UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, LEAVE TO FILE SUPPLEMENTAL PLEADING, AND CLASS CERTIFICATION

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Plaintiffs submit this memorandum of law in support of their motion for a preliminary injunction, leave to file a supplemental pleading, and class certification. Plaintiffs ask this Court to: (1) preliminarily enjoin Wisconsin's voter ID law as it applies to eligible Wisconsin voters who cannot obtain ID with reasonable effort, by requiring Defendants to offer a "reasonable impediment" affidavit option; (2) grant Plaintiffs' leave to file a supplemental pleading, *see* Fed. R. Civ. P. 15(d), which seeks to add proposed Plaintiffs who continue to lack acceptable ID for voting; and (3) certify Plaintiffs' proposed class as described below.

SUMMARY

Plaintiffs are "endeavoring to protect the voting rights of those who encounter high hurdles" to obtaining acceptable ID—that is, those who cannot obtain ID "with reasonable effort." *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (hereinafter "*Frank II*"). Specifically, Plaintiffs represent a proposed class consisting of eligible Wisconsin voters without acceptable ID for voting and who have one or more of the following barriers to obtaining ID: (1) name mismatches or other errors in a document needed to obtain ID; (2) need to obtain an underlying document from an agency other than the DMV in order to obtain ID; and/or (3) one or more underlying document(s) necessary to obtain ID cannot be found. As the Seventh Circuit recently confirmed, under the flexible *Anderson-Burdick* framework, such voters are entitled to relief from Wisconsin's voter ID law—specifically, a "safety net" remedy that would allow these voters to cast a ballot at the polling place by signing an affidavit of identity. *Id.* at 387.

Pursuant to *Frank II*'s mandate, Plaintiffs urgently seek a preliminary injunction including the use of a well-publicized "reasonable impediment" affidavit option that will allow class members to exercise their fundamental right to vote while this case is pending. Such an affidavit should allow affected voters to cast a regular ballot at the polls or by absentee. The

existing trial evidence, recently obtained evidence, and recent discovery from Defendants all confirm that Plaintiffs are likely to succeed on their claim that the DMV petition process does not eliminate the unreasonable barriers to getting ID faced by Plaintiff class members. In addition, Plaintiffs are likely to succeed in showing that Defendants' most recent emergency rule, which was hastily adopted only weeks ago in a desperate attempt to evade liability, will not meaningfully help these vulnerable voters. The remaining preliminary injunction factors also favor this relief.

Plaintiffs further seek leave to file a supplemental pleading (Ex. 1)[1] to add Plaintiffs and class representatives Melvin Robertson, Leroy Switlick, and James Green, who currently lack acceptable ID, cannot obtain ID with reasonable effort, and have recently been disenfranchised by the voter ID law and/or wish to vote in upcoming elections. *See* Fed. R. Civ. P. 15(d).

Lastly, this Court should certify Plaintiffs' proposed class of voters, Fed. R. Civ. P. 23, whose collective burdens justify the requested relief. Although class certification is not always necessary to grant *preliminary* injunctive relief, Plaintiffs seek certification at this stage to ensure efficient judicial relief. If this Court grants relief without certifying a class and the Seventh Circuit holds on appeal that Plaintiffs' requested injunction is improper without a certified class, a time-consuming remand is likely to delay relief beyond the upcoming elections.

PROCEDURAL BACKGROUND

This case challenges the manner in which Wisconsin's voter ID law unjustifiably burdens the voting rights of vulnerable citizens and classes of citizens, by requiring that they present one of a few limited forms of photo identification in order to vote. In 2014, after a two-week trial,

[1] "Ex." as used in this brief refers to the Exhibits that are attached to the Declaration of Sean J. Young, which has been filed in conjunction with this brief.

this Court invalidated the law, finding that it violated both the Constitution and Section 2 of the Voting Rights Act. Dkt. #195. This Court's decision was then reversed by the Seventh Circuit. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (hereinafter "*Frank I*").

While the first appeal was pending, on September 15, 2014, Defendants' instituted a "petition process" at the DMV in response to a Wisconsin Supreme Court ruling, *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014), *see* Dkt. #229 ¶¶ 7-8. The petition process began as an emergency rule and became Wis. Admin. Code § Trans. 102.15(5m). It also resulted in the creation of new form MV3012, Dkt. #229-1, which replaced the old MV3002 form. The stated purpose of this petition process was to help voters obtain ID without paying a fee to a governmental agency by allowing the DMV to obtain the relevant birth information for the voter. But as discussed below, this process is inadequate.

Upon remand from *Frank I*, this Court addressed Plaintiffs' remaining claims, dismissing Plaintiffs' limited constitutional challenge on behalf of eligible Wisconsin voters without acceptable ID for voting and who have one or more of the following barriers to obtaining ID: (1) name mismatches or other errors in a document needed to obtain ID; (2) need to obtain an underlying document from an agency other than the DMV in order to obtain ID; and/or (3) one or more underlying document(s) necessary to obtain ID cannot be found. Dkt. #250. The Seventh Circuit vacated that decision and remanded for this Court's consideration of that limited claim. *See Frank II*, 819 F.3d at 388.[2]

In remanding this case, the Seventh Circuit emphasized that *Frank I* "did not decide that persons unable to get a photo ID with reasonable effort lack a serious grievance," *Frank II*, 819 F.3d at 386, and it recognized Plaintiffs' contention that "high hurdles for some persons eligible

[2] The Seventh Circuit also vacated this Court's dismissal of Plaintiff veterans' Equal Protection claim on the merits, with instructions to dismiss that claim as moot. *Frank II*, 819 F.3d at 388.

to vote entitle those particular persons to relief," *id.* It added that "Plaintiffs' approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Id.* And the court confirmed that "[t]his is compatible with our opinion and mandate, just as it is compatible with *Crawford* [*v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)]." *Id.* at 386-87.

The Seventh Circuit further sanctioned the specific type of relief Plaintiffs now seek: a "safety net" affidavit that would allow voters who cannot obtain ID with reasonable effort to cast a ballot. *Frank II*, 819 F.3d at 387. Otherwise, "[u]nder Wisconsin's current law, people who do not have qualifying photo ID . . . cannot vote, even if it is impossible for them to get such an ID." *Id.* Notably, the Seventh Circuit supported the viability of such relief even after the DMV petition process went into effect, and instructed this Court to "permit the parties to explore how the state's system works today before taking up plaintiffs' remaining substantive contentions." *Id.* at 388. The case was remanded for this Court to resolve this remaining claim, and the mandate issued on May 4, 2016. Dkt. #263.[3]

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION IN THE FORM OF A "REASONABLE IMPEDIMENT" AFFIDAVIT

Plaintiffs are entitled to a preliminary injunction in the form of a well-publicized "reasonable impediment" affidavit that would allow affected voters to cast a regular or absentee ballot while this case is pending. Specifically, and as detailed *infra* Part I.B., Plaintiffs request

[3] Six days later, on May 10, 2016, Governor Walker approved an emergency rule which revised the pre-existing petition procedure. *See* Exs. 23-24. As discussed *infra* Part I.B.3., this last-minute attempt to evade liability is unlikely to eliminate the unreasonable burdens faced by Plaintiffs.

that the affidavit option contain two key features: (1) a simple, comprehensible affirmation that the voter has a "reasonable impediment" to obtaining ID, akin to the affidavits used in North Carolina and South Carolina, *see* Exs. 2, 3; and (2) the issuance of a regular ballot at the polling place. Plaintiffs further request that this Court order Defendants to provide meaningful notice of this relief through a direct mailing to affected voters.

The preliminary injunction factors fully support this interim remedy. Plaintiffs seeking a preliminary injunction must demonstrate that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *D.U. v. Rhoades*, --- F.3d. ----, No. 15-1243, 2016 WL 3126263, at *2 (7th Cir. June 3, 2016) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted." *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010). At the same time, "the threshold for demonstrating a likelihood of success on the merits is low," and "need only be better than negligible." *D.U.*, 2016 WL 3126263, at *5.

A. Plaintiffs Are Likely To Succeed On The Merits

Plaintiffs are likely to succeed on the merits of their claim. The guidance and reasoning of *Frank II* confirms that voters who are "unable to obtain acceptable ID with reasonable . . . effort" are entitled to relief under the flexible *Anderson-Burdick* framework, *Frank II*, 819 F.3d at 385-86, and that they are entitled to a "safety net" affidavit that would allow such voters to cast a ballot, *id.* at 387. This is true if even "a single person eligible to vote is unable to get acceptable photo ID with reasonable effort." *Id.* at 386. After all, "[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." *Id.* And although *Frank I* has interpreted *Crawford* as requiring courts to accept the

State's purported interests in voter ID, *Frank I*, 768 F.3d at 750, even those purported interests do not outweigh the burdens faced by those who cannot get ID with reasonable effort, *see Frank II*, 819 F.3d at 386-87 ("protect[ing] the voting rights of those who encounter high hurdles . . . is compatible with our opinion and mandate [in *Frank I*], just as it is compatible with *Crawford*.").[4]

As discussed below, the trial record confirms that the voters comprising Plaintiffs' proposed class are "unable to get a photo ID with reasonable effort." *Frank II*, 819 F.3d at 386. And developments subsequent to trial—including the post-trial DMV petition process and an even newer emergency rule—do nothing to alter that conclusion. To the contrary, the DMV petition process instituted after trial (known as the "IDPP" in internal documents) does not even purport to help the first two categories of voters in Plaintiffs' proposed class (name mismatches, multiple agencies). And recently obtained discovery and evidence demonstrate that the petition process has not materially alleviated the unreasonable burdens faced by the third category of voters whose birth records cannot be found. As one DMV employee candidly summarized, "The process is very cumbersome." Ex. 49 at 1; *see also id.* ("I keep trying to come up with a smoother process but to be honest I do not have a clue what that would be at this point."). Even volunteers who work to help voters register and vote "are often too intimidated" to help voters through this confusing process. Ex. 17 ¶ 6. Moreover, a new emergency rule—hastily passed mere days after the mandate issued in this case in a transparent effort to evade liability, *see* Exs. 23-24, piles bureaucracy on top of bureaucracy and fails to cure the procedure's core defects.

[4] To be clear, Plaintiffs do not suggest that this "reasonable impediment" affidavit cures all of the legal defects of Wisconsin's voter ID law. Plaintiffs maintain that the law should be invalidated in its entirety because it is unconstitutional and violates Section 2 of the Voting Rights Act, as this Court initially found. Dkt. #195. Plaintiffs preserve their argument that *Frank I* was wrongly decided for purposes of appeal.

For nearly five years, Defendants have made the fundamental right to vote contingent on a voter's ability to navigate a cumbersome DMV bureaucracy designed to regulate driving, with disastrous results. *See, e.g.*, Ex. 64 at 1 (petition process "has been forced on [DMV] [and was] not something anybody asked for"); Ex. 36 at 175 ("the fact that this process ultimately relates to an individual's ability to vote" does not impact the way that the DMV "adjudications or decisions [are made] in any way."). The DMV still has not even figured out how to implement the *last* emergency rule approved nearly *two years* ago. Ex. 31 at 11 (testifying in 2016 that the petition process is still "changing and evolving as we learn"). The new emergency rule will not fare any better, especially not when elections are right around the corner.

1. Voters with name mismatches in an underlying document

First, Plaintiffs are likely to succeed in demonstrating that voters with name mismatches or other errors in an underlying document needed to obtain ID continue to face unreasonable burdens to getting ID. The trial record showed that such voters must visit agencies other than the DMV to correct these errors, that those errors often cost money to fix, and that exemptions are arbitrarily provided to connected voters who contact high-ranking supervisors or elections officials, or are plaintiffs in high-profile lawsuits. Dkt. #194 at 16-18; Dkt. #195 at 34-37.

The post-trial petition process and its new MV3012 form—like the previous petition process and the old MV3002 form—do not even purport to help voters with name mismatches in their underlying documents. As one DMV employee recently confirmed, "[t]he name that they're requesting on their ID has to match with Social Security," and the information provided in the petition must match "[t]heir name at birth, their mother's maiden name, their date of birth and their place of birth." Ex. 31 at 31. Internal DMV "Case Activity Reports" describing individual petition adjudications reveal that DMV has denied several petitions on this basis. *See, e.g.*, Exs. 39, 42, 43, 55. Absent the petition process, voters with name mismatches can only rely on the

arbitrary, generalized exceptions process that Kristina Boardman described at trial: an ad hoc system where individual DMV employees can grant exemptions if they "feel comfortable" doing so. Tr. 1120-21. Indeed, Boardman expressly confirmed this year that the same "feel comfortable" standard she described at trial is the same "process that's in place today" for voters who cannot use the petition process. Ex. 30 at 103-05; *see, e.g.*, Ex. 19 (DMV supervisor rejection); Ex. 10 ¶ 5 (DMV supervisor acceptance). The post-trial petition process has not eliminated the unreasonable barriers faced by voters with name mismatches. *See, e.g.*, Ex. 11 (describing voter's unreasonable efforts in attempting to fix name mismatch problem).

The new emergency rule is no better, for it codifies the same system of unguided discretion for voters whose underlying document contains misspellings or mismatches: it simply says that such voters can obtain ID if the person vaguely "provide[s] evidence acceptable to the administrator that the person has used the name in a manner that qualifies the name as being legally changed under the common law of Wisconsin." Ex. 24 at 15. It is utterly unclear how non-lawyer DMV employees are to apply this vague legal standard. Further, whether ID is issued is still dependent upon whether the employee subjectively deems the evidence to be "acceptable," just like the old discretionary process. *See, e.g.*, Wis. Admin Code § Trans. 102.15(5m) (issuance of ID based on secondary documentation "deemed acceptable to the administrator").

2. Voters who must contend with multiple agencies

Second, Plaintiffs are likely to succeed in demonstrating that voters who must obtain an underlying document from an agency other than the DMV continue to face unreasonable burdens in obtaining ID. The trial record demonstrated that voters who have to obtain another underlying document, such as a Social Security card, often face the Catch-22 "gastonette" of having to show photo ID in order to obtain a Social Security card, *Frank II*, 819 F.3d at 386; Tr. 1884-86, and

post-trial DMV documents confirm that nothing has changed in this regard, *see* Ex. 52 at 3 ("Often an ID card is needed to pick up a SS Card"). Indeed, both the Social Security Administration website and Social Security office handouts *still* suggest that you must have photo ID to obtain a Social Security card. Ex. 27; Ex. 17 ¶¶ 7-10; *see also* Ex. 13 ¶ 5 (voter believed photo ID needed to obtain card). Some may eventually learn about the narrow and complicated school and medical records exception to obtaining a Social Security Card, *see* Ex. 17 ¶¶ 11-12 (educated attorney describing difficulties in figuring out this exception given conflicting information), but they must then sacrifice more time and make additional trips to hunt down these secondary documents, *see, e.g.*, Tr. 856-59, Ex. 10 ¶¶ 6-8, which themselves can require showing photo ID, Tr. 856-57, Dkt. #195 at 28-29. This is especially unreasonable with the existing transportation barriers that many of these voters already have to overcome. Dkt. #194 at 20-21, #195 at 30-31; *see also, e.g.*, Ex. 12, 14.

As with voters with name mismatches, the post-trial petition process does not even purport to help these voters who must engage with multiple agencies in order to obtain ID for voting purposes. Ex. 31 at 53-54 (applicants without identity or residency documents turned away). The rules do not eliminate the "proof of identity" requirement, Wis. Admin. Code § Trans. 102.15(4), which is most often fulfilled by obtaining a Social Security Card, Dkt. #195 at 28. Nor does the latest emergency rule do anything for these voters; though the rule makes amendments to provisions for voters who lack a social security *number*, *see* Ex. 24 at 16, it leaves untouched subsection (4), which governs proof of identity.

Furthermore, neither the petition process nor the emergency rule helps voters stuck on Election Day without ID and without birth certificates, who must visit multiple agencies—i.e., at least the vital records office and the DMV (and pay fees, Dkt. #195 at 31-32)—and return to

their local election offices by the Friday after Election Day.[5] These voters cannot use the petition process at all, because they will not receive a document valid for voting in time to make their provisional ballot count. Although the new emergency rule provides for the issuance of temporary identification card receipts for voting purposes, *see* Ex. 24 at 20-21, unlike the temporary receipts that are issued *immediately* to ID applicants who have all their underlying documents, the receipts issued to voters who use the petition process are not even mailed until the *sixth working day* after the application, when the three-day deadline has long passed. Ex. 24 at 20. And the petition process itself is seldom resolved in three days. As DMV officials have confirmed, the process usually takes *seven* days or more, even when the birth records are in Wisconsin. Ex. 36 at 50-54, Ex. 30 at 38. Voters have already been disenfranchised in this year's elections because of this unreasonable barrier. *See* Ex. 13 (could not visit Illinois Vital Records, Illinois DMV, and Social Security office in time to obtain ID); Ex. 16 (could not visit Iowa courts to correct name mismatches in three days); Ex. 18 (could not get birth certificate from California Vital Records in three days); Ex. 21 (same); Ex. 15 (could not get birth certificate Utah Vital Records in three days); *see also generally* Ex. 8 ¶¶ 7-8; Ex. 9 ¶¶ 4-8, 11; Dkt. #195 at 33.[6]

[5] Voters may be even more likely to show up at the polls on Election Day without ID in light of the non-existent outreach by DMV and virtually non-existent outreach and public education by GAB on the photo ID law. *See* Ex. 36 at 136; Ex. 34 at 213-14.

[6] One voter, Kari Venteris, did manage to visit multiple agencies to obtain valid ID within three days, but the efforts she had to go through to do this were patently unreasonable. *See* Ex. 22 (multiple hours-long interstate trips costing approximately $50, a particularly burdensome experience given that she is also a person with a mobility impairment). An affidavit would have spared Venteris from having to jump through these absurd hoops just to exercise her fundamental right to vote.

3. Voters with nonexistent or unavailable birth records

Lastly, Plaintiffs are likely to succeed in showing that voters whose birth records cannot be found continue to face unreasonable burdens. The trial record revealed that these voters could only obtain ID if they knew about DMV's secret MV3002 procedure in place at the time of trial. But even if they knew about the form, such voters had to endure an indefinite wait for the state of birth to determine that the birth record does not exist or could not be found; gather alternative documentation of U.S. birth, and make a second trip to the DMV in the hopes that DMV bureaucrats would exercise their unguided discretion to deem such alternative documentation "strong evidence" of U.S. birth. Dkt. #194 at 18-19, Dkt. #195 at 32 n.17. Whether a voter was able to exercise his or her fundamental right to vote was arbitrarily dependent upon which DMV center the voter visited and which supervisor was on duty.

The new petition process enacted post-trial nominally covers these voters, but recently obtained discovery confirms that the process continues to result in substantial, and often insurmountable, barriers for these voters.

The petition process, as it has haphazardly developed since it was first instituted in September 2014,[7] consists essentially of three steps after the voter submits an MV3012 petition. Each of these steps impose unreasonable barriers to obtaining ID for people whose birth records

[7] The petition process itself has presented somewhat of a moving target. For example, the petition process as described by an internal DMV document dated September 10, 2014, Exs. 50-51, differs from the petition process as of March 22, 2016, Ex. 62, even though the same regulation, Wis. Admin. Code § Trans. 102.15(5m), was in existence that entire time. DMV employees have essentially admitted that, nearly two years into the process, they continue to make it up as they go along. *See* Ex. 31 at 11 (testifying in 2016 deposition, "I guess we created . . . our internal procedures kind of as we went. We've created a training procedure document that we use now. It's changing and evolving as we learn."). Nonetheless, the fundamental defects of the process have not changed.

cannot be found, and for many other voters who must rely on—but do not possess—a birth certificate to prove their U.S. citizenship.

First, the information in the petition is sent to the Wisconsin Department of Health Services ("DHS"), and if the birth information cannot be verified immediately with the relevant vital records agency, agents from the DMV Compliance, Audit, and Fraud Unit ("CAFU")—a unit whose primary purpose is to investigate internal and external fraud, Ex. 37 at 9-11—are responsible for following up, Ex. 30 at 18-19. And the need to follow-up is common,[8] because voters born out of state are completely at the mercy of their birth state's vital records agencies, which are not subject to DHS's or DMV's jurisdiction and are free to ignore them or take unreasonable amounts of time to respond to their inquiries. This has resulted in an arbitrary process that Boardman has herself described as "cumbersome." Ex. 30 at 97. As she put it herself, "we do not have control over other states and how long they may take to respond to us." *Id.* at 66-67.

For example, South Carolina has "privatized their vital records, and it's nearly impossible to get anything out of South Carolina at this point." Ex. 37 at 21. New York routinely takes "two to three months" to respond. Ex. 29 at 79. Tennessee and Mississippi are "particularly hard to work with." Ex. 31 at 37-38. "Cook [C]ounty[, Illinois] has offered very little help when [DMV has] reached out to them," and it is rife with "careless record handling," leading DMV officials to express gratitude that they weren't born there themselves. Ex. 53; *see also* Ex. 36 at 83. And DMV has had "difficulty finding records from the south . . . during [the] Jim Crow era" generally. Ex. 31 at 94. When asked whether there was "any way to expedite the verification" for

[8] Susan Schilz, the CAFU supervisor, "didn't think [they] would get many [petitions] in CAFU" at first, assuming that DHS would be able to resolve almost all the petitions at the first step, but she was quickly disabused of that notion. Ex. 37 at 28-29.

a voter born in Michigan, DMV employees did not "know of anything [they could] do to speed this up." Ex. 68; *see also* Ex. 37 at 22-25 (South Carolina, Mississippi, Cook County "put us [DMV staff] on hold, . . . kind of put us in a phone circle and then end up hanging up on us with no care for what we're trying to do," even after DMV informs them that they are "officials from another state . . . trying to get confirmation."); Ex. 29 at 53 (Cook County); Ex. 31 at 39 (South Carolina). As Boardman summarized, "There are some states where it takes additional time to get an answer back. . . . All states register their vital records differently. Some are available electronically, some aren't. Some are at the county or parish level, some are at the state level. So it really just depends on how they're organized in that state of birth." Ex. 30 at 16.

Second, if the birth records cannot be found, the voter must provide secondary documentation, such as a baptismal certificate or early school records, as in the pre-petition days. Wis. Admin. Code § Trans. 102.15(5m)3. Voters like Melvin Robertson who have no secondary documents will not get ID, period, *see* Ex. 37 at 66-67, as demonstrated by several denied petitions from such voters, *see, e.g.*, Exs. 44, 45, 56, 59, 60, 61.

While the petition process eventually started requiring CAFU agents to attempt to help some applicants obtain these secondary documents, Ex. 30 at 26, the process could be "very difficult," Ex. 37 at 65, and take more than six months in some cases, *id.* at 46; *see also* Ex. 69 at 1 ("[*e*]*xtensive* research is performed by CAFU" when birth information is not found (emphasis added)). Indeed, the process was sometimes impossible. One CAFU agent explained that locating "school records" was challenging because "[a] lot of old schools no longer exist . . . . [N]o one has the early records." Ex. 31 at 38. She also testified to having problems finding "[s]chools, hospitals, [and] church records" "in the Jim Crow south generally," *id.* at 94-95, and that "a lot of times the school won't be in existence anymore and no one knows where the

records were kept or if they were kept when they closed. Or sometimes they'll say that all of the documents were burned in a fire or lost in a flood," *id.* at 95. The CAFU supervisor similarly noted, "We have also seen instances where schools have burned or hospitals have burned or been torn down and the records are lost through that way as well. And we have had a few cases with midwives where they are required to file a record with the municipality and where it appears they haven't." Ex. 37 at 65. Obtaining follow-up information was also difficult since "many petitioners do not have phones or emails." *Id.* at 34-35. And CAFU does not always help. *See* Ex. 71 at 2 (requiring applicants to return to DMV with secondary documents as late as 2015).

Third, whatever secondary documentation is mustered must then be presented for acceptance or rejection based entirely on the unfettered discretion of CAFU agents—there is simply no guarantee that a voter who has endured the above gauntlet will be able to vote. *See* Wis. Admin. Code §§ Trans. 102.15(5m)(b)3.-4.; Ex. 36 at 39-40. And at the end of this bureaucratic labyrinth is the "Triad," or three senior DMV officials who have the final say as to who can and cannot get ID, injecting yet another layer of discretion to the already-cumbersome process. Ex. 38 ("If we get to the end without sufficient data[,] the triad of Patrick, Kristina & Jim will make the final decision"); Ex. 30 at 21-23; Ex. 37 at 74-75 ("when [the CAFU agents] compiling information feel like [the petitioners] have enough and when it's reviewed by senior managers, they may think it isn't quite enough and it may be sent back to us."); Ex. 51 at 5 ("management has the ability, based upon the totality of circumstances, to allow for exceptions"); Ex. 30 at 73-74 (issuance is on a "case by case basis and using discretion based on the documents that are presented"); Ex. 62 at 8 (Miller has the "final say"); Ex. 63 at 1 ("DMV will have discretion when deciding whether an applicant has met the burden of proof"). "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws

. . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

Layered on top of all of the above difficulties are yet additional problems that infect the entire process. For starters, DMV has not done any outreach about the petition process, Ex. 36 at 136,[9] and it implored the GAB to run a year-long media campaign "ASAP" as early as May 2015, Ex. 70, which has yet to happen due to lack of funding thus far from the legislature. Ex. 34 at 213-14. Furthermore, the petition process has suffered from an astounding 27% error rate by DMV employees, Ex. 47; Ex. 30 at 99-100, which can cause "delays," force voters to make additional trips to the DMV, and provide additional documentation, Ex. 48 at 1. The discovery is rife with such examples. *See, e.g.*, Exs. 65, 68, 72, 73. And even "when all goes correctly," the process is already very "costly." Ex. 48. The DMV is ill-equipped to handle this procedure, because it already uses "a lot of resources that we [the DMV] don't have a lot of," requiring DMV to "absorb[] this time . . . without any added resources." Ex. 37 at 84. As one DMV employee aptly summarized almost one year into the procedure, "We seem to really be struggling with a process that should not be that difficult." Ex. 73.

Demand for the petition has furthermore started to rise during this election year, but, as DMV officials have conceded in their depositions, no additional funds, staff, or hours have been allocated to satisfy this demand, *see* Ex. 37 at 20, 85; Ex. 29 at 100-101; Ex. 30 at 61—a stark contrast to the rosy picture DMV has tried to paint to anxious legislators, *see* Ex. 66 at 2 ("DMV is well positioned to deal with any potential increases in customer demand"). Even with all of these problems, there has actually been pressure to *reduce* the amount of DMV training on the

[9] Even DMV employees continue to be unaware of the procedure. *See, e.g.*, Ex. 57 (Plaintiff Ruthelle Frank's daughter not told about petition process); Ex. 40 (caller told by DMV three times to get birth certificate themselves); Ex. 20 ¶ 6 (not told by DMV about petition process); Ex. 22 ¶¶ 12-13 (same).

petition procedure since it is unrelated to DMV's core function, Ex. 54, when training is already "challenging," Ex. 37 at 28. Being a plaintiff in litigation, or complaining to a state official, apparently continues to be the primary way to move one's petition along. *See* Ex. 58 (Governor's office monitoring ID progress of "Voter ID Plaintiffs"); Ex. 57 (discussing follow-up for Ruthelle Frank, emphasizing her role as "primary plaintiff in the Voter ID lawsuit"); Ex. 46 (following up with legislator); Ex. 67 (same); Ex. 74 (same). Average voters with these barriers are out of luck.

The new emergency rule does not alleviate these problems, but rather devises an extraordinarily elaborate system that injects even more layers of bureaucracy, confusion, and unguided discretion into an already-unruly process. *See* Ex. 24 at 18-20; *see Ross v. Blake*, --- S. Ct. ----, No. 15-339, 2016 WL 3128839, at *8 (June 6, 2016) ("an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use."). What remains fundamentally unchanged is the fact that if the birth record cannot be found, the voter is *still* not guaranteed an ID. They must still rest on the hope that any secondary documentation (which can be difficult or even impossible to find) will be deemed acceptable by the DMV administrator in accordance with her subjective discretion. *See* Ex. 24 at 19 (petition granted when administrator "concludes, on the basis of secondary documentation or other corroborating information, that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct.").

Even more shocking, this emergency rule now exposes these vulnerable voters to criminal liability. *See* Ex. 24 at 18-19 (if the DMV administrator "determines that an applicant has knowingly made a false statement or knowingly concealed a material fact . . . in an application, petition, or additional information [provided to the DMV]," they will "refer the

suspected fraud to law enforcement."); *cf. South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012) (attempts to help voters without ID "must not become a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters"). While the emergency rule appears to provide for the issuance of temporary receipts for voting to some of these voters, Ex. 24 at 20, these receipts: (1) may not be issued until after six days, when it is too late to cure the provisional ballot; (2) ultimately expire, Wis. Stat. § 343.50(1)(c); and (3) do not free the voter from the unreasonable burdens of locating hard-to-find secondary documentation and being subject to unguided DMV discretion—either of which can result in the petition's denial, at which point "*no further identification card receipts will be issued*," including after the receipt expires, Ex. 24 at 18 (emphasis added).

Enough is enough. Defendants' five-year-long experiment with the DMV demonstrates that making the DMV the gatekeeper of the right to vote is fundamentally inconsistent with the Constitution. For the above reasons, Plaintiffs are likely to succeed on the merits of their claim.

B. The Remaining Preliminary Injunction Factors Favor Allowing Voters to Cast a Regular Ballot With A "Reasonable Impediment" Affidavit

The remaining preliminary injunction factors—the need to prevent irreparable harm, the balance of equities, and the public interest—also support Plaintiffs' requested relief, a "reasonable impediment" affidavit option that would allow voters to cast a regular or absentee ballot while this case is pending. The affidavit option should also be well-publicized to voters and the public, and ordered as soon as practicable to ensure that it can be effectively implemented. Absent this relief, Plaintiff class members are likely to suffer irreparable harm by being disenfranchised. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). The balance of equities also tips in Plaintiffs' favor: "[w]hile states have a strong interest in their ability to

enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Id.* (citations and quotation marks omitted). And the public interest "favors permitting as many qualified voters to vote as possible." *Id.* at 437. Granting Plaintiffs' requested relief is consistent with this Court's broad discretion. *See Brown v. Plata*, 563 U.S. 493, 538 (2011) ("[T]he scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." (citation omitted; alteration in original)); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("[a] district court ordinarily has wide latitude in fashioning injunctive relief"); *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) (An "injunction must . . . be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion.").

1. *The affidavit should be available to voters who face a "reasonable impediment" to obtaining acceptable ID*

First, the affidavit option should allow voters without ID to cast a ballot if they affirm that they face a "reasonable impediment" to obtaining acceptable ID, akin to the "reasonable impediment" affidavits used in North Carolina and South Carolina. *See* Exs. 2, 3. Use of a "reasonable impediment" affidavit is consistent with the Seventh Circuit's recent description of those voters potentially entitled to a remedy: voters "who are unable get a photo ID with reasonable effort." *Frank II*, 819 F.3d at 386; *see Zamecnik v. Indian 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)).

However, "the process for filling out the form must not become a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters," *South Carolina*, 898 F. Supp. 2d at 40, especially given the low educational and socioeconomic status of many voters without

ID, Dkt. #195 at 25-26. It is thus critical that the affidavit "use clear, simple language," Ex. 9 ¶ 15, that will present voters with simple facts that they can readily understand, so that they can easily determine whether the facts apply to them. Accordingly, as other courts have explained, "the form at a minimum [should] have separate boxes that a voter may check for . . . 'lack of transportation'; 'disability or illness'; 'lack of birth certificate'; 'work schedule'; 'family responsibilities'; and 'other reasonable impediment.' The form will require a further brief written explanation from the voter *only if* he or she checks the 'other reasonable impediment' box on the form." *South Carolina*, 898 F. Supp. 2d at 41; *see also N.C. State Conf. of NAACP v. McCrory*, --- F. Supp. 3d ----, 2016 WL 1650774, at *120 (M.D.N.C. Apr. 25, 2016) (similar). Courts have also emphasized that "[a]ny reason that the voter *subjectively* deems reasonable [should] suffice, so long as it is not false." *South Carolina*, 898 F. Supp. 2d at 36-37; *see also N.C. NAACP*, 2016 WL 1650774, at *35. Wisconsin election officials confirm that the check box list uses "simple language and could be completed quickly and efficiently by poll workers." Ex. 8 ¶ 15. And the burden on the State is minimal, since election officials also confirm that such an affidavit could be readily drafted and implemented, *see* Ex. 8 ¶ 16; Ex. 9 ¶¶ 16-17, especially if there is sufficient lead time for preparation and training.

Although this Court could theoretically order that the affidavit have more detailed boxes with lengthier descriptions to reference the categories comprising Plaintiffs' class, the equities do not favor this alternative. Unlike the "reasonable impediment" affidavit proposed above, such a specific alternative has not been implemented or attempted in other situations. It is also more likely to confuse voters especially in light of the limited education of many voters without ID. *Cf., e.g., Ross*, 2016 WL 3128839 at *8 ("When rules are 'so confusing that . . . no reasonable [person] can use them,' then 'they're no longer available'" (citation omitted)). Moreover, by

unnecessarily restricting the pool of affected eligible voters who execute the affidavit, such an alternative will not adequately address the harms imposed on voters who "are unable to get a photo ID with reasonable effort," as recently framed by the Seventh Circuit. *Frank II*, 819 F.3d at 386. After all, an "injunction must . . . be broad enough to be effective," *Russian Media Grp.*, 598 F.3d at 307, and the public interest "favors permitting as many qualified voters to vote as possible," *Obama for Am.*, 697 F.3d at 437.

2. The affidavit should allow voters to cast a regular ballot at the polling place, not a provisional ballot

Second, the preliminary injunction factors point in favor of providing affidavit voters a regular ballot that they can cast at the polling place, not a time consuming, confusing provisional one. In Wisconsin, a provisional ballot is only counted contingent upon a voter later "satisf[ying] relevant voting requirements," Wis. Stat. § 7.15(15), such as a voter who initially fails to satisfy certain registration requirements or fails to produce acceptable ID. *See* Ex. 26 (provisional voting information sheet). Under Plaintiffs' requested remedy, however, a voter who signs a "reasonable impediment" affidavit is no longer required to perform any further action, and should thus have their ballot counted. Since the ballot must be counted anyway, there is no need to hold such ballots in suspension.

The balance of the equities for both voters and elections officials favors this approach, as Wisconsin election officials confirm that issuing regular ballots to voters who sign the affidavit is practicable, and is in fact vastly preferable to the provisional ballot process, Ex. 8 ¶ 12, Ex. 9 ¶ 13, since "[t]he provisional ballot procedure is complex, inefficient and time consuming for poll workers," Ex. 8 ¶ 11; *see also* Ex. 9 ¶ 12 ("the poll worker must complete a 17-step process when issuing a provisional ballot"); Ex. 25 at 5-6. Provisional ballots "are often difficult to grasp for voters with literacy or comprehension challenges." Ex. 8 ¶ 11. They can also threaten ballot

secrecy when they are counted out loud at the Board of Canvassers meeting, which is open to the public. Ex. 9 ¶ 10. The Voter ID statutes of Idaho, Louisiana, Michigan, and South Dakota all allow voters without ID to vote by affidavit without needlessly subjecting such voters to a cumbersome provisional ballot process. Idaho Code § 34-1114; La. Rev. Stat. § 18:562; Mich. Comp. Laws § 168.523; S.D. Codified Laws § 12-18-6.2.[10]

Similarly, absentee voters should also be provided the option to submit an executed affidavit in lieu of providing a photocopy of acceptable photo ID.

3. The affidavit option must be widely and understandably publicized by the State

The preliminary injunction factors also warrant providing meaningful notice to voters about the affidavit option. Thus, Plaintiffs request at a minimum that Defendants be required to mail individualized notice of the voter ID law and affidavit option to any registered voter who does not appear as having accepted photo ID in the DMV database, and that the affidavit option be included in any existing publicity materials related to Voter ID. *See, e.g., Lee v. Va. State Bd. of Elections*, --- F.Supp.3d ----, No. 3:15CV357, 2016 WL 2946181, at *10 (E.D.Va. May 19, 2016) (Virginia sent "86,000 postcards to persons on the active voter list who DMV records reflected possessed no DMV-issued ID and would likely need a photo ID to vote under the new law"); *N.C. NAACP*, 2016 WL 1650774, at *20 (North Carolina sent individual notices to hundreds of thousands of voters not in DMV database).

[10] This Court should not subject voters without ID—already a disadvantaged subset of the population—to any remedy that requires them to make additional trips to a clerk or other location in order to have their ballots counted. *See Crawford*, 553 U.S. at 217 (Souter, J., dissenting). Even the *Crawford* plurality opinion recognized that such an extra trip may impose a "burden [that] may not be justified as to a few voters," *Crawford*, 553 U.S. at 199, the very voters at issue here. This is particularly true in light of the well-known transportation barriers of many such voters. *See, e.g.*, Dkt. #194 at 21-22, Dkt. #195 at 30-31; Ex. 12 (transportation issues prevented voter from getting ID); Ex. 14 (same).

Including reasonable notice will help ensure that voters without ID are not irreparably harmed simply because they do not know that an affidavit option exists. Many cases recognize the common sense principle that relief is not as effective if people do not know about it. *See, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 346-49 (1979) (providing notice of relief is "ancillary" to relief itself); *Youakim v. McDonald*, 71 F.3d 1274, 1292-93 (7th Cir. 1995) (reasonable for district court to require notice as part of remedy); *Holbrook v. Pitt*, 643 F.2d 1261, 1280 (7th Cir. 1981) (tenants need notice of right to receive retroactive payments). Notice is particularly important here, given the lack of meaningful outreach or public education since 2012, and the failure, to date, to allocate the amount of funds elections officials believed necessary for an effective outreach campaign. Ex. 32 at 144-45, 156-57; Ex. 34 at 213-14; Ex. 35 at 90; *see also* Ex. 32 at 49 (clerks have already expressed "concern about whether voters are sufficiently aware of the law"); Ex. 8 ¶ 10 (similar).

For these reasons, this Court should grant Plaintiffs' motion for a preliminary injunction as soon as practicable.

II. THE COURT SHOULD GRANT PLAINTIFFS' LEAVE TO FILE A SUPPLEMENTAL PLEADING, WHICH INCLUDES NEW PLAINTIFFS RECENTLY HARMED BY THE LAW

Plaintiffs also move, pursuant to Fed. R. Civ. P. 15(d), for leave to file a supplemental pleading attached as Exhibit 1, which includes new Plaintiffs who have recently been harmed by Act 23: Melvin Robertson, Leroy Switlick, and James Green. *See* Exs. 5-7. Rule 15(d) provides that the Court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." The standards governing Rule 15(d) motions are subject to the same standards as Rule 15(a) motions to amend the complaint, which generally examine whether there is prejudice

to Defendants. *See Glatt v. Chi. Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). Leave to file supplemental pleadings should be granted when the pleadings bear "some relationship" to the existing pleadings, because "forc[ing] plaintiffs to file new lawsuits to litigate what are essentially continuations of their original suits would waste judicial resources." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 397, 402 (E.D. Wis. 2008) (citation omitted). Supplemental pleadings can also add new Plaintiffs if they were affected by recent events. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964).

The Court should grant Plaintiffs' motion for leave to file a supplemental pleading, which raises allegations about events that have transpired since Plaintiffs' First Amended Complaint filed in March 2012—namely, the three new Plaintiffs' continued lack of acceptable ID for voting. Their claims are substantially identical to the existing claims, and do not require Defendants to produce any additional documents or witnesses that are not already required by the existing claims. Plaintiffs file this motion because, *inter alia*, Defendants are likely to persist in their erroneous argument, *see infra* Part III., that longstanding proposed class representatives Ruthelle Frank, Shirley Brown, and DeWayne Smith lack standing solely because some of them obtained ID well after Plaintiffs diligently filed their original class certification motion four years ago. But Defendants' argument is inapplicable to Melvin Robertson, Leroy Switlick, and James Green, who do not currently have acceptable ID and are suitable class members because they face the same types of burdens typical to the class.

III. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This Court should also certify Plaintiffs' proposed class pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2), which consists of eligible Wisconsin voters without acceptable ID for voting and who have one or more of the following barriers to obtaining ID: (1) name mismatches or

other errors in a document needed to obtain ID; (2) need to obtain an underlying document from an agency other than the DMV in order to obtain ID; and/or (3) one or more underlying document(s) necessary to obtain ID cannot be found.[11] This Court should further find that Plaintiffs Ruthelle Frank, Shirley Brown, DeWayne Smith, and new Plaintiffs Melvin Robertson, Leroy Switlick, and James Green are all appropriate representatives for this class. Although "courts have the power to order [preliminary] injunctive relief covering potential class members prior to class certification," *Lee v. Orr*, No. 13-cv-8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013) (citation omitted), certification is appropriate at this stage. If this Court grants Plaintiffs' motion for a preliminary injunction without certifying a class and there is another appeal, and if the Seventh Circuit then holds that Plaintiffs' requested injunction is improper without a certified class, certification now would potentially avoid another time-consuming remand—a remand that may come too late for any upcoming elections. *Cf.* Fed. R. Civ. P. 62.1.

A. Plaintiffs Satisfy the Prerequisites for Class Certification

All the prerequisites for class certification are satisfied here.

Prerequisites for (b)(2) and (b)(1) classes. This Court should certify Plaintiffs' proposed class pursuant to both Rule 23(b)(2) and (b)(1). Defendants have "acted . . . on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), because every class member must obtain acceptable ID in order to vote. Furthermore, absent class-wide treatment, there is a risk that Defendants will be subjected to incompatible injunctions. *See* Fed. R. Civ. P. 23(b)(1).

Numerosity. The class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. R. 23(a)(1). DMV officials testified about routinely encountering voters with name

[11] Plaintiffs reserve the right to seek modification of any proposed or certified class based on the development of evidence. *See Fonder v. Sheriff of Kankakee Cty.*, --- F.3d. ----, No. 15-2905, 2016 WL 3027698, at *2 (7th Cir. May 26, 2016).

mismatches or other errors. Dkt. #195 at 34 n.18, 36-37 n.20; *see also* Tr. 1104, 1865, 1884. As for voters who must contend with multiple agencies to obtain ID, 1,640 eligible voters in Milwaukee County alone lack both an ID and a Social Security card needed to obtain ID. Dkt. #195 at 28. And as recent DMV testimony have confirmed, there are many voters for whom birth documents do not exist, including for older African-American voters born in the Jim Crow South. *See* Dkt. #195 at 32 n.17; Ex. 37 at 64-65 ("a lot that we've seen" were instances where birth records were never created); Ex. 31 at 94-96 (difficulty finding hospital records from Jim Crow South); Ex. 30 at 24-25 ("several" situations where petitioners could not locate birth records because they were adopted or used a different name their entire life); Ex. 5 ¶¶ 8-11; *see also* Ex. 75.

Commonality. Commonality is satisfied because all class members raise the same legal question of whether they can obtain acceptable ID with reasonable effort, and whether the state's interests justify those burdens. They are also all subject to the same DMV rules. *See, e.g.*, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir. 2012).

Typicality and Adequacy. The claims of proposed class representatives Ruthelle Frank, Shirley Brown, DeWayne Smith, Melvin Robertson, Leroy Switlick, and James Green are all "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). All of them fall into one or more of the categories comprising the class, and thus, as discussed *supra* Part I.A., all of them have faced, or are facing, unreasonable burdens extending well beyond "a [single] trip to the [DMV], gathering the required documents [they already have,[12]] and posing for a photograph." *Crawford*,

[12] *Crawford*'s use of the phrase "gathering the required documents" refers to the gathering of documents that the voter already has. The plurality opinion stated that this burden was insignificant for "most voters who need them," *Crawford*, 553 U.S. at 198, and the record in that case failed to produce even one voter for whom obtaining a birth certificate was difficult, *id.* at 200-01. Similarly, *Frank I*'s finding that "photo ID is available to people willing to scrounge up

553 U.S. at 198. For that reason, they will also "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (adequacy, typicality, and commonality inquiries tend to "merge"). Indeed, Frank, Brown, and Smith have already ably discharged their duties as class representatives by providing trial testimony about the unreasonable burdens that represent the type of unreasonable burdens that class members continue to face, and nothing further is required of them. And Robertson and Switlick also have already testified and been subject to cross-examination by Defendants: Robertson at trial in this case, *see* Tr. 418-20; *see also* Tr. 401-02; and Switlick at trial in a case also challenging the voter ID law, *see* Ex. 6. There are furthermore no antagonistic interests between any of these representatives and the absent class members, and the trial demonstrated that the class members' interests are adequately protected by Plaintiffs' counsel. *See Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 598 (7th Cir. 1993).

Should the Court believe it necessary to divide the class into three subclasses, Plaintiffs submit that: (1) Frank continues to be an adequate representative for the subclass of voters with name mismatches, since she testified about facing the daunting task of correcting her birth certificate errors herself. *See* Dkt. #195 at 34 n.19. (2) Smith continues to be an adequate representative for the subclass of voters who must visit multiple agencies to obtain ID, since he testified about the unreasonable efforts he had to undertake to obtain a Social Security card. Dkt. #195 at 29, 31. New Plaintiffs Switlick and Green are also suitable representatives because they currently lack acceptable proof of identity and thus face similar obstacles. Exs. 6, 7. (3) Brown continues to be an adequate representative for the subclass of voters whose birth records cannot be found or do not exist, since she and her son testified about their failed efforts

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a birth certificate," 768 F.3d at 748, was in reference to Wisconsin voters generally, not the subgroup for whom the burdens are particularly heavy, *see generally Frank II*, 819 F.3d 384.

to obtain her birth certificate. Tr. 210-16.[13] New Plaintiff Robertson is also an adequate representative because he testified about not having a birth certificate in his name on file, Dkt. #195 at 32 n.17, and he still lacks acceptable ID today, *see* Ex. 5 ¶ 6.

B. Proposed Class Representatives Have Standing

Defendants are likely to argue that the proposed class representatives lack standing because some of them (Brown and Smith) later obtained ID. This argument should be rejected for multiple independent reasons.

First, all the proposed class representatives have standing because, as this Court has previously observed, they are "challeng[ing] the provision requiring a voter to *present* a photo ID at the polls. It is the need to present such an ID that injures a voter and confers standing to sue." Dkt. #195 at 44 (citing *Common Cause / Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009)). Thus, "even those members of the plaintiffs who currently possess an acceptable form of ID have standing to sue." Dkt. #195 at 44. Furthermore, IDs can expire. *Id.* at 44 n.24.

Second, it is "well-established" that the claims of a *plaintiff class* do not become moot just because the claims of a *named plaintiff* become moot. *Richards v. NLRB*, 702 F.3d 1010, 1017 (7th Cir. 2012). Where, as here, named Plaintiffs Brown and Smith moved promptly for class certification prior to their individual claims becoming moot, *see* Dkt. #63; Tr. 207-09, 860 (no ID in early 2012), the claims of the absent class members can remain live, even if the named plaintiff's claim becomes moot while the class certification motion is pending. *See, e.g.*, *McMahon v. LVNV Funding*, 744 F.3d 1010, 1019 (7th Cir. 2014); *Damasco v. Clearwire Corp.*,

[13] Defendants are likely to note that Brown obtained ID after trial. But given that class members without birth records are subject to an arbitrary decision-making process that is itself unconstitutional, the mere fact that luck (or perhaps her participation in a high-profile lawsuit, *see, e.g.*, Exs. 57, 58) happened to favor her on a particular day does not mean that her experience is not typical of the standardless discretion that her fellow class members face.

662 F.3d 891, 897 (7th Cir. 2011), *overruled on other grounds by Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015); *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003). This is especially the case here, where Plaintiffs' class certification motion has remained pending for more than four years due to circumstances unique to this case and outside of Plaintiffs' control. *See, e.g.*, Dkt. ##107, 113, 123, 195, 250. To hold otherwise would leave the mootness of Plaintiffs' classes entirely at the mercy of the timing of a class certification decision, all while Defendants' civil rights violations against affected class members continue. *See, e.g.*, *Comer v. Cisneros*, 37 F.3d 775, 798-799 (2d Cir. 1994) (where court did not rule on promptly filed class certification motion for two years, class certification relates back to original filing of the class complaint).

Third, a case is not moot if even a single plaintiff has standing, *see Crawford*, 553 U.S. at 189 n.7, and here, at least one class representative from each category continues to lack ID: Frank (category one), Switlick and Green (category two), and Robertson (category three). While Frank voted absentee by mail in this year's elections without having to show ID under the "indefinitely confined" exception, Wis. Stat. § 6.86(2)(a), this does not cure Frank's injury, since she prefers to vote in person, Ex. 4 at 13, which is a reasonable and justifiable desire since it is more likely to result in one's vote actually being counted as compared to voting absentee by mail, Ex. 28 at 47-48. Furthermore, the "indefinitely confined" exception is vague, and provides cold comfort to voters who are unsure whether they qualify—in fact, recently obtained discovery suggests that municipal clerks have been unilaterally removing voters from the indefinitely confined list, without notice, when in their subjective judgment a voter is not actually indefinitely confined. Ex. 33 at 77-78. Lastly, the condition of being "indefinitely confined" is by definition "indefinite," *see* Wis. Stat. § 6.86(2)(a) ("If any elector is no longer indefinitely

confined, the elector shall so notify the municipal clerk."), and Frank will need ID if and when she is able to vote in person again.[14]

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a preliminary injunction, leave to file a supplemental pleading, and class certification. In addition, the Court should enter a preliminary injunction as set forth in the proposed order attached to this motion.

Dated this 10th day of June 2016,

Respectfully submitted,

/s/ Sean J. Young

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[14] If this Court finds that Frank lacks standing, Plaintiffs respectfully seek leave to add a substitute class representative.

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