IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

DEFENDANTS' REPLY BRIEF
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs open their opposition brief with a touch of irony. They criticize the State for not addressing Plaintiffs' expert reports, which the State had for "a full month." (Pl. Br. 1.) Plaintiffs then follow that criticism with over 140 pages of briefing that does not address Defendants' expert reports. Plaintiffs had the reports for three weeks when their opposition brief was due on February 1. In support of summary judgment, Defendants stated that they were relying upon the expert reports of Nolan McCarty, Chair of the Politics Department at Princeton University, and M.V. Hood III, a tenured professor of political science at the University of Georgia. (Dkt. 76:2.) These experts' names do not even appear in Plaintiffs' brief.

If Plaintiffs had addressed the State's expert reports in their brief, they would have grappled with the persuasive fact that Wisconsin's voter turnout "surged" when comparing the 2010 general election (before the challenged laws were enacted) to the 2014 general election (after the challenged laws were enacted). (Dkt. 87:3 (McCarty report); *see also* Dkt. 86:6 (Hood report).) The increase in voter turnout was "large by historical Wisconsin standards." (Dkt. 87:3.) "The increase in turnout was not limited to white voters. Black and Hispanic voting participation also rose considerably." (Dkt. 87:3.) Furthermore, "[d]espite the changes to procedures for absentee voting, the rates by which Black and Hispanic voters cast absentee ballots increased substantially. The increases for Blacks were proportionately greater than the increase for whites." (Dkt. 87:4.) Alas, the alleged turnout-suppressing impact of the challenged laws has not materialized in reality.

Instead of grappling with the State's experts' conclusions, Plaintiffs sing a tired refrain: "The Seventh Circuit should overturn *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014)!" (*See* Pl. Br. 6 n.1, 73, 87 n.17; *see also* Dkt. 1:48 n.5, Dkt. 19:48 n.5, Dkt. 28:10.) Plaintiffs even argue that *Frank* "makes the Seventh Circuit an outlier among the courts of appeals" and is "difficult to square with the Supreme Court's" holdings. (Pl. Br. 72.) This type of contrarian argument is obviously fruitless here.

This Court is bound by *Frank*, a decision that counsels heavily for dismissing a swath of Plaintiffs' constitutional and Voting Rights Act claims on summary judgment. *Frank* upheld Wisconsin's voter photo ID law under federal constitutional and VRA challenges. None of the challenged laws here have been or could be shown to be either as minimally "burdensome" on the right to vote or to have remotely the same negligible racial "impacts" as the lawful voter photo ID law at issue in *Frank*. Under *Frank*, Plaintiffs cannot prevail. *Frank* all but mandates that this Court enter judgment in favor of the State on Plaintiffs' VRA and "undue burden" constitutional claims.

Voting is a simple, fair, and easy process in Wisconsin. Plaintiffs' submissions on summary judgment cannot substantiate their many claims to the contrary. Plaintiffs' evidence boils down to a mixture of loosely supported anecdotes about glitches that election officials and voters observed and experienced over the past few election cycles in which the challenged laws were implemented. Such minor hiccups, frankly, are commonplace and largely unavoidable because elections in Wisconsin are administered at the local level by more than 1,800 municipal clerks. Plaintiffs' proof-by-anecdote approach to their case on summary judgment does not amount to the sort of proof of widespread and systemic burdens on voters that Plaintiffs would have to show at trial to prevail. Voting in Wisconsin is easy for everyone, and Plaintiffs have not shown otherwise.

Furthermore, adopting Plaintiffs' various constitutional arguments regarding "partisan fencing," intentional race-based discrimination, and age-based discrimination would require this Court to chart a new and unprecedented course in the law. These claims lack merit. Tellingly, Plaintiffs bury in an incomplete footnote their response to the powerful fact that "partisan fencing" claims are doomed when some challenged laws were passed with the bipartisan support of Republicans and Democrats. (Pl. Br. 136 n.21 (featuring the following incomplete citations: "(cite to public sources such as GAB or news report)" and "(cite to public source)").)

Likewise, Plaintiffs' "evidence" of intentional race-based discrimination is flimsy at best, grounded in unsubstantiated hearsay, vague supposition, and the opinions of one witness, Allan J. Lichtman. One of the so-called "major opinions" that Dr. Lichtman offers regarding the Legislature's supposed racist intentions is that, in 2015, one house of the Wisconsin Legislature passed a bill mandating a photo ID requirement for FoodShare recipients. (Dkt. 75:35 (Lichtman report).) Somehow, this completely unrelated 2015 bill that has not become law shows that the Wisconsin Legislature intentionally discriminated against minority voters on the basis of their race when the voter photo ID law was enacted in 2011, four years earlier. (Dkt. 75:35 (Lichtman report).) Plaintiffs cannot survive summary

judgment with this sort of flimsy, extraneous "evidence" as the lynch pin of their claims.

In their opening brief, Defendants stated the Seventh Circuit's holding that summary judgment is the "put up or shut up" moment in litigation. Plaintiffs have not "put up" the evidence necessary to show that they can prevail on their many, many pending claims. For the reasons argued in Defendants' opening brief and below, the Court should grant Defendants' summary judgment motion, dismiss Plaintiffs' amended complaint with prejudice, and enter judgment in Defendants' favor.

ARGUMENT

In the interests of judicial economy and the speedy and just resolution of their motion, Defendants will avoid rehashing too much. *See* Fed. R. Civ. P. 1. Their first brief "comprehensively addresses the relevant issues in this case." (Order, Jan. 20, 2016, Dkt. 89:2.) Defendants stand by their arguments and will only briefly address the germane issues raised by Plaintiffs.

I. Plaintiffs lack Article III and statutory standing as to particular claims, and their challenge to the 28-day durational residency requirement is moot.

Plaintiffs have not countered Defendants' jurisdictional and standing arguments with evidence that shows this Court has jurisdiction to proceed. It was their burden to do so. Accordingly, the Court should dismiss all pending challenges: (1) to the voter photo ID and registration laws; (2) to the 28-day

durational residency requirement; and (3) under the Voting Rights Act, as leveled by the two corporation Plaintiffs.

First, no Plaintiff has Article III standing to challenge the voter photo ID or registration laws. As Plaintiffs admit, each individual voter Plaintiff has a form of qualifying ID and is registered to vote. (*See* Dkt. 97: undisputed responses to DPFOFs 9 & 12.) They cannot be injured by the voter photo ID law when they can use their IDs to vote on Election Day. They cannot be injured by registration laws when they have met that requirement.

Plaintiffs rely upon the district court's reversed decision in *Frank*. (Pl. Br. 6.) That is a non-starter for obvious reasons: the decision has no precedential value. Plus, the Seventh Circuit did not address standing.

In addition to the reversed *Frank* district court decision, Plaintiffs cite voter photo ID cases addressing standing from the Eleventh Circuit and Tennessee, which are not controlling. (Pl. Br. 6–7.)[1] It difficult to understand why Plaintiffs rely so heavily upon *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), when the Eleventh Circuit upheld Georgia's voter photo ID law against a constitutional challenge. *Id.* at 1344. In any

[1]*Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007), contradicts the standing analysis in *Common Cause/Georgia* and *Hartgett*. The Georgia Supreme Court held that a voter lacked standing because she "did have a form of photo ID acceptable under" Georgia's law. *Id.* at 8.

event, the Eleventh Circuit and Tennessee cases are not persuasive as to standing because they run counter to *Lujan* and the State's argument here: a plaintiff must be threatened with an injury-in-fact for there to be standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). There is no injury-in-fact when the individual voter Plaintiffs have qualifying ID and are registered.

With regard to registration, the fact that one Plaintiff, Ms. Tasse, plans to move her residence at some undetermined time after she graduates from college does not establish standing to challenge registration laws now. (Pl. Br. 8; PPFOF 35.) The assertion is too speculative to confer standing. When will she graduate and move? Plaintiffs do not provide that information. For the same reasons, Ms. Tasse's circumstances cannot relieve Plaintiffs from the mootness of their 28-day durational residency requirement challenges. (*See* Pl. Br. 15.)

Plaintiffs argue that the corporation Plaintiffs have standing based the alleged injuries of their members. Of course, these corporations have no members, and Plaintiffs have not rebutted that premise. Plaintiffs now claim that One Wisconsin and Citizen Action have legions of "volunteers" and "supporters" who can provide a basis for standing (Pl. Br. 11), even though in response to interrogatories Plaintiffs stated that One Wisconsin and Citizen Action "do[] not have members as defined in Wis. Stat. § 183.0103(15)." (Dkt.

79-4 (Responses to Interrogatory Nos. 18, 19, 20).) Plaintiffs' evidence on summary judgment regarding the corporation Plaintiffs' standing to assert the interests of their "volunteers" and "supporters" does not confer standing.

Plaintiffs also claim that the corporation Plaintiffs can assert a "diversion of resources" theory of standing that shows their own injury. (Pl. Br. 11–13.) "Not every diversion of resources to counteract the defendant's conduct, however, establishes an injury in fact." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). "[T]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Id.* (citation omitted). The corporation Plaintiffs' argument and evidence suggests "simply a setback to the organization[s'] abstract social interests," which is insufficient to establish standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

There is nothing compelling these corporations to divert their resources to activities related to the challenged laws. *See Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011). The challenged laws apply to individual persons, not corporate entities that have no right to vote or race. Every action One Wisconsin and Citizen Action takes with regard to the challenged laws is their own design, is not legally required, and does not confer standing. The laws do not apply to them.

Second, Plaintiffs have not rebutted Defendants' argument that challenges to the 28-day durational residency requirement are moot. (Pl. Br. 15.) They do not address the U.S. Supreme Court and Seventh Circuit precedents that Defendants cited, and instead try to shift the focus away from the fact that *their* voter registration is complete to the idea that they would like to register other people to vote who are not Plaintiffs in this case. Plaintiffs cannot create a live controversy *for themselves* by suggesting that people who need to register to vote might be impacted by the challenged voter registration laws.

Furthermore, all the cases Plaintiffs cite in support of the theory that standing can be based upon registering others to vote were cases focused on regulations that "prevented" an individual from registering others. (Pl. Br. 9 (citing cases).) None of the challenged voter registration laws here prevent anyone from registering voters, so Plaintiffs' cases do not support their standing to sue.

Finally, One Wisconsin and Citizen Action lack statutory standing to raise a claim under the VRA. The argument is simple: The VRA outlaws racially discriminatory voting practices, and it permits an "aggrieved person" to sue. 52 U.S.C. §§ 10301, 10302. The corporation Plaintiffs have no race or right to vote therefore they are not aggrieved and cannot bring a VRA claim.

Plaintiffs make the odd argument that corporations have a race. (Pl. Br. 16.) That begs the question: What race is One Wisconsin Institute, Inc.? Citizen Action of Wisconsin Education Fund, Inc.? Plaintiffs do not answer those questions, so they cannot begin to show that One Wisconsin and Citizen Action have statutory standing under the VRA.

Plaintiffs rely upon the district court's decisions in *Frank*. (Pl. Br. 16–20.) There are three points with regard to *Frank*. One: the district court's decisions were reversed on appeal. *See Frank*, 768 F.3d at 755.

Two: the *Frank* district court's analysis of statutory standing was wrong. The *Frank* district court ruled inconsistently with the plain language of the VRA, which permits only the U.S. Attorney General or an "aggrieved person" to sue. 52 U.S.C. § 10302(a), (b). Corporations are not "aggrieved persons" because they have no right to vote and no race.

The *Frank* district court cited 1 U.S.C. § 1. Importantly, 1 U.S.C. § 1 states that "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . the words 'person' and 'whoever' include corporations." (Emphasis added).

Here, the context of the phrase "aggrieved person" in 52 U.S.C. § 10302 does not suggest that an "aggrieved person" is a corporation. The VRA is, of course, about *voting*. Corporations have no right to vote. People do. The only sensible reading of the language, in context, is that "aggrieved person" does

not include a corporation. Thus, the *Frank* district court was wrong to conclude otherwise.

Three: the Seventh Circuit did not address the VRA statutory standing argument in *Frank* because the appeal (which was joined with the *LULAC* appeal for oral argument and disposition) had at least one plaintiff-appellee, lead plaintiff Ruthelle Frank, who lacked a qualifying ID and was therefore arguably an "aggrieved person" under 52 U.S.C. § 10302. There was no reason to reach the VRA statutory standing issue, so the *Frank* court did not.

Plaintiffs have failed to rebut Defendants' standing and jurisdictional arguments. The Court should dismiss the challenged claims.

II. Plaintiffs' "undue burden" constitutional claims fail as a matter of law.

Plaintiffs' "undue burden" constitutional claims in Count 2 fail as a matter of law. Whether considered as separate challenges to each law or "cumulatively" (*see* Pl. Br. 66), the challenged laws are constitutional.

This Court must apply *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and *Frank* to these claims. In *Crawford* and *Frank*, the U.S. Supreme Court and Seventh Circuit held that voter photo ID requirements do not unconstitutionally burden the right to vote in violation of the First and Fourteenth Amendments. *Crawford*, 553 U.S. at 204; *Frank*, 768 F.3d at 851.

Crawford, in particular, discussed how "the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198. These inconveniences to voters do not "even represent a significant increase over the usual burdens of voting." *Id.* That logic extends here when one considers the miniscule burdens, if any, that the challenged laws impose on voters. Plaintiffs have submitted evidence on summary judgment of some *anecdotes* of particular voters experiencing unusual circumstances under the challenged laws, but a handful of anecdotes is not enough to *facially* invalidate any of these laws, which is what Plaintiffs seek to do. *See id.* at 202–03 (considering a law's "broad application" to "all voters"). Plaintiffs have submitted exactly zero evidence of widespread, systemic burdens on voters that are caused by *any* of the challenged laws.

Plaintiffs are trying to invalidate these laws *on their face*. Yet they have no evidence whatsoever that any of the challenged laws, either individually or cumulatively, result in a widespread, systemic burden on the right to vote. What the Court should have expected to see on summary judgment to substantiate Plaintiffs' claims (and, thereby, carry them to trial) is evidence showing widespread, *significant* burdens on their right to vote because they, for example, can no longer register to vote with the assistance of a statewide special registration deputy (SRD). Of course, that claim is

preposterous given that there are so many other methods that a voter can use to register. On summary judgment, the Court must inquire: Have Plaintiffs shown through admissible evidence that there are significant, widespread burdens on the right to vote that are actually caused by this law? If they have not met that burden, summary judgment to Defendants is the answer.

In summary, taking all of Plaintiffs' evidence on summary judgment at face value, the challenged laws impose much less stringent "burdens" (if any) on Wisconsin voters than a voter photo ID requirement. The challenged laws, like a photo ID requirement, further legitimate and important State interests, as Defendants explained in their opening brief. Under the reasoning of *Crawford* and *Frank*, the challenged laws cannot be held to unconstitutionally burden the right to vote, so Plaintiffs' "undue burden" claims in Count 2 fail.

It is unnecessary to catalogue again why each of the challenged laws passes the applicable constitutional test. A few points bear repeating.

With regard to the challenged absentee voting laws, Plaintiffs ignore the fact that Wisconsin permits absentee voters to obtain and return their ballots via U.S. Mail. Wis. Stat. § 6.86(1)(a)1. The cost is one envelope and one stamp. Voters can have ballots for all elections throughout the year delivered to their home address. They do not even need to provide a reason for using this option. *See* Wis. Stat. § 6.85(1). The no-excuse mail alternative

gives absentee voters the choice of avoiding the "long lines" that Plaintiffs suggest will snarl around polling places because of the challenged laws.

Plaintiffs argue as though absentee voting is the exclusive or primary means of voting. It is not. Wisconsin's permissive, no-excuse absentee voting option is a supplement to ordinary Election Day voting. Voters can vote on Election Day, in person, and Plaintiffs do not complain of long lines then.

Plaintiffs' concerns about limited absentee voting hours and locations depressing voter turnout are unsubstantiated by any evidence. Absentee voter turnout increased dramatically in Wisconsin after the challenged laws were implemented, across all racial groups. "Despite changes to procedures for absentee voting, the rates by which Black and Hispanic voters cast absentee ballots increased substantially. The increases for Blacks were proportionately greater than the increase for whites." (Dkt. 87:4 (McCarty report); *see also* Dkt. 87:24 (McCarty report).) Plaintiffs' claims do not play out empirically.

With regard to voter registration reforms (*i.e.*, the documentary proof requirement; the elimination of corroboration, statewide SRDs, and high school SRDs; proof of citizenship on dorm lists; and landlords providing registration forms), the basic principle is that "[r]egistering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748. The Seventh Circuit made that

observation on October 6, 2014, which is a date long after the voter registration laws challenged here were implemented.

Wisconsinites have robust opportunities to register to vote. Since 1976, Wisconsin has even permitted voters the option of registering *on Election Day at the polling place*. *See* Wis. Stat. § 6.55. This Court is bound to apply *Frank*, so Plaintiffs cannot prevail on any of their voter registration claims after the Seventh Circuit emphatically proclaimed that Wisconsin's voter registration process is easy. The options for voters to register are plentiful and varied, as explained in Defendants' opening brief in detail, and Plaintiffs' evidence on summary judgment as to the specific reforms challenged does not show why *any* of the reforms do not pass constitutional muster.

Plaintiffs make an incorrect legal argument that "[p]rovisions regulating the voter-registration process trigger heightened constitutional scrutiny." (Pl. Br. 43 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).) This is a misreading of *Anderson*, which holds that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. Plaintiffs follow their citation to *Anderson* with a string-cite of federal district court cases, but none of them supports the idea that voter-registration laws are subject to heightened scrutiny in the *Anderson/Burdick* analysis. (*See* Pl. Br. 43–44 (citing cases).)

With regard to the 28-day durational residency requirement, Plaintiffs ignore the fact that, of the states that have a specific durational residency requirement, "the average residency requirement in days is 28.8." (Dkt. 86:22 (Hood report).) "The most frequently occurring (mode) number of days required is 30." (Dkt. 86:22 (Hood report).) "[F]or twenty of these 26 states (77%) the requirement is 30 days." (Dkt. 86:22 (Hood report).) "Wisconsin's 28 day requirement is just slightly below the mean value and less [than] the median and modal values at 30 days each." (Dkt. 86:22 (Hood report).) Plaintiffs are arguing that Wisconsin's 28-day requirement is unduly burdensome on voters, when really it is fully consistent with the policy choice that many other states have made across the Nation.

With regard to the election observer law that is challenged, Plaintiffs continue to misunderstand how the law works. They assert that the law "mov[es] election observers closer to the polling table." (Pl. Br. 55.) The law does no such thing. It gives local election officials *discretion* to tell election observers to stand in a zone anywhere from three to eight feet from the area where voters check in and obtain their ballots. Wis. Stat. § 7.41(2).

Wisconsin Government Accountability Board Elections Division Administrator Michael Haas testified: "it's up to the clerk and the chief inspector to lay out the polling place to determine whether the distance is going to be under the currently law three feet or four feet or up to eight feet."

(Haas Dep. 251:12–16, Dkt. 93.) "The observers do not have a right to be as close as three feet." (Haas Dep. 251:17–18, Dkt. 93.); *see also* (Haas Dep. 251:23–252:15, Dkt. 93.)

Ironically, Plaintiffs rely upon anecdotal evidence to challenge 2013 Wisconsin Act 177, but what they fail to point out is that their examples of misbehaving election observers occurred when the old six-to-twelve-foot GAB rule that they want reinstated was in effect. (*See* Pl. Br. at 57 (addressing incidents in Racine during the June 2012 recall election).) Regardless of the existence of a few "bad apple" election observers that no one can predict or prevent, Wis. Stat. § 7.41(3) authorizes the chief inspector or municipal clerk to order the removal of observers that are creating a disruption at the polling place. Thus, the three-to-eight foot rule is reasonable, helps local election officials maintain order, and is constitutional.

With regard to Plaintiffs' challenges regarding faxing or e-mailing ballots, straight-ticket voting, and returning absentee ballots with "mistakes" on them, Defendants have nothing to add. None of the evidence Plaintiffs filed on summary judgment establishes that Plaintiffs could prevail at trial. All of these laws minimally burden voters (if at all) and are supported by the significant interests that the State explained in its opening brief. These laws are constitutional.

Finally, a word about the supposedly "stunning evidence" that Plaintiffs claim is "beginning to emerge in discovery" regarding the DMV's "extraordinary proof" petition procedures. (Pl. Br. 62.) These menacing revelations are included in Plaintiffs' brief to produce an arched judicial eyebrow. But the only thing that is stunning about the evidence is how infrequently DMV customers find it necessary to avail themselves of the exception petition procedure for obtaining a free state ID card.

As Plaintiffs point out, since September 2014 only about 600 *total* "extraordinary proof" petitions have been filed with the DMV by customers seeking a free state ID card for purposes of voting. (Pl. Br. 64.) That number should be surprisingly low when compared to the 413,342 free state ID cards that the DMV issued to customers for purposes of voting from July 2011 through November 2015. (Dkt. 86:31 (Hood report).) In other words, only .145% of *all* free ID card applicants used the DMV's "extraordinary proof" petition process. (600 divided by 413,342 equals approximately 0.00145.) Of the approximately 600 "extraordinary proof" petitions filed with DMV, only 3% have been denied (18 divided by 600 equals .03). (*See* Pl. Br. 64.) That percentage is miniscule. It shows that DMV customers who have issues with unavailable birth certificates or other documentation are exceedingly rare.

III. Plaintiffs' VRA claims fail as a matter of law.

Whether considered as individual challenges to each law or "cumulatively," Plaintiffs' VRA claims fail as a matter of law. The Court is bound to apply *Frank*, and *Frank* virtually mandates dismissal.

Instead of setting forth the Seventh Circuit's controlling legal standards (as explained in Defendants' brief at pages 20 and 21), Plaintiffs criticize the Seventh Circuit's holding in *Frank* as "an outlier among the courts of appeals" that "is difficult to square with the Supreme Court's" holdings. (Pl. Br. 72.) They would like to see *Frank* overturned on appeal, but grudgingly acknowledge that it "controls here." (*Id.* at 73.) *Frank* is fatal to Plaintiffs' VRA claims before this Court.

The State stands by and will not repeat its arguments that Section 2 VRA claims must be based upon objective criteria and that the Court should not compare present practices to past, like Section 5's "retrogression" analysis would do. (Def. Br. 23.) To the extent federal circuits have held otherwise, they are incorrect for the reasons already explained. The Seventh Circuit in *Frank* did not recognize a retrogression analysis as the correct standard in a Section 2 case. Additionally, Plaintiffs' reading of Section 2 would render it unconstitutional, as explained in Defendants' opening brief. (*Id.* at 24–27.)

The State also stands by its argument that, under *Frank*, the *Gingles* or Senate Factors are not relevant to the analysis. The Seventh Circuit found

them "unhelpful" in voter-qualification cases and did not address them further. *Frank*, 768 F.3d at 754. Even the reversed district court decision in *Frank* refused to apply the Senate Factors because they were "legal standards developed for vote-dilution cases," such as challenges to "at-large elections, redistricting plans, and the like." *Frank v. Walker*, 17 F.Supp.3d 837, 869 (E.D. Wis. 2014). The Senate Factors do not apply.

If this Court applies the Senate Factors, Plaintiffs' VRA claims still fail. A Section 2 VRA claim is analyzed under "the totality of circumstances." 52 U.S.C. § 10301(a). Considering the totality of circumstances, including every piece of evidence and argument that Plaintiffs submitted on summary judgment, all the VRA claims fail under *Frank*.

The key is that none of the challenged laws have been or could be shown to afford minority voters "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). Minorities' opportunity to vote remains the same in Wisconsin, as shown by the evidence that minority voter turnout *increased* after the challenged laws were enacted. (*See* Dkt. 87:4, 11–13, 24 (McCarty report).) *See also Frank*, 768 F.3d at 751 (addressing the relevance of voter-turnout data).

Under Plaintiffs' interpretation of the VRA, the fact that Wisconsin minorities may have experienced poor employment, education, and health outcomes and other negatives attributable to historical discrimination by

private parties—discrimination that is entirely unrelated to the challenged laws—shows that the challenged laws are illegal. (*See* Pl. Br. 87.) This theory is roundly refuted by the Seventh Circuit in *Frank*, which found the consideration of such private-party discrimination irrelevant. *See Frank*, 768 F.3d at 753. Thus, most of Plaintiffs' analysis of Section 2 claims must be disregarded by this Court.

Defendants have explained in detail in their opening brief why Plaintiffs' VRA claims fail as to every law challenged under Section 2. Plaintiffs have not filed evidence on summary judgment that could meet their burden of proving that *any* of the challenged laws causes a prohibited discriminatory result under the VRA. What is missing is a direct cause-and-effect relationship—not just speculation or an expert's ipse dixit opinion—establishing that each specific challenged law "results in discrimination on account of race." *Gonzales v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). "[P]roof of a 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." *Id.* (citations omitted; quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)).

Moreover, nothing Plaintiffs have filed on summary judgment can show that the challenged laws violate the VRA when one considers the evidence

presented to the Seventh Circuit in *Frank* that was deemed legally insufficient to show a violation of Section 2. Plaintiffs here have not shown through any of their expert reports that they can approach even the level of empirical support that unequivocally failed to show a Section 2 violation in *Frank*. This Court is bound to apply *Frank* and, in doing so, should conclude that Plaintiffs' VRA claims fail as a matter of law.

IV. Plaintiffs' intentional race-discrimination constitutional claims fail as a matter of law.

Plaintiffs assert that Defendants' argument that Plaintiffs have failed to "put up" any evidence in support of their intentional race-discrimination claims is "not only baffling, but frivolous." (Pl. Br. 115.) They miss the point. Defendants had Dr. Lichtman's report. The report simply does not substantiate Plaintiffs' claims, which fail as a matter of law.

Plaintiffs make bold allegations of official racism, which should not be taken lightly. Plaintiffs are asserting that the Wisconsin Legislature intentionally discriminated against minority voters on account of their race when it enacted the challenged laws. (*See* Am. Compl., Dkt. 19:53, ¶ 177.) This is not the "Jim Crow" South of the 1960s. It is the State of Wisconsin in the 2010s. Plaintiffs should have convincing evidence of the Legislature's racial motives if they are to lump Wisconsin with the despicable wrongs of the past. They do not have the evidence.

Dr. Lichtman's "major opinions"—which Plaintiffs inappropriately say are "facts" in their proposed findings of fact—are not evidence of purposeful racial discrimination under *Arlington Heights*. For example, Dr. Lichtman claims that "[t]here is rare direct evidence from a Republican decision-maker who initially voted for Act 23 that his Republican colleagues enacted this law and other measures discussed in this report to limit the voting opportunities for minorities in Wisconsin." (Dkt. 75:5 (Lichtman report).)

Dr. Lichtman does not deliver on his claim. A talk-radio sound bite of former Republican State Senator Dale Schultz is what Dr. Lichtman found to be the "rare direct evidence" of the Legislature's insidious racial bias:

> "In the spirit of the champion of the 1957 Voting Rights Act, I have been trying to send a message that we are not encouraging voting, we are not making voting easier in any way, shape or form with these bills. Back in 1957 with the leadership of Dwight Eisenhower, Republicans were doing that. And that makes me sad, frankly." He said, "I'm just not willing to defend them anymore . . . It's just sad when a political party has so lost faith in its ideas that it's pouring all of its energy into election mechanics. We should be pitching as political parties our ideas for improving things in the future rather than mucking around in the mechanics and making it more confrontational at the voting sites and trying to suppress the vote."

(Dkt. 75:51 (Lichtman report).) This sort of vague, attenuated hearsay does not substantiate Plaintiffs' claims of intentional discrimination and is illustrative of the limited relevance of Dr. Lichtman's work.

Defendants' expert, M.V. Hood III, addressed Dr. Lichtman's work. Dr. Hood finds that "much of [Dr. Lichtman's] opinion concerning the intent of

the Wisconsin Legislature is based on speculation or relationships in which he has failed to empirically demonstrate a causal connection." (Dkt. 86:48 (Hood report).) Dr. Hood concludes that:

- "Much of the data Professor Lichtman cites to corroborate his assertions are not relevant";
- "Second, even data that may have some bearing on the questions at hand can be refuted by the existence of contrary evidence"; and
- "As well, the corresponding causal relationships he posits to reach a conclusion of intentional discrimination are not, to any degree of confidence, substantiated."

(Dkt. 86:50 (Hood report).)

What is Plaintiffs' response to this criticism of Dr. Lichtman's work? Precisely nothing, even though Plaintiffs had Dr. Hood's report for three weeks prior to filing their opposition brief.

Finally, Plaintiffs address two more issues in their brief under the heading "IV. INTENTIONAL RACE DISCRIMINATION." The first issue appears under the sub-heading "Legislative refusal to fund legally required 'public information campaign.'" (Pl. Br. 115.) It is not clear how this issue could pertain to Plaintiffs' intentional race-discrimination claims.

The second issue appears under the sub-heading "Excess delegation run amok." (Pl. Br. 116.) Plaintiffs complain of what they perceive to be

undue discretion in the hands of DMV officials who grant free state photo ID cards in the rare case that a customer uses the "extraordinary proof" petition process. (*Id.*) It is not clear if Plaintiffs are suggesting that the DMV—apparently, like the Wisconsin Legislature—is engaging in a form of insidious, intentional race discrimination. Like their claims leveled against the Legislature, this confusing, veiled claim is not substantiated by any evidence.

V. Plaintiffs' age-discrimination constitutional claims fail as a matter of law.

Plaintiffs' claims under the Twenty-sixth Amendment would require this Court to extend the reach of that law beyond anything that its framers contemplated. As Defendants argued in their opening brief, Plaintiffs' concept of what the Amendment does finds no support in its history, text, or the cases interpreting it. (Def. Br. 52–56.) Their claims fail as a matter of law and should be dismissed, as already explained.

For starters, Plaintiffs leave a mystery of precisely what their claims are under the Twenty-sixth Amendment. What age group of voters is allegedly threatened with an injury? This failure to frame and substantiate their claims is critical because the text of the Twenty-sixth Amendment addresses "the right of citizens of the United States, who are eighteen years of age or older." U.S. Const. amend XXVI, § 1.

In their brief, Plaintiffs speak of "young voters" and "the youth vote." (Pl. Br. 117, 120, 122.) They also address laws that supposedly "target college students." (*Id.* at 121.)

"Young voters" is completely ambiguous—60-year-olds might consider themselves "young" in comparison to 80-year-olds. The "youth vote" is equally vague and unhelpful. "College students" might be 18 years old, and they might be 75 years old. Plaintiffs' amended complaint suffers from the same vagaries. (*See* Am. Compl., Dkt. 19:54, ¶ 181 ("young Wisconsinites"), ("young voters in Wisconsin").)

Plaintiffs do not in *any* of their papers on summary judgment identify by age group who is allegedly being harmed by the challenged laws, and this is fatal to their claims because the Twenty-sixth Amendment is not a generalized prohibition against "age discrimination" in voting. The Twenty-sixth Amendment "simply bans age qualifications above 18." *Gaunt v. Brown*, 341 F. Supp. 1187, 1192 (S.D. Ohio 1972, *aff'd* 409 U.S. 809 (1972). None of the challenged laws creates an age qualification above 18, period. Plaintiffs' Twenty-sixth Amendment claims all fail as a matter of law.

VI. Plaintiffs' "partisan fencing" constitutional claims fail as a matter of law.

Plaintiffs bury in an incomplete footnote their response to the powerful fact that "partisan fencing" claims are doomed when certain challenged laws were passed with the bipartisan support of Republicans and Democrats. (Pl. Br. 136 n.21 (featuring the following incomplete citations: "(cite to public sources such as GAB or news report)" and "(cite to public source).") Plaintiffs' expert, Dr. Lichtman, even pointed out that the voter photo ID law was passed with Democratic support. (Dkt. 75:24 (Lichtman report) ("3 white Democrats joined the Republican majority in voting for the bill.").)

Democratic legislators were not voting to enact laws to "fence out" Democratic voters. That would be political suicide. Plaintiffs' "partisan fencing" claims in Count 4 fail as a matter of law.

Plaintiffs do not respond to the State's argument that *Carrington v. Rash* applied a legal standard, akin to rational basis, that has been superseded by the *Anderson/Burdick* test. (Def. Br. 47.) In light of the fact that the *Carrington* test is the wrong one, it is hard to see what relevance *Carrington* has to Plaintiffs' Count 4 claims under the First and Fourteenth Amendments, which are the same provisions at issue in their Count 2 "undue burden" claims. *Anderson/Burdick* is the correct test for Count 4 claims.

Plaintiffs argue that a recent U.S. Supreme Court decision, *Shapiro v. McManus*, 136 S. Ct. 450 (2015), is relevant because it addressed Justice Kennedy's concurrence in *Vieth* regarding whether political gerrymandering claims are justiciable. (Pl. Br. 133–34.) *Shapiro* is irrelevant. It was another case about legislative districting. *Shapiro*, 136 S. Ct. at 452. The issue on appeal was whether a district judge was free to determine that a three-judge panel is not required in an apportionment challenge when the legal claim raised has been deemed "frivolous." *Id.* at 455–56. The Court concluded that a three-judge panel was required, in part, because Justice Kennedy's *Vieth* concurrence supported the idea that political gerrymandering claims are justiciable and are therefore not frivolous. *Id.* at 456. *Shapiro* does not support Plaintiffs' "partisan fencing" claims here.

Plaintiffs appear to be trying to bury the evidence that would outright disprove their "partisan fencing" claims. Dr. Yair Ghitza was retained by Plaintiffs' counsel "to append probabilistic race and partisanship estimates to individual-level records from the Wisconsin voter registration file." (Dkt. 73:2 (Ghitza report).) He did in fact "append[] a probabilistic partisanship estimate for each person." (Dkt. 73:3 (Ghitza report).) "The partisanship estimate was appended to 3,333,574 records, 98.6% of the full [voter] file." (Dkt. 73:4 (Ghitza report).) "Once all the fields were appended, [Dr. Ghitza

was] directed by Plaintiffs' counsel to provide the output file to Dr. Mayer [Plaintiffs' other expert]." (Dkt. 73:3 (Ghitza report).)

When undersigned counsel requested from Plaintiffs' counsel a copy of Dr. Ghitza's partisanship-estimate data, they responded:

> Dr. Ghitza will not be offering any opinions at trial regarding (and we will not otherwise be relying upon) the partisanship estimates that you refer to, and none of the opinions in our other expert reports or that will be offered at trial rely on those estimates. The estimates therefore are not discoverable, *see* Fed. R. Civ. P. 26(b)(4)(C), and we do not intend to produce them.

(Dec. 24, 2015, e-mail from Joshua Kaul to Clayton Kawski, on file with undersigned counsel); *see also* Dkt. 87:20 n.19 (McCarty report) (addressing Dr. Ghitza's refusal to produce partisanship-estimate data). Plaintiffs apparently would not like the State's experts to be able to probe the data.

Plaintiffs' "partisan fencing" claims fail empirically. Defendants' expert, Nolan McCarty, concluded that "[b]ased upon a comparative analysis of the gubernatorial election returns of 2010 and 2014 at the municipal level, it is difficult to identify any differences that might be attributable to a differential partisan effect of Wisconsin's voter law changes." (Dkt. 87:4 (McCarty report).) "In terms of partisan voter shares and turnout, the elections were almost identical." (Dkt. 87:4 (McCarty report).) "The only difference being that the Republican candidate did slightly better in the most Republican municipalities and slight[ly] worse in the least Republican municipalities."

(Dkt. 87:4 (McCarty report).) "Those facts are hard to reconcile with the turnout changes postulated by the plaintiffs." (Dkt. 87:4 (McCarty report).)

In summary, the "partisan fencing" claims in Count 4 fail as a matter of law. Many of the challenged laws were passed with bipartisan support, as Defendants documented with uncontroverted evidence. Notably, Plaintiffs do not dispute the relevant proposed facts (other than to point out that Representative Cory Mason is from the 62nd Assembly District). (*See* Dkt. 97:5–6.) Count 4 claims fail for the same reasons that Count 2 claims fail, and the same legal test applies. Empirically, the predicted partisan-suppressive impacts of the challenged laws did not occur. The Court should dismiss Count 4 claims because Plaintiffs have not put forth any evidence to show they can prevail.

VI. Plaintiffs' rational-basis claims fail as a matter of law.

Plaintiffs have abandoned their rational-basis claim as to technical college ID cards. (Pl. Br. 139 n.23.) This leaves only the challenges to out-of-state driver licenses and a still-undefined set of what Plaintiffs refer to as "certain forms of expired IDs." (Pl. Br. 139.)

Plaintiffs' rational-basis claims fail as a matter of law. One cannot be a resident of Wisconsin for purposes of voting and a resident of another state for purposes of driving, and Wisconsin residents must give up their out-of-state driver licenses if they want to drive here. (*See* Def. Br. 58–59

(citing Wis. Stat. §§ 343.05(3)(a), 6.10(1), 343.01(2)(g)).) Plaintiffs response to this reason why it made no sense to make out-of-state driver licenses a form of qualifying voter ID is that "[d]riving and voting are very different activities" and that "a number of Wisconsin citizens—college students in particular—have an interest in voting that they do not have in driving." (Pl. Br. 140.)

Those are fair points. But even the college students who do not want to drive in Wisconsin but want to reside and vote here will be able to use their unexpired college ID cards for voting. *See* Wis. Stat. § 5.02(6m)(f). It would result in little-to-no benefit for the Legislature to authorize yet another form of identification when these voters already have a qualifying form of ID as college students. The Legislature could have made this rational observation and choice, and that is all that the rational basis test requires.

Plaintiffs' response does not negate that it was rational for the Legislature to find that authorizing *Illinois* driver licenses as a form of identification for qualified *Wisconsin* electors would not make sense as a practical matter. It could confuse election workers. Additionally, even if there is a theoretical group of voters who would benefit from including out-of-state driver licenses, it is unnecessary to authorize them because the likely small number of benefited voters already have one or more of the many forms of qualifying ID. The Legislature made a rational choice when it drew the line

as it did in light of concerns for efficient election administration and the fact that it was already authorizing a substantial number qualifying IDs that would benefit voters. The Legislature did not have come up with a reason why it did not include *every* photo ID card in existence to pass rational basis.

Finally, Plaintiffs do not identify in their amended complaint or opposition brief what "certain forms" of expired ID they would like to see this Court order as qualifying ID for purposes of voting. (Pl. Br. 139.) This makes it impossible to grant Plaintiffs relief on this claim because the Court is not apprised of what they are asking for. Plaintiffs assert that the State's argument is "garbled" (Pl. Br. 141), but the only reason it would be garbled to Plaintiffs is because they are hiding the ball regarding which expired IDs they would like to see mandated by this Court. Their claim should be dismissed for this reason alone.

Assuming that Plaintiffs want to have this Court enter an injunction that expired forms of the IDs listed in Wis. Stat. § 5.02(6m) are acceptable for voting, the claim still fails. The Legislature rationally excluded these forms of ID, as Defendants explained in their opening brief. (Def. Br. 60–61.) Authorizing expired driver license and state-ID card receipts would not be rational because these are temporary paper documents are to be used for no longer than 60 days and are then replaced by plastic versions. (*Id.* at 61.) It would not be rational for the Legislature to include expired university and

college ID cards because if a student's ID card is expired, it is at least plausible that he is no longer enrolled at the institution, making it impossible to show current proof of enrollment. Wis. Stat. § 5.02(6m)(f).

Plaintiffs are fond of quoting the district court's decisions in *Frank*, but they fail to cite that court for its rational basis analysis regarding the Legislature's discretion to make policy choices regarding qualifying IDs. Such a legislative decision is "virtually unreviewable." *Frank v. Walker*, No. 11-C-01128, 2015 WL 6142997, at *8 (E.D. Wis. Oct. 19, 2015). What the Eastern District wrote regarding the Legislature's decision not to include veteran's ID cards applies equally to its decision not to include additional expired IDs:

> To be sure, Wisconsin probably could have included veteran's ID on the list of Act 23–qualifying ID without significantly increasing its administrative burden. However, for the reasons just discussed, the state had to draw the line between acceptable and unacceptable forms of ID somewhere. Drawing such a line "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications,* 508 U.S. at 315–16, 113 S.Ct. 2096 (internal quotation marks omitted).

Id.

As explained, the Legislature's choice of ID cards was rational. It is not this Court's job to determine if other policy choices are better. Mere rationality is enough. Accordingly, the Court should dismiss Plaintiffs' remaining rational basis claims.

CONCLUSION

For the reasons argued in this brief and in Defendants' opening brief, the Court should grant Defendant's summary judgment motion, dismiss Plaintiffs' claims with prejudice, and enter judgment in Defendants' favor.

Dated this 11th day of February, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

/s/ Clayton P. Kawski
CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7477 (Kawski)
(608) 266-3067 (Collins)
(608) 266-0020 (Keenan)
(608) 266-5457 (Murphy)

(608) 267-2223 (Fax)
kawskicp@doj.state.wi.us
collinsws@doj.state.wi.us
keenanbp@doj.state.wi.us
murphysm@doj.state.wi.us