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

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

Appeal From The United States District Court
For The Eastern District Of Wisconsin, No. 2:11-CV-1128,
The Honorable Lynn Adelman, Presiding

REPLY AND RESPONSE BRIEF OF DEFENDANTS-APPELLANTS, CROSS-APPELLEES

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Oral Argument Requested

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INTRODUCTION AND SUMMARY OF ARGUMENT

Because Wisconsin's law already provides a mandatory procedure under which any eligible voter will receive a free ID with "reasonable effort," *Frank v. Walker,* 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"), Plaintiffs spend much of their brief attacking Defendants for enacting this voter-protective regime, worrying that this will help Defendants "evad[e] liability." *See* Pls. Opening Br. 58.

Plaintiffs' focus on "liability" has caused them to overlook the legally relevant fact: *all* of the changes that Defendants made have, step by step, helped the ever-shrinking number of citizens having difficulties under Wisconsin's photo ID law. Defendants first enacted a free photo ID program, under which DMV has given out over 420,000 free IDs to eligible Wisconsin voters. A.120.[1] Next, in 2014, Defendants improved this free ID program by adding the ID Petition Process (IDPP) to help those lacking certain documents. This robust system proved insufficient for only an extremely small number of people; roughly 52, or .0124% of the 420,000 who have gotten free IDs from DMV. A.151. To address these few concerns, in May 2016, Defendants enacted another salutary change to the law, which ensures that all those who initiate the IDPP are issued a free ID promptly. The comprehensive nature of these provisions is why the district court could not identify *any* "situation[ ] in which the state's procedures fall short" of *Frank II*'s "reasonable effort" standard. A.186–87.

[1] Citations to Defendants' Separate Appendix are "A.__"; citations to Plaintiffs' Short Appendix are "SA___"; citations to Defendants' Supplemental Appendix are "RSA.__"; citations to the district court docket are "R.[ECF Number]:[Page Number]."

Beyond attacking Defendants for proactively solving the few problems that arose under Wisconsin's photo ID law, Plaintiffs make a series of meritless arguments.

With regard to the overbreadth of the preliminary injunction, Plaintiffs implausibly argue that the injunction will be used only by those who cannot obtain ID with reasonable effort. Plaintiffs' argument violates the requirement that any equitable relief must be crafted to address the "situations in which the state's procedures fall short." A.187. The district court's affidavit informs voters that reasons such as "Family responsibilities" or "Work schedule" are good enough justifications to avoid Wisconsin's photo ID law, even though this is plainly contrary to the requirements of binding caselaw. In all, the affidavit regime will be regularly used "even if by objective standards the effort needed [to get free ID] would be reasonable (and would succeed)." A.187.

Turning to likelihood of success on the merits, Plaintiffs argue that Wisconsin's current law still contains gaps, but they are simply wrong. Virtually all of Plaintiffs' arguments on this score involve novel attempts to narrow the plain terms of Wisconsin's voter-friendly laws, including what constitutes sufficient proof of identity and the breadth of the "indefinitely confined" statutory exemption. While Defendants strongly believe that Wisconsin's laws are unambiguous in voters' favor on each issue that Plaintiffs have identified—and thus there are no gaps left to address—if this Court believes that Plaintiffs' arguments create any doubt on these important issues, this Court could certify any such questions of state law to the Wisconsin Supreme

Court. Relatedly, these same state law provisions clearly provide that each Plaintiff would easily be able to vote, after expending reasonable effort, giving an additional reason why Plaintiffs have no likelihood of success on the merits. And the preliminary injunction fails on numerous other merits grounds, including because Plaintiffs have no answer to the argument that the injunction is based upon a fail-safe class.

Plaintiffs' efforts to bolster the district court's indefensible injunction by introducing new evidence for the first time on appeal are improper under binding caselaw. *See Berwick Grain Co., Inc. v. Ill. Dep't of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997). But if this Court were inclined to consider post-injunction developments, then it should take into account the fact that since Wisconsin issued its current law five months ago, every single person who has submitted an application under the IDPP has been mailed a free photo ID within six business days. This strongly supports Defendants' position that no judicial intervention is warranted.

Finally, Plaintiffs' cross-appeal—asking this Court to overturn *Frank v. Walker,* 768 F.3d 744 (7th Cir. 2014) ("*Frank I*")—is jurisdictionally improper and wrong on the merits. This case involves an interlocutory appeal from a district court order giving Plaintiffs just what they asked for: a preliminary injunction requiring an affidavit procedure. Plaintiffs cannot shoehorn into a preliminary appeal the broader issue of whether Wisconsin's photo ID law must be invalidated on its face. In any event, there is no reason to reconsider *Frank I*, which is consistent with binding Supreme Court caselaw. Plaintiffs' arguments rely primarily upon out-of-circuit cases that deal either with intentional racial discrimination not at issue here, voting laws

having nothing to do with photo ID, or as-applied challenges under the Voting Rights Act. There is no court of appeals reaching a contrary conclusion to *Frank I*'s core holding: that a photo ID law withstands facial attack under the Fourteenth Amendment and Section 2 of the Voting Rights Act.

ARGUMENT

I. The District Court's Injunction Is Overbroad And Inequitable

The district court's preliminary injunction requires that a subjective affidavit must be available at the polls to anyone without photo ID, including those who have not "tried to secure [a photo ID], and even if by objective standards the effort needed would be reasonable (and would succeed)." A.187. In their opening brief, Defendants demonstrated that this relief "exceed[s] the extent of the plaintiff[s'] protectible rights," *Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1094 (7th Cir. 1988), is broader "than necessary to provide complete relief to plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and invites every person to "become a law unto himself." *Somlo v. C. A. B.*, 367 F.2d 791, 793 (7th Cir. 1966); Defs. Opening Br. 18–21. This relief also harms both the Defendants and the public by, *inter alia*, undermining the basic purposes of the photo ID law: "the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections." *Frank I,* 768 F.3d at 745. The public will easily understand that anyone can simply sign the district court's affidavit, and DMV will have little practical ability to verify that person's eligibility to vote. Defs. Opening Br. 35.

Plaintiffs respond with four categories of meritless arguments.

First, Plaintiffs assert that *some* sort of equitable relief was warranted because, allegedly, Defendants "do not even dispute the district court's finding that Plaintiffs are likely to succeed on the merits with respect to establishing liability." Pls. Opening Br. 27. This misrepresents Defendants' position, as Plaintiffs later acknowledge. *See* Pls. Opening Br. 46 (conceding that Defendants' position is that "*no* voter will be unable to obtain ID with reasonable effort"); *accord* Defs. Opening Br. 25 ("neither Plaintiffs nor the district court have identified even a single individual who" cannot obtain photo ID with reasonable effort). In any event, even if Plaintiffs had shown that some voters cannot obtain photo ID with reasonable effort, *but see* Defs. Opening Br. 25; *infra* pp. 9–19, *Frank II* and principles of equity require that relief must be tailored to "situations in which the state's procedures fall short." A.187; *see Frank II*, 819 F.3d at 386–87. The district court's regime violates this requirement, and is thus a clear abuse of discretion. Defs. Opening Br. 20–21.

Second, when Plaintiffs turn to defending the injunction that the district court issued, they make three points that all have the same fundamental flaw. They praise the district court for "[h]ewing to the language in *Frank II*" by including the phrase "reasonable effort" in the affidavit. Pls. Opening Br. 28–29. They chide Defendants for "speculat[ing] that the affidavit will cause voters brazenly to swear under oath that they have reasonable impediments because they spent a 'single minute' trying to obtain ID." Pls. Opening Br. 32.[2] And they argue that an injunction can incidentally

[2] Plaintiffs appear to be unaware that the "single minute" language is taken directly from this Court's order. *See* A.187 (*Frank v. Walker*, No. 16-3003, Dkt. 24, Order of Aug. 10, 2016).

benefit non-class members. Pls. Opening Br. 35 (citing *Brown v. Plata*, 563 U.S. 493, 531 (2011)).

These points all miss the mark for the same reason: the district court's affidavit, *by design*, applies largely—and, in Defendants' view, *entirely*, Defs. Opening Br. 20, 25—to people who can vote after employing reasonable effort. The affidavit asks each person without ID to indicate whether they meet the reasonable-effort standard. But since "reasonable effort" is a *legal* rule that no lay voter can fairly be asked to apply unguided, the affidavit then provides a list of options to check, such as "Family responsibilities," "Work schedule," or "Lack of birth certificate." A.172. This list of options signals to voters that these reasons are categorically sufficient. But, fatal to the injunction, even Plaintiffs do not argue that any of the listed options satisfy *Frank II*'s legal rule in all, or even most, circumstances. Instead, Plaintiffs merely assert that some of the listed reasons could be sufficient in some, specialized instances. Pls. Opening Br. 30. Accordingly, the broad categories of people who can be expected to use the unaccountable affidavit far exceed the nonexistent—or, even under Plaintiffs' erroneous view, extremely small—number of voters who, objectively, cannot obtain photo ID with reasonable effort.

Just a couple of the affidavit's listed options suffice to make the point. Most everyone would honestly say that they were attending to "Family" or "Work" duties instead of making one trip to the DMV to get a free ID. Accordingly, almost every voter without a photo ID can show up without such ID on election day and honestly check either of those two options, "even if by objective standards the effort [needed to

get free ID] would be reasonable (and would succeed)." A.187. Similarly, people lacking birth certificates would fairly interpret the "birth certificate" option as permitting them to vote without photo ID, even though Wisconsin's law will provide them a free photo ID with just one trip to the DMV. A.235. In addition, some people—including Plaintiffs themselves—believe that the photo ID law serves no beneficial purpose, and thus could honestly answer that they believe that making one trip to DMV is an "[un]reasonable effort" and could so indicate after checking "Other." And, of course, as the district court previously recognized, "a person willing to commit voter-impersonation fraud could submit a false affidavit." *Frank v. Walker,* 141 F. Supp. 3d 932, 935 n.2 (E.D. Wis. 2015).

Contrary to Plaintiffs' intimations, Pls. Opening Br. 32, Defendants have no interest in putting busy election officials in the difficult situation of testing voters' honest, subjective beliefs against the legal, objective "reasonable effort" standard or attempting to ferret out knowingly false affidavits on election day. That is why any lawful remedy must be tailored to "situations in which the state's procedures fall short." A.187. While Defendants believe that there are no longer any situations where the State's procedures are inadequate under its current law, if such situations are proven to exist, only a properly tailored remedy would be lawful.[3]

[3] On October 21, 2016, Plaintiffs filed a notice of supplemental authority concerning *Fish v. Kobach*, __ F.3d __, No. 16-3147, 2016 WL 6093990 (10th Cir. Oct. 19, 2016). *Frank v. Walker*, No. 16-3003, Dkt. 57. *Fish* does not support Plaintiffs' position because while the injunction in that case involved only a "negligible risk" of overbreadth, 2016 WL 6093990, at *33, the preliminary injunction in the present case is designed to be used either entirely or primarily by those who can obtain ID with reasonable effort. In addition, while the voter

Third, Plaintiffs argue that the district court's remedy is permissible because other States have adopted "some kind of affidavit exception" and because certain election officials that oppose the photo ID law support the district court's remedy. Pls. Opening Br. 30–31. But it is the people of Wisconsin—not other States or self-selected local officials—who have the sovereign right to determine Wisconsin's election laws. The limited role of the federal courts is to identify "situations in which the state's procedures fall short" and to craft a remedy tailored to addressing those situations, if any are found to exist. A.187. The people of Wisconsin were well within their rights to conclude that the comprehensive regime their representatives enacted better serves the goals of the photo ID law than an affidavit-based system, which can be easily evaded and would provide little confidence in election integrity.

Finally, Plaintiffs wrongly speculate that Defendants' interests would be achieved by accepting "proof of identity *at the polling place*." Pls. Opening Br. 36. This misunderstands how Wisconsin's law protects every voter's right to vote, while also forwarding "both the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections." *Frank I*, 768 F.3d at 745. The vast majority of eligible voters who lack photo ID have ready access to all documents needed to definitively establish their eligibility, including proof of birth name, date, and U.S. citizenship. *See* A.120. Wisconsin reasonably asks these voters to make just one trip to DMV to get their free ID card. *See Crawford v. Marion Cnty.*

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registration provision at issue in *Fish* involved a "near certainty . . . [that] over 18,000 U.S. citizens in Kansas will be disenfranchised," *id.*, Plaintiffs have not identified a single voter who cannot obtain free photo ID under Wisconsin law with reasonable effort.

Election Bd., 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). Over 420,000 eligible voters in Wisconsin have done just that. A.120. For the few voters who do not have such documents readily available, Defendants have created a comprehensive procedure under which applicants come to DMV with the documents that every eligible voter has and then DMV *automatically* mails to each applicant, within six business days, either a permanent photo ID (if eligibility can be determined quickly) or a temporary photo ID (if more time for verification is needed). 725A3 Wis. Admin. Reg. EmR1618, § 10(a) (May 16, 2016) ("Wis. EmR1618"); A.126. The practical efficacy of this verification procedure begins with the paperwork that the applicants submit to initiate the process. Plaintiffs' proof-of-identity-at-the-polls bypass would severely undermine this verification procedure, since DMV investigators would be left with little to work with.

II. No Injunction Should Have Issued Because Plaintiffs Have No Likelihood Of Success On The Merits

A. Plaintiffs Failed To Show That There Are Any Voters—Including Plaintiffs Themselves—Who Cannot Vote After "Reasonable Effort"

The primary factual dispute on the merits of this class-based action turns on whether Plaintiffs have shown that there are eligible Wisconsin voters who cannot vote with "reasonable effort." *Frank II*, 819 F.3d at 386–87. In order to prevail on the merits of their class-based claim, Plaintiffs would need to show that there are "numerous" such voters, Fed. R. Civ. P. 23(a)(1), and that Plaintiffs themselves fall within this category. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Plaintiffs have failed to make these showings, meaning they have no likelihood of success on the merits.

1. Plaintiffs' attempts to identify gaps in Wisconsin's comprehensive photo ID program fail, and certainly fall short of establishing their burden to "demonstrat[e]" that any gaps are sufficiently widespread to satisfy Rule 23's "numerosity" standard. *Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990); *see* Fed. R. Civ. P. 23(a)(1).

Name mismatches. In their opening brief, Defendants explained that any ID applicant with a name different from the name reflected on supporting documentation may sign a name-change affidavit under Wis. EmR1618, §§ 1–3, to address this issue. Defs. Opening Br. 25–26. Plaintiffs respond that it is "unclear" how this process works for those who have errors on their birth certificates or voters with "mismatched documents." Pls. Opening Br. 16. But the process is clear and comprehensive. State law provides how someone can "establish a name *other than the name that appears on a supporting document*." Wis. EmR1618, § 1 (emphasis added). If an applicant brings a supporting document with a name mismatch to DMV—whether the mismatch is the result of a purposeful name change (such as after a marriage) or to correct an error in a supporting document (such as a person who has a typographical error on a birth certificate but whose other documents have the error corrected)—then the applicant can just sign an affidavit attesting to their correct name, A.125, which would satisfy the criterion of "evidence acceptable to the administrator" to establish the individual's accurate name. Wis. EmR1618, §§ 1, 3.[4]

[4] If the discrepancy in the applicant's documents is minor, such as a single letter difference, then this can be handled at a field office as an administrative matter. A.125.

Plaintiffs' point that this procedure does not involve an "unavailable" document, as that term is used in the IDPP, Pls. Opening Br. 16, is irrelevant because this process is not part of the IDPP. After all, if an eligible voter brings in all of the proofs required for a free ID card, but one or more of these proofs has a name mismatch, that person would get a free ID *card* by signing an affidavit—consistent with Wis. EmR1618, §§ 1, 3—without ever entering the IDPP's verification process. Tellingly, Plaintiffs have not identified *a single applicant* who has been denied a free ID under current law because of issues with "name mismatches or other errors in birth certificates or other necessary documents." *Frank II*, 819 F.3d at 386.[5]

Proof of identity. Plaintiffs fail to point to *any* eligible voter who does not have ready access to at least one "supporting document identifying the person by name and bearing the person's signature, a reproduction of the person's signature, or a photograph of the person." Wis. Admin. Code § Trans 102.15(4). This controlling definition indisputably covers documents such as social security cards, state-issued food assistance cards, many tax forms, Medicare cards and the like, any one of which is sufficient. Defs. Opening Br. 23–24.

Plaintiffs' argument that this Court should ignore this definition as an "introductory preface," Pls. Opening Br. 42, misunderstands state law. Section 102.15(4) first provides this definition, *then* explains that "[a]cceptable supporting

[5] Plaintiffs' claim that "DMV refused to issue ID through the IDPP in the voter's correct name as recently as September 2016 because birth certificate contained misspelling," Pls. Opening Br. 17–18, is thus deeply misleading. The voter referenced did not need to use the IDPP, and was issued an ID *card* in his correct name. RSA.51–53.

documents *include . . .*," *and then* offers a non-exhaustive list. Wis. Admin. Code § Trans 102.15(4) (emphasis added). Under Wisconsin law, "generally, the word 'includes' is to be given an expansive meaning, indicating that which follows is but a part of the whole. While courts may sometimes read the word 'includes' as a term of limitation or enumeration under the doctrine of *expressio unius est exclusio alterius*, there must be some textual evidence that the legislature intended this doctrine to apply." *In re Chezron M.*, 698 N.W.2d 95, 102 (Wis. 2005) (citations omitted); *accord Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Here, the only "textual evidence" supports the conclusion that Section 102.15(4)'s definition is controlling, and that the list that follows is merely exemplary.[6] Specifically, Section 102.15 defines the documents acceptable for proof of name, date of birth, and citizenship by simply providing a list of acceptable proofs, without any broad definition or the word "include" before the list. *See, e.g.*, Wis. Admin. Code §§ Trans 102.15(3), (3m). The fact that Section 102.15(4) takes an entirely different approach—providing a capacious definition, using the expansive term "include," and then providing a list—reinforces the conclusion that this Section uses the term "include[ ]" in its "generally" accepted manner, such that the broad definition is controlling and

[6] Because Wisconsin law requires a "textual" indication to forgo the "generally" accepted meaning of the term "include[ ]," *In re Chezron M.*, 698 N.W.2d at 102, Plaintiffs' citation to regulatory history adjusting the non-exhaustive list is irrelevant. *See id.* at 104.

the list that follows is merely "part of the [definitional] whole." *In re Chezron M.*, 698 N.W.2d at 102.[7]

Plaintiffs also complain that DMV has recently updated its website to add a couple more examples of documents that satisfy the proof-of-identity requirement, Pls. Opening Br. 40–43, suggesting that it is this "very recent change to the DMV website" that Defendants are relying upon. Pls. Opening Br. 41. But the identity list on DMV's website is "non-exhaustive," Wisconsin Department of Transportation, *Acceptable documents for proof of identity* (last visited Oct. 26, 2016),[8] just as the list in Section 102.15(4) is non-exhaustive. Accordingly, Section 102.15(4) and the website are entirely consistent. DMV will continue to update its website if it identifies more commonly used documents that meet Section 102.15(4)'s definition. At all times, it is the regulatory definition in Section 102.15(4)—not the website's non-exhaustive list—that is legally controlling.

Finally, Plaintiffs observe that social security cards, which some voters lack, "are the most common form of proof of identity." Pls. Opening Br. 15, 40 n.16. A social security card is a particularly convenient document for establishing proof of identity for many eligible voters precisely because it also serves as proof of social security number. Wis. Admin. Code § Trans 102.15(5). But proof of social security number is

[7] Plaintiffs point to a colloquy during the initial trial in this case, Pls. Opening Br. 43, but that exchange only supports the point that Section 102.15(4)'s list is, in fact, non-exhaustive, just as the term "include" plainly provides. *See* SA54.

[8] http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/identity.aspx.

not necessary under the IDPP. Wis. EmR1618, § 4. That means the lack of a social security card will not stop any eligible voter from getting a free photo ID.[9]

Birth certificates. Plaintiffs do not dispute that, under current law, no one needs to produce a birth certificate to obtain a free photo ID. Defs. Opening Br. 27. Instead, they worry that this may not "give them a *permanent* ID if the DMV is unable to unearth a birth certificate or secondary documentation of birth." Pls. Opening Br. 18 (emphasis added). As a threshold matter, this argument is legally irrelevant to the present appeal, which involves only a *preliminary* injunction. *See* Defs. Opening Br. 29 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). In any event, Plaintiffs are wrong on the law. If the applicant responds once to multiple DMV inquiries every six months, their temporary ID will be renewed for as long as the verification process takes. Wis. EmR1618, § 8; A.126–27. The only other way that the applicant will lose their free ID is if DMV determines, *at the end of the verification process*, that the applicant is ineligible to vote or committed fraud (or the applicant voluntarily cancels the process). Wis. EmR1618, § 8; A.126–27. While Plaintiffs worry that DMV may—for some unspecified reason—deem an applicant's response inadequate to continue the verification process, Pls. Opening Br. 18 & n.7, that concern is entirely baseless.

Those too ill or infirm to travel to DMV. Plaintiffs' claim that there are some voters who are too ill or infirm to travel to DMV to get their free ID, Pls. Opening Br.

[9] For the same reason, Plaintiffs' claim that "1,640 eligible voters in Milwaukee County alone lack both ID and a Social Security card," Pls. Opening Br. 15, is irrelevant.

19–20, is irrelevant because those individuals are statutorily exempt from the photo ID law under Wis. Stat. §§ 6.86 (2)(a) & 6.87(4)(b)2. Defs. Opening Br. 27–28.

Plaintiffs' assertion that this exception does not protect all ill or infirm individuals who are unable to travel without unreasonable effort, Pls. Opening Br. 21, is contrary to Wisconsin law. The exception applies to anyone who is "indefinitely confined." Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)2. This phrase—read in context—most naturally means "limited, restricted, restrained" "[w]ithout . . . limitation to a particular . . . time." 3 *Oxford English Dictionary* 709 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); 7 *Oxford English Dictionary* 842; *see generally State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004) ("statutory language is interpreted in the context in which it is used"). A narrower construction—such as one that would limit the exception to those forever confined to their apartments—would be unreasonable given the statute's context: providing an exemption for those who cannot reasonably vote in person. Anyone who cannot reach a polling place without unreasonable effort because of their health or age is entitled to use this exception to the photo ID law as well. That is how this statute is understood by the Wisconsin Elections Commission, which is the body charged with "the responsibility for the administration of . . . laws relating to elections." Wis. Stat. § 5.05(1); *see* Bring it to the Ballot, *Are There Exceptions to the New Law*[10] ("'Indefinitely confined' voters are

[10] http://www.bringitwisconsin.com/are-there-exceptions-new-law (last visited Oct. 25, 2016).

persons who, because of age, physical illness, infirmity or disability, may have difficulty traveling to the polling place.").[11]

Plaintiffs' further argument that there are fully healthy voters who nevertheless qualify as voters unable to obtain ID with reasonable effort because of transportation or work difficulties, Pls. Opening Br. 19–21, is based upon an erroneous understanding of the law. Under *Crawford*, *Frank I*, and *Frank II*, it is reasonable for a State to ask *every* able-bodied person to come down to DMV to obtain their free photo ID, just as they would come to the polls to cast a ballot.

Number of registered voters without photo ID. Unable to produce any record example of eligible voters who cannot obtain a photo ID after reasonable effort—let alone "numerous" such voters—Plaintiffs fall back on the claim that, at the time of the original trial in 2013, one of their experts estimated that there were "[t]hree hundred thousand *registered* voters lack[ing] acceptable ID" in Wisconsin. Pls. Opening Br. 46. But Plaintiffs leave out the critical facts about this dated figure: since trial, DMV has issued hundreds of thousands of free IDs for voting purposes only, A.120, added additional categories of acceptable photo ID, A.131; 2015 Wis. Act 261, § 2, and then implemented, A.120, and improved, A.126, the IDPP.[12]

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[11] Plaintiffs' assertion that "Defendants conceded below, 'making that trip [to the DMV] is [still] an undue burden on some voters,'" is entirely misleading. Pls. Opening Br. 19. What Defendants actually said below was that these voters are statutorily exempt from the photo ID law, which is the critical point. R.285:19–20.

[12] Plaintiffs' claim of an "error rate," Pls. Opening Br. 9, 21, 47, misrepresents the nature of the errors tracked by DMV, which include errors made by applicants. *See* R.280-47:2. Of all the error types included, most were resolved in an hour or less, with the vast majority of the remainder being resolved within the next business day. A.124–25.

* * *

Finally, it is worth noting that most of the disagreements between the parties discussed above now appear to turn on Plaintiffs' novel efforts to narrow Wisconsin's voter-friendly laws, as a matter of state law. While Defendants believe that state law unambiguously favors their position in all instances, if this Court thinks that there is doubt on these important state law disputes, it could certify these questions to the Wisconsin Supreme Court. *See* 7th Cir. R. 52; Wis. Stat. § 821.01; *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 660–61 (7th Cir. 2008).

2. Plaintiffs themselves would be able to vote with reasonable effort. Importantly, even if this Court concludes that Wisconsin's law still has some small gaps, Plaintiffs have no likelihood of success on the merits if Plaintiffs themselves do not fall into those gaps. *See Sosna*, 419 U.S. at 403.

Plaintiffs argue that four of them are members of the class they seek to represent, but their arguments are wrong.

Ruthelle Frank. Plaintiffs argue that Frank is not "guaranteed" a free photo ID, given her "erroneous birth documents." Pls. Opening Br. 37–38. As a threshold matter, Plaintiffs do not claim that Frank will ever need photo ID given that she qualifies for the "indefinitely confined" exemption. Defs. Opening Br. 12–13. Plaintiffs' argument that Frank did not need to be able to represent the class at the time of class certification, but only at the time of filing of the complaint, Pls. Opening Br. 38, is contrary to binding caselaw, which mandates that class representatives be

"member[s] of the class which [they] seek[ ] to represent at the time the class action is certified by the district court." *Sosna*, 419 U.S. at 403.[13]

Even if this Court were to reach the question of whether Frank would obtain a free ID if she were no longer "indefinitely confined," it is plain that she would. Frank has a marriage certificate, baptismal certificate, Social Security card, proof of residency, and a birth certificate. RSA.76–77. Even assuming that there is a different name on the birth certificate, Frank could sign a simple affidavit at DMV to address this concern. *See supra* pp. 10–11.

Leroy Switlick and James Green. Plaintiffs make only one record-based argument with regard to Switlick and Green: they allegedly lack proof of identity because they have no "Social Security cards." Pls. Opening Br. 40.[14] Plaintiffs do not dispute that the record establishes that both Switlick and Green have documents that fit within the definition for proof of identity: "[a] supporting document identifying the person by name and bearing the person's signature, a reproduction of the person's signature, or a photograph of the person." Wis. Admin. Code § Trans 102.15(4). Instead, Plaintiffs rely upon their meritless argument that this definition is irrelevant. Pls. Opening Br. 40. Plaintiffs thus concede that if this Court agrees with

[13] There is an exception for when "the issue would [otherwise] evade review." *Sosna*, 419 U.S. at 402 n.11. Plaintiffs have not argued that this exception applies here, nor could they, given that voters need to present photo ID at every election. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1018–19 (7th Cir. 2014), relied upon by Plaintiffs, Pls. Opening Br. 38, deals with the separate issue of when a plaintiff's suit is mooted by an offer of settlement.

[14] Plaintiffs also make a non-record based argument with regard to Switlick in particular, which Defendants address *infra* p. 24.

Defendants' argument that the Section 102.15(4) definition is controlling, *see supra* pp. 11–13, Switlick and Green have no authority to represent this class.

Melvin Robertson. Plaintiffs argue that Robertson cannot vote without unreasonable effort because he is elderly and lacks a photo ID. Pls. Opening Br. 43–44. As a threshold matter, if Robertson's advanced age is such that he cannot travel without unreasonable effort, he is statutorily exempt from the photo ID law. *See* Wis. Stat. §§ 6.86(2)(a) & 6.87(4)(b)2. If, instead, Robertson can travel without unreasonable difficulty, all he has to do is come to DMV, present the documents he has, and apply under the IDPP. Defs. Opening Br. 22. DMV will then mail him his free ID within six business days. A.126. That Robertson has previously tried to obtain photo ID from DMV, under prior law, is legally irrelevant because a class representative must be a "member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Sosna*, 419 U.S. at 403.

B. Plaintiffs' Claims Are Neither Common Nor Typical

Plaintiffs cannot establish commonality or typicality because they do not claim to have "suffered the same injury," but instead suffered an alleged deprivation based on "the same provision of law." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (citation omitted); Defs. Opening Br. 30–32. Plaintiffs do not join Defendants' arguments on this point, but merely assert that any "differences do not prove the *absence* of any common question capable of class-wide resolution." Pls. Opening Br. 48. This is no response, especially since Plaintiffs bear the "burden of showing that a proposed class satisfies the Rule 23 requirements." *Messner v.*

Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012). And Plaintiffs may not simply argue that all potential class members are impacted solely by "the voter ID law and the DMV procedures." Pls. Opening Br. 49. A class cannot be certified by a plaintiff simply alleging that all putative members suffered a deprivation resulting from "the same provision of law." *Dukes*, 564 U.S. at 350.

C. The Putative Class Is An Unascertainable, Fail-Safe Class

Plaintiffs fail Rule 23 because the class is "defined too vaguely," *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), and is a "fail safe class." *Messner,* 669 F.3d at 825; *see* Defs. Opening Br. 33. Plaintiffs ask this Court to "relax[ ] or eliminate[ ]" the ascertainability requirement. Pls. Opening Br. 50. The reason that Plaintiffs request a change of law is they cannot prevail under this Court's caselaw, which requires a class plaintiff to "identify a particular group, harmed during a particular time frame, in a particular location, in a particular way." *Mullins*, 795 F.3d at 660. Plaintiffs argue that this part of the ascertainability requirement should not apply to this type of case, which will not be a class action requiring the mailing of notices. Pls. Opening Br. 50. But this Court has never imposed such a limitation, and instead has held that the vagueness test is a critical requirement of any class action: "There can be no class action if the proposed class is amorphous or imprecise." *Mullins*, 795 F.3d at 659 (citation omitted).

Plaintiffs' attempt to explain why this is not a fail-safe class similarly fails. Plaintiffs claim they have not identified a fail-safe class because their class "consists of voters who cannot obtain ID with reasonable effort." Pls. Opening Br. 51. But this

is precisely the definition of a fail-safe class: "whether a person qualifies as a member depends on whether the person has a valid claim." *Messner*, 669 F.3d at 825. If someone can obtain an ID with reasonable effort, they are out of the class, and if they cannot obtain an ID with reasonable effort, then they are in the class. This is a "classic example of a fail-safe class," where the class consists solely of those individuals "wrongfully harmed by the defendant." Sarah R. Cansler, *An "Insurmountable Hurdle" to Class Action Certification? The Heightened Ascertainability Requirement's Effect on Small Consumer Claims*, 94 N.C. L. Rev. 1382, 1389 n.57 (May 2016) (citation omitted).

III. Plaintiffs Defaulted On The Issue Of Irreparable Harm

In their opening brief, Defendants explained that Plaintiffs failed to establish irreparable harm absent preliminary relief because, contrary to the district court's speculation, no Plaintiff will be "unable to vote" under the legal status quo. Defs. Opening Br. 34 (quoting A.142). Plaintiffs ignore this issue, which is fatal to their attempt to defend the injunction. *See East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 708 (7th Cir. 2005).

IV. Developments After The District Court's Injunction Are Legally Irrelevant To This Appeal But, In Any Event, Support The Conclusion That No Further Relief Is Warranted

A. This appeal involves two types of extra-record materials. First, both Defendants and Plaintiffs have cited publicly available governmental websites. Defs. Opening Br. 6, 7, 22, 23, 24, 26, 31; SA 60–65, 70–78. These are unquestionably judicially noticeable and properly considered as part of this appeal. *See Denius v.*

Dunlap, 330 F.3d 919, 926 (7th Cir. 2003). Second, Plaintiffs and their *amici* have sought to introduce new information—including declarations never submitted to the district court—which details certain disputed events occurring after the district court issued the preliminary injunction at issue in this appeal. Pls. Opening Br. 17–18, 20–22, 40–41; SA 79–93; Amicus Br. 4–16. This new, non-record evidence is not judicially noticeable and cannot be considered in this appeal. *See Berwick Grain Co., Inc. v. Ill. Dep't of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997) ("The appellate stage of the litigation process is not the place to introduce new evidentiary materials."); *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990) ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.").

B. If this Court disagrees with Defendants that developments that occurred after the district court's decision should not be considered as part of this appeal, then—in all fairness—Defendants must be permitted to update this Court as to what has actually happened under Wisconsin's current law. The operation of this law supports the Defendants' position that no judicial intervention is warranted.

Most importantly, since the current law was put in place in mid-May, DMV has mailed a free ID—either a renewing receipt or a permanent card—to *every single* person who has applied under the IDPP, within six business days. RSA.42–43. All told, the total of free IDs issued by DMV for voting purposes is now over 500,000. RSA.43. Under current law, no IDPP applicants have been denied a free ID for the reasons that concerned this Court in *Frank II*, 819 F.3d at 386, or the judges that

dissented from the denial of the *Frank I en banc* petition. 773 F.3d 783, 786–87 (7th Cir. 2014); *see generally* RSA.43. This strongly supports Defendants' point that no judicial intervention is warranted.

Also since the preliminary injunction, DMV has chosen—as a matter of transitional administrative discretion—to permit initiation of the IDPP by anyone who submits an IDPP application, even those who do not bring in proof of residency and identity. RSA.33, 56; *One Wisconsin Institute v. Thomsen,* No. 15-cv-324 (W.D. Wis. 2016) (hereafter "*OWI* Dkt. ___"), Dkt. 273:Ex. N. In light of Plaintiffs' repeated mischaracterization of this issue, Pls. Opening Br. 14–15; *Frank v. Walker*, No. 16-3003, Dkt. 45; Dkt. 53:4–6, Defendants again emphasize that they are not defending the legality of the photo ID law by reliance on this transitional discretion, which Defendants do not believe to be constitutionally required. *See Frank v. Walker*, No. 16-3003, Dkt. 46; Dkt. 54:1–2. Proof of residency and identity—which the record reflects that all eligible voters have ready access to, *see* Defs. Opening Br. 26—are very useful materials for DMV investigators to have as part of the verification process. It would be entirely reasonable for DMV to ask applicants to simply not forget these proofs at home. But if this Court were to hold that the Constitution requires permitting initiation of the IDPP without these proofs, this could be accommodated, as this would just make permanent the current transitional policy.

C. The new information that Plaintiffs and their *amici* have improperly attempted to introduce into this appeal would not support any relief.

Plaintiff Switlick and one of the employees of Plaintiffs' counsel submit two new declarations, recounting a trip that Switlick took to the Chase Avenue DMV in Milwaukee on September 2, 2016. SA79; SA80–82. Because these declarations have not been subjected to adversarial proceedings, Defendants can only surmise that the most probable explanation for this trip is that, after Plaintiffs' counsel found out about a computer outage at one DMV location, they drove Switlick over to that specific location. This sequence is most consistent with the fact Plaintiffs' counsel have been instructing Switlick not to cooperate with DMV, lest he be sent the free ID. A.249–50. This apparently manufactured journey does nothing to refute Defendants' argument that Switlick would obtain a free ID by making a typical trip to the DMV with the documents he already has on hand. *See* Defs. Opening Br. 23–24 & n.10.

Plaintiffs and their *amici* also submit new information relating to an undercover investigation conducted by a lawyer—Molly McGrath—who sought to elicit inaccurate information from DMV personnel about the particulars of the IDPP and then released certain recordings to the press. *See* SA83–93; Amicus Br. 4–14. It is unclear whether Plaintiffs or others have conducted many similar sting operations, but decided not to release those tapes because they would not support their arguments against the photo ID law. And while McGrath was able to elicit some inaccurate or incomplete information from certain DMV personnel, neither McGrath nor Plaintiffs point to a single example of any *actual voter* who does not have a free ID because of an inaccurate or incomplete communication given by DMV personnel. For example, the four voters highlighted by McGrath have, in fact, been mailed or

given free IDs already. *OWI* Dkt. RSA.51–53, 59–61; https://goo.gl/rgeZXE. Accordingly, Plaintiffs' claim that "evidence has already surfaced *in the last month* that DMV continues to make errors that disenfranchise voters," is false. Pls. Opening Br. 21.

In addition and notably, DMV responded quickly and comprehensively once it learned that McGrath had elicited incomplete or inaccurate information from some DMV personnel. Upon hearing McGrath's tapes, DMV implemented new queuing procedures at DMV centers, updated customer handouts relating to the IDPP, and provided hotlines for customers and staff. *See* RSA.2–3. DMV then confirmed that its procedures were sufficient by sending undercover state troopers to 31 DMV service centers to conduct quality checks by posing as citizens interested in the IDPP. RSA.24–25. These quality checks proved successful, meaning that DMV personnel are sufficiently communicating about the IDPP to interested voters. RSA.24–25.[15]

V. Plaintiffs' Cross-Appeal—Seeking To Overturn *Frank I* In An Interlocutory Posture—Is Jurisdictionally Improper And Meritless

In their cross-appeal, Plaintiffs ask this Court to overturn *Frank I* and "enjoin enforcement of Wisconsin's voter ID law." Pls. Opening Br. 51–60. This argument is made in a procedurally improper posture and is meritless in any event.

[15] On October 13, 2016, the Western District in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324, found that Defendants had not complied with the unstayed portion of its injunction by not sufficiently training its personnel and promoting the IDPP leading up to the McGrath tapes. RSA.62–69. The court then ordered Defendants to undertake new publicity and training measures. RSA.68–69. Although Defendants believe that the steps they voluntarily took upon learning about the McGrath tapes fully addressed any concerns, they have complied with the Western District's order by undertaking the additional measures that the court ordered. *See* RSA.69–72; *OWI* Dkt. 294, 295-1, 295-2.

A. This Court Lacks Jurisdiction Over Plaintiffs' Cross-Appeal

In their opposition to Plaintiffs' Petition For Initial Hearing *En Banc*, Defendants explained why Plaintiffs' cross-appeal is jurisdictionally defective. *Frank v. Walker*, No. 16-3003, Dkt. 38:13–15. Plaintiffs offer no meaningful response, confining their answer to a conclusory footnote. Pls. Opening Br. 52 n.17.

This Court lacks jurisdiction over the cross-appeal because this appeal is based entirely upon this Court's authority over non-final "[i]nterlocutory orders" "granting . . . [or] refusing" an "injunction[ ]." 28 U.S.C. § 1292(a)(1); *see* R.296:5; R.307. That is the provision that Plaintiffs cited as the basis for their cross-appeal. R.307:1. But Plaintiffs did not request—and thus the district court did not "refus[e]"—any facial injunctive relief. Plaintiffs' "motion for a preliminary injunction s[ought] an order requiring the defendants to offer voters who . . . cannot obtain [an ID] with reasonable effort the option of receiving a ballot by executing an affidavit to that effect." A.131. Agreeing that Plaintiffs' request was "sensible," the court "grant[ed]" the motion and "order[ed] the defendants to implement [the] affidavit option." A.132. Since Plaintiffs were not "injured by the terms of [this injunction, they are not] entitled to appeal." *Grinnell Mut. Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995); *accord Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir. 1992).

Had Plaintiffs sought facial relief below, Defendants would have trained their submissions not just on the issues that Plaintiffs sought to identify to justify limited relief, R.285, but would have developed a record on the validity of the entire law, as it now stands. Plaintiffs' conclusory footnote below that they were "preserv[ing] their

argument that *Frank I* was wrongly decided for purposes of appeal," R.279:6 n.4, was insufficient to put either Defendants or the district court on notice that the law's facial validity was at issue in this preliminary posture.

B. There Is No Reason To Reconsider *Frank I*

Even if Plaintiffs' cross-appeal was jurisdictionally appropriate, they offer no basis for this Court to overrule *Frank I*, either by invoking Circuit Rule 40(e) or through *en banc* procedures. *Frank I* was carefully reasoned and its conclusion followed necessarily from the Supreme Court's binding precedent in *Crawford*. The reasons that Plaintiffs now offer for overturning *Frank I* are meritless.

First, Plaintiffs argue that Wisconsin's photo ID law should be facially invalidated because "*Frank I* is now an outlier among the circuits, conflicting with decisions issued by the Fourth, Fifth, and Sixth Circuits." Pls. Opening Br. 52. This is simply wrong. The Fourth Circuit considered North Carolina's photo ID law and ordered facial relief *only* because it found that the law was enacted with racially discriminatory intent under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *see N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233–35, 237–38, 241–42 (4th Cir. 2016), an argument not at issue in this case. As to the Sixth Circuit, that court did not rule on any photo ID law, and made a decision dealing with "Ohio's particular circumstances," such that there was "no reason to think [the] decision here compels any conclusion about . . . practices in other states." *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 532, 559–60 (6th Cir. 2014). Subsequent Sixth Circuit authority further reinforces *Frank I*'s

central holding. *Ne. Ohio Coalition for the Homeless v. Husted*, __ F.3d __, No. 16-3603/3691, 2016 WL 4761326 (6th Cir. Sept. 13, 2016).

Plaintiffs' focus on the Fifth Circuit's *en banc* decision is similarly unavailing. That decision involved an as-applied claim based on the Voting Rights Act. *See Veasey v. Abbott,* 830 F.3d 216, 243, 248–50, 271–72 (5th Cir. 2016) (en banc) (specifically relying upon *Frank II*). This appeal does not involve the VRA, a claim which Plaintiffs did not raise on remand following *Frank I. See* A.012–43. Furthermore, the *Veasey* court specifically explained that "the Seventh Circuit's approach in *Frank* is not inconsistent with our own," noting that "[u]nlike in *Frank,* the district court in this case found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributed SB 14's disparate impact, in part, to the lasting effects of that State-sponsored discrimination." *Veasey,* 830 F.3d at 248. Contrary to Plaintiffs' arguments, Pls. Opening Br. 53–54, the district court in this case did not find historical and contemporary examples of *state-sponsored* discrimination. The district court in *Frank I* noted a history of segregation in the City of Milwaukee, *see* R.195:65–66, but no evidence of state sponsorship. Furthermore, there is no daylight between this Court's discussion of "legislative facts" and the Supreme Court's rule (applied by the Fifth Circuit) regarding legislative facts, which is that they may be accepted if "considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (cited at *Frank I*, 768 F.3d at 750).

Second, Plaintiffs claim that *Frank I* has been "undermined" by *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016), asserting that the Supreme Court's decision "rejected the proposition that a district court is bound by 'legislative findings'" and adopted a facial "burden" analysis inconsistent with *Frank I.* Pls. Opening Br. 56. But the law regarding legislative facts remains the same as it was when *Crawford* and *Frank I* were decided. *See Armour*, 132 S. Ct. at 2080. As for the facial issue, *Whole Woman's Health* applied an approach to facial invalidation that is unique to the abortion context. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) ("[I]n a large fraction of the cases in which [the requirement] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."); *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 367–69 (6th Cir. 2006); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662, 667–68 (8th Cir. 2011); *Isaacson v. Horne*, 716 F.3d 1213, 1230–31 (9th Cir. 2013). *Frank I* merely followed *Crawford* regarding the "burden" that a plaintiff needs to carry to obtain facial invalidation of a photo ID law. *Frank I,* 773 F.3d at 745–46. And whether some logic in *Whole Woman's Health* could be read as inconsistent with *Crawford*'s articulation of some issues is "not for [this Court] to decide." *United States v. Browning*, 436 F.3d 780, 781–82 (7th Cir. 2006).

Third, Plaintiffs contend that the adjustments that Defendants have made to their free ID program—all making it easier for voters—somehow require overturning *Frank I* and invalidating the entire photo ID law. Pls. Opening Br. 57–59. Plaintiffs' position appears to be that if Defendants had *not* taken steps to address the limited

difficulties that came to light for .0124% of over 420,000 free ID applicants, Wisconsin's photo ID law would be on stronger constitutional footing. This is plainly wrong. A photo ID law is not subject to facial invalidation even if "some voters would be unable, as a practical matter, to get photo IDs." *Frank I,* 768 F.3d at 748. Defendants' changes to make sure that *no* Wisconsin voters are in this situation cannot possibly render the law facially invalid. To the contrary, that Wisconsin has voluntarily fixed the few difficulties that once existed in its regime demonstrates that no relief, even on an as-applied basis, is warranted. *See supra* pp. 9–16.

Plaintiffs' comparison of Wisconsin's photo ID program to a "literacy test," Pls. Opening Br. 58, is risible. Literacy tests are specifically prohibited by the Voting Rights Act, 52 U.S.C. § 10501, because Congress was addressing "a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (opinion of Black, J.). On the other hand, Wisconsin adopted its photo ID law in light of the Supreme Court's upholding Indiana's law as facially lawful and following the recommendations of the bipartisan "Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III," which cogently explained that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Crawford,* 553 U.S. at 193–94 (opinion of Stevens, J.) (quoting *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005)).

Again, Plaintiffs' attack on Defendants' voter-friendly regime as creating "pointless ritual pilgrimage to the DMV," Pls. Opening Br. 58, misunderstands how Wisconsin's photo ID law functions. To establish eligibility to vote, an elector must generally offer five proofs: (1) name and date of birth; (2) identity; (3) residency; (4) U.S. citizenship; and (5) a social security number. Wis. Admin. Code § Trans 102.15. The vast majority of eligible voters have these proofs handy and will get a free ID card with one trip to DMV. *See* A.119–20. For the extremely small number of individuals who have difficulty providing these proofs, DMV will issue (at minimum) an ID receipt within six business days, which will renew as long as the verification process takes. A.126–27. The process ends when DMV determines that the applicant either is an eligible elector (in which case an ID card is issued), or is not an eligible elector (in which case the ID receipt is canceled). *See* A.126–27.[16] The critical point is that Wisconsin's process allows DMV to conduct a meaningful verification of *all* five proofs, whereas Plaintiffs' unaccountable affidavit regime does not. A procedure that makes verification of voters' credentials impossible would not serve the vital functions that this Court, the Supreme Court, and the Carter/Baker Commission have all recognized that photo ID laws serve.

CONCLUSION

The preliminary injunction should be vacated.

[16] The free receipt is not renewed if the applicant undermines the verification process by committing fraud in the application, not responding to multiple DMV inquires for six successive months, or voluntarily asking to cancel the process. Wis. EmR1618, § 8; A.126–27.

Dated: October 31, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,862 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: October 31, 2016

s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2016, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 31, 2016

s/ Misha Tseytlin

MISHA TSEYTLIN