destroy class standing. Melvin Robertson has standing because DMV will not ensure that he receives permanent ID with whatever documents he has.

B. The district court did not abuse its discretion in finding that Plaintiffs satisfied the Rule 23 prerequisites to class certification. Numerosity was satisfied because the record amply supports the district court’s finding that the class was too numerous for joinder to be practicable, especially given the difficulties of finding and joining individuals affected now and in the future. Commonality and typicality were satisfied because all class members challenge the same voter ID law and the same DMV procedures, and resolving whether those laws fail to guarantee class members permanent ID resolves the same issue for all class members in one stroke.

The class definition is sufficiently ascertainable for purposes of this Rule 23(b)(2) class, where mandatory notice and opt-out requirements do not apply, and where class members can be identified by the use of a self-identification affidavit mechanism authorized by this Court in *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669-71 (7th Cir. 2015). And the class is not a “fail-safe class” because it is not defined in terms of whether class members win or lose.

III. This Court should overrule *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (“*Frank I*”), and invalidate Wisconsin’s strict voter ID law. *Frank I* is an outlier among the circuits and has been undermined by subsequent Supreme Court decisions. Furthermore, Defendants’ purported attempts to make it easier to obtain ID do not alter the need to revisit and overrule *Frank I*. A literacy test is unjustifiable regardless of how easy a State purports to make it, and Wisconsin’s strict voter ID law is unjustifiable regardless of how many times the State purports to make it easier to obtain ID (efforts which have in any case remained unsuccessful). This Court should instruct the district court to reinstate an injunction that enjoins the enforcement of Wisconsin’s pointless voter ID law, placing the burden on the State to demonstrate, pursuant to Fed. R. Civ. P. 60(b), whether anything justifies a modification of this injunction.

For these reasons, pursuant to Plaintiffs’ cross-appeal, this Court should enjoin the enforcement of Wisconsin’s voter ID law. Otherwise, the district court’s injunction should be affirmed.

ARGUMENT

Defendants argue that the decision below was procedurally defective in terms of the nature of the remedy and class certification. However: (1) the district court did not abuse its discretion in balancing the preliminary injunction factors to create an affidavit safety net that is modelled after affidavits adopted by other strict voter ID states in response to litigation; and (2) the district court did not abuse its discretion in certifying a Rule 23(b)(2) class, which ensures that injunctive relief will cover all affected individuals and which avoids repeated litigation of the same issue. Lastly, (3) pursuant to Plaintiffs' cross-appeal, *Frank I* is an outlier and should be overruled, and Wisconsin's voter ID law accordingly enjoined.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CREATING AN AFFIDAVIT SAFETY NET AT THE POLLS

Defendants' arguments in both Parts I. and III. of their opening brief essentially attack the manner in which the district court balanced the preliminary injunction factors of irreparable harm, balance of the equities, and the public interest, to craft a preliminary remedy. Balancing these harms and interests is a quintessential exercise of district court discretion, the review of which is "deferential." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. Health*, 699 F.3d 962, 981 (7th Cir. 2012). That is because "the balancing and weighing process is not susceptible to quantification or formalization." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1436 (7th Cir. 1986). Indeed, "when it comes to reviewing the weighing and balancing of equities in a preliminary injunction case

an appellate court lacks a complete perspective since a cold record cannot totally reflect the district judge's sense of the equities . . . of a case. . . . [I]t is hard to imagine why an appellate judge, relying on a distillation of what was before the lower court, is less likely to 'inappropriately' balance the equities involved." *Id.* at 1437-38. Furthermore, "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 538 (2011) (citation omitted).

While Defendants ask this Court to micromanage the district court's exercise of discretion, they do not seriously dispute that *some* kind of affidavit safety net at the polling place is necessary. Specifically, they do not challenge the district court's core factual finding that "although many individuals who need qualifying ID will be able to obtain one with reasonable effort under [the DMV] procedures, there will still be some who will not," SA.22,¹⁰ a concession that is well-warranted, *see* Statement of the Case ("SOC") Part II. Indeed, they do not even dispute the district court's finding that Plaintiffs are likely to succeed on the merits with respect to establishing liability. Nor do they dispute the legal proposition that a safety net is necessary to protect these voters who cannot obtain ID with reasonable effort. *See Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016) ("*Frank II*"); *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right

¹⁰ Instead, Defendants make the far narrower argument that the four individual Plaintiff class representatives are able to obtain ID with reasonable effort, D.Br. at 34, an argument addressed *infra* Part II.A.

to vote . . . constitutes irreparable injury.”). An affidavit safety net is further necessary because the injunctive relief from *One Wisconsin Institute* does not provide full relief to the Plaintiff class, even if it is upheld on appeal. SOC II.F.

In sum, Defendants challenge the type of relief entered, but do not challenge the need for one. As explained below, the district court did not abuse its discretion in crafting this relief.

A. The District Court Did Not Abuse its Discretion In Balancing the Various Risks and Harms to Craft an Affidavit Safety Net

The district court did not abuse its discretion in balancing the competing risks and harms to craft an affidavit remedy, i.e., 1) preventing irreparable harm to voters who cannot obtain ID with reasonable effort; 2) preserving the State’s interests, i.e., the legislature’s purported interest in preventing in-person voter impersonation and elections officials’ interest in smooth elections administration; and 3) mitigating the threat of voter intimidation. Moreover, the remedy is virtually identical to affidavit safety nets created in response to litigation in other strict voter ID states, such as in Texas and South Carolina. ECF No. 36-2; 36-3.

First, the district court reasonably crafted an affidavit remedy that would effectively prevent irreparable harm to the many voters who have fallen, and will continue to fall, through the cracks of DMV’s constantly changing procedures. Hewing to the language of *Frank II*, the affidavit expressly applies to those voters who *Frank II* held are entitled to relief under the Constitution—voters unable to obtain ID from the DMV with reasonable effort. *See* SA.43 (requiring voters signing

affidavit to swear under penalty of perjury that they “have been unable to obtain acceptable photo identification with reasonable effort.”). As the Supreme Court has explained, it is appropriate to “devise a judicial remedy” that is based on “[the] clearly . . . articulated [] background constitutional rules at issue” *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006); *see also Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) (“injunction must . . . be broad enough to be effective”); *Zamecnik v. Ind. Prairie Sch. Dist.*, 636 F.3d 874, 879 (7th Cir. 2011) (“When the court believes the underlying right to be highly significant, it may write injunctive relief as broad as the right itself.” (citation omitted)).

To further protect vulnerable voters who cannot reasonably obtain ID, the district court reasonably ensured that the affidavit would use language that is simple and easy to understand. Otherwise, the affidavit may become “so confusing that . . . no reasonable [person] can use [it],” thereby rendering the remedy “no longer available.” *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (citations and quotations omitted); *see also Ayotte*, 546 U.S. at 329-30 (approving of “simple” judicial remedies rather than those that involve “inherently complex” “line-drawing”). The use of simple, non-technical language is especially important since voters without ID are more likely to have limited education and come from lower socioeconomic backgrounds. Dkt. 195 at 25-26. Accordingly, the district court instructed that the affidavit list common, easy-to-understand examples of barriers, e.g., “Lack of transportation,” so that such voters can be confident that they are qualified to sign the affidavit. SA.43. These enumerated barriers are amply

supported by the record. *See, e.g.*, A.095 (State conceding transportation is undue burden for some voters); SOC II.A.-C. (lack of documents); Dkt. 280-14 (work); A.068-69, Dkt. 280-22 (disability); SA.50 (family responsibilities); SOC II.E. (other barriers).

This Court should reject Defendants' claims that these barriers do not exist. Defendants assert that a birth certificate is "not needed to obtain a photo ID" because of the IDPP, D.Br. at 19-20, but this is misleading for the reasons discussed *supra* SOC II.B.-C. Defendants argue that the barriers of "transportation," "work schedule," and "family responsibilities" "do not qualify as unreasonable burdens under *Crawford*," D.Br. at 20, but while *Crawford* held that "most voters" do not have these kinds of problems, 553 U.S. at 198, courts can still protect the subset of voters for whom these are real impediments, *Frank II*, 819 F.3d at 386-87. Defendants argue that anyone with a "disability or illness" can vote absentee by mail without photo ID, D.Br. at 20, but that statutory exception applies only to those who are completely confined to the home, SA.29; SOC II.D.

Second, the district court reasonably took into account the State's interests by accounting for the Wisconsin legislature's purported interest in preventing in-person voter impersonation. Most voters still have to obtain and show ID at the polls; those with unreasonable burdens in doing so must swear, under penalty of perjury, that they are who they say they are. As the district court correctly noted, this is reasonably consistent with the State's interests because many state legislatures with voter ID laws have also enacted some kind of affidavit exception,

such as Idaho, Indiana, Louisiana, Michigan, and South Carolina. SA.34. *See Ayotte*, 546 U.S. at 330-31 (can enjoin an unconstitutional law only with respect to some to respect legislative intent). The district court further took into account the interests of Wisconsin election officials in concluding that the affidavit remedy proposed by Plaintiffs was practicable and would in fact make it *easier* to implement the voter ID law by reducing the number of provisional ballots. SA.37-38 (citing declarations from Wisconsin elections officials).

Third, the district court took reasonable steps to help ensure that the affidavit does not become a vehicle for voter intimidation and deterrence by prohibiting challenges to the reasonableness of the justification the voter provides, a measure that was adopted in both South Carolina and North Carolina. SA.34-35.¹¹ *See, e.g., Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 213 (3d Cir. 2012) (not an abuse of discretion for district court to decline modifying consent decree after balancing the risk of voter “intimidation and deterrence” against the risk of voter fraud). Indeed, a three-judge court has found that a prohibition on reasonableness challenges, among other measures, is necessary to prevent the affidavit from “becom[ing] a trap for the unwary, or a tool of intimidation or disenfranchisement of qualified voters.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 36-40 (D.D.C. 2012). Texas, too, has agreed to prohibit reasonableness

¹¹ North Carolina’s voter ID law was later invalidated because it was motivated by discriminatory intent. *See N.C. NAACP v. McCrory*, --- F.3d ---, 2016 WL 4053033 (4th Cir. July 29, 2016).

challenges in instituting its own affidavit remedy. *See Veasey v. Abbott*, 2:13-cv-00193 (S.D. Tex. Aug. 3, 2016), ECF No. 895.

If elections officials and election observers—who are allowed to stand as close as three feet from voters, *One Wisconsin Institute*, 2016 WL 4059222, at *37—are permitted to interrogate vulnerable voters over the reasonableness of their listed impediment, this harassment will inevitably deter from voting many vulnerable voters who cannot obtain ID with reasonable effort. The threat of voter intimidation is heightened in Wisconsin, where “disruptive, harassing, and intimidating [election] observers” are “prevalent in high-minority areas like Milwaukee and Racine,” *id.* at *38, and where there has been a pattern of voter intimidation in minority neighborhoods, *see, e.g.*, SA.47-49, 51-52 (voter fraud billboards posted primarily in minority neighborhoods).

Defendants nevertheless speculate that the affidavit will cause voters brazenly to swear under oath that they have reasonable impediments because they spent a “single minute” trying to obtain ID, despite the absence of any evidence that anything of the sort has occurred in states with similar affidavit procedures. D.Br. at 20. This Court has rejected similar arguments against a district court’s carefully crafted injunction because they were “speculative” and not based on evidence. *See Ezell v. City of Chicago*, 651 F.3d 684, 710 (7th Cir. 2011); *see also League of Women Voters of the U.S. v. Newby*, --- F.3d ---, 2016 WL 5349779, at *8 (D.C. Cir. Sept. 26, 2016) (injunction protecting voters would do minimal harm to election integrity because “there is precious little record evidence” that the injunction would permit

fraudulent registration by non-citizens). Courts “assess the ‘reasonable’ voter, not a voter who seeks to flout the law.” *South Carolina*, 898 F. Supp. 2d at 36 n.5.

The district court’s prohibition on reasonableness challenges is the result of careful balance between the very real risk of voter intimidation against the extreme unlikelihood of voters giving absurd reasons for not having ID. This kind of balancing of risks and harms is a quintessential exercise of discretion, and Defendants have failed to demonstrate an abuse of that discretion.¹² This is especially the case where, as here, Defendants do not challenge the district court’s finding that Plaintiffs are likely to succeed in establishing liability. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (“the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor”). At the end of the day, Defendants are simply arguing that the district court should have balanced these risks differently. That is an insufficient basis for reversal. *See Nat’l People’s Action v. Vill. of Milmette*, 914 F.2d 1008, 1011 (7th Cir. 1990) (“our review is limited to determining whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes” (quoting *Thornton v. Barnes*, 890 F.2d 1380, 1385 (7th Cir. 1989)); *cf. O.B. v. Norwood*, --- F.3d ---, 2016 WL 5335494, at *3 (7th Cir. Sept. 23, 2016) (“the

¹² As the district court reasonably found, “Just about any voter who does not face a reasonable impediment to obtaining ID will prefer to get the ID rather than take the time to fill out a bogus affidavit everytime he or she goes to the polls. Thus, the number of affidavits listing insufficient or false reasons should be very tiny. Also, someone who wishes to use the affidavit to commit fraud will likely list a legitimate reason on the affidavit rather than call attention to himself or herself by listing a clearly insufficient reason.” SA.35.

preliminary injunction should be understood simply as a first cut: as insisting that the state do *something* rather than nothing The adequacy of what it does can then be evaluated.”).

B. The Injunction Does Not Exceed the Extent of the Plaintiff Class’s Protectable Rights

Defendants next argue that the injunction is unlawful because it “exceed[s] the extent of the plaintiff[s] protectable rights.” D.Br. at 18-19 (quoting *Int’l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1094 (7th Cir. 1988)). But the “protectable rights” of the Plaintiff class—voters unable to obtain ID with reasonable effort—concern solely the right to vote without having to show photo ID. Accordingly, the injunction gives the Plaintiff class nothing more than the right to vote without having to show photo ID. It does not, for instance, order Defendants to give Plaintiff class members the right to ignore voter registration requirements, money in compensation for efforts expended trying to get ID, or any other benefit or right that is outside the scope of this litigation. The injunction is thus unlike the improper injunction in *Int’l Kennel Club*, 846 F.2d at 1093-94, which granted the plaintiff trademark protection throughout the North American continent when the plaintiff had only established infringement within the United States and Canada, not Mexico.

Defendants appear to be arguing that the injunction is invalid because there is a speculative possibility that it might help someone who is not technically in the Plaintiff class. However, the Supreme Court has explicitly rejected this proposition.

In *Brown v. Plata*, the Supreme Court upheld an injunction as within the district court's "broad" discretion, 563 U.S. at 538, even though the injunction had "positive effects beyond the plaintiff class," *id.* at 531. There, a plaintiff class of prisoners with serious health conditions demonstrated that their constitutional rights were violated, and the district court ordered a reduction in prison overcrowding. That injunction was upheld, even though such an order would undoubtedly help non-class members, by improving conditions for prisoners who did *not* have serious health conditions, and even by *releasing many of them from prison outright*. It was furthermore upheld in the face of a stringent statutory requirement, not applicable here, that any remedy be "narrowly drawn." *Id.* at 530; *cf. also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) ("Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims."); Fed. R. Civ. P. 71 (contemplating injunctive relief for "nonpart[ies]"). The injunction in this case is far narrower in scope.

C. This Court Should Not Preclude the District Court From Crafting Alternative Forms of Relief

If this Court finds that the district court has abused its discretion—and it should not—this Court should not preclude the district court from crafting a narrower affidavit remedy, since Defendants do not seriously dispute the continued existence of voters who are unable to obtain ID with reasonable effort even under the latest DMV rules *du jour*, and thus *some* kind of safety net is necessary. *See, e.g., Int'l Kennel Club*, 846 F.2d at 1094 (remanding for consideration of other

factors in crafting a narrower preliminary injunction).¹³ Moreover, in light of the new forms of non-photo identification documents (e.g., Medicare cards and food stamp cards) which Defendants claim DMV will now accept as “proof of identity” for ID issuance (*but see infra* Part II.A.2. (no guarantee this change will be permanent or effective)), this Court should not preclude the district court from ordering Defendants to accept these same non-photo identification documents as proof of identity *at the polling place* in addition to the limited forms of photo identification specified in the law. *See* A.068-69 (voter Rachel Fon, who could not get to DMV, was disenfranchised even though she brought to the polls “around 18 different forms of identification, including . . . a Medicare card”). If the purported purpose of Wisconsin’s voter ID law is to prove identity, and the DMV will now accept these non-photo identification cards as “proof of identity,” there is no justification for forcing voters to make a separate trip to the DMV when they can simply prove their identity directly at the polling place.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A RULE 23(b)(2) CLASS

Defendants next argue that Plaintiffs have no likelihood of success because the district court should not have certified a Rule 23(b)(2) class of “all those eligible to vote in Wisconsin who cannot with reasonable effort obtain a qualifying photo ID.” As a preliminary matter, class certification is not necessary to provide

¹³ For instance, an affidavit could require voters to swear that they: 1) were unable to obtain permanent ID by presenting the documents that they have after one trip to the DMV; or 2) do not have access to private or public transportation to the DMV.

Plaintiffs’ requested relief; as Defendants have previously argued, “[i]f there is relief granted by [the court] at all, it can be fashioned to cover all of these putative class members” without having to certify a class. Dkt. 83 at 8; *see also Whole Woman’s Health*, 136 S. Ct. at 2307 (“Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims.”).¹⁴ But even if class certification were necessary, Defendants’ arguments are meritless.

A. Plaintiff Class Representatives Have Standing to Bring this Class Action

Defendants initially argue that the classes should not have been certified because Plaintiff class representatives Ruthelle Frank, Leroy Switlick, James Green, and Melvin Robertson are supposedly not members of the class they seek to represent. D.Br. at 21-24. Defendants appear to be arguing that these class representatives lack standing to bring this class action. *See* D.Br. at 21 (citing *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (framing discussion in terms of standing); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (same)). As explained below, each of these class representatives has standing.

1. Ruthelle Frank has standing

Plaintiff Ruthelle Frank has standing because she is not guaranteed to get a permanent ID with whatever documents she has—namely, her erroneous birth

¹⁴ Plaintiffs argued below that class certification was unnecessary to award preliminary injunctive relief, but sought class certification for purposes of judicial economy, should this Court find class certification necessary. A.036-37.

documents.¹⁵ Defendants say that Frank “would receive an ID if she just applied,” D.Br. at 22, but they fail to mention that in November 2015, *more than a year* after the original IDPP was put in place, Frank’s daughter asked the DMV about obtaining ID for her mother and DMV turned her away, never mentioning the IDPP or any other alternative procedure. Dkt. 280-57 at 4. Nor do they mention that Frank had already tried and failed to get ID from the DMV before she filed a class complaint in December 2011 and first moved for class certification in April 2012. A.044-58; Dkt. 1, 33-5, 63; *see McMahon v. LVNV Funding, Inc.*, 744 F.3d 1010, 1018-19 (7th Cir. 2014) (relating standing back to time of filing of class complaint); *Comer v. Cisneros*, 37 F.3d 775, 797-99 (2d Cir. 1994) (similar, where class certification motion was pending for two years).

In any event, Defendants do not actually cite to any regulation that makes clear that Frank (or any other class member with name mismatch problems) will get permanent ID *now*. The actual text of the emergency rule demonstrates that voters with birth documentation containing name mismatches *do not qualify* for the IDPP or the temporary ID that comes with it, since the IDPP is only for voters who do not have birth documentation at all. *See* SOC II.B. And if voters who *can* initiate

¹⁵ She and the other Plaintiffs also have standing because they cannot vote in-person without presenting photo ID, and the creation of an affidavit option would redress that injury. SA.05-06; *see Common Cause / Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009). It is thus irrelevant that Frank was forced to rely on the vague “indefinitely confined” exception this year to cast a mail-in absentee ballot, four years after she asked for class certification, a method that is more likely to result in an uncounted ballot. Dkt. 280-28 at 47-48. Moreover, municipal clerks sometimes unilaterally remove voters from the indefinitely confined list, without notice, if they believe the voter is not really “indefinitely confined.” Dkt. 280-33 at 77-78.

the IDPP later turn up birth documentation containing mismatches, DMV can and will deny ID. *See id.*

Defendants suggest that they have every intention of giving Frank permanent ID regardless of what the rules say, relying on two declarations by the DMV Administrator promising (sort of) that she will get ID. D.Br. at 22 (citing A.007, A.128). Indeed, internal e-mails show that high-level DMV officials fully intend “to use the grey areas of the law” to get ID to her at all costs, because she “is the primary plaintiff in the Voter ID lawsuit.” Dkt. 280-57 at 1, 2. DMV has gone so far as to set up special e-mail alerts to immediately inform such officials if she happens to show up to the DMV again. *Id.* at 1 (“If she does come in I will send you an email just to make you aware.”); *see also* Dkt. 280-58 (DMV responding to request from Governor’s office by instituting an internal “standing” policy “to flag any plaintiffs if they apply”).

But it is well-established that attempts to moot out class representatives do not destroy class standing when a clear case or controversy exists between the plaintiff class and defendants. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *Chapman v. First Index, Inc.*, 796 F.3d 783, 786-88 (7th Cir. 2015). Defendants also do not suggest that *every* voter with birth documentation containing mismatches will receive the same special treatment that Frank has apparently earned by being a plaintiff in this case. *See, e.g., Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) (“[Defendants’] counsel advises us that [they] will not enforce the statute against [the plaintiffs], but the no-enforcement

pledge is good for them only, not other . . . groups in Wisconsin.”). Frank thus has standing to prosecute this class action as a class representative.

2. Leroy Switlick and James Green have standing

Plaintiffs Leroy Switlick and James Green have standing because “proof of identity” is mandatory for obtaining ID or initiating the IDPP. SOC II.A. When these voters moved for class certification and for leave to file a supplemental complaint in June 2016, they lacked proof of identity, i.e., Social Security cards, A.061-64, which is the most common form of proof of identity, SA.28. By that time, Switlick had already tried and failed *twice* to get ID from the DMV. Dkt. 288-3 at 3-A-138 to 144. Defendants complain that Green had not tried to get ID from the DMV, D.Br. at 22, but it would have obviously been futile for him to do so when he did not satisfy the mandatory proof of identity requirement.

Crowing repeatedly that “Plaintiffs failed to identify a single individual who lacks proof of identity,” D.Br. at 26, *see also* ECF No. 46 at 1, Defendants argue that both Switlick and Green satisfy DMV’s proof of identity guidelines because they have a Medicare or food stamp card, D.Br. at 22-24. This is wildly misleading, because it was not until *after the district court’s decision* that Defendants quietly altered the DMV website to indicate that documents like Medicare or food stamp cards can satisfy its “proof of identity” requirement. SOC II.A.¹⁶

¹⁶ Furthermore, Switlick was *again* unsuccessful in obtaining ID even *after* the DMV website changed SA.79-82. Defendants also appear to suggest that Plaintiffs did not establish that Switlick and Green lacked proof of identity because their respective declarations did not specifically itemize every single possible proof of identity in the known universe and say, “I lack” each of these items. *See* D.Br. at 23. However, it was sufficient for

This last-minute gamesmanship does not destroy class standing. As noted above, subsequent attempts to moot out class representatives do not destroy class standing when a clear case or controversy exists between the plaintiff class and defendants. *See Chapman*, 796 F.3d at 786-88. However “proof of identity” is defined, class members lacking it will continue to be unable to obtain ID.

Furthermore, Defendants have not established that this website change reflects a permanent change in DMV’s “proof of identity” definition, including after this litigation is concluded. As this Court has explained, “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*, 751 F.3d at 831 (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). For a multitude of reasons, Defendants have failed to satisfy their “formidable burden” of making “absolutely clear” that the very recent change to the DMV website will result in permanent change.

First, procedural changes by executive branch officials during the heat of litigation, for the ostensible purpose of securing a litigation advantage, hardly

the district court to infer, on a preliminary injunction posture, that they lacked proof of identity since Social Security cards are the most common form of such proof.

guarantee any permanency that will last past the conclusion of litigation. *See A. Philip Randolph Institute v. Husted*, --- F.3d ---, 2016 WL 5328160, at *10 (6th Cir. Sept. 23, 2016) (“there remains a distinct possibility that a future [official] will be less inclined to maintain the [change],” and because the change was made at the last minute during litigation, it “do[es] not inspire confidence in [the current official’s] assurances regarding the likelihood of recurrence”).

Second, DMV has not enshrined its recent website change in any change to the actual governing regulation. *See Wis. Admin. Code § Trans. 102.15(4)*.

Third, even if DMV amended its regulations, that would not guarantee permanency because the DMV has, in recent years, specifically amended its regulations to *reject* these *same* kinds of proof of identity. *See A. Philip Randolph Institute*, 2016 WL 5328160, at *9 (“the Supreme Court has declined to defer to a governmental actor’s voluntary cessation, even where that cessation occurred pursuant to legislative process” (citation omitted)). Before 2007, DMV’s rules expressly included as proof of identity Medicaid and welfare cards, along with numerous other forms of proof of identity that lower-income voters are more likely to have (e.g., canceled checks, employee photo ID card). SA.68-69. In 2007, however, DMV specifically deleted these documents from the regulation. SA.70-75.

Fourth, although Defendants seize upon the introductory preface of Wis. Admin. Code § Trans. 102.15(4) to suggest, for the first time on appeal, that proof of identity can literally be *any* document with a name and signature on it, D.Br. at 23, Defendants point to nothing in the record suggesting that DMV has ever

interpreted this provision this way, even though this prefatory clause has been in the regulation for at least a decade. SA.68-69. Though DMV has occasionally exercised arbitrary discretion to accept unenumerated documents pursuant to non-public guidelines, SA.53-59, this hardly provides any guarantee of uniform or equitable treatment of voters in the future.

Fifth, DMV's chronic inability to implement or even understand its own procedures, including the proof of identity requirement, belies any notion that this latest last-minute change will be effective. Earlier this year, DMV denied Switlick ID, wrongly telling him that he *needed photo ID* to satisfy the proof of identity requirement. A.061.

What the DMV website giveth, it can easily taketh away, without any notice or warning. *See A. Philip Randolph Institute*, 2016 WL 5328160, at *10 (voluntary cessation did not establish mootness because “reversing the cessation would [not] be particularly burdensome”). DMV's “inconsistent and shifting positions” should “not give [this Court] much confidence” that this mere change to the DMV website actually reflects anything permanent. *Wis. Right to Life*, 751 F.3d at 831.

3. Melvin Robertson has standing

Melvin Robertson has standing because he, like other voters whose birth documentation cannot be found, is not guaranteed to get permanent ID with whatever documents he has. *See supra* SOC II.C. Moreover, Robertson has already exerted more than reasonable efforts to obtain ID. Although he made a trip to the Milwaukee vital records office in 2012, the office was unable to find his birth

certificate and instructed him to track down *80-year old elementary school records*, and then to get a delayed birth certificate to get ID, an ordeal he was not equipped to do undertake even with the help of volunteers. A.059-60; SA.45-46. Nor does he have any baptismal certificates, hospital records, or a marriage certificate. Dkt. 280-5. Defendants insist that Robertson, who is now 87 years old, must try *again* to obtain ID “under current law,” D.Br. at 22, but they fail to point to any “current law” or regulation that guarantees that he will receive permanent ID.

Robertson has tried to get ID but failed. Frank has tried twice to get ID but failed. Switlick has tried three times to get ID but failed. Any attempt by Green to get ID would have been futile. Defendants nonetheless insist that each of these class representatives—as well as every single unnamed class member—go to the DMV, over and over again, every single time Defendants introduce a new procedural change for purposes of litigation, which now seems to happen on a monthly basis. SOC II.D.-F. This is patently unreasonable and provides yet another independent basis for standing.

Defendants’ cat-and-mouse game of constantly changing procedures and attempting to moot out class representatives do not destroy standing. If anything, they demonstrate the wisdom of having an affidavit safety net that will catch all the vulnerable voters that are inevitably left behind, as well as the wisdom of class certification.

B. The District Court Did Not Abuse Its Discretion in Certifying a Rule 23(b)(2) Class

Defendants next argue that Plaintiffs do not satisfy certain Rule 23 prerequisites to class certification. D.Br. at 24-34. This Court reviews class certification decisions for abuse of discretion, each prerequisite is satisfied if it is proven by a preponderance of the evidence, and the district court's assessment of the evidence is reviewed for clear error. *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015). As explained below, Defendants have failed to satisfy that standard with respect to each challenged prerequisite, and they do not demonstrate an abuse of discretion.

1. Numerosity

The district court did not abuse its discretion or clearly err in finding that the class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Rather than fixating upon a magical numerical threshold, the district court properly focused on whether it would be practicable to find and join *all* the many voters who are unable to obtain ID with reasonable effort. SA.08-09. It reasonably concluded that "[t]here is no way to identify every person in the state who currently faces high hurdles to obtaining ID" for purposes of joining them to a lawsuit, SA.08; that class members may not realize that they fall into this category until they are stymied from obtaining ID, making it impossible to accurately identify all class members at any given time, SA.08; and that there will constantly be new class members as "people turn eighteen, move to Wisconsin, or otherwise become eligible

to vote here and discover that they cannot obtain ID with reasonable effort,” all of whom cannot be feasibly joined on a rolling basis, SA.09. *See, e.g., Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) (“identifying, locating, and joining individuals who encounter accessibility discrimination . . . would be impracticable, regardless of whether the injury occurred in the past, is ongoing, or will occur in the future”); *Pederson v. La. State Univ.*, 213 F.3d 858, 868 & n.11 (1st Cir. 2000) (joinder impracticable where “the class includes unknown, unnamed future members”).

Defendants do not challenge this reasoning, but instead suggest that *no voter* will be unable to obtain ID with reasonable effort. D.Br. at 24-28. But for the reasons discussed *supra* SOC II., there are several categories of voters who cannot obtain permanent ID with whatever documents they have, assuming they can reasonably get to the DMV at all. Nor was the district court’s numerosity ruling “baseless speculation,” D.Br. at 29, as there is far more than a preponderance of the evidence to support it. Three hundred thousand *registered* voters lack acceptable ID. Dkt. 195 at 23. DMV officials testified about routinely encountering voters with name mismatches on their birth documents, with one DMV employee testifying that she encountered such errors once or twice a week. *Id.* at 34 n.18, 36-37 n.20. Around 1,640 eligible voters in Milwaukee County alone lack both an ID and a Social Security card needed to obtain ID. *Id.* at 28. DMV officials repeatedly admitted that they commonly encountered difficulties finding birth documentation (including secondary documents like baptismal certificates) for people born in the Jim Crow

South, as well as nearby Chicago. *Id.* at 32 n.17; Dkt. 280-37 at 64-65; Dkt. 280-31 at 94-96; Dkt. 280-30 at 24-25; A.059-60. Elections officials received “a lot of complaints” from voters “having a hard time getting to the DMV” and not all of the DMV’s service centers are accessible by public transit. Dkt. 195 at 31. DMV’s implementation of the IDPP suffers from a 27% error rate, Dkt. 280-47; 280-30 at 99-100; both Frank and Switlick have already suffered from DMV’s errors, *supra* Part II.A.1.-2.; and DMV employees have confessed that “[w]e seem to really be struggling with a process that should not be that difficult,” Dkt. 280-73. And more than 50 applicants have been denied ID under the IDPP, SA.08, which does not even include voters unable to initiate the IDPP or get to the DMV. This record hardly demonstrates clear error in the district court’s finding of numerosity.

2. Commonality

The district court also properly found that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Because the whole purpose of class actions is to “avoid repeated litigation of the same issue,” *Chicago Teachers Union, Local No. 1 v. Bd. of Education of City of Chicago*, 797 F.3d 426, 433 (7th Cir. 2015), the heart of the commonality inquiry is whether there is “a common contention that is capable of class-wide resolution,” *id.* at 434, rendering the class action device a more efficient mechanism than an endless parade of individualized lawsuits all asking the same question. Oftentimes this inquiry examines whether there is a “uniform policy or process applied to all.” *Id.* at 437. Compare, e.g., *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 353-57 (2011) (commonality not satisfied because class

members did not challenge any uniform company-wide policy); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488-90 (7th Cir. 2012) (commonality satisfied because class members challenged company-wide “teaming” and “account distribution” policies affecting all class members), *abrogated on other grounds*, *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 559 (7th Cir. 2016); *Chi. Teachers Union*, 797 F.3d at 434-37 (commonality satisfied because class members challenged same Chicago policy used to narrow the list of schools targeted for reconstitution affecting all class members).

Here, the class members all contend that the same voter ID law and the same DMV procedures apply to all class members and do not guarantee them permanent ID, as discussed *supra* SOC II., and they all contend that the same affidavit remedy is appropriate to redress their common injury. Resolving each of these contentions resolves “an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350. Defendants point to various individual circumstances of each class representative, D.Br. at 30-31, but these alleged differences do not prove the *absence* of any common question capable of class-wide resolution. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980) (“a class action will not be defeated solely because of some factual variations among class members’ grievances”); *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992) (where class members challenged same fraudulent representations by sham school, whether class members had different school experiences did not defeat commonality).

3. Typicality

Next, the district court correctly found that the class representatives' claims "are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). A representative'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." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citation omitted). This inquiry is "closely related to the [] question of commonality," *Rosario*, 963 F.2d at 1018, and it is satisfied for essentially the same reasons discussed above. Here, the claim of each class member arises from the "same event or practice"—the voter ID law and the DMV procedures, and all of their claims are based on the "same legal theory"—that the rules do not guarantee them permanent ID, SOC II, contrary to the promises that Defendants have made to the *en banc* Court. *Frank v. Walker*, --- F.3d ---, 2016 WL 4524468, at *2 (7th Cir. Aug. 29, 2016) (*en banc*). Typicality is thus satisfied.

4. Ascertainability

Defendants argue that the class definition is insufficiently ascertainable, D.Br. at 32-34, because the class definition is purportedly vague and an improper "fail-safe class." They are wrong on each count.

The purpose of the vagueness prohibition is to ensure that a court can "identify who will receive notice, who will share in any recovery, and who will be bound by a judgment." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015). These considerations have less force with respect to Rule 23(b)(2) class

actions, which are not subject to the mandatory notice and opt-out procedures of Rule 23(c)(2)(B). For this reason, several circuits have either relaxed or eliminated the ascertainability requirement for (b)(2) classes. *See, e.g., Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015); *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004) (relaxed ascertainability requirement unless Rule 23(b)(2) class requests notice and opt-out rights). Here, the district court correctly found that the class is sufficiently ascertainable for purposes of a Rule 23(b)(2) class, because the affidavit remedy itself allows class members who cannot obtain ID with reasonable effort to self-identify and provides them the relief to which they are entitled. SA.12-13. Indeed, in *Mullins*, this Court expressly endorsed the use of a self-identification affidavit mechanism as a practical way to identify class members for purposes of providing relief. 795 F.3d at 662, 669-71.

The class is also not an improper “fail-safe class.” A “fail-safe class” is one that is defined “in terms of success on the merits,” *Mullins*, 795 F.3d at 660; *see also Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012) (“fail-safe class” is “one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim.”). Fail-safe classes are improper because they are unfair to the defendant: “the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation.” *Mullins*, 795 F.3d at 660. Here, the district court did not certify a “fail-safe” class defined, for instance, as “all eligible voters who have

proven liability,” such that voters who fail to prove liability automatically fall out of the class and can try again. *See, e.g., Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (class defined as those “entitled to relief” was improper fail-safe class). Rather, the class consists of voters who cannot obtain ID with reasonable effort, and if Plaintiffs lose, i.e., if a court finds that voters who cannot obtain ID with reasonable effort do not suffer a constitutional violation, then Defendants will “prevail[], [and] *res judicata* will bar class members from re-litigating their claims.” *Mullins*, 795 F.3d at 661. There is no unfairness here.

What Defendants are really arguing is that because *Frank II* held that voters unable to obtain ID with reasonable effort are entitled to relief, certifying a class of voters unable to obtain ID with reasonable effort creates an improper “fail-safe class.” This confuses a class that successfully proves liability, which is obviously proper, with a class that is *defined in terms of* successfully proving liability, which is improper. It is like arguing, erroneously, that a class of all gay persons seeking to marry is an improper “fail-safe class” because *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), held that all gay persons are entitled to marry.

For the above reasons, the district court did not abuse its discretion in certifying the class.

III. THIS COURT SHOULD OVERTURN FRANK I AND REINSTATE THE INJUNCTION ENJOINING WISCONSIN’S VOTER ID LAW

Though the district court’s creation of a reasonable affidavit safety net was not an abuse of discretion, the district court was bound by this Court’s holding in

Frank I. Pursuant to Plaintiffs' cross-appeal, it is now time for this Court to overrule *Frank I* and reinstate the injunction enjoining Wisconsin's voter ID law.¹⁷

A. *Frank I* Should Be Overruled Because It Is Now An Outlier Among the Circuits

Frank I is now an outlier among the circuits, conflicting with decisions issued by the Fourth, Fifth, and Sixth Circuits. *Frank I* is particularly at odds with a recent *en banc* decision issued by the Fifth Circuit, which upheld the district court's finding that Texas's strict voter ID law violated Section 2 of the Voting Rights Act. See *Veasey v. Abbott*, --- F.3d ---, 2016 WL 3923868 (5th Cir. July 20, 2016) (*en banc*). *Frank I* conflicts with *Veasey* in at least three ways, and should be overruled to harmonize the law of this Court with its sister Circuits.

First, the Fifth Circuit declined to accept *Frank I*'s legal standard, *i.e.*, its assertion that Section 2 creates an "equal-treatment" requirement. 768 F.3d at 754. Instead, the Fifth Circuit declared that it was "now adopt[ing] the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims," which requires: 1) a showing of disparate impact; and 2) that the impact is caused by or linked to social and historical conditions that have contributed to discrimination against a protected class. *Veasey*, 2016 WL 3923868, at *17 (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014),

¹⁷ Defendants have argued that this Court lacks jurisdiction over this cross-appeal because Plaintiffs "won" in the district court. ECF No. 38 at 13. Plaintiffs did not "win" because the district court was unable to enjoin the entirety of Wisconsin's voter ID law due to *Frank I*'s ruling, which is what Plaintiffs wanted. A.019 n.4.

vacated on other grounds by No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)¹⁸).

A majority (eight out of fifteen) of Fifth Circuit judges expressly recognized the obvious dissonance between *Frank I* and the *Veasey* majority opinion, including the six dissenting judges, who strongly advocated for a wholesale embrace of *Frank I*'s legal standard. *See Veasey*, 2016 WL 3923868, at *65, *69-*71 (Jones, J., dissenting); *id.* at *82-*83 (Elrod, J., dissenting). And two concurring judges similarly recognized that *Veasey*'s logic was incompatible with *Frank I*, which they vehemently criticized for and “read[ing] Section 2 as only ‘an equal-treatment requirement’” that is “puzzling” and “ignores” Section 2’s text. They also criticized *Frank I* for “not mention[ing] the applicable clear-error standard of review,” “overlook[ing] many of the district court’s factual findings,” and “[q]uestioning other circuits’ approaches to vote-denial cases without offering a clear alternative.” *Id.* at *42-*44 (Higginson, J., concurring).

The *Veasey* majority opinion said briefly that “the Seventh Circuit’s approach in *Frank* is not inconsistent with our own” because, supposedly unlike in this case, the State of Texas had engaged in discrimination in both employment and education. *Veasey*, 2016 WL 3923868, at *20. But the *Veasey* majority’s assumption was premised on *Frank I*'s erroneous suggestion that there was no evidence of

¹⁸ The Sixth Circuit has since formally adopted the two-part standard that was set forth in the vacated *Ohio NAACP* decision. *See Ohio Democratic Party v. Husted*, --- F.3d ---, 2016 WL 4437605, at *13-*14 (6th Cir. Aug. 23, 2016).

State-sponsored discrimination in the record. 768 F.3d at 755. To the contrary, as Plaintiffs noted in their post-trial brief, “decades of continuing discrimination across a wide range of areas *by state* and non-state actors in Wisconsin . . . magnify Act 23’s [racially] exclusionary effects,” which formed part of the socioeconomic context in which Wisconsin’s voter ID law resulted in discriminatory burdens on minority voters. Dkt. 194 at 58 (emphasis added, citing evidence). Defendants never disputed this evidence. Nor did they argue that Plaintiffs *must* link present discriminatory effects to *state-sponsored* discrimination, Dkt. 176 at 55-60, which is why it was not necessary for the district court to specifically distinguish between state and non-state discrimination when analyzing the Section 2 claim.

Regardless, *Frank I*’s reliance on the purported absence of evidence of state-sponsored discrimination only underscores its error, since no other court has held that a showing of state-sponsored discrimination is *required* to prove a Section 2 violation. This is unsurprising, because the whole purpose of Section 2’s “effects” test was to eliminate intent as an element of liability. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

Second, in direct contrast to *Frank I*, which accepted the “legislative facts” regarding Wisconsin’s interests as conclusive, 768 F.3d at 749-51, the Fifth Circuit scrutinized Texas’s purported interests and upheld the district court’s finding that those interests were not sufficiently substantiated by the evidence, *Veasey*, 2016 WL 3923868, at *31-*33; *see also, e.g., Ohio NAACP*, 768 F.3d at 524 (State’s proffered policy justifications for voting restriction was “tenuous” and violated Section 2);

League of Women Voters N.C., 769 F.3d at 246 (same); *Michigan A. Philip Randolph Inst. v. Johnson*, --- F.3d ---, 2016 WL 4376429, at *6-*8 (6th Cir. Aug. 17, 2016) (similar). As the Fifth Circuit held, “the articulation of a legitimate interest [in preventing voter fraud] is not a magic incantation a state can utter to avoid [liability]. Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State’s announced interests and the statute enacted.” *Veasey*, 2016 WL 3923868, at *31.

Third, the Fifth Circuit credited multiple kinds of factual findings that the panel in *Frank I* specifically rejected, and determined that these findings compelled the conclusion that Texas’s voter ID law violated Section 2. *Contrast, e.g., Frank I*, 768 F.3d at 753 (racially disparate ID ownership does “not show a ‘denial’ of anything by Wisconsin, as [Section 2] requires”), *with Veasey*, 2016 WL 3923868, at *29 (“district court’s finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within [the Section 2] definition” of “abridge”); *Frank I*, 768 F.3d at 752 n.3 (irrelevant that racial minorities were twice as likely to lack ID), *with Veasey*, 2016 WL 3923868, at *22, *27 (fact that racial minorities were twice as likely to lack ID supports conclusion that voter ID law “imposes . . . disparate burdens on the right to vote”);¹⁹ *Frank I*, 768 F.3d at 753

¹⁹ *Frank I*’s rejection of “dividing percentages” to measure racial impact has also been undermined by *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), which did exactly that. *Fisher* found that the University of Texas’s affirmative action program had a “meaningful” impact on increasing racial diversity because Hispanic and African-American enrollment increased by “54 percent and 94 percent, respectively”—an increase from 11% to 16.9% for Hispanics and from 3.5% to 6.8% for African-Americans. *Id.* at 2212.

(racial disparities in socioeconomic status irrelevant), *with Veasey*, 2016 WL 3923868, at *28-29 (racial disparities in socioeconomic status relevant where they hinder ability to participate in political process); *Frank I*, 768 F.3d at 747 (district court should have measured voter ID's impact on turnout), *with Veasey*, 2016 WL 3923868, at *29 (declining “to require a showing of lower turnout to prove a Section 2 violation,” because “turnout by different voters might increase for some other reason. . . . That does not mean the voters kept away were any less disenfranchised”).²⁰

B. *Frank I* Has Been Undermined by the Supreme Court

Frank I's reasoning has also been undermined by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-13 (2016), which rejected the proposition that a district court is bound by “legislative findings” and upheld the district court's reliance on evidence at trial, including expert testimony, to evaluate the extent to which a State's interests are actually furthered by a law that burdens important constitutional rights.

Furthermore, *Whole Woman's Health* undermines *Frank I*'s holding relevant to the “burden” side of the equation, concluding that a restriction on the constitutional right to abortion must be invalidated if a “large fraction” of “women for whom the provision is an actual rather than an irrelevant restriction” faces a

²⁰ See also *N.C. NAACP v. McCrory*, --- F.3d ---, 2016 WL 4053033, at *16 (4th Cir. July 29, 2016) (“The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past. No law implicated here—neither the Fourteenth Amendment nor § 2—requires such an onerous showing.”).

“substantial obstacle.” 136 S. Ct. at 2320 (citation and alterations omitted). *Frank I* was also wrong to discount the district court’s findings concerning the significant burdens that Wisconsin’s voter ID law imposed on voters without ID, especially lower-income voters. Compare Dkt. 195 at 26-37, with *Whole Woman’s Health*, 136 S. Ct. at 2302 (the laws “erect a particularly high barrier for poor, rural, or disadvantaged women”). And just as the Supreme Court rejected the principal dissent’s argument that the law should be facially upheld because “95% of women of reproductive age” would not be burdened, *id.* at 2349 (Alito, J., dissenting), this Court should reject *Frank I*’s emphasis on the fact that 95.5% of eligible voters either already have ID or the underlying documents necessary to obtain ID, *Frank I*, 768 F.3d at 749.

C. DMV’s Constantly Changing Procedures Do Not Undermine the Need to Reconsider Frank I

DMV’s constantly changing procedures also do not undermine the need to overrule *Frank I*.

First, as discussed *supra* SOC II., DMV’s latest last-minute procedures do not guarantee permanent ID for all eligible voters. Facial relief is now appropriate. Otherwise, the State will continue its endless cat-and-mouse game of issuing new DMV procedures every time a court is about to issue a decision in this ongoing voter ID case, doing untold collateral damage to vulnerable voters in the process. These voters should not be at the mercy of the State’s constant tinkering with the machinery of DMV’s cumbersome bureaucracy.

Second, even assuming Defendants have made it easier to get ID, that is tantamount to making a literacy test easier to pass. The restriction is still unnecessary and discriminatory. *See Crawford*, 553 U.S. at 191 (“However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” (citation omitted)); *Northeast Ohio Coalition for the Homeless v. Husted*, --- F.3d ---, 2016 WL 4761326, at *13 (6th Cir. Sept. 13, 2016) (“mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope” is a “small” burden “for most voters,” but “none of the ‘precise interests put forward by’ Ohio justifies it).

Third, the more that Defendants frantically change the DMV’s procedures in the hopes of evading liability, the clearer it becomes that Wisconsin’s voter ID law does nothing more than force vulnerable voters to perform a pointless ritual pilgrimage to the DMV, whose rites have little to do with deterring mythical in-person voter impersonation fraud. Like North Carolina’s voter ID law, Wisconsin’s voter ID law and the latest DMV procedures “elevate[] form over function, creating hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud.” *N.C. NAACP v. McCrory*, --- F.3d ---, 2016 WL 4053033, at *19 (4th Cir. July 29, 2016).

For example, Defendants say DMV will now supposedly accept all kinds of documents as “proof of identity,” such as Medicare and food stamp cards (*but see supra* Part II.A.2.), yet those same non-photo ID documents are *not* sufficient to

prove one's identity at the polling place. Defendants suggest DMV will accept literally *any* document with a name and signature as “proof of identity” (*but see supra* Part II.A.2.), yet an affidavit with a name and signature swearing to their identity at the polling place is somehow not good enough. Defendants seem to suggest that voters can keep their “temporary” ID forever if they just pick up the phone whenever the DMV bureaucracy calls them—even if the voter has already provided all the information she has (*but see supra* SOC II.C.)—but do not explain what purpose this mindless exercise serves, if the voter has already provided all the information they have. Defendants say DMV will now mail temporary IDs overnight to voters who initiate the IDPP on Election Day (*but see supra* SOC II.C.), but for some reason DMV will not hand out temporary IDs over the counter when *they already do so* with other ID applicants. SA.65. And most recently, the Governor's Department of Transportation has proposed making voter ID cards cheaper by removing “security features” from the card, SA.77-78, when the entire purpose of voter ID is, purportedly, to protect against fraud.

The district court's injunction should therefore be vacated, and the case remanded with instructions to enjoin the enforcement of Wisconsin's voter ID law. *See, e.g., Watkins v. United States Army*, 875 F.2d 699, 704-05 (9th Cir. 1989) (en banc) (reinstating claim that had been dismissed by a prior appeal). Such an injunction would still permit Defendants to seek modification should they believe that developments have made it no longer appropriate. *See* Fed. R. Civ. P. 60(b).

CONCLUSION

For the above reasons, pursuant to Plaintiffs' cross-appeal, this Court should vacate the decision below and remand with instructions to enjoin the enforcement of Wisconsin's voter ID law. Otherwise, the district court's injunction should be affirmed.

Dated: September 30, 2016

Respectfully submitted,

/s/ Sean J. Young

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief and Short Appendix of Plaintiffs-Appellees/Cross-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 16,210 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 12 point Century Schoolbook font.

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, the Brief and Short Appendix of Plaintiffs-Appellees/Cross-Appellants was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that the following participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Sean J. Young

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SHORT APPENDIX

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1 Q. Thank you.

2 A. In my work, it's very important that I tell the truth and
3 guide people in the right way. So I wanted to see exactly what
4 you needed to do in order to get a birth certificate in
02:27 5 Milwaukee. By that time, there was a law that said if you were
6 born in Milwaukee, you could get a free birth certificate.

7 There were four or five gentlemen at Hadley apartments
8 who didn't have birth certificates and were not born in
9 Milwaukee, but Mr. Robertson was. So I decided that I was going
02:28 10 to take him down to a vital records to see what the process was.
11 We went to vital records, I helped him fill out his application,
12 and we sat there for about three minutes. And then the clerk
13 came back over to us and said that she had no record of
14 Mr. Robertson's birth. She then said that we would have to go
02:28 15 to Madison to get a delayed birth certificate.

16 Q. And the delayed birth certificate, did they tell you how
17 much that would cost?

18 A. That would be \$25 for the delayed birth certificate.

19 Q. And were there any other documents that were required?

02:29 20 A. They wanted documents, if I could remember correctly, from
21 when he was seven years old going to elementary school.

22 Q. And how old is he today?

23 A. He's 86-plus, I believe. I'm not sure of his age right now.

24 Q. So they wanted elementary school records from 80 years ago.

02:29 25 A. Yes.

1 Q. And \$25.

2 A. And \$25. Now, I would have helped him, but you know, that's
3 almost like doing genealogy research and I just didn't really
4 have the time to go that deep into getting a birth certificate
02:29 5 for him.

6 Q. And so then what happened? Was he able to get the birth
7 certificate?

8 A. No, he was not.

9 Q. And so then was he able to get an ID for voting purposes?

02:29 10 A. No, he was not.

11 Q. And so if Act 23 were in effect today, would he be able to
12 vote?

13 A. No, he would not.

14 Q. Now, if Act 23 were in effect, do you think that these
02:29 15 obstacles that you've been talking about would prevent other
16 African-American voters that you encountered from voting?

17 A. It would prevent them from voting, yes.

18 Q. I want to talk for a moment now about the February 2012
19 elections.

02:30 20 Did you and citizens action undertake any special
21 efforts related to Act 23 surrounding the February 2012
22 elections?

23 A. Well, again, the work that we do at Citizen Action is done
24 with coalition partners. We just can't do things by ourselves.

02:30 25 So we had a group of coalition partners that did election

1 Q. And what happened to that bill?

2 A. It didn't pass.

3 Q. Okay. I just want to clarify something on the record.

4 By the way, when I said earlier did you raise these

04:47 5 issues of racial justice in your concerns. And more than once,

6 and you said maybe twice, was that tongue in cheek? Did you

7 really only raise them twice?

8 A. No. I raised them very often. Through press releases, on

9 the radio, on TV, and screaming on the floor, whatever it took.

04:47 10 Q. Thank you. I also just want to ask you, you said you live

11 in what you call "the hood."

12 A. I don't want to go on record calling it "the hood" but --

13 Q. Well, you used that term. You live in the central city. Is

14 that a fair statement?

04:47 15 A. Yes.

16 Q. Do you recall before the 2012 election cycle seeing any

17 billboards in your neighborhood?

18 A. Yes.

19 Q. What do you recall of the billboards?

04:47 20 A. I remember seeing billboards that said voter ID is a felony.

21 Q. Voter ID is a felony?

22 A. I mean -- not voter ID. I'm sorry. I can't remember the

23 exact wording but --

24 Q. Voter fraud, maybe, is a felony?

04:48 25 A. Voter fraud, maybe, is a felony. I saw one that says

1 something about ID and, you know, but it was basically a very
2 intimidating message that should you try to vote that you could
3 be under suspicion and you need to be concerned about that. I
4 mean -- and it was very questionable why these billboards were
04:48 5 popping up.

6 Q. When you say "popping up," did you see one? Did you see
7 more than one?

8 A. Oh, I saw a few.

9 Q. And were they just along the highway or were they in the
04:48 10 neighborhood?

11 A. No. They were in the city. They weren't on the highway.
12 They weren't on the highway. And as someone who was a state
13 legislator that traveled back and forth to Madison half of the
14 week and traveled on the highway -- I also served on joint
04:49 15 finance for two terms so I traveled all around the state -- I
16 didn't really see those billboards anywhere else except for in
17 my neighborhood.

18 Q. Just in your neighborhood or in the City of Milwaukee?

19 A. Well, maybe they were other places in the City of Milwaukee,
04:49 20 but I saw them -- I noticed them mostly in my neighborhood or my
21 district.

22 Q. And did you receive any complaints from your constituents
23 about these billboards?

24 A. Well, people were asking me who is behind this? Why are
04:49 25 people trying to -- are people trying to tell us not to vote?

1 Where is this coming from?

2 Q. So you actually had constituents convey to you that they
3 felt those billboards were trying to suggest somehow they
4 shouldn't be voting.

04:50 5 A. Right, yes. That was exactly the message.

6 Q. And did you speak publicly about that?

7 A. Yes.

8 Q. What did you do?

9 A. Well, in my testimony against the bill I talked about, I
04:50 10 mentioned the billboards. I also tried to figure out the source
11 of where they were coming from. Never really got a clear answer
12 on that, who was funding it or where it was coming from, but I
13 definitely tried to look into it.

14 Q. Thank you. And let me just ask the last question again.

04:50 15 Just to be clear, you've given us some examples today
16 of issues and concerns where you felt like the legislature and
17 things that were not responsive to minority communities. Are
18 these the only ones or if we had longer than I suspect most
19 people in this room would want to take --

04:50 20 MS. LAZAR: Objection, Your Honor, leading, if we get
21 there.

22 BY MS. ROTKER:

23 Q. Were these the only ones or would you -- are there other
24 examples? I'm not asking you to list them. Are these just
04:51 25 examples?

1 Security card. The second time I didn't have my DD 214,
2 discharge papers. I had to send out for something other than my
3 VA card.

4 Q. When you said the DD 214, what is that?

10:05 5 A. That's the discharge paper you get when you come out of the
6 service.

7 Q. Do you have those on hand or no?

8 A. No, it takes three months to get those.

9 Q. So you have to send away --

10:06 10 A. Send away to get them, yeah.

11 Q. Have you tried to get a Wisconsin state ID card since those
12 two times you tried?

13 A. No, I haven't had a chance to.

14 Q. Why not?

10:06 15 A. I've been -- actually other than my working and taking my
16 kids to school I had things happen in my life like a accident
17 with my two oldest kids. So they've been incapacitated by the
18 accident. So we've been taking care of them. It's just getting
19 too busy right now.

10:06 20 Q. That's an adult child of yours?

21 A. Yes, two of them.

22 Q. And then you also -- do you have grandchildren in the home
23 too?

24 A. We helping taking care of the kids, yeah. The grandkids and
10:06 25 my kids too.

1 racial resentments, that may be movable, as they say in
2 political organizing circles, on the basis of appealing to those
3 sentiments. But I think it would be -- I think it would be
4 unfair in a caricature simply to say anyone who uses an issue --
12:20 5 that may have racial freight attached to it or racial coding is
6 necessarily a racist. I think at a broad brush and it's not --
7 and it's in some ways it's not even a scientific term. We can
8 kind of debate back and forth about what the real intent is of
9 an individual in advancing those claims.

12:21 10 Q. Now, your report also describes the way that voter fraud has
11 been debated in political campaigns as a racially-loaded issue;
12 is that right?

13 A. That's correct.

14 Q. I want to turn to page 39 in your report and what your
12:21 15 report labels as Map 1. Can you tell the Court what this map
16 refers to?

17 A. Yeah. This is a map of billboards on voter fraud that were
18 thrown up in the metro Milwaukee area during the presidential
19 campaign of 2012, in October of 2012 to be precise.

12:21 20 Q. And what was the content of these billboards?

21 A. Billboards were essentially warnings that voter fraud is a
22 crime. I think they officially said "Voter fraud is a felony,
23 and that the penalty for voter fraud is up to 3 1/2 years and a
24 \$10,000 fine."

12:22 25 Q. Where are these billboards primarily located, based on the

1 clustering on this map?

2 A. Right. Well, if you look at the map it's fairly obvious
3 just simple eyeballing that the overwhelming majority are in the
4 City of Milwaukee and clustered on the predominantly
12:22 5 African-American north side of the City of Milwaukee and in many
6 neighborhoods on the pre -- in the predominantly Hispanic south
7 side of Milwaukee.

8 Q. Is there something wrong with reminding people that voter
9 fraud is a crime, Professor Levine?

12:22 10 A. Well, I suppose in the abstract probably not. In principle,
11 probably not. But if you're warning people generally I presume
12 you'd want to -- unless you were making a racial argument about
13 who the likely perpetrators are of this phenomenon, you would
14 likely put these billboards where the voters are. And actually
12:23 15 the vast majority of voters in metropolitan Milwaukee live well
16 outside of those two parts of the City of Milwaukee where the
17 vast majority of these billboards were placed.

18 Q. Isn't Milwaukee the densest area of the metro Milwaukee
19 area? Couldn't the clustering of those billboards simply
12:23 20 reflect population density?

21 A. It is the densest area, but it's not by a long measure the
22 place of where most of the population or where most of the
23 voting-age population lives. About 35 percent of metro
24 Milwaukee's population lives in the City of Milwaukee, a lower
12:23 25 percentage in the clustered neighborhoods of the north side and

1 1080. I think you mentioned this one already, but could you
2 describe what this is?

3 A. Yes. This is the BFS 14 form, which is our internal form as
4 far as the different proofs that are accepted for name and date
12:16 5 of birth, legal presence, identity, and residency.

6 Q. And so where would you find this form?

7 A. At the service center, every window should have a copy of
8 this form when they need to reference it.

9 Q. And who would be referencing it?

12:16 10 A. The staff member at the particular window.

11 Q. In other words, it's not for customers. It's for the people
12 providing service.

13 A. Correct.

14 Q. Okay. According to this form, what would happen if someone
12:17 15 lacks a birth certificate? Does it indicate anything could be
16 done to help that person get a product if they're without a
17 birth certificate?

18 A. It doesn't, I believe -- let's see here.

19 If you look at the bottom of the first page of the
12:17 20 form where it says: "See Trans 102.15. If a person is unable
21 to provide proof of name and date of birth, documentation listed
22 above and the documents are unavailable."

23 Q. And what is Trans 102.15?

24 A. That's an administrative rule, Trans 102, in talking about
12:17 25 issuance of identification cards and driver's licenses.

1 Q. An administrative rule put out by the DOT.

2 A. Yes.

3 Q. So that would be for name and date of birth.

4 If you look at the second page of Exhibit 1080, I see
12:18 5 it has a column for proof of identity.

6 A. Yes.

7 Q. Again, I think you testified that a birth certificate is one
8 of the proofs for identity.

9 A. Not for identity. It's generally a Social Security card or
12:18 10 a driver's license, a passport, things like that.

11 Q. So what if someone did not have a Social Security card or
12 one of those other documents? Is there some exception that can
13 be made?

14 A. Yes. We give the discretion to our supervisors and managers
12:18 15 who can pass that on to the team leaders.

16 For instance, if someone didn't have a Social Security
17 card with them but yet they had a credit card with a signature,
18 a library card, and something else -- can't think of anything
19 off the top of my head, but two or three other documents that
12:18 20 weren't on this list -- a supervisor or manager could use their
21 discretion and accept that as proof of identity.

22 Q. Let's talk about the hierarchy within the customer service
23 center. You mentioned a team leader and a supervisor. So who
24 are the first line-level employees? What are they called?

12:19 25 A. CSRs or customer-service representatives.

1 Q. And who supervises them?

2 A. They would be supervised by an office supervisor or, in the
3 case of our smaller stations, the office supervisor would
4 oversee several of our locations.

12:19 5 Q. And so when someone is in a situation where they need an
6 exception, who do they turn to first?

7 A. Well, after that first level that we just talked about as
8 the CSRs, there's a lead worker at all of our offices and they
9 would turn to that person for making a determination.

12:19 10 Q. And if that person -- if that person, the lead, is not able
11 to make a determination, who do they turn to?

12 A. They would then talk to the supervisor.

13 Q. And does it happen sometimes that the supervisor has further
14 questions with a complicated situation?

12:19 15 A. Right. Many times the supervisor, if they do have
16 questions, can either come to the person that, you know -- my
17 former position or talk to their manager, because there is a
18 manager that oversees the five regions of the state.

19 Q. And if I'm a person who -- back to my situation. I'm coming
12:20 20 in to get a free ID for the first time. I'm having problems
21 because I don't have a birth certificate or my birth certificate
22 has the wrong name on it. How would that get escalated to
23 someone for help at DMV?

24 A. That should get escalated to a supervisor to find out what
12:20 25 the details are and what the issues are with the birth

1 A. Yes.

2 Q. And you know that sometimes the Social Security offices will
3 not give a Social Security card without an ID, right?

4 A. I'm not aware of their procedures but that sounds correct.

02:43 5 Q. I guess I'm asking you're aware of situations that have come
6 to your attention --

7 A. Yes, where customers come back to us and said they could not
8 get a card, yes.

9 Q. I'm going to show you what's been admitted as Exhibit 131.
10 This one I don't have to give around because it's not
11 in the 600s, right?

12 MR. KAWSKI: I have that one, thank you.

13 BY MR. DUPUIS:

14 Q. Do you recognize Exhibit 131? Let me describe it real
02:44 15 quickly. It's an e-mail chain. You're not the author of any of
16 the e-mails but you were cc'd on it. At least on the second
17 response. Not the first e-mail that appears but the two e-mails
18 below it?

19 A. Yes.

02:44 20 Q. Okay. And this is a situation in which an individual had
21 difficulty getting a Social Security card because they didn't
22 have ID, correct?

23 A. Correct.

24 Q. And DMV qualification and issuance department staff member
02:44 25 Sean Diaz wrote an e-mail in response to this, correct?

1 A. Yes.

2 Q. And what's said here is that "if the person doesn't have any
3 of the alternative forms of documentation for proof of identity,
4 and they have the documentation printout from the Social
02:45 5 Security Administration along with all the other required
6 documents, advise them to visit a DMV service center and take
7 all the documents they have and ask to speak with a supervisor."
8 Correct?

9 A. Correct.

02:45 10 Q. And those situations are evaluated on a case-by-case basis,
11 right?

12 A. Yes.

13 Q. And they're talking about a Social Security history printout
14 that's sometimes given by the Social Security Administration --

02:45 15 A. Yes.

16 Q. -- when they won't give somebody a card?

17 A. Yes.

18 Q. And that printout is not listed as an acceptable document
19 for proof of identity in lieu of the actual Social Security
02:45 20 card, right?

21 A. Correct. It is not listed as one of our acceptable proofs,
22 but it does fall unit that category of supervisor approval.

23 Q. Right. So for proof of ID there is some supervisory
24 discretion involved in accepting alternatives to the Social
02:46 25 Security card, right?

1 A. Yes. And I would also add that since we have gone to
2 REAL ID as of January of this year, we've added W-2s to the
3 list, we've added paycheck stubs with full Social Security
4 number, or -- there were two other things that Social Security
02:46 5 accept but it should be in that BFS 14 under the REAL ID
6 documentation, but we'll accept those for proof identity in
7 noncompliant cards as well.

8 Q. You brought up the BSF 14 again. Why don't you take a look
9 at that. I believe that's 1080. And proof of identity is on
02:47 10 the reverse side or page 2 of this document, right?

11 A. Yes.

12 Q. And that's where you say that the -- I was looking and I
13 don't actually see the --

14 A. Right about --

02:47 15 Q. I see it. For the non-REAL ID compliant, right?

16 A. Yup.

17 Q. So, what I was going to ask was, a veterans ID card is not
18 listed separately in the BFS 14, correct? As an acceptable form
19 of identity, right?

02:47 20 A. Correct.

21 Q. But there is the third item down, U.S. Government and
22 military dependent identification card, do you see that?

23 A. Yes.

24 Q. Is a veterans ID card acceptable under that category?

02:48 25 A. We don't have it on the list, but it should be.

1 Q. But it's not on the list now.

2 A. It's not on the list, correct.

3 Q. Now, a homeless person who has no connection with a shelter
4 or social service agency would be unable to satisfy the proof of
02:48 5 residency requirement, correct?

6 A. No. We have a document for homeless shelter documentation.

7 Q. What I am saying is a person who has no connection with a
8 shelter or a social service agency would be unable to satisfy
9 that requirement. They wouldn't be able to use that form,
02:49 10 correct?

11 A. If they don't have an address to where we could, you know,
12 mail the document, we would not be able to mail it to them.

13 Q. And it used to be that you could issue cards without mailing
14 them, correct? In fact, they were issued without mailing.

02:49 15 A. Yes. That all changed in spring of 2012 when we went to a
16 central issuance program.

17 Q. Okay. And that central issuance program, that's basically
18 the cards are now printed and produced in California, correct?

19 A. Correct.

02:49 20 Q. And mailed to the address that people indicate should be the
21 mailing address, correct?

22 A. Their residency address, correct.

23 Q. And at least for a time, hundreds of those products that
24 were mailed out were returned as undeliverable every week,
02:49 25 right?



State of Wisconsin
Department of Transportation

Acceptable documents for proof of identity

Military or
out-of-state driver
license renewal

Motorcycle licenses

Federal medical cards

Tiers of operation

Upload your Fed Med
card

Drivers license/ID
cards

Commercial license

Teen drivers

Vehicles

([en español](#))

The Wisconsin Division of Motor Vehicles (DMV) is issuing driver licenses and ID cards that meet new [federal REAL ID](#) requirements. While all Wisconsin licenses and ID cards are valid for federal uses for the next few years, at some point a REAL ID license or ID card will be required for identification at airports and federal buildings.

The following documents are acceptable proof of identity. Documents presented as proof must be original. Photocopies are not acceptable.

For REAL ID compliant and non-compliant cards:

- A valid (or expired eight years or less) photo driver license or photo identification card issued by Wisconsin or another jurisdiction, except a province of the Dominion of Canada

- U.S. Passport or Passport Card valid or expired 5 years or less and issued at age 16 or older
- Military discharge papers (including certified copy of federal form DD-214)
- U.S. government and military dependent identification card
- Marriage certificate or certified copy of judgment of divorce
- Documents permitted under proof of name and date of birth, if it bears a photograph
- A parent or guardian having legal custody identifies person under the age of 18 and the parent or guardian shows a valid Wisconsin operator's license or ID card
- Transportation Worker Identification Credential (TWIC Card), issued by the Department of Homeland Security/Transportation Security Administration
- A valid photo college ID card from any U.S. university, college or technical college(Must contain student name and photograph)
- Unexpired temporary driving license or ID card receipt, including receipts from other jurisdictions
- Social Security Card issued by the Social Security Administration
- W-2 form including the customer's name, address and SSN
- SSA - 1099 form
- Non SSA-1099 form
- Paystub with the applicants name and entire Social Security Number listed
- Or provide **BOTH** of the requirements below:
 - An unexpired foreign passport with a valid unexpired U.S. visa affixed accompanied by the approved I-94 form documenting the applicant's most recent admittance into the United States
 - A document to demonstrate a non-work authorized status

The department will decline to accept any document presented if it has reason to suspect its authenticity. Questionable documents may require additional review.

Driver Information Section

P.O. Box 7983
Madison, WI 53707-7983

Email [Wisconsin DMV email service](#)

Phone (608) 264-7447

Fax (608) 267-3812



State of Wisconsin
Department of Transportation

Acceptable documents for proof of identity

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The Wisconsin Division of Motor Vehicles (DMV) is issuing driver licenses and ID cards that meet new federal REAL ID requirements. While all Wisconsin licenses and ID cards are valid for federal uses for the next few years, at some point a REAL ID license or ID card will be required for identification at airports and federal buildings.

The following is a non-exhaustive list of documents acceptable as proof of identity. Per Trans 102.15(4)(a), any original and authentic document identifying the person by name and bearing the person's signature, a reproduction of the person's signature, or a photograph of the person is acceptable.

For REAL ID compliant and non-compliant cards:

- A valid (or expired eight years or less) photo driver license or photo identification card issued by Wisconsin or another jurisdiction, except a province of the Dominion

- of Canada
- U.S. Passport or Passport Card valid or expired 5 years or less and issued at age 16 or older
 - Military discharge papers (including certified copy of federal form DD-214)
 - U.S. government and military dependent identification card
 - Marriage certificate or certified copy of judgment of divorce
 - Documents permitted under proof of name and date of birth, if it bears a photograph
 - A parent or guardian having legal custody identifies person under the age of 18 and the parent or guardian shows a valid Wisconsin operator's license or ID card
 - Transportation Worker Identification Credential (TWIC Card), issued by the Department of Homeland Security/Transportation Security Administration
 - A valid photo college ID card from any U.S. university, college or technical college(Must contain student name and photograph)
 - Unexpired temporary driving license or ID card receipt, including receipts from other jurisdictions
 - Social Security Card issued by the Social Security Administration
 - W-2 form including the customer's name, address and SSN
 - SSA - 1099 form
 - Non SSA-1099 form
 - Paystub with the applicants name and entire Social Security Number listed
 - Or provide **BOTH** of the requirements below:
 - An unexpired foreign passport with a valid unexpired U.S. visa affixed accompanied by the approved I-94 form documenting the applicant's most recent admittance into the United States
 - A document to demonstrate a non-work authorized status
 - A government-issued product from a federal, state, county or city agency with the applicant's name and signature.

The department will decline to accept any document presented if it has reason to suspect its authenticity.

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State of Wisconsin
Department of Transportation

Wisconsin driver licenses and identification (ID) cards

How to apply

Motorcycle

Documentation
requirements

Renewal and changes

Lost or stolen

Suspended or revoked

Occupational license

New residents

Driver license/ID
cards

Commercial license

Teen drivers

Vehicles

The Wisconsin Division of Motor Vehicles (DMV) mails all driver license and identification (ID) cards from one production facility.

How long will it be before I get my permanent card in the mail?

You should receive your driver license or ID card within 10 business days. All undeliverable mail is returned to DMV.

Will I be issued a temporary license or ID card?



Paper receipt

- You will leave the DMV customer service center with a paper receipt valid for 45 days.
- The photo receipt is acceptable photo identification for voting and serves as your license or ID until your card arrives in the mail.
- Customers who renew an existing license or ID card will also leave the DMV customer service center with their expired (or soon to be expired) card, invalidated with a hole punch by the DMV processor.

NOTE: The receipt is not acceptable as proof of identity for a Social Security Number replacement card. If you plan to request a Social Security Number replacement card, please wait for your driver license or ID card to arrive in the mail before visiting a Social Security office.

Wisconsin driver license and ID cards issued Fall 2015



Visioning The Future:
Election Administration in Wisconsin in 2014

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**State of Wisconsin
Government Accountability Board**

**WISCONSIN'S
2009-2014 ELECTION
ADMINISTRATION
PLAN**

**October 1, 2009
September 30, 2014**



A Strategic Direction for Election Administration in Wisconsin
Wisconsin Dynamic Plan for Achieving the Help America Vote Act of 2002



submitted to the

United States Election Assistance Commission
1225 New York Avenue, NW, Suite 1100
Washington, DC 20005

October 2009

Visioning The Future:
Election Administration in Wisconsin in 2014

Visioning The Future:
Election Administration in Wisconsin in 2014

**WISCONSIN ELECTION ADMINISTRATION
CHARACTERISTICS AT-A-GLANCE**
(As of August 2009)

- 5.6 million residents
- 1,922 local election officials
- 4.3 million voting age population
- 20,000 to 30,000 poll workers
- 3.5 million registered voters
- 2,822 polling places
- 1,850 towns, villages and cities
- 3,600 wards/precincts reporting election data

Note: These numbers are subject to change from one election to another.

GUIDING POLICIES, PRINCIPLES AND VALUES

The development of Wisconsin's 2009-2014 Election Administration Plan was guided by the following core policies, principles and values. The 2009-2014 Plan must:

- ▲ **Improve Election Administration**
Examine initiatives to increase the efficiency and effectiveness of elections
- ▲ **Preserve, Protect and Advance Voting Integrity**
Ensure open, fair and transparent elections
- ▲ **Improve Voter Participation and the Voting Experience**
Explore alternatives and options for casting votes
- ▲ **Improve Administrative Efficiency**
Reduce election-related burdens on local election officials
- ▲ **Improve Collaboration with Our Customers and Policy Makers**
A continuing commitment to consult, collaborate with and seek advice from county and municipal election officials, members of the state legislature, voters, other concerned and interested parties, elected officials and advocacy groups.

1. For a person born in Wisconsin, a copy of the person's Wisconsin birth certificate issued and certified in accordance with s. 69.21, Stats.;

2. For a person born outside Wisconsin, a certified copy of his or her birth certificate or the equivalent document from the state, territory or foreign country of birth;

Note: Neither a hospital birth certificate nor baptismal certificate satisfies this requirement. Effective November 1, 1986 s. 69.24 (1) (a), Stats., prohibits Wisconsin hospitals from issuing a document which appears to be a birth certificate.

3. A US passport;

4. A passport issued by a foreign country that bears an identifiable photograph of the person and identifies the person's first and last names, and the person's day, month and year of birth;

5. A Wisconsin operator's license bearing an identifiable photograph of the person;

6. A Wisconsin identification card issued under s. 343.50, Stats., bearing an identifiable photograph of the person;

7. A federal I-151 or I-551 "alien registration receipt card";

8. A federal I-94 "parole edition" or "refugees version" arrival-departure record, together with a certification, on the department's form, by the person, of the person's name and date of birth, a copy of a U.S. department of state refugee data center reception and placement program assurance form and a letter from the person's sponsoring agency on its letterhead, supporting the person's application for a Wisconsin ID or driver license and confirming the person's identification. Applicants who are unable to provide a reception and placement program assurance form may be issued a license, but only after their identification has been confirmed by the U.S. immigration and naturalization service;

9. A U.S. certificate of naturalization;

10. A certificate of U.S. citizenship;

11. A federal temporary resident card or employment authorization card;

12. A notification of birth registration issued by the Wisconsin division of health or a Wisconsin county or city health department;

13. A federal I-181 "memorandum of creation of lawful permanent residence."

14. A northern marina card;

15. An American Indian card;

Note: Neither tribal issued cards nor U.S. Department of Indian Affairs issued cards are acceptable.

16. An operator's license or identification card of another jurisdiction that is valid or expired 4 years or less, bearing an identifiable photograph and signature, or reproduction of the signature of the person.

17. A court order with full name, date of birth and court seal.

Note: Examples include, but are not limited to, adoption document, name change document, or gender document. This does not include abstract of criminal or civil conviction.

18. An armed forces of the United States identification card issued to military personnel.

19. A Mexican voter registration card bearing an identifiable photograph and signature, or reproduction of the signature of the person.

(b) If a person is unable to provide documentation under par. (a), and the documents are unavailable to the person, the person may make a written petition to the administrator of the division of motor vehicles for an exception to the requirements of par. (a). The application shall include supporting documentation required by sub. (4) and:

1. A certification of the person's name and date of birth on the department's form;

2. An explanation of the circumstances by which the person is unable to provide any of the documents described in par. (a); and

3. Whatever documentation is available which states the person's name and date of birth.

(c) The administrator may delegate to the administrator's subordinates the authority to accept or reject such extraordinary proof of name and date of birth.

Note: Form MV3002 certification of name and date of birth.

(4) PROOF OF IDENTITY. One of the following is satisfactory proof of identity:

(a) A supporting document identifying the person by name and bearing the person's signature, a reproduction of the person's signature, or an identifiable photograph of the person. Acceptable supporting documents include:

1. A driver education course completion certificate;

2. An operator's license, including an out-of-state license bearing a photograph of the person;

3. Military discharge papers (including certified copy of federal form DD-214);

4. A U.S. government and military dependent identification card;

5. A state-issued photo identification card;

6. An employee photo identification card;

7. A student photo identification card;

8. A U.S. merchants service photo identification card;

9. A copy of the person's federal or state income tax return;

10. A professional license;

11. A marriage certificate or certified copy of judgment of divorce;

12. An international driver's license;

13. A social security card issued by the social security administration;

Note: Metal or other duplicate Social Security Cards are not acceptable.

14. A credit card;

15. A private investigator's license;

16. A life insurance policy;

17. A canceled check;

18. A welfare card;

19. A medicaid card;

20. A Canadian social insurance card.

21. Identification card issued by a foreign consulate bearing an identifiable photograph and signature, or reproduction of the signature, of the person.

(b) Any of the following supporting documents identifying the person by name:

1. A certified school record or transcript.

2. A vehicle title issued 30 or more days prior to the date on which it is presented to the department as proof of identity under this section.

Note: Proof of registration is not sufficient.

3. A prison release document.

4. An affidavit from a physician who testifies as to the person's identity and to have known the person for more than 2 years, together with copies of the physician's medical chart for the person.

(c) As an alternative to par. (a) or (b), the department may accept the following as satisfactory proof of identity for purposes of this subsection:

1. The person is personally known to the license examiner;

2. The person is applying by mail to reinstate a suspended license which is in the actual possession of the department, the person's name, as shown on the license, is unchanged, the person is still a Wisconsin resident, and the suspended license itself is not expired, altered, mutilated or otherwise in a condition unsatisfactory for proper use;

3. The person is applying for an operator's license or identification card, is identified in person by the person's spouse, and the spouse presents a valid Wisconsin operator's license or identification card issued by the department; or

4. The person is applying for an operator's license or identification card, is identified, in person, by a parent, child, or guardian having legal custody, and the parent, child or guardian shows a valid Wisconsin operator's license or identification card issued by the department.

Note: These alternatives are not satisfactory proof of name and date of birth under sub. (3).

(5) **PROOF OF SOCIAL SECURITY NUMBER.** (a) Each person who applies for an operator's license is required to provide his or her social security number, except as provided in pars. (b) and (c). The department may verify the number with the federal social security administration prior to acceptance for issuance of an operator's license or identification card. The original social security card or other documentation satisfactory to the department to prove the person's social security number shall be presented to the examiner for verification of the number, when any of the following apply:

1. A duplicate social security number is found on the department's driver files and assigned to another person;

2. The social security number provided on the person's current application does not match the number provided by the person on a previous application that is recorded on the person's driver file;

3. The social security number being submitted does not match the format of social security numbers issued by the federal social security administration.

(b) The department shall issue a special number, in lieu of the social security number, to identify the person when the person's seriously held religious convictions do not allow them to provide a social security number to the department. When the person objects to providing a social security number due to a religious conviction, the person shall complete, sign, and date a statement certifying the objection on a form provided by the department.

Note: See s. 343.14 (2) (b), Stats. Form MV3415 Religious conviction exemption request.

(c) The department may issue a special number, in lieu of the social security number, to identify the person when the person has not been issued a social security number or the social security number is not available, and the person is being issued an original instruction permit and the person does not have an existing driver file in Wisconsin. The person is required to provide his or her social security number on any subsequent application following the original issuance of the instruction permit.

(6) **TEMPORARY DRIVER RECEIPT.** The department may issue a temporary driver receipt to a person who is temporarily unable to meet the identification requirements of sub. (3). The temporary driver receipt shall state the date of issue, shall be clearly marked "NOT VALID FOR IDENTIFICATION," and shall be validated for the operation of a vehicle for a stated period of up to 60 days from the date issued. The person may complete his or her license application within this period by presenting proof of the person's name and date of birth in accordance with sub. (3) (a). For good cause shown, the department may renew the driving receipt once for an additional period of no more than 30 days. This subsection does not prohibit a person from proceeding under sub. (3) (b). This subsection applies only to persons who meet all of the following:

(a) Were previously licensed in another jurisdiction who surrender to the department the driver's license issued by the other jurisdiction.

(b) Are unable to immediately provide proof of name and date of birth in accordance with sub. (3) (a), but state that they will be able to do so.

(c) Submit an otherwise complete and acceptable application, including the proof of identity required by sub. (4) and social security number required by sub. (5).

Note: Form MV3432, Receipt.

(7) **GENERAL DOCUMENT CONDITIONS.** All documents offered by persons applying for licenses in accordance with this section shall be original documents, unless otherwise expressly allowed. Certified copies of government documents shall bear an original certification and the seal of the appropriate agency, or otherwise exhibit evidence to the satisfaction of the department that the document is an authentic, accurate and unaltered copy of the original government document. Mutilated, altered or uncertified photocopies of documents are not acceptable.

(8) **FOREIGN LANGUAGE DOCUMENTS.** Documents offered to meet the requirements of sub. (3) or (4) which are in a foreign language shall be accompanied by a photocopy of the foreign language document, to be retained by the department, and by a written English language translation, on the form provided by the department, that is certified as accurate by the translator. The person applying for a license may not certify the translation. The administrator may waive the written translation if the translation is made by an authorized and qualified employee of the department.

Note: Form MV3452 Foreign language document translation certification.

History: Cr. Register, January, 1984, No. 337, eff. 2-1-84; emerg. am. eff. 6-24-86; r. and rec. Register, December, 1990, No. 420, eff. 1-1-91; am. (6) (intro.), Register, January, 1993, No. 445, eff. 2-1-93; am. (3) (a) 5, 6, 11, (4) (intro.), 2., 4. to 8., 13., 19., (5) (a) (intro.), cr. (3) (a) 14. to 18., (4) (intro.), (a) 20., (b), renum. (4) (b) (intro.), 1., 4., 6. and 7. to be (4) (c) (intro.), 1. to 4. and am. (4) (c) (intro.), r. (4) (b) 2., 3., 5., Register, January, 1997, No. 493, eff. 2-1-97; am. (2) (a), (c) (intro.), 7., (3) (a) (intro.), 8., 16., (3) (b) 1., 3., (c) and (4) (a) 1., (4) (b) 2., (6) (intro.) and (b), cr. (3) (a) 19., (4) (a) 21, Register, December, 1999, No. 528, eff. 1-1-00; emerg. am. (3) (a) 8., eff. 12-21-01; **CR 02-005; am. (3) (a) 8, Register May 2002 No. 557, eff. 6-1-02; corrections in (2) (c) 4. and 5. made under s. 13.93 (2m) (b) 7., Stats., Register May 2002 No. 557.**

Trans 102.16 Operator's license and license endorsement issuance periods.

(1) **ORIGINAL, REINSTATED AND PROBATIONARY LICENSES.** Reinstated licenses, probationary licenses, and original licenses other than instruction permits and license endorsements shall expire 2 years from the licensed person's next birthday.

Note: See s. 343.20 (1) (a), Stats.

(2) **EYESIGHT TESTS.** The eyesight test shall be given to each person who applies for renewal of a 2, 4 or 8 year license at the time application is made.

Note: See s. 343.16 (3) (a), Stats.

(3) **RENEWED REGULAR, COMMERCIAL DRIVER AND MOTORCYCLE ONLY LICENSES.** Regular, commercial and motorcycle only licenses shall expire 8 years from the expiration date of the license being renewed if the license is renewed prior to its expiration, or 7 years from the person's next birthday in all other circumstances, except as otherwise provided in this section.

(3m) **LICENSE EXTENSIONS.** A regular license issued by the department may be extended by the department for 4 years from the expiration date of the license if the department has selected the license for 4 year extension rather than renewal in order to balance the number of licenses that will expire in future years. The department may consider a person's driving history in deciding whether to extend the person's license. Vision examinations may not be required for extensions.

Note: s. 343.20 (1) (f), Stats., provides that this extension program sunsets on December 31, 2001.

(4) **LICENSE RENEWAL.** No person may renew:

(a) An operator's license more than one year prior to the expiration date of the license.

(b) A probationary license or special restricted license more than 90 days prior to the expiration date of the license.

(5) **NEW STATE RESIDENTS.** Original operator's licenses issued under s. 343.20 (1) (e), Stats., shall expire 3 years after the licensed person's next birthday.

Note: Section 343.20, Stats., provides for licensing of qualified drivers previously licensed in other jurisdictions.

(6) **SPECIAL RESTRICTED LICENSES.** Special restricted license renewals shall be issued to expire as follows:

**ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES**

CR 06-128

The Wisconsin Department of Transportation adopts an order to repeal TRANS 102.15(3)(a)16., 19. and 20., (4)(a)1., 6., 7., 12., 14., 18., 19., 21. and 22., (b), (c)(intro.), 1., 3., 4. and 5., (4m)(a) and (e), and (8); renumber TRANS 102.14(3); renumber and amend TRANS 102.15(4)(c)2.(intro.); amend TRANS 102.15(3)(a)2. and 4., (4)(a)2. and 5.; and create TRANS 102.14(3)(b), and 102.15(3)(a)21., (4)(a)24. and (4m)(f), relating to proof of identity.

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: ss. 340.01(37) and (40), 343.01(2)(g), 343.05(4)(b) and (c), 343.06(1)(k), 343.14 and 343.50(2), Stats.

Statutory authority: ss. 85.16, 343.02, 343.05(4)(c), 343.06, 343.14 and 343.50, Stats.

Explanation of agency authority: 2005 Wisconsin Act 126 requires that a person applying for a driver's license (DL) or identification card (ID) provide documentary proof of citizenship or legal presence in the United States. Altering the list of documents acceptable as proof of name and date of birth, identity, residency, and Social Security number will serve two purposes:

1. Making documents that could be used by persons without legal presence in this country unacceptable.
2. Conforming the list of acceptable documents to what is used in other states and set forth in the American Association of Motor Vehicle Administrator (AAMVA) standards. The federal government will likely use AAMVA standards to determine state compliance with REAL ID.

Current law also prohibits the Department from issuing a driver's license or identification card to any person who is not a resident. It should be noted that any nonresident of the United States may operate on an international driving permit, and a resident of another state may operate on a license issued by that other state for up to one year, and are exempt from licensing requirements of Chapter 343, Stats.

Related statute or rule: ss. 343.05, 343.06, 343.14 and 343.20, Stats., and ch. Trans 102.

Plain language analysis: This proposed rule making limits the list of acceptable documents for proof of name and date of birth, identity, residency, and Social Security number to be consistent with other states and standards established by the American Association of Motor Vehicle Administrators (AAMVA). The rule making establishes a

minimum duration stay for temporary visitors of one year for a driver's license or six months for an identification card and those applicants must have at least six or three months, respectively, of that authorized stay remaining to be eligible; temporary visitors are immediately eligible for those documents if their minimum legal stay is equal to or longer than those minimum durations.

Summary of, and preliminary comparison with, existing or proposed federal regulation: Adopting the AAMVA list of acceptable documents for proof of name and date of birth, identity, residency, and Social Security number moves Wisconsin towards compliance with the federal REAL ID Act (Public Law 109-013). REAL ID also requires that DL/IDs issued to temporary visitors expire on the date their authorized stay ends (i.e., a "temporary license").

Comparison with Rules in Adjacent States: All states will be required to comply with REAL ID by May 11, 2008 or their citizens will not be able to use their driver's license (DL) or identification card (ID) for any federal purpose such as boarding airplanes or entering federal buildings. For temporary visitors, surrounding states have the following requirements for minimum length of stay and temporary licenses:

Michigan: No legal presence required (no minimum length of stay or temporary license requirement). Michigan presumes that any person who obtains employment intends to remain in the state. MCLS 257.51a. Michigan law prohibits issuing a driver's license to a "foreign exchange student." MCLS 257.303(1)(h).

Minnesota: No minimum length of stay required to be eligible for a driver's license. Licenses for temporary visitors are issued for the same amount of time as citizens (i.e., four years), with an end date included on the license for the end of the authorized stay. If a person's authorized stay ends before the regular expiration date of the license, the license is cancelled when the authorized stay ends.

Illinois: Temporary visitor's driver's licenses may be issued to any foreign national authorized to be in the country for at least one year and having at least six months of the authorized stay remaining. 625 ILCS 5/6-105.1, 92 Ill. Adm. Code 1030.11(d).

Iowa: Temporary visitors must be authorized to be in the country for at least 30 days to be eligible for a driver's license. The term of the DL/ID is limited to the length of authorized stay, not to exceed two years. Iowa Code 321.196.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: N/A

Analysis and supporting documentation used to determine effect on small businesses: This is not expected to have any significant impact on small businesses, as the list of acceptable documents for proof of name and date of birth, identity, residency, and Social Security number is being changed to align with the upcoming legal presence requirements. In addition, temporary visitors may operate for up to one year on an International Driving Permit, so the minimum length of stay requirement will not impact drivers licensed in their home countries. Any temporary visitor whose length of stay goes beyond one year would be eligible for a driver's license.

Effect on small business: This rule making will have no effect on small businesses. The Department's Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect and anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands. The Department estimates that there will be no fiscal impact on state revenues or liabilities or any costs incurred by the private sector.

Agency contact person and copies of proposed rule: Copies of the proposed rule may be obtained, without cost, by writing to Gary Guenther, Department of Transportation, Bureau of Field Services, Room 266, P. O. Box 8917, Madison, WI 53708-8917. You may also contact Mr. Guenther by phone at (608) 266-2743 or via e-mail: gary.guenther@dot.state.wi.us.

TEXT OF PROPOSED RULE

SECTION 1. Trans 102.14(3) is renumbered Trans 102.14(3)(a).

SECTION 2. Trans 102.14(3)(b) is created to read:

Trans 102.14(3)(b)1. A person whose legal presence or authorized stay in this country is a period of 12 months or less and ends not more than 6 months after he or she applies for an operator's license is not a resident of this state within the meaning of s. 343.01(2)(g), Stats.

2. A person whose legal presence or authorized stay in this country is a period of 6 months or less and ends not more than 3 months after he or she applies for an identification card is not a resident of this state within the meaning of s. 343.01(2)(g), Stats.

SECTION 3. Trans 102.15(3)(a)2. and 4. are amended to read:

Trans 102.15(3)(a)2. For a person born ~~outside Wisconsin~~ in another jurisdiction, other than a province of the Dominion of Canada, a certified copy of his or her birth certificate or the equivalent document from ~~the state, territory~~ that other jurisdiction or

~~foreign country of birth~~ a certificate of birth abroad issued by the U.S. department of state (federal form FS-545 or DS-1350);

4. A valid, unexpired passport issued by a foreign country with federal I-551 resident alien registration receipt card or federal I-94 arrival and departure record that bears a photograph of the person and identifies the person's first and last names, and the person's day, month and year of birth;

SECTION 4. Trans 102.15(3)(a)16., 19. and 20. are repealed.

SECTION 5. Trans 102.15(3)(a)21. is created to read:

Trans 102.15(3)(a)21. Department of homeland security/transportation security administration transportation worker identification credential.

SECTION 6. Trans 102.15(4)(a)1. is repealed.

SECTION 7. Trans 102.15(4)(a)2. and 5. are amended to read:

~~An operator's~~ A valid operator's license, including a license from another jurisdiction ~~that is valid or expired 4 years or less, except a province of the Dominion of Canada,~~ bearing a photograph of the person;

NOTE: Temporary driving receipts from other jurisdictions are not acceptable. "Another jurisdiction" is defined at s. 340.01(41m), Stats.

5. A valid photo identification card issued by Wisconsin or another jurisdiction ~~that is valid or is expired 4 years or less, except a province of the Dominion of Canada,~~ bearing a photograph of the person;

SECTION 8. Trans 102.15(4)(a)6., 7., 12., 14., 18., 19., 21. and 22. are repealed.

SECTION 9. Trans 102.15(4)(a)24. is created to read:

Trans 102.15(4)(a)24. Department of homeland security/transportation security administration transportation worker identification credential.

SECTION 10. Trans 102.15(4)(b) is repealed.

SECTION 11. Trans 102.15(4)(c)(intro.) and 1. are repealed.

SECTION 12. Trans 102.15(4)(c)2.(intro.), and a. to c. are renumbered Trans 102.15(4)(c)(intro.) and 1. to 3. and, as amended, Trans 102.15(4)(c)(intro.) is amended to read:

Trans 102.15(4)(c)(intro.) ~~The~~ A person ~~is~~ applying without a personal appearance to reinstate a suspended or revoked license or identification card or to renew a license subject to s. Trans 102.03(2) and (5) or obtain a duplicate license or identification card, if all of the following apply:

SECTION 13. Trans 102.15(4)(c)3., 4. and 5. are repealed.

SECTION 14. Trans 102.15(4m)(a) and (e) are repealed.

SECTION 15. Trans 102.15(4m)(f) is created to read:

Trans 102.15(4m)(f) Mortgage documents for a residential real property located in Wisconsin.

SECTION 16. Trans 102.15(8) is repealed.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of March, 2007.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation

Wisconsin Legislature

CR 06-128

Status: Final**Register Entries**

Date	Register	File
4/30/2007	616B, Rules Published	Transportation (CR 06-128)
4/14/2007	616A, Rules Filed	Transportation (CR 06-128)
1/31/2007	613B, Rules Submitted to Legislature	Text
12/14/2006	612A, Rulemaking Notices	Text

History

Date	Action	Journal
11/30/2006	Received by Legislative Council.	
12/18/2006	Report sent to Agency.	
11/30/2006	Received by Legislative Council.	
12/18/2006	Report sent to Agency.	

Assembly Actions

Date / House	Action	Journal
1/10/2007 Asm.	Report received from Agency	
1/18/2007 Asm.	Referred to committee on Homeland Security and State Preparedness	
1/29/2007 Asm.	Public hearing scheduled.	
3/6/2007 Asm.	Executive session held.	
3/6/2007 Asm.	Review period waived, Ayes 7, Noes 0.	

Senate Actions

Date / House	Action	Journal
1/10/2007 Sen.	Report received from Agency	
1/12/2007 Sen.	Referred to committee on Transportation, Tourism and Insurance	
2/12/2007 Sen.	No action taken	
5/1/2007 Sen.	Effective date 5-1-2007	

Content subject to change after proofing by Chief Clerk staff.

Decision Item (DIN) - 5505

Decision Item (DIN) Title - ID for Voting Purposes

NARRATIVE

SUMMARY: The Department requests \$164,200 in FY 18 in appropriation 563, s.20.395 (5)(cq) Wis Stats., to fund the cost of information technology changes needed to produce an ID card to be identified for voting purposes only.

DIN 5505: ID FOR VOTING PURPOSES

SUMMARY: The Department requests \$164,200 in FY 18 in appropriation 563, s.20.395 (5)(cq) Wis Stats., to fund the cost of information technology changes needed to produce an ID card to be identified for voting purposes only.

DISCUSSION:

Driver licenses and identification cards are widely used in the financial, commercial, and retail environments as evidence of identify. 2011 Wisconsin Act 23 established the requirement for voters to present proof of identification prior to voting such as an unexpired driver's license or Wisconsin identification card (ID). Act 23 also required the Department to provide an ID at no cost if the applicant requested the card for the purpose of voting. The Department began issuing IDs for voting purposes on July 1, 2011. 2011 Wisconsin Act 75 provided for free duplicate IDs at no cost to the applicant for voting.

Unless the applicant indicates the ID will be used for voting purposes, under current law the cost for an ID is \$18 while the cost for a duplicate ID is \$6. The Department collects an additional \$10 per card for the issuance of the card for a total of \$28 and \$16, respectively.

Prior to the passage of Act 23, there were two conditions which allowed the issuance of an ID card at no cost to the applicant. In general, ID cards at no cost to the applicant are available if the Department cancels the valid driver's license after an exam related to health conditions which may impair a driver's ability to safely operate a motor vehicle. In addition, the Department may issue an ID card at no cost if a driver surrenders their license for health related reasons.

As can be seen in Table 1, total revenues from ID card issuance declined from almost \$3.2 million in FY 10 to \$437,000 in FY 15, or slightly more than 86 percent. FY 10 was the last full year prior to the implementation of providing free IDs for voting. Revenues for FY 13 reflects the first full year of ID card revenue as affected by the provision of free IDs for voting.

**Table 1
ID card Revenue between FY 10 and FY 15**

Revenue	FY 10	FY 11	FY 12	FY 13	FY 14	FY 15	Percentage Change FY 10 to FY 15
ID Revenue	\$1,910,100	\$1,880,200	\$531,400	\$299,200	\$258,700	\$269,000	-85.9%
Est Issuance Fee Revenue	1,267,200	1,248,600	420,600	185,300	161,700	168,000	-86.7%
Total	\$3,177,300	\$3,128,800	\$952,000	\$484,500	\$420,400	\$437,000	-86.2%

In FY 2015, 83 percent of IDs were issued at no charge to the applicant. Of those, it is estimated 99.4 percent related to voter identification. As Wisconsin ID cards can be used for a variety of purposes besides voting, the Department assumes ID card holders are gaining value beyond the use of the card for voting purposes. If free ID cards were marked for "Voting Purposes Only" this may discourage people from obtaining a free ID for purposes in addition to voting.

The American Association of Motor Vehicle Administrators (AAMVA) develops driver license and identification card standards that enhance document security features, reduces the potential for document tampering and identify theft, and establishes consistency between jurisdictions as well meeting the requirements of the federal Real ID Act of 2005.

The Department has a multi-year contract with a vendor to produce driver licenses and identification cards. Under the current contract, each license or ID issued costs \$3.10 per card. The Department proposes issuing "Voting Purposes Only," IDs on card stock which does not contain all of the security features included in a

REAL-ID compliant ID card. As a result, the cost per card under this proposal would decrease to \$2.60 per card. In order to implement this provision computer systems at the vendor and at DMV will need to be modified at an estimated one-time cost of \$164,200 with nine months needed to implement the changes.

In FY 2015, an average of 8,047 free ID cards were issued each month. If free IDs were specially marked for voting purposes, the Department assumes 30 percent of applicants will opt for an ID which requires payment. Based on FY 2015 data, the proposal would result in additional revenues to the transportation fund of \$194,000 in FY 18 and \$775,800 in FY 19.

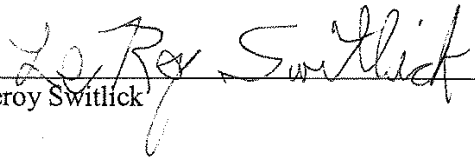
DECLARATION OF LEROY SWITLICK

I, Leroy Switlick, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I make this Declaration on my own personal knowledge.
2. On September 2, 2016, I was able to get a ride to go to the Wisconsin DMV on Chase Ave. in Milwaukee. The last two times I went to DMV I paid for a cab each way, and I did not want to pay for a cab again because I am on a fixed income.
3. When I got there, DMV said their computer systems were down and had been down all day, and because of that they were not processing ID applications and did not expect to for the rest of the day. They did not offer any way that I could get ID without going back again.
4. This was the third time I went to DMV to try to get an ID, and the third time I was not able to do so.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 2, 2016.


Leroy Switlick


DECLARATION OF KRISTIN HANSEN

I, Kristin Hansen, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I make this Declaration on my own personal knowledge.
2. I work in development for the ACLU of Wisconsin.
3. On September 2, 2016, I gave Leroy Switlick a ride to the Wisconsin DMV on Chase Ave. in Milwaukee so that he could try to get ID to vote.
4. When we got there, the DMV employee said their computer systems were down statewide and had been down for five hours, and because of that they were not processing ID applications. When I asked how long the computers would be down for, she said that she had no idea.
5. Because Mr. Switlick was having trouble standing, he went outside to lean against the building to rest. Then I went back in again to see if there was any way to at least get him forms to fill out at home.
6. When I went back in, I saw a sign posted that DMV was not issuing IDs because of computer problems. I took a photograph of that sign. "Attachment A" is a true and correct copy of the photograph I took at 1:25 pm.
7. Even though the Chase Ave. DMV is in a heavily Latino community, the sign was only posted in English.
8. As the DMV employee – who was not wearing a name tag - gave me the ID application form, I asked how many people had been turned away today. She did not answer. I said "I hope people aren't getting mad at you." She said, "No, they are nice because they know there's nothing we can do about it. It happens all the time."

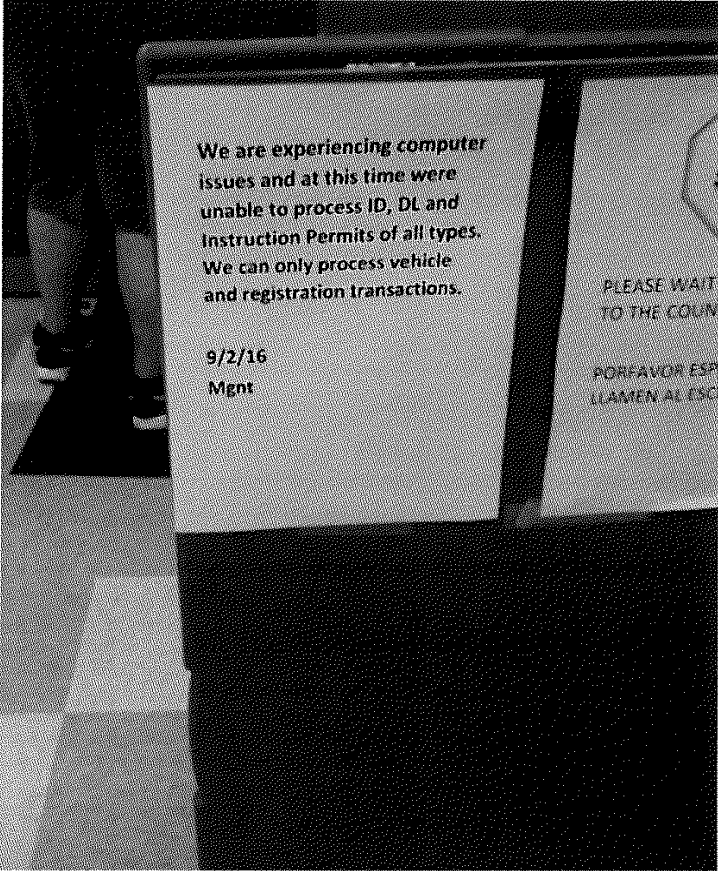
I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept. 2, 2016.



Kristin Hansen

ATTACHMENT A



No. 16-3003 [Consolidated with No. 16-3052]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

SCOTT WALKER, et al.,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 2:11-cv-01128-LA
The Honorable Lynn S. Adelman, Presiding

DECLARATION OF MOLLY MCGRATH

I, Molly McGrath, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I make this Declaration on my own personal knowledge.
2. I am a member of the League of Women Voters of Wisconsin.
3. I frequently help Wisconsin citizens to exercise their right to vote by providing them with information about Wisconsin's Voter ID law, assisting them in obtaining documents needed to obtain an ID that complies with the Voter ID law, providing transportation to DMV offices, and helping them to navigate the process for obtaining ID at DMV offices.
4. I have assisted Wisconsin citizens in obtaining IDs needed to vote,

including assisting citizens in navigating the current ID Petition Process (IDPP) at DMV offices, in August and September 2016.

5. I have observed that DMV employees appear to be unfamiliar with the current IDPP or fail to initiate it in appropriate circumstances. I have observed DMV employees failing to initiate the IDPP after confirming that the citizen lacks a birth certificate or passport. I have observed that DMV employees have been uncertain as to how to carry out the IDPP and have not advised the citizen that he or she will promptly receive a credential to use for voting.

6. For example, on September 22, 2016, I accompanied Zack Moore to the Wisconsin DMV office at 2001 Bartillon Drive in Madison to obtain a Wisconsin ID, which he needs in order to vote in the upcoming November election.

7. I was present and personally observed Mr. Moore's encounter with the DMV employees on September 22, 2016, as he attempted to obtain a Wisconsin ID. I also interacted with the DMV employees who were assisting Mr. Moore.

8. I observed that the DMV employees who assisted Mr. Moore failed to initiate the IDPP and appeared to lack familiarity with the IDPP after I inquired about it.

9. Mr. Moore left the DMV without receiving an ID or other credential that will allow him to vote, despite presenting an Illinois ID, a social security card and proof of Wisconsin residence in the form of a paycheck stub. He also did not receive any promise or assurance from DMV employees that an ID or other voting credential would be mailed to him before the election in November if he initiated the IDPP. The DMV

employees advised that if he entered the IDPP, it would take 6-8 weeks for him to obtain a state ID and did not advise that he would receive another credential allowing him to vote in the meantime. I note that on the date of this encounter, September 22, 2016, the November election was less than seven weeks away.

10. I lawfully audio-recorded Mr. Moore's encounter with the DMV employees on my cell phone on September 22, 2016. I have preserved the audio recording and can make it available to the Court if requested.

11. A true and correct transcription of my audio recording of Mr. Moore's encounter with the DMV employees is attached as Exhibit A.

12. On September 23, 2016, I accompanied Claudelle Boyd to the DMV office at Sheboygan Avenue in Madison. Mr. Boyd was seeking a Wisconsin ID so that he can vote in the November election. Mr. Boyd's experience also illustrates the inadequacy of the IDPP, as currently implemented.

13. Mr. Boyd's birth certificate records his name as "Clardelle" in error. His name is listed correctly as "Claudelle" on his Illinois state ID, social security card, mail (proof of residence), medical insurance card, and marriage certificate.

14. Mr. Boyd previously applied for and received a Wisconsin ID that was issued in the name of "Clardelle."

15. Mr. Boyd went to the DMV on September 23 to attempt to obtain a state ID under his real name, "Claudelle Boyd." DMV employees refused to issue an ID with Mr. Boyd's correct name, stating that they were required to use the name on the "source document," which they said was the birth certificate.

16. I asked the DMV employee how Mr. Boyd could get an ID to vote and he suggested that Mr. Boyd use the existing Wisconsin ID, which lists an incorrect name. I pointed out that using the incorrect ID would require Mr. Boyd to vote under an incorrect name, in violation of Wisconsin law. The DMV employee stated that he was not familiar enough with the voting laws to know whether it would be legal for Mr. Boyd to vote using an incorrect name.

17. The DMV employee advised that Mr. Boyd's only options for obtaining a correct Wisconsin ID were to either obtain a passport listing his correct name or to get his birth certificate corrected.

18. I asked the DMV employee if Mr. Boyd could use the IDPP to obtain a credential to vote under his correct name. The DMV employee advised that they could not use the IDPP because Mr. Boyd has a birth certificate, even though the birth certificate lists an incorrect name for Mr. Boyd.

19. On September 21, 2016, I assisted Noreen Glover in obtaining an ID to vote at the Sheboygan Avenue DMV office in Madison. Ms. Glover's experience also reveals the unpredictability and inconsistencies in how DMV employees are carrying out the IDPP.

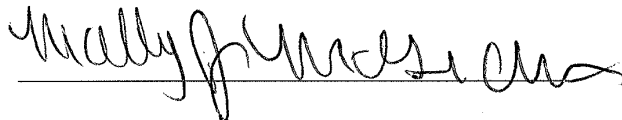
20. Ms. Glover had an original birth certificate, a photocopy of her social security card, a photocopy of her Illinois ID, and proof of residence. The first DMV employee we encountered advised Ms. Glover that she needed to present an original document showing proof of identity. I stated to the DMV employee that I believed we could "just show up with whatever papers we had and then we get an ID to vote?" The

DMV employee advised that he was unsure if the IDPP was available for a person who has a birth certificate. He passed us along to the next window. The next DMV employee accepted Ms. Glover's photocopies as proof of identity, and issued a receipt for a Wisconsin ID to Ms. Glover. When I asked the employee if the photocopies were acceptable, he stated "typically no...I can do it." He also advised Ms. Glover to obtain a replacement social security card as soon as possible.

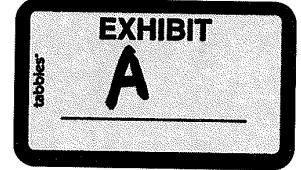
21. I lawfully audio-recorded Ms. Glover's encounter with the DMV employees on my cell phone on September 21, 2016. I have preserved the audio recording and can make it available to the Court if requested.

22. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2016.

A handwritten signature in cursive script, appearing to read "Molly McGrath", written over a horizontal line.

Molly McGrath



DMV Audio Transcript 9-22-2016

Molly: So what they'll...

DMV Employee: Hi, How are you today?

Man: I'm well

DMV Employee: What can I do for you today?

Man: I came to get a Wisconsin ID

DMV Employee: A Wisconsin ID, ok do you have an ID in a different state?

Man: Yeah, Illinois

DMV Employee: Illinois. Alright you'll need a couple things. Birth Certificate or passport, and you need proof of Wisconsin residency which would be a utility bill, a bank statement, a lease statement, things like that. You have to have those two things before you can get a Wisconsin ID.

Man: Well, I got a pay check stub with my address on it, and my Social Security Card.

DMV Employee: It has to be a birth certificate or passport.

Man: So, my birth certificate is in Illinois.

DMV Employee: You're going to have to get it. We can't issue one without it.

Molly: Is there not the petition process available?

DMV Employee: No, it, um...

lots of background noise, other conversations, announcer

Other female voice, DMV Employee 2: Alright, so never had an ID before in Wisconsin, right?

Man: No

DMV Employee 2: No driver's license or anything like that? Then, do you have your birth certificate?

Man: No

DMV Employee 2: I thought it was, I was like, what is that? Yep, so you've got your Social Security Card. So we just have to check identity. So, this is one thing. Yeah, you've got plenty of identity. And then what do you have for residency?

Man: My pay check stub.

DMV Employee 2: That's perfect, yeah absolutely. And where were you born, just out of curiosity?

Man: Chicago

Other DMV Employee: In Chicago? Ok. So how the petition process works is, you wouldn't get anything today. And what we'd have to do is validate with Illinois that your information is correct. Um, *coughs* if you ever get a driver's license though, you'll have to show a birth certificate. I don't know if it's easier

for you to try and order one and actually bring in the birth certificate and you'd get a product right away, or we can start the petition process for you. I mean it's totally up to you. I can just tell you, you won't get anything today and it's contingent upon Illinois responding.

Man: Wow, ok

DMV Employee 2: So if you have your birth certificate somewhere, and it's just like, obviously down there, and somebody could mail it or whatever it's a lot easier. However, we can still do it either way. I just want to let you know if you ever get a driver's license you'll have to show the birth certificate.

Man: Ah, so how long would take if I did the uh,

DMV Employee 2: It's contingent upon the state, and Illinois responding, so I don't know how long that will take.

Man: I think I'll try to call and get my birth certificate.

DMV Employee 2: Will you? Yeah, Yeah. You have everything else you need.

Man: Ok.

DMV Employee 2: Yeah, each one of these things will work just fine.

Man: Ok.

DMV Employee 2: It's totally up to you though, like I said.

Man: Yeah, I'm gonna call my sister and have her send my birth certificate.

Molly: Do you know how much a birth certificate is?

DMV Employee 2: I can print it out for you from Illinois, like all their information. I know in Wisconsin what they are, I don't know what they are in Illinois.

Molly: So we have to buy that birth certificate in order to vote?

DMV Employee 2: Well is she...No, so you said she might have the birth certificate?

Man: Yeah.

Molly: Ok.

DMV Employee 2: So she has the birth certificate, it's just a matter of mailing it.

Molly: Ok.

DMV Employee 2: I don't know what Illinois charges for birth certificates, you'll have to look it up. But, um, it would be easier for you and you'd probably get it faster, but it's totally up to you, we can do it either way.

Man: No, I'll just have my sister mail it the.

DMV Employee 2: Perfect. Yeah, yeah.

Molly: Could we start this? And then, in case or...

DMV Employee 2: Well I wouldn't start if you're going to mail it. Cause it, yeah,

DMV Employee 1: Then it'll be...

DMV Employee 2: Yeah, then it's just double work

Molly: Ok, 'cause I read about like that you could just show up with whatever documents you have and then you can get a free ID for voting.

DMV Employee 2: We can start the petition process, but it's contingent upon Illinois responding.

Molly: Oh, ok.

DMV Employee 2: So, we don't know how long that would take with Illinois. So, if you have the birth certificate and it's just a matter of it mailing, I would do that honestly.

Molly: Ok, so even if you initiate the petition process you're not gonna get...

DMV Employee 2: Well I wouldn't start it if you have the birth certificate, and you're planning on mailing it, you know what I mean?

Molly: Right. But I'm just wondering, how that would work? Like for, if you initiate the petition process do you get an ID? For voting?

DMV Employee 1: No, you don't get anything.

DMV Employee 2: No, you don't get anything right away.

Molly: Ok, so even if we start the petition process, and it takes 8 weeks, he wouldn't be able to vote.

DMV Employee 1: Right, right, right.

DMV Employee 2: well, I don't know, they're working on that. It's kind of up in the air right now. So, um if you want more information we can get you over the supervisor over at window 3. How about we do that?

DMV Employee 2: You want to get her a G ticket?

DMV Employee 1: Sure.

Molly (to man): Does your sister have one, for sure?

DMV Employee 2 (to someone else): I don't know yet. Jaime, can you answer some questions about the ID program for this person, this gentleman over here.

Man: Yeah, yeah. So, I'll just have her mail it out. That'll be easier.

lots of background noise

DMV Employee 2(to someone else): He's just wondering if he gets, I don't know how it works now, ok, well what I think he's going to do is have his sister mail the birth certificate, because I said we wouldn't give him anything today, yeah so, but if you just want to tell him the same thing I said, yeah.

DMV Employee 2, to Man: Go to Window 2, ok? They'll help you out, ok? Thanks.

background noise

Molly: if your sister knows where it is, is that going to be a problem for her?

Man: No, she's still got a bunch of my stuff... (garbled, too much background noise) ...that she's still keeping up with.

Molly: Ok.

Molly: Hey.

DMV Employee 3, Man's voice: Did she give you the G ticket?

Man: Yeah.

Clerk 3: Alright.

Molly: Um, yeah.

DMV Employee 3: Alright, so what's going on.

Man: I'm trying to uh, get a Wisconsin ID so I can vote.

DMV Employee 3: Ok.

Man: I don't have my birth certificate, but I got everything else.

DMV Employee 3: Ok.

Man: And then uh, the other uh, option she said is I can have my sister mail my birth certificate down here, but I'm trying to figure out the other process. Like, how long that would take.

DMV Employee 3: 6-8 weeks.

Man: Woah.

DMV Employee 3: That's what I'm saying. If you know where your birth certificate is, it's definitely faster to get it. You know, even if you have to drive down there and get it and come back. You know what I'm saying? Because if we do that we process, what that does, is we have to scan in all the information, fax it over to the department that handles those situations, and then they contact the state you were born in. And then they have to verify your name and date of birth. And that all takes longer than if you just have it in your hand.

Man: Ok.

DMV Employee 3: You know, because it all just depends on how quickly that department verifies the information and gets back to us. And then we got to produce it and then we got to send it to you, and it's just a much lengthier process than what people think. Alright?

Man: Ok.

DMV Employee 3: Um, have you ever had a Wisconsin ID before, or a driver's license?

Man: Never.

DMV Employee 3: Ok, do you have something to show your address?

Man: yeah, my pay check stub.

DMV Employee 3: Ok, excellent. So if you got your pay check stub, your identification card, and it looks like you might've had your Social Security Card too? Yep. So it looks like the only piece you're missing is that birth certificate. So if you can get that faster than a couple weeks, it's definitely going to be a benefit. Because if you had that birth certificate, we print that out to you right away.

Man: Ok.

DMV Employee 3: Alright.

Molly: I thought there was like, you could get an ID if you, like the sign over there: "No birth certificate, no problem. You can get an ID to vote."

DMV Employee 3: You can. It just takes the time.

Molly: So even if we just start the petition process, he wouldn't get anything temporarily that says you can vote?

DMV Employee 3: Nope. Nope. That's just why, it's, you know it's just much better if you have that birth certificate, than going through that process.

Molly: Yeah

DMV Employee 3: Because that process takes time.

Molly: Like 6-8 weeks you're saying, too? And November's like, what? And if his sister doesn't have the birth certificate, do you know how much it is in Illinois?

DMV Employee 3: I can give you some information on it?

Molly: So it's either like 6-8 weeks, might not be able to vote, or pay for the birth certificate?

DMV Employee 3: Mmm hmm. And then, I know they've been saying they're trying to speed that process up, but the thing that hinges on the whole process is how quickly the state gets back to us.

Molly: Right.

DMV Employee 3: You know.

Molly: So it's like Cook County, you do the math. (laughs)

DMV Employee 3: That's what I'm saying, like if you really want to bet on Illinois getting back to us quickly, that's probably not the best scenario there.

DMV Employee 3, to himself: Let's just see if this is what I want.

Molly: I actually have another question too. If we were going to start the petition process, would you have to void his Illinois ID?

DMV Employee 3: No.

Molly: Ok.

DMV Employee 3: No, that only gets voided when he gets the product.

Molly: Ok.

DMV Employee 3: Alright, yep. So it looks like— Illinois right?

Man: Yeah.

DMV Employee 3: Alright, Illinois. So it looks like it's going to be about \$15 to get a certified copy. That's the spot that you'd have to get it to. You might want to Google that, because I'm sure there's a website or a number that you might want to call before you try. So you can figure out what you might need to actually get that birth certificate reproduced for you. Alright?

Molly: So at this point, like close to the election, it's easier to just pay for and get the birth certificate and make sure you have an ID...

DMV Employee 3: Yeah, it's just...

Molly: ..than to start the petition process.

DMV Employee 3: Yeah. Like I said, cause we really can't get give a super hard estimate of when you're going to get it. Just because of those you know unvariable (sic) pieces of the information getting to us in time you know, so if you want to guarantee that you have it on time, that's...I know that here in Wisconsin you go to the Vital Records they print it out for you in like 20 minutes, you pay \$4 more bucks and you get a whole other copy.

Molly: Yeah.

DMV Employee 3: I don't know if Illinois' got that same option or not, but I definitely think they should be able to print it off same day.

Molly: mmmm. That's expensive though, for a ballot. You know (laughs).

DMV Employee 3: Yeah, well, it's actually \$24 here in Wisconsin so it's actually on the cheaper end which is weird because Illinois is usually so expensiver (sic) than anything. But the good thing is you get the ID for free, so.

Molly: Yeah. Mmm hmm. Ok, thank you.

DMV Employee 3: You're welcome. Good luck to your friend.

Molly: thanks. (whispers) oh my gosh. Oh my gosh. We have to talk about this. Um, they're not following the law. Um, Zach(?)