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 PERMANENT INJUNCTION, CLASS CERTIFICATION, AND JUDGMENT ON REMAINING AS-APPLIED CLAIMS

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Plaintiffs respectfully submit this memorandum of law in support of their motion for a permanent injunction, class certification, and judgment on their remaining as-applied claims, which are now ripe for adjudication.

This Court previously entered judgment in favor of Plaintiffs and enjoined the enforcement of Wisconsin's voter ID law based solely on Section 2 of the Voting Rights Act and the invalidity of Act 23 in its entirety under the *Anderson-Burdick* framework. (Dkt. #195 at 38-39, 68.) *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). The Court explicitly stated that it was not ruling on Plaintiffs' remaining claims, including several narrower as-applied challenges to Act 23's photo identification provisions (hereinafter "Act 23"), and their corresponding motion for class certification. (Dkt. #195 at 2, 69.) The Court of Appeals for the Seventh Circuit subsequently reversed, finding error solely with respect to the claims that were adjudicated by this Court. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank II*"). The United States Supreme Court denied certiorari, and the mandate issued on March 25, 2015. (Dkt. #221.)

Now that the case has returned to this Court, the claims left unresolved are ripe for adjudication. Plaintiffs thus respectfully request that the Court certify Plaintiffs' proposed putative classes and enter judgment in favor of Plaintiffs on certain remaining as-applied claims, which have already been fully tried before this Court. First, this Court should find Defendants liable on the claims brought by veterans, technical college students, and voters with out-of-state driver's licenses, who possess forms of photo identification that Defendants should be required to accept as identification for voting purposes. Second, this Court should find Defendants liable

on the claims brought by voters who lack photo identification and face legal or significant practical barriers to obtaining photo identification. With respect to remedy, Plaintiffs do not seek to enjoin Act 23's photo identification provisions entirely. Rather, Plaintiffs seek limited relief that is narrowly tailored to each of the ways in which Act 23 is unconstitutional as applied to these classes of voters.

PROCEDURAL BACKGROUND

This case challenges the manner in which Act 23 discriminates against certain vulnerable classes of citizens, by requiring that they present one of a few limited forms of photo identification in order to vote. Throughout the course of this litigation, Plaintiffs have vigorously pursued several distinct and independent claims in challenging the lawfulness of Act 23. These claims included not only those under Section 2 of the Voting Rights Act and the Fourteenth Amendment, but also as-applied constitutional challenges on behalf of narrow classes of citizens harmed by the law, including: veterans with secure photo identification issued by the U.S. Veterans' Administration; technical college students with photo identification that otherwise complies with the student ID card requirements of Act 23; eligible Wisconsin voters with out-of-state driver's licenses; and certain eligible voters who lack photo identification but face legal or systemic practical barriers to obtaining ID. Class certification was sought for each of these putative classes. (Dkt. #63, #194 at 92-106.) Plaintiffs sought to enjoin Act 23 in its entirety on their Section 2 and Fourteenth Amendment claims, and, in the alternative, requested more limited relief for each of the specific classes, such as expanding the types of photo ID deemed acceptable for voting and providing an affidavit exception for voters unable to obtain ID. (Dkt. #194 at 90-92.)

On April 29, 2014, this Court entered judgment in Plaintiffs' favor and enjoined Act 23 in its entirety. Recognizing the principle that courts should generally refrain from reaching constitutional questions unless it becomes necessary (*see* Dkt. #195 at 2), the Court "only address[ed] two of the plaintiffs' claims—the . . . claim that Act 23 places an unjustified burden on the right to vote and the claim . . . that Act 23 violates Section 2 of the Voting Rights Act." (Dkt. #195 at 2.) The Court specifically noted, "I do not address the *Frank* plaintiffs' remaining claims, which are all constitutional claims." (*Id.*) In addition, the Court declined to rule on Plaintiffs' motion for class certification, concluding that it was "moot because, as the defendants concede, all members of the proposed classes will benefit from the permanent injunction whether or not classes are certified." (*Id.* at 69.) Because the Court invalidated the entire statute, it was also unnecessary for the Court to explicitly distinguish between "facial" and "as-applied" challenges under *Crawford*. Accordingly, the Court did not address Plaintiffs' alternative requested forms of relief, such as expanding the list of acceptable IDs, or establishing an affidavit exception, all of which would have satisfied the state's tenuous interest in deterring voter impersonation fraud without disenfranchising vulnerable voters in the process.

"[B]y not addressing all constitutional claims," this Court expressly acknowledged that it was "leaving the door open to successive appeals." (Dkt. #195 at 3.) It recognized that should its judgment be reversed, "the remaining constitutional claims do not overlap substantially with the Section 2 claim and could more easily be addressed in separate proceedings." (*Id.*) The Seventh Circuit subsequently reversed and vacated this Court's injunction. The United States Supreme Court denied certiorari, and the mandate has issued, returning the case to this Court. Plaintiffs' remaining claims are now ripe for adjudication.

ARGUMENT

I. THE SEVENTH CIRCUIT'S MANDATE DID NOT RESOLVE PLAINTIFFS' OUTSTANDING, AS-APPLIED CLAIMS

This Court's initial decision focused solely on Plaintiffs' claims under the *Anderson-Burdick* framework and their claim under Section 2 of the Voting Rights Act, and it enjoined Act 23 in its entirety based on those claims. Thus, at that time, it was unnecessary for the Court to address Plaintiffs' remaining claims, though the Court correctly observed that reversal would necessitate further action. (Dkt. #195 at 3.) In light of the Seventh Circuit's reversal, adjudication of Plaintiffs' remaining claims is now required.

As an initial matter, the Seventh Circuit mandate does not address all of Plaintiffs' claims. Once a mandate issues, district courts must carefully "determine the scope of [the] appellate mandate"—which includes both "a certified copy of the judgment" and "a copy of the court's opinion," Fed. R. App. P. 41(a)—"as well as issues not decided expressly or impliedly by the Court." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Nat. Res.*, 71 F.3d 1197, 1202 (6th Cir. 1995); *see, e.g.*, *Samirah v. Gonzales*, No. 03 C 1298, 2006 WL 516580, at *1 (N.D. Ill. Feb. 28, 2006) (following reversal, noting, "we must only determine whether the Seventh Circuit dismissed all counts in the complaint, effectively terminating the case, or if it reversed on a narrow ground"). As the Federal Circuit has explained:

> "[A]n appellate mandate governs only that which was actually decided . . . . [E]very appellate court judgment vests jurisdiction in the district court to carry out some further proceedings. . . . Frequently, . . . the disposition of a case in the court of appeals will require the district court to undertake more significant proceedings. In either case, the nature of the district court's remaining tasks is discerned not simply from the language of the judgment, but from the judgment in combination with the accompanying opinion.

Exxon Chem. Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1478 & 1483 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 877 (1998); *see also, e.g.*, *U.S. v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) ("reversal" of judgment of conviction did not necessarily preclude a new trial given the reasoning of the prior appellate opinion).

Here, the Seventh Circuit's mandate, as expressed through its opinion, was limited to Plaintiffs' claims under Section 2 of the Voting Rights Act; and while it also ruled on Plaintiffs' Fourteenth Amendment claim, the panel explicitly made a distinction between "facial" versus "as-applied" challenges under *Crawford* and then addressed the challenge solely to the extent that it was a facial attack. *See Frank II*, 768 F.3d at 751-55 (Section 2), 747 (discussing *Crawford* "challenge to Act 23 as written ('on its face'), rather than to its effects ('as applied')"). The Seventh Circuit also went so far as to equate the Fourteenth Amendment claim it was addressing with the facial attack that was at issue in *Crawford* itself. *See id.*; *see also Crawford*, 553 U.S. at 188-89 ("We are, however, persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a *facial attack on the validity of the entire state statute* . . . ." (emphasis added)). Consistent with that limitation, the Seventh Circuit focused on Act 23's impact on the voting population as a whole, repeatedly emphasizing its belief that nearly all voters should be able to obtain photo identification without tremendous difficulty, and not on the burden placed on specific groups of voters. *See, e.g.*, *Frank II*, 768 F.3d at 749 ("if 22% of the eligible population does not perform even the easiest step, registration, it is difficult to infer from the fact that 9% have not acquired photo ID that that step is particularly difficult"); *id.* ("for most eligible voters not having a photo ID is a matter of choice rather than a state-created obstacle"). As the Seventh Circuit concluded,

"'[t]he application of the statute to the *vast majority* of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.' That is true of Wisconsin as well." *Frank II*, 768 F.3d at 755 (quoting *Crawford*, 553 U.S. at 204) (emphasis added).

Because the Seventh Circuit addressed and rejected Plaintiffs' Fourteenth Amendment claims only to the extent that they were an attack on the validity of the entire statute, Plaintiffs' remaining as-applied claims, including their corresponding motion for class certification, were "not decided expressly or impliedly by the [appellate] Court," *Fort Gratiot Sanitary Landfill, Inc.*, 71 F.3d at 1202, and should now be adjudicated by this Court. *See, e.g.*, *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam) (where prior Supreme Court decision upheld law against facial attack, district court erred by construing the decision as precluding an as-applied challenge). Plaintiffs' as-applied challenges on behalf of certain classes focus on "discrete and well-defined instances" in which Act 23 imposes unconstitutional burdens that require judicial resolution. *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (quotations and citation omitted).[1] In addition, they seek remedies narrowly tied to the specific harms alleged by each as-applied claim, as opposed to invalidation of the entire law. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) (while "facial challenges and as-applied challenges can overlap conceptually[,] . . . there is a difference: Where the claim and the relief that would follow reach beyond the particular circumstances of the plaintiffs, they must satisfy

[1] *See also Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) ("[i]n a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant. It is enough that we have only the statute itself and the statement of basis and purpose that accompanied its promulgation." (citations, quotations, and internal alterations omitted)).

the standards for a facial challenge to the extent of that reach." (citations, quotations, and internal quotations omitted)). The fact that Plaintiffs did not succeed on their challenges to the validity of the entire statute on appeal, moreover, is not dispositive on the merits of their as-applied challenges. *See, e.g.*, *Gonzales*, 550 U.S. at 168 (rejecting challenge to the validity of the entire statute but noting that "[t]he Act is open to a proper as-applied challenge in a discrete case").[2]

For these reasons, this Court may, and should, act upon Plaintiffs' remaining claims, which have been fully tried before this Court. As discussed below, this Court should first find that Act 23 unconstitutionally prevents veterans with secure photo identification issued by the U.S. Veterans' Administration, technical college students with photo identification that otherwise complies with the student ID card requires of Act 23, and eligible Wisconsin voters with out-of-state driver's licenses from using their respective forms of photo identification to vote. These photo identification cards are materially indistinct from the forms of identification accepted under Act 23, and there is no adequate justification for their exclusion; this Court should order Defendants to accept these forms of identification for voting purposes. Second, this Court should find that Act 23 unconstitutionally fails to provide an exception for voters who lack photo identification and face legal or systemic practical barriers to obtaining them, and should order a limited remedy that will prevent these voters from being disenfranchised.

[2] *See, e.g.*, *Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 666 (7th Cir. 2010) ("Our disposition of this facial challenge does not preclude a future plaintiff . . . from bringing an as-applied challenge to the Act . . . ."); *Lee v. Keith*, 463 F.3d 763, 769-70 (7th Cir. 2006) (despite previously upholding statute requiring independent candidates to file signatures before partisan primaries, court could invalidate statute in subsequent case, because "historical record" demonstrated that early deadline resulted in "complete exclusion of independents" from the ballot).

II. ACT 23 VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO VETERANS BY ARBITRARILY EXCLUDING THE USE OF VETERANS' ID FOR VOTING

For the reasons outlined in Plaintiffs' post-trial brief (*see* Dkt. #194 at 92-96, 103-04), this Court should certify as a class veterans who possess secure photo identification cards issued by the U.S. Veterans' Administration ("VA ID") (Class 6), and find that Act 23 violates the Equal Protection Clause as applied to that class. "'[I]nvidious' distinctions cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 23, 30 (1998). In particular, a statute cannot exclude a certain class of people from its protections while at the same time extending its protection to those who are similarly situated in all material respects. *See, e.g.*, *Ctr. for Inquiry, Inc. v. Marion Circuit Ct. Clerk*, 758 F.3d 869, 874-75 (7th Cir. 2014) (violation of Equal Protection Clause to preclude secular humanists from solemnizing marriages while allowing religious groups with similar values to do so).

Here, Act 23 arbitrarily excludes the use of secure VA IDs, even as it accepts photo ID issued by the U.S. military. This was done even after Wisconsin's top elections official specifically recommended the inclusion of VA IDs. (Fr. Exs. 1 at 2, 2 at 3, Tr. 871:10-22.) There is no adequate justification for excluding holders of VA ID cards from the franchise when their photo identification cards are materially identical to the forms of ID that Wisconsin accepts under Act 23. Although Defendants argue that VA IDs are excluded because they do not include an expiration or issuance date, and because the photograph may not be current (Dkt. #176 at 123), they conceded at trial that some military and tribal ID cards accepted under Act 23 also lack expiration dates (Tr. 1965:5-18), Wis. Stat. § 5.02(6m)(a)(3), (6m)(e); and that Act 23 allows the use of DMV-issued ID with photos that are as much as 16 years old (Tr. 1850:11-22),

Wis. Stat. § 343.50(5)(a)3. Veterans, many of whom are homeless or marginally housed (Tr. 1637:1-7), should not be prevented from participating in the democracy that they have risked their lives to protect. *Cf. Carrington v. Rash*, 380 U.S. 89, 97 (1965) ("The uniform of our country must not be the badge of disfranchisement for the man or woman who wears it." (citation and internal alterations omitted)).

Accordingly, this Court should enter an injunction requiring Defendants to accept VA IDs as identification for voting purposes.[3]

III. ACT 23 VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO TECHNICAL COLLEGE STUDENTS BY ARBITRARILY OBSTRUCTING USE OF TECHNICAL COLLEGE ID FOR VOTING

Similarly, this Court should certify a class of Wisconsin technical college students who have photo ID otherwise acceptable under the student ID provisions of Act 23 (Class 4) for the reasons outlined in Plaintiffs' post-trial brief (*see* Dkt. #194 at 92-96, 102), and find that Act 23 violates the Equal Protection Clause as applied to that class. Act 23 allows student IDs from other Wisconsin colleges and universities to be used for voting if the school is accredited and the card has a signature, issuance date, and an expiration date not later than two years after the date of issuance. Wis. Stat. § 5.02(6m)(f). But, without justification, Wisconsin legislators have impeded the use of student IDs satisfying the exact same date and signature requirements that are

[3] A plaintiff seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). As explained in the post-trial brief, Plaintiffs have amply satisfied these factors here. (Dkt. #194 at 88.)

issued by *two-year* Wisconsin technical colleges, which are also accredited by Wisconsin.[4] Technical college ID cards are materially identical to the student ID cards acceptable under Act 23, with the only difference being that the holder attends a state-operated, accredited technical college (which are generally two-year colleges) instead of other private and state-run colleges and universities (most of which are four-year institutions). As discussed above, the law is clear. A statute cannot exclude a certain class of people from its protections while at the same time extending its protection to those who are similarly situated in all material respects. *See, e.g.*, *Ctr. for Inquiry, Inc.*, 758 F.3d at 874-75.

Defendants' post-trial brief does not even attempt to proffer a justification for this differential treatment. Instead, Defendants merely suggest the issue is moot, since the Wisconsin Government Accountability Board ("GAB") has determined that accredited technical college IDs that satisfy the signature and date requirements *could* be acceptable for voting. (Dkt. #176 at 120-21; *see also* Tr. 879:12-16, Fr. Ex. 5 at 2-4.) However, the Wisconsin legislature's Joint Committee for the Review of Administrative Rules (JCRAR) refused to accept the GAB's determination and required the GAB to formally promulgate administrative rules. (Tr. 879:8-11, 880:4-9; *see also* Dkt. #195 at 5.) Those rules have not been promulgated, and they could again be blocked by the legislature or the governor (Fr. Ex. 372, Tr. 882:8-883:14), thus precluding the use of technical college ID for voting.

[4] Indeed, it is presumably easier for Wisconsin technical colleges to adapt their IDs to satisfy the two-year issuance-expiration date requirements (*see, e.g.*, Tr. 389:8-390:7), precisely because the Wisconsin Technical College System issues two-year degrees. *See* Wis. Stat. §§ 38.001(1m) (technical colleges "responsible for . . . programs . . . below the baccalaureate level, including associate degrees . . ."); 38.01(1) ("'Associate degree program' means a 2-year, post-high school program . . .").

In addition, this uncertain regime will result in disparate and arbitrary application of the technical college ID procedures throughout the state, in violation of the Constitution, *see Bush v. Gore*, 531 U.S. 98, 104-05 (2000), because different elections officials have offered different opinions about whether technical college IDs are acceptable for voting at all. (*Compare* Tr. 1957:23-1958:4 (GAB opinion that technical college IDs could be used to vote during February 2012 election when Act 23 was in effect), *with* Def. Ex. 1109 at 1 (Milwaukee Election Commissioner Robert Spindell asserting that technical college IDs are *not* valid for voting).) Defendants point to the testimony of Michael Haas, GAB Elections Division Administrator, for supposed clarity on the issue (Dkt. #176 at 121), but not even Mr. Haas could provide a straight answer when directly questioned by this Court as to whether technical college students could vote with their student identification cards. (Tr. at 1968:1-19 ("Q. So if the photo ID law is in effect, then what's the status of . . . tech students relative to the law? . . . A. Well, I think a lot of it depends upon the timing. . . ."). Eligible voters with Wisconsin technical college IDs cannot be constitutionally subject to a regime "so completely devoid of standards and restraints." *Louisiana v. U.S.*, 380 U.S. 145, 153 (1965). And as a result of this legal state of limbo, technical college students also may be needlessly challenged—and intimidated—at the polls on a basis that is inapplicable to most other voters. (Tr. 1958:5-7; 1968:2-13.)

Because technical colleges are accredited under Wisconsin law, Defendants have offered no reason why accredited Wisconsin technical college IDs, if otherwise compliant with the student ID rules of Act 23, should not be accepted on the same terms as IDs from four-year Wisconsin colleges and universities. Accordingly, this Court should enter an injunction deeming

accredited Wisconsin technical college photo IDs, if otherwise compliant with the student ID requirements of Act 23, to be acceptable forms of identification for voting purposes.

IV. ACT 23 IMPOSES AN UNCONSTITUTIONAL POLL TAX ON VOTERS WITH OUT-OF-STATE DRIVER LICENSES BY REQUIRING THEM TO SURRENDER THESE LICENSES IN ORDER TO VOTE

Next, this Court should, on behalf of Wisconsin voters with out-of-state driver's licenses (Class 3), certify that class for the reasons outlined in Plaintiffs' post-trial brief. (*See* Dkt. #194 at 92-96, 101-02.) In addition, it should find that Act 23 imposes an unconstitutional poll tax on that class in violation of the Twenty-Fourth Amendment and the Fourteenth Amendment by requiring members of that class to surrender their out-of-state driver's licenses (and lose the ability to drive) in order to obtain "free" ID to vote. *See Harman v. Forssenius*, 380 U.S. 528, 538-39 (1965) (Twenty-Fourth Amendment); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (Fourteenth Amendment). The Constitution prohibits not only poll taxes as such, but also the imposition of any "material requirement . . . upon those who refuse to surrender their constitutional right to vote," and it "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Harman*, 380 U.S. at 540, 540-41; *see, e.g.*, *id.* at 544 (requiring certificate of residence tantamount to poll tax). Whether the voter is able to satisfy the material requirement is irrelevant; that the voter is subject to that requirement at all is constitutionally unacceptable. *See Common Cause / Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009), *cert. denied*, *NAACP v. Billups*, 556 U.S. 1282 (2009).

Under Act 23, voters cannot use out-of-state driver's licenses as an acceptable form of voter identification. *See* Wis. Stat. § 5.02(6m)(a)-(f). And voters with out-of-state licenses are prohibited from obtaining a "free" Wisconsin photo ID card to vote unless they surrender those

licenses. (Tr. 828:14-18, 1113:7-16.) These voters then face three choices: (1) If such voters want to obtain a "free" Wisconsin ID to vote, they must, as noted above, surrender their out-of-state driver's license and give up their driving privileges. (*See, e.g.*, Tr. 1794:18-1975:16 (Diane Hermann-Brown helped elderly mother surrender her out-of-state driver's license, including her driving privileges, in exchange for a Wisconsin ID to vote).) (2) If such voters want to retain their ability to drive and their right to vote, they must *pay money* for a Wisconsin's driver's license (and surrender their out-of-state license), *see* Wis. Stat. §§ 343.11, 343.21, or pay money for another acceptable form of ID such as a passport. (*See, e.g.*, Tr. 693:20-694:7, 696:7-24 (Samantha Meszaros declined to surrender Illinois driver's license, which she used almost exclusively when she was visiting her parents at home, and paid $100 for a passport).) (3) If such voters want to retain their ability to drive and not pay money, then they cannot vote. (*See, e.g.*, Tr. 974:4-976:3, 980:25-981:2 (Matthew Dearing declined to surrender New York driver's license, which he seldom used in Wisconsin, and was unable to vote in February 2012 election).) Forcing voters into this Hobson's choice is offensive to the Constitution. *See, e.g.*, *Harman*, 380 U.S. at 541-42 (forcing voters to choose between paying money and going through a "cumbersome procedure" to submit certificate of residence was an unconstitutional poll tax).

Defendants' post-trial brief does not dispute that forcing eligible Wisconsin voters to surrender their out-of-state driver's licenses in exchange for the right to vote would be an unconstitutional poll tax. Instead, Defendants argue that this is a claim without a plaintiff, because there is supposedly no such thing as a voter who is eligible to vote in Wisconsin *and* who legitimately has an out-of-state driver's license. (Dkt. #176 at 112-14.) According to Defendants, "[a]n individual cannot be a resident of one state for driving (Wisconsin) and a

resident of another state for voting (non Wisconsin). If one is a resident for one of these purposes, one is a resident for the other." (Dkt. #176 at 112 (citations omitted).)

But this is simply wrong. As Wisconsin's top elections official explained at trial, having an out-of-state driver's license is "not conclusive evidence that [such voters] lack the intent to be[] a resident for voting purposes." (Tr. 873:3-24.) GAB is clear that these voters include students from out-of-state who go to school and lawfully vote in Wisconsin, and "snowbirds," people who live part year in Wisconsin and part in other states but vote only in Wisconsin;[5] and GAB has acknowledged that many of these people drive seldom, if at all, in Wisconsin. (Tr. 874:5-15.) Defendants nevertheless point to the supposed similarities in language between Wis. Stat. § 343.01(2)(g), which defines residence for purposes of driving, and subsection (1) of Wis. Stat. § 6.10, which defines residence for purposes of voting (*see* Dkt. #176 at 112), but Defendants ignore subsections (2) through (13) of Wis. Stat. § 6.10, which sets forth *twelve* other criteria used to determine residence for voting purposes. These separate subsections expressly address both students, *see id.* § 6.10(4), (12), and people who do not live full-time in Wisconsin, *see id.* § 6.10(5). States cannot use crude and inaccurate proxies, such as the mere possession of an out-of-state driver's license, as conclusive proof that a voter does not satisfy the state's residency requirements for voting. *See Carrington*, 380 U.S. at 94-95 (state could not categorically bar military voters from voting simply because they tend to be "transient" and less

[5] (*See* Fr. Ex. 1 at 3 ("Wisconsin law permits out-of-state students to vote in Wisconsin elections if they have established a 10-day [now 28-day] physical presence and intend the presence to be their residence for voting purposes. . . . These students may want to keep their out-of-state license because they may return to their home state for vacations or summer employment."), Tr. 1687:14-1688:21 (GAB's Ross Hein aware of at least 10 snowbirds who are eligible to vote in Wisconsin but have out-of-state driver's licenses).)

likely to satisfy Texas's residency requirement for voting, in place of "more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote").

Defendants try to deflect the blame for this poll tax by noting that "existing motor vehicle laws[, not Act 23,] have always required a Wisconsin resident that drives here to have a Wisconsin driver license." (Dkt. #176 at 112-13.) But a voting restriction cannot be immune to challenge simply because it relies on a separate bureaucratic procedure unrelated to voting to impede access to the ballot. *Cf., e.g., Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) (three-judge court holding that requiring voters to go through the burdensome procedure of obtaining "poll tax receipts within a fixed time from the sheriff who is not an election official" violated Twenty-Fourth Amendment).

Accordingly, to avoid the imposition of an unconstitutional poll tax, this Court should enter an injunction deeming out-of-state driver's licenses (that are unexpired or have expired since the last general election, which are the same requirements applicable to in-state driver's licenses) to be acceptable forms of identification for voting purposes.

V. ACT 23 IMPOSES UNCONSTITUTIONAL BURDENS ON CLASS 1 VOTERS BY FAILING TO PROVIDE A NARROW EXEMPTION FOR THOSE VOTERS

Act 23 also violates the Fourteenth Amendment as applied to Class 1, which was left uncertified in this Court's last ruling: eligible Wisconsin voters who lack photo ID and face systemic practical barriers to obtaining an ID. Act 23 does not provide any fail-safe for these voters, such as allowing them to execute an affidavit at the polling place in lieu of presenting qualifying identification. *See, e.g., South Carolina v. U.S.*, 898 F. Supp. 2d 30, 35-38, 40-41 (D.D.C. 2012) (allowing voters without ID to vote at polling place with affidavit attesting to

"reasonable impediment" to obtaining ID, with the affidavit containing a non-exhaustive list of impediments voters could check off); *cf. Crawford*, 553 U.S. at 186 (voters who are "indigent" may vote by affidavit). Had such an exception been provided, Ruthelle Frank would not have had to ensure that her birth records needed to conform to other documents (Fr. Ex. 606); Eddie Lee Holloway, Jr. would not have had to spend $180 on a bus trip to Illinois in an unsuccessful effort to comply with DMV's demand that he amend the birth records he had in his possession so as to conform to his social security records (Tr. 44:12-52:1); Melvin Robertson, whose birth certificate does not exist and who lacks any other evidence of birth, would not have had to try in vain to find 80-year-old elementary school records (Tr. 400:20-402:10); and DeWayne Smith would not have had to make three or four trips to Social Security, a trip to Froedert Hospital, and two trips to DMV—all by bus or in reliance upon others who drove—to obtain the Social Security card that DMV demanded (Tr. 856:9-859:9). None of these class members would have had to go through these obstacles just to exercise their fundamental right to vote. Even if enjoining Act 23 entirely is too broad a remedy for these class members, a more limited option, such as the affidavit exception described above, is entirely appropriate. *See Wis. Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186-87 (7th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998) (court should generally confine remedy to nature of the harm alleged by the as-applied claim).[6]

This Court should therefore certify Class 1 for the reasons outlined in Plaintiffs' post-trial brief (*see* Dkt. #194 at 92-99), and focus on the application of Act 23 to that class. The specific

[6] To the extent that this Court believes that *Frank II*'s facial ruling requires it to dismiss these as-applied challenges, Plaintiffs respectfully contend that *Frank* was wrongly decided given its non-record-based application of *Crawford* and its many factual and legal inaccuracies. *See Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc). Plaintiffs thus preserve that argument should it become necessary to make on appeal.

burdens faced by these voters are detailed in Plaintiffs' post-trial brief (Dkt. #194 at 10-26), and include transportation barriers, inaccessible DMV locations, and missing or misspelled birth certificates or social security cards. They amply demonstrate that these tens of thousands of voters face substantial difficulties obtaining photo identification and are likely to be deterred from voting in future elections. This Court should therefore enter judgment in Plaintiffs' favor on this as-applied claim.

With respect to remedy, this Court should find that the most practicable way to remedy the harms to these specific voters is an injunction allowing Wisconsin voters without acceptable forms of ID to vote at the polling place by signing an affidavit, under penalty of perjury, affirming their identity, their lack of acceptable identification, and the existence of a reasonable impediment beyond their control that has prevented them from obtaining ID. The affidavit should provide examples of reasonable impediments that the elector may check off, *see South Carolina*, 898 F. Supp. 2d at 40-41, and "any reason asserted by the voter on the reasonable impediment affidavit for not having obtained a photo ID must be accepted . . . unless the affidavit is 'false,'" *id.* at 36. This will alleviate the unique burdens imposed on this specific class of voters without undermining the state's purported interest in deterring in-person voter impersonation fraud. *See id.* ("the reasonable impediment affidavit simply helps to ensure that voters with non-photo voter registration cards are who they say they are").[7]

[7] Providing an affidavit option would also provide complete alternative relief to voters with VA ID, technical college ID, and out-of-state drivers' licenses, as well as with respect to Plaintiffs' Claims 7 and 8, which demonstrate that Act 23's implementation will be inconsistent, chaotic, and fundamentally unfair, in violation of the Equal Protection and Due Process Clauses.

In addition, the record is clear that, notwithstanding the extensive confusion among clerks and voters alike about the specific and complicated requirements and exemptions under Act 23, no individualized notice was provided to voters who will need ID to vote, or to those who may be exempt from these requirements but do not realize that they are. (Tr. 913:23-914:18; 1646:2-1648:17; 1960:6-12.) Many of these voters either do not know that they must obtain ID, or will go through extraordinary efforts to obtain ID because they do not realize that they fall within Act 23's narrow exemptions. (*See, e.g.*, Fr. Ex. 608 at 14:7-15:4 (Ruth Ann Obermeyer did not know she might fall under the "indefinitely confined" exception to Act 23).) To remedy this significant burden, this Court should require that Defendants send individualized, mailed notice to each registered voter listed in the Statewide Voter Registration System database; and inform them clearly and in language appropriate for persons with limited education about Act 23's requirements, how they can obtain or renew ID if necessary, this Court's injunction, and any exemptions that might apply. In addition, this Court should order Defendants to send individualized, mailed notice to each registered voter currently or previously listed in on a permanent absentee list and to each facility (including but not limited to nursing homes and group homes); and clearly inform them that they (or their residents) may be exempt from Act 23, how to vote if they are exempt, and also how they can obtain ID if they are not exempt.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for class certification and enter judgment in favor of Plaintiffs on their as-applied claims. In addition, the Court should enter an injunction as set forth in the proposed order attached to this motion.

Dated this 26th day of March 2015,

Respectfully submitted,

/s/ Sean J. Young

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