

No. 16-3091 [Consolidated with 16-3083]

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**In the United States Court of Appeals  
FOR THE SEVENTH CIRCUIT**

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ONE WISCONSIN INSTITUTE, INC., ET AL.,  
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

*v.*

MARK L. THOMSEN, ET AL.,  
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

—  
Appeal From The United States District Court  
For The Western District Of Wisconsin, No. 3:15-cv-324,  
The Honorable James D. Peterson, Presiding

—  
**DEFENDANTS-APPELLANTS, CROSS-APPELLEES'  
EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL**

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## INTRODUCTION

The district court in this case enjoined *seven* of Wisconsin's election laws on their face. These laws govern ordinary election logistics, and do so in a manner consistent with both nationwide practice and sound election administration. They include such banal provisions as a 28-day residency requirement (where 30 days is a common standard), rules governing the time and location for no-questions-asked in-person absentee voting (a permissive type of absentee voting many States do not even offer), and a mandate that clerks distribute absentee ballots by mail. The court invalidated all of these rules even though a longer residency requirement would have been lawful, *see, e.g., Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding a 50-day residency requirement), and even though there is no constitutional right to unrestricted absentee voting, *see Griffin v. Roupas*, 385 F.3d 1128, 1129, 1130–32 (7th Cir. 2004); *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969).

Without a stay, the district court's "disruption of the state's electoral system will cause irreparable injury" to Wisconsin and its citizens. *Frank v. Walker*, No. 16-3003, Dkt. 42, at 1 (7th Cir. Aug. 10, 2016) (order granting stay). The court's judgment upsets the status quo, overturning a regime under which Wisconsinites have voted for years. Forcing the State to put its entirely reasonable, commonplace election-administration rules on hold will waste the time and resources of the State's election officials and county clerks' offices, requiring a revamping of their election publications, official forms, website notices, training materials, polling schedules, and more.

Meanwhile, the risk of any harm to Plaintiffs from a stay is minimal, given that even the district court concluded that most of these provisions impose only meager burdens.

In light of the upcoming deadlines in Wisconsin's election laws—especially the Wednesday, August 31, 2016, date for printing and mailing absentee ballots, *see infra* pp. 15–18—the State respectfully asks for a decision on this stay motion as soon as practicable, but preferably no later than Friday, August 26.

## STATEMENT

### **I. The District Court Facially Enjoins Seven Election Provisions**

Over the last decade, Wisconsin has adopted (and, in one case, declined to adopt) several election rules relevant to this appeal. On July 29, 2016, the district court invalidated and enjoined seven laws on their face. R.234:118–19.<sup>1</sup>

*28-day durational residency law.* Wisconsin law requires that residents who move within Wisconsin fewer than 28 days before an election vote in their former municipalities (or by absentee), but residents who move into Wisconsin from out of State must have lived in Wisconsin for at least 28 days before voting here (except if casting a ballot for the offices of president and vice president), R.234:74. Wis. Stat. §§ 6.02, 6.15(1); 6.85. The 28-day minimum is slightly *more* favorable to voters than the average of the 25 States and the District of Columbia that have reported a date-specific residency threshold. *See* R.86:23–24. The district court enjoined this provision

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<sup>1</sup> Citations of the district court record are: “R.[ECF Entry Number]:[Page Number].”

under the “*Anderson-Burdick*” test—derived from the First and Fourteenth Amendments, see *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)—holding that the burdens that the 28-day rule imposed were not outweighed by the State’s interests. R.234:53–54; 74–79. The court then mandated that the State impose a 10-day residency requirement, which the court derived from Wisconsin’s prior law.

*Three laws providing for the locations and times for in-person absentee voting.*

Wisconsin has a highly permissive in-person absentee voting program that is available “for any reason” to almost any eligible voter who is “unable or unwilling” to vote in person. Wis. Stat. § 6.85(1). Such a no-questions-asked in-person absentee voting program is not available in 23 States.<sup>2</sup> The district court invalidated three provisions of that voter-friendly regime, even though none of the provisions make this type of absentee voting unavailable to any voter.

Wisconsin law permits municipalities to designate an alternate site for absentee voting. Wis. Stat. § 6.855(1). Some in the Legislature preferred that there be more than one site, so they introduced Senate Bill 91, which “would have permitted municipalities to open multiple in-person absentee voting locations.” R.234:10. The Bill was never signed into law, yet the district court held that the *Anderson-Burdick* doctrine requires the reforms as proposed in Senate Bill 91. R.234:61–62.

Wisconsin law also directs municipalities to offer in-person absentee voting between the third Monday preceding an election day and the Friday before election day,

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<sup>2</sup> National Conference of State Legislatures, *Absentee and Early Voting*, available at <http://goo.gl/uSPUZx>.

and makes the timing of in-person absentee voting consistent across the State, limiting it generally to weekdays between 8 a.m. and 7 p.m. Wis. Stat. § 6.86(1)(b). The court held that these timing rules were unlawful because the State could not justify the “moderate burdens” they supposedly imposed. R.234:56, 62. The court also held the provisions invalid under the Voting Rights Act. R.234:109–10. And the court held that the law requiring uniform timing of in-person absentee voting intentionally discriminated on the basis of race, in violation of the Fifteenth Amendment, because, in the court’s view, the legislative history showed that the law was enacted with Milwaukee and other “large municipalities” in mind. R.234:45.

*Law requiring that absentee ballots be sent by regular mail.* Before 2011, municipal clerks transmitted some absentee ballots to voters “by fax or email,” in addition to regular mail. R.234:85. This put a demand on clerk resources and exposed absentees’ votes to election officials, who had to “re-create electronically returned ballots in paper form on election day.” R.234:85. Wisconsin thus enacted a law prohibiting “municipal clerks from faxing or emailing absentee ballots to absentee voters other than overseas and military voters.” R.234:9. The court struck down this law under *Anderson-Burdick*, concluding that it “places a moderate burden on voters who are traveling” but that it lacks sufficient “justification[s].” R.234:84.

*Two laws relating to voting by college students.* Under Wisconsin law, a college student may establish residency for voter registration by relying on a certified list, provided at the university’s option, of those who live in college housing. Wis. Stat.

§ 6.34(3)(a)7.b (“dorm lists”). To also confirm students’ citizenship, Wisconsin law requires that any dorm list include only U.S. citizens. Wis. Stat. § 6.34(3)(a)7. The court held that this rule put “only slight” burdens on students, yet, because the court thought the rule not even “minimally rational,” it was held invalid under the *Anderson-Burdick* test. R.234:69.

Finally, Wisconsin law provides that students may use current, but not expired, student IDs to satisfy the photo ID requirement. Wis. Stat. § 5.02(6m)(f). The court concluded that this rule failed rational-basis review. R.234:112–15.

## **II. The District Court Declines To Stay Its Across-The-Board Injunctions Of The Seven Invalidated Laws**

Defendants asked the district court to stay its judgment and injunction, pointing out that the court’s rulings were likely to be reversed and would cause the State substantial harm while also confusing voters. R.241:1–14. On August 11, 2016, the district court denied the motion in relevant part, reiterating its view that the invalidated laws are unconstitutional and adding that no irreparable harm would befall the State during the pendency of the appeal. R.255:1–12.<sup>3</sup>

### **LEGAL STANDARD**

Presented with a motion for stay pending appeal, this Court “consider[s] the moving party’s likelihood of success on the merits, the irreparable harm that will

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<sup>3</sup> Defendants also asked the court to stay an as-applied injunction of Wisconsin’s ID Petition Process (“IDPP”), which relates to the State’s photo ID law, *see* 2011 Wis. Act 23. The district court granted, in part, Defendants’ stay motion as to that portion of the injunction. R.234:2. Accordingly, this motion will not address the IDPP decision, although Defendants intend to challenge the district court’s injunction with regard to the IDPP in their merits briefing.

result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. . . . [A] sliding scale approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (citations omitted).

## ARGUMENT

### I. Defendants Are Very Likely To Succeed On Appeal

A. The court held seven of Wisconsin's laws facially invalid under the First and/or Fourteenth Amendments, principally under the *Anderson-Burdick* test. But the court's analysis violated at least three principles: *First*, to warrant an "across-the-board injunction" under *Anderson-Burdick*, an election regulation must unduly burden the right to vote *not* of discrete pockets of electors but of voters *generally*, *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("[T]he burden some voters face[ ]" under a challenged law "[can]not prevent the state from applying the law generally."); *see Burdick*, 504 U.S. at 436–37; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (opinion of Stevens, J.) (courts must consider "the statute's broad application to all [of the State's] voters"). *Second*, "the usual burdens of voting" set the objective benchmark of an election regulation's severity, *Crawford*, 553 U.S. at 198 (plurality) (holding in context of facial challenge that, "for most voters," getting an ID is "surely" not "a substantial burden" (emphasis added)). *Third*, non-severe burdens on voting "trigger less exacting review, and a State's 'im-



portant regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions,’” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick*, 504 U.S. at 434), meaning that mere rational-basis review usually applies, *see, e.g., Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998), just as it does in many equal-protection challenges.

*28-day durational residency law.* The district court concluded that the 28-day rule imposed only “a moderate burden on voters,” but then claimed three pages later that the burden was “severe” in light of its supposed impact on some poor and transient voters, R.234:74–77. Regardless of which (if any) of these contradictory views one accepts (in reality, any “burden” is mild: Wisconsin’s rule is friendlier to residents than similar requirements in many other States, *see supra* pp. 3–4), there is no possible claim that the 28-day rule even prevents “a significant number of voters from participating in [State] elections in a meaningful manner,” *Crawford*, 553 U.S. at 190 (opinion of Stevens, J.) (describing the basis of Justice Kennedy’s dissent in *Timmons*), or that it lacks a “plainly legitimate sweep,” *id.* at 202–03. Moreover, the district court did not account for the State’s interest in efficient, secure election administration, R.206:64–66 (and record citations therein),<sup>4</sup> which is more than enough to justify this “reasonable, nondiscriminatory” rule. *Timmons*, 520 U.S. at

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<sup>4</sup> R.206 is the defendants’ post-trial brief. Citations in this brief refer to the page number of the brief on the bottom of the page and not to the ECF page numbers on the top of each page.

358. Notably, the Supreme Court has rejected an equal-protection challenge to a residency requirement of 50 days, explaining that “[S]tates have valid and sufficient interests in providing for *some* period of time [for durational residency]—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds.” *Marston*, 410 U.S. at 680. Wisconsin’s more voter-friendly law is lawful under the same rationale.

*Three laws providing for the locations and times for in-person absentee voting.* Wisconsin has enacted three relevant laws that impose certain limitations on the State’s no-questions-asked in-person absentee voting regime—a regime that many States do not offer. *See supra* p. 4. These three laws limit municipalities to one alternate site for in-person absentee voting (aside from the office of the municipal clerk), provide for a 10-day in-person absentee voting window, and mandate uniform rules for in-person absentee voting hours. *See supra* pp. 4–5. The court evaluated these in-person absentee timing and location rules as applied to certain subgroups’ “[p]re-existing disadvantages.” R.234:57. What was missing from the district court’s analysis was any explanation of how these in-person absentee voting rules impose burdens on the electorate in general, *Crawford*, 553 U.S. at 202–03 (plurality), or involve greater burdens than those involved in election-day in-person voting, *id.* at 198 (plurality). The court also concluded that any burden these laws placed upon voters was “moderate,” R.234:56, but then impermissibly invalidated them on their face, R.234:118, even though these banal laws plainly served the legitimate interest of reducing burdens on election officials before election day. R.206:54–60 (and record citations

therein); *see Timmons*, 520 U.S. at 358. The court further did not adequately address the point that no-questions-asked in-person absentee voting is not constitutionally required *at all*, *see Griffin*, 385 F.3d at 1129, 1131, *McDonald*, 394 U.S. at 807–08, meaning that Wisconsin has already provided voters with more in-person absentee voting rights than the Constitution mandates.

*Law requiring that absentee ballots must be sent by regular mail.* The court invalidated a law requiring that most absentee ballots be sent only by regular mail—rather than by fax or email—because the court believed that this “moderate[ly]” burdened voters “who are traveling [around election day], particularly [those] outside of the country or in locations with unreliable mail delivery.” R.234:84. But facial invalidation based upon a “moderate” burden on only an exceedingly small group of voters is forbidden. *Crawford*, 553 U.S. at 190 (plurality). The district court further erred by disregarding the State’s interest in reducing burdens on clerks’ offices and alleviating concerns that *actual votes* not be exposed to election officials, *see, e.g.*, R.86:19, which interests easily sustain a “reasonable, nondiscriminatory” rule. *Timmons*, 520 U.S. at 358. Anyway, there is no general constitutional right to unrestricted absentee voting to begin with. *See Griffin*, 385 F.3d at 1129; *McDonald*, 394 U.S. at 807.

*Two laws relating to voting by college students.* The court also invalidated a law providing that if a university submits a dorm list for voter-registration purposes, such a list must confirm that the students are U.S. citizens. The court stated that the “burdens” this imposed were “only slight,” but concluded that the rule was not “min-

imally rational,” in part because “none of the state’s other methods for proving residence require voters to ‘confirm’ their U.S. citizenship beyond signing” a form. R.234:69. But a law “aimed at remedying a problem need not entirely eliminate the problem”—“reform may take one step at a time.” *Greater Chicago Combine & Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir. 2005) (citation omitted). Regardless, this rule cannot plausibly be described as a meaningful burden: college students continue to have *numerous* options to prove their residency, the same options available to all voters in general. R.217:133. Even if the provision does impose a “burden,” albeit “only [a] slight” one, the district court also erroneously failed to consider whether the burden fell upon voters *generally*—or even all student voters—before striking it down on its face. *See Crawford*, 553 U.S. at 202–03 (plurality).

The court made a similar error when it invalidated, on mere rational-basis review, the provision deeming non-expired student IDs acceptable for purposes of the photo ID law. R.234:112–15. Permitting current—as opposed to expired—student IDs is not even arguably “discriminatory” and is, in any event, clearly “related to [the] legitimate state interest” served by a voter ID law. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002).

B. The court also held that certain in-person absentee timing rules violate the Fifteenth Amendment’s ban on intentional race discrimination because, when the Legislature passed Act 146, it was focused upon in-person absentee voting in Milwaukee and other “large municipalities.” R.234:45. That holding has several flaws.

To begin with, the district court rested its finding of discrimination on statements from *two* legislators (out of 132) “objecting to the extended hours for in-person absentee voting in Milwaukee and Madison,” and one election official testifying secondhand as to what he thought the Legislature knew about the law’s possible effects. R.234:42–45. The court’s theory was that, by “specifically” regulating “large municipalities,” the Legislature was targeting “African Americans and Latinos” by proxy. R.234:45. This does not add up. The challenged rules also affect Milwaukee’s *non-black* and *non-Hispanic* voters, who make up a substantial part of the city.<sup>5</sup> And in Madison and many other “large municipalities,” African Americans and Latinos are disproportionately *underrepresented* relative to national averages<sup>6</sup>—sometimes vastly.<sup>7</sup> Far stronger “large municipality” theories of intentional discrimination have failed. *See Hearne*, 185 F.3d at 776 (rejecting equal-protection argument that legislation applying only to Chicago targeted African Americans by “proxy”); *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 370 (6th Cir. 2002) (holding that, by restricting the voting rights of only Detroit residents, “the Michigan legislators sought to address a problem that they perceived to exist in [places] with large populations, not that they wanted to disenfranchise African-Americans”).

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<sup>5</sup> U.S. Census Bureau (USCB), *QuickFacts: Milwaukee city, Wisconsin*, available at <http://goo.gl/ZRgPJJ>.

<sup>6</sup> *E.g.*, U.S. Census Bureau, *QuickFacts: Madison city, Wisconsin*, available at <https://goo.gl/Xq5Vrt>.

<sup>7</sup> *E.g.*, U.S. Census Bureau, *QuickFacts: Appleton city, Wisconsin*, available at <https://goo.gl/5kVLkb>; U.S. Census Bureau, *Quickfacts: Eau Claire city, Wisconsin*, available at <https://goo.gl/y69PNQ>.

In any event, under the district court's own theory, the law was not racially motivated. The court concluded that the Legislature's "intent" had been *at worst* merely "to secure [a] partisan advantage," R.234:45, not to harm certain racial minorities, which would mean that the Legislature had been at worst indifferent to the law's supposed disparate racial impact. This point alone should have doomed any claim of discriminatory purpose. *See Bond v. Atkinson*, 728 F.3d 690, 693 (7th Cir. 2013) ("[I]t is not enough to show that" the Legislature "knew" that members of certain racial groups "would fare worse than [white voters]"; must show "that the [Legislature] adopted that policy because of, not in spite of or with indifference to," any disparate racial effect). Compounding its error, the court did not dismiss the Legislature's race-neutral justifications of the law as simply "pretextual," *David K. v. Lane*, 839 F.2d 1265, 1272 (7th Cir. 1988), but instead as "meager." R.234:45.

C. The court also concluded that the 28-day residency rule violated Section 2 of the Voting Rights Act (the Act) because, in the court's view, the rule imposed a burden on voting closely linked to "historical conditions of discrimination" caused in particular by the City of Milwaukee. R.234:107. But *Frank I* held that "units of government are responsible for *their own* discrimination" under Section 2. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (*Frank I*). While the district court seemed to recognize that Milwaukee's discrimination was "technically not the state's own discrimination," it thought the "broad remedial purpose" of the Act trumped what it described as *Frank I*'s "rigid distinction." R.234:107. But the district court had no authority to question *Frank I*'s "distinction[s]," rigid or otherwise.

The court alternatively held that it was enough that Milwaukee's discrimination "interact[ed]" with the 28-day rule to produce "disparate burdens," R.234:107–08, but such "interaction" hardly establishes the State's supposed "purpose" of curtailing minority voting, *Frank I*, 768 F.3d at 753–54. In any event, the Act's 1970 Amendments permit States to close registration 30 days before elections for federal office, which supports the conclusion that Wisconsin's less restrictive 28-day rule (which does not even apply to votes for president or vice president) is lawful under Section 2. *See* 52 U.S.C. § 20507(a).

## **II. The Injunction Will Irreparably Harm The State And Public, And A Stay Will Cause Plaintiffs No Harm**

A stay of the district court's sweeping injunction would "simply . . . preserve the status quo." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995). Most of the enjoined laws have been on the books for years. With fewer than 90 days remaining before the November elections, and "the state's election machinery already in progress," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), requiring clerks' offices and election administrators to discard their election manuals and comply immediately with the court's wide-ranging injunction would waste public resources and "result in voter confusion," *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Meanwhile, any risk of temporary harm to Plaintiffs from a stay is either minimal or speculative.

Declining to stay the district court's decision and injunction would prevent the State from "effectuating" its laws, itself "a form of irreparable injury," *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The election reforms targeted

in this litigation represent the will of Wisconsin's citizens. Until each of the provisions' validity has been finally determined, the popular will should not be frustrated. *See Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) (“[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.”).

While this democratic-governance rationale is sufficient to justify a stay here as to all of the laws, failure to issue a stay will also cause law-specific harms, further reinforcing the need for immediate relief.

*28-day durational residency law.* Absentee ballots—which must be printed and ready for circulation by August 31, 2016, *see* Wisconsin Government Accountability Board (now “Elections Commission”), *Calendar of Election and Campaign Events* at 15, *available at* <http://goo.gl/ZTK2M1>—will need to inform voters what the durational-residency rule is in Wisconsin: either presumably 10 days (under the court's ruling) or 28 days (per the statute). That is because an absentee voter must certify, if appropriate, that he has not “changed [ ] residence within the state from one ward to another later than 28 days [or, under the judgment below, 10 days] before the election.” Elections Commission, *Official Absentee Ballot Application / Certification (EL-122)*, *available at* <http://goo.gl/udSS11>. Relatedly, if the decision below is not stayed, the Commission may well need to rewrite, reprint, and recirculate the statewide voter-registration application, which presently references the 28-day rule. Elections Commission, *Wisconsin Voter Registration Application (EL-131)*, *available at*



<http://goo.gl/9W8QUL> (“Voter Registration Form”); *see also* DMV, *Voter Registration in Wisconsin*, available at <http://goo.gl/YlycAz> (informing voters of 28-day rule).

In addition, without a stay, the public would also suffer from a sudden (and likely temporary) change in the durational-residency rule. As the district court explained, R.234:74, knowing where to go to cast one’s ballot is important; potential absentees must be allowed to make plans. Finally, changing the “28” to “10” in the registration form could raise a different problem: if the judgment were not stayed, but this Court were to reverse near election day, the State would need to determine whether registrations completed between 28 days and 10 days before the election are valid.

*Three laws providing for the locations and times for in-person absentee voting.* The court’s micromanagement of the location and times of in-person absentee voting will impose administrative and financial burdens on local election administrators, putting pressure on clerks to open additional voting places and keep longer hours at the municipalities’ expense—the avoidance of which expense was a reason for the reforms. *See* R.216:118–20; R.219:14–16, 32–33; R.218:114–15, 160–61. The court’s new in-person-absentee election rules also threaten widespread voter confusion. *See Purcell*, 549 U.S. at 4–5. For example, without a stay, voters will need to figure out their municipalities’ new schedules for in-person absentee voting. *See* R.219:15–16; R.216:118–20; R.218:114. And those schedules surely will differ even across regions of the State, a problem especially for residents of smaller municipalities in the Milwaukee and Madison media networks, where news of the big cities’ unique voting

schedules could crowd out reports of which polling places in their own towns will be open for absentee voting and when. *See* R.218:160–61, 170–71, 179–80.

*Law requiring that absentee ballots must be sent by regular mail.* As noted above, on August 31, election clerks will mail absentee ballots to voters with valid requests on file. *See supra* p. 15. Absent a stay, clerks will need to start emailing and faxing absentee ballots and also process the ballots that are returned via those methods. *Supra* pp. 5, 10. Both tasks will drain clerk-office resources.

*Two laws relating to voting by college students.* The injunction will have a similarly disruptive effect on the rule requiring dorm lists to confirm students' citizenship. The registration form currently in circulation throughout the State instructs student applicants that they may present a student "ID . . . coupled with an on-campus housing listing . . . that denotes US Citizenship." *Voter Registration Form* at 2. Unless the judgment is stayed, the Elections Commission will need to reprint and recirculate the corrected version.

In addition, changing the list of permissible IDs will also cause harm to the State and public. As voters begin receiving their absentee ballots, they will need to know what forms of ID may be presented with their votes. As of today, notices on official state election websites, including the posted instructions for submitting absentee ballots, specify in detail what forms of ID are acceptable. Elections Commission, *Application for Absentee Ballot (EL-121)*, available at <http://goo.gl/yZOACv>. Absent a stay, these and other forms (including the absentee ballots themselves) would likely need to be altered—and immediately.

**CONCLUSION**

The judgment and permanent injunction should be stayed pending appeal.

Dated: August 12, 2016.

Respectfully Submitted,

BRAD D. SCHIMEL  
Wisconsin Attorney General

s/ Misha Tseytlin  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of August, 2016, I filed the foregoing Motion 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: August 12, 2016

s/Misha Tseytlin  
MISHA TSEYTLIN

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

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ONE WISCONSIN INSTITUTE, INC.,  
CITIZEN ACTION OF WISCONSIN EDUCATION  
FUND, INC., RENEE M. GAGNER,  
ANITA JOHNSON, CODY R. NELSON,  
JENNIFER S. TASSE, SCOTT T. TRINDL,  
MICHAEL R. WILDER, JOHNNY M. RANDLE,  
DAVID WALKER, DAVID APONTE, and  
CASSANDRA M. SILAS,

Plaintiffs,

v.

MARK L. THOMSEN, ANN S. JACOBS,  
BEVERLY R. GILL, JULIE M. GLANCEY,  
STEVE KING, DON M. MILLS,  
MICHAEL HAAS, MARK GOTTLIEB, and  
KRISTINA BOARDMAN,  
*all in their official capacities,*

Defendants.

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ORDER

15-cv-324-jdp

Plaintiffs prevailed on some, but not all, of their challenges to changes in Wisconsin's election laws. The court enjoined enforcement of those laws that it found to be unconstitutional. Both sides have appealed. Dkt. 236 and Dkt. 240.

Defendants now move to stay the court's injunction pending appeal. Dkt. 241. Defendants contend that it is likely that the court's decision will be reversed on appeal and that the injunction would require "a vast overhaul of state election procedures," which would require enormous effort and confuse voters. Dkt. 251, at 2. But defendants' description of the court's injunction is, to put it mildly, an exaggeration. The injunction requires modest, but meaningful, adjustments to a few election procedures and requirements. Yet it leaves in place the framework that the legislature has chosen, particularly the strict voter ID law, under

which no one votes without an acceptable photo ID. Defendants have not made a strong showing that they are likely to succeed on the merits of their appeal: the court is not persuaded that any aspect of its decision was wrong. Accordingly, the court will deny the motion to stay, in all but one respect.

The court will stay the requirement that the state fundamentally reform the IDPP before the next election. To be clear: the state must reform the IDPP because the current process prevents some qualified electors from getting acceptable IDs, and even successful petitioners must often endure undue burdens before getting those IDs. But the state's emergency measures already in place will allow anyone who enters the IDPP to get a receipt that will serve as a valid ID for the November 2016 election. This is not a permanent solution because the long-term status of the receipts is uncertain. But the required reform can wait until the parties complete their appeal.

#### ANALYSIS

Pursuant to Federal Rule of Civil Procedure 62(c), this court has the authority to stay an injunction while an appeal of the order granting that injunction is pending. "To determine whether to grant a stay, [the court] consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). The court uses a "sliding scale" approach: "the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.*

**A. Defendants' likelihood of success on the merits**

Defendants have not shown a strong likelihood of success on the merits. Defendants principally stand on their post-trial brief to explain why their position on the merits of the case is correct. *See* Dkt. 241, at 3 n.1. The court's opinion, Dkt. 234, thoroughly explains the court's reasons for rejecting defendants' arguments. But defendants' motion to stay makes six specific criticisms of the court's opinion. These are not entirely new points, but the court will address each one.

First, defendants contend that the one-location rule for in-person absentee voting was in effect long before the rest of the challenged provisions. According to defendants, plaintiffs' "core challenge is that the Legislature should have changed a long-standing law" and that the court ruled "that a *non-change* to an existing law is unconstitutional." Dkt. 241, at 4 (original emphasis). Not true. Plaintiffs did not challenge the legislature's failure to change the law. Plaintiffs' challenge, and the court's conclusion, was that the long-standing one-location rule is unconstitutional under the *Anderson-Burdick* framework, particularly when combined with limits on the hours available for in-person absentee voting.

Second, defendants contend that "[s]tatewide regulation of in-person absentee timing is necessary for orderly and effective elections," and that by eliminating the state's restrictions on the hours for in-person absentee voting, the court has imposed burdens on municipal clerks and allowed inconsistent hours across municipalities. *Id.* This is not a new argument, and it is wrong in two ways. First, Wisconsin law allows municipal clerks to set their own hours for in-person absentee voting, so the challenged law simply does not eliminate inconsistency in voting hours. Before Wisconsin enacted the challenged provisions, municipal clerks could set whatever hours they wanted to set. Under the new laws, municipal

clerks can still set whatever hours they want to set, provided that those hours are within a 10-day window before the election and between 8:00 a.m. and 7:00 p.m. Some communities offer in-person absentee voting for only a few hours, so the state allows vast inconsistency. Second, the court's injunction imposes no burden on anyone: under the injunction, municipal clerks can set the hours for in-person absentee voting based on the needs of their communities; no clerks are required to offer more than 10 days or weekend voting. Defendants have not explained how they will reconcile the inconsistency between their justifications for the challenged provisions and what those provisions actually accomplish. Moreover, they have not explained how they will overcome the strong evidence of intentional race discrimination that led the court to invalidate these restrictions under the Fifteenth Amendment.

Third, defendants contend that the court's conclusions about Wisconsin's registration requirements (i.e., requiring dorm lists to indicate a student's citizenship and imposing a 28-day durational residency requirement) were contrary to binding precedent. For support, they direct the court to *Frank v. Walker*, in which the Seventh Circuit stated that "[r]egistering to vote is easy in Wisconsin." 768 F.3d 744, 748 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015). *Frank* did not involve a challenge to Wisconsin's registration requirements, and this statement (which was to set up a point about the number of registered voters who lacked a qualifying ID being comparatively small) is hardly "binding precedent" that spells certain reversal in this case. The Seventh Circuit has not categorically held that Wisconsin's voting registration rules are impervious to constitutional review.

As for the durational residency requirement, defendants are correct that the Supreme Court has upheld requirements that were longer than Wisconsin's 28-day rule. *See, e.g., Burns*



*v. Fortson*, 410 U.S. 686 (1973) (per curiam) (50-day requirement). But the challenge in this case was to the legislature’s decision to *increase* the existing 10-day requirement to 28 days.<sup>1</sup> The court concluded that although durational residency requirements are justifiable to prevent certain types of election fraud, defendants had offered no justification for the increase. Defendants did not explain at trial, or in their post-trial brief, and they have not explained in their motion for a stay, how a 10-day rule was insufficient to prevent the types of election fraud that durational residency requirements are designed to prevent. Nor have defendants explained how a 28-day rule *better* prevents those types of fraud. The increase in the durational residency requirement imposes severe burdens on those whom it affects, and defendants offered no plausible justification for imposing those burdens.

Fourth, defendants contend that the court discredited their evidence of the security, accuracy, and efficiency considerations that justified the challenged provision preventing municipal clerks from sending absentee ballots by fax or email. That is correct: the court concluded that these justifications were not persuasive because defendants had not presented evidence suggesting that there were genuine or widespread problems with delivering ballots electronically. These justifications were particularly suspect because the legislature *requires* clerks to send ballots electronically to certain categories of voters (those in the military or permanently residing overseas).

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<sup>1</sup> In their reply—and for the first time in this case—defendants express confusion at what the state of the law currently is for Wisconsin’s durational residency requirement. Dkt. 251, at 6. There is no genuine confusion. The court concluded that “the sections of Act 23 amending Wis. Stat. §§ 6.02, .10(3), and .15 to increase the durational residency requirement from 10 days to 28 days violate the First and Fourteenth Amendments.” Dkt. 234, at 116. With those provisions of Act 23 invalidated, Wis. Stat. §§ 6.02, .10(3), and .15 are as they were before Act 23 amended them to increase the durational residency requirement. Beginning with the November 2016 election, Wisconsin will have a 10-day durational residency requirement.

Fifth, defendants criticize the court's holding that the ban on using expired student IDs fails under rational basis review. Dkt. 241, at 6. Defendants' point, apparently, is that rational basis review is so minimally demanding that the court's decision must be wrong. But defendants had three (four, counting their motion to stay) opportunities to present a rational justification for the state's decision to exclude expired student ID cards from the list of acceptable IDs, and they failed to do so. Defendants argue that "it is plainly rational to require a person using a student ID to be a current student." *Id.* The court acknowledged this point in its order. Dkt. 234, at 114. But Wisconsin law *already* ensures that only current students vote because it requires a voter who uses a student ID at the polls to also provide proof of enrollment. Wis. Stat. § 5.02(6m)(f). Defendants have not explained why the additional measure of requiring that a student ID be *unexpired* provides any additional measure of security. Thus, the requirement is redundant and simply makes it more likely that an otherwise qualified voter will be unable to vote.

Sixth, defendants contend that the court misunderstood the current state of the IDPP. They argue that under the court's injunction, ineligible voters will have credentials that allow them to vote for several years, and the state will be powerless to stop them. The court is not persuaded. However, the court's decision to stay the injunction as it relates to the long-term reform of the IDPP, places the issue on the back burner for now.

Here is the problem. Under the emergency rule, a petitioner gets a receipt valid for 60 days. The petitioner automatically gets a renewed receipt, good for another 60 days, unless the DMV denies the petition in the meantime, which would happen if the DMV discovers that the petitioner has committed fraud or is ineligible for an ID. Apparently, a petitioner who cannot come up with the necessary documents will keep getting renewed receipts, in 60-

day increments.<sup>2</sup> But after 180 days, the game changes. At that point, the petitioner is required to provide “additional information” to keep the petition pending. “[I]f the applicant provides no additional information within the next 180 days the petition will be denied and no further identification card receipts will be issued[.]” PX453, § 8.

So where would this leave Mrs. Smith, the qualified elector who could not get a voter ID through the IDPP? *See* Dkt. 234, at 1-2. Under the emergency rule, her receipt would be subject to cancellation once 180 days pass without her providing some new information to the DMV. Instead of receiving the permanent voter ID to which she is entitled, Mrs. Smith would be required to sustain a back-and-forth exchange with the DMV indefinitely, even though she has already provided all the information that she has. This is a burden that far exceeds what *Crawford* and *Frank* contemplated. Although the state has given Mrs. Smith a receipt that will allow her to vote in November 2016, her right to vote in subsequent elections is very much in doubt. And there are about 100 petitioners who, like Mrs. Smith, are stuck in the IDPP. The state has no permanent solution for their conundrum. Defendants have not convinced the court that the IDPP is constitutionally sound.

But in the short term, the emergency rule blunts the constitutional injury to those who are stuck in the IDPP by giving them receipts valid for voting. As long as defendants inform the public about the IDPP—and the court will not stay that aspect of its injunction—this will take care of the problem until the November election. The court will leave it to the

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<sup>2</sup> The testimony at trial was that renewals would issue automatically for 180 days. Tr. 6, at 13:5-14. But that is not entirely clear from the text of the rule itself. PX453, § 8. The text of the rule does not make clear exactly when a petitioner is on the 180-day clock to provide more information.

state to reform or replace the IDPP to meet the basic standards set out in the court's opinion, but that work can wait until the appeals in this case are resolved.

## **B. Balance of harms**

Defendants have not demonstrated a strong likelihood of success on the merits. Accordingly, the balance of harms and the public interest would have to weigh strongly in their favor for the court to stay its permanent injunction pending appeal. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007).

The court begins at a high level, with the harm that would befall plaintiffs and other voters if the court stayed its injunction. The enjoined provisions, regardless of the theory under which the court has invalidated them, have one thing in common: they impede Wisconsin citizens from voting. A stay would irreparably injure plaintiffs and the public by abridging voters' constitutional rights. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (“[V]iolations of First Amendment rights are presumed to constitute irreparable injuries.”); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.”). For the reasons explained in the court's opinion, none of the enjoined provisions meaningfully contribute to the public's interest in election integrity or efficiency.

The court turns now to the specific harms that defendants attribute to each aspect of the court's injunction.

The long-term reform of the IDPP will require affirmative effort by the state. Although it is not clear to the court how much effort will be required to reform the IDPP to remedy its constitutional flaws, the court will stay this aspect of its injunction (paragraphs

10.b. and 10.d. of the injunction order) until this appeal is resolved. The other two aspects of the injunction that relate to the IDPP are: the order that the DMV promptly issue credentials valid as a voting ID to petitioners who enter the IDPP (paragraph 10.a); and that the state inform the public that those who enter the IDPP will receive such credentials (paragraph 10.c). For the short-term, the state has already committed to paragraph 10.a by providing receipts to those with pending petitions. The defendants have not asserted that complying with paragraph 10.c would be unduly burdensome. Thus, the court will not stay the order that the state make reasonable efforts to educate the public about IDPP receipts.

The injunction against enforcing the one-location rule and the limits on the times for in-person absentee voting imposes no direct burden or hardship on the state or on any municipality. It will be up to the election authority in each municipality to decide if more than one location should be set up to take in-person absentee votes. If an additional location serves no useful purpose, or would pose intractable logistical problems, then the municipality can stick with one location. But if a municipality, say Milwaukee, decides that additional locations would be feasible and helpful to its citizens, then that municipality can undertake the effort. The same principle applies to the hours for in-person absentee voting: no municipality has to offer any more hours than its election authority deems appropriate.

Defendants contend that the court's injunction would lead to confusion if municipal clerks opened the time for in-person absentee voting before the ballots are ready. Defendants point to no evidence that any municipal clerk wanted to open in-person absentee voting before the ballots were ready. At trial, municipal clerks uniformly testified that the availability of the ballots poses a logically necessary first moment when in-person absentee voting is possible. Tr. 7a, at 113:25-114:15. Defendants' argument that the injunction

creates confusing disparities between municipalities rings hollow because the state already allows enormous disparities between communities. For example, the clerk's office of the Town of Port Washington has office hours only two days a week, whereas the clerk's office for the City of Port Washington is open every weekday during business hours. *Id.* at 160:21-25, 177:4-8. The hours for in-person absentee voting will vary greatly from town to town, regardless of the court's injunction. Defendants' contention that the injunction harms the legislature's attempt to create a "cohesive statewide election system" is not remotely credible.

Defendants have almost nothing to say about any harm from the court's injunction against the extended durational residency requirement. At trial, defendants adduced no evidence at all of any fraud or impropriety that resulted from the shorter 10-day requirement, and they do not now point out any threat to election integrity if the 28-day requirement is enjoined. Defendants merely pose the question: what should an election administrator do with a voter who registered while the 28-day rule was enjoined, if the court's ruling is later reversed? But posing this question does not demonstrate any harm. There are undoubtedly vast numbers of current voters who registered under the 10-day rule before the passage of 2011 Wis. Act. 23. Those voters do not pose any current problem by remaining on the rolls; neither would a few voters newly registered under a 10-day rule. Balanced against the acute burden imposed on a recently moved person who is forced to return to his or her old district to register and vote, this alleged harm is inconsequential.

Defendants contend that faxing and emailing absentee ballots takes work, introduces the possibility of error, and makes the ballot less private. The court addressed these issues in its consideration of the merits of plaintiffs' challenge to these restrictions, and it held that these concerns did not justify the acute burdens imposed on voters who could not get

absentee ballots in time by regular mail. Defendants add nothing new in their request for a stay of the court's injunction. Given that municipal clerks are already required to deliver absentee ballots for military and permanently overseas voters, the court concludes that distributing some additional fax and email ballots does not impose a significant hardship on the state or municipal clerks.

The court finds it hard to see how the relatively minor changes to student voting requirements pose any burden or harm to anyone. Defendants do not address the injunction against enforcing the requirement that "dorm lists" must include citizenship information if they are to be used as proof of residence. The court considers it conceded then that this part of the injunction poses no meaningful hardship. As for the injunction against the provision that requires student IDs used for voting to be unexpired, defendants say only that absent a stay, universities may not make arrangements to issue compliant IDs. Dkt. 241, at 7. That is pure speculation. Wisconsin law requires that a student ID for voting have an expiration period of two years. The standard ID cards at many universities do not comply with this requirement, and so those schools will have to issue compliant IDs regardless of whether poll workers are allowed to accept expired IDs. It is hard to imagine that this slight adjustment could not be easily integrated into the instructions for poll workers.

One more point in closing. Defendants assert that voting rights cases typically involve a "dizzying back-and-forth between election laws being enjoined and reinstated." *Id.* at 9. Case in point: the Seventh Circuit recently stayed a preliminary injunction that the Eastern District of Wisconsin entered requiring the state to adopt an affidavit procedure for voters who did not present IDs at the polls. *Frank v. Walker*, No. 16-3003 (7th Cir. Aug. 10, 2015) (order staying injunction pending appeal). If this most recent decision in *Frank* had any

bearing on this case, the court would consider it carefully. But it relates solely to the affidavit procedure that Judge Adelman imposed as a remedy. This court declined to impose that remedy, choosing instead an injunction closely tied to the specific constitutional problems in Wisconsin's election regime. The tightly drawn injunction should reduce the likelihood of a back-and-forth with the court of appeals.

But the court cannot avoid the potential back-and-forth simply by finding for defendants. Plaintiffs have appealed the court's decision as well, and if they win, the court's injunction will have to be reworked to make it more favorable to them. For now, this court has found for plaintiffs on some of their claims, and it has identified several ways in which Wisconsin's election regime violates the constitutional rights of its citizens. Both sides have the right to appeal this decision to the court of appeals. But while these appeals proceed, the court will not let the constitutional violations it has found endure.

#### ORDER

IT IS ORDERED that defendants' motion to stay the court's permanent injunction pending appeal, Dkt. 241, is DENIED in substantial part. As explained above, only the provisions of the injunction requiring the state to reform its IDPP within 30 days of the date of the court's opinion on the merits are STAYED pending the outcome of the parties' appeals. The rest of the injunction remains in effect.

Entered August 11, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON  
District Judge



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

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ONE WISCONSIN INSTITUTE, INC.,  
CITIZEN ACTION OF WISCONSIN EDUCATION  
FUND, INC., RENEE M. GAGNER,  
ANITA JOHNSON, CODY R. NELSON,  
JENNIFER S. TASSE, SCOTT T. TRINDL,  
MICHAEL R. WILDER, JOHNNY M. RANDLE,  
DAVID WALKER, DAVID APONTE, and  
CASSANDRA M. SILAS,

Plaintiffs,

v.

MARK L. THOMSEN, ANN S. JACOBS,  
BEVERLY R. GILL, JULIE M. GLANCEY,  
STEVE KING, DON M. MILLS,  
MICHAEL HAAS, MARK GOTTLIEB, and  
KRISTINA BOARDMAN,  
*all in their official capacities,*

Defendants.

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FINDINGS OF FACT &  
CONCLUSIONS OF LAW

15-cv-324-jdp

Mrs. Smith has lived in Milwaukee since 2003.<sup>1</sup> She was born at home, in Missouri, in 1916. In her long life she has survived two husbands, and she has left many of the typical traces of her life in public records. But, like many older African Americans born in the South, she does not have a birth certificate or other documents that would definitively prove her date and place of birth. After Wisconsin's voter ID law took effect, she needed a photo ID to vote. So she entered the ID Petition Process (IDPP) at the Wisconsin Department of Motor Vehicles (DMV) to get a Wisconsin ID. DMV employees were able to find Mrs. Smith's record in the 1930 census, but despite their sustained efforts, they could not link Mrs. Smith

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<sup>1</sup> "Mrs. Smith" is not her real name, which I withhold to protect her privacy. The record of her interaction with the DMV is PX421.

to a Missouri birth record, so they did not issue her a Wisconsin ID. She is unquestionably a qualified Wisconsin elector, and yet she could not vote in 2016. Because she was born in the South, barely 50 years after slavery, her story is particularly compelling. But it is not unique: Mrs. Smith is one of about 100 qualified electors who tried to but could not obtain a Wisconsin ID for the April 2016 primary.

Wisconsin's voter ID law is part of 2011 Wis. Act 23, enacted the year after Wisconsin Republicans won the governorship and majorities in both houses of the legislature. Act 23 was the first of eight laws enacted over the next four years that transformed Wisconsin's election system. Plaintiffs in this case challenge the voter ID law, the IDPP, and more than a dozen other provisions in these new laws, none of which make voting easier for anyone. Plaintiffs contend that the new voting requirements and restrictions were driven by partisan objectives rather than by any legitimate concern for election integrity, that these laws unduly burden the right to vote, and that they discriminate against minorities, Democrats, and the young. Plaintiffs contend that the new election laws violate the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments to the Constitution, and § 2 of the Voting Rights Act.

This case was tried to the court in May. Over nine extended days, the court heard the testimony of 45 live witnesses, including six experts, with additional witnesses presented by deposition. The parties submitted lengthy post-trial briefs, and the court heard closing arguments on June 30. The opinion that follows is the court's verdict. It sets out in detail the facts that the court finds and the legal conclusions that the court draws from those facts. Because of the large number of claims asserted in this case, and the volume of evidence submitted, the opinion is necessarily long, and few readers will endure to the end. But I will

try, in a few pages of introduction, to explain succinctly the court's essential holdings and the reasons for them.

I start with a word about my role. It is not the job of a federal judge to decide whether a state's laws are wise, and I certainly do not have free-floating authority to rewrite Wisconsin's election laws. My task here is the more limited one of pointing out where Wisconsin's election laws cross constitutional boundaries. The Constitution leaves important decisions about election administration to the states. But election laws inevitably bear on the fundamental right to vote, so constitutional principles come into play. The standards that I must apply to plaintiffs' claims require me to examine carefully the purposes behind these laws, and sometimes to draw inferences about the motives of the lawmakers who enacted them. I conclude that some of these laws cannot stand.

Wisconsin's voter ID law has been challenged as unconstitutional before, in both federal and state court. In the federal case, *Frank v. Walker*, the Seventh Circuit held that Wisconsin's voter ID law is similar, in all the ways that matter, to Indiana's voter ID law, which the United States Supreme Court upheld in *Crawford v. Marion County Election Board*. The important takeaways from *Frank* and *Crawford* are: (1) voter ID laws protect the integrity of elections and thereby engender confidence in the electoral process; (2) the vast majority of citizens have qualifying photo IDs, or could get one with reasonable effort; and (3) even if some people would have trouble getting an ID, and even if those people tend to be minorities, voter ID laws are not facially unconstitutional. I am bound to follow *Frank* and *Crawford*, so plaintiffs' effort to get me to toss out the whole voter ID law fails.

If it were within my purview, I would reevaluate *Frank* and *Crawford*, but not because I would necessarily reach a different conclusion. A well-conceived and carefully implemented

voter ID law can protect the integrity of elections without unduly impeding participation in elections. But the rationale of these cases should be reexamined. The evidence in this case casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities. To put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease. But I must follow *Frank* and *Crawford* and reject plaintiffs' facial challenge to the law as a whole.

The most pointed problem with Wisconsin's voter ID law is that it lacks a functioning safety net for qualified electors who cannot get a voter ID with reasonable effort. The IDPP is supposed to be this safety net, but as Mrs. Smith's story illustrates, the IDPP is pretty much a disaster. It disenfranchised about 100 qualified electors—the vast majority of whom were African American or Latino—who should have been given IDs to vote in the April 2016 primary. But the problem is deeper than that: even voters who succeed in the IDPP manage to get an ID only after surmounting severe burdens. If the petitioner lacks a birth certificate and does not have one of the usual alternatives to a birth certificate, on average, it takes five communications with the DMV after the initial application to get an ID. I conclude that the IDPP is unconstitutional and needs to be reformed or replaced. Because time is short with the fall elections approaching, I will issue an injunction targeted to the constitutional deficiencies that I identify.

Judge Lynn Adelman for the U.S. District Court for the Eastern District of Wisconsin has also concluded that the IDPP is likely unconstitutional, and he has issued a preliminary injunction requiring Wisconsin to institute an affidavit procedure. This procedure would

allow an elector without an ID to vote by signing an affidavit stating that he or she is a qualified elector but could not get a photo ID. Judge Adelman's injunction provides one type of safety net. But plaintiffs have not asked me to impose that solution, and I will not. The state has already issued an emergency rule under which those who are in the IDPP will get receipts valid for voting. Although that is not a complete or permanent solution, it blunts the harshest effects of the IDPP. I will also order the state to publicize that anyone who enters the IDPP will promptly get a receipt valid for voting. To address this problem over the longer term, I will order the state to reform the IDPP to meet certain standards, leaving it to the state to determine how best to cure its constitutional problems. I take this approach because it respects the state's decision to have a strict voter ID law rather than an affidavit system. But Wisconsin may adopt a strict voter ID system *only* if that system has a well-functioning safety net, as both the Seventh Circuit and the Wisconsin Supreme Court have held.

The heart of the opinion considers whether each of the other challenged provisions unduly burdens the right to vote, in violation of the First and Fourteenth Amendments. This analysis proceeds under what is known as the *Anderson-Burdick* framework, which sets out a three-step analysis. First, I determine the extent of the burden imposed by the challenged provision. Second, I evaluate the interest that the state offers to justify that burden. Third, I judge whether the interest justifies the burden. Certain of Wisconsin's election laws fail *Anderson-Burdick* review. For reasons explained in the opinion, I conclude that the state may not enforce:

- most of the state-imposed limitations on the time and location for in-person absentee voting (although the state may set a uniform rule disallowing in-person absentee voting on the Monday before elections);
- the requirement that "dorm lists" to be used as proof of residence include citizenship information;

- the 28-day durational residency requirement;
- the prohibition on distributing absentee ballots by fax or email; and
- the bar on using expired but otherwise qualifying student IDs.

The purported justifications for these laws do not justify the burdens they impose.

Plaintiffs also contend that the challenged laws intentionally discriminate on the basis of race and age. This is a serious charge against Wisconsin public officials. I reject most of it, applying the framework set out by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. But applying that same framework, I find that 2013 Wis. Act 146, restricting hours for in-person absentee voting, intentionally discriminates on the basis of race. I reach this conclusion because I am persuaded that this law was specifically targeted to curtail voting in Milwaukee without any other legitimate purpose. The legislature's immediate goal was to achieve a partisan objective, but the means of achieving that objective was to suppress the reliably Democratic vote of Milwaukee's African Americans. Thus, I conclude that the limits on in-person absentee voting imposed by Act 146 fail under the Fifteenth Amendment, as well as under the *Anderson-Burdick* analysis.

In sum, Wisconsin has the authority to regulate its elections to preserve their integrity, and a voter ID requirement can be part of a well-conceived election system. But, as explained in the pages that follow, parts of Wisconsin's election regime fail to comply with the constitutional requirement that its elections remain fair and equally open to all qualified electors.

One last point: I do not intend to disrupt the August 6, 2016 election. My decision and the injunction will have no effect on that election.

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## FACTS

Although extensive evidence has been presented in this case, material factual disputes few and quite circumscribed. The parties sharply dispute plaintiffs' allegations that any of the challenged laws were motivated by improper purposes, particularly intentional race and age discrimination. The parties also dispute the effect of the challenged laws on voter turnout, and whether these effects are felt more heavily by minorities and other groups of voters. But much is undisputed.

The parties have stipulated to a set of background facts, most of which describe the challenged provisions and how they operate. *See* Dkt. 184. The court adopts these facts and recounts them below, along with other facts about Wisconsin's election system before the challenged provisions went into effect. The court also adopts the facts found by Judge Adelman concerning the history and operation of the IDPP, which he based substantially on the evidence presented in this case. *Frank v. Walker*, No. 11-cv-1128, 2016 WL 3948068 (E.D. Wis. July 19, 2016). The court will incorporate the rest of its factual findings in the analysis section of this opinion.

Historically, Wisconsin has had a well-respected election system, and the state has consistently had turnout rates among the highest in the country. Presidential elections were close in Wisconsin: the 2000 and 2004 elections were decided by less than one-half of one percentage point. In 2008, however, President Obama won Wisconsin by almost 14 percentage points. Two years later, Republicans took control of both houses of the state legislature, and voters elected a Republican governor. Since then, Wisconsin has implemented a series of election reforms. These laws covered almost every aspect of voting: registration, absentee voting, photo identification, and election-day mechanics.



## A. The challenged provisions

On May 25, 2011, Wisconsin enacted 2011 Wis. Act 23. That legislation made the following changes to Wisconsin election law:

- It imposed a voter ID requirement.
- It reduced the window of time during which municipalities could offer in-person absentee voting from a period of as much as 30 days that ended on the day before election day to a period of 12 days that ended on the Friday before election day.
- It eliminated “corroboration” as a means of proving residence for the purpose of registering to vote.<sup>2</sup>
- It mandated that any “dorm list” provided to a municipal clerk to be used in connection with college IDs to prove residence for the purpose of registering to vote include a certification that the students on the dorm list were United States citizens.
- It increased the in-state durational residency requirement for voting for offices other than president and vice president from 10 days to 28 days before an election and required individuals who moved within Wisconsin later than 28 days before an election to vote in their previous wards or election districts.
- It eliminated straight-ticket voting on official ballots.
- It eliminated the authority of the Government Accountability Board (GAB) to appoint special registration deputies (SRDs) who could register voters on a statewide basis.

On November 16, 2011, Wisconsin enacted 2011 Wis. Act 75, which prohibited municipal clerks from faxing or emailing absentee ballots to absentee voters other than overseas and military voters.

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<sup>2</sup> Corroboration allows a registered voter to sign a statement verifying the residence of another person, which allows that person to register to vote.

On April 6, 2012, Wisconsin enacted 2011 Wis. Act 227, which prohibited municipal clerks from returning an absentee ballot to an elector unless the ballot was spoiled or damaged, had an improperly completed certificate, or had no certificate.

Also on April 6, 2012, Wisconsin enacted 2011 Wis. Act 240, which eliminated the requirements that SRDs be appointed at public high schools; that, in certain circumstances, SRDs be appointed at or sent to private high schools and tribal schools; and that voter-registration applications from enrolled students and members of a high school's staff be accepted at that high school.

In August 2012, the GAB directed election officials to accept electronic versions of documents that could be used to prove residence for the purpose of registering to vote.

On March 20, 2013, Senate Bill 91 was introduced in the Wisconsin State Senate. This bill would have permitted municipalities to open multiple in-person absentee voting locations (under existing law, municipalities were limited to only one location). The bill failed to pass.

On December 12, 2013, Wisconsin enacted 2013 Wis. Act 76. This legislation had the effect of overturning a city ordinance in Madison that required landlords to provide voter-registration forms to new tenants.

On March 27, 2014, Wisconsin enacted 2013 Wis. Act 146, which reduced the window during which municipalities could offer in-person absentee voting. This law eliminated the option of offering in-person absentee voting on weekends and on weekdays before 8 a.m. or after 7 p.m.

On April 2, 2014, Wisconsin enacted 2013 Wis. Act 177, which required that observation areas at polling places be placed between three and eight feet from the location

where voters signed in and obtained their ballots and from the location where voters registered to vote.

Also on April 2, 2014, Wisconsin enacted 2013 Wis. Act 182, which required all voters, other than statutory overseas and military voters, to provide documentary proof of residence when registering to vote. Before the passage of this legislation, the requirement that a voter provide documentary proof of residence when registering to vote applied only to those who registered after the third Wednesday preceding (i.e., 20 days before) an election.

## **B. Parties and procedural history**

The plaintiffs in this case include two organizations and several individuals. One Wisconsin Institute, Inc. is a nonprofit corporation with a mission “to advance progressive values, ideas, and policies through strategic research and sophisticated communications.” Dkt. 141, ¶ 4. Citizen Action of Wisconsin Education Fund, Inc. is also a nonprofit corporation focused on pursuing social and economic justice. The individual plaintiffs are Renee Gagner, Anita Johnson, Cody Nelson, Jennifer Tasse, Scott Trindl, Michael Wilder, Johnny Randle, David Walker, David Aponte, and Cassandra Silas. They all allege that the challenged provisions injure their rights to vote, register to vote, register others to vote, or vote for Democratic candidates.

The initial defendants in this case were the members of the GAB and two of its officers. Plaintiffs have added and removed some defendants along the way, and the list now includes: Mark Thomsen, Ann Jacobs, Beverly Gill, Julie Glancey, Steve King, and Don Mills, the members of the Wisconsin Elections Commission; Michael Haas, the administrator of the Wisconsin Elections Commission; Mark Gottlieb, the secretary of the Wisconsin Department

of Transportation (DOT); and Kristina Boardman, the administrator of the DMV. Plaintiffs have sued all defendants in their official capacities.

Plaintiffs filed this suit in May 2015, alleging that the challenged provisions were unconstitutional, violated the Voting Rights Act, and resulted from intentional discrimination by the Wisconsin legislature. The court granted defendants' motion to dismiss plaintiffs' challenge to the voter ID law, as well as some of their Equal Protection challenges to other provisions. Dkt. 66. But the court later permitted plaintiffs to partially reinstate their claims regarding the voter ID law, based on evidence that defendants produced during discovery. Dkt. 139. A few months later, the court substantially denied defendants' motion for summary judgment, Dkt. 185, and the case proceeded to trial.

#### ANALYSIS

The court will structure its analysis as follows:

First, standing. The court concludes that plaintiffs have standing to challenge each of the provisions at issue, and that the corporation plaintiffs can pursue claims under the Voting Rights Act.

Second, plaintiffs' facial challenges to Wisconsin's voter ID law. This law has already been upheld after extensive litigation in the federal courts. The court concludes that invalidating the entire voter ID law would not be appropriate in this case.

Third, plaintiffs' claims of intentional discrimination. Plaintiffs have proven by a preponderance of the evidence that the legislature passed the provisions limiting the hours for in-person absentee voting at least partially with the intent to discriminate against voters on the basis of race. But the court concludes that the remaining provisions do not violate the

Fifteenth Amendment. The court also concludes that none of the challenged provisions violate the Twenty-Sixth Amendment.

Fourth, plaintiffs' "partisan fencing" claims. Although plaintiffs allege a separate claim for partisan fencing, the court concludes that their constitutional claim provides an adequate framework for analyzing these allegations.

Fifth, plaintiffs' First and Fourteenth Amendment claims for unduly burdening the right to vote. The court concludes that some, but not all, of the challenged provisions are unconstitutional because the state's justifications for them do not outweigh the burdens that they impose.

Sixth, plaintiffs' Voting Rights Act claims. The court concludes that one of the challenged provisions violates the Voting Rights Act.

Seventh, plaintiffs' Fourteenth Amendment Equal Protection claim. The court concludes that defendants have failed to articulate a rational basis for the state's decision to exclude expired student IDs as acceptable forms of voter ID.

#### **A. Standing**

The court begins with standing. At summary judgment, the court rejected defendants' justiciability arguments, including arguments related to standing. Defendants now renew some of these arguments, contending that no plaintiff has standing to challenge the voter ID law. Defendants also contend that plaintiffs lack standing to challenge almost all of the other provisions that are at issue. For plaintiffs' Voting Rights Act claims, defendants contend that no plaintiff qualifies as an "aggrieved person" able to pursue claims under the act.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the

challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted), *as revised*, (May 24, 2016). Defendants contend that plaintiffs have not proven the first of these elements: a cognizable injury in fact. As the parties invoking this court’s jurisdiction, plaintiffs bear the burden of establishing that they have standing. *Id.* But only one plaintiff needs to have standing to challenge a given provision because the complaint seeks only injunctive relief. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

Of the 10 individual plaintiffs in this case, 6 received qualifying IDs from the DMV and 4 received receipts through the IDPP. DX022; PX445. Defendants want to stop there, arguing that none of the individual plaintiffs are harmed by the voter ID law because they all currently have qualifying IDs. But there are several problems with this argument. The most obvious problem is that under the DMV’s current rules, the receipts that four of the individual plaintiffs received will expire after two automatic renewals, which means 180 days after issuance. Although these plaintiffs will be able to vote in the upcoming August and November elections, there is essentially no plan in place for them after they use their two renewals. Without a valid ID, these plaintiffs will not be able to vote. Thus, they have “suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548.

Even setting aside the plaintiffs who will lack acceptable IDs and be unable to vote after the November 2016 election, the voter ID law also injures the remaining individual plaintiffs. At summary judgment, the court concluded that having to *present* an ID at the polls was a sufficient injury for purposes of conferring Article III standing. Dkt. 185, at 10 (citing

*Frank v. Walker*, 17 F. Supp. 3d 837, 866 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015), and *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009)). The court also concluded that the plaintiffs who have IDs will have to renew them or acquire other forms of identification once their current IDs expire, which would be another injury that confers standing. *Id.*

Defendants do not substantively engage these issues; they simply assert that “[t]his Court was wrong when it held that voters who have a qualifying ID have Article III standing to challenge the voter photo ID law.” Dkt. 206, at 13. If defendants want to preserve the issue for appeal, then they have done so. But they have not identified reasons for the court to depart from its earlier conclusion that plaintiffs have standing to challenge the voter ID law.

As for the other provisions at issue, the corporation plaintiffs have standing to challenge these laws. “An organization may establish an injury to itself sufficient to support standing to challenge a statute or policy by showing that the statute or policy frustrates the organization’s goals and necessitates the expenditure of resources in ways that would not otherwise be required.” 15 James Wm. Moore et al., *Moore’s Federal Practice* § 101.60[1][f] (3d ed. 2015) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Crawford*, 472 F.3d at 951 (“[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.”). To establish standing, an organization must point “to a ‘concrete and demonstrable injury to its activities,’ not ‘simply a setback to the organization’s abstract social interests.’” *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (alterations omitted) (quoting *Havens Realty Corp.*, 455 U.S. at 379).

At trial, plaintiffs adduced evidence that One Wisconsin and Citizen Action each devoted money, staff time, and other resources away from their other priorities to educate voters about the new laws. For example, Analiese Eicher, One Wisconsin's program and development director, testified that she researched all but one of the challenged provisions. Tr. 5p, at 145:12-17.<sup>3</sup> The purpose of this research was to allow One Wisconsin to educate its supporters, its partners, and the press. *Id.* at 145:18-25. Eicher also testified that had she not been researching the legislation, she would have been working on other programs or initiatives for One Wisconsin. *Id.* at 147:4-16. Eicher would have been advocating for other voting-related changes, such as automatic voter registration, online registration, and felony reenfranchisement. *Id.* at 147:18-24. On an organizational level, One Wisconsin developed a website to help voters navigate the registration process in an effort to remediate some of the confusion surrounding the challenged provisions. *Id.* at 148:7-9, 149:3-8.

Likewise, Anita Johnson, an individual plaintiff and one of Citizen Action's community organizers, testified that her job responsibilities have "ballooned" over the last few years as the laws have changed. Tr. 1p, at 4:16-5:1. Her presentations to community groups now take longer, she has been able to register fewer people, and she has stopped working on other issues for Citizen Action to focus exclusively on voting rights. *Id.* at 5:15-16, 7:20-8:5, 11:7-25, 32:24-33:11.

Based on this evidence, the court finds that the corporation plaintiffs are not simply redirecting their resources to litigation, which would not be an injury-in-fact that would confer standing. *See N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Instead,

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<sup>3</sup> Citations to trial transcripts are by day, session, page, and line. Thus, "Tr. 5p, at 145:12-17" refers to the transcript from the fifth day of trial, afternoon session, page 145, lines 12 through 17.



both corporations are devoting resources away from other tasks and toward researching, or educating voters about, the challenged provisions. These expenditures are injuries that give both corporations standing to challenge the provisions at issue in this case because the corporations are counteracting what they perceive to be unlawful practices. *Cf. Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008).

Defendants' final justiciability challenge relates to the Voting Rights Act and whether any plaintiff qualifies as an "aggrieved person" for purposes of bringing suit pursuant to 52 U.S.C. § 10302. The court rejected this challenge at summary judgment, adopting the Eastern District of Wisconsin's reasoning in *Frank* and concluding that the corporation plaintiffs could assert claims under the Voting Rights Act. Dkt. 185, at 14-15. Once again, defendants do not substantively confront this analysis. *See* Dkt. 206, at 15. In fact, the authority on which defendants rely—*Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989)—does not actually support their assertion that corporations cannot file suit under the Voting Rights Act. *Roberts* involved an unsuccessful political candidate whose alleged injury was the loss of votes that he would have received but for the challenged voting practice. 883 F.2d at 621. The Eighth Circuit held "that an unsuccessful candidate attempting to challenge election results does not have standing under the Voting Rights Act." *Id.* But the Eighth Circuit also noted that the candidate was not suing on behalf of others who were unable to protect their own rights, *id.*, which is what the corporation plaintiffs are doing in this case. The court will adhere to its earlier conclusion that One Wisconsin and Citizen Action can pursue claims under the Voting Rights Act.

## B. Facial challenges to Wisconsin's voter ID law

Wisconsin's voter ID law has been through the federal courts before. The Seventh Circuit upheld the law in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015), relying on the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Thus, this court will begin its consideration of the merits by addressing plaintiffs' contention that despite the holdings in *Crawford* and *Frank*, Wisconsin's voter ID law is facially unconstitutional and violates the Voting Rights Act.

*Crawford* considered a facial challenge to Indiana's voter ID law. 553 U.S. at 185. The critical holding in *Crawford* is that requiring a voter to show a photo ID before voting serves the important governmental interest in ensuring the integrity of elections, particularly by preventing in-person voting fraud, thereby engendering confidence in elections. *Id.* at 200-03. *Crawford* also held that securing an Indiana photo ID, which required assembling certain vital documents and going to the DMV to apply for the ID, imposed only modest burdens that were not much greater than the effort ordinarily required to register and vote. *Id.* at 198. *Crawford* upheld Indiana's voter ID law against a facial challenge even though the burdens of the law fell somewhat more heavily on minority voters, and even though some individual voters might not be able to get a photo ID without surmounting more severe burdens.

In *Frank*, the Seventh Circuit considered a facial challenge to Wisconsin's voter ID law. 768 F.3d at 745. The district court had determined that there were factual distinctions between Wisconsin's law and Indiana's law: most significantly, that there were many more voters who did not have a qualifying photo ID in Wisconsin, and that those voters tended to be minorities. The Seventh Circuit expressed skepticism about the evidence of how many voters lacked ID, but concluded that, in any case, those distinctions were not material to the

facial challenge. The Seventh Circuit held that Wisconsin's voter ID law was not materially different from the Indiana law at issue in *Crawford*, and that under *Crawford*, Wisconsin's voter ID law was facially constitutional. *Id.*

It is hard to deny that a state and its citizens have a truly compelling interest in maintaining election integrity. As the evidence in this case proved once again, voter fraud is rare but not non-existent. The court credits the evidence of plaintiffs' expert on the subject, Dr. Lorraine C. Minnite, who testified and filed two expert reports. PX039; PX044. But the more compelling evidence comes from Milwaukee County, the one county in the state that has tried to systematically discover and track violations of election law. The county has an assistant district attorney devoted full-time to the job, Bruce Landgraf. Based on Landgraf's testimony, and on other evidence discussed below, the court finds that impersonation fraud—the type of fraud that voter ID is designed to prevent—is extremely rare. In most elections there are a very few incidents in which impersonation fraud cannot be ruled out. But as *Crawford* and *Frank* held, despite rarity with which election fraud occurs, it is nevertheless reasonable for states to take steps to prevent it.

Any system that requires voters to get a credential will necessarily impose a burden on them. But if the burden is a modest one, and if the credential meaningfully fosters integrity, then the constitution is satisfied. Under *Crawford* and *Frank*, collecting the necessary records and making a trip to the DMV to get an ID is a modest burden in light of the state interest that it serves. Those cases probably reflected an unduly rosy view of DMV field offices, but the evidence in this case confirms, yet again, that the vast majority of Wisconsin citizens already have the necessary ID. And most citizens who do not have an ID can get one with relative ease.

This court is, of course, bound to follow *Crawford* and *Frank*, which defendants contend doom plaintiffs' facial challenge to Wisconsin's voter ID law. Defendants are correct. But *Crawford* and *Frank* deserve reappraisal. The court is skeptical that voter ID laws engender confidence in elections, which is one of the important governmental purposes that courts have used to sustain the constitutionality of those laws.

The evidence in this case showed that portions of Wisconsin's population, especially those who live in minority communities, perceive voter ID laws as a means of suppressing voters. This means that they undermine rather than enhance confidence in our electoral system. Good national research suggests that voter ID laws suppress turnout, and that they have a small, but demonstrable, disparate effect on minority groups. *See* PX072. At trial, testimony of African American community leaders confirmed that voter ID laws engender acute resentment in minority communities. *See, e.g.*, Tr. 1p, at 131:21-24. And some of the Wisconsin legislators who supported voter ID laws believed that they would have partisan effects. Their willingness to publically tout the partisan impact of those laws deepens the resentment and undermines belief in electoral fairness.

Underlying the philosophical debate is a fundamentally factual question: do voter ID laws protect the integrity of elections? According to the *Frank* court, *Crawford* definitively answered this question. 768 F.3d at 750 (“[W]hether a photo ID requirement promotes public confidence in the electoral system is a ‘legislative fact’—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state.”). The primary integrity-based justification offered for voter ID laws is that they prevent voter fraud. But that seems to be a dubious proposition. A voter ID requirement addresses only certain types of election malfeasance; specifically, impersonation fraud, by which one person poses as

another and votes under his or her name. This happens from time to time by accident, when a voter signs the poll book on the wrong line. That produces some frustration for voters and poll workers, but it does not represent a fundamental threat to the integrity of elections because it does not happen that often and because everyone ultimately gets to vote.

The real fear is multiple voting: that a committed but unethical partisan could cast many votes for his or her candidate under different names. Yet there is utterly no evidence that this is a systematic problem, or even a common occurrence in Wisconsin or anywhere in the United States. PX039, at 2, 35. True, it is not unheard of: in one well-known case, a Milwaukee man was so committed to Governor Walker's re-election that he voted 14 times. Tr. 8a, at 184:3-24. He was charged with and convicted of voter fraud (even without the benefits of the voter ID law). Proponents of voter ID would say that there could be other incidents of voter fraud that have gone undetected. But there is no evidence to support that hypothesis. As many have pointed out, multiple voting is not a very effective way of influencing an election, and few people would risk the penalties to do so. The bottom line is that impersonation fraud is a truly isolated phenomenon that has not posed a significant threat to the integrity of Wisconsin's elections.

The same cannot be said for Wisconsin's voter ID law, which has so far been implemented in a rigorously strict form: the only way to vote is to secure a state-approved ID. As part of Act 23, Wisconsin enacted a statute allowing citizens to receive free IDs to vote. But it was not until the eve of trial in this case that the state started paying for the underlying documents (e.g., birth certificates) that citizens needed to submit to obtain these free IDs. Even now, citizens who lack vital records can obtain free IDs only after navigating the complicated IDPP. Wisconsin's strict implementation of its voter ID law has

disenfranchised more citizens than have ever been shown to have committed impersonation fraud.

In theory, the well-designed and easy-to-use registration and voting system imagined in *Crawford* and *Frank* facilitates public confidence without eroding participation in elections. But in practice, Wisconsin's system bears little resemblance to that ideal.

So where does that leave plaintiffs' facial challenge to the voter ID law? Plaintiffs contend that two aspects of the factual record of this case distinguish it from *Crawford* and *Frank*, paving the way to a fresh facial challenge.

### **1. Facial relief because of intentional discrimination**

First, plaintiffs assert that Wisconsin's voter ID law was motivated, at least in part, by racial animus. This is a serious allegation against the public officials of Wisconsin, but the court cannot easily dismiss it here. There is manifest racial disparity in the operation of the IDPP: of the 61 actual denials that the DMV had issued as of April 2016, 85 percent were to African Americans or Latinos. PX475. And government witnesses concede that 60 of these denials were issued to qualified electors entitled to vote, but who could not meet the IDPP's criteria for a state-issued ID. *See* Tr. 6, at 75:24-76:17 (DMV administrator); Tr. 8p, at 191:2-5 (investigations unit employee). The legislative history suggests that some of the provisions challenged in this case were specifically intended to curtail voting in Milwaukee, where 40 percent of the population is African American and 17.3 percent is Latino (approximately two-thirds of the state's minority population). Both sides agree that if the court finds that the Wisconsin legislature enacted a voter ID law for the at least partially with the intent to discriminate on the basis of race, then the law is constitutionally unsound and

cannot stand. The court will address this issue below, in discussing the intentional discrimination claims that plaintiffs have alleged in this case.

## 2. Facial relief because the IDPP has failed

The second factual distinction concerns the IDPP, which plaintiffs contend imposes severe and discriminatory burdens on some qualified Wisconsin electors. The IDPP was the subject of a great deal of testimony at trial, and it has become a dominant issue in this case. Plaintiffs contend that the IDPP demonstrates Wisconsin's intentional race discrimination, is unconstitutional under the *Anderson-Burdick* framework, and violates the Voting Rights Act.<sup>4</sup> And because this constitutionally required safety net is not working, plaintiffs argue that the court must strike down the entire voter ID law.

The context for, and history of, Wisconsin's effort to implement the IDPP began with Act 23, passed in 2011. Besides establishing voter ID, this legislation created Wis. Stat. § 343.50(5)(a)3., which provided that a voter could get a Wisconsin ID from the DMV for free, if the voter requested it for voting. But voters who did not have their birth certificates had to get copies, which typically required paying a fee to a government agency. Thus, getting a free ID was not really free.

Many thought that the fees that voters had to pay for copies of their vital records were tantamount to an unconstitutional poll tax. Indeed, that was the conclusion that the Wisconsin Supreme Court reached in *Milwaukee Branch of NAACP v. Walker*, which relied on *Crawford* to uphold Wisconsin's voter ID law against a facial challenge. 2014 WI 98, ¶ 7, 357 Wis. 2d 469, 851 N.W.2d 262, *reconsideration dismissed*, 856 N.W.2d 177 (2014). The state supreme court applied a savings construction to the Wisconsin Administrative Code to

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<sup>4</sup> The court will analyze the IDPP under these legal theories later in this opinion.

provide that the required vital documents were “unavailable” to a prospective voter if he or she would have to pay a fee to get them. *Id.* ¶¶ 66-71. Thus, a person who had to pay to get a birth certificate could use the DMV’s special petition process in Wis. Admin. Code DOT § 102.15 (i.e., the IDPP) to ask for a free ID on the grounds that a birth certificate was unavailable. As the Seventh Circuit recognized in *Frank*, the availability of a truly free ID provided a necessary safety net that preserved the constitutionality of Wisconsin’s voter ID law. 768 F.3d at 747. But since then, effectuating the savings construction to provide free photo IDs to voters who lacked the requisite vital records has proven to be difficult for the DMV, to say the least.

For purposes of this opinion, the court does not need to retrace every detail of DOT’s response to *NAACP v. Walker*; plaintiffs have set out the timeline in a chart appended to their brief. Dkt. 207, at 253-57. In summary, the DOT instituted an emergency rule on September 11, 2014 (the day before the appellate argument in *Frank*). PX456. The emergency rule changed the definition of “unavailable,” following the Wisconsin Supreme Court’s direction, and it reorganized the IDPP into a new subsection of Wisconsin’s Administrative Code, DOT § 102.15(5m). The emergency rule also created a procedure that, in essence, required the DMV to track down the birth record of any person who requested a free voter ID, if the person did not have a copy of their birth record. The procedure was complicated because the process required interaction between various divisions of the DMV, the Wisconsin Department of Health Services, and agencies of other states. PX472. The main task of investigating and evaluating petitions fell to the DMV’s Compliance and Fraud Unit (CAFU), which, as its name implies, has staff members whose normal duties are to investigate allegations of fraud.



Many people successfully navigated the IDPP. Out of 1,389 petitions for free IDs, the DVM issued IDs to 1,132 petitioners. Of the petitioners who applied, 487 had to go through “adjudication,” which included a full investigation by CAFU<sup>5</sup> and a final decision from Jim Miller, the head of the DMV’s Bureau of Field Services (a different unit from CAFU). 230 of the petitioners who went through adjudication received IDs; 257 petitioners did not. DMV records indicate that 98 of the petitioners who did not receive IDs after adjudication cancelled their petitions.<sup>6</sup>

The petitioners in suspended or denied status were the ones who faced serious roadblocks in the IDPP: their birth records did not exist, or those records did not perfectly match their names or other aspects of their identities, such as Social Security records. The problems arose because the DMV evaluated IDPP petitions for voting IDs by using the same identification standards that it applied to applications for Wisconsin driver licenses and standard IDs. To acquire any one of these products from the DMV, a person must prove both their identity and their legal presence in the United States. Thus, the DMV refused to issue IDs to IDPP petitioners until CAFU could confirm their identities with a match to a

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<sup>5</sup> Full investigation by CAFU commonly involved acquiring a CLEAR background report. These reports contained a substantial amount of deeply personal information, including any criminal records, judgments and liens, residence history, home and vehicle ownership history, and a list of possible relatives and associates. The DMV witnesses testified that the DMV never used CLEAR reports to the disadvantage of petitioners. But even assuming that CLEAR reports were acquired only to connect petitioners to vital records, the court finds that having DMV personnel acquire and review a compilation of personal information imposes a substantial burden on the right to vote.

<sup>6</sup> The DMV’s code for “customer initiated cancel” covers a wide range of results. For example, petitions received this code when the petitioner died while the petition was pending. Petitions also received this code if a petitioner simply gave up or if he or she found a birth certificate and applied for a standard state-issued ID.

valid birth record, or to some equivalently secure alternative. Some petitioners simply could not meet the DMV's standard of proof, and so they could not obtain free IDs.

The lack of a valid birth record correlated strikingly, yet predictably, with minority status. The evidence at trial demonstrated that Puerto Rico, Cook County, Illinois, and states with a history of *de jure* segregation have systematic deficiencies in their vital records systems. Voters born in those places were commonly unable to confirm their identities under the DMV's standards. For example, many African American residents in Wisconsin were born in Cook County or in southern states. PX479. And many of the state's Latino residents were born in Puerto Rico. *Id.* As of April 2016, more than half of the petitioners who had entered the IDPP were born in Illinois, Mississippi, or a southern state that had a history of *de jure* segregation. PX478.

In June 2015, the DMV began issuing denials to IDPP petitioners. By the time of trial in this case, the DMV had issued 61 denials, 53 of which were to minority petitioners.<sup>7</sup> Again, with one exception, the DMV had no reason to doubt that those who were denied a photo ID were Wisconsin residents, United States citizens, at least 18 years of age, and qualified to vote. Tr. 6, at 75:24-76:17. The sole exception was a Latina woman who mistakenly believed that she had been naturalized.

Since the state first implemented the IDPP, another related problem has prevented petitioners from successfully navigating the process. Until recently, the state had not appropriated any funds to pay for petitioners' vital records. Although no petitioner was asked to pay for any vital record, the state did not acquire any vital record for which a fee was

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<sup>7</sup> Nine of the petitioners who received denial letters were able to track down vital records on their own and receive free IDs without using the IDPP. *See* Dkt. 207, at 69 (discussing examples). The DMV re-coded these denials to "customer-initiated cancellations."

required. The result was that some petitioners fell into limbo: the DMV did not deny their petitions, but the petitioners could not confirm their identities. These petitioners ended up in “suspend” status, with the DMV essentially waiting either for the petitioner to turn up new records, or for enough time to pass that the DMV could officially deny the petition.

On March 7, 2016, DMV officials and state legal counsel met to discuss the state’s failure to pay for vital records. At some point after the meeting, the DMV received funds, and during the second week of trial in this case, the DMV made its first payment to acquire a vital record for a petitioner. Tr. 7p, at 111:2-17.

On May 10, 2016, a week before the trial in this case began, the governor approved another emergency rule modifying the IDPP. PX452. The new rule acknowledged that emergency rulemaking was required to ensure that qualified electors could get a photo ID with reasonable effort in time for the next elections:

This emergency rulemaking [was] also necessary to preserve the integrity of the verification process utilized by the Department in issuing an identification card while still preserving the public welfare by ensuring that qualified applicants who may not be able to obtain acceptable photographic identification for voting purposes with reasonable effort will be able to obtain photographic identification before the next scheduled elections.

PX453, at 14. The rule ameliorated some of the deficiencies of the IDPP: it established procedures and standards for evaluating petitions; it provided a means to surmount common impediments such as minor mismatches between a birth record and other aspects of a petitioner’s identity; and it established “more likely than not” as the standard for evaluating evidence of identity, birthdate, and citizenship.<sup>8</sup> Perhaps most important, the emergency rule

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<sup>8</sup> At trial, DMV witnesses testified that the new emergency rule codified current practice. Tr. 8p, at 190:7-193:7. This testimony was not credible. The testimony of CAFU employees showed that petitioners were held to a much higher standard than “more likely than not.”

required the DMV to issue petitioners temporary identification card receipts that were valid for voting purposes while their petitions were pending.

Defendants contend that the latest emergency rule fixes the problems with the IDPP, and that because all petitioners still in the process have a receipt valid for voting, the dispute over the IDPP is moot. The court disagrees for two reasons.

First, the receipts issued under the emergency rule are not permanent. Those who hold them will be able to vote only so long as the receipts are renewed. But qualified electors are entitled to vote as a matter of constitutional right, not merely by the grace of the executive branch of the state government. The state has promised to renew the receipts for 180 days so that they will be good through the November 2016 election. But the state has been utterly silent on what happens after that. As things stand now, after these receipts expire, petitioners will once again find themselves in IDPP limbo. Thus, at best, the emergency rule gives the state time to devise a new solution (but the court has not seen any evidence to suggest that the state is actually working on a solution).

Second, even under the emergency rule, petitioners will have to convince the DMV to exercise its discretion to issue them IDs. Although the emergency rule guides that discretion and specifies that the applicable standard of proof is “more likely than not,” the process is still far more arduous than collecting documents and making a trip to the DMV, as envisioned in *Crawford* and *Frank*. Being investigated by CAFU, even under the newest iteration of Wisconsin’s emergency rule, still makes it unnecessarily difficult to obtain an ID.

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The court finds that IDPP petitions were decided by a standard that was at least as rigorous as “clear and convincing proof.”

For now, suffice it to say that the court agrees that the IDPP is a wretched failure: it has disenfranchised a number of citizens who are unquestionably qualified to vote, and these disenfranchised citizens are overwhelmingly African American and Latino. The IDPP violates the constitutional rights of those who must use it, and so Wisconsin must therefore replace or substantially reform the process. But that does not mean that the voter ID law is unconstitutional in all of its applications. Because a targeted remedy can cure the constitutional flaws of the IDPP (and thus, the entire voter ID law), facial relief is not necessary or appropriate.

*Crawford* and *Frank* effectively foreclose invalidating Wisconsin's voter ID law outright. Based on the evidence presented at trial, the court has some misgivings about whether the law actually promotes confidence and integrity. But precedent is precedent, and so the court will deny plaintiffs' request to invalidate the entire voter ID regime.

### **C. Intentional discrimination**

Plaintiffs assert claims under the Fifteenth and Twenty-Sixth Amendments, alleging intentional discrimination on the basis of race and on the basis of age. The legal standards for evaluating these claims are substantially identical, and most of the pertinent evidence for each claim is the same. With the exception of Wisconsin's restriction on the number of hours that municipal clerks can offer in-person absentee voting, the court concludes that plaintiffs have failed to prove their claims of intentional discrimination.

#### **1. Race discrimination**

Plaintiffs contend that the Wisconsin legislature passed many of the challenged provisions in violation of the Fifteenth Amendment. To succeed on these claims, plaintiffs must demonstrate that the legislature intentionally discriminated against voters because of

their race. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Discriminatory animus does not need to be the only reason for Wisconsin's new laws, or even the primary reason, but "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264-65. Nor do plaintiffs have to prove discriminatory intent with direct evidence of racial animus. *Rogers*, 458 U.S. at 618.

Whether a law is motivated by racial discrimination is a difficult factual determination, guided by sparse precedent. *Arlington Heights* provides the essential template: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The starting point of the analysis is whether the law has had a disparate impact. But unless there is a startling pattern, inexplicable on grounds other than race, impact alone is not determinative. In that case, other evidence must support a finding of discrimination. This evidence can include the historical background and context of the law and the legislative history, especially any contemporaneous statements by the decision-making body. *See id.* at 266-68.

Before turning to the *Arlington Heights* analysis, the court considers defendants' evidentiary objection to one of plaintiffs' experts, historian Allan Lichtman, PhD. At trial, Dr. Lichtman testified that several of the challenged provisions were motivated by intentional race discrimination. *See* Tr. 6, at 237:5-18. Defendants contend that Dr. Lichtman's testimony invaded the province of the court by offering an opinion on an ultimate issue in the case, and that it was therefore not a proper topic for expert analysis. The court agrees. Dr. Lichtman provided some useful factual background to the legislation at issue—

background that defendants did not dispute—but the court will not otherwise adopt his analysis or opinions about the specific issue of the legislature’s intent in passing the challenged provisions.

With these considerations in mind, the court turns to the merits of plaintiffs’ intentional race discrimination claim. The court will analyze this claim first in the context of Wisconsin’s voter ID law, then in the context of the IDPP, and finally in the context of the other challenged provisions.

**a. The voter ID law**

To analyze whether Wisconsin’s voter ID law violates the Fifteenth Amendment, the court begins by summarizing the disparate impact that the law has had on racial minorities. The question of how many people in Wisconsin have a driver license or a Wisconsin ID has proved to be surprisingly hard to answer. The district court in *Frank* estimated that about 300,000, about 9 percent of the state’s registered voters, lacked a valid photo ID. 17 F. Supp. 3d at 854. The Seventh Circuit doubted this, partly because the district court in *Crawford* estimated that only 43,000 lacked ID in Indiana, and partly because it just seems implausible that 9 percent of the adult population could get by without a photo ID. 768 F.3d at 748.

To answer this question, both sides’ experts matched the statewide voter registration database to the DMV database. Both sides recognize that the databases are not readily matched, which makes errors likely. After identifying and correcting for errors, plaintiffs’ expert, Kenneth Mayer, PhD, estimated that 8.4 percent of registered voters lack a Wisconsin ID. Defendants’ expert, M.V. Hood III, PhD, put the estimate at only 4.54 percent. The primary difference between the two experts is that Dr. Hood had the help of a DMV programmer, Fred Eckhardt, who was able to match an additional 112,817 registered

voters to valid Wisconsin IDs. Tr. 4p, at 201:17-202:1. The court finds that Eckhardt's work was reliable, and that Dr. Hood's estimate is therefore the more credible one as to the number of registered voters without ID.

Unfortunately, Dr. Hood did not break those numbers down by race. Dr. Mayer did, PX038, at 19 (Table 3), and he shows that African Americans and Latinos are more likely to lack ID. But his starting point uses the inflated 8.4 percent of voters without ID. With some of its own arithmetic to reconcile Dr. Mayer's proportions to Dr. Hood's base,<sup>9</sup> the court finds that approximately 4.5 percent of white voters lack ID; 5.3 percent of African American voters lack ID; and 6.0 percent of Latino voters lack ID. The court notes that these numbers say nothing about what proportions of voters lack the documentation that would allow them to get a qualifying ID if they sought one.

Dr. Hood's evidence shows that African Americans and Latinos make up a disproportionate share of those seeking free IDs for voting. African Americans accounted for 35.6 percent of free IDs, whereas they make up only 5.6 percent of the citizen voting age population. Latinos accounted for 8.3 percent of the free IDs, against only 3.3 percent of the citizen voting age population. These numbers show very pronounced racial differences among those who seek IDs. This, in turn, strongly suggests that a greatly disproportionate share of African Americans and Latinos will have to go to the trouble of acquiring a qualifying ID to vote. But most of those who seek free IDs are probably voters who have the documents necessary to get a qualifying ID. *Frank* recognizes that this disparity could well have a corresponding disparate effect on turnout because any procedural requirement will dissuade

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<sup>9</sup> The court also assumes that the errors corrected by Eckhardt are distributed evenly across racial groups. Nothing in Eckhardt's description of the errors that he found suggested that they would correlate with race.



some voters. But under *Frank*, the burden of going to the DMV to get a free ID is not constitutionally significant because it is a modest burden no greater than the ordinary burdens involved in voting. Still, the evidence here shows that patterns of ID possession are racially disparate, and that is likely to have a racially disparate effect on turnout. And some proportion of those seeking IDs will lack the usual documentation and have to enter the IDPP. Those individuals, too, tend to be minorities: 67.9 percent of those who entered the IDPP were minorities. PX474.

The bottom line is that the evidence suggests that the vast majority of Wisconsin voters have a qualifying ID or could get one. But both ID possession and the lack of qualifying documentation correlate strongly with race.

Next, the court considers the historical background of the voter ID law. As plaintiffs showed, before 2011, Wisconsin had an exemplary election system that produced high levels of voter participation without significant irregularities. *See* PX036, at 23 (Lichtman report discussing studies from the Pew Charitable Trusts ranking Wisconsin second best in the nation in electoral performance in 2008 and fourth best in 2010). The court will not go so far as to say that Wisconsin could not have improved its elections. But there was no evidence that Wisconsin elections actually suffered from identifiable problems, despite unsubstantiated allegations of fraud in the 2004 presidential election.

Plaintiffs contend that demographic shifts in Wisconsin made the minority vote critical to the outcome of elections. For example, from 2010 to 2014, the white voting age population in Wisconsin declined by 1.3 percent, while the African American population increased by 3.5 percent, and the Latino population increased by 8.7 percent. *Id.* at 16-17. Voting in Wisconsin is sharply polarized by race: in statewide elections over the last decade,

90 percent of African Americans and 63 percent of Latinos voted for Democratic candidates. Because Wisconsin is a closely divided swing state, marginal differences in turnout can be decisive in close elections. Plaintiffs contend that demographic and political considerations combined to give Wisconsin Republicans a motive to discriminate against minorities in voting laws.

The Wisconsin political environment changed dramatically in 2010: Republican Scott Walker was elected governor, and Republicans won control of both houses of the legislature. Although the recall elections in summer 2012 briefly shifted control of the state senate to Democrats, Republicans regained control of the chamber a few months later. The legislature and the governorship have been in Republican control since then. Plaintiffs contend that sustained one-party control over the legislature and governorship gave Republicans the opportunity to pass discriminatory election legislation.

Plaintiffs concede that there were no procedural irregularities in how Wisconsin's voter ID law, or any of the other challenged provisions, were passed. "Given unified Republican control of the legislature and governorship . . . Republicans did not have to violate procedural rules to enact many of the limitations on voting" that are at issue. *Id.* at 48. Nevertheless, plaintiffs contend that the bills were rushed through the legislature, depriving the GAB of time to review them, and providing inadequate time for public input. *See* PX084. This dovetails with plaintiffs' contention that there were *substantive* irregularities with the laws, by which plaintiffs mean that the laws were not well justified or consistent. Defendants are correct that the legislature had no obligation to provide any rationale to support a validly enacted law. But plaintiffs have a point: the challenged laws were passed by a process that allowed limited public input and little actual debate. The legislative history

demonstrates that Democrats and members of the public voiced concerns about the discriminatory impact of the laws, and that those concerns largely went un rebutted. Thus, the court has little information about what actually prompted these bills and the reasons why the legislature enacted them into law. Most of them were passed with only summary statements of legislative purpose, typically invoking only generic concerns for election integrity or consistency. *See, e.g.*, PX058; PX216.

Plaintiffs would fill the gap in the official legislative record with extra-legislative comments by Republican legislators and staffers, which plaintiffs contend strongly indicate discriminatory intent. The court will not recapitulate all such statements in the record, but plaintiffs have identified a few as particularly telling. First, plaintiffs cite to a recent comment by former state senator Glenn Grothman (now a U.S. representative) that he thought that Wisconsin's voter ID law would help Republicans in the 2016 presidential election. PX068. Second, plaintiffs cite to Grothman's statements on the floor of the senate in 2014 concerning the need to limit the hours for in-person absentee voting in Milwaukee. PX022. Third, plaintiffs cite to statements by former state senator Dale Schulz and by his staffer Todd Albaugh. During a radio interview, Schultz indicated that the Republican leadership of the legislature passed the voter ID law for partisan purposes, not out of any legitimate concern for the integrity of Wisconsin elections. PX067. Albaugh testified that at the last meeting of the Republican caucus before the vote on Act 23, the Republican leadership insisted that Republicans get in line to support the bill because it was important to future Republican electoral success. *See* Tr. 1a, at 84:1-24.<sup>10</sup>

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<sup>10</sup> At trial, defendants disputed Albaugh's interpretation and evaluation of the meeting, and they also objected to his testimony on hearsay grounds. The court overrules the hearsay objection because Lazich's out-of-court statements were not offered for their truth. The point

The parties have also stipulated to the admissibility of notes and correspondence from the files of various Republican legislators. *See* Dkt. 184, at 3-4. Among other things, this evidence includes senator Alberta Darling's expressed opinion that had it been in effect, the voter ID law would have made a difference in the November 2012 election, *id.* at 4, which like Grothman's more recent statement, shows that legislators believed that Act 23 would have a partisan impact on elections.

The court may consider these statements under *Arlington Heights*. But ample authority counsels skepticism, and the court will not simplistically assign discriminatory intent to the legislature based on the comments of individual legislators. *See Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at \*9 (5th Cir. July 20, 2016) ("While probative in theory, even those (after-the-fact) stray statements made by a few individual legislators voting for SB 14 may not be the best indicia of the Texas Legislature's intent."). The comments that plaintiffs have identified paint a consistent picture that resonates with the rest of the record, particularly the lack of a verified problem with voter fraud, and the increasingly partisan divisions in support for the law. The conclusion is hard to resist: the Republican leadership believed that voter ID would help the prospects of Republicans in future elections. (And for that matter, Democrats apparently thought that, too.)

As for other context surrounding Wisconsin's voter ID law, the court notes that Act 23 was the first in a series of election reforms that the Republican-controlled legislature passed between 2011 and 2014. None of these laws made registration or voting easier for

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was not that the voter ID law would actually help Republicans in future elections. The point was that Lazich thought they would, and that was part of her motive for encouraging support for the voter ID law. Defendants offered no evidence to dispute the accuracy of Albaugh's recounting of what was said at the meeting.

anyone, but they had only minimal effect on less transient, wealthier voters. For reasons explained more fully below, the stated rationales for many provisions of Act 23, and for the election laws that followed it, were meager. Accordingly, in light of the record of the case as a whole, the conclusion is nearly inescapable: the election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interests.

Against this background, the court turns to the more difficult question of whether Act 23 was motivated by racial animus. For the following reasons, the court finds that it was not.

First, the legislature passed the voter ID bill in 2011, three years after the Supreme Court upheld a facial challenge to a similar voter ID law in *Crawford*. The Court had held that voter ID laws served a legitimate government interest in election integrity, and that they did not have an unduly disparate impact on racial minorities. Legislators would have been entitled to embrace the rationale that the Supreme Court endorsed, even if other legislators or members of the public contended that the law would have a disparate impact on minorities.

Second, voter ID bills have a long history in Wisconsin and in the United States, and that history does not suggest that such laws are inherently motivated by racial animus. In 2005, the Commission on Federal Election Reform, co-chaired by Jimmy Carter and James Baker III, identified a voter ID system with photo ID as one of five pillars of a reformed U.S. election system. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (September 2005), <http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF>. That same year, the Wisconsin legislature passed a photo ID bill that was ultimately vetoed by Governor Doyle, a Democrat. Although Democrats tended to oppose that bill, it garnered significant

bipartisan support. This history shows that legislators and politicians with no motive to discriminate against minorities have nevertheless supported voter ID laws.

Third, even though there is scant evidence of actual voter fraud in Wisconsin, the concern for election integrity provides a valid, non-discriminatory reason for supporting a voter ID law. To be sure, there is a legitimate countervailing concern that voter ID requirements impede access to the polls. But the existence of a robust, non-discriminatory rationale in favor of voter ID makes it hard to draw the inference that support for voter ID must be racially motivated.<sup>11</sup>

Plaintiffs nevertheless contend that the strict version of voter ID enacted in 2011 suggests a discriminatory motive. But by then, the potential for a voter ID requirement to have a racially disparate impact had long been recognized. *See, e.g., id.* at 20 (“The introduction of voter ID requirements has raised concerns that they may present a barrier to voting, particularly by traditionally marginalized groups, such as the poor and minorities, some of whom lack a government issued photo ID.”) Democrats, private citizens, and the GAB repeatedly raised these types of concerns to the legislature. *See, e.g.,* PX014; PX084; PX263; PX299. The legislature passed the voter ID bill anyway, and the governor signed it.

Plaintiffs contend that the legislature’s apparent willful blindness to Act 23’s disparate effects is strong evidence of discrimination. But the legislature did not entirely ignore these

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<sup>11</sup> Dr. Lichtman points out that in 2015, during consideration of a bill to require photo IDs for the Food Share program, the Wisconsin Assembly rejected an amendment that would have allowed Food Share IDs to be used for voting. PX036, at 36-37. According to Dr. Lichtman, if the legislature were sincerely interested in election integrity, it would accept Food Share IDs for voting because they are every bit as secure as Wisconsin IDs. The refusal to accept Food Share IDs is, therefore, evidence of discriminatory intent. The argument would be persuasive, if it were contemporaneous with Act 23, the voter ID law. The force of the argument is also blunted because the Food Share ID bill has not been enacted.

concerns. Act 23 created Wis. Stat. § 343.50(5)(a)3., which required the DMV to provide a free ID to any citizen over the age of 18 who requested one for voting. Since the introduction of the IDPP in 2014, the profound difficulty of providing traditional DMV-issued IDs to some voters has become apparent, and the state has been painfully reluctant to address these problems. But in 2011, to the legislature that passed Act 23, the free ID seemed like a reasonable response to the concerns that opponents raised. *Cf. Building Confidence in U.S. Elections*, at 20 (“Part of these concerns are addressed by assuring that government-issued photo identification is available without expense to any citizen.”).

In sum, the court concludes that plaintiffs have not proven by a preponderance of the evidence that the voter ID provision of Act 23 was motivated, even in part, by racial animus. Wisconsin’s voter ID law therefore does not violate the Fifteenth Amendment.

**b. The IDPP**

The racial imbalances among IDPP petitioners, and among the results of the process, are striking. Minorities make up only 11 percent of Wisconsin’s citizen voting age population, but they make up 55 percent of the voters who have received free IDs since Act 23 was passed. DX265. As of April 2016, two-thirds of those who entered the process were minorities; African Americans alone represented 55.9 percent of IDPP petitioners. PX474. Worse yet, African Americans and Latinos represented 85 percent (52 out of 61) of all IDPP denials. PX475.

Plaintiffs contend that these numbers present the kind of striking pattern that is inexplicable as anything but intentional discrimination. They argue that the court should find the IDPP to be unconstitutional on that basis alone, relying on decisions such as *Gomillion v.*

*Lightfoot*, 364 U.S. 339 (1960) (allegations of extreme gerrymandering, if proven, would be tantamount to a “mathematical demonstration” of discrimination).

The court is not persuaded that statistics about the petitioners who have used the IDPP, or been denied free IDs, compel a finding of intentional race discrimination. And the reasoning is simple: the free ID procedure and the IDPP were designed to blunt the potential for disenfranchisement that might arise from Wisconsin’s voter ID law. The potential for disenfranchisement, as all recognized, fell more heavily on minorities. Thus, it is no surprise that those who sought free IDs, or who entered the IDPP because they lacked vital records, were predominantly minorities. It is also no surprise that minorities foundered at high rates in a process that required documentary proof of identity, birthdate, and citizenship.

Make no mistake: the IDPP as it currently exists has failed to fulfill its constitutional purpose. But plaintiffs have not shown that it is the result of intentional race discrimination. As plaintiffs’ counsel repeatedly reiterated to the DMV witnesses, plaintiffs do not allege that DMV employees intended to discriminate against anyone. And as the court observed during trial, some CAFU employees undertook nearly heroic efforts to track down documents to prove petitioners’ identities and birthdates. The court finds that DMV employees, especially CAFU employees, undertook their duties in good faith, trying as best they could under the governing regulations to get IDs into the hands of as many petitioners as possible.

Another reason why the court cannot find that the legislature intentionally discriminated on the basis of race is that the legislature did not design or implement the IDPP. The fault lies with the executive branch, which let the IDPP grind on until plaintiffs in this litigation exposed its many flaws. But plaintiffs have not shown that anyone in the executive branch knew that the IDPP was disenfranchising voters and ignored the problem.



The flaws would not have been hard to find, and Wisconsin should have done better. But based on the evidence presented at trial, the court cannot find that members of the executive branch acted with racial animus in creating or implementing the IDPP.

**c. Other challenged provisions**

The court now turns to the other provisions that plaintiffs challenge under the Fifteenth Amendment. Setting aside the provisions relating to in-person absentee voting, plaintiffs contend that the legislature enacted the following regulations, at least in part, with the intent to discriminate against African Americans and Latinos: (1) eliminating corroboration; (2) requiring documentary proof-of-residence; (3) eliminating statewide SRDs; (4) increasing the durational residency requirement; (5) changing the location for election observers; and (6) eliminating straight-ticket voting.

Plaintiffs contend that each of these changes in Wisconsin's voting laws particularly disadvantage minorities, who tend to be poorer, less educated, and more transient. But disparate impact alone is not enough to show intentional discrimination. *Arlington Heights*, 429 U.S. at 264-65. These regulations are all facially neutral, and the extra burdens that they impose would fall on anyone who is poorer, less educated, or more transient, regardless of race. As explained in other parts of this opinion, some of these regulations are not justified by significant government interests, which puts their legitimacy under *Anderson-Burdick* in doubt. But plaintiffs give the court no reason to find that any of these regulations were targeted at minority voters or that the legislature was racially motivated in passing any of them. Accordingly, the court concludes that plaintiffs have not shown by a preponderance of the evidence that any of these changes in Wisconsin's voting laws were motivated, even in part, by racial animus.

As for the one-location rule, plaintiffs proved that forcing all municipalities to offer only one location for in-person absentee voting imposed greater burdens on voters in large municipalities like Milwaukee than it did on voters in smaller towns. And because Milwaukee has a predominantly minority population, the one-location rule was all but guaranteed to have a disparate impact. But this provision has been in effect since 2005, long before the legislature enacted the restrictions to the hours for in-person absentee voting. *See* Wis. Stat. § 6.855(1). Thus, the legislative history and other contextual evidence discussed above does not bear on the issue of whether the legislature passed the one-location rule with the intent to discriminate. Indeed, plaintiffs have not offered any evidence addressing the legislature's intent in enacting this statute. The court therefore concludes that plaintiffs have failed to prove that the one-location rule violates the Fifteenth Amendment.

That leaves the provisions that reduce the days and hours in which in-person absentee voting is allowed. Plaintiffs have adduced evidence that weekend and evening voting is particularly important for socioeconomically disadvantaged voters, and that, in Wisconsin and nationwide, African American and Latino voters have made particularly good use of various forms of early voting. *See, e.g.*, PX036, at 42; PX047. Early voting in groups on Sundays—including church-supported “Souls to the Polls” efforts—is a widespread practice among African American voters, in Wisconsin and nationwide. Tr. 1p, at 134:6-135:1; PX245, at 38. But again, a disparate impact, without more, does not prove intentional discrimination.

But plaintiffs have more. Statements by legislators show that Act 146 reduced the hours allowed for in-person absentee voting specifically to curtail voting in Milwaukee, and, secondarily, in Madison. Senator Grothman made repeated statements objecting to the

extended hours for in-person absentee voting in Milwaukee and Madison, indicating that hours for voting needed to be “reined in.”<sup>12</sup> On the floor of the senate, he said, “I want to nip this in the bud before too many other cities get on board.” PX022, at 5. Senate Majority Leader Scott Fitzgerald made similar comments. *Id.* at 12. As he put it, “But the question of where this is coming from and why are we doing this and why are we trying to disenfranchise people, I mean, I say it’s because the people I represent in the 13th district continue to ask me, ‘What is going on in Milwaukee?’” *Id.* at 16.

Defendants contend that Grothman and Fitzgerald were simply trying to achieve a measure of statewide uniformity because smaller towns were unable to afford the extended hours that Milwaukee was offering. That explanation is hard to credit. Under Act 146, the legislature still tolerates disparities in voting hours among Wisconsin municipalities. Each municipality can set its own hours for in-person absentee voting. Larger cities can still outdo smaller municipalities by having their full-time clerks hold office hours that cover the full work week, while smaller towns with part-time clerks will hold limited hours, sometimes as little as an afternoon a week. Thus, rather than achieving uniformity, the provisions governing the hours for in-person absentee voting preserved great disparities from town-to-town. The legislative record shows that Act 146 was uniformly opposed by municipal clerks. PX216. Its only supporter of record was the Republican election activist Ardis Cerny. *Id.* And

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<sup>12</sup> Plaintiffs have adduced evidence that might suggest personal bias on Grothman’s part. PX078 (statements about Martin Luther King, Jr. Day); PX073 (about Milwaukee voters who would not be able to vote on weekends: “[A]nybody who can’t vote with all these options, they’ve really got a problem. I really don’t think they care that much about voting in the first place, right?”). The court does not ascribe Grothman’s personal antagonism toward minority voters to the legislature.

Governor Walker partially vetoed the bill as too extreme a reduction in opportunities to vote. PX058.

The acknowledged impetus for this law was the sight of long lines of Milwaukee citizens voting after hours. Yet instead of finding a way to provide more access to voters in small towns, the legislature responded by reining in voters in Milwaukee, the state's most populous city, where two-thirds of its African American citizens live. At trial, Kevin Kennedy, director of the GAB, confirmed that the purpose of reducing the hours for in-person absentee voting was to restrain voting in Milwaukee:

Clearly in the recall election, the City of Milwaukee opened its in-person absentee voting for Memorial Day, which was the day before the gubernatorial recall election, and that did not sit well with the Republican majority. They thought that was designed purposely . . . to allow more Democratic voters, even though it could also be said it was designed to facilitate the needs of the unique voters in Milwaukee. But that was not lost on the Legislature that the largest city made that choice whereas other municipalities wouldn't make that choice.

Tr. 5a, at 109:21-110:5.

The legislature's ultimate objective was political: Republicans sought to maintain control of the state government. But the methods that the legislature chose to achieve that result involved suppressing the votes of Milwaukee's residents, who are disproportionately African American and Latino. The legislature did not act out of pure racial animus; rather, suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve its political objective. But that, too, constitutes race discrimination. *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus."); *see also Rogers*, 458 U.S. at

617 (“[M]ultimember districts violate the Fourteenth Amendment if ‘conceived or operated as purposeful devices to further racial discrimination’ by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.”).

Based on the evidence that plaintiffs have presented, the court finds that Wisconsin’s restrictions on the hours for in-person absentee voting have had a disparate effect on African Americans and Latinos. The court also finds that the legislature’s justification for these restrictions was meager, and that the intent was to secure partisan advantage. Finally, the court finds that the legislature specifically targeted large municipalities—Milwaukee in particular—intending to curtail minority voting. Combined, these findings lead the court to further find that the legislature passed the provisions restricting the hours for in-person absentee voting motivated in part by the intent to discriminate against voters on the basis of race.

## 2. Age discrimination

Plaintiffs contend that some of the challenged provisions discriminate against younger voters on the basis of age, in violation of the Twenty-Sixth Amendment. The Twenty-Sixth Amendment provides that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

The federal courts that have considered Twenty-Sixth Amendment claims recognize that there is “a dearth of guidance on what test applies to Twenty-Sixth Amendment claims.” *N.C. State Conference of the NAACP v. McCrory*, No. 13-cv-658, 2016 WL 1650774, at \*165 (M.D.N.C. Apr. 25, 2016), *rev’d*, No. 16-1468 (4th Cir. July 29, 2016)<sup>13</sup>; *see also Walgren v.*

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<sup>13</sup> The court has reviewed the Fourth Circuit’s decision invalidating North Carolina’s voter ID

*Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) (“[W]e are still without the assistance of any precedents guiding us in evaluating the impact of the Twenty-sixth Amendment.”); *Nashville Student Org. Comm. v. Hargett*, No. 15-cv-210, 2015 WL 9307284, at \*6 (M.D. Tenn. Dec. 21, 2015) (“As the parties note in their briefing, there is no controlling caselaw from the Sixth Circuit or the Supreme Court regarding the proper interpretation of the Twenty-Sixth Amendment or the standard to be used in deciding claims for Twenty-Sixth Amendment violations based on an alleged abridgment or denial of the right to vote.”).

The text of the Twenty-Sixth Amendment is patterned on the Fifteenth Amendment, which prohibits the denial or abridgement of the right to vote on the basis of race. This suggests that *Arlington Heights* provides the appropriate framework for evaluating plaintiffs’ claims of intentional age discrimination. Indeed, other courts have taken this approach when confronted with similar allegations. *See, e.g., Lee v. Va. State Bd. of Elections*, No. 15-cv-357, 2016 WL 2946181, at \*26 (E.D. Va. May 19, 2016). Although the district court in *North Carolina State Conference of the NAACP* expressed doubt that the Twenty-Sixth Amendment was intended to operate just like the Fifteenth Amendment, the court followed an *Arlington Heights*-style analysis for the purposes of its decision. 2016 WL 1650774, at \*165.

*Anderson-Burdick* provides a framework through which the court could evaluate the burdens that fall on younger voters and the state’s justification for those burdens. But “[i]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were

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law on the grounds that it was motivated by an intent to discriminate on the basis of race. The decision relies on factual considerations unique to North Carolina, and, accordingly, it has no bearing on this case.

found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment.” *Walgren*, 519 F.2d at 1367. Thus, for plaintiffs’ age discrimination claims, the court will apply the *Arlington Heights* framework, beginning by considering whether plaintiffs have shown that the challenged provisions have had a disparate impact on younger voters. All of the challenged provisions are facially neutral, but plaintiffs have offered anecdotal evidence that some of them disproportionately affect younger voters. *See generally* Dkt. 207, at 236-41 (discussing trial evidence). As a class, younger voters are poorer and less established. They are therefore less likely to have a driver license and documentary proof of residence. They are also more transient, and thus will likely face the burden of registration more often.

But this evidence falls short of showing that young people are more likely to face burdens that they cannot overcome with reasonable effort. Young people may be more likely to lack a driver license. But that does not show that they are more likely to lack the credentials that one needs to get a Wisconsin ID. Young people may move more often, and they may be more likely to conduct their affairs online. But that does not mean that they will lack the documents needed to register, particularly because online documents can serve as proof of residence. The court does not find strong evidence of a disparate impact, which puts plaintiffs’ Twenty-Sixth Amendment claim on weak footing.

Plaintiffs have some evidence of anti-youth comments made by legislators, particularly those by Senate Majority Leader Mary Lazich. Before the vote on Act 23, Lazich told the senate Republican caucus that they should support the bill because of what it “could mean for the neighborhoods of Milwaukee and the college campuses across this state.” Tr. 1a, at 84:1-24. As the court has already concluded, the Republican majority was motivated, in part,

by partisan objectives. But without more, this type of evidence did not establish discrimination on the basis of race, and it does not establish discrimination on the basis of age either.

Much of plaintiffs' evidence concerns the restrictions that the legislature placed on the use of college IDs. The rationale for these restrictions is not as weak as the rationale for the reduction in hours for in-person absentee voting. Under *Anderson-Burdick*, the court will evaluate whether these restrictions impose burdens that are warranted in light of the interests that they serve. But in the context of intentional age discrimination, the question is more limited: were these restrictions so baseless as to suggest purposeful discrimination against young voters? The court concludes that the answer is "no." The restrictions served a legitimate interest in election integrity because many college students have documentation of two residences: their school addresses, and their permanent home addresses. The legislature had a legitimate interest in ensuring that students registered in only one place. *See, e.g.*, PX229 (legislative note expressing interest in tightening up registration requirements so that out-of-state students would have to declare residency in Wisconsin to vote in the state). The court will review the state's rationales for the other challenged restrictions later in this opinion. For the purposes of plaintiffs' age discrimination claim, however, it is sufficient to say that these rationales are not so feeble as to suggest intentional discrimination.

One last point. College students may use any of the means of identification or proof of residence that are available to all citizens generally. The legislature also extended to students the *additional* ability to use their college IDs, albeit under certain restrictive conditions. As a practical matter, these restrictions meant that the standard student IDs that many University of Wisconsin campuses issue were not valid for voting. But some



universities have provided workarounds in the form of special university-issued voting IDs. This seems like an unwarranted rigmarole, but the end result is that college students have more ID options than other citizens do.

The court concludes that plaintiffs have not proven by a preponderance of the evidence that the challenged provisions were motivated by intentional age discrimination.

#### **D. Partisan fencing claim**

At the heart of this case is plaintiffs' contention that the Wisconsin legislature passed the challenged provisions with the intent to suppress Democratic votes to gain a partisan advantage in future elections. Plaintiffs contend that to accomplish this objective, the legislature identified groups of voters who would likely vote for Democrats and then passed measures to frustrate those voters' access to the ballot box. Put differently, the legislature targeted minorities, younger citizens, and citizens in urban areas like Milwaukee, not necessarily because of racial or age-based animus, but because it believed that these groups tended to vote for Democrats. Plaintiffs bundle these allegations into a "partisan fencing" claim. Dkt. 141, ¶¶ 197-99.

This is not the first time that a group of plaintiffs in a voting rights case has asserted a partisan fencing claim. *See, e.g., Lee v. Virginia State Bd. of Elections*, No. 15-cv-357 (E.D. Va. filed June 11, 2015); *Ohio Org. Collaborative v. Husted*, No. 15-cv-1802 (S.D. Ohio filed May 8, 2015). But the legal theory is still a novel one, and neither party directs the court to precedent—binding or otherwise—that definitively establishes a framework for analyzing partisan fencing claims. Plaintiffs extrapolate that their partisan fencing claim is essentially a claim for intentional discrimination, relying on statements in various Supreme Court decisions. They therefore urge the court to consider their evidence of partisan motivation by

using the *Arlington Heights* framework, which would lead the court to invalidate any election qualification that was motivated, even in part, by partisan objectives. Defendants contend that a partisan fencing claim is really just a unique species of an undue burden claim, for which the *Anderson-Burdick* framework is appropriate.

Plaintiffs derive the term “partisan fencing” from *Carrington v. Rash*, a case in which the Supreme Court invalidated a Texas constitutional provision that prevented members of the United States armed forces from voting if they moved to Texas during their service. 380 U.S. 89, 89 (1965). The Court held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” *Id.* at 94. But the Court decided *Carrington* well before *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the two namesake cases for the *Anderson-Burdick* framework that courts now apply to evaluate whether voting regulations burden First and Fourteenth Amendment rights. Moreover, *Carrington* dealt with an outright prohibition on voting—service members who moved to Texas during their military service could not vote while they were in the armed forces. *Id.* at 89. And cases applying *Carrington* tend to involve outright prohibitions on the right to vote. *See, e.g., Evans v. Cornman*, 398 U.S. 419, 419-20 (1970) (Maryland citizens who lived on a federal reservation prohibited from voting because they were not residents of Maryland); *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969) (per curiam) (“[O]nly ‘property taxpayers’ [had] the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility.”). Here, none of the challenged provisions categorically bar any citizen of Wisconsin from voting. For these reasons, *Carrington* is not directly on point here.

Looking toward more recent cases, at least one Justice of the Supreme Court has suggested that there would be First Amendment implications for state restrictions on voting that place burdens on voters because of their political views. *See Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring) (“If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.”). Several years later, a unanimous Court noted that this suggestion was “uncontradicted by the majority in any of our cases.” *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). But these decisions involved gerrymandering, which is not at issue in this case.

The import of these cases is that analyzing a partisan fencing claim involves a balancing analysis under the First Amendment. And that is exactly what the *Anderson-Burdick* framework provides. The framework requires the court to identify the nature and severity of the burden that a given voting regulation creates and then weigh that burden against the state’s justification for it. *Common Cause Ind. v. Individual Members of the Ind. Election Comm’n*, 800 F.3d 913, 917 (7th Cir. 2015). Thus, *Anderson-Burdick* appears to fit the bill for plaintiffs’ partisan fencing claim.

Two federal district courts that have confronted this question reached the same conclusion. In *Ohio Organizing Collaborative v. Husted*, the Southern District of Ohio concluded that *Carrington* does not “appear to create a separate equal protection cause of action to challenge a facially neutral law that was allegedly passed with the purpose of fencing out voters of a particular political affiliation.” No. 15-cv-1802, 2016 WL 3248030, at \*48 (S.D. Ohio May 24, 2016). Instead, the court relied on the *Anderson-Burdick* framework as “the proper standard under which to evaluate an equal protection challenge to laws that

allegedly burden the right to vote of certain groups of voters.” *Id.* Likewise, in *Lee v. Virginia State Board of Elections*, the Eastern District of Virginia acknowledged that “[t]he term ‘partisan fencing’ is derived from *Carrington* . . . and is somewhat of an aberration.” 2016 WL 2946181, at \*26. The court concluded that the term “has been rarely deployed in election law litigation thereafter. It does not appear to create a separate cause of action but may be a useful analytical tool in evaluating First Amendment and Equal Protection Clause cases.” *Id.* The reasoning in these decisions is persuasive, and this court will follow their guidance.

The court will not adopt plaintiffs’ partisan fencing theory, but the theory is not completely without basis. This case challenges state laws governing voter qualifications and election mechanics; it is not a redistricting case. That distinction is important. The redistricting process is inherently political through and through, and a gerrymandering claim requires a court to decide how much partisan politics is too much. *See generally League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413-23 (2006). By contrast, voter qualifications and election administration should not be political at all, and partisan gain can never justify a legislative enactment that burdens the right to vote. So, plaintiffs argue, a state should not be allowed to manipulate its election regime by imposing even slight burdens, if the purpose is to suppress turnout to achieve a partisan advantage.

Despite the appeal of plaintiffs’ theory, *Crawford* and *Frank* foreclose the argument that partisan fencing claims should be handled like claims of intentional race or age discrimination, for which *any* discriminatory legislative intent is sufficient to invalidate a law. *See Frank*, 768 F.3d at 755 (“[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”) (quoting *Crawford*,

553 U.S. at 204)). Put differently, a provision is not unconstitutional if the legislators who passed it were partly motivated by partisan gain, so long as there were sufficient valid justifications. The *Anderson-Burdick* framework enables federal courts to undertake this type of review.

In sum, the court rejects plaintiffs' proposal to treat their partisan fencing claim as distinct from their undue burden claims under the First and Fourteenth Amendments. As explained below, the evidence of partisan motivation that plaintiffs have adduced is pertinent to the legislature's justifications for passing the challenged provisions. The court will therefore consider this evidence as part of its *Anderson-Burdick* balancing analysis.

#### **E. First and Fourteenth Amendment claims for undue burdens on the right to vote**

Plaintiffs contend that each of the challenged provisions violates the First and Fourteenth Amendments by impermissibly burdening the right of Wisconsin citizens to vote. "A state election law, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Common Cause Ind.*, 800 F.3d at 917 (quoting *Anderson*, 460 U.S. at 788). But that is not to say that every voting-related law must survive strict scrutiny. Requiring states to narrowly tailor their election regulations to advance only compelling interests "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Federal courts must therefore apply a "more flexible standard" when reviewing challenges to a state's election laws. *Common Cause Ind.*, 800 F.3d at 917.

Under the flexible *Anderson-Burdick* standard, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation

burdens First and Fourteenth Amendment rights.” *Burdick*, 504 U.S. at 434. The court must undertake a three-step analysis for each of the challenged provisions. First, the court must determine the nature and severity of the burden that a given provision imposes. Second, the court must identify the state’s justification for the provision. Third, the court must weigh the burdens against the state’s justifications for imposing them “and then make the ‘hard judgment’ that our adversary system demands.” *Crawford*, 553 U.S. at 190.

For the first step in the *Anderson-Burdick* analysis, the court must focus on the burdens that the challenged provisions place on eligible voters who cannot comply with the new requirements (e.g., who lack registration documents, who need to vote during a different in-person absentee voting period or at a different location, or who prefer to vote straight-ticket). *See id.* at 198 (“The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483.”). Just because the majority of Wisconsin voters are able to comply with the state’s registration requirements, absentee voting procedures, and miscellaneous election regulations does not mean that the burdens that these laws impose are constitutionally insignificant. But just as important, the fact that a few Wisconsin voters have difficulty complying with these laws is not enough to invalidate them across the board. *Crawford*, 553 U.S. at 199-200 (“And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners’ right to the [facial] relief they seek in this litigation.”).

For the second step in the *Anderson-Burdick* analysis, the court must “consider the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the

plaintiff's rights." *Common Cause Ind.*, 800 F.3d at 921 (citations and internal quotation marks omitted).

For the third step in the *Anderson-Burdick* analysis, the court must weigh the burdens of a given provision against the state's justification for it. When the state imposes a "severe" restriction on the right to vote, then "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (citations and internal quotation marks omitted). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

With these considerations in mind, the court turns to the specific provisions that plaintiffs challenge in this case.

### **I. Limiting in-person absentee voting**

In 2005, Wisconsin enacted Wis. Stat. § 6.855, which limited municipalities to one location for in-person absentee voting. At that time, the state did not limit the hours for in-person absentee voting. But as a practical matter, in-person absentee voting could not begin until municipal clerks received the ballots from the company that printed them, which was usually three to five weeks before the election. Tr. 2, at 265:5-7; Tr. 4p, at 121:3-11; Tr. 7a, at 114:9-15. Through Act 23, passed in 2011, and Act 146, passed in 2014, the legislature narrowed the window for in-person absentee voting to 10 days and prohibited municipal clerks from offering in-person absentee voting on weekends or on the Monday before an election. The legislature also limited the hours available for in-person absentee voting to between 8:00 a.m. and 7:00 p.m.

The court finds that the challenged in-person absentee voting provisions place a moderate burden on the right to vote.

Wisconsin's changes to its in-person absentee voting regime came amidst an increase in the use of absentee voting, both nationally and in Wisconsin. About 60,000 voters cast in-person absentee ballots on the Monday before the November 2008 general election. PX435, at 13. As plaintiffs' expert, Barry Burden, PhD, testified, absentee voting in Wisconsin (both by mail and in-person) increased from 10.6 percent to 15.5 percent between the 2010 and 2014 midterm elections. PX037, at 23. For presidential elections, the increase was not as significant: 21.1 percent in 2008 to 21.4 percent in 2012. *Id.* Defendants' expert, Dr. Hood, reached similar conclusions. Tr. 8a, at 32-41; DX001, at 11.

In spite of these trends, plaintiffs contend that the one-location rule and hour limit stifled in-person absentee voting in Wisconsin. Their theory is that if the legislature had not passed the challenged provisions, then in-person absentee voting would have increased even more, particularly among minorities and young voters, who tend to vote for Democrats. The court agrees with Dr. Hood that it would be nearly impossible to directly prove this theory—there is no way to redo the 2012 and 2014 elections without the in-person absentee provisions in place. Tr. 8a, at 44:3-6. Neither side had compelling statistical evidence that African Americans in Wisconsin had made disproportionate use of in-person absentee voting.

But plaintiffs had good anecdotal and circumstantial evidence that the in-person absentee laws impose burdens for certain voters by demonstrating that the changes had profound effects in larger municipalities like Madison and Milwaukee. These cities are home to populations of voters who disproportionately lack the resources, transportation, or flexible work schedules necessary to vote in-person absentee during the decreased timeframe. PX037,



at 26-27. At trial, clerks from both cities testified that the new laws forced them to drastically cut back on the amount of time that they could offer in-person absentee voting. For example, before the November 2012 elections, Madison offered in-person absentee voting until 8:00 p.m. on weekdays, and for a few hours on Saturdays and Sundays. Tr. 2, at 265:16-20. Up to 1,200 voters a day would use in-person absentee voting. *Id.* at 266:1-6. As for Milwaukee, defendants' own expert summarized how the changes have similarly affected the availability of in-person absentee voting since 2008.

Table 2. In-Person Absentee Voting Characteristics, City of Milwaukee, 2008-2014

<b>Election</b>	<b>Start</b>	<b>Stop</b>	<b>Hours</b>	<b>Weekends Permitted</b>	<b>Days Available</b>	<b>Total Hours</b>
2008 General	10/13	11/3	8:00 am-8: pm, M-F; 9:00 am-5:00 pm, Sat.	Yes	17 days	200
2010 General	10/5	11/1	8:30 am-4:30 pm, M-F; 8:30 am-12:30 pm, Sat.	Yes	21 days	164
→Act 23						
2012 General	10/22	11/2	8:30 am-7:00 pm, M-F; 9:00 am-5:00 pm, S-S	Yes	12 days	121
→Act 146						
2014 General	10/20	10/31	8:00 am-7:00 pm, M-F	No	10 days	110

DX001, at 9. Voters in both municipalities took advantage of the opportunities available before the state limited in-person absentee voting, particularly weekend voting. PX206.

In Wisconsin, voters in larger cities experience disadvantages in education, income, employment, and access to transportation. PX036, at 5-15; PX037, at 26-27. Several lay witnesses testified that these pre-existing disadvantages interact with the new laws to make it more difficult for these voters to vote during the shorter period for in-person absentee voting. For example, eliminating weekend voting and reducing the number of days on which a clerk's office can accept in-person absentee ballots is problematic for a person whose job or class

schedule is less flexible. Tr. 1p, at 14:13-15:8, 75:8-25, 144:19-25; Tr. 3p, at 31:2-5. Combined with the one-location rule, limiting hours leads to longer lines at clerk's offices, which in turn requires voters to be prepared to devote more time to voting. Tr. 1p, at 92:18-96:3; Tr. 2, at 266:7-16. Having only one location creates difficulties for voters who lack access to transportation.

Eliminating weekend voting also prevented groups from holding voting drives like "Souls to the Polls"—an initiative that encouraged church congregations to vote in-person absentee after church on Sunday. Tr. 1p, at 134:20-135:1; Tr. 2, at 183:14-17. But these types of collateral effects only indirectly burden voters; impediments for groups trying to get individuals to vote do not necessarily implicate the First Amendment. *Cf. Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388-96 (5th Cir. 2013) ("[W]e are unpersuaded that the smorgasbord of activities comprising voter registration drives involves expressive conduct or conduct so inextricably intertwined with speech as to require First Amendment scrutiny."); *Coal. for Sensible & Humane Sols. v. Wamser*, 771 F.2d 395, 400 (8th Cir. 1985) (acknowledging the claim that "refusal to appoint qualified volunteers as deputy registrars restricts the accessibility of voter registration facilities and thus indirectly constitutes an unconstitutional infringement of the right to vote," but refusing to "agree that there is a constitutional right to greater access to voter registration facilities per se").

The challenged provisions do not categorically bar individuals from voting. The state has shrunk the window in which municipalities can offer in-person absentee voting, but it has not closed that window completely. If the shortened period is not convenient for certain voters, then they can vote using mail-in absentee voting or vote on election day. Regardless, both sides' evidence confirms that in-person absentee voting is still widely used, and its use

has increased over the last several years. As noted above, plaintiffs argue that without the challenged provisions, in-person absentee voting would be increasing *more*. But their anecdotal evidence is not sufficient to prove this assertion.

Before turning to step two of the *Anderson-Burdick* analysis, the court will address defendants' preliminary argument that there is no constitutionally protected right to cast an absentee ballot. Defendants invoke *Griffin v. Roupas*, a case in which a group of working mothers challenged Illinois's refusal to let them vote absentee because they did not satisfy any of the statutory prerequisites (out of the county, physical incapacity, religious observance, etc.). 385 F.3d 1128, 1129 (7th Cir. 2004). The *Griffin* court rejected the idea "that the Constitution requires all states to allow unlimited absentee voting," *id.* at 1130, which defendants implicitly contend should end the discussion. But this case is not about Wisconsin's outright refusal to allow in-person absentee voting. Rather, plaintiffs allege that the state is denying them the opportunity to exercise a right that they already have. Put differently, plaintiffs contend that by choosing to give its citizens the privilege of in-person absentee voting, the state must administer that privilege evenhandedly. *See Zessar v. Helander*, No. 05-cv-1917, 2006 WL 642646, at \*6 (N.D. Ill. Mar. 13, 2006) ("[O]nce [states] create such a regime, they must administer it in accordance with the Constitution." (citing *Paul v. Davis*, 424 U.S. 693, 710-12 (1976))). The court therefore rejects defendants' argument that plaintiffs' challenge to the in-person absentee voting provisions does not implicate their constitutional rights.

Defendants advance four justifications for the challenged in-person absentee voting provisions. First, they contend that shortening the timeframe for in-person absentee voting will allow the state to conduct uniform, orderly elections. Municipal clerks can better control

the process and manage staffing. Clerks can also guarantee that absentee ballots will be available once in-person absentee voting starts (ballots are delivered at different times, which means that a clerk's office might have them available four weeks before an election one year, but only two weeks before that same election in a different year).

Second, defendants contend that municipal clerks are busy during election season. With the reduced window for in-person absentee voting, clerks have more time for other tasks, such as conducting voting at residential care facilities, mailing absentee ballots, and entering voter registrations. Clerks also have non-election-related duties, and it becomes difficult to attend to them during business hours once in-person absentee voting begins. The reduced window allows them to take care of other responsibilities before turning their exclusive attention to voting.

Third, defendants contend that limiting in-person absentee voting to one location saves money. More locations mean more staff, supplies, and security. Clerks are also able to directly supervise the entire process because it is occurring in one location rather than across the municipality.

Fourth, defendants contend that limiting in-person absentee voting to one location avoids voter confusion by creating uniformity. Their concern is that voters might accidentally believe that because they can vote in-person absentee at multiple locations, they can also vote at multiple polling locations on election day.

With one exception, these interests do not justify the moderate burdens that the challenged provisions impose. Alleviating the workload for clerks could be a sufficient reason to limit the hours for in-person absentee voting. But the laws that the challenged provisions replaced did not *require* municipal clerks to offer in-person absentee voting during the now-

eliminated days and times or at multiple locations. A clerk who wanted to retain control over the process, save money by using less staff, or reduce the hours to have time to attend to other duties could have chosen to do so under the old laws. Thus, any burdens on clerks that the state was purporting to address were voluntarily undertaken, which undermines the state's interest in alleviating those burdens.

Furthermore, the state's interest in establishing uniform times for in-person absentee voting does not make sense because clerks can currently set whatever hours and days they want for in-person absentee voting, within the parameters of the statutes. Contrary to defendants' assertion, Dkt. 206, at 65, the new laws do not actually "provide[] a set date when in-person absentee voting begins." Municipal clerks are still free to start in-person absentee voting at different times, so long as it is not before the window opens. Under the new law, smaller towns with part-time clerks can still conduct in-person absentee voting by appointment only or on just a few days a week, *see, e.g.*, Tr. 7a, at 166:21-177:14; PX161, while larger municipalities can offer in-person absentee voting from 8:00 a.m. to 7:00 p.m., Monday through Friday, for two weeks, *see, e.g.*, Tr. 2, at 265:2-12. Thus, the challenged provisions do not actually create any consistency in when individual clerk's offices offer in-person absentee voting.

Requiring all municipalities to have one location for in-person absentee voting may have a superficial appeal. But uniformity for uniformity's sake gets the state only so far. In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496. PX037, at 26. The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location. There is simply no evidence that a one-location rule prevents voter

confusion, or that any confusion would be as widespread or burdensome as the types of difficulties that voters face when having only one location at which to vote in-person absentee.

Evidence at trial suggested that one of the justifications for the challenged in-person absentee provisions was to “rein in” the big cities in the state, principally for political purposes. *See generally* PX022. State legislators were concerned that smaller municipalities could not keep up with the cities that had the resources to provide 60 to 70 hours of in-person absentee voting each week. *Id.* Ensuring equal access to the franchise is certainly a valid state interest, probably even a compelling one. But stifling votes for partisan gain is not a valid interest. And Wisconsin’s approach in this instance was backward: rather than *expanding* in-person absentee voting in smaller municipalities, the state *limited* in-person absentee voting in larger municipalities. By doing so, the state has imposed moderate burdens on the residents of those larger municipalities.

The court concludes that most of the challenged in-person absentee voting provisions violate the First and Fourteenth Amendments for three reasons: the moderate burdens that they impose are not justified by the state’s proffered interests; local control addresses the needs of the communities; and the purported consistency is illusory.

The one exception is the state’s decision to prohibit in-person absentee voting on the Monday before an election. The Wisconsin Municipal Clerks Association advocated for this provision, emphasizing that the day before an election is usually very busy. Tr. 4p, at 123:8-124:12; Tr. 7a, at 158:22-160:9. The GAB advocated for this provision as well. Tr. 5a, at 102:2-4. The state’s interest in preventing clerks from incurring additional responsibilities on the day before an election, even voluntarily, is considerably more important than during the

weeks leading up to the election. Clerks cannot complete some of their preparation for election day until all absentee ballots are cast, and so allowing in-person absentee voting right up through the eve of the election necessarily prevents clerks from completing those tasks until after hours. Prohibiting in-person absentee voting on the day before an election allows clerks to focus on preparing for the election, go home at a reasonable hour, and be as sharp as possible for election day, which will itself be a long day. The state's interest in prohibiting in-person absentee voting on the day before an election outweighs the moderate burdens that this measure imposes. Thus, the court concludes that this one provision does not violate the First and Fourteenth Amendments.

## **2. Requiring documentary proof of residence and eliminating corroboration**

Wisconsin requires voters to provide documentary proof of residence when registering to vote. Wis. Stat. § 6.34(2). Before Act 23, passed in 2011, voters could use corroboration to prove their residence. And before Act 182, passed in 2014, voters needed to provide documentary proof of residence only when registering to vote within 20 days before an election. Plaintiffs challenge both the requirement of documentary proof of residence and the elimination of corroboration. These are two aspects of an overall challenge to what Wisconsin requires from voters who want to register. Plaintiffs contend that Wisconsin's proof of residence requirement burdens Wisconsin voters, particularly young voters who live with their parents, elderly voters, economically disadvantaged voters who live with friends or relatives, women voters whose residency documents are in their husbands' names, and minority voters who suffer from higher rates of residential instability.<sup>14</sup>

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<sup>14</sup> Plaintiffs also contend that Wisconsin's registration requirements have effectively put an end to voter registration drives. As explained above, the court's primary task under *Anderson-Burdick* is to evaluate the burden that a given provision places on voters. "[T]here is nothing

The court finds that the challenged registration provisions impose only slight burdens on voters.

Between 2006 and 2012, about 35,000 Wisconsin citizens used corroboration to register to vote. PX038, at 39. But plaintiffs have adduced only anecdotal evidence to support their contention that the elimination of corroboration imposes a severe burden. They have not proven that minorities, Democrats, or young voters experience any widespread or insurmountable difficulties registering to vote on account of this change in the law. Indeed, plaintiffs' expert conceded that he did "not have specific data on how many people were unable to register because they were no longer permitted to use corroborating witnesses to prove residency." *Id.* The same is true of plaintiffs' evidence about voters who could not provide documentary proof of residence: although plaintiffs have identified examples of voters who were turned away at the polls, there is no evidence about how prevalent the problem is, or about how many voters cannot obtain documentary proof of residence with reasonable effort.

Voters in Wisconsin can satisfy the proof of residence requirement with a little planning. For example, rather than trying to register on election day, voters can contact their municipal clerk beforehand, when there is still time to update mailing addresses for bank statements, utility bills, or other acceptable forms of proof of residence. *See* PX490, at 5-6 (voter tried to use corroboration at the polls); PX045, at 3 (same); PX059, at 1 (183 people not able to register at polls because they did not have proof of residence). Wisconsin also

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'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place," *Voting for Am., Inc.*, 732 F.3d at 392 (citations omitted), which means that the First Amendment would not protect a group's mere desire to register voters. Plaintiffs' evidence regarding voter registration drives is mostly tangential to the main issues in this case.



allows voters to present electronic copies of their proof of residence documents (e.g., online bank statements or utility bills), which eliminates the need to wait for a document to arrive by mail.

At least some clerks have even identified a solution for voters who are simply unable to obtain the necessary documentation. Under Wis. Stat. § 6.34(3)(a)11., a person can register to vote by providing a document issued by a unit of government. Thus, if a voter provides a municipal clerk with the address at which the voter wants to register, the clerk can send the voter a letter and *that letter* then becomes a government document that the voter can use to register. *See, e.g.*, Tr. 1p, at 163-65; Tr. 2, at 301-02. This system is not much different from the one that Wisconsin used to have. When a voter registered, the clerk's office would send him or her a postcard to confirm the registration address. If the card came back as undeliverable, then the clerk's office knew that there was a problem; if the card did not come back, then the clerk's office considered the registration verified. The current laws merely add the step that a voter must return to the clerk's office to verify receiving the document.

The lone context in which proof of residence requirements and the elimination of corroboration can be more problematic is election day registration. An unregistered voter who lacks easy access to documentary proof of residence and decides on election day that he or she will vote may be unable to register without corroboration. The specific burdens on voters who plan to register on election day are still slight. With a little advanced planning, even a voter who lacks access to standard methods for proving residence can register to vote on election day.

For many voters, registering to vote will not be a regular event: once registered, a voter can continue voting under that registration until he or she moves. And even for voters who

move often, if they complete the registration process once, they will be prepared for it in the future. Wisconsin law allows voters to choose from an array of documents to prove residence, and this flexibility means that the loss of corroboration does not impose a severe burden on the right to vote. It may be inconvenient to plan ahead to register at the polls on election day, particularly without corroboration, and it may be cumbersome to update account information with a bank or utility company. But these activities are no more burdensome than those that the Supreme Court has already considered. *See Crawford*, 553 U.S. at 198 (“For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”).

Defendants justify the registration requirements as ensuring that voters actually reside in the municipalities where they register to vote. Asking for proof of residence, and not accepting corroboration, also helps prevent fraud. Defendants adduced no actual evidence of fraudulent use of corroboration though. *See, e.g.*, Tr. 7a, at 118:20-119:6 (voter attempted to pressure other voters to corroborate his residence but they all refused).

These interests justify the slight burdens that the challenged registration provisions impose. Residence is a bona fide voter qualification. Plaintiffs are correct that defendants have not adduced evidence of a genuine threat or history of registration-related fraud. But “[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Pursuant to *Frank* and *Crawford*, states can anticipate

and guard against fraudulent voting, and public confidence in elections is a legitimate state interest.<sup>15</sup> Regardless, a voter's residence in a particular municipality is a qualification for voting in that municipality. The state has an interest in making sure that only qualified voters are participating in elections, and the proof of residence requirement is directly linked to that goal.

The court concludes that the challenged registration requirements do not violate the First and Fourteenth Amendments.

### **3. Changing how students can use “dorm lists” to register**

Before Act 23, college and university students could register to vote use their student IDs and a “dorm list” that their institutions provided to municipal clerks.<sup>16</sup> The legislature has changed this provision by requiring that dorm lists also indicate whether students are U.S. citizens. This change requires colleges and universities to provide information that the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, prevents them from disclosing without consent. PX435, at 34-35.<sup>17</sup> Rather than obtaining consent to provide this information, most colleges and universities have stopped providing dorm lists to municipal clerks. PX436, at 10.

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<sup>15</sup> *Frank* and *Crawford* dealt with the requirement of presenting ID at the polls on election day. Presenting documentary proof of residence is the functional equivalent of a photo ID for the registration side of elections.

<sup>16</sup> A dorm list is “a certified and current list of students who reside in housing sponsored by the university, college, or technical college.” Wis. Stat. § 6.34(3)(a)7.b.

<sup>17</sup> FERPA permits colleges and universities to release only “directory information” without parental consent. This information includes “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” 20 U.S.C. § 1232g(a)(5)(A).

The court finds that the dorm list provision places only a slight burden on student voters.

The dorm list provision is a special accommodation that allows college and university students to prove their residences with student IDs. This option is *in addition to* the standard options that all voters have. Act 23 pulls back only some of the special dispensation that the legislature gave students. The challenged provisions do not deny students the ability to register outright. Students can also register using a student ID and a fee receipt showing that they paid tuition in the last nine months. *See* Wis. Stat. § 6.34(3)(a)7.a. And of course, students can register by presenting any of the other listed documents to prove residence. Plaintiffs did not present evidence showing how often students used dorm lists before Act 23, or how many students are now unable to register without the option. Without this sort of proof, plaintiffs cannot demonstrate that any burden on student voters is more than slight.

Act 23 nevertheless burdens student voters who want to use their student IDs as proof of residence to register because it conditions their registration on proof of citizenship, which is something that no other voter must present to register. When any voter registers in Wisconsin, including a student voter, the voter must sign a statement certifying that he or she is a U.S. citizen. *See* DX101. But that is it. Voters do not need to actually *prove* that they are citizens. True, the primary burden that this provision imposes is on colleges and universities, which must provide compliant dorm lists. But if colleges and universities are unwilling to provide these lists, then for all practical purposes, Act 23 has taken away a method through which students can register to vote.

Defendants justify the provision by arguing that U.S. citizenship is a qualification for voting in Wisconsin, *see* Wis. Const. art. III, § 1, and so “it makes sense to confirm it.”

Dkt. 206, at 87.<sup>18</sup> That is a weak justification for two reasons. First, none of the state’s other methods for proving residence require voters to “confirm” their U.S. citizenship beyond signing a citizenship certification on the registration form. Students sign this certification too. Defendants do not explain how this certification procedure, which apparently satisfies the state’s interest in confirming citizenship for the overwhelming majority of non-students who register to vote, is insufficient in the context of student voters. Second, even if the state is particularly worried about non-citizen students voting—and at trial, the state presented no evidence of such a problem—the challenged provision does not allay that concern. Non-citizen students could easily skirt the requirement of demonstrating citizenship by using one of the other methods for proving residence.

Although the changes to using a dorm list to register impose only slight burdens, the state has not offered even a minimally rational justification for the law. The court therefore concludes that this provision violates the First and Fourteenth Amendments.

#### **4. Eliminating statewide SRDs and eliminating SRDs and registration locations at high schools**

Plaintiffs challenge the provisions of Act 23, passed in 2011, that eliminated statewide SRDs and the provisions of Act 240, passed in 2012, that eliminated the requirement that high schools accept registrations from staff and enrolled students.

The court finds that the challenged SRD and high school registration provisions place only slight burdens on voters.

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<sup>18</sup> Defendants also argue that students have other options for proving residence. But that is not a justification for the law; as explained above, it is a reason for concluding that the law imposes only slight burdens on student voters.

Most of the burdens that plaintiffs identify from these laws do not fall directly on voters. For example, plaintiffs contend that eliminating statewide SRDs hinders individuals who register voters during off-site registration drives. *See, e.g.*, Tr. 1p, at 7:20-8:25 (Citizen Action employee cannot register voters outside the municipalities in which she is an SRD), 187:15-188:6 (college student cannot be a statewide SRD); Tr. 3a, at 101:1-102:21 (organizations cannot conduct voter-registration drives). Plaintiffs also contend that without statewide SRDs, more voters will be forced to register at a municipal clerk's office or at the polls, which will cause congestion and additional work for clerks and poll workers. Tr. 2, at 327:14-20. The *Anderson-Burdick* framework does not focus on these burdens; rather, the relevant issue is the nature and severity of the burdens that fall on *voters* and on the right to vote.

The real burden for voters is the loss of potentially convenient options for registering through a statewide SRD or at a high school. But plaintiffs have not adduced evidence of how widespread or significant this problem is. No testimony or expert opinion established how many voters want to register through statewide SRDs or at high schools and are unable to do so. Nor did any testimony establish how many voters are unable to register at all without these options. The closest that plaintiffs came was an anecdote about one municipality not appointing any SRDs in 2011 and 2012, which meant that all voters had to register through the clerk's office those years. PX490, at 3. Yet that burden was principally the result of that particular clerk refusing to appoint any SRDs. Plaintiffs do not argue that all, or even many, other municipalities refuse to appoint SRDs.

Defendants justify these provisions by arguing that statewide SRDs make mistakes that municipal clerks have to spend time correcting. Tr. 4p, at 133:3-20 (continuous

difficulties in municipalities across the state with untimely or incorrect registrations from SRDs); Tr. 7a, at 121:2-7 (statewide SRDs submit incomplete forms, “which complicates things and requires follow-up”), 170:6-19 (same); Tr. 8p, at 133:8-12 (GAB auditor had problems with legibility and missing information from statewide SRDs). Defendants also presented evidence that students and staff did not use high school registration locations that frequently, and that high school SRDs also had problems submitting registrations. Tr. 4p, at 130:18-23 (problems with high school SRDs), 131:8-17 (less than 10 registrations per year from a high school), 132:3-9 (high school students like to register on election day or in the clerk’s office because “it’s a Facebook picture-taking time”); Tr. 7a, at 169: 11-19 (clerk has never received a registration from a high school and has not heard complaints about eliminating high schools as registration locations). Although this evidence was not conclusive for every municipality in the state, it supported defendants’ assertion that voters did not use high school registration locations that much.

Plaintiffs counter these concerns by pointing out that they came only from small municipalities. Clerks from larger municipalities supported having statewide SRDs. Tr. 1p, at 88:3-8. Plaintiffs also argue that even if statewide SRDs make mistakes, these lead municipal clerks to engage with voters to correct those mistakes, and so the net result is beneficial. Plaintiffs’ criticisms are not persuasive: a state certainly does not have to stand by and watch problems fester in smaller municipalities just because one or two larger municipalities do not have, or can easily overcome, those same problems. The legislature was entitled to conclude that the problems with statewide SRDs outweighed the benefits.

Defendants also justify eliminating statewide SRDs on the grounds that it gave clerks direct control over the SRDs in their municipalities.<sup>19</sup> The state supervised statewide SRDs, which made it difficult for municipal clerks to revoke or train SRDs when problems occurred. Tr. 4p, at 132:10-24. The benefits of local control led the Wisconsin Municipal Clerks Association to support eliminating statewide SRDs. *Id.* Now, clerks train and supervise each SRD in their municipality, which allows them to address issues quicker and more efficiently.

The state's interests in eliminating mistakes from high school and statewide SRDs, and in giving municipal clerks the ability to directly manage the SRDs with whom they work, justify the slight burdens that the challenged provisions impose. There is nothing stopping an individual from registering to be an SRD in as many municipalities as he or she likes. And alternative registration options alleviate virtually any inconvenience to voters who would benefit from being able to register with a statewide SRD.

The court concludes that the challenged SRD and high school registration provisions do not violate the First and Fourteenth Amendments.

##### **5. Preempting Madison's landlord ordinance**

Act 76, passed in 2013, overrode an ordinance that Madison passed in July 2012 requiring landlords to distribute voter registration forms to new tenants. Plaintiffs contend that the act burdens the right to vote by making it harder to register.

The court finds that the landlord provision imposes only a slight burden on voters.

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<sup>19</sup> The court notes that for this issue, the parties have switched sides on the importance of local control. Plaintiffs—for whom local control was so important in the context of in-person absentee voting—now appear to want statewide control, and defendants—for whom uniformity was so important in the context of in-person absentee voting—now argue that local control is vital.



There is some evidence that Madison's ordinance was an effective tool for reaching voters who rented their homes. *See, e.g.*, Tr. 3a, at 24:17-25:4. In the short time that Madison's ordinance was in effect, Madison registered at least 500 voters who submitted the forms that their landlords had given them. *Id.* at 168:4-9. That was right before the November 2012 presidential election.<sup>20</sup> Madison is also home to a large student population, with many students renting their homes.

As with other challenged provisions, plaintiffs have not adduced evidence of a significant or widespread burden. The state statute does not preclude landlords from distributing materials; it just prevents municipalities from *requiring* that they distribute materials. Even assuming that in practice the law means that no landlord will provide forms, the only real burden that voters experience is having to obtain registration forms elsewhere—the rest of the steps for registering are the same. At most, the state has denied Madison voters a convenience. Plaintiffs have not adduced evidence of voters in Madison (or anywhere in Wisconsin) who did not receive registration forms from their landlords and were unable to register to vote.

Defendants justify the law on the grounds that requiring landlords to provide voting materials creates the possibility for voter confusion. At trial, two municipal clerks opined that landlords, who are not trained election officials, could distribute outdated materials or inaccurate information. Tr. 4p, at 136:22-137:20; Tr. 7p, at 19:10-20:7. This testimony was speculative; defendants did not introduce evidence that landlords have actually distributed

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<sup>20</sup> The municipal clerk could not remember if it was the 2010 or 2012 election. But the ordinance went into effect in July 2012. *See* Madison, Wis., Code of Ordinances, § 32.06(5).

the wrong information. But the potential for confusion is at least plausible, which makes the state's interest in avoiding it a reasonable one.

The state has an interest in ensuring that voters receive the correct information about where and how to register to vote. Here, the possibility that landlords will provide outdated or inaccurate information seems minimal, and defendants' justification for overriding Madison's ordinance is relatively weak. If the statute more than minimally burdened the right to vote, then it probably would not withstand constitutional scrutiny. But defendants have put forth a rational explanation for it, and that explanation is sufficient to justify the slight burden that the law imposes.

The court concludes that the landlord provision does not violate the First and Fourteenth Amendments.

#### **6. Increasing the durational residency requirement**

Act 23, passed in 2011, increased Wisconsin's durational residency requirement from 10 days to 28 days. This means that residents who move within Wisconsin fewer than 28 days before an election have to vote in their former municipalities. And residents who move into Wisconsin from out-of-state fewer than 28 days before an election cannot vote in Wisconsin at all (except for the offices of president and vice president, pursuant to Wis. Stat. § 6.15(1)).

The court finds that the increased durational residency requirement imposes a moderate burden on voters in Wisconsin, particularly for populations that tend to be more transient or lack access to transportation.

“Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws

deprive them of a fundamental political right, preservative of all rights.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citations, internal quotations, and alterations omitted). Plaintiffs have adduced evidence from which the court can infer that a longer residency requirement leads to increased difficulties for certain types of voters. That is an important consideration because the court must evaluate the burdens that the law imposes on voters who cannot comply with it. *See Crawford*, 553 U.S. at 198. Here, the burden is significant. A voter who does not satisfy the durational residency requirement cannot vote unless he or she: (1) travels back to his or her former municipality; or (2) votes absentee by mail. These options reduce the burden that the law imposes, but they do not negate it entirely.

Plaintiffs seek a return to the old 10-day rule, presumably because the rule does not impermissibly burden the right to vote. Thus, their contention is really that the *increase* from 10 days to 28 days burdens the right to vote. Given the specific burdens at issue, plaintiffs’ evidence of problems with the overall durational residency requirement, *see e.g.*, Tr. 1p, at 44:19-45:6; PX055, at 2; PX059, at 1, is not particularly relevant.

Plaintiffs have not adduced direct evidence of the burdens that the change from 10 days to 28 days imposes. They have not identified how many voters would be able to comply with a 10-day rule but not with a 28-day rule. *See* Tr. 1p, at 44:9-14 (Citizen Action employee unable to identify how many voters were affected by the increase); Tr. 2, at 292:17-25 (municipal clerk testified to an unspecified “increase”); PX490, at 18 (one voter affected by the increase).<sup>21</sup> Nor could plaintiffs’ experts pin down how widespread the problem is. For example, Dr. Lichtman presented 2010 census data to show that only 1.6

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<sup>21</sup> Defendants offered anecdotal evidence that not very many voters fall into the window between 10 and 28 days. *See, e.g.*, Tr. 7a, at 122:4-10, 172:22-173:6. But this evidence, too, is inconclusive.

percent of the white population had moved into the state during the previous year, compared 2.1 percent of African Americans and 2.4 percent of Latinos. PX036, at 47. For in-state moves, 12.5 percent of white residents had lived in a different house in the previous year, compared to 26.2 percent of African Americans and 19.5 percent of Latinos. *Id.* at 41. But this information covered the entire year and was not limited to eligible voters.

As with many of their other claims, plaintiffs attempted to indirectly prove the nature and severity of the burdens that the increased durational residency requirement creates. Voters who move more often have to confront residency requirements more often. Wisconsin has a significant population of African American and Latino voters, who are more likely to be transient than white voters are. PX036, at 40-41; PX037, at 27. Thus, the court can infer that the durational residency requirement will impose considerable burdens on a class of voters within the state that will have difficulty complying with the requirement.

For voters who move into Wisconsin from another state, the 28-day residency requirement disenfranchises them from state and local elections in Wisconsin (although they can vote for president and vice president). Voters who move within the state at least have the option of voting in their former municipalities. But that option is realistically available only to those who can travel. Although voting absentee by mail can alleviate some of the burden for voters who cannot travel, that option presents its own obstacles. There is considerable public distrust of voting absentee by mail, the process is cumbersome and difficult to understand for some voters, and it presents added security challenges for municipal clerks. Tr. 1p, at 76:13-77:24; Tr. 2, at 114:18-117:10; Tr. 4p, at 158:7-159:14.

On top of the burdens of actually voting in a former municipality, the durational residency requirement presents unique registration problems as well. Voters who must

register in their former municipalities may no longer have documents to prove their residence. Tr. 1p, at 79:16-22; Tr. 2, at 290:3-291:2. And even if a voter has adequate documentation, the registration form requires signing a certification that the voter has “resided at the [former] residential address for at least 28 consecutive days immediately preceding this election, with no present intent to move.” DX101, at 1. Signing this certification puts voters in an uncomfortable position because the form states that “[f]alsification of information on this form is punishable under Wisconsin law as a Class I felony.” *Id.*; see also Tr. 1p, at 79:7-15; Tr. 2, at 290:3-291:2. Also, for voters who sign the form and are able to register, there may still be confusion when the municipal clerk sends a confirmation postcard to confirm the new registration at the old address and the card is returned as undeliverable. PX436, at 24.

Defendants justify the longer residency requirement as preserving election integrity, safeguarding voter confidence, and avoiding voter confusion. Specifically, the requirement serves these interests by preventing voter “colonization,” which “involve[s] voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud.” *Dunn*, 405 U.S. at 345. Defendants also contend that the requirement prevents “party raiding,” “whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary.” *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

Defendants’ purported interests in the 28-day durational residency requirement do not justify the severe burdens that the provision imposes for several reasons. First, defendants

did not introduce any evidence at trial of a genuine threat of colonization or party raiding. Nor have defendants explained how a durational residency requirement prevents party raiding, which is a problem that involves voters who are *already registered*.

Second, even if the threat of colonization motivated the state's actions, defendants failed to address the difference between a durational residency requirement in the abstract, and increasing that requirement from 10 days to 28 days. The state's interests certainly justify some sort of residency requirement. *See Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding a 50-day rule and holding that “[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds”). But defendants have not explained how a 28-day rule serves these interests better than a 10-day rule does. The court is not persuaded that increasing a durational residency requirement by 18 days actually inhibits colonization, raiding, or fraud, at least not to the extent necessary to justify the burdens that the increase imposes on otherwise-qualified voters. To the contrary, the requirement appears to simply make it harder for otherwise eligible voters to vote. It is also somewhat inconsistent with allowing election day registration, which lets voters decide to vote at the last minute.

The state also advances a few practical points, which go toward avoiding voter confusion. For example, a GAB official testified that “the justification put forward to support the 28-day residency is partly that it was maybe more consistent with what some other states had.” Tr. 8p, at 41:16-18. Indeed, 25 states and the District of Columbia have a durational residency requirement, and the average length is 28.8 days. DX001, at 23. In 77 percent of those states, the requirement is 30 days. *Id.* The shortest requirement is 20 days. *Id.* at 24.

Consistency with other states is a superficial rationale that does not justify burdening (or completely disenfranchising) voters within the state who cannot comply with the requirement. Nor did defendants present evidence that there were such persistent problems with registration fraud (or *any* problems, for that matter) that the state needed to lengthen its durational residency requirement.

Defendants also argue that the increased requirement allows voters more time to gather documents and plan for voting. For example, a voter who moves to a new district 11 days before an election might not have enough time to obtain documentary proof of the new residence, and a voter who moves 9 days before an election might not have enough time to request an absentee ballot from his or her former municipality. Any such convenience is utterly speculative—defendants did not identify a single voter who benefitted from the increased time in which to gather registration documents. Regardless, the rule adds considerable *inconvenience*. As one municipal clerk testified during trial, the rule is cumbersome for a person who moves 20 days before an election and is able to gather the necessary registration documents. Tr. 7a, at 140:16-142:1. Thus, defendants' convenience-based justification is not persuasive.

The court concludes that the state's change to the durational residency requirement violates the First and Fourteenth Amendments.

#### **7. Establishing a zone for election observers**

Act 177, passed in 2014, established a statutorily prescribed zone in which election observers must stand at the polls to oversee voting on election day. The zone had to be between three and eight feet away from the table at which voters announced their names or registered to vote. Wis. Stat. § 7.41(2). This act overrode an existing GAB rule that allowed

observers to be between 6 and 12 feet from the location where voters were announcing their presence and registering to vote. Part of the impetus for Act 177 was that a select group of election observers complained that officials were invoking the GAB's rule to keep them too far away to be able to hear and see events at polling places. *See* PX240; PX441, at 14-15. Plaintiffs allege that the state burdened the right to vote by moving observers closer to voters and facilitating harassment and intimidation.

The court finds that the provisions governing where election officials can position election observers imposes only a slight burden on the right to vote.

Although the executive director for Milwaukee's Election Commission confirmed that "99.5% of election observers respect the state's election observer rules," Tr. 1p, at 112:16-18, some municipalities have had problems with disruptive, harassing, and intimidating observers. These problems are prevalent in high-minority areas like Milwaukee and Racine. PX045, at 3; PX436, at 19. Besides intimidating voters, having observers close to poll workers implicates voter privacy concerns: depending on the types of documents that a voter presents for registering or as identification, an observer could be able to see financial statements, social security numbers, or other personal information. Overly zealous election observers also potentially slow down poll workers and cause delays at the polls. Plaintiffs contend that these problems would not exist, or would at least not rise to the level of constitutional violations, under the GAB's former 6-to-12-foot rule.

Despite the evidence of problems with some observers, plaintiffs have not shown that Act 177 imposes a significant burden on voters. The court does not doubt that election observers can create consternation for many voters. But Wis. Stat. § 7.41(2) gives municipal clerks and chief election inspectors discretion to create an observation area at each polling



place; it does not require that they place observers closer than the GAB rule allowed. The court is not persuaded that the statute imposes any significant burden on voters. Local election officials have the discretion, under the statute, to manage the position of observers.

In the anecdotes that plaintiffs presented at trial, problems with election observers occurred when poll workers or chief inspectors failed to exercise the authority that the state gave them to control or even remove observers. Problems also occurred when observers were closer than three feet, which was not a situation that the state even allowed, let alone imposed on voters. *See, e.g.*, Tr. 1p, at 85:4-6 (“Well, to be clear, that wasn’t related to the space, the space issue; that was just related to the conduct of the observer.”). Also, plaintiffs’ evidence of problems consisted of incidents that occurred *before* the state passed Act 177, which undermines their assertion that the new law burdens the right to vote.

Plaintiffs’ challenge to Wisconsin’s election observer law is essentially dissatisfaction with the choices that clerks or chief inspectors have made, or with their failure to address unruly observers. By establishing a range in which officials can place observers, the state has arguably made it possible for others to impose burdens on voters. But plaintiffs have failed to prove that election officials consistently exercise their authority under Wis. Stat. § 7.41(2) in a way that impedes or intimidates voters. At most, then, the law imposes only a slight burden on the right to vote.

Defendants offer a compelling justification for giving municipal clerks and chief election inspectors discretion to establish an observation zone. “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Here, the state balanced the right that observers have to be present at the polls with the

rights that voters have to keep their personal information private and with the flexibility that poll workers need to conduct efficient and fair elections. Rather than setting a one-size-fits-all rule, the legislature created guidelines to allow local municipalities to organize and control their polling places. Flexibility is important because not all polling places can accommodate a uniform distance. Tr. 2, at 286:17-289:22; Tr. 4p, at 139:18-140:2. And the range that the legislature selected was not unreasonable: three feet may be necessary to accommodate elderly observers or cramped polling places; eight feet allows observers to see and hear without interfering with poll workers.

To be clear, the court does not condone harassment or intimidation by election observers, at any distance from registration or announcement tables. The state would be well served to impress upon municipal clerks and chief inspectors the importance of managing election observers. And those election officials must in turn exercise their authority to protect voters from unruly observers. As far as Act 177 is concerned, however, the state's justification for the act outweighs any burdens that it creates.

The court concludes that the challenged election observer provisions do not violate the First and Fourteenth Amendments.

#### **8. Eliminating straight-ticket voting**

Act 23, passed in 2011, eliminated straight-ticket voting: voters must now select individual candidates on their ballots. Plaintiffs contend that this burdens the right to vote, particularly for voters with lower levels of educational attainment.

The court finds that this provision creates only a slight burden on the right to vote, even among populations with lower levels of educational attainment or who have less time to spend voting.

The burdens that plaintiffs identify include longer lines at the polls (because voters must mark an entire ballot) and increased confusion and likelihood of mistakes. But there was limited evidence about whether the elimination of straight-ticket voting caused these burdens and, if so, to what extent. Dr. Lichtman wrote in his report that “[t]he elimination of straight-ticket voting in Act 23 also has an adverse impact on waiting time since it makes voting lengthier for those who would otherwise use this option.” PX036, at 44. Yet Dr. Lichtman did not identify evidence to support this assertion or indicate how much delay the elimination of straight-ticket voting actually caused. As for lay witnesses, plaintiffs elicited testimony that the lack of straight-ticket voting could confuse voters. *See, e.g.*, Tr. 1p, at 82:17-83:3. But the actual evidence of confusion involved voters who remembered having the option in the past and asking about whether it still existed. PX490, at 22-23. Beyond that, straight-ticket voting was mostly a convenience, and plaintiffs did not adduce evidence that the lack of straight-ticket voting deterred anyone from voting.

Defendants’ first justification for eliminating straight-ticket voting is that it was joining a national trend. As another district court recently explained, that argument does not get the state very far. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2016 WL 3922355, at \*8 (E.D. Mich. July 21, 2016) (“The fact that some other states do not allow straight party voting changes none of the facts that are before this Court. Furthermore, and more importantly, the behaviors of other states are *irrelevant* to the question of constitutionality. If the Ohio Legislature successfully instituted poll-taxes and literacy tests without challenge, it would not change the fact that poll-taxes and literacy tests are still clearly unconstitutional burdens on the right to vote.” (original emphasis)).

Defendants also argue that eliminating straight-ticket voting decreases the chance of a voter selecting a straight-ticket option and then voting for candidates on the rest of the ballot. This type of over-voting would invalidate some or all of a voter's choices. Wis. Stat. § 7.50(1)(b). Defendants did not introduce evidence that these types of problems were prevalent, although they seem no more or less likely than the confusion that some voters might experience after not seeing a straight-ticket option that they are used to. Nevertheless, defendants' justification is reasonable.

Finally, defendants argue that eliminating straight-ticket voting encourages voters to become more informed about candidates or issues, and it ensures that voters do not accidentally overlook items on a ballot. Defendants did not introduce evidence of how often these problems occur, but the danger is there: in elections with referenda or non-partisan races, a voter who uses a straight-ticket option could overlook some items on a ballot. Tr. 7p, at 20:8-21:23. This justification is reasonable.

The court concludes that the straight-ticket provision does not violate the First and Fourteenth Amendments.

#### **9. Prohibiting clerks from sending absentee ballots by fax or email**

Act 75, passed in 2011, prevents municipal clerks from faxing or emailing absentee ballots, except to military or overseas electors. Plaintiffs contend that this provision unjustifiably burdens voters who are traveling but who do not qualify as overseas electors.

The court finds that this provision places a moderate burden on voters who are traveling, particularly if they are outside of the country or in locations with unreliable mail delivery.

Before Act 75, some municipalities sent hundreds of ballots by fax or email. Tr. 1p, at 87:8-12; Tr. 2, at 332:11-22. Now, without the option for electronic ballots, absentee voters must rely on mail service. This is particularly problematic for students or researchers who are abroad in remote areas, but it also affects domestic travelers, especially for elections in which ballots are not finalized until close to election day. Tr. 2, at 329:8-332:10; Tr. 7a, at 144:25-145:23; PX491, at 6-9. In at least some cases, voters who cannot receive ballots by fax or email are simply unable to vote. Although voters are able to request their ballots by fax or email, that does them little good if the mailed ballot itself does not ever arrive, or if it arrives too late for a voter to return it in time to be counted.

Defendants justify the law by contending that faxing or emailing ballots requires significant time and energy from municipal clerks. They also contend that there is a higher chance of human error because clerks have to re-create electronically returned ballots in paper form on election day, and that this process invades the voter's privacy because those officials will see the voter's selections. And a voter who receives an electronic copy of a ballot could forward that ballot to other voters, who might incorrectly believe that they can vote with it. According to defendants' expert, Dr. Hood, these considerations supported the state's decision to do away with faxing and emailing ballots to most absentee voters. DX001, at 19. As to the specific instances in which voters have had difficulty with receiving or sending absentee ballots by mail, defendants contend that voters can overcome these difficulties with planning, and they observe that electronic methods for sending ballots may not be any more reliable than using mail.

Defendants' justifications are not persuasive. Wisconsin already requires municipal clerks to send ballots by fax or email to military voters and to voters who are permanently

overseas, which undercuts most of defendants' justifications. At trial, defendants principally relied on the testimony of two municipal clerks to defend this law. *See* Tr. 4p, at 141:12-142:25; Tr. 7a, at 116:11-118:8. These clerks testified that electronic ballots can create a little more work before and on election day. Defendants did not present evidence of widespread opposition to sending ballots by fax or email. Indeed, other election officials could not see reasons for eliminating the practice, or testified that it did not create significant logistical problems. Tr. 2, at 332:23-333:4 ("It took a few minutes to compile the email."), 333:15-17; PX435, at 48. From a practical perspective, the court simply does not credit the assertion that in the year 2016, printing a paper ballot and instructions, putting them into an envelope, and physically sending the envelope overseas is less burdensome on municipal clerks than compiling a PDF and sending an email. This is especially so because clerks are already sending ballots electronically to military and overseas electors.

Defendants also overstate their concerns about privacy, security, and errors. A voter who chooses to submit an absentee ballot electronically is voluntarily giving up some of the privacy that a mailed ballot would have. That is the voter's problem, not the state's problem: a voter who is concerned about privacy can simply avoid voting by fax or email. As for defendants' concern that voters may forward electronic copies of absentee ballots, they presented only one example of this occurring. There is no reason to think that it is a widespread problem. Even if it occurs regularly, a municipal clerk can correct the issue with an email to the voter who submitted a forwarded ballot. Finally, even crediting defendants' assertion that there is a higher *chance* for human error when re-creating an electronically received ballot in paper form, that chance is minimal because two election officials perform

the task together. Defendants did not adduce evidence that mistakes ever actually happened, or that they happen with any frequency.

If the challenges of sending and receiving electronic ballots are as severe as defendants make them out to be, then the state can make the practice optional instead of mandatory.<sup>22</sup> But the state's justifications for flatly prohibiting clerks from sending ballots by fax or email do not outweigh the moderate burdens that the challenged provision places on voters who are affected by it.

The court concludes that the provision prohibiting municipal clerks from sending absentee ballots by fax or email violates the First and Fourteenth Amendments.

#### **10. Limiting when clerks can return absentee ballots to voters**

Act 227, passed in 2012, prevents clerks from returning a received absentee ballot to a voter unless the ballot is damaged or has an incomplete certification. Plaintiffs contend that these provisions place undue burdens on voters with lower levels of educational attainment, who tend to be African Americans and Latinos.

The court finds that the provisions governing when clerks can return absentee ballots to voters place only a slight burden on the right to vote.

After Act 227, municipal clerks cannot return absentee ballots to voters to correct mistakes such as over-voting or improper marks. According to plaintiffs, minorities are more likely to make these kinds of mistakes because they have lower levels of educational attainment. PX036, at 9. Dr. Lichtman opined that “[t]his problem is especially acute for Wisconsin Hispanics. According to the US Census American Community Survey 2010, 3-Year Estimates, 33.2 percent of Hispanics in Wisconsin speak English ‘less than very well.’”

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<sup>22</sup> Before 2011, the statute was permissive, not mandatory.

*Id.* at 48. The court does not give these opinions much value because Dr. Lichtman did not link his conclusion to the voting context. He did not identify what percentage of minority voters would have difficulty understanding a ballot, nor did he explain whether (and why) absentee ballots would be a type of printed document that minority voters would struggle to understand. Likewise, plaintiffs have not directed the court to any evidence demonstrating that comprehension problems with absentee ballots actually occur. *See* Dkt. 207, at 67.

Defendants' justification for this provision is straightforward and persuasive. Election officials do not open absentee ballots until election day, when they feed the ballots through counting machines. Thus, the only time that clerks would see the types of mistakes that plaintiffs identify is when they are actually preparing to feed the ballots through the machines. At that point, it is too late to return the ballot to the voter. In contrast, the errors for which clerks are now allowed to return absentee ballots are visible without opening the ballot envelope: "a spoiled or damaged absentee ballot," Wis. Stat. § 6.86(5), and "an absentee ballot with an improperly completed certificate or with no certificate," *id.* § 6.87(9).

Beyond the procedural justification, defendants argue that permitting clerks to return ballots to correct "mistakes"—as plaintiffs want—leaves clerks without any real guidance. One clerk could determine that a voter made a mistake by not voting for each office on a ballot, while a different clerk could determine that the same voter apparently did not want to vote for each office. Preventing ambiguity and confusion serves the state's interest in running efficient and orderly elections.

The court concludes that the limits on when clerks can return absentee ballots to voters do not violate the First and Fourteenth Amendments.



## 11. The IDPP

Plaintiffs contend that the IDPP impermissibly burdens the right to vote. They seek to invalidate the process not only for the petitioners who are currently trapped within it, but also for future petitioners who use the IDPP to obtain a free ID for voting purposes.

The court finds that the IDPP imposes severe burdens on the right to vote.

At least 60 qualified electors—those whose petitions were denied—were disenfranchised for the 2016 spring primary in Wisconsin. There were also 36 people in “suspend” status who had not been issued IDs. There is no evidence that any of these people were not qualified electors. And as defendants’ expert, Dr. Hood, acknowledged, there are “undoubtedly” people who are discouraged from even entering the process because they lack the documents or think that it is too cumbersome. Tr. 7p, at 199:11-200:8.

Even petitioners who succeed in navigating the IDPP do so only after enduring severe burdens. Becky Beck, a CAFU research agent, indicated that once a petition gets to CAFU, it typically takes five separate contacts between the investigator and the petitioner to verify the petitioner’s identity, birthdate, and citizenship. Tr. 8p, at 159:12-16. CAFU’s Case Activity Reports document many instances in which petitioners are repeatedly sent to family members, hospitals, or schools to hunt for additional documentation, even when there is no doubt that the person is a qualified elector. Sometimes these petitioners succeed—but only after they have engaged in months of back-and-forth with CAFU—when the DMV finally determines, in its discretion, that the petitioner has made a strong enough case to warrant issuing an ID. Even when the effort is ultimately successful, the IDPP imposes burdens that far exceed those contemplated in *Crawford* and *Frank*.

Defendants invoke the same justifications that *Crawford* and *Frank* discuss. They contend that Wisconsin's voter ID law (which includes the IDPP) deters fraud, promotes public confidence in elections, and promotes the orderly administration of elections. These interests justify a voter ID law in general, but they do not justify the severe burdens that the IDPP imposes. The Seventh Circuit has anticipated that such burdens could pose constitutional problems for Wisconsin's voter ID law; it noted in *Frank* that:

*Milwaukee Branch of NAACP* and the regulations leave much to the discretion of the employees at the Department of Motor Vehicles who decide whether a given person has an adequate claim for assistance or dispensing with the need for a birth certificate. Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated.

768 F.3d at 747 n.1.

The evidence presented at trial confirms that the IDPP disenfranchises otherwise qualified voters. And even when confronted with lawsuits in two different federal courts, the state has utterly failed to devise a workable solution for getting these voters IDs. The state's most recent emergency rule allows the petitioners who are currently in the IDPP to vote in the November 2016 election. But there is no plan in place for after the petitioners' current receipts expire. Kicking the problem down the road does not alleviate the severe burdens that these petitioners must endure, nor does it prevent any future petitioners from suffering the same severe burdens. In short, many IDPP petitioners face insurmountable obstacles that serve no important interest because the government concedes that these petitioners are qualified electors. These justifications, such as they are, do not outweigh the burdens that the IDPP imposes.

The court concludes that the current version of the IDPP violates the First and Fourteenth Amendments.

## 12. Cumulative effect

Plaintiffs contend that the cumulative effect of the challenged provisions in this case imposes an undue burden on the right to vote. According to plaintiffs, even if individual provisions comport with the First and Fourteenth Amendments, the court must still consider the overall effect of Wisconsin's election system on voters, particularly on Democratic voters. To prove this aspect of their case, plaintiffs rely heavily on the "calculus of voting" theory that Dr. Burden explained in his expert report. PX037, at 4-5. Under this theory, a voter's likelihood of voting is essentially the result of a formula that reflects a cost-benefit analysis. A person will vote if his or her probability of determining the outcome of the election, multiplied by the net psychological benefit of seeing his or her preferred candidate win, is greater than the "cost" of voting (i.e., the effort needed to become informed, and the time and resources needed to register to vote and cast a ballot). *Id.*

Plaintiffs argue that Wisconsin has imposed a series of independently minor burdens that, collectively, increase the cost of voting enough to deter voters who tend to vote for Democrats. As explained above, plaintiffs did not present compelling statistical evidence of the deterrent effects that the challenged provisions have. But the nature of the challenged provisions, none of which facilitate voting or registration, makes it reasonable to infer that there will be some such effect. And as the Seventh Circuit recognized in *Frank*, "*any* procedural step filters out some potential voters." 768 F.3d at 749 (original emphasis). But a deterrent effect alone, especially one that is not reliably quantified, does not render the cumulative effect somehow unconstitutional.

The *Anderson-Burdick* framework requires the court to evaluate “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Burdick*, 504 U.S. at 434. This requirement is difficult in the context of “cumulative effects” because the state can have different justifications for different rules, each with varying levels of persuasiveness. Plaintiffs do not propose a legal framework for evaluating a “cumulative effects” claim under *Anderson-Burdick*. But even looking broadly at the laws that they challenge in this case, the court’s analysis of the individual provisions already addresses the problematic aspects of Wisconsin’s election system.

Take the challenged registration provisions: the court agrees that aspects of Wisconsin’s registration requirements burden the right to vote, particularly for voters who are more likely to move (which includes minority and younger voters, and thus, Democratic voters) and for voters who lack convenient access to documentary proof of residence (again, minority and younger voters, and thus, Democratic voters). But the state’s interests in preempting fraud, avoiding confusion, and ensuring that only qualified voters register to vote are compelling enough to justify at least some of the burdens that the challenged provisions collectively impose. Removing the restrictions on using dorm lists and reducing the durational residency requirement will ease the burdens of Wisconsin’s registration laws, at least to a degree that the state’s interests can justify.

Likewise, the principal problem with Wisconsin’s in-person absentee system is that it addresses inequality across municipalities by suppressing voting in larger cities rather than by enabling increased voting in smaller cities. Invalidating that approach not only addresses the burdens on in-person absentee voting, but it also alleviates burdens in other aspects of Wisconsin’s election system. A voter who is intimidated by election observers or who is

concerned about long lines at the polls because there is no straight-ticket voting, for example, may be able to vote in-person absentee and avoid those concerns altogether.

In short, although plaintiffs press a separate claim for the cumulative effects of the challenged provisions, the court concludes that they are entitled to no broader relief than the invalidation of the specific provisions that the court has identified as constitutionally infirm. A remedy directed at the diffuse cumulative effects of Wisconsin's election regime would invite, essentially, a rewrite of the state's election laws. That would be an unwarranted intervention by a federal court into an area reserved to the state legislature.

#### **F. Voting Rights Act claims**

Plaintiffs challenge the following provisions under § 2 of the Voting Rights Act: the reductions to in-person absentee voting; the one-location rule for in-person absentee voting; the elimination of corroboration; the requirement of documentary proof of residence; the elimination of statewide SRDs; the increased durational residency requirement; the zone for election observers; and the elimination of straight-ticket voting. Plaintiffs contend that these provisions disparately burden African Americans and Latinos.

Section 2 of the Voting Rights Act prohibits states and political subdivisions from implementing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Plaintiffs can establish a violation of § 2 by showing that, based on the totality of the circumstances, Wisconsin's election process is "not equally open to participation by members of a class of [protected] citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

*Id.* § 10301(b). Plaintiffs do not need to adduce proof of discriminatory intent to prevail on their Voting Rights Act claims. *Chisom v. Roemer*, 501 U.S. 380, 394-95 (1991).

Most case law applying § 2 of the Voting Rights Act pertains to so-called “vote dilution” claims, which generally involve gerrymandering. Plaintiffs in this case bring claims over voting and registration requirements, which are “vote denial” claims for which Voting Rights Act law is less developed. In *Frank*, the Seventh Circuit endorsed a two-step inquiry for reviewing vote-denial challenges to voting qualifications under the Voting Rights Act:

First, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Second, that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

768 F.3d at 754-55 (citations and internal quotation marks omitted). But the Seventh Circuit also cautioned that “§ 2(a) does not condemn a voting practice just because it has a disparate effect on minorities.” *Id.* at 753. “It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command.” *Id.* at 754. The court must therefore analyze whether plaintiffs have proven that: (1) the challenged provisions impose disparate burdens on African Americans and Latinos; and (2) under the totality of the circumstances, these burdens are linked to the state’s historical conditions of discrimination.

### **1. Disparate burdens**

Two threshold issues affect how the court evaluates plaintiffs’ evidence of disparate burdens. First, defendants contend that the Voting Rights Act requires plaintiffs to couch

their evidence in terms of a departure from an “objective benchmark,” rather than a departure from what Wisconsin’s laws used to be. Dkt. 206, at 114. The Supreme Court has indicated that a different baseline is part of what distinguishes § 2 claims from § 5 claims:

In § 5 preclearance proceedings—which uniquely deal only and specifically with *changes* in voting procedures—the baseline is the status quo that is proposed to be changed: If the change “abridges the right to vote” relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* “results in [an] abridgement of the right to vote” or “abridge[s] [the right to vote]” relative to what the right to vote *ought to be*, the status quo itself must be changed.

*Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (original emphasis).

But *Reno* and the other cases on which defendants rely are vote *dilution* cases; this is a vote *denial* case. The few other federal courts that have considered how to evaluate burdens in vote denial cases have determined that this distinction is important. Relying on the text of the Voting Rights Act, the Southern District of Ohio recently concluded that “the relevant benchmark is inherently built into § 2 claims and is whether members of the minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.” *Ohio Org. Collaborative*, 2016 WL 3248030, at \*39; *see also Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 556 (6th Cir. 2014) (“Section 2 vote denial claims inherently provide a clear, workable benchmark. . . . under the challenged law or practice, how do minorities fare in their ability ‘to participate in the political process’ *as compared to other groups of voters?*” (original emphasis) (quoting 42 U.S.C. § 1973(b), which has been transferred to 52 U.S.C. § 10301)), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The reasoning in these cases is

persuasive, and the court rejects defendants' argument that plaintiffs must identify an objective benchmark to prevail on their Voting Rights Act claims.

Part of determining whether minority voters have less opportunity to participate than other members of the electorate may involve comparing the challenged provisions with the laws that they replaced. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 241-42 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015); *Ohio Org. Collaborative*, 2016 WL 3248030, at \*40 (“[A]n analysis of whether a change in law results in a decreased opportunity of minorities to vote as compared to other voters is exactly the type of analysis required by § 2 claims.”). But that is not to say that a given provision would violate the Voting Rights Act just because it leaves minority voters worse off than a prior law. The appropriate inquiry at this first step is whether the challenged provision burdens minority voters more than other voters. *See Frank*, 768 F.3d at 753.

The second threshold issue concerns the type of evidence that the parties have presented to prove (or disprove) that African Americans and Latinos have suffered disparate burdens under the challenged provisions. Experts on both sides have presented extensive statistical evidence derived from election turnout data in Wisconsin over time. Given the information available about Wisconsin's elections, turnout rates may be the best that the parties can offer. But raw turnout statistics reveal very little about the disparate burdens that a state's election system imposes. For example, defendants tout the high turnout numbers for the April 2016 election—the first statewide election in which the voter ID law and other challenged provisions were in effect—as evidence that minorities are not suffering disparate burdens under Wisconsin's election laws. Tr. 1a, at 60:8-17. But turnout in a given election depends on many factors, ranging from which offices are on the ballot to the amount of



money spent on campaigning and the contentiousness of the races. The April 2016 Wisconsin involved unusually sharply contested primaries on both sides, which undoubtedly contributed to the higher-than-average turnout for an April election. Tr. 2, at 42:10-43:9. One cannot infer from the high overall turnout that Wisconsin's election laws have no impact, or that they have no differential impact on minorities.

That is not to say that turnout statistics are utterly useless. Plaintiffs' expert, Dr. Mayer, used the statewide voter database, correlated to a separate database of demographic and political information, to track several cohorts of voters across the 2010 and 2014 elections (i.e., before and after some of the challenged provisions went into effect). Both sides' experts agreed that comparing midterm elections, rather than presidential elections, made sense, because Barack Obama's presence on the ballot in 2008 and 2012 would likely skew minority turnout. And, although the usual constellation of factors affected voting in 2010 and 2014, a change in election law regime was one significant difference between those elections, and no one was aware of any other major factor likely to affect turnout. Dr. Mayer also opined that, based on survey research, in 2014 most voters believed that the voter ID law was in effect, even though it was actually still enjoined. Thus, Dr. Mayer was of the view that the 2014 election would be a good test of the impact of the laws challenged in this case.

Dr. Mayer used statistical regression analysis to isolate some of the variables that contribute to a voter's likelihood of voting. Based on this analysis, Dr. Mayer concluded that African Americans, Latinos, and those who lived in student wards, were slightly less likely to vote in the 2014 election than the average voter was. PX043, at 14 (updated Table 8). By contrast, in the 2010 election, African Americans and those in student wards were actually

*more* likely to have voted. For Latinos, the difference between 2010 and 2014 was small (though slightly in the opposite direction; they were slightly less likely to vote in 2010). Plaintiffs contend that Dr. Mayer's analysis shows that they challenged the provisions decreased likelihood that minorities will vote. These conclusions are in line with other national studies, which conclude that voter ID laws tend to suppress minority turnout at elections. *See* PX072.

Defendants' expert, Nolan McCarty, PhD, criticized Dr. Mayer's conclusions because Dr. Mayer does not account for "roll-off" in the statewide voter database. That database provides a "snapshot" in that it includes voting records only for those voters who are registered as of the date the report of the database is generated, which in Dr. Mayer's case was September 24, 2015. Thus the September 24, 2015 database does not include the voting records of any voter who was not registered as of that date, even though that voter might have been registered for the 2010 or 2014 elections. Dr. McCarty surmises that minority voters would have been more likely to rolloff, so that Dr. Mayer's turnout rates for 2010 were too high, and thus the difference between those rates and the 2014 rates would be smaller. DX005, at 9. Dr. Mayer response is that despite the roll-off effect, his conclusions are sound, because he finds the effect even among the cohort of committed voters (because they stayed registered from 2010 to 2015 without rolling off the database). The court finds that, despite Dr. McCarty's criticism, Dr. Mayer's regression analysis supports the conclusion that the probability of an African American voting, relative to an average voter, was less in 2014 than it was in 2010. The court finds that Dr. Mayer's conclusions about those who live in student wards are not informative, because his definition of those who live in student wards does not include only students. The bottom line is that Dr. Mayer's analysis lends some support to the

plaintiffs' claim that the challenged provisions tend to reduce African American voting by some modest amount. But nothing presented by either side demonstrated that the challenged laws had a striking impact on turnout overall or among any class of voters.

And even with the support of other empirical evidence, Dr. Mayer's conclusions, without more, are not enough to carry the day for plaintiffs. "It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command." *Frank*, 768 F.3d at 754. At the end of the day, turnout statistics report outcomes, not the burdens of the election regulations that might have influenced those outcomes. Thus, the court must look for specific evidence demonstrating that the challenged provisions fall disparately on minorities.

**a. Registration provisions**

Plaintiffs challenge three registration-related provisions under the Voting Rights Act: proof of residence, elimination of corroboration, and elimination of statewide SRDs. Plaintiffs contend that these provisions impose disparate burdens on minority voters, who are more likely to move than white voters are. The court accepts plaintiffs' expert evidence that minority populations are more transient. PX036, at 47. If those populations register at the same rate that white populations do, then they would need to complete registration more often. For minority voters who do not have convenient access to proof of residence, this requirement could be disparately burdensome, as could the elimination of corroboration.

Wisconsin's registration requirements apply to all voters, regardless of race. The fact that voters must register after they move does not itself impose a disparate burden. Instead, plaintiffs must demonstrate that it is categorically more difficult for African American or Latino voters to comply with the registration requirements, and that registering more often

therefore forces these populations to confront those difficulties more often. Plaintiffs have failed to make this showing.

Even acknowledging that minorities are more likely to lack driver licenses or state-issued IDs, those are only 2 of the 12 options for proving residence that Wis. Stat. § 6.34(3)(a) authorizes. Dr. Lichtman indicates that minorities are more likely to be unemployed, *id.* at 7-8, which could mean that they would lack access to paychecks. But that still leaves residential leases, utility bills, bank statements, and documents issued by any unit of government. Indeed, as discussed above, municipal clerks have devised a strategy for sending letters to voters and then letting them use those letters to register. *See, e.g.*, Tr. 1p, at 163-65; Tr. 2, at 301-02. Plaintiffs therefore cannot demonstrate that the documentary proof of residence requirement burdens minorities for purposes of § 2. *Cf. Frank*, 768 F.3d at 752-53 (“[P]ersons who rely on the waiver procedure still must apply for it, which means that on average black and Latino residents must file more paperwork than white residents. Although these findings document a disparate outcome, they do not show a ‘denial’ of anything by Wisconsin, as § 2(a) requires.”).

As for corroboration, plaintiffs’ evidence of a disparate burden substantially consists of anecdotes and lay observations. *See, e.g.*, Tr. 1p, at 78:7-20 (corroboration is useful to people who are transient or in poverty); Tr. 3a, at 88:15-20 (corroboration facilitates participation by homeless or marginally housed voters). This testimony does not establish a verifiable disparate effect. And although some voters have been unable to register at the polls because corroboration is no longer an option, plaintiffs do not identify a racial slant to this problem. In fact, Dr. Lichtman expressly acknowledged that statistics about the use of corroboration

by race are not available. PX036, at 40. This leaves plaintiffs unable to prove that the elimination of corroboration disparately prevents minorities from registering to vote.

In the abstract, African Americans and Latinos could have more difficulties presenting documentary proof of residence, particularly without corroboration. But plaintiffs have not actually *proven* that the challenged burdens disparately burden minorities. There is no persuasive evidence that minorities who want to register are systematically unable to comply with the requirement that they present proof of residence. The challenged provision violates the Voting Rights Act only if it gives “members of the protected class . . . less opportunity than other members of the electorate to participate in the political process.” *Frank*, 768 F.3d at 755 (citations and internal quotation marks omitted). Given the number of documents that voters can use to prove their residence, African American and Latino voters do not have “less opportunity” to participate in elections just because they are less likely to be able to use certain types of documents. *Cf. Ohio Org. Collaborative*, 2016 WL 3248030, at \*40 (prohibiting officials from sending unsolicited applications for absentee ballots does not create a burden for § 2 purposes).

Plaintiffs also argue that minority voters are more likely to register through SRDs at voter-registration drives than white voters are. But plaintiffs’ only citation for this proposition is a website. *See* Dkt. 207, at 204. Plaintiffs did not introduce the website as evidence at trial, and they do not direct the court to other evidence admitted at trial that supports this contention. The court therefore concludes that plaintiffs have failed to prove that the elimination of statewide SRDs has had a disparate effect on minorities.

The court concludes that the challenged provisions requiring documentary proof of residence, eliminating corroboration, and eliminating statewide SRDs do not disparately burden African Americans or Latinos.

**b. Durational residency provision**

In the context of plaintiffs' constitutional challenge, the court concluded that the increased durational residency requirement imposes disparate burdens on African Americans and Latinos. For substantially the same reasons, the court concludes that this provision also disparately burdens minorities for purposes of the plaintiffs' Voting Rights Act claims.

Wisconsin's minority populations are much more transient than its white population is, in terms of both moving into the state and moving within the state. PX036, at 47. Unlike the methods for proving residence, there is no flexibility in the durational residency requirement: a voter either satisfies the requirement or does not satisfy it. Voters who have not been in a municipality for at least 28 days must either return to their former municipalities (if they moved within Wisconsin) or be disenfranchised. Because African Americans and Latinos are also more likely to lack access to transportation and to have less flexible work schedules, traveling to another municipality is not always feasible. On top of these burdens, voters who first have to register in their former municipalities must complete the awkward process of certifying that they have "resided at the [former] residential address for at least 28 consecutive days immediately preceding this election, with no present intent to move." DX101, at 1.

The court concludes that the durational residency provision disparately burdens African Americans and Latinos.

**c. In-person absentee voting provisions**

In the context of plaintiffs' constitutional challenge, the court concluded that Wisconsin's in-person absentee voting provisions burden the right to vote, particularly for minority populations in larger municipalities. For substantially the same reasons, the court concludes that these provisions also disparately burden minorities for purposes of plaintiffs' Voting Rights Act claims.

Wisconsin's rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one location to cast a ballot, while voters in smaller municipalities will breeze through the process. And because most of Wisconsin's African American population lives in Milwaukee, the state's largest city, the in-person absentee voting provisions necessarily produce racially disparate burdens. Moreover, plaintiffs have demonstrated that minorities actually used the extended hours for in-person absentee voting that were available to them under the old laws. PX036, at 43.

The court concludes that the in-person absentee voting provisions disparately burden African Americans and Latinos.

**d. Election observer and straight-ticket voting provisions**

Plaintiffs contend that African Americans and Latinos are disparately affected by the state's rules governing where election observers can stand at polling places and by the state's elimination of straight-ticket voting.

Problems with election observers are more prevalent in high-minority areas like Milwaukee and Racine. But, as with plaintiffs' constitutional challenges to this provision, the problem for plaintiffs' Voting Rights Act claims is that municipal clerks and chief election

inspectors decide where observers stand, not the state. The individual decisions that election officials make may lead to increased harassment at certain polling places. But that is not the same as saying that the state has imposed a disparate burden on minorities just by defining a range in which to position observers.

Plaintiffs rely exclusively on anecdotal evidence to prove that observers intimidate or harass African Americans and Latino voters more often than white voters. This evidence is insufficient to prove a violation of the Voting Rights Act, and most of it is not directly relevant. Plaintiffs have not presented evidence—expert or otherwise—that minorities disparately suffer burdens when election observers stand close to them, or that the state’s zone for election observers leads election officials to place observers closer to voters in minority-heavy municipalities. Indeed, plaintiffs’ anecdotal evidence does not address the distances at which observers have caused problems, except to suggest that many observers were closer than three feet. That is not a result of Act 177—the state prohibited election officials from allowing observers to be closer than three feet. Thus, plaintiffs cannot attribute these problems to the state for purposes of proving a disparate burden.

This leaves plaintiffs’ evidence that problems are more prevalent in Milwaukee and Racine. These problems occurred under the GAB’s rule, not under the statute that replaced it, which undermines plaintiffs’ assertion that Act 177 disparately burdens minorities. But even inferring that problems are more common in these municipalities under the new rule, the burden that minorities experience still comes from election officials not using the authority that the state has given them to control election observers. Plaintiffs have not proven that the state has imposed a disparate burden on African Americans or Latinos by



giving election officials discretion to designate zones for election observers that are appropriate for their polling locations.

As for the elimination of straight-ticket voting, the court has already found that this provision imposes only slight burdens on the right to vote. For substantially similar reasons, the court concludes that the provision does not create a disparate burden for purposes of plaintiffs' Voting Rights Act claims. Again, plaintiffs' evidence is entirely anecdotal and mainly establishes only that African Americans and Latinos would prefer to use straight-ticket voting. The elimination of straight-ticket voting applies to all voters, regardless of race. Plaintiffs have failed to prove that this provision gives minorities less opportunity to vote than other voters.

The court concludes that the challenged provisions governing election observers and straight-ticket voting do not disparately burden African Americans or Latinos.

**e. The IDPP**

As explained above, the IDPP imposes a discriminatory burden on racial minority groups, meaning that their members have less opportunity than others do to participate in the political process. Plaintiffs have made a more than ample showing on this element.

The court concludes that the IDPP disparately burdens African Americans and Latinos.

**2. Caused by or linked to social and historical conditions**

The second step in analyzing a claim under the Voting Rights Act is to consider whether a discriminatory burden is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Frank*, 768 F.3d at 755. Having concluded that Wisconsin's durational residency

requirement, provisions for in-person absentee voting, and IDPP disparately burden African Americans and Latinos, the court now considers whether those burdens are linked to social and historical conditions of discrimination.

Plaintiffs contend that the court should apply the so-called *Gingles* factors to analyze their Voting Rights Act claims. The Supreme Court has endorsed these factors, at least in the context of vote dilution cases. *See Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986). But the Seventh Circuit has found them to be “unhelpful in voter-qualification cases,” *Frank*, 768 F.3d at 754, and so the court will not organize its analysis by factor. Nevertheless, the Voting Rights Act requires courts to examine “the totality of circumstances,” 52 U.S.C. § 10301(b), which essentially comprises the same inquiries that the *Gingles* factors address. Thus, plaintiffs’ evidence about Wisconsin’s history of discrimination and about the effects of past discrimination that minority groups suffer is relevant to their Voting Rights Act claims.

Wisconsin has a relatively scant history of state-sanctioned discrimination. When Wisconsin became a state in 1848, its constitution did not extend the right to vote to African Americans; they obtained that right after the measure was passed at a statewide election in 1849. But the effect of the election remained in doubt until 1866, when the Wisconsin Supreme Court clarified that African Americans had the right to vote. *See generally Gillespie v. Palmer*, 20 Wis. 544 (1866).

Other statewide policies (or lack thereof) have disparately affected minorities to some degree, even if they were not facially discriminatory. For example, from 1913 to 2006, only municipalities with more than 5,000 residents had to register voters. In other municipalities, voters did not have to register. According to Dr. Burden, the result of this practice was that “98% of blacks and 91% of Latinos lived in municipalities where registration was required. In

contrast, only 68% of whites lived in these municipalities.” PX037, at 11. Thus, until 2006, minorities in Wisconsin disproportionately faced more impediments to voting than white citizens faced.

Few municipalities outside of Milwaukee provide election-related materials in languages other than English, despite the fact that the GAB makes these forms available for clerks to use, and no other municipality provides ballots in Spanish. *Id.* Given the significant percentages of Spanish-speaking voters in municipalities across the state, *id.*; PX036, at 48, Wisconsin’s failure to address the issue is significant.

Plaintiffs’ other evidence of historical conditions of discrimination concerns Milwaukee. This makes sense, given that Milwaukee is home to most of the state’s minority population. Along with other large cities in the state, Milwaukee is where the disparate burdens that the challenged provisions impose are most prevalent. But under the Voting Rights Act, “units of government are responsible for their own discrimination but not for rectifying the effects of other persons’ discrimination.” *Frank*, 768 F.3d at 753. Thus, defendants have argued in this case that Milwaukee’s history of discrimination, which is technically not the state’s own discrimination, cannot give rise to liability under the Voting Rights Act.

Drawing such a rigid distinction for purposes of plaintiffs’ Voting Rights Act claims would undermine the purposes of the law. *See Chisom*, 501 U.S. at 403 (“Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting. . . . [T]he Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination.” (citations, internal quotation marks, and alterations omitted)). But even assuming that the Voting Rights Act does not

impose liability on the state for a municipality's discrimination—a questionable assumption—the act certainly prevents a state from enacting laws that interact with a municipality's history of discrimination to impose disparate burdens. *See Frank*, 768 F.3d at 754 (“We are not saying that, as long as blacks register and vote more frequently than whites, a state is entitled to make changes for the purpose of curtailing black voting. Far from it; that would clearly violate § 2 [of the Voting Rights Act].”).

Beginning with the in-person absentee provisions, there is evidence that the state legislature passed these laws, at least in part, to specifically address what it perceived to be a problem with larger municipalities, like Milwaukee. Legislators were concerned that these municipalities offered residents more opportunities to vote than smaller municipalities offered. For example, during a floor session in the state senate, proponents of limiting the window for in-person absentee voting specifically referred to nipping Milwaukee and Madison's practices “before too many other cities get on board.” PX022, at 6. Even if the state was not directly responsible for creating the socioeconomic disparities that exist in Milwaukee and other larger cities, the in-person absentee provisions impose burdens *because* of those disparities. For these reasons, the court concludes that evidence of discrimination in Milwaukee is relevant to the causation element of plaintiffs' Voting Rights Act claims.

During the 1960s and 1970s, Milwaukee experienced considerable white flight. Although the city's Common Council passed an open housing law, discriminatory housing practices continued to limit housing choices for African Americans, confining them to the inner city. PX037, at 12. Zoning regulations in the municipalities surrounding Milwaukee further reinforced the segregation. As a result, two-thirds of Wisconsin's African American

residents now live in Milwaukee, which remains one of the most segregated cities in the country. *Id.* at 13.

Coupled with segregated housing practices, Milwaukee has also had a difficult history with discrimination in education. In 1976—more than 20 years after *Brown v. Board of Education*—a federal judge concluded that Milwaukee’s schools were illegally segregated. *Amos v. Bd. of Sch. Dirs. of Milwaukee*, 408 F. Supp. 765 (E.D. Wis.), *aff’d sub nom.*, *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *vacated*, 433 U.S. 672 (1977). The case settled after going to the Supreme Court. But the results of educational inequality have persisted. In 2015, high school graduation rates in Wisconsin were 66 percent for blacks, 78 percent for Latinos, and 93 percent for whites.<sup>23</sup> PX037, at 16.

Most of the rest of plaintiffs’ expert evidence does not link to the disparate burdens that the in-person absentee provisions create. For example, Dr. Burden catalogs other instances of racial disparities in incarceration rates, income, and health. *Id.* at 15-18. Although this evidence is credible, it is only tangentially relevant to plaintiffs’ Voting Rights Act claims. Likewise, Dr. Burden’s analysis of other *Gingles* factors (i.e., racially polarized voting, race-based appeals in political campaigns, minority members elected to public office) does not bear directly on the disparate burdens that the court has found.

Disparities in housing, education, and employment, have left minority groups condensed into high-density urban areas, which makes them particularly vulnerable to Wisconsin’s rules for in-person absentee voting. With only one location for in-person absentee voting, voters must travel farther than they would otherwise have to travel if municipalities could establish more locations. And basic math confirms that one location in a

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<sup>23</sup> Although these are statewide statistics, the problem is likely just as prevalent in Milwaukee.

larger municipality will have to contend with a larger volume of voters than one location in a smaller municipality will have to confront. Lower levels of educational attainment and employment decrease the flexibility that minority populations will have to spend time waiting in line to vote in-person absentee, which makes the reduced hours problematic as well. The court therefore finds that the burdens that Wisconsin's in-person absentee provisions impose are linked to historical conditions of discrimination. These provisions are invalid under the Voting Rights Act.

As for durational residency, African Americans and Latinos will have to deal with this requirement more often than white voters will because they move more often. These populations are also more likely to lack access to transportation, meaning that if they do not satisfy the durational residency requirement, they will be less able to travel back to vote in their former municipalities. But plaintiffs have not persuasively explained how these burdens are linked to the historical conditions of discrimination described above. "Section 2(a) forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank*, 768 F.3d at 753. The court therefore finds that the burdens that Wisconsin's durational residency requirement imposes are not linked the historical conditions of discrimination. These provisions do not violate the Voting Rights Act.

Finally, based on the evidence adduced at trial, the court cannot conclude that the burdens that the IDPP imposes are linked to historical conditions of discrimination in Wisconsin. Most of the problems that petitioners have had with getting through the IDPP relate to their inability to provide vital records to the DMV or to CAFU. But those failures tend to result from historical conditions of discrimination in the petitioner's home state or

country. Under *Frank*, it is not clear that the Voting Rights Act authorizes the court to hold Wisconsin accountable for these conditions. See 768 F.3d at 753 (“The judge did not conclude that the state of Wisconsin has discriminated in any of these respects. That’s important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons’ discrimination.”). It would be up to the Seventh Circuit, not this court, to clarify the scope of the inquiry under § 2.

Plaintiffs contend that this is an excessively narrow reading of the Voting Rights Act, because it would allow Wisconsin to ignore rank discrimination by other states. They may be right, but the result appears to follow from *Frank*. Because the IDPP is manifestly unconstitutional under the *Anderson-Burdick* framework, the court will invalidate the IDPP regardless of its status under the Voting Rights Act.

#### **G. Fourteenth Amendment claims for disparate treatment of voters**

Plaintiffs initially challenged three of the provisions at issue under the Fourteenth Amendment, alleging that the legislature lacked a rational basis for: (1) implementing a 28-day durational residency requirement; (2) eliminating straight-ticket voting; and (3) excluding technical college, out-of-state, and other expired IDs as qualifying forms of voter ID. Dkt. 19, ¶¶ 164-69. The court dismissed the claims concerning Wisconsin’s durational residency requirement and straight-ticket voting. Dkt. 66, at 5-9. At summary judgment, plaintiffs dropped their challenge to excluding technical college IDs, and the court granted summary judgment to defendants on most of the rest of plaintiffs’ remaining rational basis claim. Dkt. 185, at 20-24. The court denied defendants’ motion for summary judgment with regard to plaintiffs’ challenge that the state lacked a rational basis for excluding expired college or university IDs from the list of qualifying forms of voter ID.

In their post-trial brief, plaintiffs purport to “continue to challenge the rational basis of excluding three forms of ID: 1) out-of-state driver’s licenses, 2) driving receipts issued under Wis. Stat. § 343.11, and 3) state ID card receipts.” Dkt. 207, at 128. Plaintiffs are free to pursue these issues on appeal, but the court has already entered summary judgment for defendants on these aspects of plaintiffs’ rational basis claims.

Plaintiffs also note that at summary judgment, the court “ruled that excluding expired college or university IDs lacked a rational basis.” *Id.* at 128 n.32. That is incorrect. In denying defendants’ motion, the court did not affirmatively conclude that the state lacked a rational basis for excluding expired college or university IDs. As the pertinent section of the summary judgment opinion stated: “[a]t this point, defendants have failed to identify a rational basis for the legislature’s decision to exclude expired student IDs. The court will deny this aspect of defendants’ motion for summary judgment.” Dkt. 185, at 24. The court essentially concluded that defendants’ proffered justifications for excluding expired student IDs were insufficient, and that defendants would have to do better at trial if they wanted to overcome plaintiffs’ rational basis challenge.

Ultimately, plaintiffs’ misreading of the summary judgment decision is immaterial because rational basis review focuses on the state’s justification for its actions, rather than on plaintiffs’ disagreement with those actions. “[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). The court will uphold the state’s decision to exclude expired college or university IDs if defendants identify “a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Id.* at 320. Defendants did not need to produce evidence at trial to support the rationality of the state’s decision, nor



are they limited to the justifications that the legislature had in mind at the time that it passed the challenged provisions—any rational justification for the laws will overcome an equal protection challenge. *Id.* at 320-21.

The state's approach to college and university IDs is somewhat inconsistent. The state purports to have given students the flexibility and convenience to choose how to verify their identities at the polls. In addition to the other forms of acceptable ID that are available to citizens generally, students have the unique option of using the IDs that they receive from their schools. But that option is not as convenient as it appears. College or university IDs are acceptable only if they expire within two years after issuance. Wis. Stat. § 5.02(6m)(f). The standard ID that the University of Wisconsin-Madison—the state's flagship university—issues does not comply with this requirement. Tr. 1p, at 173:2-174:18; Tr. 3a, at 44:13-21. Instead, UW-Madison offers a second, voting-specific ID to its students who want to use university-issued IDs to vote. Tr. 3a, at 45:15-46:19. Thus, in practice, the option to use a college or university ID does not provide much flexibility or convenience.

The state has also taken considerable pains to limit the use of college or university IDs to current students only. The three requirements in Wis. Stat. § 5.02(6m)(f) are redundant: (1) the ID card itself must be unexpired; (2) the card must have an expiration date that is no more than two years after its date of issuance; and (3) the voter must present proof of current enrollment. If each of these requirements provided some additional level of protection against former students using their IDs to vote, then those requirements might be rational. But as it stands, defendants have not explained why any requirement beyond proof of current enrollment is necessary to protect against fraudulent voting with a college or university ID.

Nevertheless, plaintiffs' rational basis claim challenges only the requirement that the ID card be unexpired when a voter presents it at the polls.

Defendants argue that it is rational to require voters to present unexpired college and university IDs because voters can use these IDs only in conjunction with proof of enrollment. *See Wis. Stat. § 5.02(6m)(f)*. According to defendants, the state reasonably has presumed that anyone with an expired ID is probably no longer enrolled at the issuing college or university. Thus, it makes no sense to allow a voter to use an expired college or university ID because that voter will not be able to also provide proof of enrollment. This is a circular argument. Worse, it is the exact argument that defendants presented at summary judgment. The court concluded that this argument was not persuasive for two reasons:

First, defendants apparently make no room for the possibility that a student could be enrolled at an institution but have an expired student ID. If incoming freshmen at four-year universities receive student IDs that expire two years after issuance, then any junior or senior who fails to obtain a new student ID would have to find a different way to prove his or her identity. Second, unlike receipts for driver licenses and ID cards, expired student IDs are not later replaced with entirely different documents. Defendants therefore cannot rely on the same arguments about simplifying elections by eliminating unnecessary duplicative forms of ID.

Dkt. 185, at 24. Repetition has not made defendants' argument any more persuasive.

At a macro level, the state's concern with ensuring that only current students vote with student IDs may be rational. But *Wis. Stat. § 5.02(6m)(f)* adequately addresses that concern by requiring a voter to present proof of enrollment with the student ID. Adding the requirement that a voter's college or university ID be unexpired does not provide any additional protection against fraudulent voting. If anything, this measure prevents otherwise qualified voters from voting simply because they have not renewed their IDs since beginning

school. Thus, even under an exceedingly deferential rational basis review, the state has failed to justify its disparate treatment of voters with expired IDs. The court concludes that requiring unexpired college or university IDs violates the Fourteenth Amendment.

To be clear, the court is not concluding that voters have carte blanche to use expired college or university IDs at the polls; they must still comply with the other requirements of Wis. Stat. § 5.02(6m)(f). Plaintiffs have not directed their rational basis challenge to the requirement that a voter with a college or university ID also present proof of enrollment at the issuing institution. Nor have plaintiffs challenged the rational basis for permitting only IDs that expire no more than two years after issuance.<sup>24</sup> These requirements still apply. The only thing that will change is that the ID card that a college or university student actually presents at the polls can be expired.

#### CONCLUSION AND REMEDIES

The court has identified several constitutional and statutory violations, and the court will grant declaratory and injunctive relief accordingly.

For the challenged provisions relating to in-person absentee voting, Wisconsin's statutes establishing a one-location rule, Wis. Stat. § 6.855-.86, violate the First and Fourteenth Amendments and § 2 of the Voting Rights Act. Likewise, the sections of Act 146 amending Wis. Stat. §§ 6.86(1)(b) to limit the days and times for in-person absentee voting violate the Fifteenth Amendment. These provisions, along with the sections of Act 23 that

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<sup>24</sup> Without the requirement that a voter present an unexpired college or university ID, it seems unnecessary to regulate the ID's expiration date. But that is outside the scope of plaintiffs' challenge, and so the court will leave it to the state to determine whether this provision is still necessary.

limit the hours for in-person absentee voting, also violate § 2 of the Voting Rights Act and the First and Fourteenth Amendments, except with regard to preventing municipal clerks from holding hours for in-person absentee voting on the Monday before an election.

For the challenged provisions relating to registering to vote, the sections of Act 23 amending Wis. Stat. § 6.34(3)(a)7. to require dorm lists to include proof of a student's citizenship violate the First and Fourteenth Amendments. Likewise, the sections of Act 23 amending Wis. Stat. §§ 6.02, .10(3), and .15 to increase the durational residency requirement from 10 days to 28 days violate the First and Fourteenth Amendments.

For the challenged provisions relating to election procedures, the sections of Act 75 amending Wis. Stat § 6.87(3)(d) to prohibit municipal clerks from emailing or faxing absentee ballots to voters violate the First and Fourteenth Amendments.

For the challenged provisions relating to voter ID, the statutes and administrative rules that create and govern the IDPP that voters can use to obtain free IDs for purposes of voting violate the First and Fourteenth Amendments.

Plaintiffs seek a permanent injunction. Dkt. 207, at 244. They must therefore demonstrate that: (1) they have succeeded on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm that Wisconsin will suffer if the injunction is granted; and (5) the injunction will not harm the public interest. *Old Republic Ins. Co. v. Emp'rs Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998). Based on the court's conclusion that several of the challenged provisions violate the Constitution or the Voting Rights Act, or both, the court finds that plaintiffs have made the requisite showing

and injunctive relief is appropriate. With the exception of the IDPP, the court will permanently enjoin defendants from enforcing the invalid provisions.

The IDPP does not require wholesale invalidation. As described in the introduction to this opinion, another federal court has already issued a preliminary injunction against enforcing the IDPP. That injunction imposes an affidavit-based solution, essentially allowing voters to sign a form instead of presenting an ID at the polls. Plaintiffs have not asked for that type of relief here, and the court will not grant it. Nothing would prevent the state from complying with both Judge Adelman's injunction and the one that this court will impose.

This court will require that the IDPP be reformed to satisfy two criteria. First, Wisconsin cannot make it unreasonably difficult for voters to obtain a free ID. Once a petitioner has submitted materials sufficient to initiate the IDPP, the DMV must promptly issue a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential. Second, the state must inform the general public that those who enter the IDPP will promptly receive a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential.

For further clarification: the credentials issued under this procedure need not be valid for any purpose other than voting; the court is not ordering the state to issue Wisconsin IDs to all those who enter the IDPP. But the credentials issued are not temporary: petitioners and the public must be informed that these credentials have a term equivalent to that of a driver license or Wisconsin ID, and that they will be valid for voting until they expire or are revoked for good cause. Good cause is shown if the petitioner is not a qualified elector; the failure to provide additional information or communication to the DMV is not good cause. The

receipts issued under the most recent Emergency Rule would meet these requirements, with the exception of the currently stated term of expiration.

## ORDER

IT IS ORDERED that:

1. The IDPP as implemented is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
2. 2013 Wis. Act 146 is unconstitutional under the Fifteenth Amendment to the United States Constitution;
3. The restriction limiting municipalities to one location for in-person absentee voting is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
4. The state-imposed limits on the time for in-person absentee voting, with the exception of the prohibition applicable to the Monday before election day, are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
5. The requirement that “dorm lists” to be used as proof of residence include citizenship information is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
6. The increase of the durational residency requirement from 10 days to 28 days is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
7. The prohibition on distributing absentee ballots by fax or email is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
8. The prohibition on using expired, but otherwise qualifying, student IDs is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
9. Plaintiffs’ request for a permanent injunction is GRANTED, and defendants are permanently enjoined from enforcing any of the provisions held unlawful in sections 1 through 8 of this ORDER;
10. Defendants, and their officers, agents, servants, employees, attorneys, and all those acting in active concert or participation with them, or having actual or implicit knowledge of this order, are further ORDERED to:

- a. Promptly issue a credential valid as a voting ID to any person who enters the IDPP or who has a petition pending;
  - b. Provide that any such credential has a term of expiration equivalent to that of a Wisconsin driver license or photo ID and will not be cancelled without cause;
  - c. Inform the general public that credentials valid for voting will be issued to persons who enter the IDPP;
  - d. Further reform the IDPP so that qualified electors will receive a credential valid for voting without undue burden, consistent with this opinion;
11. Provisions 10.a. through 10.d. are to be effectuated within 30 days so that they will be in place and available for voters well before the November 8, 2016, election.
12. The court retains jurisdiction to oversee compliance with the injunction;
13. The court intends this ruling to be immediately appealable; for the avoidance of doubt, the court grants permission to any party to file an interlocutory appeal if this order is not final for appeal purposes.

Entered July 29, 2016.

BY THE COURT:

/s/

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JAMES D. PETERSON  
District Judge

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

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

**Plaintiffs,**

**v.**

**NICHOL, *et al.*,**

**Defendants.**

**Civil Action No. 3:15-CV-324**

**EXPERT REPORT OF M.V. HOOD III**

I, M.V. Hood III, do hereby declare the following:



## **I. INTRODUCTION AND BACKGROUND**

My name is M.V. (Trey) Hood III, and I am a tenured professor at the University of Georgia with an appointment in the Department of Political Science. I also serve as the Director of Graduate Studies for the Department. I have been a faculty member at the University of Georgia since August of 1999. I am an expert in American politics, specifically in the areas of electoral politics, racial politics, election administration, and Southern politics. I teach courses on American politics, Southern politics, and research methods and have taught graduate seminars on the topics of election administration and Southern politics.

I have received research grants from the National Science Foundation and the Pew Charitable Trust. I have also published peer-reviewed journal articles specifically in the areas of election administration, early voting, and voter ID. My academic publications are detailed in a copy of my vita that is attached to the end of this document. Currently, I serve on the editorial boards for *Social Science Quarterly* and *Election Law Journal*. The latter is a peer-reviewed academic journal focused on the area of election administration.

During the preceding four years, I have offered expert testimony in ten cases, *State of Florida v. United States* (No. 11-1428, D.D.C.), *NAACP v. Walker* (11-CV-5492, Dane County Circuit Court), *Jones v. Deininger* (12-CV-00185-LA, E.D.Wis.), *Frank v. Walker* (2:11-CV-01128-LA, E.D.Wis.), *South Carolina v. United States* (12-203, D.D.C), *Rios-Andino v. Orange County* (6:12-cv-1188-Orl-22KRS), *Veasey v. Perry* (2:13-cv-193, NGR), *United States v. North Carolina* (1:13-CV-861), *Bethune-Hill v. Virginia State Board of Elections* (3:14-cv-00852-REP-GBL-BMK), and *The Ohio Democratic Party v. Husted* (2:15-cv-1802). In assisting the defendants in analyzing Wisconsin's voting laws, I am receiving \$300 an hour for this work and \$300 an hour for any testimony associated with this work. In reaching my conclusions, I have drawn on my training, experience, and knowledge as a social scientist who has specifically conducted research in the areas under examination in this expert report.

## **II. SCOPE AND OVERVIEW**

I have been asked by counsel for the State of Wisconsin to respond to challenges plaintiffs have brought against various aspects of Wisconsin's election system. Section III provides a description for the process of voting in Wisconsin and Section IV follows with a description of the general election climate in the state. Section V examines issues related to the in-person absentee voting system and Section VI specifically analyzes changes to the state's by-mail voting procedures. This is followed by Section VII that examines voter registration and residency requirements. Section VIII covers the voter identification component of Act 23. The remaining sections of this report are devoted to specific points of rebuttal to the plaintiffs' experts: Professor Burden (X), Professor Mayer (XI), Professor Lichtman (XII), and Professor Minnite (XII). The final section of my report (XIII) provides a synopsis of my overall conclusions in this case.

### **III. THE PROCESS OF VOTING IN WISCONSIN**

Elections are administered by Wisconsin's 1,853 municipal clerks. Voters in Wisconsin can choose one of three methods for casting a ballot: in-person absentee, absentee by mail, or at the polling place on election-day. Beginning in 2000 Wisconsin implemented what is termed *no-excuse* absentee balloting (either in-person or through the mail).<sup>1</sup> In addition, qualified citizens have the option to register (or change their registration) during the in-person absentee voting period or on election-day. Wisconsin has then what is termed SDR (same-day registration during the in-person absentee period) and EDR (registration on election-day).

In Wisconsin in-person absentee voting and absentee voting by mail are both considered forms of absentee voting, distinct from other forms of early in-person voting. Either method in Wisconsin, therefore, requires voters to fill out an absentee ballot application. Upon receiving and completing their ballot it must then be placed in an absentee ballot envelope which must be signed by the voter and witnessed. These absentee ballots are then stored by the municipal clerk in a secure location until they are transported to the location where ballots will be tabulated on election-day. This form of voting is distinct from some states where early in-person voting does not require the steps normally associated with absentee balloting and where the voter's ballot would be completed and cast at the same time (e.g. a voter casting a ballot on a DRE machine during the early voting period).<sup>2</sup>

#### *Comparing Wisconsin's Election Context to Other States*

How does the election environment in Wisconsin compare to that in other states? First, in terms of states that offer some form of early in-person voting Wisconsin joins thirty-five other states and the District of Columbia.<sup>3</sup> Conversely, 15 other states offer no form of in-person, no-excuse absentee/early balloting.<sup>4</sup> Table 1 below details information collected on states (and the District of Columbia) that allow same-day and/or election-day registration.<sup>5</sup> Three states currently offer, or will be offering in the future the same-day registration option. Five states and the District of Columbia offer election-day registration. Seven states offer both same-day and election-day registration. In the future, two additional states, California and Hawaii, will also fall into this category. Eighteen percent of states, including Wisconsin, offer (or will offer) both the SDR and EDR option to citizens. Two-thirds of states (65%) do not offer SDR, EDR, or a combination of the two. Offering both SDR and EDR, therefore, places Wisconsin within a fairly small minority of states.

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<sup>1</sup>See 1999 Wisconsin Act 182 which amended Wisconsin Statute § 6.85.

<sup>2</sup>*An Examination of Early Voting in Wisconsin*. Wisconsin Government Accountability Board Report. January 2010.

<sup>3</sup>In this section the term *in-person early voting* includes any state that offers any form of no-excuse, in-person absentee voting.

<sup>4</sup>I conducted an in-depth analysis of this question in a previous expert report. For reference see Declaration of M.V. Hood III. *The Ohio Democratic Party v. Husted* (2:15-cv-1802). September 18, 2015. Pages 17-19.

<sup>5</sup>Source: *The Book of the States*, Table 6.6 (<http://knowledgecenter.csg.org/kc/category/content-type/bos-2015>).

Table 1. States Categorized by the Presence of Same and Election-Day Registration

Same-Day Registration	Election-Day Registration	Both
<u>MD</u> , IL, VT [2,3]	DC, CT, IA, ID, NH, RI [6]	<u>CA</u> , CO, <u>HI</u> , ME, MN, MT, ND, <u>WI</u> , WY [7,9]

Note: Underlined states have yet to implement the specified change.

In terms of the types of voting and registration options available, Wisconsin’s citizens have an expansive set of options, especially when compared to other states. For example, neighboring state Michigan offers electors no early in-person voting and, as a consequence, there is also no SDR option available. Michigan voters cannot register on election-day, instead they must be registered 30-days prior to the date of the general election. Absentee balloting is available, but these voters must have an excuse. As a consequence, most voters in Michigan must cast their ballot in-person at their polling place from 7:00 am to 8:00 pm on election-day. Compared to Wisconsin, the electoral environment for Michigan voters is extremely limited.

In regard to the basic structure of Wisconsin’s electoral system I think it is critical to note that nothing has changed. Voters can still cast an absentee ballot, without excuse, in-person or through the mail. For citizens who need to register the same-day and election-day options are still available. Balloting at one’s polling place on election-day remains a choice for casting a ballot as well.

Two of the plaintiff’s experts, Professors Burden and Mayer, have published research comparing the electoral environment of the states in regard to voter turnout.<sup>6</sup> A synopsis of their findings is as follows: *despite being a popular election reform, early voting depresses net voter turnout. The only consistent way to increase turnout is to permit Election Day registration....The depressant effect [of early voting] is only partially offset if SDR is present or if EDR offers a vehicle for the last-minute mobilization of marginal voters. This result upends the conventional view that anything that makes voting easier will raise turnout.*<sup>7</sup> States offering an early in-person voting option alone, therefore, will have lower relative levels of voter turnout. Only election-day registration or a combination of same-day registration and election-day registration offers the possibility of counteracting the negative effect on turnout produced by early voting. As documented, Wisconsin offers both SDR and EDR and these provisions will continue to remain in place. According to the research referenced here, Wisconsin’s electoral environment is already configured in such a way as to ensure maximum turnout.

<sup>6</sup>Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2014. “Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform.” *American Journal of Political Science* 58(1): 95-109.

<sup>7</sup>Burden et al. (2014: 108).

#### **IV. THE ELECTION CLIMATE IN WISCONSIN**

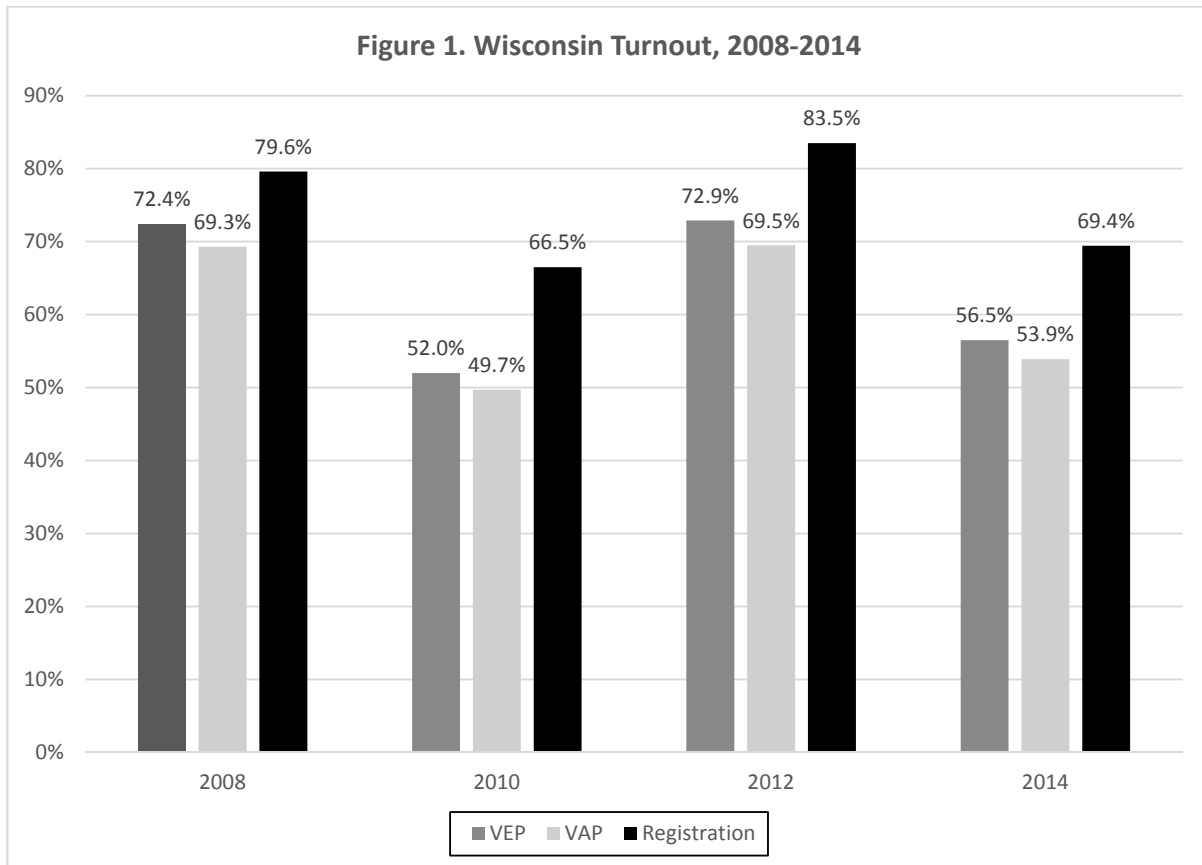
In this section I will examine Wisconsin's recent electoral history and make a number of comparisons to other states as well. One place to begin would be to examine voter turnout in Wisconsin over the past four federal election cycles, from 2008 to 2014. There are different methods for gauging turnout. One way is to use the population of eligible voters as the denominator. Examining turnout as a percentage of the voting eligible population also allows for comparisons to be made between Wisconsin and other states. Turnout results for Wisconsin are located in Figure 1 below. Comparing midterm elections to other midterms, turnout increased 4.5-points from 2010 to 2014. For presidential elections turnout rose by 0.5% from 2008 to 2012. Across the election cycles that saw the implementation of many of the election provisions under challenge in this case, turnout actually increased. Compared to other states and the District of Columbia, Wisconsin's turnout rate in 2008 placed it second, seventh in 2010, second in 2012, and again second in 2014. For the post-implementation presidential and midterm election-cycles Wisconsin's turnout rate was second to only one other state.<sup>8</sup>

Using the voting age population as the denominator a similar patterns emerges. Across presidential election-cycles turnout increases by 0.2% from 2008 to 2012. Comparing midterm elections turnout increased 4.2 points, from 49.7% in 2010 to 53.9% in 2014. Finally, using registered voters as the denominator one may note that turnout increased across both presidential and mid-term cycles. From 2008 to 2012 turnout among registered voters increased 3.9-points and from 2010 to 2014 by 2.9-points.<sup>9</sup>

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<sup>8</sup>Source for voting eligible turnout, voting age turnout, and state comparisons: United States Election Project ([www.electproject.org/home/voter-turnout/voter-turnout-data](http://www.electproject.org/home/voter-turnout/voter-turnout-data)).

<sup>9</sup>Registration figures reported in GAB-190 documents reflect both new registrations and registration changes. As such, these figures do not represent the actual pool of registrants available to vote in a specific election. Registration numbers are therefore derived from the figures reported following the election in question. For example, the January 2015 registration figure is used for calculations involving the 2014 midterm election. Source: Wisconsin Government Accountability Board (<http://www.gab.wi.gov/publications/statistics/registration>).



Whether one examines turnout using the voting age population, voting eligible population, or the pool of registrants, the same pattern emerges. Across the election cycles (2012 and 2014) in which the challenged provisions were implemented, voter turnout in Wisconsin increased. Second, comparing turnout among the fifty states and the District of Columbia one finds that in 2012 and 2014 Wisconsin had the second highest turnout rate. These two facts alone should give some pause to the claims made by the plaintiffs that the election changes undertaken by the state will depress turnout in the 2016 presidential election. The challenged provisions have already been implemented and a very straightforward before and after examination of turnout rates fails to demonstrate any adverse consequences. In the next section I will continue my examination by analyzing the potential impact in relation to in-person absentee voting in Wisconsin.

## **V. IN-PERSON ABSENTEE VOTING IN WISCONSIN**

### **A. Changes to In-Person Absentee Voting in Wisconsin**

At issue in this case are a number of provisions related to in-person absentee voting in Wisconsin. Prior to 2011, in-person absentee voting could begin when ballots were made available to municipal clerks. As defined in statutory law, ballots were to be made available 30

days prior to the date of a general election.<sup>10</sup> Although in-person absentee voting could, therefore, technically start 30 days prior to the date of an election it should be noted that this was not mandated in statute. The start time for in-person absentee voting varied between municipalities, as did the hours offered which were typically based on the office hours for the municipal clerk. As such, prior to the 2012 election-cycle there was little in the way of uniformity for in-person absentee days and times across municipalities.

Following the passage of Act 23 in 2011, the in-person absentee voting period was shortened to two weeks. More specifically, the in-person absentee voting period started the third Monday before the election and ended the Friday before election-day.<sup>11</sup> In 2013, Act 146 eliminated in-person absentee voting on weekends and set the hour-range that municipalities could offer in-person absentee voting during the week from 8:00 a.m. to 7:00 p.m.<sup>12</sup> Following implementation of Act 146 municipalities can now offer a maximum of 110 hours of in-person absentee voting. Through these statutory changes the State of Wisconsin has established uniform day and hour limits for in-person absentee voting throughout municipalities in the state.

In order to better illustrate the changes to in-person absentee voting and because some factors may still vary slightly between voting units I will use Wisconsin's largest municipality, the City of Milwaukee, as an example. Table 2 below details in-person absentee voting for the City of Milwaukee from 2008 through 2014 for a number of different factors. In 2008 the in-person absentee voting period was 200 hours over a 17-day period and included weekends and after-business hours. In 2010 the in-person absentee period was increased by four days to 21. The number of available hours was 164 and included one Saturday, but no after-business hours during the week. With the implementation of Act 23 prior to the 2012 general, Milwaukee's in-person absentee voting period spanned a total of 121 hours over 12 days. During the 2012 cycle there was one weekend available (Saturday and Sunday) along with extended hours during weekdays. Act 146, put in place prior to the 2014 general, cut the in-person absentee period to 110 hours over a 10-day period. Act 146 eliminated weekend days from the in-person absentee period, however, the City of Milwaukee did maintain extended hours until 7:00 pm during the week. Again, I am using the City of Milwaukee as an example because the information necessary to reconstruct the specific days and times for each election was available.<sup>13</sup>

It should be noted that before 2014 the days and times offered by municipality varied considerably. Acts 23 and 146 have reduced the differences across municipalities considerably to create uniform dates for beginning and ending the 10-day in-person absentee weekday period. Within these parameters municipal clerks are allowed to offer extended hours beginning at 8:00 am and ending at 7:00 pm Monday through Friday.<sup>14</sup>

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<sup>10</sup>On this point see Wisconsin Statutes § 7.10(3) and 7.15(1)(cm).

<sup>11</sup>See 2011 Wisconsin Act 23. Enacted: May 25, 2011. Act 23 amended Wisconsin Statute § 6.86 (1)(b).

<sup>12</sup>Municipalities can choose to offer fewer hours than the eleven-hour daily maximum. See 2013 Wisconsin Act 146 2013. Enacted: March 27, 2014. Act 146 amended Wisconsin Statute § 6.86 (1)(b).

<sup>13</sup>Information for the 2010, 2012, and 2014 election-cycles for Milwaukee from Type-E Notices. Information for the 2008 election from the Wisconsin GAB.

<sup>14</sup>See 2011 Wisconsin Act 23. Enacted: May 25, 2011. Act 23 amended Wisconsin Statute § 6.86 (1)(b).

There are advantages to a uniform schedule for in-person absentee voting in Wisconsin. Uniformity helps to ensure first and foremost that every registrant has the same opportunity, regardless of the municipality in which they reside, to vote in-person absentee. In addition, misunderstandings among voters concerning exactly when they can vote in-person absentee should be greatly diminished. The fact that all of Wisconsin’s municipalities have standardized days for in-person absentee voting would allow the GAB to produce public service messages that could be used to blanket the state.

Table 2. In-Person Absentee Voting Characteristics, City of Milwaukee, 2008-2014

Election	Start	Stop	Hours	Weekends Permitted	Days Available	Total Hours
2008 General	10/13	11/3	8:00 am-8: pm, M-F; 9:00 am-5:00 pm, Sat.	Yes	17 days	200
2010 General	10/5	11/1	8:30 am-4:30 pm, M-F; 8:30 am-12:30 pm, Sat.	Yes	21 days	164
→Act 23						
2012 General	10/22	11/2	8:30 am-7:00 pm, M-F; 9:00 am-5:00 pm, S-S	Yes	12 days	121
→Act 146						
2014 General	10/20	10/31	8:00 am-7:00 pm, M-F	No	10 days	110

## B. Analysis of In-Person Absentee Voting in Wisconsin

### *In-Person Absentee Turnout in Wisconsin*

In this section of my report I will compare in-person absentee voting turnout rates for general election cycles for which data are available. I was able to collect complete data for the 2010, 2012, and 2014 general elections.<sup>15</sup> The Government Accountability Board estimated in-person absentee turnout for the 2008 general election.<sup>16</sup> Prior to 2008 there are no statistics (or estimates) by which to study in-person absentee usage in Wisconsin.

None of the changes under challenge by the plaintiffs related to in-person absentee voting were implemented prior to the 2012 general election. Two elections, the 2010 midterm and the 2008 presidential are available to study in-person absentee usage prior to the alterations under

<sup>15</sup>Data for early in-person voting come from the 2010, 2012, and 2014 GAB-190 Election Voting and Registration Statistics Reports. Available at: <http://www.gab.wi.gov/elections-voting/statistics>.

<sup>16</sup>The GAB estimated that between 64% and 75% of absentee ballots in the 2008 general election were cast in-person. For the estimate of in-person absentee voting in 2008 I use the top-end estimate of 75% (which equates to 475,649 in-person absentee votes). Source: “An Examination of Early Voting in Wisconsin, An In-Depth Review and Analysis.” Wisconsin Government Accountability Board.” (<http://elections.state.wi.us/docview.asp?docid=16760>). Note also that the 2008 early in-person figures for the Cities of Milwaukee and Madison found in Figures 4 and 5 are not estimates.

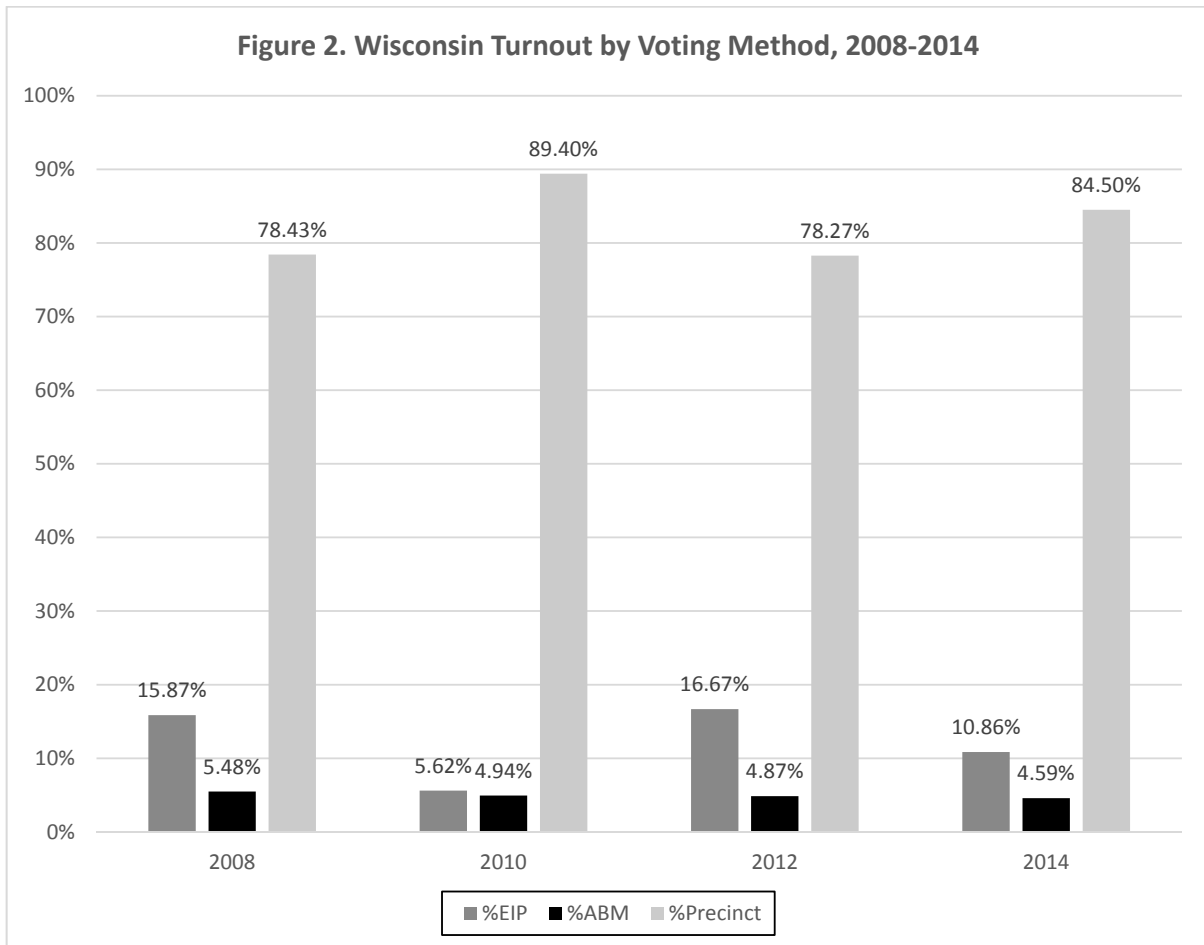


challenge. Two companion elections, the 2014 midterm and the 2012 presidential occurred following changes to Wisconsin's statutes involving in-person absentee voting. As in other states, turnout for midterm (off-year) elections in Wisconsin demonstrate an entirely different pattern from presidential election years. As such, the most apt comparison points are to analyze in-person absentee turnout for the 2008 and 2012 presidential elections and the 2010 and 2014 midterm elections. Comparing the 2014 midterm to the 2010 midterm actually provides the most stringent test of any potential negative effects as the provisions of both Act 23 and Act 146 were fully implemented in the 2014 election-cycle.

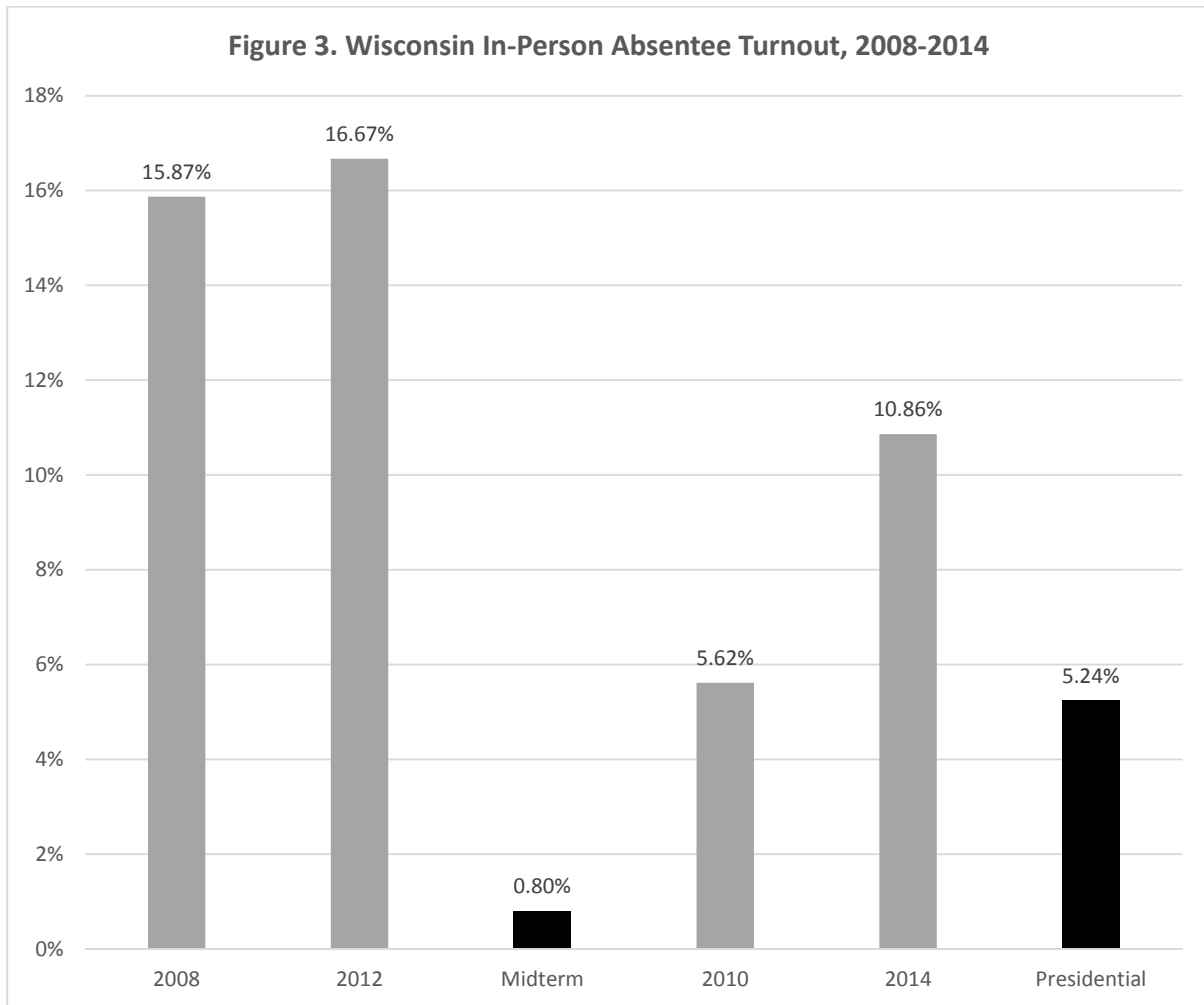
Figure 2 examines voter turnout in Wisconsin by voting method: in-person absentee; absentee by mail; or at the polling place on election-day.<sup>17</sup> From the figure one may note the overwhelming majority of Wisconsin voters cast a ballot at their polling place on election-day. For presidential elections this figure is just below 80% and for midterm elections the comparable figure is between 85% and 90%. The second most prevalent method is in-person absentee voting which is used at slightly higher rates during presidential election cycles as compared to midterm elections. Of the years available for analysis, in-person absentee turnout ranges from 5.6% in 2010 to 16.7% in 2012. Finally, in any given general election-cycle an average of 5.0% of Wisconsin's electorate will vote absentee by mail.

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<sup>17</sup>Note: Figures do not sum to 100% because the small number of military and overseas absentee by mail ballots are not shown.



The next figure (Figure 3) provides a closer examination of in-person absentee turnout in Wisconsin from 2008 to 2014. Presidential elections and mid-term elections are grouped together for comparison. EIP turnout was 15.87% in 2008 and 16.67% in 2012, producing an increase of 0.80-points. In the 2010 midterm 5.62% of total turnout was comprised of in-person absentee voting, as compared to 10.86% in 2014. From 2010 to 2014 in-person absentee turnout almost doubled, increasing 5.24-points. Again, the mid-term election cycle comparison provides the best test of any detrimental effects on in-person absentee turnout given both the shortened voting period and elimination of weekend days were in place in 2014, but not 2010. The results of this straightforward test indicate that across a presidential election-cycle that saw a shortened in-person absentee voting period and again across a midterm election-cycle which saw both a shortened period and the elimination of weekend days, the in-person absentee turnout rate did not decrease.



I also provide some additional data from Wisconsin’s two largest municipalities, the Cities of Milwaukee and Madison. Figure 4 tracks in-person absentee turnout for the City of Milwaukee from 2008 through 2014. Across the two presidential election cycles in-person absentee turnout for the City of Milwaukee increased by 0.9-points, from 11.6% to 12.6%. Looking back at Table 2 we can compare the in-person absentee periods in Milwaukee across these two election cycles. From 2008 to 2012 the number of hours available during the in-person absentee period decreased by 40%, from 200 total to 121, and the voting period in terms of days was diminished by 29%, from 17 to 12. In-person absentee turnout across the two midterm elections examined, at over 5-points, is even more pronounced. Again, the 2014 election-cycle should offer an even more stringent examination of altering the in-person absentee voting period. In 2014 there were no weekend days available in Milwaukee to vote in-person absentee and the total number of hours and days available had also been constricted. Comparing the 2014 election-cycle to the 2010 election-cycle there were a 11 fewer days (52% less) and 54 fewer hours (33% less) available during the in-person absentee voting period. Despite a shorter in-person absentee voting period, fewer days and hours available to vote early, and the elimination of weekends from the voting

calendar, the rate of in-person absentee voting in the City of Milwaukee actually increased presidential election to presidential election and midterm to midterm.

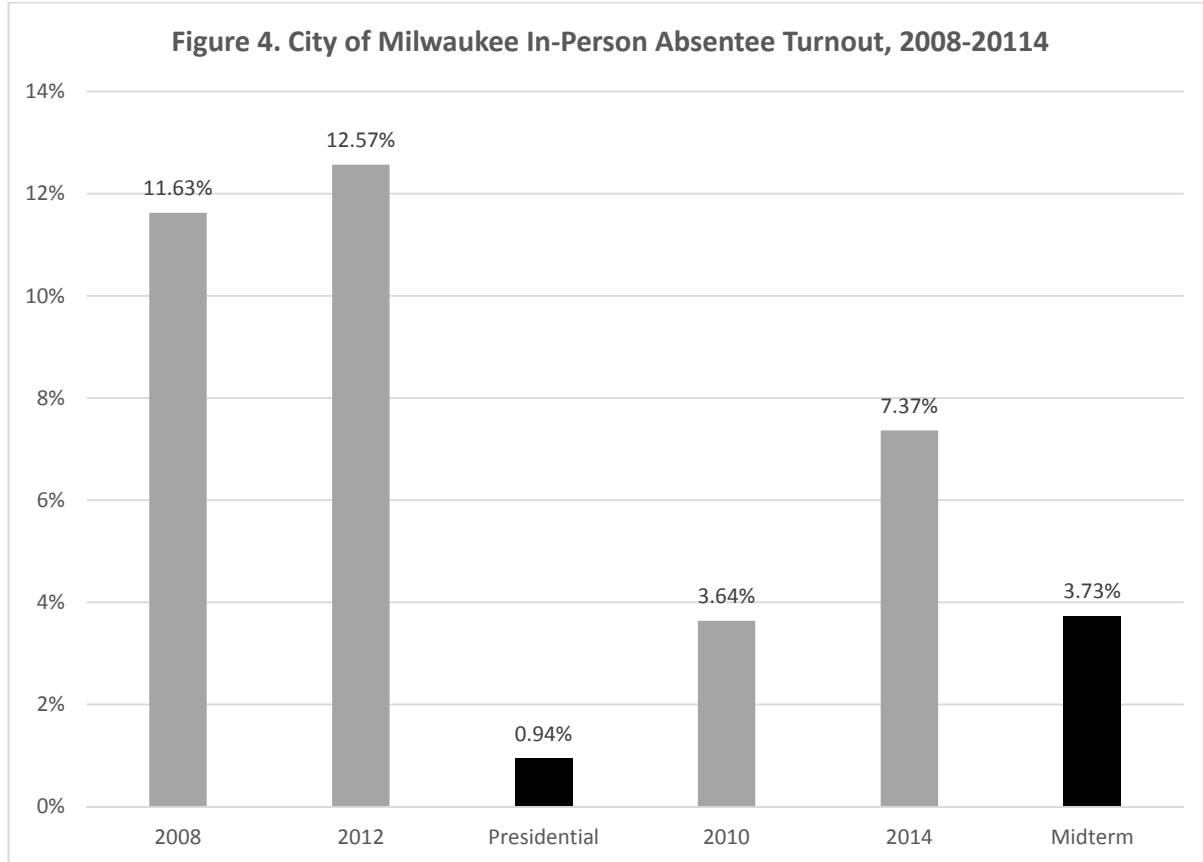
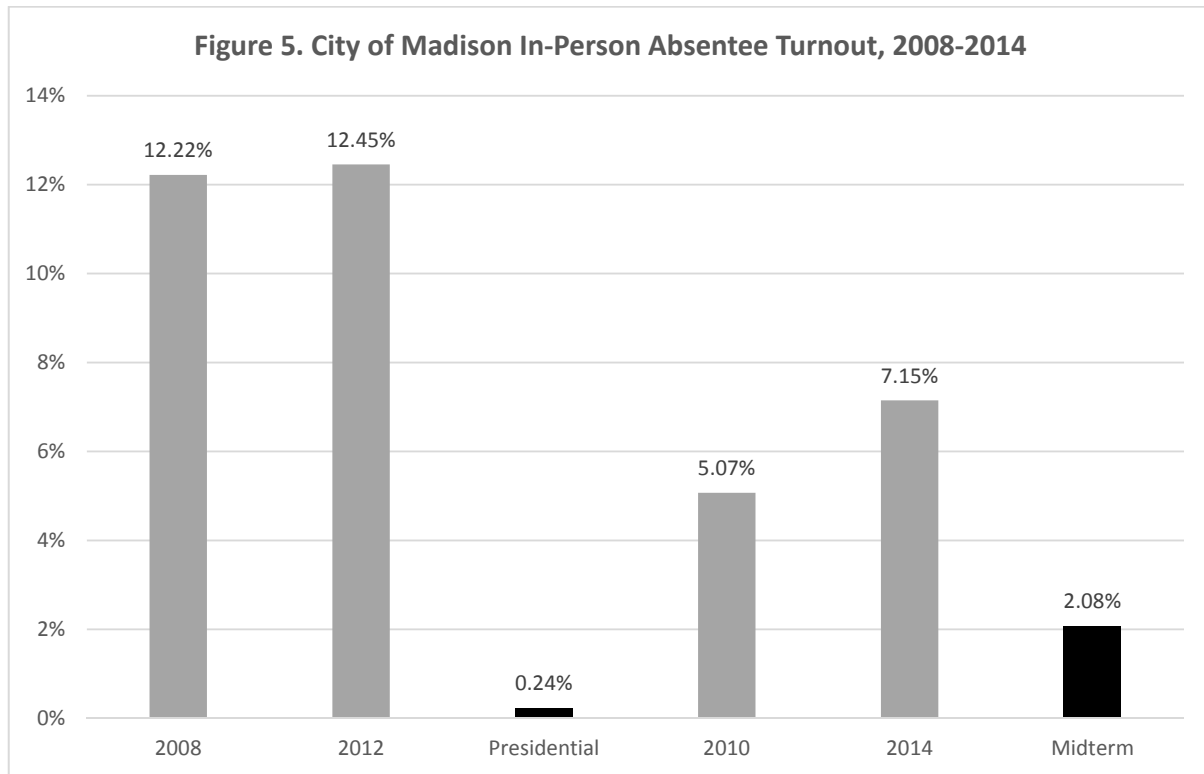


Figure 5 documents a similar pattern for Wisconsin's second largest municipality, the City of Madison. Across the two presidential elections analyzed, in-person absentee turnout increased one-quarter of a percentage point, from 12.2% to 12.5%. In-person absentee turnout in the 2010 midterm, at 5.1%, increased just over two-points in 2014 to 7.2%. Again, as in the City of Milwaukee and the state at large, in-person absentee turnout for the City of Madison increased over the election cycles that saw reductions in the number of days and hours available. In summary, the in-depth analysis of in-person absentee turnout in Wisconsin from 2008 to 2014 fails to produce any deleterious results relating to the changes implemented by Acts 23 or 146.



*In-Person Absentee Voting Sites*

Under the current election code each municipality in Wisconsin is allowed to operate one in-person absentee voting site. Typically, this site is analogous to the municipal clerk’s office. In 2005 legislation was passed that allowed municipalities to establish an alternative site for in-person absentee voting.<sup>18</sup> Municipalities, however, may not offer more than one in-person absentee voting site. As with days and hours Wisconsin has also established uniformity in regard to the number of in-person absentee sites throughout the state.

Another state in the Great Lakes region, Ohio, is likewise uniform on this metric. In Ohio, however, in-person absentee voting is administered at the county-level. Therefore, there are a total of 88 in-person absentee voting sites in Ohio, compared with 1,853 sites in Wisconsin. Wisconsin has more than twenty-one times the number of in-person absentee voting sites as does Ohio. Ohio also has a larger population base as compared to Wisconsin. Using figures on the registrant population in Ohio and Wisconsin from the 2014 general, the ratio of registrants to in-person absentee sites in Ohio is 1:88,048.<sup>19</sup> In Wisconsin, the ratio is 1:1,883.<sup>20</sup>

*Response to Professor Burden’s Opinion on Uniform In-Person Absentee Sites*

Professor Burden’s expert report says little about the issue of in-person absentee sites. In fact, he devotes just one paragraph to this topic and conducts no analysis of his own. Professor Burden

<sup>18</sup>See 2005 Wisconsin Act 451 which added § 6.855 to the election code.

<sup>19</sup>Calculated as: 7,748,201 / 88. Data on registrants found at: [www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2014Results.aspx](http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2014Results.aspx).

<sup>20</sup>Calculated as: 3,488,772 / 1,853. Data on registrants found at: [www.gab.wi.gov/elections-voting/statistics](http://www.gab.wi.gov/elections-voting/statistics).

notes that the size of municipalities in Wisconsin varies greatly. He then cites a published study that found the density of early voting sites is related to overall turnout. More specifically, the study found a positive relationship between sites per person (measured by the voting age population in a county) and the overall turnout rate.<sup>21</sup> I should note that the study cited is not specific to Wisconsin and does not analyze early in-person turnout, which is the more appropriate metric in this case.

The degree to which the number of sites may be related to in-person absentee turnout in Wisconsin can be tested empirically. I have used similar measures of convenience to study early voting.<sup>22</sup> A ratio measure can be constructed which takes into account the number of in-person absentee sites per registered voters. Again, in the case of Wisconsin there is one in-person absentee site per municipality, making the numerator one in all cases. The denominator is equivalent to the number of registered voters in the municipality at the time of the election. This ratio can be expressed as follows for each municipality:

$$\text{In-Person Absentee Site Density} = 1 / \text{Number of Registered Voters}$$

This measure is bounded on the upper end at 1 which would equate hypothetically to a municipality with one registrant. As the number of registered voters in a municipality grows, the sites density ratio would move toward zero. For example, the ratio for a municipality with 10,000 registrants would be .0001. Using this measure one would hypothesize that the site density ratio should be positively related to in-person absentee turnout for a given municipality. Stated differently, as the number of registrants decreases (higher values on site density ratio), the percentage of electors voting in-person absentee should increase.

In order to test this hypothesis I constructed a statistical model where the dependent variable is the percentage of voters within a municipality casting an in-person absentee ballot.<sup>23</sup> The independent variable is the site density ratio described above. I was able to collect data at the municipal-level for the 2010, 2012, and 2014 general elections using GAB-190 detailed reports. The models presented below are estimated using OLS regression.<sup>24</sup>

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<sup>21</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 25.

<sup>22</sup>See M.V. Hood III and Charles S. Bullock, III. 2011. "An Examination of Efforts to Encourage the Incidence of Early In-Person Voting in Georgia, 2008." *Election Law Journal* 10(2): 103-113.

<sup>23</sup>For each municipality, calculated as: in-person absentee votes / total votes cast.

<sup>24</sup>Models estimated in Stata 14. Results weighted by total registration are statistically and substantively the same as those presented (which are not weighted).

Table 3. The Relationship between In-Person Absentee Turnout and Site Density (All Municipalities)

	2010	2012	2014
Constant	.032*** (.001)	.080*** (.002)	.051*** (.001)
Sites Density Ratio	-.274*** (.000)	-2.932*** (.361)	-.643*** (.201)
R <sup>2</sup>	.01	.04	.06
N	1,812	1,820	1,821

Notes: \*\*\*p<.001

What does Table 3 tell us about the relationship of in-person absentee usage and the density of in-person absentee sites in Wisconsin? Contrary to what was hypothesized, the relationship between these two measures is actually negative, not positive. This fact is evidenced by the minus sign on the coefficient for the *Sites Density Ratio* coefficient. This coefficient is negative and statistically significant across all three of the election-cycles analyzed. In-person absentee turnout in Wisconsin is, therefore, not related to convenience (measured in this manner). Municipalities with greater in-person absentee access, as defined by fewer registrants per site, actually have lower rates of in-person absentee turnout.

As an additional robustness check I limited the sample of municipalities to those with more than 1,000 registrants and re-estimated the models above. The results can be found in Table 4 below. The results for municipalities with more than 1,000 registrants reveal an even stronger, negative relationship between convenience and in-person absentee turnout. The coefficient for the *Sites Density Ratio* is again negative and statistically significant. As with the models for all municipalities found in Table 3, access defined by the fewer registrants per site is not related to higher rates of in-person absentee turnout. This relationship can be viewed graphically by examining the provided scatterplots and accompanying least squares prediction lines. Figures 6, 7, and 8 plot in-person absentee turnout for the 2010, 2012, and 2014 general elections for municipalities with more than 1,000 registrants. The *best-fit* lines as predicted from the models in Table 4 clearly slope downward, an indication that as the sites density ratio increases the level of in-person absentee voting is predicted to decrease.

In summary, the statistical analyses presented clearly refute the idea that simply increasing in-person absentee sites in a given municipality will increase in-person absentee turnout. An examination of the last three general elections indicates that convenience (density) is actually inversely related with the percentage of voters in a given municipality choosing to cast an in-person absentee ballot.

Table 4. The Relationship between In-Person Absentee Turnout and Site Density (Municipalities with more than 1,000 Registrants)

	2010	2012	2014
Constant	.083*** (.002)	.262*** (.006)	.174*** (.004)
Sites Density Ratio	-67.553*** (4.304)	-237.192*** (10.933)	-158.862*** (7.656)
R <sup>2</sup>	.31	.44	.43
N	563	611	575

Notes: \*\*\*p<.001

Figure 6. Percent In-Person Absentee Turnout by Early Voting Sites Density, 2010 General

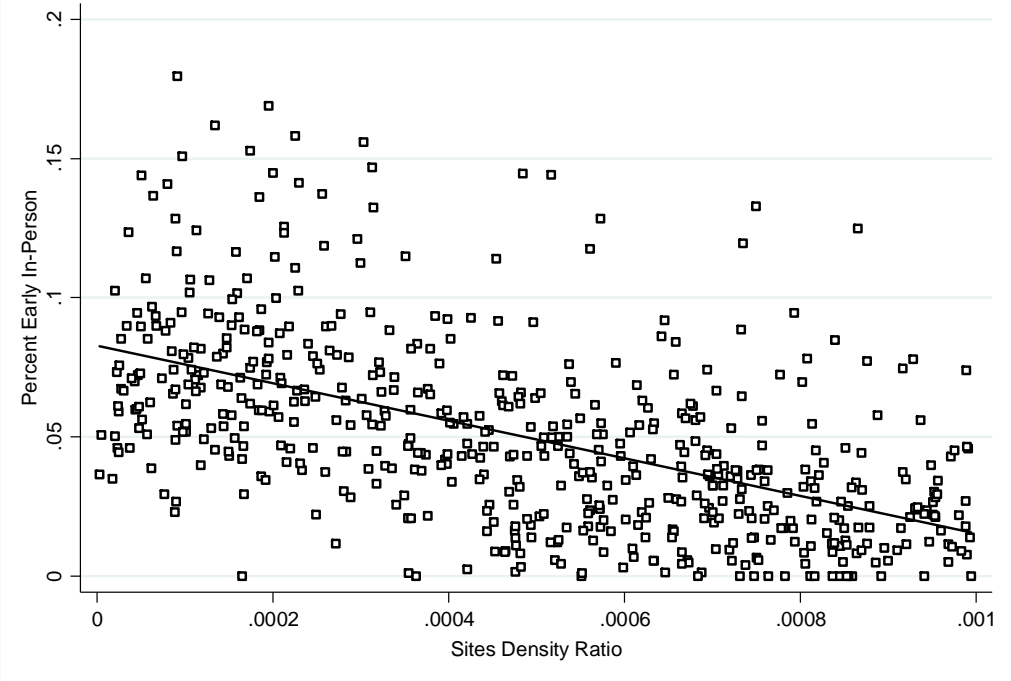




Figure 7. Percent In-Person Absentee Turnout by Early Voting Sites Density, 2012 General

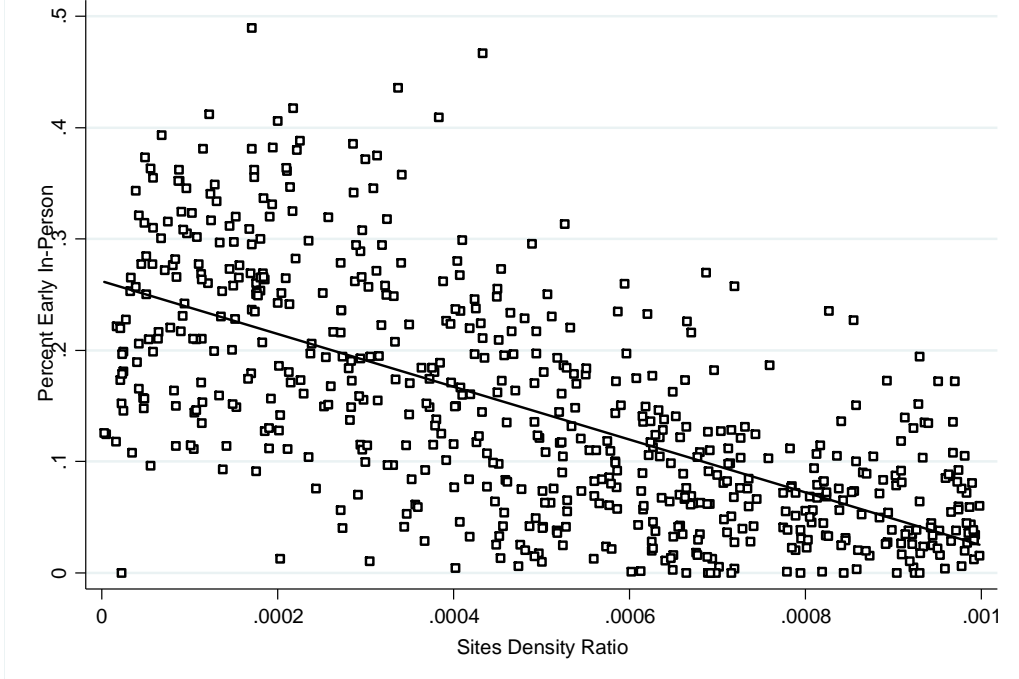
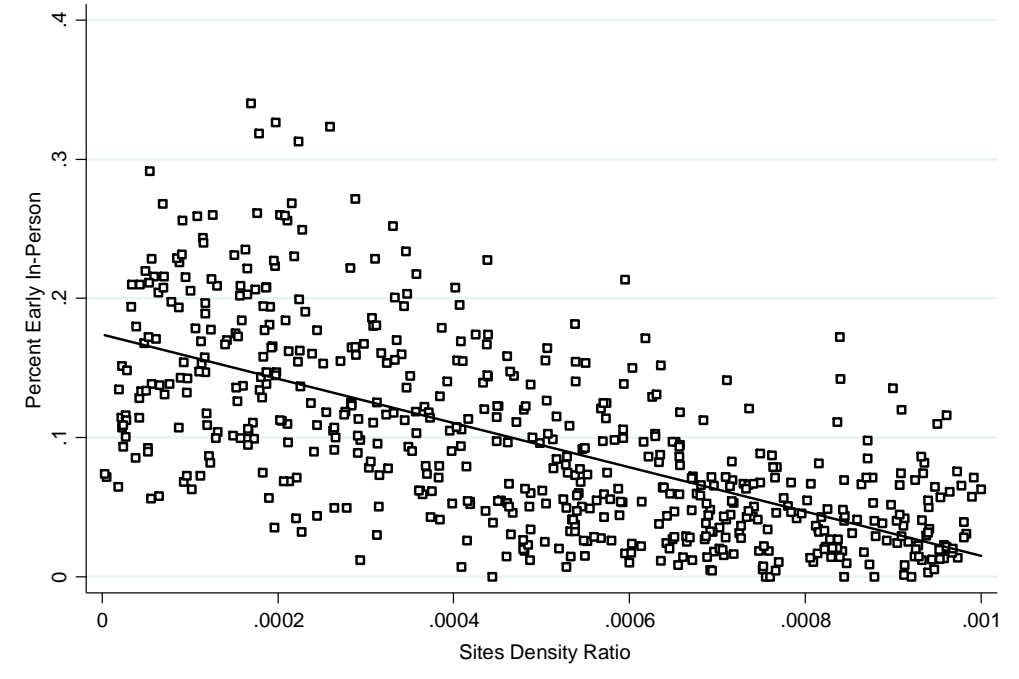


Figure 8. Percent In-Person Absentee Turnout by Early Votes Sites Density, 2014 General



I would also like to point out that although there is one in-person absentee site per municipality in Wisconsin, this fact does not mean that the resources deployed to these single sites are equivalent across municipalities. The resources (i.e. number of poll workers) deployed to support in-person absentee voting will vary based on the size of the electorate. The more pertinent question is not necessarily how many sites are being utilized, but are the resources deployed by municipalities during in-person absentee period adequate to handle voter demand. In addition, adding additional in-person absentee sites within a municipality might increase geographic access, but could exacerbate resource issues. For example, imagine a municipality using 20 poll workers to staff a single in-person absentee voting site. If forced to open an additional site these workers might simply be split with ten at each site. In short, more sites does not always equate to more voter access/convenience.

## **VI. ABSENTEE BY-MAIL BALLOTING IN WISCONSIN**

In addition to the in-person absentee option, voters in Wisconsin can also cast an absentee ballot by mail without an excuse. In regard to this form of voting plaintiffs are challenging the elimination of ballot transmission via fax or e-mail. It should be noted that an elector may still request an absentee ballot from their municipal clerk using fax or e-mail.<sup>25</sup> The actual ballot, however, must be transmitted through U.S. mail.

In response to this challenge I can state from an election administration standpoint there are a number of common sense reasons for no longer allowing the transmission of absentee ballots via fax or e-mail. If an elector receives an absentee ballot by fax or e-mail they will, of course, need to print the ballot and fill it out. The ballot in this form, however, cannot be read into the tabulation machine. An employee in the municipal clerk's office, therefore, has to take the voter's preferences and record these on a regulation ballot. This process can lead to the introduction of unintended errors and also reduces voter privacy. Second, voters who receive a ballot by fax or e-mail sometimes forward it to others. The issue is that ballots can sometimes vary greatly, even within the same municipality. For example, voters living in Milwaukee are not all in the same state legislative districts for example. For these reasons, limiting the transmission of ballots to voters through the mail helps to reduce errors associated with the process of absentee voting or even the possibility of having their absentee ballot altogether disqualified.<sup>26</sup>

Plaintiffs also challenge changes to Wisconsin's election code that reduce the number of reasons permitted for which a clerk may return an absentee ballot to a voter for correction. The election code does allow a clerk to return an absentee ballot in the event that the ballot is not accompanied by a certificate or the certificate is not properly completed.<sup>27</sup> Otherwise, the

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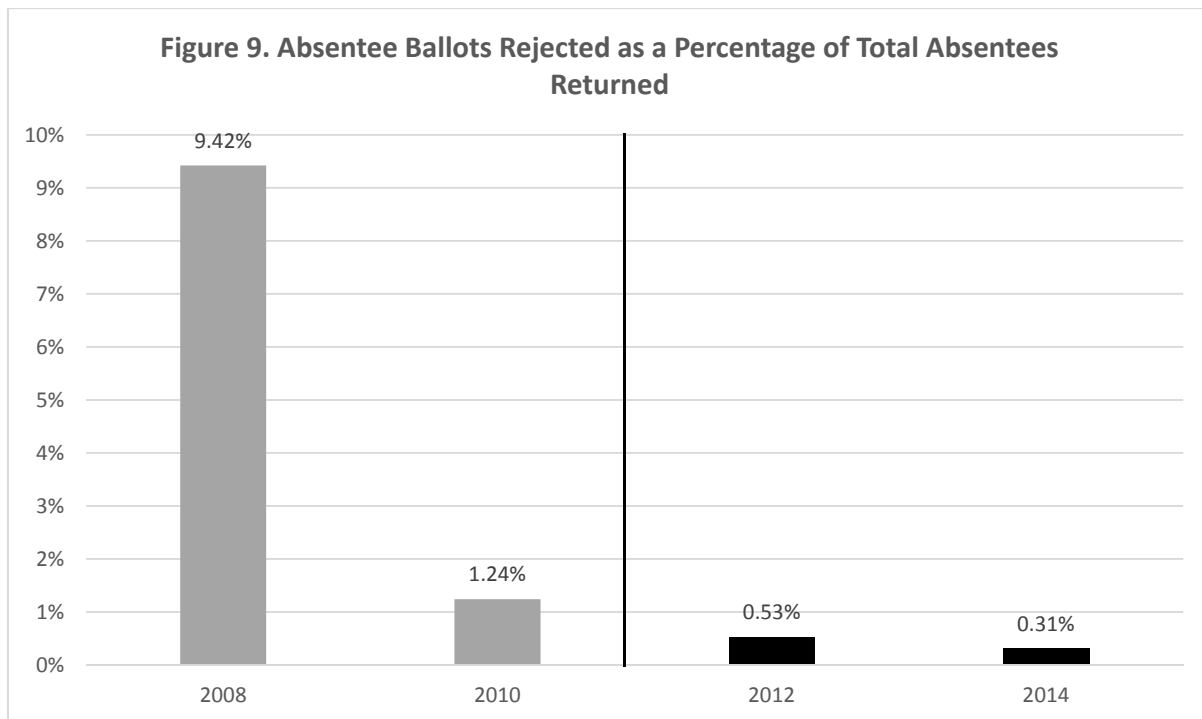
<sup>25</sup>See <http://www.gab.wi.gov/voters/absentee>.

<sup>26</sup>See Declaration of Susan Westerbeke. *One Wisconsin Institute v. Nichol*. January 5, 2016. Page 5; Declaration of Tim McCumber. *One Wisconsin Institute v. Nichol*. January 5, 2016. Page 4; Declaration of Diane Hermann-Brown. *One Wisconsin Institute v. Nichol*. January 8, 2016. Page 6; and the Declaration of Constance K. McHugh. *One Wisconsin Institute v. Nichol*. January 5, 2016. Pages 3-4.

<sup>27</sup>See Wisconsin Statute § 6.87 (9) altered by 2011 Wisconsin Act 277. Note: These provisions also apply for absentee voters returning a ballot in-person to the clerk.

responsibility rests with the voter to request a replacement ballot in the event that the ballot is spoiled or mistakes made on the ballot require correction. While the burden to obtain a replacement ballot rests with the voter, the fact that a replacement ballot can be requested is clearly laid out in the required uniform instructions for absentee electors.<sup>28</sup> Contrary to the opinion proffered by the plaintiffs then, these provisions still allow clerks to return ballots to electors for corrections to the certificate, while maintaining the privacy of the ballot itself.

In terms of evidence, there are some data collected by the GAB on absentee ballot rejection rates.<sup>29</sup> If the plaintiffs are correct, the provisions under discussion relating to absentee ballots should cause an increase in the absentee ballot rejection rate. I was able to collect data for this metric for the 2008, 2010, 2012, and 2014 general elections.<sup>30</sup> These provisions were implemented prior to the 2012 election-cycle, so we should see a spike in rejection rate in 2012 and 2014. Figure 9 measures the rejection rate as the number of absentee ballots rejected as a percentage of the total number of absentee ballots returned. In 2008, just over nine percent (9.24%) of all absentee ballots were rejected. This figure fell substantially, to 1.24% in 2010. Following the implementation of Act 227 (2011), the absentee rejection rate fell to just 0.53% in 2012. In 2010, this figure dropped again to 0.31%. Using 2010 as a comparison point, the absentee ballot rejection rate was more than cut in half in 2012. In 2014, the rejection rate was only a quarter of the 2010 figure.

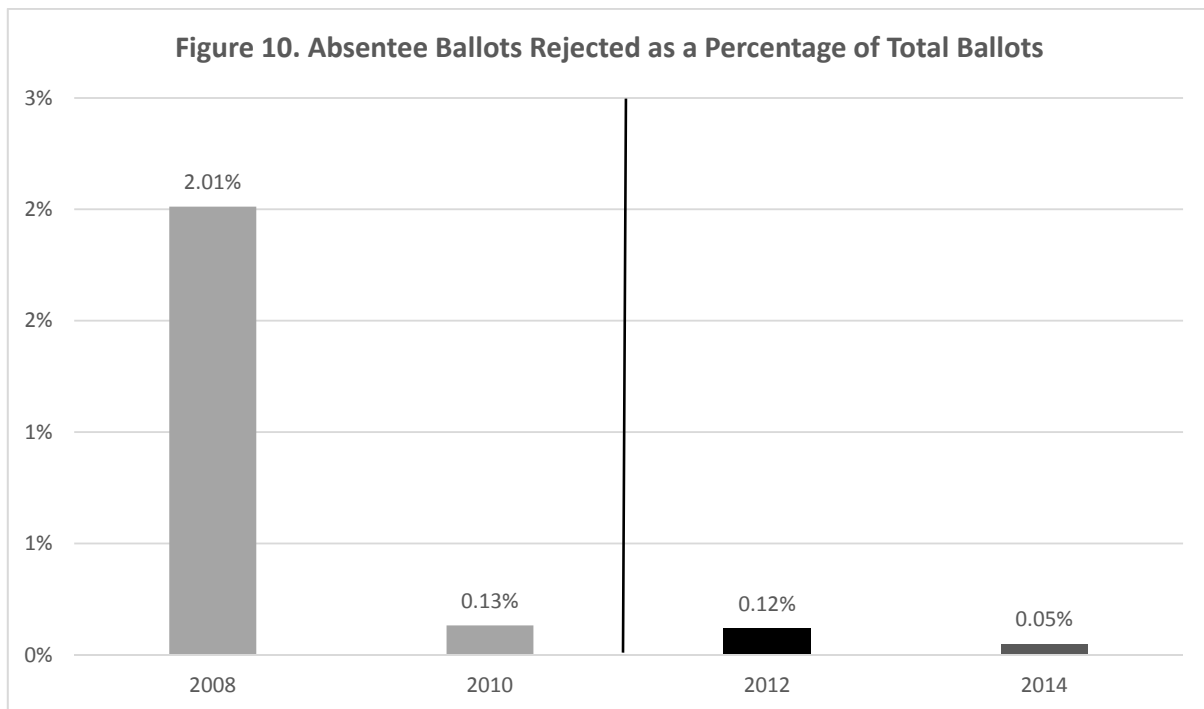


<sup>28</sup>See Wisconsin Statute § 6.869.

<sup>29</sup>Data for absentee balloting come from the 2010, 2012, and 2014 GAB-190 Election Voting and Registration Statistics Reports. Available at: <http://www.gab.wi.gov/elections-voting/statistics>.

<sup>30</sup>Absentee ballots rejected includes both in-person and by-mail. I was unable to obtain data that separated the rejection rate by in-person and by-mail.

Figure 10 below measure the absentee ballot rejection rate as a percentage of total votes cast in the election. Again, one may note a similar pattern as uncovered in Figure 9. As a percentage of total ballots cast, the absentee ballot rejection rate was two percent in 2008. This figure fell to about one tenth of percentage point in 2010 (0.13%) and 2012 (0.12%) and one twentieth of a percentage point in 2014 (0.05%). Again, the absentee ballot rejection rate falls each election cycle from 2008 to 2014 and this decline continues even following implementation of the changes brought about by Act 227. In conclusion, examination of the absentee ballot rejection rate provides no evidence that Act 227 caused the number of absentee ballots being rejected to increase.



#### *Response to Professor Burden's Absentee Ballot Analysis*

Professor Burden has also offered an opinion on changes to statutes affecting absentee balloting in Wisconsin. In offering his opinion he performs a number of statistical analyses that examine the proportion of absentee ballots that went uncounted out of the total number issued. Professor Burden concludes that the rate of uncounted absentee votes is positively associated with the percentage of blacks or Hispanics in the geographic reporting area.<sup>31</sup>

I would argue that the analysis that Professor Burden presents, however, tells us very little about the effects of changes recently implemented that relate to absentee balloting. The issue with Professor Burden's analyses, and subsequent opinion, relates to the metric he chooses to examine potential effects. There are a multitude of reasons why the number of absentee ballots requested by voters does not equal the number of absentee ballots counted in the end. A certain number of electors will request an absentee ballot and never return it. Some may return their absentee

<sup>31</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Pages 26-31.

ballot, but miss the deadline by which it must be received by the clerk. Some absentee voters (or potential absentee voters) actually die prior to the date of the election. In other cases an absentee ballot is requested and mailed, but the postal service is unable to deliver it to the given address.

Some reasons why an absentee ballot may not be counted do involve voter error (e.g. failure to sign one's ballot or obtain a witness signature). As previously discussed, plaintiffs' contend that Act 227 will cause the number of absentee ballots rejected to increase. Given that the GAB actually reports the absentee ballot rejection rate, this would be the appropriate measure for examining the effects of Act 227, not the rate at which absentee ballots are counted (of which the rejection rate is only a subset). Again, only a small fraction, 0.31%, of absentee ballots actually returned were rejected (see Figure 9) and the calculated rejection rate has fallen in each election beginning in 2008. Professor Burden's inferences about race and the rate at which absentee ballots are not counted tell us little about the effects of Act 227. In short, the wrong metric was used to gauge the effects of changes to absentee balloting.

## **VII. REGISTRATION AND RESIDENCY REQUIREMENTS IN WISCONSIN**

The plaintiffs in this matter also object to a number of requirements related to registration and residency. Specifically, Act 182 requires those registering to vote or altering their voter registration record to provide documentary evidence of proof of residency.<sup>32</sup> Prior to passage of Act 182 proof of residency was required only for late registrants, those registering or altering their record after the close of the regular registration period. Act 182 expanded this requirement to include any Wisconsin citizen registering to vote.

There are many types of documents under Wisconsin statute which suffice for establishing proof of residency. Some examples include a current and valid Wisconsin driver's license or state ID card; an identification card issued by the State of Wisconsin or a sub-governmental unit thereof; an employee identification card; a university or technical college ID; a utility bill; a bank statement; a paystub; a residential lease; notices or correspondence from a government agency (e.g. these programs may include Medicare, Medicaid, Social Security, SNAP, and SSI); and correspondence from a Wisconsin Native American Tribe.<sup>33</sup>

The above list is quite extensive, but does not include all possible proof of residence documents. Most Wisconsinites are in possession of one or more these documents. In addition, for a citizen registering during the in-person absentee voting period or on election-day a number of these documents will also serve as proof of identification. Proof of identification is not required to register to vote (only proof of residency); however, for those electors who wish to both register and vote at the same time proof of identification is required to cast a ballot. Some examples of

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<sup>32</sup>See 2013 Wisconsin Act 182, Section 2H.

<sup>33</sup>See Wisconsin Statute § 6.34 (3)(a) for an exhaustive list of documents to satisfy the proof of residency requirement. See also Proof of Residence for Voter Registration at [www.gab.wi.gov/sites/default/files/publication/154/proof\\_of\\_residence\\_pdf\\_29621.pdf](http://www.gab.wi.gov/sites/default/files/publication/154/proof_of_residence_pdf_29621.pdf). A proof of residency document must contain name and current address. See Wisconsin Statute § 6.34 (3)(b). Military and overseas electors are not subject to the proof of residence requirement. See Wisconsin Statute § 6.34 (2).

documents that can act as both proof of residence and identity are a Wisconsin driver's license, state ID card or a university identification card. In fact, in order to apply for a free state ID card under the voter ID law an applicant must provide documentary evidence to establish residency.<sup>34</sup> Any Wisconsinite who possesses proof of identity for the purpose of voting, therefore, should already possess proof of residency.

In the past a citizen registering to vote who was unable to provide documentary evidence of residency was allowed to establish residency under corroboration by another registrant from the same municipality. In this case said registrant would sign a statement attesting to the residency of the registrant who lacked a proof of residency document. Act 23 altered several sections of Wisconsin's statutory code by eliminating the use of corroboration for proof of residency in the voter registration process.<sup>35</sup> By eliminating this mechanism to establish proof of residency Act 23 establishes a fair and consistent standard across all electors. The fact that all registrants must provide documentary evidence also establishes a higher standard of proof for this requirement. As demonstrated above, given the wide range of acceptable documents which could be used to establish residency, this requirement should not create a burden to electors in Wisconsin. As well, making the proof of residence requirement applicable to any registrant (i.e. Act 182) and not just a citizen registering during a specified date range also creates a consistent standard in this regard.

The plaintiffs also object to the State of Wisconsin having increased the residency requirement from 10 days to 28 days under Act 23.<sup>36</sup> Is the 28 day residency requirement unusual? All states have some type of residency requirement. Twenty-five states and the District of Columbia indicate a specific number of days required to establish residency.<sup>37</sup> Figure 11 below compares Wisconsin to those states (and the District of Columbia) which also have a specific residency requirement.<sup>38</sup> Across these states the average residency requirement in days is 28.8. The most frequently occurring (mode) number of days required is 30. In fact, for twenty of these 26 states (77%) the requirement is 30 days. Wisconsin's 28 day requirement is just slightly below the mean value and less the median and modal values at 30 days each. Viewed in this context the twenty-eight day residency requirement is certainly not out of line with most other states.

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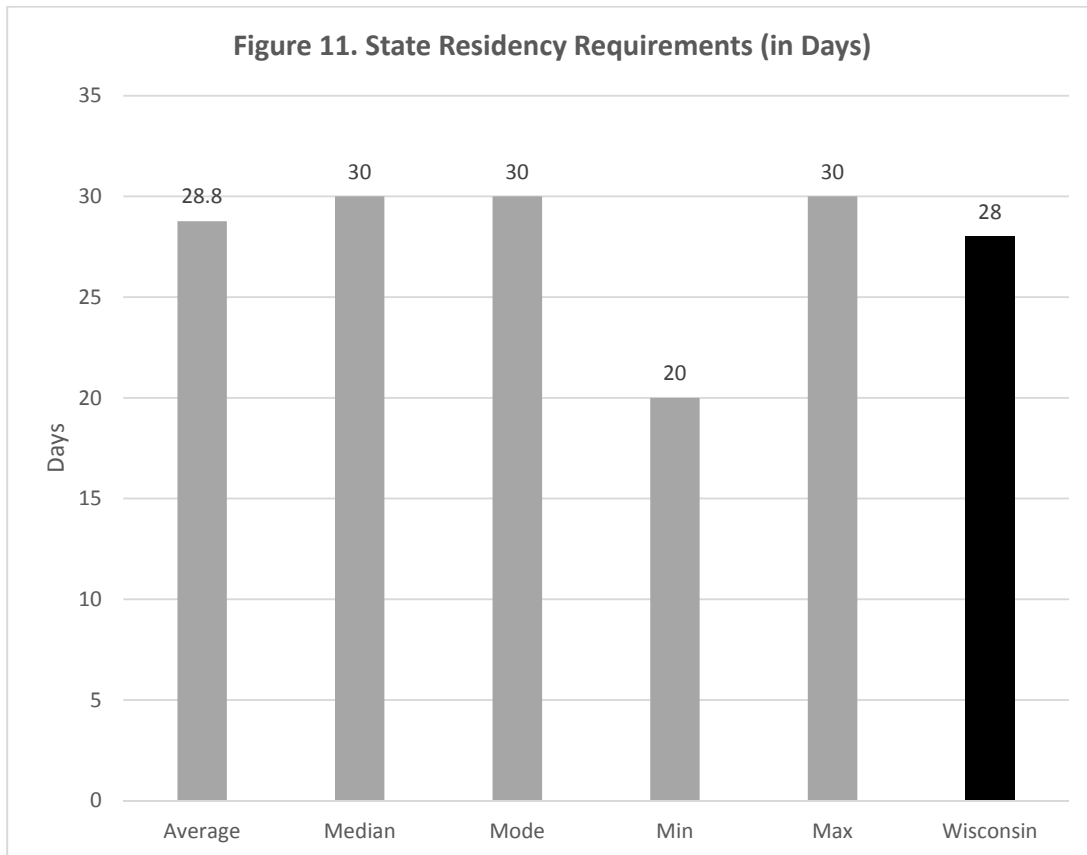
<sup>34</sup>See "How Do I get a Free State ID Card?" found at <http://bringit.wisconsin.gov/how-do-i-get-free-state-id-card>.

<sup>35</sup>See 2011 Wisconsin Act 23, Sections 17, 29, and 40-41.

<sup>36</sup>See 2011 Wisconsin Act 23, Sections 10-12 which amended Wisconsin Statute § 6.02 (1) and (2).

<sup>37</sup>This number is distinct from the number of days before the close of registration.

<sup>38</sup>Information on residency requirements from "Table 6.6, Voter Registration Information." *The Book of the States 2015*. Found at <http://knowledgecenter.csg.org/kc/category/content-type/bos-2015>.



Requiring all registrants to provide documentary proof of residency, eliminating corroboration as an alternative method for establishing proof of residency, and increasing the residency requirement to 28 days in my opinion should not act to create an unfair burden on any Wisconsin elector. Instead, these measures standardize a set of fair and consistent practices for all registrants in the state.

## **VIII. WISCONSIN'S VOTER ID STATUTE**

### **Matching the Voter Registration and DOT Databases**

In this section of my report I attempt to determine the number registrants in Wisconsin who do possess a driver's license or state identification card issued by the Department of Transportation.

#### *Data Sources*

I was provided with data by the Wisconsin Department of Justice that originated from two sources: The Government Accountability Board and the Department of Transportation, Division of Motor Vehicles.<sup>39</sup> From the Division of Motor Vehicles I received a set of data files that contained a list of Wisconsin residents who had been issued a driver's license and a second file that detailed Wisconsin residents who had been issued a state identification card. Hereafter, I will

<sup>39</sup>The copy of the voter registration database from the Government Accountability Board was created on October 20, 2015.

refer these as the DMV databases. Both these data files contained a unique identification number (customer ID), full Social Security number, and a driver's license number which is also referred to as a state Identification number. In addition, both these files contained information on race/ethnicity, gender, date of birth, residential address, and name (defined as first name, middle initial, last name, and name suffix). There were a total of 594,410 records in the State ID card database and 4,461,901 records in the driver's license database.

From the Government Accountability Board I received a copy of the current Wisconsin voter registration database which contained a record of all registrants who were classified as *Active*.<sup>40</sup> Along with a unique identification number for each registrant (voter registration number) the database contained a state identification number (analogous to a driver's license number).<sup>41</sup> This file also contained information on date of birth, name (defined as first name, middle name, last name, and name suffix), residential address, and a partial Social Security number (last four digits) for some records. The voter registration number does not include any information on the race or ethnicity of registrants in Wisconsin. There were a total of 3,338,332 unique records in the voter registration database.<sup>42</sup>

Before attempting to match (link) records across these databases I undertook a number of standard data cleaning processes. For example, all extra spaces and hyphens were removed from name fields. The last name field for the DMV databases also contained a name suffix (e.g. III), while this information was in separate fields in the voter registration database. In order to make these data fields comparable, I combined the last name and suffix fields in the voter registration database. The state ID number fields were also standardized across all databases (i.e. hyphens removed). All numeric fields to be used for matching (i.e. date of birth, SSN, zip code) were also converted to text fields and standardized across databases. For example, because the DMV databases contained nine-digit Social Security numbers I created a new field to house only the last four digits. All values in date of birth fields were likewise standardized as text strings (e.g. the date 01/01/1970 is translated to 01011970). These steps help to ensure consistency in values between databases and also aid in the creation of match strings discussed in the section labeled *Record Matching*.

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<sup>40</sup>The copy of the voter registration database from the Government Accountability Board was created on September 25, 2015.

<sup>41</sup>Prior to January 1, 2006 registrants were not required to provide their driver's license or state ID card number when registering to vote (Wisconsin Act 256, Section 49b amended Wisconsin Statute s.6.33(1)).

<sup>42</sup>I removed a total of 6 duplicate cases, based on the voter registration number, from the voter registration database.



*Known Issues with Record Linkage in Wisconsin*

There are a number of issues that make an exact rendering of the number of Wisconsin registrants who lack valid Act 23 identification extremely problematic to produce. These issues will result in an undercount of registrants who possess Act 23 ID and, consequently, an inflated no-match rate. Below, I outline these known issues.

There is no unique and permanent identifier between the two databases.

The state identification number generated by the Division of Motor Vehicles in Wisconsin is a unique identifier at a given point in time. It is based on an individual's name, sex, and date of birth. Any modifications to these factors will generate a new state identification number which will then become attached to the individual in question. A name change, a correction to an incorrect date of birth, or even the addition of a full middle name in place of a middle initial will alter one's state identification number in Wisconsin.<sup>43</sup>

While the DMV certainly updates a product holder's state identification number in their database, there is no clear mechanism whereby a registrant in the voter registration database would have this same field updated. A copy of the DMV database and a copy of the voter registration database produced in very close temporal proximity will, therefore, contain some unknown number of registrants whose state identification number varies from their identification number in the DMV database. This issue not only affects the ability to match individuals through their state ID number, but also by other fields as well (e.g. name and date of birth). Just as alterations to one's name or date of birth produce a new state identification number that may not be reflected in the voter registration database, these same underlying changes will also make it impossible to match registrants using these fields as the name or date of birth change will also not be immediately reflected in the voter registration database.

In contrast to Wisconsin's state identification number, full Social Security numbers would be an example of a unique and permanent identifier for an individual. Unfortunately, the voter registration database does not contain an individual's full Social Security number.<sup>44</sup>

The voter registration database field for state identification numbers is not fully populated.

As previously noted, before January 1, 2006 citizens in Wisconsin were not required to provide their state identification number when registering to vote. As a consequence, 884,924 registrant records contain no state identification number.<sup>45</sup> This figure amounts to over a quarter (26.2%) of total registrants. The fact that the state identification number field is missing for more than a quarter of registrants increases the difficulty in matching these individuals back to the DMV database.

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<sup>43</sup>Wisconsin Department of Transportation. Driver's License Manual. Section 220: Driver Records. Appendix I: Coding of a Driver's License.

<sup>44</sup>The GAB voter registration database did contain partial (last four digits) Social Security numbers for some records.

The voter registration database and the DMV database contain inconsistent data within fields. If available, using a unique identifier for matching is always preferable to using other fields such as name and date of birth. Because of the problems noted with state identification numbers, I have had to rely on additional fields to conduct my matching analysis. Relying on such fields, however, will certainly lead to an undercount of the true number of matches. Why? Any difference, however slight, for any of the fields being utilized in the matching query will result in a non-match. For example, for the same individual one database might include a name suffix (e.g. III), while another may not.

The voter registration database field for partial Social Security numbers is not fully populated. Registrants in Wisconsin are not required to provide their full Social Security number and are only required to provide the last four digits of their Social Security number in the event that they do not have a Wisconsin driver's license or State ID number.<sup>46</sup> Although partial Social Security numbers are not capable of uniquely identifying an individual, they can be used in conjunction with other information fields to create match strings. Partial Social Security numbers were only available for 1,182,275, or 35.0%, of the records in the voter registration database. Two-thirds of the records in the voter registration database did not contain even a partial Social Security number, making any matching exercise all the more difficult. One-fifth (20.4%) of all records in the voter registration database do not contain either a partial Social Security number or a state identification number.

These data sources do not take into account other forms of identification which meet the requirements for Act 23.

Act 23 allows Wisconsin registrants to use seven other forms of identification in addition to a driver's license or state ID card. The other forms of identification are a military ID, a passport, a certificate of naturalization, a DOT identification card receipt, a tribal ID, a university or college ID, and a driving receipt issued by the Division of Motor Vehicles.<sup>47</sup> I was not given access to data related to these forms of identification. As a result, I was unable to take any of these other seven forms of identification into account when producing my estimates of Wisconsin registrants who lack valid identification under Act 23. Not being able to take these other forms of identification into account will produce an undercount of the number of registrants who lack Act 23 identification.

In North Carolina, Professor Charles Stewart found 33.3% of registrants had a passport and 4.9% possessed a military ID.<sup>48</sup> In Texas, Professor Stephen Ansolabehere reported 42.3% of registrants had a passport while 4.7% had a military ID. Of course, many registrants may have multiple forms of identification. Professor Stewart's North Carolina report does allow one to infer the number of registrants who may have a passport alone.<sup>49</sup> After initially matching the North Carolina registration database to anyone who possessed a North Carolina driver's license

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<sup>45</sup>This figure only denotes the presence of a value in the State ID number field. Not all of the records in the voter registration database contain a valid state identification number.

<sup>46</sup>See Wisconsin voter registration application at:

[www.gab.wi.gov/sites/default/files/gab\\_forms/4/2gab\\_131\\_voter\\_registration\\_app\\_rev\\_2014\\_05\\_fillable\\_19781.pdf](http://www.gab.wi.gov/sites/default/files/gab_forms/4/2gab_131_voter_registration_app_rev_2014_05_fillable_19781.pdf)

<sup>47</sup>2011 Wisconsin Act 23 and "Wisconsin Legislative Council Act Memo, Changes to Election Laws." Wisconsin Governmental Accountability Board. (<http://legis.wisconsin.gov/lc/publications/act/2011/act023-ab007.pdf>).

<sup>48</sup>Declaration of Stephen D. Ansolabehere. *Veasey v. Perry* (2:13-cv-263 NGR). June 27, 2014. Table V.2.

<sup>49</sup>Declaration of Charles Stewart III. *U.S. v. North Carolina* (1:13-CV-861). February 12, 2014. Table 5.

or state ID card Professor Stewart then added any registrant who matched on a passport, decreasing the no-match percentage by 2.6%. The inference that can be drawn then is that 2.6% of North Carolina registrants possessed a U.S. passport, but not a driver's license or state ID card. Any registrant who possessed a military ID was then added, reducing the no-match rate by another 0.3%. The implication of this finding is that 0.3% of registrants in North Carolina had a military ID, but not a driver's license, state ID, or passport. The addition of passports and military IDs reduced the overall no-match rate by 2.9% in North Carolina. After an initial match on driver's license and state ID in South Carolina I was able to match an additional 2.5% of registrants who possessed a passport or military ID.<sup>50</sup>

There are an estimated 153,322 registrants in Wisconsin (4.5%) who did not match to a record in the driver's license or state ID card databases. Having access to the U.S. State Department and the Department of Defense databases would have allowed matching for passports and military IDs to have been conducted. Some subset of these 153,322 registrants would have a passport or military ID, but not a Wisconsin driver's license or state ID card. Logically, from these examples above if data on passports and military IDs were available the no-match rate in Wisconsin would fall below the 4.5% figure I have calculated. Based on these examples from other states the no-match rate Wisconsin should conservatively fall below 3.0%.

The DMV database does not contain driver's licenses or state ID cards which have recently expired.

Act 23 allows one to vote with an acceptable form of identification that has expired since the date of the last general election. In the present case, any Wisconsin registrant with a driver's license or state ID card that has expired since November 4, 2014 would still be able to use these forms of identification to vote under Act 23. The DMV database does not include any driver's license or state ID card that expired prior to October 19, 2015. Registrants with a license or ID card that had expired between November 4, 2014 and October 18, 2015 would not be able to be matched back to the DMV database. This fact would result in an undercount of the actual number of Wisconsin registrants with valid Act 23 identification. Additionally, any registrant with a U.S. passport or military ID (see point above) which had expired since the date of the last general election would also be able to use such identification for purposes of voting under Act 23.<sup>51</sup>

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<sup>50</sup>Supplemental Declaration of M.V. Hood III. *South Carolina v. U.S.* (12-203 CKK-BMK-JDB). July 28, 2012. Table 3.

<sup>51</sup>For the small number of cases (3.5% of the total registration database) I sent to the Department of Transportation for additional matching, information on licenses that had expired since the date of the last general election was available.

*Record Matching*

In order to link records between the voter registration and DMV databases, I created sets of match strings by concatenating information from the specific fields listed in Table 5.

Table 5. Strings Used to Match Records between the DMV and Voter Registration Databases

Match String	Fields Used to Create String
1	State ID Number
2	Last Name, Date of Birth, SSN (last four)
3	Last Name, First Name, Date of Birth
4	Last Name, First Name, Date of Birth, Zip Code
5	Last Name, First Name, Middle Initial, Date of Birth

Five separate matches were conducted between the DMV databases and the voter registration database.<sup>52</sup> For each match, any record in the voter registration database with an equivalent match string in one of the DMV databases would be denoted as having qualifying Act 23 identification.<sup>53</sup> For instance, the hypothetical example below using Match String 2 would result in a match between the DMV and voter registration databases:



*Findings*

The results of the matching queries used to link records across the voter registration and DMV databases are presented in Table 6. The table lists the number of records linked (matched) using the five matching strings by each of the two DMV databases. The next to last row displays the number of total unique matches produced. Using the DMV database I was able to match 88.97% of the cases in the voter registration database, while the state ID card database matched to 6.23% of the registrant records.

<sup>52</sup>Technically this equated to ten separate matches, five for the driver’s license database and five for the state ID card database. Voter registration records could be linked by more than one match string.

<sup>53</sup>The relationship between the voter registration and DMV databases was specified as one-to-many. What this means in practical terms is a record in the voter registration database could match to multiple records in the DMV databases. This is a conservative approach to record linkage as multiple unique records with identical match strings in the DMV databases will only be counted as a single match back to the voter registration database.

Table 6. Matching Voter Registration Records to DMV Records

	Number of Records		Percent of Total Registrants	
	Driver's License	State ID Card	Driver's License	State ID Card
Match 1	2,215,598	165,703	65.54%	4.90%
Match 2	965,146	115,587	28.55%	3.42%
Match 3	2,920,163	199,751	86.39%	5.91%
Match 4	2,590,972	147,815	76.65%	4.37%
Match 5	2,805,716	189,129	83.00%	5.59%
Total Unique Matches	3,007,452	210,586	88.97%	6.23%
Total Registrants	3,380,332	----	----	----

The next table combines the results from Table 7 into an overall match and no-match rate. A total of 3,137,939 records, or 92.83%, of voter registration records were matched to either of the two DMV databases. This leaves 242,393, or **7.17%**, of voter registration records that were unmatched to a DMV record.

Table 7. Results of DMV Record Match

	Number of Records	Percent of Total Registrants
Record Matched to <u>either</u> the DL or State ID Database	3,137,939	92.83%
No Match	242,393	<b>7.17%</b>
Total Registrants	3,380,332	----

After the initial match effort displayed above, I noted there were a total of 119,421 unmatched voter registration records that contained a value in the state ID number field. This equates to just under half (49.3%) of the total number of unmatched records. Given the issues documented above concerning the use of state identification numbers, I sent these unmatched records to the Department of Transportation. Having access to the full DMV database would allow DOT to determine if the state identification numbers associated with these unmatched records are related to a different state identification number in the DMV records. The results of what I will refer to as the DOT secondary match can be found in Table 8.

Table 8. DOT Secondary Match Results

	Number	Percent of Total
Unable to Match	6,604	5.53%
Matched	112,817	94.47%
Associated with an Invalid Act 23 Product	23,740	19.88%
Current DL or State ID Card	89,077	<b>74.59%</b>
Total Records	119,421	----

This table indicates that the DOT was able to match just under 95% of these records. The remaining unmatched records may have contained invalid or incomplete data in the state identification number field (e.g. a mistake resulting from a data entry error). Of the records that DOT was able to match, 19.88% were associated with a DMV record for a product that would not be valid for complying with Act 23.<sup>54</sup> Although these individuals are not in possession of valid Act 23 identification, as prior holders of such identification the process to obtain a current no-cost state identification card is straightforward. One would simply need to provide proof of identification (which could include the expired driver’s license or state ID card).<sup>55</sup> Given this process, another 23,740 registrants could easily become compliant with Act 23 if they are not already in possession of another qualifying form of identification such as a U.S. military ID. The remaining 74.59% of these records did match to an Act 23 compliant driver’s license or state identification card. These 89,077 matches are added to the existing 3,137,939 matches in Table 9, bringing the total number of matches to 3,227,016. Notwithstanding the issues I have discussed with matching records in Wisconsin, the final number of no-match records stands at 153,322, bringing the percentage of unmatched registrants from 7.17% down to 4.54%.<sup>56</sup> Given known data issues (see section above) and the fact that an individual may possess other types of qualifying Act 23 identification (e.g. U.S. passport), I feel confident the actual percentage of registrants in Wisconsin without Act 23 identification is below the 4.54% rate I calculated.

<sup>54</sup>The product in question had expired prior to the date of the last general election (i.e. before November 4, 2014).

<sup>55</sup>For an explanation of this process see: <http://wisconsin.gov/Pages/dmv/license-drivs/how-to-apply/id-card.aspx>.

<sup>56</sup>Any large government database comprised of individuals is temporally dynamic and, as such, is constantly experiencing some degree of *churn*. In the case of the voter registration database some registrants *exit* through death, felony disenfranchisement, or by moving out of state. At the same time other individuals who reach voting age or who move to Wisconsin from another state *enter* and are added to the voter rolls. Out of an abundance of caution I also replicated the figures in Table 9 after utilizing additional data fields in the DMV databases. These fields denote whether a license holder is deceased or has moved out of the State of Wisconsin. Removing such individuals slightly reduces the overall pool of registrants. The number of no-matches will remain unchanged because only those registrants matched from the DMV databases to a voter registration record can be removed. Consequently, the no-match rate will rise. Even so, the overall no-match rate increases only 0.09-points, from 6.05% to 6.14%.

Table 9. Final Results of DMV Record Match

	Number of Records	Percent of Total Registrants
Initial Record Match	3,137,939	92.83%
DOT Secondary Match	89,077	2.64%
Total Matches	3,227,016	95.46%
No Match	153,316	<b>4.54%</b>
Total Registrants	3,380,332	----

The final table in this section (Table 10) compares my no-match rate to that of Professor Mayer. Professor Mayer’s final no-match percentage, at 8.38%, was 3.84-points higher than the no-match rate I calculated. As such, Professor Mayer’s no-match list is certain to contain individuals who are actually in possession of Act 23 identification. As a result, any analyses where Professor Mayer uses the no-match categorization will likewise be rendered as potentially inaccurate.

Table 10. Comparing DMV Record Match

	Number of Records	Percent of Total Registrants
Mayer-No Match	283,346	8.38%
Hood-No Match	153,316	4.54%
Difference	<b>(-)130,030</b>	<b>(-)3.84%</b>

*The Free ID Program*

One factor that is mitigating any negative effects of Act 23 is a program administered by the Wisconsin Department of Transportation. Under this program any citizen can obtain a state ID card at no-cost for the purpose of voting.<sup>57</sup> From July 2011 through November of 2015 the Wisconsin Division of Motor Vehicles has issued a total of 413,342 no-cost state ID cards.<sup>58</sup> Wisconsinites seeking to obtain a free state ID must fill out DOT form MV3004. This form clearly states that *all ID cards used for voting are FREE* by simply checking a box on the form.<sup>59</sup> The inference that can be drawn then is that since its inception, more than a four hundred thousand Wisconsin citizens have taken advantage of this program and have applied for a free identification card for the purpose of voting. In addition, by examining the racial breakdown of

<sup>57</sup>Wisconsin Statute § 343.50(5)(a)3. For more information on applying for a no-cost State ID see <http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx>.

<sup>58</sup>This figure includes both original issuances as well as renewals and duplicates. Source: Wisconsin DOT Document labeled “Monthly Free ID Stats”.

<sup>59</sup>Form MV3004 located at: <http://www.dot.wisconsin.gov/drivers/forms/mv3004.pdf>.

those Wisconsin residents who have obtained a free ID card for voting it is clear that racial and ethnic minorities comprise a disproportionate share of this group.<sup>60</sup>

As indicated by Table 11, the percentage of blacks and Hispanics taking advantage of the free ID program far exceeds their share of the voting age population. This is especially the case for blacks who constitute 5.6% of the voting age population in Wisconsin, but who make up 35.6% of those taking advantage of the free ID program. Likewise, the Hispanic share of free ID's issued, at 8.3%, exceeds their share of the citizen voting age population at 3.3%. To the degree that a racial gap in ID possession may exist in Wisconsin, it is clear that the no-cost state ID program is acting to alleviate any such disparity.

Table 11. Racial/Ethnic Breakdown for No-Fee State ID Cards Issued by Wisconsin DMV

Race/Ethnicity	Frequency	Percentage
White	139,696	52.0%
Black	95,677	35.6%
Hispanic	22,273	8.3%
Asian	4,457	1.7%
American Indian	6,740	2.5%
Total	268,843	100%

Source: Wisconsin Department of Transportation state identification card database.

*Underlying Documentation*

In addition to the free state ID program which was implemented with the passage of Act 23, a subsequent opinion of the Wisconsin Supreme Court has also provided another point of mitigation to the State's voter ID law. In order to obtain an original, no-cost state ID one must provide proof of name and date of birth and proof of citizenship. For most citizens born in the United States these factors could be documented using a birth certificate. In *NAACP v. Walker* the Wisconsin Supreme Court ruled that any citizen applying for no-fee state ID card should not be required to pay for documentary evidence, such as a birth certificate.<sup>61</sup> In order to comply with this opinion, the Department of Transportation created a *petition process* for citizens who lacked documentary evidence to obtain a no-cost state ID card.<sup>62</sup> In such instances the applicant would fill out DOT Form MV3012 and the DOT would attempt to verify said applicant's identity

<sup>60</sup>These figures are calculated by author from the Wisconsin DMV state identification card database. The DMV does record the race/ethnicity of license or State ID holders.

<sup>61</sup>See Paragraph 70 of *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.. 2d 262 (Wis. 2014).

<sup>62</sup>This process was initially put in place by means of an emergency administrative rule implemented on September 15, 2014. See Declaration of Kristina H. Boardman. *Frank v. Walker* (11-CV-1128). April 23, 2015. A permanent rule titled "Extraordinary Proof of Name, Date of Birth, or U.S. Citizenship" can be found in the Wisconsin Administrative Code. Department of Transportation. Chapter 102.15(5m).



by contacting government agencies such as the Wisconsin Department of Health Services.<sup>63</sup> If verification is not attained, the DOT is authorized to rely on secondary documentation, termed *extraordinary proof*, such as a baptismal certificate or Census record to establish proof of name, date of birth or U.S. citizenship.<sup>64</sup>

I obtained some statistics from the Wisconsin Department of Transportation regarding the petition process for the no-cost state ID card.<sup>65</sup> In just over a year, from September 15, 2014 through November 30, 2015, the DOT has issued 51,160 original, no-cost state ID cards. Of these original issuances 1,022 lacked qualifying documentation and relied on the petition process. This equates to only 2.0% of the original issuances under examination. Breaking these 1,022 cases down further, 814 (80%) have been resolved through adjudication. Only 6% (72) of these cases were classified as still pending when this report was filed.<sup>66</sup> Finally, of the total number of petitions, only 3.0% were issued using *extraordinary proof*. This would equate to only 0.06% of all original ID issuances detailed in this report.

#### *The Plaintiffs' Voter ID Objections*

As of this date two claims are still active in regard to the present case. In this section I will provide a response to these objections based on the information I have collected and analyses conducted.

#### Claim 1: Partisan Fencing

The plaintiffs claim *Democratic voters are disproportionately likely not to have a qualifying ID*. From this, the plaintiffs further contend that this will result in the disproportionate suppression of the Democratic vote in Wisconsin.<sup>67</sup> Experts for the plaintiffs, however, provide no empirical support for this claim. Wisconsin is an open primary state and, consequently, does not require registrants to claim a political party affiliation. As such, any information relating to the partisanship of voters must be estimated. Neither Professor Mayer nor Professor Burden provides any such estimate in their reports. In fact, Professor Mayer had Catalyst append partisanship data onto the voter registration file.<sup>68</sup> His report, however, makes no use of these data.

Professor Mayer claims there is a racial gap in ID possession in Wisconsin in that blacks and Hispanics have a higher non-possession rate than whites. Again, I dispute this is necessarily the case, but even if this were so it would not necessarily translate into a partisan disparity. Why? Although minorities are more likely than non-Hispanic whites to identify as Democrats, one would still need to take into account the racial composition of the Republican and Democratic Parties in Wisconsin in order to answer this question.<sup>69</sup> Since Wisconsin does not have

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<sup>63</sup>The DOT is also authorized to contact government agencies in other states as well (e.g. for an out-of-state birth certificate). DOT Form MV 3012 can be accessed here: <http://wisconsindot.gov/Pages/global-footer/formdocs/default.aspx>.

<sup>64</sup>See Wisconsin Administrative Code. Department of Transportation. Chapter 102.15(5m)(3).

<sup>65</sup>"Petition Record Process Voter ID Monthly Report." Wisconsin Department of Transportation. Report received from counsel.

<sup>66</sup>Another 57 cases were canceled by the customer, 64 were suspended after the customer failed to respond, and the remaining 15 cases were denied.

<sup>67</sup>Complaint. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). May 29, 2015.

<sup>68</sup>See Expert Report of Yair Ghitza. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015.

<sup>69</sup>If this were an analysis examining an issue of racial impact, calculation of rates by racial group would be sufficient (i.e. to examine the question of how a voter ID law could affect racial and ethnic groups one might calculate the rate of ID non-possession for each group) One would not need to take into account the overall size of the racial groups in

registration by political party, I make use of a large-scale public opinion survey to determine the racial/ethnic breakdown of the Republican and Democratic Parties in the state.<sup>70</sup> The Cooperative Congressional Election Study (CCES) allows one to draw state-level inferences, including estimates of party identification.<sup>71</sup> Using the Wisconsin sample, the racial breakdown of the two-party system is described in Table 12 below. The table indicates the percentage of each racial/ethnic group that identifies with each party. For example, 37.9% of whites identify as Democrats and 43.9% identify as Republicans.

Table 12. Two-Party Breakdown by Race for Wisconsin

Party	White	Black	Hispanic
Democrat	37.9%	59.2%	71.4%
Republican	43.9%	24.5%	14.3%

Source: 2014 CCES

Next, I gathered data on the racial/ethnic breakdown of Wisconsin’s citizen voting age population from the Census Bureau.<sup>72</sup> The results are as follows:

Table 13. Citizen Voting Age Population by Race/Ethnicity for Wisconsin

Group	Percent CVAP	Number
Non-Hispanic White	87.97%	879.7
Black	5.56%	55.6
Hispanic	3.25%	32.5

Source: U.S. Census Bureau

The column to the far right of Table 13 partitions a hypothetical electorate of 1,000 registrants by race/ethnicity based on the above percentages. For example, since whites comprise 87.97% of the citizen voting age population in Wisconsin, of the 1,000 hypothetical registrants 879.7 would be white.

The next step in this estimation process is to partition the hypothetical electorate by partisan affiliation (these estimates are found in Table 14). This can be accomplished by multiplying the estimated number in each racial/ethnic CVAP category (Table 13) by the partisan breakdown for each of these two groups (Table 12). For example, the estimate for the number of white Democrats would be 333.4 [879.7\*.379].

the electorate. To examine the question of whether Act 23 produces a partisan effect, however, it is necessary to take into account both rates by race/ethnicity as well as the racial composition of the parties.

<sup>70</sup>As a proxy for party registration I am relying on individual-level party identification. Republican *leaners* are coded as Republicans and Democratic *leaners* as Democrats.

<sup>71</sup>For more information see: <http://projects.iq.harvard.edu/cces/home>.

<sup>72</sup>U.S. Census Bureau. Tables B05003[B,H,I]. “Sex by Age by Nativity and Citizenship Status (Total Population, Hispanic or Latino, White Alone, Black or Africa American Alone).” 2010-2014 American Community Survey 5-Year Estimates.

Table 14. Distribution of Hypothetical Wisconsin Electorate into Two Major Parties

Party	White	Black	Hispanic
Democrat	333.4	32.9	23.2
Republican	386.2	13.6	4.6

Finally, I will use Professor Mayer’s estimates of non-possession by race to determine the numbers of Republicans and Democrats who may not possess Act 23 identification. Taking the 333.4 white Democrats and multiplying by .083 would yield a figure of 27.7. This is the estimate of white Democrats who lack Act 23 identification. These calculations are repeated for each combination of race and party in Table 15. Next, these figures are summed within party to produce a total estimate of Democrats and Republicans in Wisconsin who may be affected by Act 23. In the end, 33.9 Republicans versus 33.5 Democrats are estimated to lack identification—a virtual wash.

Table 15. Estimating the Number of Wisconsin Partisans without Identification

Race/Ethnicity	Non-Possession Rate <sup>73</sup>	Democrat	Republican
White	.083	27.7	32.1
Black	.098	3.2	1.3
Hispanic	.111	2.6	0.5
Total without ID		<b>33.5</b>	<b>33.9</b>

This exercise demonstrates that Act 23 will not necessarily lead to a partisan advantage for the Republican Party in Wisconsin. I should note this finding holds even relying on the plaintiffs’ expert calculations of ID non-possession which I do not accept as accurate (see again my previous discussion of the issues in producing an accurate no-match rate). Not only are these non-possession rates inflated, one would also have to make the heroic assumption that none of the partisans lacking identification would be unable to obtain a qualifying form of identification and vote. This is also certainly, as well, not the case (see discussion of free State ID program). In summary, even under these unrealistic assumptions, I fail to find evidence for any claim of partisan fencing associated with Act 23.

Claim 2: Exclusion of Certain Types of IDs

The plaintiffs claim the exclusion of certain types of identification does not *serve any state interest and is not rational*. Specifically, the plaintiffs object to the exclusion of technical college IDs, non-Wisconsin driver’s licenses, and expired IDs.<sup>74</sup>

<sup>73</sup>Expert Report of Professor Kenneth Mayer. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015. Table 3.

<sup>74</sup>Complaint. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). May 29, 2015.

Table 16. Types of Identification Allowed to Vote by State

	Wisconsin <sup>75</sup>	North Carolina	Texas	Georgia	South Carolina
Drivers' License	X	X	X	X	X
State ID Card	X	X	X	X	X
U.S. Passport	X	X	X	X	X
U.S. Military ID	X	X	X	X	X
Free Photo ID for Purposes of Voting	X <sup>76</sup>	X	X	X	X
Veteran's Affairs ID		X	X	<sup>77</sup>	
U.S. Citizenship Certificate	X		X		
Concealed Weapons Permit			X		
Tribal ID	X	X		X	
Federal/State/Local Government Employee ID				X	
University/College ID	X			X	

The table above compares Wisconsin to a number of other states which have passed government-issued photo identification laws based on the types of allowable identification. In terms of permissible identification, all five states allow a driver's license, state identification card, U.S. passport, U.S. military ID, or a free photo ID card issued for the purpose of voting. Beyond that, Wisconsin, North Carolina, Texas and Georgia offer additional forms of identification, although these vary. Under the Wisconsin, North Carolina, and Georgia statutes a tribal ID is allowed. The final category listed in Table 16 for Georgia technically includes any *valid photo ID from any branch, department, agency, or entity of the U.S. Government, Georgia, or any county*,

<sup>75</sup>In addition to these categories identified in Table 16 Wisconsin also allows the following to be used as valid Act 23 identification: a driving or identification card receipt issued by DOT (valid for 45 days) or a notice of suspension or revocation of driver's license (within 60 days of election of issuance). For detailed documentation on Act 23 identification see 2011 Wisconsin Act 23, Section 1. Enacted: May 25, 2011 or <http://bringit.wisconsin.gov/do-i-have-right-photo-id>.

<sup>76</sup>In Wisconsin the free photo ID is a no-cost version of the State ID Card issued by the Department of Transportation.

<sup>77</sup>While there is not an explicit category for VA Identification cards in Georgia, this type of identification would be permitted under the category of a valid federal government ID with photo.

*municipality, board, authority or other entity of this state.*<sup>78, 79</sup> Among these states only Wisconsin and Georgia include identification cards issued by state universities or colleges and only Texas and Wisconsin allow the use of a U.S. citizenship certificate. In comparison to other states the mix of acceptable types of photo identification required by Act 23 does vary, but is also characterized by a heavy degree of overlap, especially among the most predominant forms of identification (i.e. driver's license).

On the issue of technical college IDs the Government Accountability Board has ruled that that these IDs are equivalent to university or college IDs for the purpose of voting and, therefore, acceptable as Act 23 identification for the purpose of voting. This interpretation has been codified in the form of Emergency Rule SS 038-15.<sup>80</sup> This emergency rule was approved by the GAB on April 29, 2015. This rule was also noted by Judge Adelman in his final decision and order for *Frank v. Walker*.<sup>81</sup> A permanent rule allowing the use of technical college IDs will be published in the Wisconsin Administrative Register on February 1, 2016.<sup>82</sup> This fact would appear to make this claim by the plaintiffs moot.

As to the question of accepting out-of-state driver's licenses for the purpose of voting only Georgia and North Carolina permit this form of identification. In North Carolina the use of an out-of-state license, however, is limited to those who have registered to vote within 90 days of an election. Wisconsin, South Carolina, and Texas do not allow voters to use an out-of-state license. Given the fact that a licensed driver who moves to Wisconsin from another state must obtain a Wisconsin driver's license within 60 days of establishing residency, allowing the use of out-of-state licenses for voting would be of limited utility to most voters.<sup>83</sup> In addition, this exclusion is consistent in that the only non-Wisconsin forms of identification acceptable under Act 23 are issued by the federal government (e.g. U.S. passport or military ID).

In South Carolina all forms of ID must be valid and current. In Georgia, the driver's license, if valid, can be expired. In Texas, with the exception of the U.S. Citizenship Certificate that has no expiration date, identification cannot be expired for more than 60 days from the date of the election. North Carolina recently amended its statute to allow expired driver's licenses for up to four years. Otherwise, with the exception of military ID's or VA cards, identification must be unexpired.<sup>84</sup> In Wisconsin the driver's license, state ID card, U.S. passport, and U.S. military ID may be expired after the date of the most recent general election. Other forms of Act 23 ID must be unexpired. Wisconsin does allow the most prevalent forms of identification to be expired for up to two years (since the date of the last general election). With the exception of Georgia which does not appear to set a time limit and North Carolina, this exception in Act 23 is more generous than the Texas exception of 60 days and South Carolina where identification must be unexpired.

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<sup>78</sup>Georgia Secretary of State website:

[http://sos.ga.gov/index.php/elections/georgia\\_voter\\_identification\\_requirements2](http://sos.ga.gov/index.php/elections/georgia_voter_identification_requirements2) and O.C.G.A. § 21-2-417 (2015).

<sup>79</sup>North Carolina electors may present an out-of-state driver's license or state-issued identification card if they have registered to vote within 90 days of an election.

<sup>80</sup>Source: [https://docs.legis.wisconsin.gov/code/register/2015/712A2/register/ss/ss\\_038\\_15/ss\\_038\\_15](https://docs.legis.wisconsin.gov/code/register/2015/712A2/register/ss/ss_038_15/ss_038_15).

<sup>81</sup>See Opinion and Order. *Frank v. Walker* (2:11-cv-01128-LA). October 19, 2015. Pages 5-8.

<sup>82</sup>Declaration of Michael Haas. *One Wisconsin Institute v. Nichol* (15-CV-324). January 7, 2016. Page 2.

<sup>83</sup>See <http://wisconsin.gov/Pages/dmv/license-drvs/how-to-apply/ooslicense.aspx>.

<sup>84</sup>In North Carolina an exception does allow those 70 years of age and older to present an expired driver's license or state-issued identification card as long as these forms of identification were current on the registrant's 70<sup>th</sup> birthday.

For those Wisconsinites who possess a DMV product that is expired, the process to obtain a current state identification card is simple and straightforward. Any citizen in possession of a driver’s license (or state ID card) that is not more than eight years expired could obtain a current state ID card, including the free variant, by simply providing proof of identity.<sup>85</sup> The expired license or state ID would constitute proof of identity.<sup>86</sup> Given the ease with which a state ID can be renewed, the two-year grace period for voting with an expired card is more than reasonable.

In summation, any state that implements a government-issued photo identification law for the purpose of voting must set parameters on what types of identification will be accepted and whether they can be expired. In this regard Wisconsin’s Act 23 is no different from similar state statutes. The mix of acceptable types of identification that can be used for voting in Wisconsin has a heavy degree of overlap with other states. Further, Wisconsin is certainly not alone in refusing to accept out-of-state driver’s licenses or certain types of expired identification. The success of the no-cost state ID card program should more than offset any minor, negative effects that may be produced by refusing out-of-state licenses or certain types of expired identification.

*Provisional Ballot Analysis*

The voter ID component of Act 23 has been in effect since May of 2015. From May through December of 2015 there have been a total of 29 local and special elections held throughout Wisconsin. I collected information on the number of provisional ballots that were cast in these elections because a voter was unable to present valid Act 23 identification at the polls.<sup>87</sup> The results of this exercise are located in Table 17 below.

Table 17. Act 23 Identification Provisional Ballots Cast in Wisconsin, 2015

<b>Election</b>	<b>Date</b>	<b>Provisional ID</b>	<b>Total Votes Cast</b>	<b>Percent Provisional</b>
Hudson-Alderman, District 2	11/3/2015	0	196	0.0%
Arcadia-Mayoral Recall	11/24/2015	1	541	0.18%
Windsor- Referendum	11/3/2015	0	1,875	0.0%
Greenville-Referendum	11/3/2015	0	2,208	0.0%
Milwaukee-Special, Alderman District 11	8/18/2015	0	4,496	0.0%
Milwaukee-Special Primary, Alderman District 11	7/21/2015	0	4,155	0.0%
Oconomowoc-Special Primary, District 4	10/13/2015	0	198	0.0%
Oconomowoc-Special, District 4	11/10/2015	0	223	0.0%
Germantown-Special Referendum	11/3/2015	1	2,673	0.04%

<sup>85</sup>For a more detailed explanation of this process see: <http://wisconsin.gov/Pages/dmv/license-drivs/how-to-apply/id-card.aspx>.

<sup>86</sup>Those customers who are no longer in possession of their expired driver’s license or state identification card, can simply use their Social Security card. For a full listing of documents which satisfy proof of identity see: <http://wisconsin.gov/Pages/dmv/license-drivs/how-to-apply/identity.aspx>.

<sup>87</sup>Turnout and provisional vote data from the Wisconsin Government Accountability Board.

Maine-Referendum	12/8/2015	0	716	0.0%
Polk-Referendum	11/3/2015	0	551	0.0%
Somers-Special Election	6/9/2015	0	321	0.0%
Franklin-Recall, Alderman District 4	9/8/2015	0	693	0.0%
Boscobel School-Referendum	11/3/2015	0	1,106	0.0%
Crivitz-School Referendum	12/22/2015	0	904	0.0%
Fennimore School-Referendum	6/16/2015	0	427	0.0%
Geneva School-Referendum	5/9/2015	0	201	0.0%
Peshigo School-Referendum	11/3/2015	0	1,663	0.0%
Potosi School-Referendum	11/3/2015	0	657	0.0%
Randall School-Referendum	10/13/2015	0	433	0.0%
Shawano School-Referendum	11/3/2015	0	2,060	0.0%
South Shore School-Referendum	5/19/2015	0	634	0.0%
Tigerton School-Referendum	11/3/2015	0	654	0.0%
Tomorrow River School-Referendum	11/3/2015	0	585	0.0%
Unity School-Referendum	11/3/2015	0	1,243	0.0%
Special Primary-Assembly 99	9/1/2015	0	3,422	0.0%
Special-Assembly 99	9/29/2015	0	1,593	0.0%
Special Primary-State Senate 33	6/23/2015	3	11,449	0.03%
Special-State Senate 33	7/21/2015	1	10,012	0.01%
<b>Total (29 Elections)</b>		<b>6</b>	<b>55,889</b>	<b>0.011%</b>

Across the 29 election analyzed there were only six reported provisional ballots cast due to the identification provisions under Act 23. Aggregating across these 29 elections the provisional ballot rate was eleven-hundredths of a percentage point (0.011%). Stated differently, for every 10,000 votes cast there were 1.1 provisional ballots due to non-compliance with Act 23. While these results are based on a set of local and special elections with lower levels of turnout, they are indicative of one thing—almost no one participating in these elections was affected by the implementation of Act 23. The number of provisional ballots would naturally be expected to rise in a statewide election, but so would turnout. In my opinion the provisional ballot rate would still equate to only a fraction of a percentage point even during a general election scenario.

*Wisconsin ID: Overall Conclusions*

What can be concluded about the voter ID requirement instituted by Act 23 in Wisconsin? First, most registrants in the state are already in possession of a driver's license or state identification card and, therefore, in compliance with Act 23. Second, some subset of registrants on the no-match list will possess some other form of Act 23 identification such as a military ID or a U.S. passport. Third, under the State's program to provide a free form of Act 23 identification, over 400,000 no-cost state identification cards have been issued by the DMV and it has been minority citizens who have disproportionately taken advantage of this program. Fifth, I can find no empirical evidence that the plaintiffs' partisan fencing claim has any validity. Sixth, the mix of

acceptable forms of identification to comply with Act 23 is certainly within the parameters set by other states that have implemented photo ID laws. The specific claim that technical college IDs are not allowable forms of Act 23 identification is also moot. Finally, moving from potential to actual effects it is clear that, to date, almost no Wisconsin electors have been affected by the identification requirements of Act 23.



## **IX. ADDITIONAL RESPONSE TO PROFESSOR MAYER**<sup>88</sup>

In response to Professor Mayer's expert report I have some additional points of rebuttal I would like to cover. Again, I would like to reiterate that Professor Mayer's no match list is considerably larger than the list I produced. In fact, it is 1.8 times the size of my no-match list. The analyses he conducts, therefore, include over 130,000 registrants he classifies as not having Act 23 identification who, in fact, do (see again Table 10). These would also be individuals for whom racial self-identification data from the DMV databases could be used; instead, Professor Mayer must rely on estimates of this characteristic from Catalist. The Catalist estimates may not correctly identify the race/ethnicity of these registrants. As a consequence, any conclusions Professor Mayer draws about non-ID non-possession rates, race and ID non-possession rates, or race and voter turnout rates should not be relied upon.

Professor Mayer performs a series of statistical analyses in an effort to determine the effects of various changes to Wisconsin's election laws. There are, however, a number of issues with these analyses which make any inferences extremely problematic. First, Professor Mayer relies on a temporally static copy of the Wisconsin voter registration database produced on October 20, 2015 (nearly a year past the 2014 midterm). This is essentially a snapshot in time of the Wisconsin electorate as it existed on that date. The voter registration database, however, is in constant flux with registrants moving on and off the roll for a variety of reasons (e.g. reaching voting age; moving out of state). The voter history data in Wisconsin as well is very much tied to the registration snapshot as these data are simply appended to the registration records. As such, individuals who may have cast a ballot in a previous election, but who are no longer in the registration database will not be recorded as having voted. This same criticism also applies to the pool of registrants. As one moves further away from the snapshot date the database will be less reflective of the pool of registrants at that point in time.

Professor Mayer acknowledges this issue, however, he nevertheless proceeds with using this single snapshot of the registration database to draw over-time conclusions. The best method for managing this concern would be to obtain historical snapshots of the voter registration database. A second method might involve creating a panel of voters to study over time. Professor Mayer attempts to deal with this issue by truncating the registration database by specific dates. While this might capture a group who was a part of the electorate at a particular point in time, it does not accurately represent the electorate as it existed at that time (see point above). Second, if Professor Mayer is using the registration date field<sup>89</sup> this may not accurately reflect for all records the original date of registration.<sup>90</sup>

These problems are apparent by simply looking at Table 6 of Professor Mayer's report. The turnout rate he calculates for 2014 is 71.3% and for 2010 it is 73.9%. From 2010 to 2014

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<sup>88</sup>This section references the Expert Report of Professor Kenneth Mayer. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015.

<sup>89</sup>Labeled as "Effective Date" in the SVRS database.

<sup>90</sup>For many registrants this value is reflective of the date which an existing registrant's voter record was first converted into the SVRS. Most conversions of these registrants occurred in 2005 and 2006 when the SVRS was being put in place. The Effective Date field value will also be altered if a registrant's status changes, for example from active to inactive. E-Mail correspondence from GAB. January 6, 2016.

Professor Mayer's figures indicate a drop in overall turnout of 2.5-points. The turnout rates he calculates from the GAB figures are 71.2% in 2014 and 62.3% in 2010—an increase of 8.9-points.<sup>91</sup> Looking back at Figure 1, I demonstrate that from 2010 to 2014 turnout went up 4.5-points (VEP), 4.2-points (VAP), or 2.9-points (registration). Professor Mayer's data shows a pattern of decreasing turnout from 2010 to 2014 which does not mirror reality. As such, what kind of confidence can one place in his turnout estimates by race for these elections? In my opinion, very little.

I would also point out that in the end Professor Mayer is simply comparing overall turnout rates (albeit estimated from individual-level data) and drawing the inference that these patterns are explained by the underlying changes to Wisconsin's election code. With the exception of denoting whether a registrant lives in a student ward or does not have identification he fails to directly test for potential effects of the challenged election reforms. For example, if one wants to determine the effects of Acts 23 and 146 on in-person absentee balloting then one should gather data on this particular method of voting and formulate a test, not rely on general voter turnout of which in-person absentee voting is but one component.

Professor Mayer argues that he isolates the effects related to these election changes by controlling for other factors (see Table 7). Again, as I argue above I do not agree that these models are effectively testing the potential impact of these challenged provisions. Even so, these models are only controlling for a registrant's race, age, sex, and prior voting history. In my opinion these turnout models are underspecified in that they do not control for a host of other known factors related to turnout such as income, education, residence, campaign spending, advertising coverage, and election competitiveness to name just a few. Professor Mayer also translates the findings from his empirical models into predicted probabilities which is standard practice. He, however, fails to provide any predicted probabilities for white registrants. In addition, he does not provide 95% confidence intervals for these probability estimates or test to see if the differences between these estimates [for example:  $p(\text{White Turnout-2014}) - p(\text{Black Turnout-2014})$ ] are statistically significant.

Further, as already noted any inferences about those lacking Act 23 identification should be viewed with skepticism as Professor Mayer's no-match list is highly inflated. Perhaps even more important is his claim that his analyses are actually testing the effects of the voter ID component of Act 23 in 2014. The voter ID statute was not in effect in 2014. Period. Any claim to the contrary is incorrect.

Professor Mayer bases this claim on the fact that voters who lacked identification believed the voter ID requirement to be in effect and were, therefore, deterred from voting (this, itself, is an untestable assumption). Professor Mayer cites a public opinion poll from Marquette University that indicates a slight majority (53%) thought the voter ID law would be in effect for the 2014 general election. Of course, we already know that despite what voters may have believed at the time, more than 95% of Wisconsin registrants were already in compliance with Act 23. Further,

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<sup>91</sup>The denominator (total registration) Professor Mayer uses for these calculations is not correct in that it does not include late or election-day registrations. The turnout calculation is, therefore, inflated. Even though the GAB turnout figures he calculates are inflated they also show that turnout went up, not down, from 2010 to 2014.

it should be noted that there may have been good reason for some in the electorate to be confused at the time. A U.S. Supreme Court decision blocking implementation of Act 23 came out late in the evening of October 9<sup>th</sup>.<sup>92</sup> The poll was conducted from October 9-12, 2014. Over the time span when the poll was being conducted the enforceability of Act 23 changed. Because of this confounding effect the results from this particular survey question should not have been reported. In reality, Wisconsin voters had several weeks before the election to absorb the news that Act 23 would not be enforced during the 2014 midterm. This is evident when examining a poll from the same organization a few weeks after the U.S. Supreme Court decision. In the October 23-26, 2014 Marquette Law School Poll, only 20.3% of respondents indicated that photo ID would be required in the 2014 general.<sup>93</sup> In summary, Professor Mayer's analyses in no way test the effects of Wisconsin's voter identification law on turnout.

Professor Mayer also attempts to draw inferences about college students in Wisconsin and their rates of voter turnout. He does this not by identifying individual college students, but by locating younger registrants (18-24 years of age) in wards that are in geographic proximity to college campuses. I note that Professor Mayer's average student ward contains less than a majority of 18 to 24 year olds. On the low end, a ward whose population is comprised of only 7% of 18 to 24 year olds was classified as a *student ward* simply on the basis of its geographic location.

Professor Mayer concludes from his analyses that registrants in these student wards were affected by the election provisions under challenge, as evidenced by depressed turnout in 2014. This inference is not as straightforward as it may appear. First, the use of this contextual measure is not necessarily the best indicator the target population Professor Mayer is attempting to isolate, namely enrolled college students who are Wisconsin residents and have moved their residency for the purpose of voting to their campus address. This population is several steps removed from the definition that Professor Mayer uses to classify a ward a student ward. Even if all 18 to 24 year olds in the ward are actually enrolled in college, one still has to ask if all these students are qualified to vote as residents of the ward in question. In sum, quite a few untested assumptions have to be accepted if one is to concur with Professor Mayer's characterization of what constitutes a student ward. Further, if there is uncertainty concerning these student wards, drawing inferences using these units must also be called into question.

Professor Mayer's analysis of turnout in Wisconsin is characterized by a number of concerns I have catalogued above. In isolation, any of these concerns would be enough to call his results into question. Taken collectively, these concerns do not allow any valid conclusions to be drawn about the election provisions under challenge.

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<sup>92</sup>A *Washington Post* article on this decision was posted on October 9<sup>th</sup>. The first comments appear at 10:32 pm EDT (9:32 pm in Wisconsin). Most likely the poll was closed for the evening before the news story was released. See [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-blocks-wisconsin-voter-id-law/2014/10/09/e52af8fe-4ff4-11e4-8c24-487e92bc997b\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-blocks-wisconsin-voter-id-law/2014/10/09/e52af8fe-4ff4-11e4-8c24-487e92bc997b_story.html).

<sup>93</sup>Source: <https://law.marquette.edu/poll/results-data>.

## **X. ADDITIONAL RESPONSE TO PROFESSOR BURDEN**<sup>94</sup>

I previously responded to a number of issues raised by Professor Burden regarding in-person absentee voting sites and specific changes to the absentee balloting process. In this section I will offer a number of responses to other sections of Professor Burden's report.

### *The Senate Factors*

A considerable portion of Professor Burden's report is devoted to what are known as the *Senate Factors* and within this group Senate Factor Five. In this section he provides evidence of employment, income/poverty, education, health, and housing disparities by race and ethnicity in Wisconsin. Poverty, by itself, is not a protected category as is race.<sup>95</sup> Professor Burden argues that *the challenged changes in Wisconsin election law will disproportionately deter or prevent black and Latino residents from voting by interacting with social and economic conditions affecting racial minorities* in the state.<sup>96</sup> Socio-economic statistics such as these are facts that can be documented. The real question in this case, however, involves the degree to which any such socio-economic disparities may interact with Wisconsin's election laws to hamper political participation on the part of racial minorities.<sup>97</sup>

Before one can widen the scope to examine other factors such as socio-economic disparities a causal connection needs to be established showing that the election practice(s) in question is/are denying racial (or language) minorities *an equal opportunity to participate in the political process*.<sup>98</sup> As I demonstrate in this report there is no evidence to support the supposition that these changes have caused, or will cause, a diminishment in the ability of minorities to participate politically in Wisconsin. As such, there is also no evidence to support the claim that such election provisions in association with noted socio-economic disparities will further compound the ability of minorities to participate in the political process in Wisconsin.

While Professor Burden's report does examine most of the named Senate Factors, it also ignores a host of other considerations related to the conduct of elections in Wisconsin. In formulating a list of factors to be considered in making a judgment regarding the totality of circumstances in reference to a Section 2 violation, the Senate made it clear that this set of factors is *neither exclusive nor comprehensive*.<sup>99</sup> The State of Wisconsin, along with municipal clerks, are charged with implementing elections. In this role the state must sometimes respond to circumstances and make adjustments to regulations that guide elections—elections are not static nor do they occur in a vacuum. As I have documented elsewhere in this report, a number of the challenged election provisions can be defended simply from an election administration standpoint. For example, limiting the transmission of absentee ballots to the mail helps maintain privacy while

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<sup>94</sup>This section references the Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015.

<sup>95</sup>[T]he law has never recognized poverty to be a protected sub-set under Section 2. J. Christian Adams. 2015.

"Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not." *Touro Law Review* 31(2): 320.

<sup>96</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 8.

<sup>97</sup>See 52 U.S.C. § 10301.

<sup>98</sup>U.S. Department of Justice. "Section 2 of the Voting Rights Act" found at: <http://www.justice.gov/crt/section-2-voting-rights-act>.

<sup>99</sup>U.S. Department of Justice. "Section 2 of the Voting Rights Act."

diminishing errors and confusion. Professor Burden's report fails to take into account that election laws may be altered for a whole host of legitimate reasons.

### *The Calculus of Voting*

A portion of Professor Burden's report focuses on the *calculus of voting*.<sup>100</sup> This theory deals with probability that an individual will participate in the electoral process given the perceived benefits and costs. In reference to Down's theory, Professor Burden's report concentrates specifically and solely on the costs of voting.<sup>101</sup> He equates the challenged election provisions to additional costs that are borne by Wisconsin voters. Among his conclusions are that *the disruptions to the voting process introduced by the challenged changes in Wisconsin election law are likely to deter participation by groups of residents who have more fragile voting habits and fewer resources to overcome the disruptions to those habits*. Racial minorities are among those groups he says will be deterred from participating.<sup>102</sup>

While Professor Burden's predictions using the calculus of voting appear reasonable, a few points of rebuttal are in order. Although a prominent conceptual approach in political science, the calculus of voting is still a theory. As such, what is predicted by Down's theory does not always end up occurring in the actual world of elections. Uhlaner expands on this disconnect below:

With regard to the specific issue of voter turnout, however, Down's work sets up a paradox. He concludes that most citizens would find it rational to abstain when voting is **not** costless: "since the returns from voting are often so miniscule, even low voting costs may cause many partisan citizens to abstain." However, empirically we do observe **substantial** numbers of voters.<sup>103</sup>

Given Professor Burden's application of the calculus of voting one would predict that reductions in the in-person absentee voting period, the total number of hours available, and the elimination of weekend availability would increase the cost for voters using this method; therefore, as a consequence there should be a corresponding drop in the in-person absentee turnout rate. As Section V of my report demonstrates this is not the case. Following changes to in-person absentee voting turnout using this method actually increased. This is but one example where the application of Down's theory would not have correctly predicted the actual pattern observed.

### *Recent Voter Turnout in Wisconsin*

Professor Burden's report also makes some voter turnout comparisons by racial/ethnic subgroup in order to draw some inferences about the election provisions under challenge (see primarily Table 1 of his report). On this matter Professor Burden states:

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<sup>100</sup>Anthony Downs. 1957. *An Economic Theory of Democracy*. New York: Harper and Row.

<sup>101</sup>Of course, opposite costs are benefits which for many voters may outweigh any costs associated with participating.

<sup>102</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 6.

<sup>103</sup>Carole Jean Uhlaner. 1993. "What the Downsian Voter Weighs: A Reassessment of the Costs and Benefits of Action." In *Information, Participation, and Choice: An Economic Theory of Democracy in Perspective*, Bernard Grofman, ed. Ann Arbor: University of Michigan Press, 67-79. Note: Emphases in bold added by myself.

The most relevant comparison in Table 1 is between the 2010 and 2014 elections, as indicated by the shaded columns. These are the two midterm elections that bracketed the implementation of the provisions challenged by this litigation.<sup>104</sup>

As he notes, the State of Wisconsin does not keep official registration and turnout statistics by race and ethnicity. The statistics cited by Professor Burden were derived from the Census Bureau's Current Population Surveys of Voting and Registration. As the name implies, these are surveys and should be viewed in that light. Political science research has long indicated that self-reports of turnout often result in inflation of this measure.<sup>105</sup> Many surveys that include questions relating to voter turnout go through a validation process where public records are used to "correct" respondent's answers on the voter turnout question. The voting and registration surveys conducted by the Census Bureau do not undergo any type of vote validation process. Because these estimates are based on survey data and because these types of surveys are prone to specific biases it is important that the CPS turnout estimates be used in conjunction with measures of uncertainty. In other words, a range where the *true* measure is located should also be provided.

For each turnout estimate the Census Bureau provides a margin of error whereby a 90% confidence interval can be calculated. In Figure 12 below I report turnout from the CPS as a percentage of the citizen voting age population for Anglos (non-Hispanic whites), Blacks, and Hispanics in Wisconsin for the 2010 and 2014 midterm elections.<sup>106</sup> According to the CPS figures, Anglo turnout in 2010 was 55.3% in 2010 compared to 58.8% in 2014. These values are plotted in Figure 12 along with the 90% confidence interval. When comparing turnout across elections it is important to determine whether the confidence intervals for such estimates overlap. Looking at the figure, the confidence intervals for the two Anglo turnout estimates overlap. In this case one cannot say with any degree of statistical certainty that the real rate of voter turnout for Anglos increased in 2014, as compared to 2010.

The turnout point estimates for Blacks and Hispanics decline from 2010 to 2014. Again, one must also take note of the confidence intervals plotted for each of these estimates. For both blacks and Hispanics, however, the confidence intervals for the 2010 turnout estimate clearly overlap with those for 2014. Just as one cannot be certain that Anglo turnout increased from 2010 to 2014, it is equally true that one cannot be certain that Black and Hispanic turnout actually decreased across these same election cycles. Translating statistical language into plain English, the 2010 and 2014 voter turnout rates for Anglos, Blacks, and Hispanics are indistinguishable from each other. Although he does not report confidence intervals, Professor Burden acknowledges this fact when he states, *[t]hese differences across elections are generally not statistically significant by conventional standards given the modest sample sizes and*

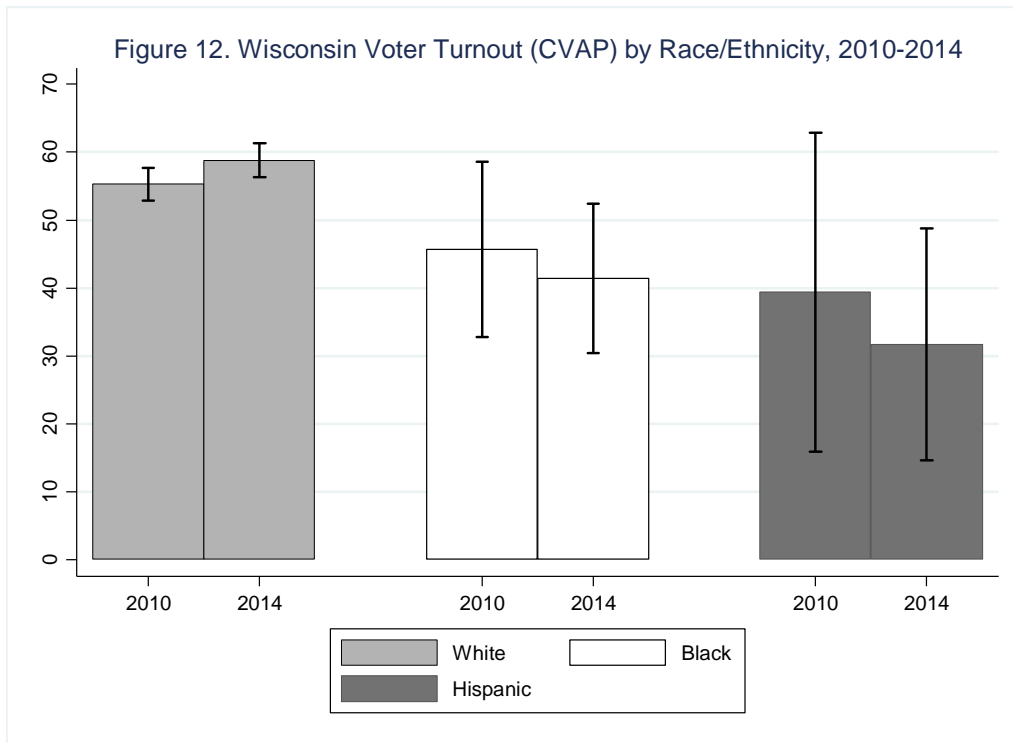
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<sup>104</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 8.

<sup>105</sup>For a review of this literature see Seth C. McKee, M.V. Hood III, and David Hill. 2012. "Achieving Validation: Barack Obama and Black Turnout in 2008." *State Politics and Policy Quarterly* 12: 3-22.

<sup>106</sup>U.S. Census Bureau. Voting and Registration. Population Characteristic (P20) Reports and Detailed Tables available at: <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/index.html>.

accompanying margins of error.<sup>107</sup> The conclusion to be drawn from the findings displayed in Figure 12 indicate that minority turnout rates in Wisconsin remained constant across these two midterm election cycles. In summary, comparing racial/ethnic turnout rates from 2010 to 2014 tells us nothing about the potential impact of the election provisions under challenge.



<sup>107</sup>See Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 7.

## **XI. RESPONSE TO PROFESSOR LICHTMAN**<sup>108</sup>

In this section I respond to the expert report of Professor Lichtman who contends that the election provisions under challenge in this case were put in place by the Wisconsin State Legislature with the intention of discriminating against racial/ethnic minority voters. Professor Lichtman makes the claim that he will provide evidence of such discriminatory intent. In my opinion, much of his 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. I also find much of the information on which he bases these claims are very selective in nature (below, I will provide some examples). Finally, he relies almost entirely on secondary data and provides almost nothing in terms of original data analysis on this question.

Professor Lichtman offers no evidence that Wisconsin has a past history of racial discrimination in reference to its election practices. On this point I would like to note that there have been three separate applications of Section 5 since the Voting Rights Act was implemented, in 1965, 1970, and 1975. The 1965 and 1970 *triggers* applied to jurisdictions which had a test or device for registration (e.g. literacy test) and which also had low levels of registration or turnout. In 1975, a third trigger related to single-language minorities was added. If a jurisdiction fell under Section 5 coverage the implication is that discriminatory registration or voting practices were present.<sup>109</sup> Section 5 jurisdictions are required to pre-clear any changes related to the conduct of elections or registration with the federal government prior to implementation in order to prevent new discriminatory measures from taking effect.<sup>110</sup> Neither the State of Wisconsin, nor any component therein, has ever fallen under Section 5 coverage of the Voting Rights Act.<sup>111</sup> Had Wisconsin had a long history of discriminatory election practices then certainly the state, or specific jurisdictions within the state, would have been covered by Section 5.

Much of Professor Lichtman's report focuses on socio-economic disparities between Anglos, Blacks, and Hispanics in Wisconsin. As I stated when critiquing Professor Burden's report, the fact is that such disparities do exist and this can be empirically demonstrated. The linkage of such disparities to a claim of intentional discrimination is not, in my opinion, tenable. As stated above, in what manner are such socio-economic disparities connected to minority political participation, much less the legislative intent to discriminate?

Professor Lichtman then proceeds to makes the assertion that white voting strength, on which GOP control of the state rests, is in decline. He then claims, as a consequence of this demographic shift, the Republican controlled legislature passed a series of election-related bills specifically designed to maintain GOP political control by suppressing minority turnout. This is

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<sup>108</sup>This section references the Expert Report of Allan J. Lichtman. *One Wisconsin v. Nichol*. December 10, 2015.

<sup>109</sup>Examples of these types of practices included literacy or understanding tests, the use of white primaries, and poll taxes. These devices were especially prevalent in the South. See V.O. Key. 1949. *Southern Politics in State and Nation*. New York: Knopf.

<sup>110</sup>Charles S. Bullock, III and Ronald Keith Gaddie. 2009. *The Triumph of the Voting Rights Act*. Norman, OK: University of Oklahoma Press.

<sup>111</sup>A list of covered jurisdictions is located at: <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5>. Section 5 is still active, but currently unenforceable since the U.S. Supreme Court decision *Shelby County v. Holder* in 2013.



quite a claim! In the end, Professor Lichtman provides nothing in the way of systematic evidence to support such an assertion. Again, I was unable to find any evidence to support the contention that the election provisions under challenge have negatively impacted the ability of citizens to participate in the political process.

Professor Lichtman makes use of a number of secondary data sources to bolster this claim. Looking at the issue of Republican voting strength in particular, he states, *[e]xit poll data demonstrates that Republican electoral success in Wisconsin turns in part on white voter turnout relative to minority turnout.*<sup>112</sup> He makes use of exit poll data in Table 8 of his report to substantiate this claim. This table, however, looks at vote choice by race, not turnout by race. Using the same exit poll data as Professor Lichtman, the estimated composition of the Wisconsin electorate was 90% white in 2004, 92% white in 2006, 89% white in 2008, and 90% white in 2010. The share of the electorate that was white in 2010 was the same as in 2004, and up a point from 2008. The election-cycle preceding passage of Act 23 in 2011 saw white turnout up, not down as Professor Lichtman implies. In contrast, the white share of the Wisconsin electorate in 2012 was 86% and in 2014 it stood at 88%. If the challenged election provisions were put in place to bolster white turnout at the expense of minority participation (as claimed by Professor Lichtman), they did not produce the desired effect.

Again, in order to bolster the assertion that the Wisconsin Legislature intended to suppress minority turnout, Professor Lichtman cites evidence which he claims demonstrates that legislators had prior knowledge that such legislation would produce the desired negative impact sought. For example, he states that changes to Wisconsin's in-person absentee balloting were undertaken with the knowledge that minority voters would be disproportionately affected. He bases this on a set of surveys from 2008 and 2012 which he purports to show minorities in Wisconsin utilized early voting at a greater rate than whites. Of course, the 2012 surveys were not in existence when Act 23 was passed in 2011. Further, there is no evidence to conclude that any Wisconsin legislator was aware of the 2008 survey or its specific findings. Professor Lichtman also indicates that he relied on quantities produced by combining these surveys. He provides no explanation of how he produced these findings or the manner in which he constructed confidence intervals or significance tests. I was unable to access the underlying data for the 2008 and 2012 Performance of American Elections Surveys and the written reports found online do not present a breakdown of voting method by state and race.

In the same section covering in-person absentee voting Professor Lichtman asserts that cutting the number of days available for this mode of voting resulted in ever longer lines, especially for minority voters. These findings are located in Table 19 of his report. For these calculations he relies on the Cooperative Congressional Election Studies in 2008 and 2012. It should be noted that he does not make use of the racial identifiers in the survey, but only attempts to compare Milwaukee County to the rest of Wisconsin. Wait times in Milwaukee County do not equate with wait times for minority voters. Even more problematic is the fact that the question on these surveys asks, *approximately how long did you have to wait in line to vote?* It is asked of both

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<sup>112</sup>This section references the Expert Report of Barry C. Burden. *One Wisconsin v. Nichol*. December 10, 2015. Page 17.

election-day precinct and in-person early (absentee) voters.<sup>113</sup> It is impossible then to separate wait times by voting method. Any inference drawn from these questions concerning in-person absentee voting and wait times is, consequently, invalid. Ironically, the Survey of Performance of American Elections showed the average wait time for in-person voting in Wisconsin was only 9 minutes in 2008 and 8 minutes in 2012.<sup>114</sup>

Professor Lichtman also claims that the legislative justification of public support for these various election reforms is unfounded. He cites evidence from a Marquette Law School public opinion poll. In this same poll 60.4% of Wisconsinites indicate that they favor *requiring a government issued photo ID to vote*.<sup>115</sup> Likewise, another academic article found that that 75% of Wisconsin residents favored requiring voters to show government-issued photo identification in 2008.<sup>116</sup>

In the end what are we left with? 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 contradictory evidence. As well, the corresponding causal relationships he posits to reach a conclusion of intentional discrimination are not, to any degree of confidence, substantiated.

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<sup>113</sup>CCES information at: <http://projects.iq.harvard.edu/cces/home>.

<sup>114</sup>See Appendix 2, Average Line Length by State. Charles Stewart. 2012 Survey of the Performance of American Elections Final Report ([http://elections.delaware.gov/pdfs/SPAE\\_2012.pdf](http://elections.delaware.gov/pdfs/SPAE_2012.pdf)).

<sup>115</sup>Marquette Law School Poll. October 23-26, 2014. Source: <https://law.marquette.edu/poll/results-data>.

<sup>116</sup>R. Michael Alvarez, Thad E. Hall, Ines Levin, and Charles Stewart III. 2011. "Voter Opinions about Election Reform: Do They Support Making Voting More Convenient?" *Election Law Journal* 10(2): 73-86.

## XII. RESPONSE TO PROFESSOR MINNITE

In this section I respond to an expert report submitted by Professor Lorraine Minnite. Professor Minnite's report deals primarily with the topic of voter fraud and voter ID laws.

In her expert report Professor Minnite states:

*I conclude that measures which risk reducing voter access to the ballot are not justified by claims that such requirements are needed to reduce or prevent voter impersonation forms of election fraud because as the record makes clear, fraud committed by voters either in registering to vote or at the polls on Election Day is exceedingly rare.<sup>117</sup>*

Professor Minnite also states, *given historical patterns and evidence and the context for party competition, that such policies actually serve as a form of voter suppression.* Further, she contends that it is black Americans who are typically the object of such efforts.<sup>118</sup>

In specific reference to the voter ID component of Act 23, I take issue with a number of points in Professor Minnite's expert report and her ultimate conclusions offered above. Professor Minnite defines voter fraud as the *intentional corruption of the voting process by voters.*<sup>119</sup> Her search for fraudulent activity then is quite narrow in my opinion as it fails to take into account any election-related fraud committed in other contexts. For example, it is certainly possible for individual voters to be involved in electoral fraud in collusion with poll workers. In my own work I argue that a more expansive definition is required to study this subject which can include not only fraud committed on the part of individuals, but also other third-party entities as well as poll workers, candidates, and political parties. A wider definition of election-related fraud allows one to search for a variety of fraudulent activities and not just fraud which may be perpetrated by a single individual.

Second, all of Professor Minnite's conclusions are based on reports of voter fraud. As such, she has simply relied on secondary data sources like federal court indictments, GAB documents, or journalistic reports. Relying on reports overlooks fraudulent activity that may have gone unreported. As an illegal activity, those engaged in election fraud do not want to be discovered. I argue in my own work that in order to fully examine election fraud one must go beyond simply relying on reports of voter/election fraud and actively search for the existence of such activities. I suggest a general methodology to scientifically study election fraud through forensic techniques based on KDD (Knowledge Discovery in Databases).<sup>120</sup>

Wisconsin is among a handful of states that allow EDR or election-day registration. It is possible then for an unregistered Wisconsin resident to show up at the polls on election-day, register, and then cast a ballot. Given this scenario it seems reasonable for election officials to be able to confidently identify such individuals, given there is no time on election-day for these cases to

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<sup>117</sup>Expert Report of Professor Lorraine C. Minnite. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015. Pages 34-35.

<sup>118</sup>Expert Report of Professor Lorraine C. Minnite. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015. Page 35.

<sup>119</sup>Expert Report of Professor Lorraine C. Minnite. *One Wisconsin Institute v. Nichol* (3:15-cv-00324). December 10, 2015. Pages 7-8.

<sup>120</sup>M.V. Hood III and William Gillespie. 2012. "They Just Don't Vote Like They Used To: A Methodology to Empirically Assess Election Fraud." *Social Science Quarterly* 93: 76-94.

undergo any type of validity checks. Requiring these individuals to provide a form of Act 23 identification could assist in this scenario in reducing the possibility of election-related fraud.

In the end, whether or not past election fraud in Wisconsin can be proven is not relevant to the ability of states to implement changes to their election code designed to prevent future instances of election fraud. Even in the absence of evidence for election fraud the U.S. Supreme Court has concluded in *Crawford et al. v. Marion County Election Board et al.* that the states should be able to implement reasonable requirements to safeguard against future occurrences of voter fraud.<sup>121</sup> As well, I have yet to find any expert, including Professor Minnite, who concludes that the presentation of government-issued photo identification does not make it extremely difficult for an individual to commit in-person voter impersonation. In Wisconsin, some fraud prevention is also extended to absentee by mail voting as these voters must also include a photocopy of a valid Act 23 identification with their ballot.<sup>122</sup>

As to the claims of voter suppression, especially those related to minority voters, Professor Minnite provides absolutely no empirical evidence, nor is she able to cite any peer-reviewed literature that finds such effects. My own academic work examining the implementation of Georgia's voter identification statute fails to find any evidence that racial minorities were disproportionately affected.<sup>123</sup>

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<sup>121</sup>In this case the Court upheld the constitutionality of Indiana's voter ID law, in part, based on this logic (553 U.S. 181, 128 S.Ct. 1610).

<sup>122</sup>See <http://bringit.wisconsin.gov>.

<sup>123</sup>M.V. Hood III and Charles S. Bullock, III. 2012. "Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute." *State Politics and Policy Quarterly* 12(4): 394–414.

### XIII. OVERALL CONCLUSIONS

The framers left the qualification of voters up to the states and along with this task the responsibility to administer elections as well.<sup>124</sup> The State of Wisconsin, being admitted to the Union in 1848, has conducted elections for over 150 years. The plaintiffs in the present matter raise a plethora of objections concerning the manner in which Wisconsin administers its elections. However, after a close examination of these questioned procedures I have come to the conclusion that Wisconsin's election code provides a reasonable and common sense approach to the manner in which elections are conducted in the state. Further, Wisconsin has acted to continue to make elections more manageable, fair, and efficient (i.e. standardization for in-person absentee voting days and hours). As well, the electoral climate in the state can be characterized as extremely positive as evidenced by the fact that in three of the last four federal election cycles Wisconsin recorded the second highest voter turnout rate in the country.

My examination of in-person absentee balloting demonstrated that despite reductions in days and hours, turnout for this form of voting did not decrease as predicted, but actually increased. Likewise, the plaintiffs' claim that additional in-person absentee voting sites would equate to more convenience and, consequently, higher turnout was shown not to reflect reality. The results of my empirical analyses on this topic demonstrate that larger municipalities in Wisconsin are in no way disadvantaged by being able to offer only a single in-person absentee voting site. The recent changes to in-person absentee voting in Wisconsin represent a means by which voter convenience can be balanced against the cost, both literal and administrative, for providing this service.<sup>125</sup>

My report also examined changes to the absentee by-mail process in Wisconsin. Upon investigating the plaintiffs' complaints I discovered common sense administrative justifications for the existence of these provisions. For example, only allowing absentee ballots to be transmitted through the mail helps to prevent unintentional errors and maintain voter privacy. Second, contrary to what one would predict from claims alleged by the plaintiffs, I found that the rate at which absentee ballots have been rejected has fallen, not risen, over the last two federal election cycles. My examination of Wisconsin's registration process involving the end of corroboration determined that this change instituted a fair and consistent standard for all electors in the state. Finally, increasing the residency requirement to 28 days places Wisconsin firmly in line with other states that have similar requirements.

I would like to reiterate at this point that in-person absentee voting has not been eliminated in Wisconsin—this option is still fully available for registrants to utilize if they desire. As well, electors can also cast a no-excuse absentee ballot by mail or vote at their polling place on

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<sup>124</sup>See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes. 2007. *The Law of Democracy, Legal Structure of the Political Process*. New York: Foundation Press. Obviously, states must operate within parameters that have been set by subsequent amendments to the U.S. Constitution and federal law (i.e. The Voting Rights Act); nevertheless, it is still the states who oversee and implement elections.

<sup>125</sup>On this point see the Declaration of Diane Hermann-Brown. *One Wisconsin Institute v. Nichol*. January 8, 2016. Page 1-3; the Declaration of Kathleen Novack. *One Wisconsin Institute v. Nichol*. January 7, 2016. Pages 2-5; the Declaration of Constance McHugh. *One Wisconsin Institute v. Nichol*. January 5, 2016. Pages 1-2; and the Declaration of Susan Westerbeke. *One Wisconsin Institute v. Nichol*. January 5, 2016. Pages 1-3.

election-day. In addition, citizens can still register to vote during the in-person absentee period (SDR) or on the day of the election itself (EDR). A uniform statewide system for in-person absentee voting days, hours, and sites is now in place. This system still includes the ability of municipalities to offer extended in-person absentee hours.

A voter in Wisconsin, as in any state, can legally only cast a single ballot in a given election. For the 2016 presidential general election Wisconsinites will have the opportunity to vote absentee in-person across a total of 110 hours spread over a 10-day period. They will also have the opportunity to vote at their local polling location on election-day over a 13 hour period (from 7:00 am to 8:00 pm). Finally, any registrant can also cast an absentee ballot through the mail, without excuse, beginning 47 days prior to the date of the election.<sup>126</sup> Just considering in-person voting options for the moment, the hypothetical Wisconsin voter has a total of 123 hours across an 11-day period in which they can cast their single ballot. In short, there appears to be more than ample opportunity, time, and convenience for voters to accomplish this duty in the State of Wisconsin.

In summary, I can think of no reason that would lead me believe that the changes undertaken to Wisconsin's election code under challenge in this case have, or will have, a detrimental impact on the ability of Wisconsin voters to cast a ballot, including minority voters.

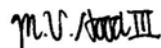
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<sup>126</sup>See Wisconsin Government Accountability Board website: <http://www.gab.wi.gov/clerks/guidance-absentee>.

**XIV. DECLARATION**

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on January 11, 2016



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M.V. (Trey) Hood III

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

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

Plaintiffs,

v.

Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

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**MOTION TO STAY INJUNCTION AND RULING PENDING APPEAL**

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Defendants respectfully move the Court for an order staying the permanent injunction and ruling, entered on July 29, 2016 (Dkt. 234), as well as its judgment, entered on August 1, 2016 (Dkt. 235), while this case is on appeal. The current injunction and ruling require a vast overhaul of Wisconsin's election procedures. But Defendants are likely to prevail on appeal, and election law cases like this are consistently modified on appeal. It would cause major disruption and voter confusion to require Defendants to change election procedures and inform the public of those changes, only to change the procedures back, and re-inform the public, after an appeal. Issuing a stay now will give the appellate courts an opportunity to clarify election requirements before public funds are spent, with sufficient time to ensure that the public is adequately—and correctly—informed of the



applicable requirements. In contrast, denying a stay will require putting resources into an election overhaul that could very well be reversed, and at minimum is going to be in flux through appellate proceedings. This Court should stay the injunction and ruling pending appellate review to prevent harm to Defendants and the public.

### LEGAL STANDARD

Federal Rule of Civil Procedure 62(c) states: “While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” Federal Rule of Appellate Procedure 8(a)(1) states: “A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of the district court pending appeal[.]”

The Seventh Circuit has stated the standard for granting a stay pending appeal:

The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir.1997). . . . To determine whether to grant a stay, we consider the moving party’s likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *See Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir.2007); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir.1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300. As with a motion for a preliminary injunction, a “sliding scale” approach applies; the greater the moving party’s likelihood of success on the

merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707.

*In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014).

## ARGUMENT

The stay factors support staying the Court's injunction and ruling. The injunction and ruling will likely be overturned on appeal, and enforcing the injunction and ruling pending appeal will cause great harm to the state and to voters. And recent similar district court decisions in voting rights cases have consistently been modified on appeal. It is imprudent to require the state to begin a massive overhaul of its election procedures today, when it is highly likely that some, if not all, of the current injunction and ruling will not be in effect for upcoming elections.

**I. Defendants will likely succeed on appeal on every issue, and the balance of harms and public interest support granting a stay.<sup>1</sup>**

A stay is justified because Defendants will likely succeed on appeal and because the balance of harms support granting a stay.

The Court's first ruling was that the statute establishing one location for in-person absentee voting is unconstitutional. (Dkt. 234:115.) But the

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<sup>1</sup> Defendants' position on the merits of each claim is thoroughly explained, with citations to relevant facts and law, in the hundreds of pages of briefing on summary judgment and post-trial submissions. For the sake of brevity, this stay motion summarizes those positions and errors in the Court's decision, but does not repeat voluminous prior briefing.

one-location rule is nothing new—the constellation of laws challenged by Plaintiffs did not change the number of locations. And there are good administrative reasons to keep the one-location rule in effect. (See Dkt. 206:57–59.) Plaintiffs’ core challenge is that the Legislature should have changed a long-standing law in 2013, despite the many reasons why the law helps election administration. This Court’s ruling that a *non-change* to an existing law is unconstitutional amounts to a judicial creation of election procedures and is unlikely to survive appeal. As a practical matter, failure to stay the injunction and ruling pending appeal creates a risk that municipalities will advertise multiple voting locations, some of which will be unavailable on election day.

The Court’s ruling on extended hours for in-person absentee voting raises similar problems. Statewide regulation of in-person absentee timing is necessary for orderly and effective elections. For all the reasons established at trial by the clerks with first-hand knowledge of real-world election logistics, eliminating the sensible timing regulations would be detrimental to election administration. (See Dkt. 206:54–57.) As to potential harms to the public, municipalities may advertise extended hours for in-person absentee voting in the absence of a stay. These hours are likely to be inconsistent, create extra works for clerks, and may even be set to start before ballots are ready. That confusion will be even worse if the injunction and ruling are

reversed on appeal, requiring administrators to try to advertise last-minute changes to previously announced election hours.

The Court's registration-related injunction provisions are contrary to binding precedent holding that "[r]egistering to vote is easy in Wisconsin." *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014). Despite this precedent, the Court found the "dorm list" requirement unconstitutional, even though students who are unable to rely on a dorm list have twelve different ways to register, including eleven of the forms available to non-students. Wis. Stat. § 6.34(3)(a)1–6, 8–11. And this Court enjoined a 28-day durational residency requirement even though the U.S. Supreme Court has approved longer durational requirements. *Burns v. Fortson*, 410 U.S. 686, 687 (1973) (per curiam) (50-day requirement); *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam) (50-day requirement); *Dunn v. Blumstein*, 405 U.S. 330, 363 (1972) (Blackmun, J., concurring) (30-day requirement). This Court's injunction and ruling run against binding precedent and will likely be reversed on appeal.

As to potential harms, these registration decisions pose a real risk of creating a quagmire surrounding situations where a person improperly registered before reversal. What do election administrators do with a registration that occurred under the rules of the injunction after the

injunction and ruling are reversed? This problem is avoided entirely by a stay.

This Court enjoined limitations on electronic or faxing ballots despite extensive evidence of the security, accuracy, and efficiency reasons for the limits. (*See* Dkt. 206:91–93.) It dismissed security concerns by concluding, without evidence, that voters who transmit ballots by electronic means are “voluntarily” giving up voting privacy, and that forwarded ballots are detectable. (Dkt. 234:86.) But compromising election security is unnecessary, and clerks have no time or means to know when a ballot is returned by the wrong person. This portion of the injunction and ruling will likely fall on appeal, but if there is a reversal after ballots are sent, or returned, there will be confusion over how—or whether—to count wrongly-returned ballots.

The injunction prohibits the prohibition of expired student IDs on *rational basis* review. (Dkt. 234:112–113.) But it is plainly rational to require a person using a student ID to be a current student, and not someone who graduated and moved away long ago. The Court notes that enrollment papers are used in conjunction with an ID, but enrollment papers do not have a photograph, so poll workers have no way of knowing if the papers correspond to the voter without a corresponding valid photo student ID. (Dkt. 234:114.) Regarding any alleged burden, testimony from students establishes that

compliant IDs are available on campus *on election day*. (Dkt 206:154–55 and record cites therein.) But absent a stay, universities may not make arrangements to issue compliant IDs, resulting in confusion after reversal on appeal.

Finally, this Court’s modification of the IDPP rests on a fundamental misreading of black-letter law. (Dkt. 234:117–19.) Under the injunction and ruling, anyone who enters the IDPP must promptly be issued a credential for voting, unless the person is not entitled to one. (*Id.*) That already happens:

The department shall issue an identification card receipt . . . to any individual who has applied for an identification card without charge for the purposes of voting and who makes a written petition . . . The department shall issue the receipt not later than the sixth working day after the applicant made the petition.

Wis. EmR1618 § 8. But the court went on to order that this identification must have a period of expiration no shorter than a driver license. (Dkt. 234:119.)

This order appears to rest on the false premise that the photo receipts in the current process expire after a limited number of automatic renewals totaling 180 days, and that the law is silent about what happens after that. (Dkt. 234:14, 28.) That is not true. The rule is clear that renewed receipts will continue to be sent, with no limit on the number of automatic renewals: “The department shall issue a new receipt to the applicant not later than 10 days before the expiration date of the prior receipt, and having a date of

issuance that is the same as the expiration date of the prior receipt.”

Wis. EmR1618 § 10. Renewals only stop after a denial:

The department shall issue no receipt to an applicant after the denial of a petition under sub. (5m)(b)3., except that if the applicant provides additional information that revives an investigation under sub. (5m)(b)3., the department shall immediately issue, and continue to reissue, a receipt to the applicant as provided in that subdivision.

Wis. EmR1618 § 10. The corresponding denial rule—sub. (5m)(b)3.—permits denials after an applicant does not give information to DMV for 180 consecutive days, for fraud, or when an applicant is ineligible.

Wis. EmR1618 § 8; *see also* Tr. 5-23-16:23 (“[renewals] could be longer if they brought forward new information.”) The 180-day timeline relied upon by the court is the absolute minimum that an applicant can have a receipt, not a maximum. The law is not “silent” about what happens after 180 days, and the IDPP does not create an undue burden on voting.

Without a stay, everyone in the IDPP will get an identification card that is valid for several years, including applicants who might be ineligible to vote or receive an ID. Unless the Court orders a stay, those improperly-issued IDs will be in circulation during the general election, and for years thereafter. DMV would be effectively powerless to stop such ineligible persons from using an improperly-issued ID on election day. A stay pending appeal is necessary to prevent this harm, and to protect the election system.

**II. The reliable pattern of reversal or modification on appeal in similar election law cases counsels strongly in favor of staying the injunction and ruling pending appellate review.**

In virtually every recent major election law case, the district court's decision was modified or reversed on appeal. The result has been a reliably dizzying back-and-forth between election laws being enjoined and reinstated. Because avoiding such back-and-forth is of paramount concern for avoiding voter confusion and conserving public resources, this trend weighs heavily in favor of a stay, under both the likelihood-of-success and public-interest prongs.

This back-and-forth has even already happened between Wisconsin district courts and the Seventh Circuit in the *Frank* litigation, where the district court has twice been reversed on appeal, with another stay likely within days. *See Frank v. Walker*, Nos. 16-3003, 16-3052 (7th Cir. August 1, 2016) (emergency motion to stay preliminary injunction (7th Cir. Dkt. 16)). The district court permanently enjoined Wisconsin's voter ID law, only to have that decision stayed, then ultimately reversed.



*See Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).<sup>2</sup> The Seventh Circuit concluded that not only did the district court err in concluding the voter ID law violated the Constitution and the Voting Rights Act, but also that the injunction was overly broad. *See Frank I*, 768 F.3d at 755.

Following remand, the district court changed course, and concluded that *Frank I* barred plaintiffs' additional request for relief. *See Frank v. Walker*, 141 F. Supp. 3d 932, 935–36 (E.D. Wis. 2015). But as this Court is aware, this spring the Seventh Circuit vacated portions of the district court's decision, concluding that further proceedings were warranted. *See Frank v. Walker (Frank II)*, 819 F.3d 384, 388 (7th Cir. 2016).

The recent decision in *North Carolina State Conference of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033 (4th Cir. July 29, 2016), is another example of this pattern of confusing back-and-forth. Following a trial, the district court made voluminous findings of fact. *See id.* at \*5–6. The Fourth Circuit, however, rejected those findings and reversed the district court's

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<sup>2</sup> Further contributing to the back-and-forth, the Supreme Court vacated the Seventh Circuit's stay, with the effect being to reinstate the district court's injunction until the Supreme Court eventually denied certiorari, after which the voter ID law went back into effect after having been improperly enjoined for almost a year. *See Frank v. Walker*, 135 S. Ct. 7, 7 (2014) (vacating stay pending resolution of petition for writ of certiorari); *Frank v. Walker*, 135 S. Ct. 1551 (2015) (denying petition).

denial of a permanent injunction, concluding that the district court's findings were clearly erroneous in multiple respects. *See id.* at \*9–11, 21–22.

And before that reversal, the district court had previously denied a motion for a preliminary injunction, only to have the Fourth Circuit reverse that decision in part, based on the conclusion that the district court abused its discretion in denying the preliminary injunction. *See N. Carolina State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 334 (M.D.N.C.); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 230 (4th Cir. 2014). The Supreme Court then stayed *that* decision, thereby allowing all of the challenged provisions to stand for the upcoming election. *N. Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6, 6 (2014).

Strikingly similar procedural patterns have played out in other states. In a challenge to Texas's voter ID law, the district court enjoined the law, *see Veasey v. Perry*, 71 F. Supp. 3d 627, 633, 707 (S.D. Tex. 2014); the Fifth Circuit stayed the injunction, *see Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014); and the U.S. Supreme Court declined to vacate stay of injunction, allowing the challenged voter ID provision to stand for the

upcoming election. *See Veasey v. Perry*, 135 S. Ct. 9, 9–10 (2014).<sup>3</sup>

And in a challenge to Ohio’s limitation on early in-person voting, the district court enjoined a law limiting early voting, *see Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio); the Sixth Circuit denied a stay and affirmed the district court’s injunction, *see Ohio State Conference of NAACP v. Husted*, 769 F.3d 385 (6th Cir. 2014) (denying stay pending appeal); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) (affirming injunction); and the Supreme Court stayed the injunction, allowing the challenged law to stand during upcoming election. *See Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42, 189 L. Ed. 2d 894 (2014).

These cases illustrate that there is a reliable pattern of reversal or modification from nearly all initial election law decisions. This Court should avoid this burdensome, expensive, and confusing back-and-forth. This can be easily accomplished by granting a stay that permits the appeals process to give final guidance before imposing the severe overhaul of election procedures required by the injunction and ruling.

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<sup>3</sup> In another round of back-and-forth, the Fifth Circuit recently affirmed the district court’s decision in part, concluding that injunctive relief was proper based on the finding of discriminatory effects of the voter ID law. *See Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at \*39 (5th Cir. July 20, 2016).

## CONCLUSION

Defendants will likely succeed on appeal. Failing to grant a stay will result in harm to the public, who will have to sort through the various rulings, and to the Defendants, who will be required to expend resources complying with an injunction and ruling that will be reversed. This Court should not require Defendants and Wisconsin citizens to endure the dizzying back-and-forth that is so common during appeals in this type of case. For the reasons argued in this motion, the Court should stay its injunction and ruling (Dkt. 234), as well as its judgment (Dkt. 235), pending appeal.

Dated this 3rd day of August, 2016.

Respectfully submitted,

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

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

Plaintiffs,

v.

Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

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**DEFENDANTS' POST-TRIAL BRIEF**

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## INTRODUCTION

Plaintiffs did not prove their dozens of legal claims challenging a host of election laws enacted since 2011. The trial evidence showed that Wisconsin elections are fair, easy to navigate, and open to all. The Court should enter judgment in Defendants' favor as to all pending claims.

To start, Plaintiffs did not prove that they have standing to challenge the voter photo ID law, 2011 Wisconsin Act 23 ("Act 23"). Of the Plaintiffs who testified at trial, all have a qualifying ID (and in some cases, multiple forms of qualifying ID). When even the testifying Plaintiffs cannot prove they will be injured by the law, how can they credibly argue that it should be struck down? They are not burdened by a photo ID requirement—they just need to remember to bring their qualifying IDs to the polls. The Court lacks jurisdiction over claims against the voter photo ID law when no Plaintiff has proven he has standing to challenge it.

Jurisdictional issues aside, Plaintiffs have not proven that the voter photo ID law, changes to absentee voting, changes to voter registration and residency requirements, and other miscellaneous election administration laws violate the U.S. Constitution or Section 2 the Voting Rights Act of 1965. The trial evidence proved that voter turnout in Wisconsin has climbed—to historic levels in April 2016—even after implementation of the challenged laws. The use of absentee voting has continued to increase across the demographic

groups relevant for purposes of analyzing Plaintiffs' claims. Plaintiffs' apparent argument is that voter turnout and absentee-voting rates would have increased *more* if the challenged laws were not enacted. The lack of proof for such untestable claims was confirmed at trial.

As the Court sifts through and winnows the trial evidence, a theme will emerge: Plaintiffs' trial proof is primarily anecdotes. An individual voter may have experienced a problem. A witness may have observed a relatively small number of voters who experienced another problem. Or a state legislator may have made an off-hand or silly remark. These strands of evidence, really isolated blips on the radar, are insufficient to prove Plaintiffs' allegations of widespread constitutional and statutory violations that would justify that the challenged laws be struck down on their face, as to *all* voters. An anecdote is not evidence of a systemic burden on voters. It is not the type of proof that satisfies Plaintiffs' burden to obtain facial invalidation of these laws.

Wisconsin continues to be a national leader in election administration and voter turnout. Plaintiffs' multitude of constitutional and statutory claims buckle under the weight of the trial evidence, which proved that the challenged election laws are both constitutional and consistent with the Voting Rights Act. The Court should enter judgment in Defendants' favor.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In Count 1 of the Second Amended Complaint, Plaintiffs raised a series of claims under Section 2 of the Voting Rights Act of 1965. Section 2(a) of the Voting Rights Act states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

52 U.S.C. § 10301(a).

A violation of Section 2(a) of the Voting Rights Act is established “if, based upon the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by members of a protected class, “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

52 U.S.C. § 10301(b).

In Counts 2, 3, 4, 5, and 6 of the Second Amended Complaint, Plaintiffs raised a series of claims under the First, Fourteenth, Fifteenth, and Twenty-sixth Amendments to the U.S. Constitution. Those Amendments state, in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. Const. amend. XV, § 1.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

U.S. Const. amend. XXVI, § 1.

## **FACTUAL BACKGROUND**

Consistent with this Court's order, Defendants will not submit proposed findings of fact. (May 27, 2016, order, Dkt. 198:1.) Salient facts for the Court to find will be described in the Argument section below.

## **ARGUMENT**

### **I. Jurisdiction and standing**

Article III of the U.S. Constitution confines the federal courts to adjudicating actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1.

“[T]he requirements of Article III case-or-controversy standing are threefold: (1) an injury in-fact; (2) fairly traceable to the defendant’s action; and (3) capable of being redressed by a favorable decision from the court.” *Parvati Corp. v. City of Oak Forest*, 630 F.3d 512, 516 (7th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

**A. Plaintiffs did not prove that they have standing to challenge the voter photo ID law.**

No testifying Plaintiff lacks a form of Act 23 qualifying ID. There are no Plaintiffs who proved at trial that they have Article III standing to challenge the voter photo ID law. Accordingly, the Court lacks jurisdiction over claims challenging the voter photo ID law.

A voter who is not injured cannot show “that the challenged action of the defendant caused an ‘injury in fact’ that is likely to be redressed by a favorable decision.” *Judge v. Quinn*, 612 F.3d 537, 544 (7th Cir. 2010), *opinion amended on denial of reh’g*, 387 F. App’x 629 (7th Cir. 2010). Such an individual has no Article III standing.

Four voter Plaintiffs testified at trial: Renee M. Gagner, Anita Johnson, Cassandra M. Silas, and Jennifer S. Tasse. No other individual voter Plaintiffs testified, but Plaintiff Scott T. Trindl filed deposition designations with the Court. In his deposition, Mr. Trindl confirmed that he has a form of qualifying ID, a Wisconsin driver license. (Trindl Depo., Dkt. 180:80.) Plaintiffs Cody R.



Nelson, Michael R. Wilder, Johnny M. Randle, David Walker, and David Aponte did not testify to prove they lack qualifying ID.

All individual voter Plaintiffs have a qualifying ID. Defendants' exhibit 22 is a copy of certified driver records from the Wisconsin DMV showing the qualifying IDs issued to Plaintiffs Gagner, Johnson, Nelson, Tasse, Trindl, and Wilder. (DX22:1–13.) Likewise, Defendants' exhibit 130 contains interrogatory responses in which Plaintiffs Gagner, Johnson, Nelson, Tasse, Trindl, and Wilder stated that they have forms of qualifying ID to vote. (DX130, Response to Interrogatory No. 10.)

Plaintiffs Aponte, Randle, Silas, and Walker have a state ID card receipt that was issued after the Wisconsin DOT promulgated administrative rules on May 13, 2016, that are applicable to ID petition process (“IDPP”) petitioners. (DX272–DX275; PX445:1–8.) While the receipt expires in 60 days, it will be renewed. (DX268:20–21 (May 13, 2016, emergency rule).) DMV will continue to re-issue receipts without the petitioner needing to apply for a renewal. (Tr. 05-23-16 at 9 (Boardman testimony).)<sup>1</sup> Even if these four Plaintiffs do not receive their plastic state ID cards in time for the November 2016 general election, renewals of their state ID card receipts will permit them to prove their

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<sup>1</sup> Citations are to the draft trial transcripts. The following citation formats are used in this brief: “Tr. [date], [day of trial]-[‘A’ for a.m., ‘P’ for p.m.]-[page number]” and “Tr. [date] at [page number].”

identities to vote on Election Day. They are not threatened with an injury by the voter photo ID requirement.

The corporate Plaintiffs, One Wisconsin Institute, Inc. (“One Wisconsin”) and Citizen Action of Wisconsin Education Fund, Inc. (“Citizen Action”), have no right to vote. They are not injured by a requirement that voters show a qualifying ID to vote. Likewise, these Plaintiffs offered no evidence to prove they have standing to assert their members’ rights. These Plaintiffs have no members. (DX130, Response to Interrogatory Nos. 18–20 (stating that One Wisconsin and Citizen Action do not have members).) The corporate Plaintiffs did not prove that their members lack qualifying ID.

This Court was wrong when it held that voters who have a qualifying ID have Article III standing to challenge the voter photo ID law. (*See* May 12, 2016, opinion and order, Dkt. 185:10.)

A voter is not injured by a photo ID requirement when he has ID, even if the ID will expire in the future.

No Plaintiff proved an injury that confers Article III standing to challenge the voter photo ID law. Accordingly, the Court lacks jurisdiction over claims challenging the voter photo ID law, the claims should be dismissed, and judgment should be entered in Defendants’ favor.

Finally, additional standing arguments are raised in the Argument sections below. There are several claims for which no Plaintiff proved an injury to establish Article III standing and this Court's jurisdiction.

**B. No Plaintiff is an “aggrieved person” under the Voting Rights Act to challenge the voter photo ID law.**

Related to (but legally different from) the Article III standing issue is the fact that no Plaintiff proved he is an “aggrieved person” under the Voting Rights Act to challenge the voter photo ID law.

Only an “aggrieved person” or the U.S. Attorney General may sue to enforce the guarantees of the Voting Rights Act. 52 U.S.C. § 10302(a), (b). Therefore, statutory standing under the Voting Rights Act for private litigants is limited to an “aggrieved person” seeking to enforce his or her right to vote. 52 U.S.C. § 10302(a), (b); *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). “Aggrieved persons” are those persons who claim that their right to vote has been infringed because of their race. *Id.*

No individual voter Plaintiff proved he or she is an “aggrieved person” because Plaintiffs have a form of Act 23 qualifying ID, in particular an ID that can be used in upcoming 2016 elections. The individual voter Plaintiffs who testified at trial or otherwise lodged evidence in the trial record cannot maintain a Voting Rights Act claim against the voter photo ID law because they have not proven that they will be aggrieved by it.

Standing under the text of the Voting Rights Act does not extend to non-persons like the two corporation Plaintiffs, which have no race and no right to vote. *See Roberts*, 883 F.2d at 621. They cannot be an “aggrieved person” under the plain language of the Voting Rights Act. 52 U.S.C. § 10302(a), (b). One Wisconsin and Citizen Action cannot assert a Section 2 claim to challenge the voter photo ID law.

There are no Plaintiffs who proved at trial that they are an “aggrieved person” who can enforce a claim to challenge the voter photo ID law under the Voting Rights Act. The Court should dismiss Plaintiffs’ Section 2 claim challenging the voter photo ID law and enter judgment in Defendants’ favor.

## **II. “Undue burden” claims under the First and Fourteenth Amendments (Count 2)**

Whether considered individually or cumulatively, none of the challenged laws creates an undue burden on the right to vote in violation of the First and Fourteenth Amendments. Plaintiffs challenge a host of laws in Count 2 of the Second Amended Complaint, including the voter photo ID law, absentee voting laws, voter registration laws, and other miscellaneous election laws. For the Court’s reference, Dkt. 79-1:2 is a chart Defendants filed with their summary judgment papers showing all of the claims and legal theories Plaintiffs raised.

**A. Legal standard for “undue burden” claims under the First and Fourteenth Amendments**

The U.S. Supreme Court “has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,” but this right “is not absolute.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). “[T]he States have the power to impose voter qualifications and to regulate access to the franchise in other ways.” *Id.* When the Supreme Court considers a challenge to a voting regulation under the First and Fourteenth Amendments, it thus applies “more than one test, depending upon the interest affected or the classification involved.” *Id.* at 335.

The Supreme Court has rejected a “litmus-paper test” for “[c]onstitutional challenges to specific provisions of a State’s election laws” and instead has applied a “flexible standard.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008) (opinion of Stevens, J.). Under the *Anderson/Burdick* test, “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.” *Crawford*, 553 U.S. at 190.

The Seventh Circuit stated the applicable test in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d

913 (7th Cir. 2015). When considering a constitutional challenge to a state election law, the Court must weigh:

“the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

*Id.* at 917 (quoting *Burdick*, 504 U.S. at 434). “This balance means that, if the regulation severely burdens the First and Fourteenth Amendment rights of voters, the regulation ‘must be narrowly drawn to advance a state interest of compelling importance.’” *Id.* (quoting *Burdick*, 504 U.S. at 434). “When the state election law ‘imposes only reasonable, nondiscriminatory restrictions upon the rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.’” *Id.* (quoting *Burdick*, 504 U.S. at 434).

**B. Voter photo ID does not impose an “undue burden” on the right to vote.**

Plaintiffs ask the Court to strike the voter photo ID law down as unconstitutional on its face. (Second Am. Compl., Dkt. 141:70 (prayer for relief).) Applying the *Anderson/Burdick* test, the U.S. Supreme Court’s decision in *Crawford*, and the Seventh Circuit’s decision in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), this Court should conclude that the voter photo ID law is constitutional.

*Frank* held that the voter photo ID law is constitutional under the same legal theory advanced here, and this Court is bound by *Frank*. The trial evidence proved that, as time has passed, fewer and fewer Wisconsin voters are without qualifying ID. The evidence in *Frank* was insufficient to prove that the law is unconstitutional. Based upon the more current data since *Frank*, Plaintiffs' trial evidence was even less convincing, so the result should be the same under the *Anderson/Burdick* test. The law should be upheld.

**1. The State has legitimate and important interests supporting a voter photo ID requirement.**

The State has legitimate and important interests supporting a voter photo ID requirement:

- a voter photo ID requirement helps detect, deter, and prevent in-person voter impersonation fraud;
- a voter photo ID requirement deters and helps detect other types of voter fraud because a voter intending to commit fraud will have to identify himself with an ID card at the polls;
- a voter photo ID requirement promotes public confidence in the integrity of the election process; and
- a voter photo ID requirement promotes orderly election administration and accurate recordkeeping.

The U.S. Supreme Court has recognized these compelling State interests. In *Crawford*, the Court recognized the legitimacy and importance of the State's interests in preventing fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of the election process. *Crawford*, 553 U.S. at 191–97 (opinion of Stevens, J.). The Court did not require the State to present evidence to justify those interests, but rather said:

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

*Id.* at 196; *see also Burson v. Freeman*, 504 U.S. 191, 199 (1992) (observing that an important component of a State's compelling interest in regulating elections is “ensuring that an individual's right to vote is not undermined by fraud”). The Court has readily acknowledged the independent importance of the State's interest in promoting public confidence in the integrity of the electoral process. *Id.* at 197; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel



disenfranchised.”); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in preserving the integrity of its election process”).

Other post-*Crawford* decisions in voter photo ID cases have recognized the same state interests with equal readiness. *See, e.g., Frank*, 768 F.3d at 750–51; *City of Memphis v. Hargett*, 414 S.W.3d 88, 103–05 (Tenn. 2013); *South Carolina v. United States*, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011); *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 767–69 (Ind. 2010); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353–54 (11th Cir. 2009). After *Crawford*, the State’s interests are not subject to debate.

Plaintiffs will argue that the State’s interest in preventing voter fraud is not legitimate enough to justify a voter photo ID requirement because there is scant evidence of recent instances of voter impersonation fraud in Wisconsin. That argument fails.

First, the argument has been specifically rejected in *Crawford* and *Common Cause/Georgia*. *See Crawford*, 553 U.S. at 191–97; *Common Cause/Georgia*, 554 F.3d at 1353–54. The Seventh Circuit’s decision in *Crawford* pointed out that, in the absence of effective voter ID procedures, voter impersonation fraud is very difficult to detect. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 953–54 (7th Cir. 2007), *aff’d* 553 U.S. 181 (2008).

The trial evidence confirmed the difficulty in detecting this kind of fraud. Referring to instances of so-called “stolen votes” (also known as voter impersonation fraud), Milwaukee County Assistant District Attorney Bruce Landgraf testified that in 2008 his office received approximately ten referrals for “stolen votes,” in 2012 approximately ten referrals, and in 2014 one referral. (Tr. 05-25-16, 8-A-186–87.) Eighty to ninety percent of these referrals “are resolved with innocent explanations.” (Tr. 05-25-16, 8-A-187.) But for the 2012 and 2014 elections, “one or two would remain unexplained. There was—there normally is never an explanation that can be determined and they remain unexplained and unresolved.” (Tr. 05-25-16, 8-A-187–88.) “It’s very difficult to make an identification of a person who would come in and cast a ballot in the name of another individual.” (Tr. 05-25-16, 8-A-188.) Thus, some impersonation fraud cases cannot be investigated and prosecuted.

Plaintiffs’ expert, Dr. Lorraine Minnite, agreed that voter fraud “has happened occasionally.” (Tr. 05-20-16 at 61.) She agreed that the existence of fraudulent votes could affect the outcome of a close election, “theoretically.” (Tr. 05-20-16 at 61–62.) While her admission that voter fraud is real was tepid, Dr. Minnite was familiar with at least one recent Wisconsin case of fraud that met her definition of “voter fraud.” (Tr. 05-20-16 at 62–64 (discussing the case of Robert D. Monroe).)

Assistant District Attorney Landgraf detailed at trial the case of Robert D. Monroe of Shorewood, who committed voter impersonation fraud by using absentee ballots. (Tr. 05-25-16, 8-A-184–86; *see also* DX149–153.) Mr. Monroe filled out absentee ballot applications using the names of his son and stepson, voting using the ballots sent to him. (Tr. 05-25-16, 8-A-184–85.) At the time he committed these crimes, the voter photo ID law was not in place, so Mr. Monroe was not required to submit copies of qualifying ID with the absentee ballot applications. (Tr. 05-25-16, 8-A-185.)

The infrequency of such prosecutions, without more, is insufficient to confirm that such fraud does not exist or that there is no legitimate and important interest in preventing potential fraud. Notably, the Supreme Court deemed such an interest valid despite the fact that the *Crawford* “record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history.” *Crawford*, 553 U.S. at 194.

Moreover, even if voter impersonation fraud could be affirmatively shown to be rare in Wisconsin at the present time, history nonetheless shows such fraud to be a real and significant danger. The Supreme Court has expressly recognized that danger and has held that states have a legitimate and important interest in addressing it by imposing reasonable photo identification requirements that will prevent such fraud. *Crawford*, 553 U.S. at 195 (noting that “flagrant examples of such fraud in other parts of

the country have been documented throughout this Nation's history by respected historians and journalists" (footnote omitted)).

Constitutional principles do not require a state to wait until a particular type of voter fraud has become an unmanageable problem before it takes reasonable affirmative steps to prevent such fraud. The Supreme Court has held that legislatures may be proactive in their efforts to prevent fraud. In *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986), the Supreme Court held that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." As James Madison noted, men are not angels, and sound government must be structured in light of that realistic understanding. See *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). Elections provide the means to acquire political power, and history teaches that some people are willing to violate the law for such ends. States need not wait until after they have been robbed before locking the door.

Additionally, it is not true that voter photo ID requirements protect against *only* the type of fraud in which a would-be voter tries to impersonate another individual on the poll list. Photo ID requirements also provide protections against unlawful voting under invalid voter registrations. For example, photo ID requirements will make it easier to identify and prevent

unlawful voting by a registered voter who has subsequently been convicted of a felony or by a person who is not a U.S. citizen, but who has established residency in Wisconsin and has managed to register to vote in the past. Similarly, photo ID requirements will help to deter and prevent: (1) unlawful voting by registered Wisconsin voters who no longer maintain residency in this State but have not yet been removed from the poll list; and (2) unlawful double voting by individuals who register to vote in more than one state.

Voter fraud occurs in Wisconsin, and Act 23's voter photo ID requirement helps detect, deter, and prevent it. Assistant District Attorney Landgraf testified about other forms of election fraud that he has investigated and prosecuted, including voting by disqualified persons and multiple voting. (Tr. 05-25-16, 8-A-174-75.) Copies of the criminal complaints and related documents from Milwaukee voter fraud cases were admitted into the trial record as Defendants' exhibits 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, and 160. (*See also* DX288 (e-mail detailing voter fraud prosecutions); DX289 (spreadsheet detailing voter fraud prosecutions).) Some of these cases might have been deterred by Act 23's voter photo ID requirement, had it been in effect. Requiring voters to show a photo ID provides valuable evidence to election officials that a voter was at the polling place. Someone who is required to identify himself to election officials is less likely to attempt fraud.

The State also has a legitimate and important interest in promoting public confidence in. *Crawford*, 553 U.S. at 197. The Supreme Court noted:

public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter–Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

*Id.* (quoting National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 1618 (2002)); *see also Purcell*, 549 U.S. at 4 (“A State indisputably has a compelling interest in preserving the integrity of its election process”).

Voter photo ID requirements are favored by the public. Marquette Law School Polls conducted October 23 through 26, 2014, showed that, in Wisconsin, 60.4% of likely voters and 59.8% of registered voters favor a photo ID requirement to vote. (DX142:13; DX254:13.) A 2012 Pew Research Center poll showed that, by a margin of “77% to 20%, voters favor a requirement that those voting be required to show photo ID.” (DX143:1.) The same poll found that “95% of Republican voters say a photo ID should be required to vote, as do 83% of independents. By comparison, 61% of Democrats who say photo identification should be required; 34% say it should not.” (*Id.* at 2.) These numbers suggest that voter photo ID requirements are preferred and instill voter confidence in elections.

## **2. Alleged burdens of a voter photo ID requirement**

The next step in the *Anderson/Burdick* test is to identify the burdens that the challenged law could place on voters. The Court received evidence at trial regarding the alleged burdens of the voter photo ID law. A starting point in the analysis is the number of registered Wisconsin voters who lack either of the two most common forms of qualifying ID: a state ID card or a Wisconsin driver license, both issued by the Wisconsin DMV.

### **a. Possession rates of qualifying ID and the mitigating impact of the free state ID card program**

Approximately 4.2 million people have a Wisconsin driver license. (Tr. 05-23-16 at 93 (Boardman testimony).) That is about 95 percent of the people over age 18 in the State, based upon a rough estimate that there are 4.4 million people in Wisconsin over age 18. (Tr. 05-23-16 at 93.)

The State's expert, Dr. M.V. Hood III of the University of Georgia, testified at trial and submitted a report stating his estimate of the number of registered voters who lack either a Wisconsin driver license or state ID card issued by the Wisconsin DMV. Pages 23 through 31 of his report walk through the analysis that he completed, and that analysis will not be repeated here. (DX1:24–32.)

It is important to note that Dr. Hood went one step beyond Plaintiffs' expert, Dr. Kenneth Mayer, in completing a "matching" analysis that merged

the DMV customer databases for state ID cards and driver licenses with the Wisconsin Government Accountability Board's ("GAB's") Statewide Voter Registration System (SVRS) database. Whereas Dr. Mayer stopped once his matching analysis was complete, Dr. Hood found that, after he could no longer match records, he was nonetheless left with a large number of SVRS records that had unique state identification numbers, suggesting that these individuals might also have DMV products. Dr. Hood sent this list back to DMV to determine if the records could be matched to the SVRS data. (DX1:30.) This was the DOT "secondary match" that Dr. Hood incorporated into his ultimate findings. (*Id.*)

Wisconsin DOT computer programmer Fred Eckhardt described how the "secondary match" was completed. (Tr. 05-19-16, 4-P-189–211.) Mr. Eckhardt received a file that included approximately 119,000 entries from the SVRS database. (Tr. 05-19-16, 4-P-192.) He was asked to determine whether any of the entries had a Wisconsin driver license or state ID card that was valid on November 4, 2014. (Tr. 05-19-16, 4-P-192.) He ran a program that used the unique state identification number for the individual records to try to link the 119,000 entries to a historical entry in DMV's database. (Tr. 05-19-16, 4-P-192–94.) A common instance of such a match would occur when an individual changes his or her last name—the individual's unique state identification number would not change, but he or she would be issued a new



driver license or Wisconsin state ID card number. (Tr. 05-19-16, 4-P-194.) By using the DMV database that showed each customer's unique state identification number, Mr. Eckhardt was able to determine if any of the 119,000 unmatched individuals from SVRS possessed a valid driver license or state ID card as of November 4, 2014. (Tr. 05-19-16, 4-P-192–94, 198–99.)

DOT's secondary match identified an additional 89,077 records that were a voter with qualifying ID. (DX1:31.) Mr. Eckhardt also identified 23,740 of the 119,000 records that had no qualifying ID for voting, and 6,604 records with no record of any DMV product. (Tr. 05-19-16, 4-P-192–94.)

In Table 9 from his report, reproduced below, Dr. Hood summarized his findings with regard to how many registered voters lack a Wisconsin driver license or state ID card:

**Table 9. Final Results of DMV Record Match**

	Number of Records	Percent of Total Registrants
Initial Record Match	3,137,939	92.83%
DOT Secondary Match	89,077	2.64%
Total Matches	3,227,016	95.46%
No Match	153,316	<b>4.54%</b>
Total Registrants	3,380,332	----

(DX1:32.) Dr. Hood concluded that 153,316, or 4.54% of Wisconsin registered voters, lack either a state ID card or a driver license, based upon an analysis

of GAB and DMV data current as of fall 2015. (*Id.*) This compares to Dr. Mayer's findings of 283,346 voters and 8.38%, respectively. (*Id.*)

In *Frank*, the Seventh Circuit accepted for purposes of review the district judge's finding of fact that there were 300,000 voters (roughly 9% of all registered voters) who lacked qualifying ID. *Frank*, 768 F.3d at 746, 748. Even based upon Dr. Mayer's findings here, there is a downward trend in non-possession rates from *Frank* to now. Based upon Dr. Hood's findings—which should be adopted—the trend is starkly downward and suggests that the population lacking qualifying ID is dwindling rapidly.

Of course, there are other forms of Act 23 qualifying ID in addition to Wisconsin driver licenses and state ID cards. The list of qualifying IDs now includes (1) a Wisconsin driver license; (2) a Wisconsin state identification card; (3) a U.S. military identification card; (4) a U.S. passport; (5) a certificate of U.S. nationalization issued not earlier than two years before the date of the election; (6) an unexpired Wisconsin driver license receipt; (7) an unexpired Wisconsin identification card receipt; (8) an identification card issued by a federally recognized Indian tribe; (9) an unexpired identification card issued by an accredited college or university in Wisconsin, if it meets certain criteria; and (10) an unexpired veterans ID card issued by the federal department of veterans affairs. Wis. Stat. § 5.02(6m)(a)–(g). Veterans ID cards were added to the list by the Legislature in March 2016. See 2015 Wis. Act 261, § 2. As of

February 2016, technical college ID cards were recognized as a form of qualifying ID by a permanent GAB administrative rule. *See* Wis. Admin. Code ch. GAB 10.

Dr. Hood could not provide an estimate of the number of Wisconsin voters who have, for example, a U.S. passport or a military ID but no other qualifying ID. Nonetheless, it was his opinion that the estimates he and Dr. Mayer made necessarily overstate the number of voters who lack a qualifying ID because some voters have these other forms of qualifying ID. (*See* Tr. 05-24-16, 7-P-172; *see also* DX1:27–28, 31.)

Dr. Hood opined that the Wisconsin DMV's free state ID card program has been a mitigating factor that decreases the burden of the voter photo ID law for many voters. (Tr. 05-24-16, 7-P-186; *see also* DX1:32.) He analyzed DMV data current through April 2016 and produced a demonstrative exhibit that shows the number of free state ID cards issued by DMV, with a breakdown of IDs issued by type and race of the customer:

**Racial/Ethnic Breakdown for No-Fee State ID Cards Issued by Wisconsin DMV, July 2011-April 2016**

<b>Race/Ethnicity</b>	<b>Original</b>	<b>Duplicate</b>	<b>Renewal</b>	<b>Other</b>	<b>Total</b>	<b>% CVAP</b>
White	58.3% [74,615]	34.8% [77,518]	55.0% [37,813]	30.0% [160]	45.3% [190,106]	88.0%
Black	<b>28.1%</b> [35,934]	52.6% [117,155]	33.5% [23,018]	57.6% [307]	<b>42.0%</b> [176,414]	5.6%
Hispanic	<b>9.2%</b> [11,761]	8.8% [19,516]	7.3% [5,034]	8.8% [47]	<b>8.7%</b> [36,358]	3.2%
Asian	2.4% [3,002]	0.8% [1,867]	1.1% [773]	0.8% [4]	1.3% [5,646]	1.4%
American Indian	2.1% [2,626]	3.0% [6,743]	3.1% [2,153]	2.8% [15]	2.8% [11,537]	0.8%
Minority	41.7% 53,323	65.2% [145,281]	45.0% [30,978]	70.0% [373]	54.7% 229,955	11.0%
<b>Total</b>	<b>127,938</b>	<b>222,799</b>	<b>68,791</b>	<b>533</b>	<b>420,061</b>	

Sources: Wisconsin Department of Transportation. 2010-2014 ACS Survey, U.S. Census Bureau.

Notes: The *Other* category includes reissuances and reinstatements.

(DX265.) From July 2011 through April 2016, DMV issued over 420,000 free state ID cards for voting, including almost 128,000 original cards. (*Id.*; see also Tr. 05-23-16 at 128–29 (Boardman testimony); DX168.)

To obtain a free state ID card, a customer can visit a DMV customer service center. The Wisconsin DMV has 91 field offices throughout the state, with roughly 350 to 370 people staffing those locations. (Tr. 05-23-16 at 91, 98.) Someone who wants to initiate the process of obtaining a free state ID card for voting does not need to go to a particular location. (Tr. 05-23-16 at 98.) By statute, each county in Wisconsin must have at least 20 hours per week of DMV field service. (Tr. 05-23-16 at 97). Many counties have more than that. (Tr. 05-23-16 at 97.) Milwaukee, for example, has six locations, most of which are open

from 8:30 a.m. to 4:45 p.m., Monday through Friday. (Tr. 05-23-16 at 97–98.)

Defendants' exhibit 54 is a map showing the locations of DMV customer service centers. (DX54.)

DMV's website includes a wealth of information regarding how to obtain a state ID card or driver license, the hours and locations of customer service centers, related forms, etc. (DX25–34, 39–52.) Defendants' exhibit 31 is a website excerpt showing a search to find the nearest DMV. (DX31.)

The vast majority of customers who obtain a free state ID card for voting complete the standard MV3004 form. (DX28, 29 (Spanish version).) The form includes a box to check for a customer who is requesting a Wisconsin state ID card for free for the purpose of voting. (*Id.*) To obtain an ID card, an applicant must prove: name and date of birth, legal presence, residency, identity, and social security number. (Tr. 05-23-16 at 100); *see also* Wis. Admin. Code § Trans 102.15(3), (3m), (4), (4m), and (5).

Customers who lack necessary documents to obtain a free state ID card using the standard MV3004 form can initiate an ID petition by completing form MV3012. (DX51, 52 (Spanish version).) This is the ID petition process.

**b. Plaintiffs' attack on the IDPP, a program established to help voters get free state ID cards for voting**

Plaintiffs mounted a peculiar attack at trial, not on the voter photo ID law itself, or on the free state ID card program per se, but on the IDPP, a

process intended to mitigate some of the documentary burdens of getting a free state ID card. (*See* DX1:33 (Hood report).) The IDPP has been a resounding success that continues to assist the “tiny fraction of the voting population”—in the Court’s words, Tr. 05-24-16, 7-P-193—who have confounding vital records issues.

The available data regarding the IDPP show the small number of DMV customers who have been impacted. From September 15, 2014, when the IDPP started, through May 12, 2016, there were a total of 1389 IDPP petitions filed. (DX280; *see also* Tr. 05-23-16 at 132.) Of those petitions, 1,132 were resolved by the issuance of a free state ID card, and 230 of those issuances were resolved by “adjudication” in the Wisconsin DMV’s Compliance, Audit and Fraud Unit (CAFU). (DX280; *see also* Tr. 05-23-16 at 132.) As of May 12, 2016, 98 petitions were cancelled by the customer, 67 were pending, and 40 were suspended due to no response from the customer. (DX280.) There were a total of only 52 denials. (*Id.*) This does not mean that those 52 IDPP petitioners will not get a plastic free state ID card. (Tr. 05-23-16 at 134.) Those customers can re-engage the IDPP at any time and continue working toward getting a permanent state ID card. (Tr. 05-23-16 at 134.) Of the free state ID cards issued via the IDPP through May 12, 2016, only 62 required the use of “extraordinary proof,” documents like family Bibles or hospital birth records. (DX280.)

During trial, the Court described the IDPP-related efforts of Wisconsin DMV's CAFU employees as "almost heroic" and then "heroic." (Tr. 05-19-15 at 4-A-104; Tr. 05-24-16, 7-P-192.) Those descriptions are on-point. CAFU employees Susan Schilz, Leah Fix, and Becky Beck testified at trial about the zealous measures that CAFU will pursue to track down documentation for customers so that a free state IDs can be issued.

CAFU investigators engage in varied efforts to help petitioners obtain ID. Ms. Beck testified about these efforts, including poring over ancient documents and forms, searching various databases, examining whatever personal documents a petitioner might provide, and following up with petitioners on each possible lead. (Tr. 05-25-16, 8-P-151–57.) IDPP investigations include acts like searching 1930s census information for evidence of birth. (Tr. 05-19-16, 4-A-103.) And these kinds of efforts are typical. (Tr. 05-19-16, 4-A-104.)

When investigating possible leads for obtaining needed documents, CAFU investigators will occasionally rely upon a CLEAR report, which provides comprehensive background information about an individual, including previous residences, names, aliases, known family members, and other potentially identifying information. (Tr. 05-24-16, 7-P-84; *see, e.g.*, DX290 (example of a CLEAR report).) Although CLEAR reports include criminal history, where available, CAFU never uses the criminal history information

when processing an IDPP petition. (Tr. 05-24-16, 7-P-94–95.) Information in a CLEAR report is never used as a basis to deny a petition, only as a lead to find helpful information. (Tr. 05-24-16, 7-P-94–95.)

For CAFU investigators, the goal of the IDPP is “[t]o get an ID issued for the petitioner.” (Tr. 05-25-16, 8-P-146 (Beck testimony); *see also* Tr. 05-24-16, 7-P-65 (Fix testimony; same); Tr. 05-23-16 at 115 (Boardman testimony; same).) Ms. Beck testified about her efforts to assist Plaintiff Johnny M. Randle in getting an ID. Mr. Randle’s situation is indicative of the kind of back-and-forth that CAFU will engage in with an IDPP petitioner, and sometimes the petitioner’s friends or family.

In attempting to assist Mr. Randle with his IDPP petition, Ms. Beck contacted Mr. Randle multiple times, and ultimately informed him that he could obtain an ID by simply filling out a common-law-name-change affidavit. (Tr. 05-25-16, 8-P-158–59.) Mr. Randle’s daughter, Nanette Mayze, filled out the affidavit once, but there were multiple errors on the form that prevented it from being processed. (Tr. 05-25-16, 8-P-160.) Thereafter, Ms. Beck sent Mr. Randle and his daughter a pre-filled form, with a stamped return envelope, which required only that either Mr. Randle sign it, or that his daughter sign as a valid power-of-attorney. (Tr. 05-25-16, 8-P-160–61.) Mr. Randle’s daughter never expressed any confusion regarding what she was required to submit to show a valid power-of-attorney. (Tr. 05-25-16, 8-P-161.)



Neither Mr. Randle nor his daughter returned the form, and neither one responded to Ms. Beck's attempts to contact them regarding the final step before an ID could be issued. (Tr. 05-25-16, 8-P-160–61.) Kristina Boardman, DMV's Administrator, testified that if Mr. Randle had signed and returned the mostly completed common-law-name-change form that DMV sent, that Mr. Randle would get a free state ID card. (Tr. 05-23-16 at 134–35.)

Mr. Randle's daughter, Ms. Mayze, also testified at trial. Mr. Randle started the process of getting a Wisconsin state ID card in 2011. At that time, his motivation for getting the ID was not to vote—it was for another purpose. (Tr. 05-16-16, 1-A-135–36.) The motivation was the same in 2015, as Mr. Randle has never voted in Wisconsin. The voter ID process was just another way of getting a Wisconsin state ID card. (Tr. 05-16-16, 1-A-137.)

Even though Mr. Randle has had a copy of his birth certificate since 2011, he did not provide it to DMV right away or use it to fill out his IDPP petition. This caused inaccuracies on Mr. Randle's IDPP petition, including an incorrect county of birth, mother's maiden name, and father's first name. These inaccuracies also delayed the process because DMV was trying to find out the correct information. (Tr. 05-16-16, 1-A-139–41; *see also* DX211:1.)

Mr. Randle is unable to obtain a Wisconsin state ID card because the name on his birth certificate—Johnnie Marton Randall—is sufficiently different from the name on his social security card—Johnny Martin Randle.

(PX367:12, 14.) Mr. Randle’s daughter, Ms. Mayze, was agreeable to filling out a common-law-name-change affidavit to cure this discrepancy, but she filled out the form incorrectly. (Tr. 05-16-16, 1-A-114–15; DX211:3.) When Ms. Beck assisted Ms. Mayze by typing in the correct information and mailing the form back to Ms. Mayze to complete, Ms. Mayze did not even look at the letter or attached common-law-name-change affidavit—she just set it aside. (Tr. 05-16-16, 1-A-116, 143; PX367:19–21.)

While Ms. Mayze claims she did not understand the common-law-name-change affidavit process, she did read the form’s instructions before she signed it and had it notarized. (Tr. 05-16-16, 1-A-141; DX211:3.) She did not think to call Ms. Beck or anyone else at DMV to have them further explain the form. (Tr. 05-16-16, 1-A-143.)

Mr. Randle is agreeable to signing a document that says he wants to use the name he has always been known as, “J-O-H-N-N-Y M. R-A-N-D-L-E.” He is willing to continue to work with DMV to complete that process through use of the common-law-name-change affidavit. (Tr. 05-16-16, 1-A-143–44.)

Ms. Schilz supervises the CAFU at Wisconsin DMV. (Tr. 05-19-16, 4-A-55–56.) CAFU became involved in the IDPP in September 2014. (Tr. 05-19-16, 4-A-56–57.) In addition to processing some IDPP petitions, CAFU investigates “internal and external fraud [at Wisconsin DMV], internal is employee

behavior and external is customers who misrepresent themselves or jump title or that sort of thing.” (Tr. 05-19-16, 4-A-56.)

IDPP petitions involve unavailable birth certificates. That said, many IDPP petitions are resolved by the Wisconsin Department of Health Services (DHS) by locating a customer’s vital record; these never reach CAFU. (Tr. 05-19-16, 4-A-62.) DHS processes a search for Wisconsin vital records very quickly. (Tr. 05-19-16, 4-P-30.) Vital records searches from other states are done through a database called EVVE, or by looking through records if the other state does not participate in EVVE. (Tr. 05-19-16, 4-P-29–30.)

Ms. Schilz was not aware of the races of IDPP petitioners, petitioners who were denied, or the proportion of IDPP petitioners who were born in states in the South where there used to be slavery. (Tr. 05-19-16, 4-A-65–68, 73, 100–01.) Ms. Boardman also testified that she was not familiar with the racial make-up of IDPP denials. (Tr. 05-23-16 at 61–62.)

Ms. Schilz testified about how she and her CAFU colleagues are personally invested in resolving IDPP petitions, but she and her colleagues still follow established procedures and DMV rules:

One, I don’t decide whether [IDPP petitions] are denied or suspended. The process that we’ve defined does. And these are the rules that we’ve been operating under. This is what DMV does. We authenticate people before we proceed to give them a product. So I believe it is a little personal. We get involved with these people, yes, but we’ve set up these guidelines and the unit that I supervise I expect them to follow the guidelines until they change or until we learn something new.

(Tr. 05-19-16, 4-A-88–89.) To establish a match for ID issuance purposes, CAFU must determine that the information a petitioner is providing matches with a birth record or some other secondary information. (Tr. 05-19-16, 4-A-87.) Ms. Schilz testified: “And there are no discrepancies so that you know, to maintain integrity in our database and in our functions that we don’t allow a second identity to be developed. So we really want to get to what that individual wants and needs and still maintain that integrity.” (Tr. 05-19-16, 4-A-87.) “The identity verification requirements are important to prevent someone from creating multiple identities, and also to protect the integrity of DMV’s databases.” (Tr. 05-19-16, 4-P-49.)

Cancelled IDPP petitions are canceled by a petitioner, who initiates the cancellation. (Tr. 05-19-16, 4-A-63.) Petitioners who die during the IDPP are put into cancelled status because it is the only category where there will be no further DMV action on the file. (Tr. 05-23-16 at 64–65.) A petition that is in “suspended” status becomes active again if there is any activity initiated by the customer. (Tr. 05-19-16, 4-A-90.) If a petition is categorized as “denied,” and then the petitioner goes to a DMV customer service center with a birth certificate and gets an ID, the petition is removed from the denied category. (Tr. 05-19-16, 4-A-98.)

An application categorized as denied can become re-active if the customer communicates with CAFU and provides additional information. (Tr.

05-19-16, 4-A-91.) The application does not start over from scratch; all of the pre-denial information is retained and used by CAFU. (Tr. 05-19-16, 4-A-91.) An applicant who previously worked with CAFU does not need to re-start the process. CAFU will pick up the investigation again. (Tr. 05-19-16, 4-A-91–92.)

CAFU sometimes makes a recommendation to DMV to issue an ID, and that recommendation is declined. (Tr. 05-19-16, 4-A-89.) When that happens, CAFU continues to work on the case to get to “yes”—issuing an ID. (Tr. 05-19-16, 4-A-90.) There have been instances where a recommended issuance was declined, then returned to CAFU for further investigation, and ultimately, an ID was issued to the customer after more information was located. (Tr. 05-19-16, 4-P-99.)

Ms. Fix is a lead worker in CAFU and is responsible for managing and coordinating the workload of CAFU investigators, as well as developing training materials for CAFU investigators and other DMV workers involved in processing IDPP petitions. (05-24-16, 7-P-53–54.) CAFU team members meet at least twice per week to discuss IDPP petitions—once as a one-on-one with Ms. Fix, and once as the entire CAFU team. (Tr. 05-24-16, 7-P-55.) During these meetings, as well as in other informal meetings, CAFU team members collaborate and share ideas, with the goal of helping petitioners obtain IDs. (Tr. 05-24-16, 7-P-56.)

At the outset of the IDPP, CAFU investigators did not have any particular guidance about how best to help petitioners obtain IDs. (Tr. 05-24-16, 7-P-57.) Over the course of the past two years, the process has constantly evolved, and comprehensive procedures have been developed to better aid investigators in helping petitioners obtain IDs. (Tr. 05-24-16, 7-P-57–60.) The primary resource for processing ID petitions is a handbook that is continually updated, and is regularly used by all members of the CAFU team. (Tr. 05-24-16, 7-P-59–60; *see* DX 294.) Defendants’ exhibit 294 shows CAFU’s process for IDPP petitions, as of May 23, 2016. (DX294.) It directs CAFU staff:

Note: Do not direct the customer to spend money in order to obtain additional documents. Remember the entire premise for this process is to not require a customer to pay for documents in order to obtain a free voter identification card.

(*Id.* at 7.)

Ms. Fix is responsible for monitoring errors that occur in the IDPP. (Tr. 05-24-16, 7-P-65.) Errors in the IDPP are tracked in a semi-annual error report. (Tr. 05-24-16, 7-P-67–68; *see* DX61 (August 2015 through January 2016 error report).) Of all the errors included in the error report, most are resolved in one hour or less, with the vast majority of the remainder being resolved within the next business day. (Tr. 05-24-16, 7-P-69–79.) Of those errors that might delay the petition process longer than one day, all involve an “error” in which the DMV service center did not receive necessary documents from the

petitioner, so any delay related to those errors will depend on how long it takes the petitioner to provide necessary documents. (Tr. 05-24-16, 7-P-69–79.) Likewise, the only way that one of these errors would result in non-issuance of an ID is if the customer does not return to a service center to provide necessary information. (Tr. 05-24-16, 7-P-79.)

The list of errors reported not only serves as a measure of which steps in the ID process are causing difficulty, but also as a training tool for DMV service center staff to better address the initial steps in the ID petition process. (Tr. 05-24-16, 7-P-69–80, 81.) The highest accuracy rate (*i.e.*, the lowest error rate) for DMV regions occurs in the region including Milwaukee. (Tr. 05-24-16, 7-P-81; DX61:2.) Ms. Fix believes that the current reporting period for errors indicates a downward trend in IDPP processing errors. (Tr. 05-24-16, 7-P-81.)

Ms. Fix testified about Plaintiff Cassandra Silas's IDPP petition. Ms. Fix noted the multiple contacts that CAFU investigators had with Ms. Silas. (Tr. 05-24-16, 7-P-83–84.) Ms. Fix also noted that Ms. Silas has not contacted anyone in CAFU since she was issued a free state ID card receipt. (Tr. 05-24-16, 7-P-86.) If Ms. Silas were to contact CAFU, her IDPP petition would be reactivated, and CAFU investigators could contact officials in Cook County, to obtain the documents needed to issue Ms. Silas an ID. (Tr. 05-24-16, 7-P-86.)

Ms. Silas also testified at trial. Ms. Silas wants a Wisconsin state ID card for several reasons—not just to vote. (Tr. 05-16-16, 1-A-175.) She had a copy of her birth certificate in the past, but she misplaced it. (Tr. 05-16-16, 1-A-167.) She may have also gotten a copy of her birth certificate herself while she was in Chicago. (Tr. 05-16-16, 1-A-168.) The IDPP petition Ms. Silas filled out contained inaccurate information, including an incorrect county of birth and mother’s maiden name. (Tr. 05-16-16, 1-A-169.) Ms. Silas knew that her mother’s maiden name was incorrect, but she does not know if she ever corrected that information with DMV. (Tr. 05-16-16, 1-A-170–71.) Ms. Silas also requested her school records with an incorrect spelling of her first name, *i.e.*, “C-A-S-S-A-N-D-E-R-A.” (Tr. 05-16-16, 1-A-172–73.) These inaccuracies delayed the IDPP process. (Tr. 05-16-16, 1-A-173.)

On February 20, 2015, DMV staff contacted Cook County (Illinois) Hospital on Ms. Silas’s behalf to try to get verification of a birth record. They were informed that the hospital could only release information to Ms. Silas. DMV relayed this information to Ms. Silas on March 2, 2015, and Ms. Silas said she would contact Cook County Hospital herself. (Tr. 05-16-16, 1-A-174; *see also* PX354:1.) But Ms. Silas never did try to contact Cook County Hospital. (Tr. 05-16-16, 1-A-175.) Ms. Silas is willing to continue to work with DMV and the IDPP to try to find her birth record. (Tr. 05-16-16, 1-A-176.)



On May 13, 2016, the Wisconsin DOT promulgated administrative rules relating to the IDPP. (DX268.) Significantly, the rules provide temporary free state ID card receipts to IDPP petitioners to be used for voting. (*Id.* at 20.) On May 13, 2016, DMV issued 146 such receipts to IDPP petitioners by U.S. Mail. (Tr. 05-19-16 at 4-A-93.) IDPP petitioners in pending, suspended, and denied statuses as of May 13, 2016, were issued state ID card receipts for voting. (Tr. 05-19-16, 4-A-96.) The only petitioners who did not get a receipt are those who were not eligible and those who initiated their own cancellations. (Tr. 05-19-16, 4-A-96.)

Under the rules, receipts are issued after five days because DMV has found that 60 percent of IDPP petitioners received their free state ID cards within five days or less, and the receipt timing was designed to give time for the majority of IDPP petitioners to get a permanent card before a temporary receipt is issued. (Tr. 05-23-16 at 72–73.) Ms. Boardman testified that, near an Election Day, DMV will issue a photo receipt by mail on the day that the customer submits an IDPP petition. This is not required by the rules, but it is permitted. (Tr. 05-23-16 at 73–74, 89.)

In sum, the IDPP should be viewed as a mitigating factor for the alleged burdens of the voter photo ID law. The IDPP itself, and the dedicated public servants at the Wisconsin DMV who administer the IDPP, should not be

heaped with scorn. The IDPP is not a problem; it is a solution that blunts the burdens faced by a tiny fraction of voters.

**c. Another mitigating factor: GAB's voter photo ID education and outreach efforts**

Those voters who already possess a form of Act 23 qualifying ID are not significantly burdened by the law.<sup>2</sup> They simply need to remember to bring their IDs to the polls on Election Day. The extensive training and education efforts made by GAB mitigate the minimal burden of remembering by ensuring that Wisconsin voters are educated about the law. *See* 2011 Wis. Act 23, § 144(1); Wis. Stat. § 7.08(12).

The Court heard testimony and received documentary evidence regarding the Bring It to the Ballot public information campaign. GAB witnesses Michael Haas, Elections Division Administrator, and Meagan Wolfe, Public Outreach Coordinator-Elections Specialist, testified about the extensive efforts that GAB has made since 2011 to educate voters and election officials throughout the State about the voter photo ID law (and other changes in the law). (Tr. 05-25-16, 8-P-25–31 (Haas testimony); Tr. 05-25-16, 8-P-79–94 (Wolfe testimony).)

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<sup>2</sup> The available scholarship finds that voter photo ID requirements have not been shown to discourage or deny many people from voting. Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: Political Science & Politics 127, 128–29 (Jan. 2009), found in the trial record at DX8.

With the assistance of a third-party contractor, GAB developed the Bring It to the Ballot campaign and revised its election official training materials in response to the Legislature's requirements. Ms. Wolfe testified at trial how GAB's public information campaign educates prospective voters and election officials about the voter photo identification requirement. (Tr. 05-25-16, 8-P-79-94.)

Ms. Wolfe and Allison Coakley, Elections Training Coordinator at GAB, described examples of some of the training and outreach media and materials that GAB produced, such as:

- The Bring It to the Ballot website, <http://bringit.wisconsin.gov/>, (excerpts at DX81-DX83; DX104 (Spanish language example));
- A series of informational videos (one was played at trial, Tr. 05-25-16, 8-P-83), TV ads, radio ads, posters, and Bring It to the Ballot brochures, (DX84 includes links to all of these materials);
- A toll-free hotline for voters, 1-866-VOTE-WIS, (Tr. 05-25-16, 8-P-74-76);
- E-mail addresses that voters and clerks can use to communicate their questions and other issues to GAB, (Tr. 05-25-16, 8-P-76);
- A Bring It to the Ballot resource guide, (DX87);
- A video, "Complete Guide to Voting and Photo ID in Wisconsin," (DX88), and related PowerPoint presentation, (DX89);
- Press releases regarding the voter photo ID law, (DX94-DX96; DX106);
- Election day manuals for Wisconsin election officials, (DX222; DX223);
- Webinars and related training materials and announcements sent to local election officials, (DX242-DX244); and

- FAQs regarding the voter photo ID law from a Webinar presentation, (DX245);

The GAB-witness trial testimony and exhibits illustrate the wide-ranging public information and education campaign that GAB created and implemented in 2011 through March 2012, when the law was enjoined until April 2015 (with a limited window of the law being un-enjoined in 2014), and that was reinstated with the voter photo ID law in force after the April 2015 election.

GAB requested \$250,000 in additional funding on May 10, 2016. (DX266; Tr. 05-25-16, 8-P-31–33.) That request was approved by a unanimous vote of the Legislature’s budget committee on June 13, 2016. Jason Stein, *Budget Panel Oks funds for voter ID education*, Milwaukee Journal Sentinel, June 13, 2016, available at <http://tinyurl.com/hdp5nnp>; see also <http://tinyurl.com/jo5wrqu> (Joint Committee on Finance meeting minutes). The GAB’s successor agency can use this funding to run statewide TV, radio, and online public service announcements about the voter photo ID law. (See DX266:2.)

**3. Voter turnout and provisional ballot usage show that the burden created by voter photo ID is minimal.**

There have been three elections in which the voter photo ID law was enforced: February 2012, February 2016, and April 2016. The April 2016 election saw historic turnout. Plaintiffs’ expert, Dr. Barry Burden, described

the aggregate turnout number for April 2016 as “astounding.” (Tr. 05-17-16 at 39.) GAB estimated turnout at 47.5%, and it was the highest April primary turnout in 40 years. (DX171; Tr. 05-25-16, 8-A-26.) As Dr. Hood acknowledged, many factors drive voter turnout, and the competitive Democratic and Republican presidential primaries in April were certainly drivers of turnout. (Tr. 05-25-16, 8-A-27.) Nonetheless, Dr. Hood opined that “[t]his is the first I guess pretty major statewide election where the voter ID law was again in effect and it’s hard to see the overall at least the negative consequences.” (Tr. 05-25-16, 8-A-26.)

Provisional ballots cast are also a relevant measure of whether voters were burdened by the voter photo ID law. Under the voter photo ID law, a voter who does not possess a qualifying ID can vote a provisional ballot on Election Day and then must produce qualifying proof of identification no later than 4 p.m. on the Friday after the election for his ballot to be counted. Wis. Stat. § 6.97(3)(b).

Dr. Hood analyzed elections in which the voter photo law was implemented, and he found that the number of voters who voted provisionally because of the voter photo ID law was very small. (*See* Tr. 05-25-16, 8-A-20–26.) In the February 2016 non-partisan primary, there were a total of 91 provisional ballots cast for ID reasons out of 567,038 total ballots cast, or 0.016%. (DX170.) Of the provisional ballots, 62 were not counted. (*Id.*) In the

April 2016 presidential primary, there were a total of 375 provisional ballots cast for ID reasons out of 2,113,544 total ballots cast, or 0.018%. (DX170.) Of the provisional ballots, 278 were not counted. (*Id.*) Defendants' exhibit 169 is a chart prepared by Dr. Hood that demonstrates the very small numbers of provisional ballots cast in comparison to the total votes cast.

Defendants' exhibits 123 and 124 include data from GAB regarding provisional ballots cast by individual voter and municipality for the April 2016 election. The City of Madison saw 123 total provisional ballots cast; Milwaukee had 58. (DX124:1.)

Aggregate turnout and provisional ballots are relevant metrics of the potential burden that a voter photo ID requirement places on voters. And they show that voters are turning out in droves after implementation of the voter photo ID law and that very few voters used the provisional ballot option on Election Day.

#### **4. Application of the *Anderson/Burdick* test**

The last step in the *Anderson/Burdick* test is to determine whether the State's legitimate interests in the voter photo ID law are weighty enough, on balance, to justify the burdens on voters. The answer is yes.

The trial evidence proved that the voter photo ID law is even less burdensome on voters now than it was when *Frank* was decided. And the State's interests are no less important now than they were in *Frank*. On

balance, the Court should conclude that the voter photo ID law is constitutional under the *Anderson/Burdick* test and *Frank*.

Finally, there is no reason for the Court to enter “as applied” relief in this case as to the voter photo ID law. All the named Plaintiffs have qualifying ID, so there is no as-applied relief available to them. Furthermore, even if certain Plaintiffs could be viewed as unconstitutionally burdened by the voter photo ID law, this case is not a Rule 23 class action (unlike *Frank*, which was and is on remand). This Court has not been presented with evidence to show that Plaintiffs’ particular circumstances would, pursuant to a proper showing under Rule 23, allow the Court to certify a class or classes to enter class-specific relief. There is simply no vehicle for the Court to fashion as-applied relief.

**C. The challenged absentee voting laws do not create an “undue burden” on the right to vote.**

Plaintiffs level a series of constitutional challenges to the Legislature’s determination of when and where in-person absentee voting can occur in Wisconsin. But absentee voting is not constitutionally mandated. The Legislature authorized “no excuse” absentee voting as a privilege for voters; it is not a right.

As an initial matter, no Plaintiff has shown he is injured by the challenged absentee voting laws and, therefore, has Article III standing to challenge them. The Court lacks jurisdiction over these claims. Beyond

standing, Plaintiffs' trial proof as to their claims about absentee voting changes falls short. The data show that usage of absentee voting in Wisconsin continues to climb, even after implementation of these laws. Plaintiffs believe that absentee usage would climb *more* without the challenged laws, but that claim is unproven and unprovable.

### **1. Background on Wisconsin's permissive absentee voting system**

Plaintiffs describe their absentee-voting claims in terms of "early" voting, which does not exist in Wisconsin. The legislative acts and corresponding statutes Plaintiffs challenge concern in-person absentee voting, which is distinct from "early" voting. *Compare* Wis. Stat. §§ 6.84–6.89, *with* Fla. Stat. § 101.657, *and* Alaska Stat. § 15.20.064. Wisconsin does not have "early" voting in the sense that there is an alternate time to cast a ballot than on Election Day. Instead, Wisconsin has liberal absentee voting procedures for electors who cannot vote in their ward's polling place on Election Day, or who are "unwilling" to do so. Wis. Stat. § 6.85(1).

Wisconsin's in-person absentee voting regime is highly permissive. An elector may vote absentee if he or she is unable or unwilling to appear at a polling place on Election Day "for any reason," and also for electors who move from one ward to another within 28 days of an election. Wis. Stat. §§ 6.85(1), (2). The elector does not even need to explain any necessity for absentee voting.



This type of no-questions-asked, “no excuse” absentee voting is common and is used by 27 states and the District of Columbia.<sup>3</sup>

Wisconsin’s absentee voting laws are designed to encourage voting and to balance reasonable regulations with protections to ensure efficient and trustworthy elections. The Wisconsin Legislature enacted a policy statement that clarifies that absentee voting is a privilege, not a right:

The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat § 6.84(1).

Consistent with the legislature’s policy statement, there is no constitutionally protected right to vote absentee. *See McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 807–08 (1969) (“absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise.”); *see also Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (affirming dismissal where “[i]n essence the plaintiffs [were] claiming a

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<sup>3</sup> National Conference of State Legislatures, Absentee and Early Voting, <http://tinyurl.com/k6faxfw> (last visited June 16, 2016).

blanket right of registered voters to vote by absentee ballot”); *McDonald v. Bd. of Election Comm’rs of Chicago*, 277 F. Supp. 14, 17 (N.D. Ill. 1967), *aff’d* 394 U.S. 802 (1969) (“the privilege of absentee voting is one within the legislative power to grant or withhold”); *Snyder v. King*, 958 N.E.2d 764, 785 (Ind. 2011) (interpreting Indiana state law and concluding, “we perceive no state constitutional requirement that the General Assembly extend the absentee ballot to convicted prisoners”); *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963) (interpreting Kentucky law, holding “to vote by absentee ballot is a privilege extended by the Legislature and not an absolute right”).

Plaintiffs’ claims that electors’ voting rights are being unconstitutionally usurped because of Wisconsin’s absentee voting procedures fail. Plaintiffs do not contend that they are prohibited from voting by these rules. Instead, they suggest that certain reasonable changes to absentee voting since 2011 are unconstitutional. But each of the changes was prudent, nondiscriminatory, and within the scope of permissible management of elections that States conduct consistent with the Constitution.

Plaintiffs request that the Court micro-manage the ordinary and necessary logistics of the election process. As the Seventh Circuit stated, “it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting.” *Griffin*, 385 F.3d at 1130. Wisconsin’s absentee voting procedures are lawful and appropriate. They make

it easy for absentee voters to obtain, cast, and correct absentee ballots that are damaged or have certifications that contain technical defects. Plaintiffs' contrary arguments are meritless.

An elector who wishes to vote absentee has several ways to obtain a ballot. He or she may apply for an absentee ballot by mail, in person, by e-mail, or by fax. Wis. Stat. § 6.86(1)(a). An elector can even mail, fax, or e-mail a single application at the beginning of the year to get an absentee ballot for every election for the entire year. Wis. Stat. § 6.86(2m)(a). A disabled voter can apply to receive absentee ballots for all elections in the year of the application, plus all future elections in perpetuity. Wis. Stat. § 6.86(2). Mailed and electronic applications must be received by 5 p.m. on the fifth day preceding the election. Wis. Stat. § 6.86(1)(b). Defendants' exhibits 97 through 99 are GAB form 121, the Wisconsin Application for Absentee Ballot, in English, Spanish, and Hmong.

In-person applications for an absentee ballot may be submitted Monday through Friday, except legal holidays, between 8 a.m. on the third Monday preceding the election and 7 p.m. on the Friday preceding the election. Wis. Stat. § 6.86(b). In other words, electors have from 8 a.m. to 7 p.m. on weekdays for the two weeks prior to the election, excluding legal holidays, to obtain and vote an in-person absentee ballot.

A voter can receive an absentee ballot several ways. The clerk will mail a ballot or give it to the elector in person, unless otherwise requested by the elector. Wis. Stat. § 6.87(3)(a). A hospitalized elector may obtain a ballot through an agent. Wis. Stat. § 6.86(3)(a)1. An elector who is in the military or who lives overseas permanently can receive an absentee ballot by fax or electronic transmission. Wis. Stat. § 6.87(3)(d). Residents of certain residential care facilities and retirement homes may receive an absentee ballot via a special registration deputy. Wis. Stat. § 6.875(6)(c)(1). Sequestered jurors may vote at court during a recess. Wis. Stat. § 6.86(1)(b). Most relevant here, when a voter applies in-person for an absentee ballot, an election official can hand that person a ballot on the spot, and the voter can immediately complete and return the absentee ballot.

Each absentee ballot contains a certificate indicating that the elector voted and met certain voting requirements. Wis. Stat. § 6.87(2). It is filled out partially by the elector and partially by the local election official for in-person applications. Wis. Stat. § 6.87(2). Overseas and military voters who return a ballot by mail fill out the certificate. Wis. Stat. §§ 6.24(4)(d), 6.87(3)(d).

**2. Expert evidence regarding absentee voting showed that absentee voting rates continue to rise in Wisconsin.**

The State presented expert testimony and expert reports that demonstrate that absentee voting in Wisconsin has continued to increase.

Dr. Hood analyzed in-person absentee voting turnout in Wisconsin at the statewide level and for the cities of Madison and Milwaukee, based upon GAB data. (DX1:9–14.) His findings, including Figures 2 through 5 of his expert report, show a marked up-tick in absentee voting usage statewide, in Milwaukee, and in Madison by comparing the 2008 presidential November election to the 2012 presidential November election, and by comparing the 2010 mid-term November election to the 2014 mid-term November election. The 2010-to-2014 comparison is particularly helpful to the constitutional analysis because the 2010 election was conducted before the challenged in-person absentee voting laws were enacted, and the 2014 election was conducted after the challenges in-person absentee voting laws were implemented. Dr. Hood’s findings do not support a conclusion that the changes in the law reflect unconstitutional burdens on the right to vote.

Dr. Hood’s findings from pages 12 through 14 of his report can be summarized by the following table:

<b>Jurisdiction</b>	<b>Change in in-person absentee turnout from 2008 presidential to 2012 presidential election</b>	<b>Change in in-person absentee turnout from 2010 mid-term to 2014 mid-term election</b>
Wisconsin (statewide)	+0.80%	+5.24%
City of Milwaukee	+0.94%	+3.73%
City of Madison	+0.24%	+2.08%

(DX1:12–14, Figures 3 through 5; Tr. 05-25-16, 8-A-32–41; *see also* Tr. 05-25-16, 8-A-34 (addressing a typo in Dr. Hood’s report regarding the words “Midterm” and “Presidential” being swapped in Figure 3).)

Plaintiffs will argue that in-person absentee voting rates would have increased *more* were it not for the challenged laws. As Dr. Hood testified, it is not possible to test that hypothesis. (Tr. 05-25-16, 8-A-41–42.) “We can’t go back in time and rerun the election under different rules, which is what would have to happen to study that question, in my opinion.” (Tr. 05-25-16, 8-A-42; *see also* Tr. 05-26-16, 9-A-77 (McCarty testimony).)

The State’s expert Dr. Nolan McCarty of Princeton University also analyzed absentee voting rates, and his conclusions are found at pages 23 through 25 of his report. (DX5:23–25.) Rather than analyze aggregate absentee turnout rates by jurisdiction, Dr. McCarty analyzed absentee turnout rates statewide by demographic groups, including white, black, and Hispanic voters. (DX5:24.) He concluded that absentee voting rates increased across these demographic groups between 2010 and 2014, with the increase among African Americans and Hispanic voters as high or higher than the increase observed for white voters, depending upon whether the percentage rate differential or “odds ratio” is used. (Tr. 05-26-16, 9-73–77; DX5:23–24.) When measured as a share of registrants, African American voters were about twice as likely to vote

absentee in 2014 as in 2010. (Tr. 05-26-16, 9-75–77; DX5:24.) Tables 4 and 5 from Dr. McCarty’s report, reproduced below, summarize his findings:

	2014	2010	Diff	Odds Ratio
White	11.2%	6.1%	5.1%	1.85
Black	7.6%	3.8%	3.8%	2.02
Hispanic	4.0%	2.1%	1.9%	1.89

	2014	2010	Diff	Odds Ratio
White	15.4%	9.3%	6.1%	1.66
Black	12.3%	6.7%	5.6%	1.82
Hispanic	8.0%	5.0%	3.0%	1.61

(DX5:24.)

Dr. Hood also studied whether there is a correlation between in-person absentee voting turnout and the number of registered voters using a single in-person absentee voting site in a municipality. (DX1:14–19.) He noted that “there are a total of 88 in-person absentee voting sites in Ohio, compared with 1,853 sites in Wisconsin.” (DX1:14.) The ratio of registrants to in-person absentee sites in Ohio is 1:88,048. (*Id.*) In Wisconsin, the ratio is 1:1,883. (*Id.*) A federal district judge in Ohio recently rejected a challenge to the number of locations for early in-person absentee voting. *See The Ohio Org. Collaborative v. Husted*, No. 15-CV-1802, 2016 WL 3248030, at \*23–24 (S.D. Ohio May 24, 2016) (upholding Ohio Revised Code § 3501.10(C)).

Analyzing municipal-level data from GAB for the 2010, 2012, and 2014 general elections, Dr. Hood found that “[m]unicipalities with greater in-person absentee access, as defined by fewer registrants per site, actually have lower rates of in-person absentee turnout.” (DX1:16.) “[T]he statistical analyses presented clearly refute the idea that simply increasing in-person absentee sites in a given municipality will increase in-person absentee turnout.” (*Id.*) “An examination of the last three general elections indicates that convenience (density) is actually inversely related with the percentage of voters in a given municipality choosing to cast an in-person absentee ballot.” (*Id.*)

### **3. Application of the *Anderson/Burdick* test**

Wisconsin’s time and location rules for voting in-person absentee do not unduly burden the right to vote in violation of the First and Fourteenth Amendments, as Plaintiffs allege in Count 2. (Second Am. Compl., Dkt. 141 ¶¶ 88–98, 186–88.) Plaintiffs have failed to prove their claims when Wisconsin’s laws minimally burden the right to vote and are supported by significant State interests in orderly and efficient election administration.

The first step in the analysis is to determine whether Wisconsin’s laws create a “severe” burden on the right to vote. Wisconsin’s timeframe and location rule for voting in-person absentee is robust and accommodating. And voters can always vote on Election Day, in person. There is no constitutional right to vote an absentee ballot. Accordingly, Wisconsin’s timeframe and



location rule for in-person absentee voting does not severely burden the right to vote. “[W]hen a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

The next step in the constitutional analysis is to determine whether the State’s asserted interests justify the challenged laws. *See Burdick*, 504 U.S. at 434. They do.

Wisconsin’s regulation of election timing is necessary to conduct an orderly election. *See* U.S. Const. art. I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 730 (1974). The current in-person absentee voting times and locations are beneficial to local election officials. The Court heard testimony from four defense fact witness who are municipal and county clerks, the “boots on the ground” who administer elections. Diane Hermann-Brown, Clerk for Sun Prairie, Susan Westerbeke, Clerk for Port Washington, Constance McHugh, Clerk for Cedarburg, and Kathleen Novack, Clerk for Waukesha County, testified for the State.

Clerk Hermann-Brown is a member of and has held leadership roles with the Wisconsin Municipal Clerks Association (WMCA), including president. (Tr. 05-19-16, 4-P-111.) She is the chair of WMCA’s Elections Communications

Committee. (Tr. 05-19-16, 4-P-112.) WMCA is Wisconsin's municipal clerks association. (Tr. 05-19-16, 4-P-109.) As Clerk Hermann-Brown testified, WMCA "tr[ies] to be the voice of the majority" of the more than 1,800 municipal clerks in the state. (Tr. 05-19-16, 4-P-123.)

WMCA supported limiting the period for in-person absentee voting to the 12 days before an election. Limiting the period allows clerks to have better control over the process and to support funding for extra staff, which is more difficult to plan for if the period is extended. It also ensures that clerks will always have ballots during this defined period of time. Before the law change, clerks did not always have ballots three or four weeks before the election, which is hard to explain to voters. (Tr. 05-19-16, 4-P-116.) The structure of the two-week, or ten-business-day, period for in-person absentee voting also makes it easier for voters to be certain when they are allowed to vote in-person absentee. (Tr. 05-24-16, 7-A-155.)

The time period from when municipal clerks receive ballots to when in-person absentee voting starts is a very busy time for clerks. They are conducting voting at residential care facilities, mailing absentee ballots, entering voter registrations, and their normal licensing and budget duties typically arise during some of the scheduled elections. (Tr. 05-19-16, 4-P-117–18.) When in-person absentee voting starts, clerks are unable to do these other duties because in-person absentee voting takes up most of their time. (Tr. 05-

24-16, 7-A-111.) Clerk Westerbeke is not able to get much of anything else done during that two-week period because voters are coming in consistently all day, registering and voting, and so none of the other work is able to get done. Her work requires weekends and evenings during that time, on top of setting up the election. (Tr. 05-24-16, 7-A-155.)

WMCA advocated very strongly to eliminate the Monday before the election for in-person absentee voting. Without this change, clerks had no time to reconcile absentee ballots, print the poll books and supplemental poll books, prepare the polls for Election Day, provide customer service, answer phone calls from voters with questions, etc. (Tr. 05-19-16, 4-P-119; Tr. 05-24-16, 7-A-156–57; Tr. 05-24-16, 7-A-113.) Clerk Hermann-Brown recalled that, during one presidential election, her office had a line for absentee voting at 5 p.m. requiring that the location remain open until 6:30 p.m. to allow the last person to vote. And then she had to reconcile the ballots, make sure everything was signed on the ballots/certificates, finalize the poll books, and then set up the polling facilities. She got home after 10 p.m. and was back at 5:30 a.m., working a 20-hour day. All in-person absentee ballots must also be logged in the poll books before Election Day. (05-19-16, 4-P-119–20.)

Clerk Westerbeke testified that she must spend the entire Monday before Election Day preparing and packing election materials to move to poll locations. The street department must come and move all of the materials to

the locations to be set up. She also has to complete all the data entry that has to occur before Election Day, including registration forms and marking absentee ballots that are received. (Tr. 05-24-16, 7-A-156.) If in-person absentee voting included the Monday before the election, Clerk Westerbeke would have problems entering all this data before the poll books were printed. The longer the process goes on, the later and more delayed a clerk is in preparing, so then she may find herself working late in the night the night before an election, which is how it used to be. (Tr. 05-24-16, 7-A-157.)

WMCA also advocated for the law change restricting the hours of in-person voting and eliminating in-person absentee voting on weekends. This eliminates some voter confusion because there is consistency across the state: no clerks are open on weekends, holidays, or the Monday before the election for in-person absentee voting. (Tr. 05-19-16, 4-P-120–21.)

Limiting in-person absentee voting to one location per municipality is an advantage for most municipalities because it costs less, gives clerks better control over the process, allows better training and centralization for staff, and ensures better security. (Tr. 05-19-16, 4-P-114; Tr. 05-24-16, 7-A-109.) Clerks can better reconcile the ballots according to the absentee logs and generally better ensure that ballots are properly taken care of and accounted for. (Tr. 05-19-16, 4-P-115.) More than one location for in-person absentee voting requires

more staff, supplies, setting up, securing of the ballots and documents—all at a cost that some municipalities cannot bear. (Tr. 05-24-16, Tr. 7-A-154.)

From a municipal clerk's perspective, limiting in-person absentee voting to one location also causes less confusion for voters. Multiple locations increase the risk of voter confusion about the correct polling locations on Election Day. Voters are already confused sometimes about whether they can vote at city hall on Election Day. The more locations you add, the more likely voters will confuse those locations with polling locations on Election Day. (Tr. 05-19-16, 4-P-115; Tr. 05-24-16, 7-A-110.)

From a county clerk's perspective, Clerk Novack testified that there is an advantage to having only one location per municipality for in-person absentee voting. For example, the City of Waukesha has 39 wards, which means that, at a minimum, clerks are providing as many as 40 to 45 different types of ballots for that municipality. For in-person absentee voting, the City of Waukesha has to maintain a file by individual ballot style for each ballot to have enough for everyone. If there were two in-person absentee voting sites in the City of Waukesha, the cost of ballots would increase because each site would want to have almost a virtually identical number of ballots available to ensure they do not run out. In Waukesha County, the cost of a single ballot is 16 cents. That cost is significant when multiplied by the 290,000 ballots ordered for the April 2016 election. A county pays for all ballots for county,

state, and federal elections. If it miscalculates and has to order more ballots, it could cost as much as one dollar per ballot (Tr. 05-24-16, 7-P-13–15.) Clerk Novack also testified that it would be confusing to figure out where an individual would go to actually vote in-person absentee if municipalities started splitting up the municipality into multiple voting locations. (Tr. 05-24-16, 7-P-13.)

Prior to the challenged laws, in-person absentee voting started once the clerks had the ballots. (Tr. 05-19-16, 4-P-148; Tr. 05-24-16, 7-A-111.) In February 2016, for example, Waukesha County had approximately 203 different ballot styles that the county clerk had to program. (Tr. 05-24-16, 7-P-6.) For the February 2016 election, the municipal clerks had the ballots 21 days before the election. (Tr. 05-24-16, 7-P-8.) For the April 2016 election, the municipal clerks had the ballots about 36 days before the election. (Tr. 05-24-16, 7-P-9–10.) For the August 2016 election, the municipal clerks will have the ballots 48 days before the election. (Tr. 05-24-16, 7-P-10.) Thus, there would be no consistency for voters if in-person absentee voting was extended to when municipalities received the ballots. (Tr. 05-24-16, 7-P-10–11.)

The current schedule for in-person absentee voting provides a set date when in-person absentee voting begins. (Tr. 05-24-16, 7-A-112.) There is uniformity in the in-person absentee voting period and in the hours the clerks

can keep, but municipalities can still choose within statutory parameters. (Tr. 05-19-16, 4-P-148.)

Allowing larger municipalities the option to have different in-person absentee voting hours would impact smaller surrounding municipalities. For example, voters in Port Washington obtain a lot of their information from the Milwaukee media. It would confuse voters in Port Washington if Milwaukee has different in-person absentee voting times. There is an advantage to having some uniformity and consistency with the period available for in-person absentee voting. (Tr. 05-24-16, 7-A-157-58, 176-77.)

As the preceding evidence shows, Wisconsin has significant interests in its current system of where and when in-person absentee voting occurs. The testimony from four local election officials demonstrates that the system, as it stands, is favorable to efficient election administration. The expert evidence shows that the challenged laws have not negatively impacted absentee balloting. Considering all of the evidence, Wisconsin's legitimate interests in promoting orderly election administration and in controlling the costs of elections are more than enough to justify the slight burdens that are placed on voting by the challenged laws governing the time frame and location for in-person absentee voting. Plaintiffs have failed to prove their Count 2 claims, and judgment should be entered in Defendants' favor.

**D. The 28-day durational residency requirement does not create an “undue burden” on the right to vote.**

In May 2011, Wisconsin enacted a 28-day durational residency requirement for voting, which increased from a previous 10-day requirement. 2011 Wis. Act 23, §§ 10–12 (amending Wis. Stat. §§ 6.02(1)–(2), 6.10(3)). Even many of the legislators who opposed the change supported retaining a durational residency requirement of some length. *See, e.g.*, 2013 S.B. 173 (bill to amend from 28 to 10 days). Plaintiffs do not suggest that there is a problem with the previous 10-day requirement. (*See* Second Am. Compl., Dkt. 141 ¶¶ 129–34.) Instead, they assert that the additional 18 days “severely burdens those voters who move shortly before an election.” (Dkt. 141 ¶ 130.)

Plaintiffs’ “undue burden” claim challenging Wisconsin’s 28-day durational residency requirement fails. No individual voter Plaintiff has proven he has Article III standing to challenge the law, and One Wisconsin and Citizen Action have no standing, either. No Plaintiff proved he will be injured by a 28-day durational residency requirement. The Court lacks jurisdiction over a challenge to the requirement.

Aside from standing, as the trial evidence proved, the duration of Wisconsin’s residency requirement is consistent with other states that require voters to reside in one location for a period of time prior to voting there. Wisconsin has election administration interests in voters residing for at least



28 days where they plan to vote, including interests in voters familiarizing themselves with local races and in having adequate time to obtain a current proof of residence document.

The requirement is not unique. Dr. Hood’s January 2016 report analyzed whether Wisconsin’s 28-day durational residency requirement is unusual. (DX1:23–24.) Twenty-five states and the District of Columbia indicate a specific number of days required to establish residency. (*Id.* at 23.) The average number of days is 28.8. (*Id.*) The most frequently occurring number of days is 30, and 77% of the jurisdictions that have a specific day requirement use 30 days. (*Id.*) “Viewed in this context the twenty-eight day residency requirement is certainly not out of line with most other states.” (*Id.*)

Plaintiffs allege that the increase in Wisconsin’s durational residency requirement by 18 days unduly burdens the right to vote under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. (Second Am. Compl., Dkt. 141 ¶¶ 186–88.) Plaintiffs cite to *Anderson*, 460 U.S. 780, and *Burdick*, 504 U.S. 428, for support. (Second Am. Compl., Dkt. 141 ¶ 187.) But Plaintiffs’ claim fails under the *Anderson/Burdick* test.

The character and magnitude of the alleged injury at issue—an increase of Wisconsin’s durational residency requirement by 18 days—creates only a minimal risk of injury to a small number of voters who might move. The

Supreme Court already has upheld durational residency requirements of a similar character to Wisconsin's 28-day requirement. *Burns v. Fortson*, 410 U.S. 636, 687 (1973) (per curiam) (50-day requirement); *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam) (50-day requirement); *Dunn*, 405 U.S. at 363 (Blackmun, J., concurring) (30-day requirement).

The magnitude of the modest 18-day increase is small. Plaintiffs did not prove at trial the number of moving voters potentially impacted by the 28-day requirement, but they concede it impacts only those who move shortly before an election (Second Am. Compl., Dkt. 141 ¶ 130.) Plaintiffs were not able to establish through trial evidence whether or to what extent voters will be unduly burdened by a 28-day durational residency requirement. In other words, Plaintiffs could not quantify through trial evidence the number of voters who will be burdened by this change in the law. Plaintiffs' evidence of any burdens is purely anecdotal and did not prove that there are systemic, statewide burdens on voters created by the 28-day durational residency requirement.

Clerk Westerbeke testified that she has seen only “a few individuals, not a great amount,” who fell into the window between ten and 28 days of residency. (Tr. 05-24-16, 7-A-169–70.) Clerk McHugh testified that in the last couple of years she has only seen “a handful of people” who fell into the

ten-to-28-day window, “maybe three or four or five or six that have come in.” (Tr. 05-24-16, 7-A-119–20.)

There may be a small number of moving voters who will be impacted by the additional 18 days. But an intra-state mover may vote by mail-in absentee ballot if he or she does not want to drive back to his or her previous ward to vote. Likewise, a voter who moves to Wisconsin from out-of-state may vote in presidential and vice presidential elections in Wisconsin. The burden on these voters is minimal, and Plaintiffs did not prove otherwise.

Wisconsin’s interests in the 28-day durational residency requirement are sufficient to justify these limited burdens. Wisconsin’s durational residency requirement serves compelling state interests. It preserves the integrity of the election process by maintaining a stable political system, insuring the purity of the ballot box, safeguarding voter confidence, and avoiding voter confusion. *See Crawford*, 553 U.S. at 197 (voter confidence); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) (integrity of process); *Dunn*, 405 U.S. at 345 (purity of ballot box); *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (stable system, integrity of process, voter confusion). The residency requirement serves these legitimate state interests by inhibiting voter colonization, party raiding, and voter fraud. *See Crawford*, 553 U.S. at 194–97 (fraud); *Rosario*, 410 U.S. at 760 (raiding); *Dunn*, 405 U.S. at 345 (colonization); *Swamp*, 950 F.2d at 386 (raiding). As a state with both an open primary and same-day voter

registration, Wisconsin is particularly at risk for colonization, raiding, and fraud. The 28-day requirement serves all of these important state interests.

GAB witness Michael Haas testified at trial about the justifications for a 28-day residency requirement: “I believe the justification put forward to support the 28-day residency is partly that it was maybe more consistent with what some other states had and again to possibly require a more – longer term connection for the voter that particular location where they were voting.” (Tr. 05-25-16, 8-P-38.) “There can be no question about the legitimacy of the State’s interest in fostering informed and educated expressions of the popular will in a general election.” *Anderson*, 460 U.S. at 796.

Municipal clerk witnesses also testified about the benefits of a 28-day requirement. Clerk Hermann-Brown testified that a 28-day requirement would give voters who recently moved more time to get their absentee ballot from a previous municipality if they were required to vote there. (Tr. 05-19-16, 4-P-133.) She also highlighted that voters would have more time to obtain a proof of residence document, such as a utility bill, under a 28-day requirement. (Tr. 05-19-16, 4-P-134.) Clerk Westerbeke testified that increasing the residency requirement gives voters more time to obtain proof of residence documents like a bank statement, utility bill, or cable bill. (Tr. 05-24-16, 7-A-170.) Clerk McHugh also testified that “going from 10 to 28 days gives people

a few more weeks of cushion to get the adequate proof of residence they need to register.” (Tr. 05-24-16, 7-A-119.)

Considering the State’s legitimate election administration interests in a 28-day durational residency requirement, and weighing them against the minimal burdens that will be experienced by some undetermined number of voters, the law does not unconstitutionally burden the right to vote.

**E. The challenged voter registration laws**

“Registering to vote is easy in Wisconsin.” *Frank*, 768 F.3d at 748. The Seventh Circuit made that observation in an October 6, 2014, opinion that was published *after* the challenged voter registration laws in this case were enacted. To start, no Plaintiff has Article III standing to challenge the voter registration laws because they have not shown that they will be injured by them. They are registered to vote or, in the case of One Wisconsin and Citizen Action, they have no right to vote. The Court lacks jurisdiction over these claims. Beyond standing concerns, Plaintiffs’ claims fail.

**1. Background regarding voter registration in Wisconsin**

Wisconsin requires every qualified elector to register in order to cast a ballot. Wis. Stat. § 6.27. There are some narrow exceptions required by federal law: voters who do not meet residency requirements can vote for president and

vice president, Wis. Stat. §§ 6.15 and 6.18, and military electors are not required to register. Wis. Stat. § 6.22.

**a. Wisconsin provides four different ways to register to vote.**

In registering to vote, an elector needs to fill out a form containing information showing that he or she meets the qualifications for voting in Wis. Stat. § 6.02 and submit proof of the elector's residence per Wis. Stat. § 6.34.

There are several different ways to register to vote in Wisconsin. Wisconsin is at the forefront of making registration simple and easy because voters can register at their polling place on Election Day. Prior to Election Day, voters can register in three different ways: (1) by mailing the form and proof of residence to the appropriate local official; (2) in person at the office of the municipal clerk, the municipal board of elections, or at another location authorized by the municipality; or (3) through a special registration deputy authorized to accept voter registration forms by a municipality.

**(1) Election Day registration (EDR) and same-day registration (SDR)**

Wisconsin allows all qualified electors to register at the polling place on Election Day, even if elector is a new registration or was previously registered at another address but needs to change the registration to his or her current address. Wis. Stat. § 6.55(2)(a)1.

Wisconsin's voter registration scheme is relatively easy because it is one of only seven states that offer both same-day registration during the in-person absentee voting period *and* Election Day registration. (DX1:4.) Dr. Hood found that "[t]wo-thirds of states (65%) do not offer SDR, EDR, or a combination of the two. Offering both SDR and EDR, therefore, places Wisconsin within a fairly small minority of states." (*Id.*)

## **(2) Registration by mail**

Wisconsin allows voters to register by mail by using a form prescribed by the Government Accountability Board. Wis. Stat. § 6.30(4). Defendants' exhibits 101 through 103 are GAB form 131, the Wisconsin Voter Registration Application, in English, Spanish, and Hmong. Voters can access this form in several ways. A voter can complete the voter registration form electronically on the website <http://myvote.wi.gov>, print the completed form, and then mail it to the appropriate municipal clerk's office, which the website provides when the individual enters his or her address.

The GAB also has a copy of the voter registration form on its website, which can be completed electronically and then printed, or it can be printed in hard copy, filled out by hand, and then mailed to the appropriate local elections official. GAB's forms are found at the following website link: <http://www.gab.wi.gov/forms/voters>. GAB's website also includes a current and

updated list of all addresses for the State's hundreds of municipal clerks:  
<http://www.gab.wi.gov/clerks/directory>.

Many local elections offices also have the voter registration form on their websites. For example, the City of Milwaukee Election Commission has an electronic version of the form on its website, <http://city.milwaukee.gov/election>, under the "Voter Information" drop-down menu: <http://tinyurl.com/h6qvl2u>. Likewise, the City of Madison website provides a link to both the voter registration form on the GAB's website and the [myvote.wi.gov](http://myvote.wi.gov) website, along with instructions on how to register to vote: <http://www.cityofmadison.com/election/voter/pre.cfm>.

### **(3) Registering in person**

Voters can also register in person. Wis. Stat. § 6.30(1). Voters can register at the municipal clerk's office until the close of business on the Friday before an election. Wis. Stat. § 6.29(2)(a).

Voters can also register in person at the board of elections commissioners and the office of the county clerk and at any other registration location approved by a municipality, such as fire houses, police stations, public libraries, or any other facility. Wis. Stat. § 6.28(1). For example, the Cities of Madison and Milwaukee allow registration at all of the public libraries in the city. See <http://www.cityofmadison.com/election/voter/pre.cfm> (Madison); <http://city.milwaukee.gov/vote#.VoLjfvkrJ1M> (Milwaukee). These in-person



registrations need to be completed by the third Wednesday preceding the election (which equates to 20 days prior to the election). Wis. Stat. § 6.28(1).

#### **(4) Special registration deputies**

Wisconsin also allows municipalities to appoint qualified electors as special registration deputies who can accept voter registration forms. Wis. Stat. § 6.26(2)(a). The special registration deputy collects the forms and then turns them in to the municipal clerk. *Id.* Applicants are appointed by municipalities, but they can be appointed as a deputy by more than one municipality. *Id.*

### **2. Documentary proof of residence**

Every voter who is not a permanent overseas or military elector must “provide an identifying document that establishes proof of residence.” Wis. Stat. § 6.34(2). Following the enactment of 2013 Wisconsin Act 182, this requirement applies to all voters. 2013 Wis. Act. 182, § 2h. In August 2012, the Government Accountability Board authorized the use of electronic versions of the documents accepted as proof of residence. (*See* DX86, 105.)

Wisconsin law allows many different types of documents to serve as proof of residence. Any document used to establish residency must contain the voter’s current first and last name and current address. Wis. Stat. § 6.34(3)(b). The law recognizes thirteen different types of documents that can be used to prove residence:

- (1) A Wisconsin driver license;
- (2) A Wisconsin state identification card;
- (3) Any other official identification card or license issued by a Wisconsin governmental body or unit;
- (4) An official picture identification card of license issued by an employer;
- (5) A real property tax bill or receipt for the current or prior year;
- (6) A residential lease (although this cannot be used to register by mail);
- (7) A university, college, or technical college photo identification card, together with a fee payment receipt issued within the past nine months;
- (8) A university, college, or technical college photo identification card if the school provides a certified list of students that are U.S. citizens to the municipal clerk;
- (9) A utility bill for a period commencing not earlier than ninety days before registration;
- (10) A bank statement;
- (11) A paycheck;
- (12) A check or other document provided by a unit of government; and
- (13) A contract or intake document prepared by a residential care facility.

Wis. Stat. § 6.34(3)(a). Residential care facility documents were added to the list in March 2016. (*See* DX96.)

Against this backdrop of an easy voter registration system, Plaintiffs challenge the documentary proof or residence requirement, the elimination of high school and statewide SRDs, changes to the use of certified dorm lists, and a law relating to a Madison ordinance by which landlords distributed voter registration applications to new tenants.

**3. The documentary proof of residence requirement creates no “undue burden” on the right to vote.**

Plaintiffs challenge the Legislature’s expansion of the documentary proof of residence requirement as unconstitutionally burdensome. If the voter photo ID requirement in *Frank* was found constitutional under the *Anderson/Burdick* test, a documentary proof of residence requirement is also constitutional. The options for documentary proof under Wis. Stat. § 6.34(3)(a) are even more expansive than the voter photo ID options under Wis. Stat. § 5.02(6m).

Moreover, Plaintiffs offered no evidence regarding how many voters lacks necessary proof of residence documents and relied instead upon scattered anecdotes of voters who could not register because they did not have documentary proof in hand. Those anecdotes do not explain whether those voters had proof at home, at work, in their cars, or could access it online.

For example, Plaintiffs’ fact witness Donna Richards testified about seven voters she witnessed in Fond du Lac on Election Day in April 2016 who did not have proof of residence in hand when they came to register. (Tr. 05-20-16, 5-P-45.) But on cross-examination, Ms. Richards testified: “I don’t know that they didn’t have proof of residence at home.” (Tr. 05-20-16, 5-P-56.) She also confirmed that someone who presented to her earlier in the day on Election Day may have had time that same day to either go home and

get a proof of registration document or make a change to some account to have a proof of registration document. (Tr. 05-20-16, 5-P-58.) With even a minimal amount of advance preparation, a voter can easily comply with the documentary proof requirement.

Plaintiffs have failed to prove the extent of the burdens, if any, that voters are experiencing because of the documentary proof requirement. The voter registration law includes many, many options for voters to prove their residency with a document, making it very unlikely that any large number of voters cannot meet the requirement. Plaintiffs have not been able to quantify through trial evidence the number of voters who are experiencing a problem—aside from some anecdotes—making it virtually impossible to substantiate their constitutional claim.

With regard to the State's justifications for a documentary proof of residence requirement, Michael Haas, Election Division Administrator at GAB explained that “the theory supporting that requirement is to insure that individuals who register to vote have established a residency in the ward that they are voting in and for the officials who represent that particular area.” (Tr. 05-25-16, 8-P-37–38.) Showing a document with your name and address on it helps prove that you currently reside there. If the residency requirement and voter registrations laws are to be meaningful, it makes sense for voters to

provide some concrete proof of their current residence. A documentary proof of residence law accomplishes that legitimate election administration goal.

Additionally, a documentary proof of residence requirement makes it more difficult for a voter to commit fraud in registering to vote. A person would have to a forge a proof document, procure one through misrepresentation, or make a false statement on the voter registration form regarding his current residence. Relatedly, requiring documentary proof of residence can bolster voter confidence in the integrity of the election process because it makes fraud more difficult.

On balance, and applying the *Anderson/Burdick* test, the State's legitimate justifications for a documentary proof of residence requirement outweigh any minimal burdens on the right to vote. Plaintiffs have not proven that the law is unconstitutionally burdensome. The Court should enter judgment in Defendants' favor.

**4. The elimination of corroboration creates no “undue burden” on the right to vote.**

Plaintiffs challenge the elimination of the option for registering voters to prove their residence by a corroborating witness. No Plaintiff has proved he has Article III standing to make this claim, and the Court lacks jurisdiction over the claim. Furthermore, Plaintiffs have failed to prove this claim.

Dr. Mayer's December 2015 expert report pinpoints the lack-of-proof problem with Plaintiffs' "undue burden" claim as to corroboration: "I do not have specific data on how many people were unable to register because they were no longer permitted to use corroborating witnesses to prove residency." (PX38:39.) Plaintiffs were not able to substantiate at trial how burdensome eliminating corroboration is on voters, or how many voters were even impacted by the change. While Plaintiffs may point to anecdotal evidence of voters who lacked proof of residency documents, these limited examples do not show a widespread burden. They have not proven their claim.

Municipal clerk witnesses confirmed that eliminating corroboration is not problematic. Clerk Constance McHugh testified that corroboration was "rarely" used in places like Cedarburg and Fox Point. (Tr. 05-24-16, 7-A-116.) She also testified that corroboration can lead individuals to pressure others to corroborate for them. Clerk McHugh witnessed such an incident when she worked in Fox Point. An individual came in to register to vote without proof of residence, and he went around asking voters at the polling location to corroborate for him, even though they did not know his residence. The voters felt pressured to corroborate for the man, though none did. (Tr. 05-24-16, 7-A-117.) Since the elimination of corroboration, there have been no instances in Cedarburg where Clerk McHugh was unable to register a voter because they did not obtain proof of residence. (Tr. 05-24-16, 7-A-117.)

Likewise, since the elimination of corroboration, there have been no instances in Sun Prairie where Clerk Hermann-Brown was unable to register voters because they could not obtain proof of residency. (Tr. 05-19-16, 4-P-124.) Clerk Westerbeke has not seen any effect on voters' ability to register since corroboration has been eliminated. (Tr. 05-24-16, 7-A-159.) While corroboration was a convenient option for some, there remain robust options for voters to prove their residence using the expansive list of documents found in Wis. Stat. § 6.34(3)(a).

The Legislature made the rational choice that it prefers voters to show documentary proof of residence to register rather than to allow for corroborating witnesses. While the threat of fraud by corroborating witnesses is likely not very great, it is nonetheless possible for a voter to register and vote unlawfully if no documentary proof of residence is required.

Plaintiffs have not proven that the benefits of requiring documentary proof of residence are outweighed by the very minimal burdens on the right to vote. They have not proven that corroboration was widely used, or even that it was used much at all. They also have not shown what percentage of voters lack documentary proof of residence. If the voter photo ID law in *Frank* was found to be constitutional, then surely eliminating the corroboration option creates no unconstitutional burden. Under the *Anderson/Burdick* test, this change in

the law passes constitutional muster. The Court should enter judgment in Defendants' favor.

**5. The elimination of statewide and high school special registration deputies creates no “undue burden” on the right to vote.**

Plaintiffs challenge that Wisconsin no longer has special registration deputies at high schools and that GAB can no longer certify statewide special registration deputies. No Plaintiff proved he has Article III standing to make this claim. The Court lacks jurisdiction. Beyond standing, under the *Anderson/Burdick* test, these changes in the law pass constitutional muster. The State's election administration interests in determining who can be certified to register voters outweigh any minimal burden on voters' options to register. The options remain robust.

With regard to statewide SRDs, the Court heard testimony from local election officials and the GAB regarding how statewide SRDs did not do their jobs very well. Clerk Hermann-Brown testified that WMCA supported the elimination of statewide SRDs. (Tr. 05-19-16, 4-P-127–28.) Clerks had issues with statewide SRDs not getting the registration forms submitted in a timely manner, the forms being sent to the wrong municipalities, using the wrong SRD number on the form, and including incorrect driver license numbers. These problems with statewide SRDs were continuous and coming from across the State. (Tr. 05-19-16, 4-P-128–29.)



Prior to the elimination of statewide SRDs, Clerk Constance McHugh would see them return many registration forms incomplete, lacking information, perhaps not signed, missing driver license numbers or birth dates, errors which complicated things and required follow up on the clerk's part. (05-24-16, 7-A-118.)

Clerk Westerbeke had many of these same issues with statewide SRDs. They would register individuals in the wrong municipality, and the individuals would show up at the wrong municipality thinking they were registered. (Tr. 05-24-16, 7-A-167.) These mistakes took time for clerks to address and correct, especially when the forms came in shortly before the election.

Allison Coakley of GAB testified about how she audited voter registration forms that statewide SRDs submitted to GAB. (Tr. 05-25-16, 8-P-128.) She noticed problems with the legibility of forms and missing information like required dates of birth, signatures, and addresses. (Tr. 05-25-16, 8-P-128.)

With statewide SRDs, it was more difficult for municipal clerks to disqualify or revoke an SRD because the State had control. (Tr. 05-19-16, 4-P-128.) Now, if there are repeated issues with a municipal SRD, the municipalities either work with that SRD or revoke his or her status. (Tr. 05-19-16, 4-P-129.) Even without statewide SRDs, voters can register with municipal SRDs, on Election Day, in the clerk's office, or they can register themselves using the guidance on MyVote.WI.gov. (Tr. 05-24-16, 7-A-119.)

With regard to high school SRDs, Clerk Hermann-Brown testified that she had “no concerns” about eliminating them. (Tr. 05-19-16, 4-P-126.) She voiced several issues with these SRDs. It was hard to keep track of the change in personnel where staff SRDs would come and go; the schools would not always allow that staff member to come to training and learn how to register; and the high school SRDs did not always send back their forms in a timely manner. Sometimes the registration forms were not received until after an election, and sometimes they would be sent to the wrong municipality, since high schools can cover multiple municipalities. High school SRD were seldom used. (Tr. 05-19-16, 4-P-126.)

Clerk Hermann-Brown also testified that it takes additional time for clerks to train high school SRDs. For example, in Sun Prairie, SRD training was normally done on nights and weekends, but school staff members would not attend then, so the clerk would have to go to the high school specially to train that SRD. (Tr. 05-19-16, 4-P-179.) In Port Washington, Clerk Westerbeke trained the high school vice principal to be an SRD, but nobody utilized him to register. Nobody complained when high school SRDs were eliminated in the high school. (Tr. 05-19-16, 7-A-166.) High school students like to register on Election Day, or they come to the clerk’s office to register because it is a “Facebook picture taking time.” (Tr. 05-19-16, 4-P-127.)

Applying the *Anderson/Burdick* test, the Court should conclude that the State's legitimate interests in efficient election administration outweigh any minimal burdens on the right to vote of not having statewide SRDs and SRDs at high schools. As discussed above, voters have robust options to register to vote including by SDR during absentee voting, on Election Day (EDR), by mail, and by municipal SRDs. Plaintiffs have not proven that the changes to the law are unconstitutionally burdensome on the right to vote; therefore, the Court should enter judgment in Defendants' favor.

**6. Changes to the use of “dorm lists” create no “undue burden” on the right to vote.**

Plaintiffs alleged in their Second Amended Complaint that Act 23 unconstitutionally burdens the right to vote because it:

made it harder for students to use a college ID as proof of residence for the purpose of registration by permitting “dorm lists” provided to municipal clerks to be used in connection with college IDs to prove residence for the purpose of voter registration only if the colleges or universities providing those dorm lists verify the citizenship status of the students on the list.

(Second Am. Compl., Dkt. 141 ¶ 62.) No Plaintiff has Article III standing to make this claim, and the Court lacks jurisdiction. Further, Plaintiffs have failed to prove at trial the extent to which “dorm lists” were even used for registration purposes, let alone that the right to vote is significantly burdened by this change in the law. As can be said of many of the challenges to voter registration laws, under *Frank*, if the voter photo ID law is constitutional, so

is this law. The documents available to prove one's residence to register to voter are expansive, and dorm lists are only one option.

Diane Lowe of the GAB confirmed that college students do not have to use their student ID cards to register to vote. (Tr. 05-20-16, 5-P-129.) "They can use any of the approved acceptable forms of proof of residence." (Tr. 05-20-16, 5-P-129.) In other words, a certified dorm list is "one of many options" to register to vote, and "a college student does not have to use that method as proof of residence." (Tr. 05-20-16, 5-P-129.) Plaintiffs cannot point to trial evidence proving how many students used student ID cards (or "dorm lists") to register to vote. The so-called burden they identified here cannot be measured, making it very difficult to show that the purported burden is an unconstitutional one. Again, their proof is merely anecdotal.

The Legislature legitimately required that colleges confirm the citizenship status of students on "dorm lists." U.S. citizenship is a qualification to vote, so it makes sense to confirm it. Wis. Const. art. III, § 1. This is a legitimate election administration interest. Likewise, the Legislature sensibly provided a long list of documentary options to prove residence, and student IDs, coupled with certified "dorm lists," are one of the many documentary proof options available to students. Again, Wisconsin has a legitimate election administration interest in the expansive list of options that the Legislature provided to prove residency.

Students at public universities can use documents issued to them by their school to register to vote. *See* Wis. Stat. § 6.34(3)(a)(12). That would include documents like tuition statements. Plaintiff Jennifer Tasse testified that UW-Madison students can even use the option of going to the school's website and updating their current residential address on the site, and then use the electronic version as their proof of residence document. (Tr. 05-18-16, 3-A-32; *see also* Tr. 05-16-16, 1-P-174 (Gosey testimony), Tr. 05-17-16, 2-A-7-8 (Gosey testimony).)

On balance, and applying the *Anderson/Burdick* test, the State's legitimate interests outweigh any minimal burden on the right to vote that Plaintiffs have shown. The Court should enter judgment in the State's favor.

**7. 2013 Wisconsin Act 76, relating to landlords providing voter registration applications to new tenants, creates no “undue burden” on the right to vote.**

Plaintiffs challenge 2013 Wisconsin Act 76, which they allege “burdens the voting rights of Madison's citizens who rent and move frequently by prohibiting a means of facilitating their ability to register to vote or to keep their registration form up to date.” (Second Am. Compl., Dkt. 141 ¶ 123.) Act 76 provides that “No city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law. 2013 Wis.

Act 76, § 2. Act 76 effectively overturned a Madison ordinance requiring landlords to distribute voter registration forms to new tenants.

No Plaintiff proved he has Article III standing to challenge Act 76, and the Court lacks jurisdiction. Beyond standing, Plaintiffs have failed to prove that Act 76 unconstitutionally burdens the right to vote. While voter registration forms distributed by landlords to new tenants were sometimes used by voters to register in the City of Madison, the trial evidence did not prove that these same voters would have been *unable* to register without the forms they received from their landlords. The forms were just a convenience. It is not possible to show that these voters were *burdened* by the change in the law, only that they will now have to use the same robust and expansive options for registering to vote that all voters have in Wisconsin. The burden on the right to vote—which is limited to the City of Madison—is minimal.

Requiring landlords to distribute voter registration forms does not make sense from an election administration standpoint. Sun Prairie Clerk Hermann-Brown testified that it would be difficult to require landlords to distribute voter registration forms because there would be a risk that they would hand out the wrong form or an outdated form. (Tr. 05-19-16, 4-P-132.) Waukesha County Clerk Novack testified that it would not be a good idea to require landlords to distribute voter registration forms to tenants. It would be putting landlords in a situation that they are not trained for, as it could invite questions when the

forms are distributed. It would also be a difficult system for a county or municipal clerk to monitor. (Tr. 05-24-16, 7-P-17–18.) By enacting Act 76, the Legislature made a uniform, statewide practice and avoided these types of concerns.

Considering the State’s legitimate election administration interests in a uniform, statewide system of voter registration, and weighing those interests against the minimal (if any) burden on the right to vote, the law is constitutional. The Court should enter judgment in Defendants’ favor.

**F. Wisconsin’s election observer rules create no “undue burden” on the right to vote.**

Plaintiffs challenge 2013 Wisconsin Act 177, which amended Wis. Stat. § 7.41, a statute concerning election observers. Wisconsin Stat. § 7.41(1) permits members of the public to be present at a polling place or municipal clerk’s office where ballots are being cast and counted “for the purpose of observ[ing the] election and the absentee ballot voting process.” The chief election inspector or municipal clerk in charge may reasonably limit the number of observers representing the same organization at the same location. *Id.* Observers are required to print their names and sign a log maintained by the chief election inspector or municipal clerk. *Id.*

The portion of Wis. Stat. § 7.41 that Plaintiffs challenge is Wis. Stat. § 7.41(2), which addresses the designated observation area for election observers. It states:

(2) The chief inspector or municipal clerk may restrict the location of any individual exercising the right under sub. (1) to certain areas within a polling place, the clerk's office, or alternate site under s. 6.855. The chief inspector or municipal clerk shall clearly designate observation areas for election observers under sub. (1). *The observation areas shall be not less than 3 feet from nor more than 8 feet from the table at which electors announce their name and address to be issued a voter number at the polling place, office, or alternate site and not less than 3 feet from nor more than 8 feet from the table at which a person may register to vote at the polling place, office, or alternate site.* The observation areas shall be so positioned to permit any election observer to readily observe all public aspects of the voting process.

The chief inspector or municipal clerk is authorized to order the removal of any observer who “commits an overt act which”: (1) “[d]isrupts the operation of the polling place, clerk’s office, or alternate site under s. 6.855” or (2) “[v]iolates s. 12.03 (2) or 12.035.” Wis. Stat. § 7.41(3).

Plaintiffs’ complain that election observers could be permitted to stand as close as three feet from voters. (*See* Second Am. Compl., Dkt. 141 ¶ 135.) They allege that, prior to 2013 Wisconsin Act 177, “observers were required, pursuant to GAB policy, to maintain a six-foot distance from voters.” (Dkt. 141 ¶ 135.) Plaintiffs claim that by “*reducing* the buffer zone” between voters and election observers “the State legislature facilitated, and even encouraged, voter intimidation by election observers and will cause wait times to increase for



voters at polling locations at which aggressive observers are present.” (Dkt. 141 ¶ 138.)

No Plaintiff proved he has Article III standing to challenge this law, and the Court lacks jurisdiction. Beyond standing, Plaintiffs fundamentally misunderstand how the law operates.

**1. Plaintiffs misunderstand how the law works.**

2013 Wisconsin Act 177 and Wis. Stat. § 7.41(2) do not violate the Constitution. First, Plaintiffs misunderstand how Wis. Stat. § 7.41(2) works. The law puts discretion in the hands of *local* election officials to set an observer area that is as close as three feet from voters and as far as eight feet from voters. Local election officials (namely, the chief election inspector or municipal clerk) control where election observers can stand within the established zone. Wis. Stat. § 7.41(2); *see also* Tr. 05-16-16, 1-P-38. The State officials who are named Defendants in this case do not control where election observers stand at a polling place. *See* Wis. Stat. § 7.41(2) If a chief election inspector or municipal clerk wants election observers to stand no closer than six, seven, or eight feet from voters, she can require that space, consistent with Wis. Stat. § 7.41(2).

Thus, Plaintiffs misunderstand what the Legislature did in enacting 2013 Wisconsin Act 177. It did not give State officials, particularly the named

Defendants, the authority to control precisely where election observers stand at a polling place.

In addition to their authority to tell election observers where to stand, local election officials can kick out election observers who are being disruptive. Wis. Stat. § 7.41(3). Thus, an election observer who is harassing voters, election officials, or other observers would be subject to removal by the chief election inspector or municipal clerk, regardless of where the harassing observer is standing. *Id.*

**2. Wisconsin Stat. § 7.41(2) does not unduly burden the right to vote.**

Wisconsin Stat. § 7.41(2) does not unduly burden the right to vote. Step one in the “undue burden” analysis is to analyze the character and magnitude of the asserted injury to the right to vote. *See Anderson*, 460 U.S. at 789.

Wisconsin Stat. § 7.41(2) is not a regulation that could reasonably be said to impose a “severe” burden on voting rights. *See Burdick*, 504 U.S. at 434. It does not directly impact the process of registering to vote, proving one’s identity, or any other aspect of casting a ballot. It cannot be characterized as a limitation on the right to vote. It is instead a law that addresses the conduct of election observers and election officials at the polling place, and one that ensures that peace and order is maintained. It is a “reasonable, nondiscriminatory restriction[]” that imposes a minimal burden on voting, if

any, that is warranted by Wisconsin's "important regulatory interests." *Anderson*, 460 U.S. at 788.

In contrast to that minimal burden, the State has legitimate and important interests in orderly election administration that are furthered by the law. Wisconsin Stat. § 7.41 gives local election officials the authority to tell election observers precisely where to stand *and* the authority to eject them from the polling place for being unruly. Wis. Stat. § 7.41(2), (3). The statute promotes orderly election administration by giving local election officials the tools they need to maintain stability and calm at the polling place on Election Day if election observers get out of line.

The fact that the law gives local election officials some discretion to determine precisely where election observers stand does not discount the State's important interest in orderly election administration. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Discretion is an essential component of the State's "interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Id.* at 364. Here, the Legislature has given local election officials some control over where election observers stand by creating a reasonable default zone of three-to-eight feet in which local election officials can choose to place observers.

It is important to note that the appropriate distance for election observers to stand from voters and election officials could vary by polling place, and the variation might also depend upon the observers themselves. Some observers might have difficulty hearing or seeing, and placing them up to six feet away might cause more potential disruption for voters and election officials than if they were placed closer. Elderly election observers might have difficulty hearing or seeing if they are six feet away from voter registration tables, which could result in more interruptions and questions from the observers for election officials, the chief election inspector, or the municipal clerk. Not all polling places have the space to move election observers farther away from voters. Accordingly, it makes sense to grant the chief election inspector and municipal clerk discretion to place election observers in a location that is tailored to the space needs of the polling place and the sensory needs of the election observers themselves. Wisconsin Stat. § 7.41(2) serves those needs.

Wisconsin Stat. § 7.41(2) also furthers the State's legitimate interest in promoting voter confidence in the integrity of the election process. *See Crawford*, 553 U.S. at 197; *Rosario*, 410 U.S. at 761. The statute gives local election officials the authority to manage the physical set-up of a polling place, which is important to give the appearance and actuality of propriety in the conduct of an election.

Plaintiffs relied at trial upon the testimony of election official fact witnesses like Neil Albrecht and Maribeth Witzel-Behl, Andrea Kaminski of the League of Women Voters, or Diane Lowe of the GAB, to attempt to substantiate their claim that the election observer law unduly burden the right to vote. Plaintiffs also rely upon evidence regarding a particular election observer, Ardis Cerny, who has been accused of inappropriate behavior while observing. The fact remains that, as Mr. Albrecht confirmed, “99.5% of elections observers respect the State’s election observer rules.” (Tr. 05-16-16, 1-P-108.) Thus, what Plaintiffs’ trial evidence amounts to is a series of disjointed anecdotes that show no systemic pattern of abuse and intimidation by election observers, or an inability of local election officials to maintain order at their polling places. Local election officials have always had the authority to maintain order at the polling place and kick out election observers who disobey lawful orders. (*See* Tr. 05-25-16, 8-P-36 (Haas testimony).) The three-to-eight-foot rule did not change that authority.

In sum, weighing the slight burdens that the law creates against the promotion of significant State interests that the Supreme Court has recognized, this Court should conclude that Wis. Stat. § 7.41(2) imposes no undue burden on the right to vote. Plaintiffs failed to prove their Count 2 claim, so judgment should be entered in Defendants’ favor.

**G. Changes to when absentee ballots can be faxed and e-mailed create no “undue burden” on the right to vote.**

Plaintiffs allege that 2011 Wisconsin Act 75, § 50 imposed an unconstitutional burden on the right to vote. (Second Am. Compl., Dkt. 141 ¶ 147.) This law, Wis. Stat. § 6.87(3)(d), provides that a municipal clerk can transmit a ballot by fax or e-mail only to a military elector, as defined in Wis. Stat. § 6.34(1)(a), or an overseas elector, as defined in Wis. Stat. § 6.34(1)(b). Any elector may still request an absentee ballot from his municipal clerk via fax or e-mail. The practical effect of Act 75 is that temporary overseas voters can no longer receive absentee ballots by fax or e-mail. No Plaintiff proved that he has Article III standing to challenge the law, and the Court lacks jurisdiction. Beyond standing, Plaintiffs failed to prove their claim.

There are good election administration reasons to limit the number of absentee ballots that are transmitted electronically, including the practical reason that electronic ballots, whether they are faxed or e-mailed, cannot be run through vote-tabulating machines without being recreated on an official paper ballot at the polling place. This leaves room for human error in the process of recreating the ballot, and it can compromise the secrecy of the ballot. It also creates extra work for municipal clerks and their staff. The Court heard testimony regarding these issues.

Clerk Hermann-Brown and Clerk McHugh testified that it is more work for clerks to scan and e-mail a ballot because, once returned by the voter, the paper ballot has to be opened and re-created onto an official ballot, which is completed by two election inspectors on Election Day at the polling place. This process lends itself to human error and loss of privacy for the voter. (Tr. 05-19-16, 4-P-137–38; Tr. 05-24-16, 7-A-115.)

Clerk Hermann-Brown testified that e-mailing ballots was “more time consuming and it was a challenge.” (Tr. 05-19-16, 4-P-162.) She testified that she supported the change in the law regarding electronic transmission of absentee ballots. (Tr. 05-24-16, 7-A-114.) It is very time-consuming to fax and e-mail ballots, especially trying to juggle it with people coming to vote in-person absentee. Clerks would have to devote a lot of resources to stand at a fax machine or to stand at a copier and scan ballots and then hope that they get to the person on the other end. Clerk McHugh has had problems e-mailing ballots where the recipient did not have sufficient Internet bandwidth to download the ballot. Many times it required emailing or faxing two or three or four times. (Tr. 05-24-16, 7-A-114.)

Clerk McHugh also testified to the security concerns associated with e-mailing and faxing ballots. For example, in Cedarburg an absentee ballot was forwarded to another person who did not request the ballot. At the end of the night on Election Day, the ballot was rejected because the person who cast the

ballot did not have a written request on file for the ballot. (Tr. 05-24-16, 7-A-114–15.)

Dr. Hood also gave his opinion regarding the use of e-mail and fax to transmit absentee ballots. He identified in his report “a number of common sense reasons for no longer allowing the transmission of absentee ballots via fax or e-mail.” (DX1:19.) First, there is the problem that an e-mailed or faxed ballot “cannot be read into the tabulation machine.” (*Id.*) “An employee in the municipal clerk’s office, therefore, has to take the voter’s preferences and record these on a regulation ballot.” (*Id.*) “This process can lead to the introduction of unintended errors and also reduces voter privacy.” (*Id.*)

Dr. Hood also identified the problem of voters forwarding fax and e-mail ballots to others. (DX1:19.) “[B]allots can sometimes vary greatly, even within the same municipality. For example, voters living in Milwaukee are not all in the same state legislative districts.” (*Id.*) “[L]imiting the transmission of ballots to voters through the mail helps to reduce errors associated with the process of absentee voting or even the possibility of having their absentee ballot altogether disqualified.” (*Id.*)

E-mailed ballots do not solve the timing needs of temporary overseas voters. Clerk McHugh testified about an occasion when a temporary overseas voter in Canada was mailed an absentee ballot form, but it was not returned in time to be counted. However, the voter did not make the request for an



absentee ballot until less than one a week before the election. There was no way of knowing whether even an e-mailed ballot would have been received in time to be counted. (Tr. 05-24-16, 7-A-142–43.)

Plaintiffs have pointed to anecdotal examples about transmitting ballots overseas. It is not clear from the trial record what number of ballots are transmitted to temporary overseas voters, making analyzing the burden difficult. While individual, isolated examples may seem particularly burdensome, Plaintiffs' anecdotal evidence does not prove that there is anything other than a minimal, scattered impact on Wisconsin's right to vote due to Act 75.

For example, Plaintiffs' fact witness Jessica Garrels testified at her trial deposition about her difficulties in transmitting an absentee ballot in September 2014. If she had been e-mailed a ballot after she returned to Mali, she would have still had a question about whether it would have arrived back in Wisconsin in time to be counted because of the unreliability of the Mali mail. (PX491 (transcript), *hereinafter* "Garrels Trial Tr.," 14–15.) She would have had to use a commercial carrier like DHL to ensure the ballot returned in time to be counted. (Garrels Trial Tr. 15.)

Even as to Ms. Garrels' example, she failed to show that the lack of e-mail transmission was a significant burden. She testified that she did not vote in the February 2016 election because she suspected that an absentee ballot

by mail would not arrive in Laos, where she now lives, in time. (Garrels Trial Tr. 17.) But it was possible to get mail in Laos in about two weeks through her staff, and Ms. Garrels had no reason to believe the ballot would not be returned to Marshfield within two weeks. (Garrels Trial Tr. 30.)

Ms. Garrels is able to vote in future elections while she lives in Laos because she has made arrangements to have her absentee ballots mailed to the diplomatic pouch at the U.S. Embassy in Vientiane. When the ballot arrives, the embassy will contact Ms. Garrels via e-mail so that she can travel to Vientiane, fill out the ballot, and return it using the diplomatic pouch. (Garrels Trial Tr. 18–22.) Ms. Garrels travels to Vientiane every six to eight weeks for work, and it is possible that she could combine her trip to complete her absentee ballot with a work trip. (Garrels Trial Tr. 31.)

Finally, Internet service in Laos is not always dependable, especially in the rainy season. Downloading large attachments can also be problematic. (Garrels Trial Tr. 35.) E-mail transmission of an absentee ballot may not be a viable or reliable option for Ms. Garrels.

With proper planning, even someone in Ms. Garrels' unique situation could make arrangements to receive and return an absentee ballot in time for it to be counted. The election administration benefits of faxing and e-mailing absentee ballots to temporary overseas voters are limited, and they are outweighed by the potential inefficiencies and risks of error, loss of privacy,

and administrative burdens created by there being more of these ballots for municipal clerks and their staff to process.

In sum, applying the *Anderson/Burdick* test, the State's legitimate interests in Act 75 outweigh the minimal burdens that a select and limited number of voters experience due to the change in the law. The law is constitutional, and the Court should enter judgment in Defendants' favor.

**H. The elimination of straight-ticket voting creates no “undue burden” on the right to vote.**

2011 Wisconsin Act 23, § 6 eliminated straight-ticket voting, except as to military and overseas voters in certain elections. Act 23 repealed Wis. Stat. § 5.64(1)(ar)1.a. (2009–10), which stated: “The ballot shall permit an elector to . . . vote a straight party ticket for president and vice president, whenever those offices are contested, and for all statewide, congressional, legislative, and county offices.” Plaintiffs believe this change is unconstitutional, and they are wrong. No Plaintiff proved he has Article III standing to challenge the law, and the Court lacks jurisdiction. Beyond standing, the claim fails.

The prevailing trend nationally is away from providing a straight-ticket option on the ballot. Wisconsin is part of the large majority of states that do not have straight-ticket voting. According to the National Conference of State Legislatures, as of January 8, 2016, only nine states offered a form of straight-ticket voting: Alabama, Indiana, Iowa, Kentucky, Oklahoma, Pennsylvania,

South Carolina, Texas, and Utah. See National Conference of State Legislatures, *Straight Ticket Voting States*, <http://tinyurl.com/z4pkjno>. Michigan's legislature recently voted to eliminate straight-ticket voting. Kathleen Gray, "Michigan Senate, House OK end to straight ticket voting," Detroit Free Press, Dec. 16, 2015, <http://tinyurl.com/hdm6623>. If federal courts accept Plaintiffs' theories about the supposed illegality of States not having a straight-ticket option on the ballot, about forty States' laws could be subject to constitutional and Voting Rights Act challenges.

Plaintiffs can point to no decision that holds that there is a constitutional right to vote a straight-ticket, or any decision that holds that it is unconstitutional to eliminate straight-ticket voting. As with their other "undue burden" claims under the First and Fourteenth Amendments, the analysis is under the *Anderson/Burdick* test.

Here, the burden on the right to vote of not having a straight-ticket option on the ballot is minimal. It cannot be reasonably characterized as a "severe" burden. Voters have access to ballots the same as before the change, and the only difference is that the ballot no longer includes a straight-ticket option. 2011 Wisconsin Act 23, § 6 imposes "reasonable, non-discriminatory restrictions" on the rights of voters. See *Burdick*, 504 U.S. at 434. The next step in the analysis is to determine the State's interests.

Straight-ticket voting was not an option on all ballots, like presidential primary ballots, which confused voters. (Tr. 05-19-16, 4-P-136.) Likewise, with straight-ticket voting, there was more of a chance that voters would not see the non-partisan offices or referendum questions lower on the ballot. (Tr. 05-24-16, 7-P-19.) The State has legitimate interests in preventing “confusion, deception, and even frustration of the democratic process at the general election.” *Jeness v. Fortson*, 403 U.S. 431, 442 (1971). 2011 Wisconsin Act 23, § 6 advances the State’s interest in avoiding voter confusion by eliminating a potentially befuddling ballot configuration for voters.

Eliminating the straight-ticket option decreases the possibility of voters marking the straight-ticket box on the ballot and then proceeding to vote for candidates on the remainder of the ballot anyway. “When an elector casts more votes for any office or measure than he or she is entitled to cast at an election, all the elector’s votes for that office or measure are invalid and the elector is deemed to have voted for none of them.” Wis. Stat. § 7.50(1)(b). A voter who does not understand the straight-ticket option might engage in this type of “over-voting.” 2011 Wisconsin Act 23, § 6 eliminates this potential confusion by requiring a vote by candidate, not by party.

Additionally, eliminating the straight-ticket option from the general election ballot avoids the confusion that some voters might experience due to the fact that a partisan primary election ballot is limited to voting for one

party's candidates. A voter who voted in a partisan primary might be confused if the general election ballot has an analogous, partisan-only, straight-ticket option. Similarly, some voters who only vote at general elections might be confused to see a straight-ticket option on the general election ballot when they believed that a party-only option is available only for a partisan primary. 2011 Wisconsin Act 23, § 6 furthers the State's legitimate interest in avoiding voter confusion regarding the ballot.

2011 Wisconsin Act 23, § 6 also promotes a legitimate State interest in a more-informed and less-polarized voting populace. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson*, 460 U.S. at 796. Eliminating a straight-ticket option from the ballot encourages voters to pay attention to who they are voting for rather than only paying attention to the political parties listed on the ballot. Eliminating a straight-ticket option could increase the likelihood that a voter will consider the candidate and her specific views, not just the political party's platform, thereby promoting the State's interest in a more-informed electorate.

In sum, weighing the minimal burden that 2011 Wisconsin Act 23, § 6 places on the right to vote against the State's specific and legitimate interests, on balance the law creates no undue burden on the right to vote in violation of

the First and Fourteenth Amendments. Accordingly, the Court should dismiss Plaintiffs' Count 2 as to 2011 Wisconsin Act 23, § 6.

**I. Changes to when absentee ballots can be returned to a voter to correct “mistakes” create no “undue burden” on the right to vote.**

Plaintiffs have alleged that 2011 Wisconsin Act 227, § 4 “severely burdens” voting rights by “prohibit[ing] municipal clerks from returning absentee ballots to voters to correct mistakes (such as errors in marking the ballot) unless the ballots are spoiled or damaged or there was no certificate or an improperly completed certificate.” (Second Am. Compl., Dkt. 141 ¶¶ 151, 150.) This claim does not make practical sense in terms of how absentee ballots are processed, on Election Day, by local election officials. Furthermore, no Plaintiff proved he has Article III standing to challenge the law, and the Court lacks jurisdiction. Plaintiffs failed to prove their claim at trial, and the Court should enter judgment in Defendants' favor.

Plaintiffs' claim does not make sense in light of how municipal clerks process absentee ballots. The State's municipal clerk witnesses testified about how absentee ballots are handled. Clerk Hermann-Brown testified that, when an absentee ballot is returned, it is put in the appropriate district (or ward) box and sent to the polling place on Election Day. (Tr. 05-19-16, 4-P-137–38.) Clerk McHugh testified that absentee ballots are filed in a secure room until

Election Day. (Tr. 05-24-16, 7-A-115.) On Election Day, they are fed through the voting equipment. (Tr. 05-24-16, 7-A-115.)

Clerk Westerbeke testified that when an absentee ballot comes back to the municipal clerk's office with deficiencies on the certification—like a missing witness signature—the voter is contacted. (Tr. 05-24-16, 7-A-192.) In most cases this is not a problem because the ballot can be sent back to the voter in time to correct the deficiency. (Tr. 05-24-16, 7-A-192.)

Absentee ballot envelopes are not opened until Election Day, when they are then run through vote tabulating machines at the polling place in the ward where the voter resides. Since absentee ballots are not actually seen by local election officials until Election Day, it does not make sense that municipal clerks would be in a position to return a ballot to a voter to correct an “error” in how the ballot was marked. There would be no time to do so on Election Day, when municipal clerks and election inspectors are very busy administering the election.

Additionally, there is the question of what is an “error” or “mistake.” What constitutes an error under Plaintiffs’ rule? Plaintiffs’ rule would be unworkable and burdensome for local election officials. It would require an election official to determine whether every absentee ballot contains a “mistake” in voter intent, which is impractical. For example, suppose a voter marks a selection for a candidate for judge, but not for county treasurer, a



permissible and countable ballot. Is the local election official to guess as to whether omitting a vote for treasurer was intentional or a mistake? There is simply no practical way for a municipal clerk is to know if an absentee ballot contains that type of unintentional error. Asking local election officials to determine whether a particular ballot contains a “mistake” is an unworkable task, which would be piled on top of the already hectic schedule of an election.

The bottom line is that absentee ballots are not counted until Election Day when they are run through the vote-tabulating machine and end up in the ballot box. Wis. Stat. §§ 6.88(1), (3), 7.52. Returning ballots with “mistakes” would require a review of every absentee ballot when it comes in, and some rapid system of returning the ballots to the elector and obtaining a ballot, all while administering the normal Election Day process. If a ballot is rejected because of an error, that voter would have to come in to the municipal clerk’s office because there would not be time to mail the ballot, get it fixed, and then mail the ballot back. This is unworkable.

Likewise, Plaintiffs have not been able to provide evidence of the so-called “severe burden” on the right to vote created by this law, perhaps other than some miscellaneous anecdotes. It is not clear whether this is a problem or just something that Plaintiffs are hypothesizing. That said, the burden part of the analysis is hard to pin down.

The State has legitimate election administration interests in establishing when municipal clerks can contact voters regarding errors relating to absentee ballots. It is sensible to limit those contacts to errors regarding the certification of the absentee ballot envelope, which can be easily seen by the municipal clerk or the clerks' staff when the envelopes are returned and sorted by ward for later distribution on Election Day.

Given the State's legitimate interests, and weighing them against the non-existent or unproven "burdens" on the right to vote, the law regarding when municipal clerks can send back absentee ballots to voters passes constitutional muster under the *Anderson/Burdick* test.

### **III. Section 2 of the Voting Rights Act claims (Count 1)**

Whether considered individually or cumulatively, the challenged laws do not violate Section 2. The Court can reference Defendants' claim chart, Dkt. 79-1:2, to see the laws challenged under Section 2. The Court's guiding light on the Section 2 claims is the Seventh Circuit's decision in *Frank*. Under *Frank*, Plaintiffs failed at trial to prove their Section 2 claims.

#### **A. Legal standard for Section 2 claims**

Sections 2(a) and 2(b) of the Voting Rights Act are quoted above and need not be repeated. Plaintiffs' specific claims arise under Section 2(a) and are vote denial claims, as described below.

**1. This case involves vote denial claims under Section 2, not vote dilution claims.**

There are two types of claims under Section 2(a) of the Voting Rights Act: vote denial claims and vote dilution claims. Professor Daniel Tokaji has described these distinct claims:

[I]t is important to distinguish two analytically distinct types of V[oting] R[ights] A[ct] cases: those involving vote denial and those involving vote dilution. “Vote denial” refers to practices that prevent people from voting or having their votes counted. Historically, examples of practices resulting in vote denial include literacy tests, poll taxes, all-white primaries, and English-only ballots. “Vote dilution,” on the other hand, refers to practices that diminish minorities’ political influence in places where they are allowed to vote. Chief examples of vote-dilution practices include at-large elections and redistricting plans that keep minorities’ voting strength weak.

Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691–92 (Summer 2006); *see also id.* at 718; *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (distinguishing vote denial from vote dilution claims and indicating that the former “refers to practices that prevent people from having their vote counted”).

Plaintiffs’ claims in the Second Amended Complaint are properly characterized as vote denial claims because they challenge laws that go to one’s eligibility to vote, rather than a districting plan or at-large election scheme that is alleged to dilute minorities’ voting strength.

In the vote denial context, Section 2 prohibits States from imposing voting practices that cause minority voters to be disproportionately excluded

from the political process, even if the disproportionate exclusion is not motivated by a racial purpose. But the law goes no further. Section 2's plain language prohibits only voting practices "imposed" by States that "result[]" in, or cause, minority voters to have "less opportunity" to vote than non-minorities because the system is not "equally open" to them. 52 U.S.C. § 10301(a), (b). The law does not require states to maximize minority opportunities by eliminating the usual burdens of voting to overcome underlying socio-economic disparities among racial groups. Nor does it invalidate voting practices simply because they "ha[ve] a disparate effect on minorities." *Frank*, 768 F.3d at 753. Section 2 is "an equal-treatment requirement," not "an equal-outcome command." *Id.* at 754.

To prove their vote denial claims, Plaintiffs are required to establish causation. *Gonzalez 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) (citations omitted). "[A] plaintiff can prevail in a section 2 claim only if, based on the totality of the circumstances, . . . the challenged voting practice results in discrimination on account of race." *Id.* (citations omitted). "Although, proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, . . . proof 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)).

“[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 ‘results’ inquiry.” *Smith*, 109 F.3d at 595.<sup>4</sup> A Section 2 claim “based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes the disparity, will be rejected.” *Gonzalez*, 677 F.3d at 405 (citation omitted).

**2. *Frank v. Walker* established the applicable standard.<sup>5</sup>**

In *Frank v. Walker*, the Seventh Circuit held that “a Section 2 vote-denial claim consists of two elements:”

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<sup>4</sup> See also *Ortiz v. City of Phila. Office of the City Comm’rs*, 28 F.3d 306, 315 (3d Cir. 1994) (rejecting the contention that Pennsylvania’s voter-purge statute violated Section 2 simply because more minority members than whites were inactive voters); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358–59 (4th Cir. 1989) (upholding Virginia’s appointment-based school board system against a Section 2 challenge despite a statistical disparity between the percentage of blacks in the population and the percentage of blacks on the school board); *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting a Section 2 challenge to an at-large voting system based exclusively on a statistical difference between Hispanic and white voter turnout); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting a Section 2 challenge to Tennessee’s felon-disenfranchisement law that rested primarily on the statistical difference between minority and white felony-conviction rates).

<sup>5</sup> On April 12, 2016, the Seventh Circuit decided *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (“*Frank II*”). *Frank II* did not address a Section 2 claim. Instead, *Frank II* remanded the case to the district court to consider a claim that the voter photo ID law violates the Equal Protection Clause as applied to classes of voters who would be unable to obtain qualifying ID with reasonable effort. *Id.*

- First, “the challenged ‘standard, practice, or procedure’ must impose a discriminatory burden on members of a protected class, meaning that members of the protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Husted*, 768 F.3d at 553, 2014 WL 4724703, at \*24 (quoting [52 U.S.C. § 10301(a)-(b), formerly] 42 U.S.C. § 1973(a)-(b));
- Second, that burden “must in part be caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.” *Id.* (quoting *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752).

768 F.3d at 754–55 (brackets in original). The Seventh Circuit is “skeptical about the second of these steps, because it does not distinguish discrimination by the [State] from other persons’ discrimination.” *Id.* at 755.

The Seventh Circuit held that Wisconsin’s voter photo ID requirement complied with Section 2 because the law “[did] not draw any line by race” and because it “extend[ed] to every citizen an equal opportunity to get a photo ID.” *Frank*, 768 F.3d at 753. It was beside the point that “Blacks and Latinos are disproportionately likely to lack an ID,” because “[Section 2] does not condemn a voting practice just because it has a disparate impact on minorities.” *Id.* It was also beside the point that disparities in the rates at which minorities get photo IDs are ultimately “traceable to the effects of discrimination in areas such as education, employment, and housing,” because “Section 2 forbids discrimination by ‘race or color’ but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters.” *Id.*

The Seventh Circuit observed that such factors are sometimes considered in Section 2 cases that address “claims that racial gerrymandering has been employed to dilute the votes of racial or ethnic groups.” *Frank*, 768 F.3d at 752 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991)). “In *Gingles* the Justices borrowed nine factors from a Senate committee report (often called the ‘*Gingles* factors’) as the standard for applying § 2.” *Id.* The Seventh Circuit expressly rejected the *Gingles* factors as “unhelpful” to resolving Section 2 claims in “voter-qualification cases.” *Frank*, 768 F.3d at 754. This Court is bound by *Frank*. Accordingly, the Court should not consider the *Gingles* factors because they are irrelevant to resolving Plaintiffs’ Section 2 vote denial claims.

**3. Section 2 plaintiffs must establish that the challenged law results in less minority opportunity to vote as compared to an objective benchmark.**

Section 2 plaintiffs must establish that the challenged practice results in less minority opportunity to vote compared to what would result from an objective benchmark, not to what would result from a plaintiff’s preferred minority-maximizing alternative. *See Holder v. Hall*, 512 U.S. 874, 881 (1994) (opinion of Kennedy, J.). This rule follows from Section 2’s plain language: the statute prohibits practices that “deny or abridge” the right to vote. 52 U.S.C. § 10301(a). Since time, place, and manner regulations (unlike, for example, literacy tests) do not “deny” anyone the vote, challenges to such practices must

show that they “abridge” minority voting rights. The concept of “abridgement” in turn “necessarily entails a comparison” with “what the right to vote *ought to be*.” *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (“*Bossier II*”).

Since Section 2 does not require a system that maximizes minority opportunities, but only one that provides an “equal opportunity,” the benchmark for what “ought to be” cannot simply be an alternative that enhances minority voter convenience compared to the challenged practice. For example, Plaintiffs claim that Section 2 requires a 30-day in-person absentee voting period, but they offer no reason why 30 days constitutes an objective benchmark, as opposed to 5, 10, or 20 days of in-person absentee voting. (Second Am. Compl., Dkt. 141 ¶¶ 62, 89.)

Nor does Section 2 impose an “anti-retrogression” standard like Section 5 of the Voting Right Act, which compares a State’s current voting laws to the prior status quo. Section 5 proceedings “uniquely deal only and specifically with *changes* in voting procedures,” so the appropriate baseline of comparison “is the status quo that is proposed to be changed.” *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, “involve not only changes but (much more commonly) the status quo itself.” *Id.* Because “retrogression”—*i.e.*, whether a change makes minorities worse off—“is not the inquiry [under] § 2,” the fact that a state once had a particular practice in place does not make it the benchmark for a § 2 challenge. *Holder*, 512 U.S. at 884 (opinion of Kennedy,



J.). Rather, the measure of “abridgement” under Section 2 must be a nationwide, objective benchmark that the federal judiciary can rely on without comparison to the prior status quo, and without simply imposing the maximization preferences of Section 2 plaintiffs on state officials.

Since Plaintiffs do not and cannot point to any “benchmark” of voting practices that are objectively superior to the challenged laws, but instead propose alternatives that are purportedly superior only because they enhance minority participation, they have not alleged violations of Section 2.

**4. Plaintiffs’ interpretation of Section 2 would violate the Constitution.**

If Plaintiffs’ interpretation of Section 2 is accepted, the statute would exceed Congress’s power to enforce the Fifteenth Amendment. Notably, the Fifteenth Amendment prohibits only “purposeful discrimination,” and does not prohibit laws simply because they “result[] in a racially disproportionate impact.” *City of Mobile v. Bolden*, 446 U.S. 55, 63, 70 (1980) (opinion of Stewart, J.) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)); *cf. Washington v. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment). Congress has power to “enforce” that provision “by appropriate legislation,” U.S. Const. amend. XV, § 2, which allows Congress to “remedy or prevent” instances of intentional discrimination, so long as there is “a congruence and proportionality between the injury to be prevented or remedied

and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). The enforcement power does not, however, allow Congress to “alte[r] the meaning” of the Fifteenth Amendment’s protections. *Id.* at 519.

To fall within the enforcement power, Section 2 must be a “congruent and proportional” effort to prevent purposeful race discrimination. This does not mean that congressional enactments are strictly limited to banning only “purposeful discrimination.” They may bar actions with discriminatory effects, but only insofar as they are a genuine prophylactic effort to eliminate intentional discrimination. If the statute is not a congruent and proportional effort to weed out purposeful discrimination, it is not a legitimate effort to “enforce” the Constitution, but a forbidden “attempt [to enact] a substantive change in constitutional protections.” *City of Boerne*, 521 U.S. at 532. If Section 2 were not an effort to prohibit unconstitutional discrimination, it would impermissibly “chang[e]” the Fifteenth Amendment from a ban on purposeful discrimination to a ban on disparate effects. *Id.*

Properly interpreted, the Section 2 “results” test is appropriate enforcement legislation. As established above, the test prohibits only practices that depart from an objective benchmark in a manner that proximately causes minorities to have less opportunity to vote than non-minorities. If a State departs from an objective benchmark practice and adopts a practice that causes minorities to have less voting opportunity, such departure can be

banned as a prophylactic effort to prohibit intentional discrimination. Such departures from the norm are “actions . . . from which one can infer, if [they] remain unexplained, that it is more likely than not that such actions were [purposefully] discriminatory.” *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (addressing the standard for establishing intentional discrimination). By ensuring that Section 2 is “limited to those cases in which constitutional violations [are] most likely,” the Section 2 “results” test stays within the bounds of Congress’s enforcement power. *City of Boerne*, 521 U.S. at 533.

In addition to exceeding the enforcement power, interpreting Section 2 to require States to boost minority voting participation would affirmatively violate the Constitution’s equal-treatment guarantee. The U.S. Supreme Court has expressly held that abandoning “traditional districting principles” for the purpose of enhancing minority voting strength violates the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 919 (1996) (a state may not subordinate neutral principles to create a majority-minority district). Section 2 cannot require States to abandon traditional electoral practices such as, for example, Election Day and advance registration, for the purpose of maximizing minority voter participation. In short, “race” cannot be the “predominant factor” in electoral decisions. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Requiring States to adjust their race-neutral laws to enhance minority participation rates would require exactly that—the “sordid business” of “divvying us up by race” through deliberate race-based decision-making. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.). Under Plaintiffs’ interpretation of Section 2, any failure to enhance minority voting opportunity constitutes a discriminatory “result,” and Section 2’s text flatly prohibits all such “results,” regardless of how strong or compelling the State’s justification for the practice. *See Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Because Plaintiffs’ interpretation raises “serious constitutional question[s]” concerning Congress’ enforcement powers and the Equal Protection Clause, it must be rejected if it is “fairly possible” to interpret Section 2 as outlined above. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Plaintiffs’ interpretation rearranges “the usual constitutional balance of federal and state powers,” and must be rejected unless Congress’ intent to achieve this result has been made “unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). The Constitution reserves to the States the power to fix and enforce voting qualifications and procedures. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. If Section 2 authorized the federal judiciary to override state election laws as Plaintiffs claim, Congress would have said so clearly.

**B. Voter photo ID does not violate Section 2.**

In *Frank*, the Seventh Circuit concluded that the voter photo ID law does not violate Section 2. *Frank*, 768 F.3d at 755. Here, Plaintiffs have not proven that the result should be different. In fact, Plaintiffs were unable to muster the same type and quantum of racially disparate impact evidence at trial that the *Frank* Plaintiffs did, making their Section 2 case even weaker than the case presented in *Frank*. The result: the law is valid under Section 2.

Plaintiffs focused their Section 2 attack squarely on the IDPP and whether individuals in that program are mostly minorities. (*See, e.g.*, PX474, 475, 476, 477.) While it is true that minorities use the IDPP more frequently than whites, that fact does not show a Section 2 violation. All it shows is that the IDPP is working to get free IDs to those who need them.

Obviously, the IDPP involves only a tiny fraction of Wisconsin's voting population and is not representative of all who must comply with the voter photo ID law. The IDPP encompasses a very small percentage of voters seeking a free state ID card from DMV, and data regarding the IDPP do not prove how *all* minorities are impacted by the voter photo ID law. Looking to the IDPP alone is a misguided way of cherry picking evidence that does not paint a complete picture of the voter photo ID law. Disparate impact evidence pertaining to the IDPP is not enough to establish a Section 2 violation, and it

certainly is not enough to overcome *Frank*, which virtually mandates judgment for the State on the Section 2 claim.

Plaintiffs here were not able to avoid some essential findings in *Frank*. The Seventh Circuit stated that the *Frank* district judge: “found that in Milwaukee County (which the judge took as a proxy for the whole state) 97.6% of white eligible voters have a qualifying photo ID or the documents they need to get one. That figure is 95.5% for black eligible voters and 94.1% for Latino eligible voters.” *Frank*, 768 F.3d at 746. These numbers did not convince the Seventh Circuit as to the Section 2 claim.

Plaintiffs here did not even try to present evidence showing this type of analysis and racial disparity, leaving a gaping hole in their Section 2 case. While Plaintiffs offered trial evidence regarding non-possession rates of ID cards by race, they did not offer evidence comparing whether or to what extent voters of different races lack underlying documents to obtain free state ID cards. Plaintiffs did not go as far as the *Frank* Plaintiffs to show this disparity, which is key to the Section 2 analysis because it informs to what extent races are burdened differently in obtaining free state ID cards.

Dr. Mayer, for example, offered an opinion in his December 2015 report regarding non-possession rates of Wisconsin driver licenses and state ID cards, by race. He concluded that whites do not possess these IDs at a rate of 8.4%,

blacks at a rate of 9.8%, and Hispanics at a rate of 11.1%. (PX38:20 (Table 3).)

But non-possession rates of IDs are only one half of the analysis.

Dr. Mayer did *not* opine upon whether minorities, either statewide or in Milwaukee, possess birth certificates or other underlying documents necessary to obtain a free state ID card at rates that differ from whites. In *Frank*, evidence of such disparities was in the trial record, although it ultimately did not convince the Seventh Circuit. *See Frank*, 768 F.3d at 746, 755. Here, Plaintiffs failed to offer *any* evidence regarding racial disparities, either statewide or in Milwaukee, in possession rates for birth certificates and other documents necessary to obtain free state ID cards.

The evidence Plaintiffs offered at trial to address whether minorities possess documents necessary to obtain free state ID cards at rates different from whites was data showing that IDPP petitioners were largely born in states, including those in the South, where obtaining some documents appears to be more difficult. (See PX478, 479.) But this evidence analyzes *only* the IDPP petitioners when there are *millions* of eligible voters in Wisconsin. If Plaintiffs are staking their entire Section 2 claim upon a plainly non-representative sample of about 1,000 IDPP petitioners, *see, e.g.*, PX340 and PX474, the claim is indeed weak and utterly unsubstantiated. IDPP petitioners are not a valid proxy to measure the statewide impact, if any, of the voter photo ID law on

minorities. The only thing *that* evidence measures is the racial make-up of IDPP petitioners.

Plaintiffs' focus on the "Senate Factors" is, as the *Frank* court found, "unhelpful." *Frank*, 768 F.3d at 754. Plaintiffs' expert, Dr. Barry Burden, devoted a substantial number of the pages in his December 2015 report to an analysis of the Senate Factors. (PX37:9–23.) In particular, in his analysis of Senate Factor Five he delved into private discrimination by non-State actors. (PX37:11–17.) This analysis is irrelevant when "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753.

The Senate Factors are irrelevant to vote denial claims and should not be applied. The Seventh Circuit finds these factors "unhelpful" in voter-qualification cases. *Frank*, 768 F.3d at 754. Even the *Frank* district judge 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).

Even if this Court applies the Senate Factors, Plaintiffs' Section 2 claims still fail. A Section 2 claim is analyzed in light of "the totality of circumstances." 52 U.S.C. § 10301(a). Considering the totality of circumstances and every piece



of trial evidence, Plaintiffs' Section 2 claims as to the voter photo ID law (and all the challenged laws) fail under *Frank*.

Vote denial claims like those here turn on a showing of whether the challenged laws 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 under the voter photo ID law, as the Seventh Circuit held in *Frank*. *See Frank*, 768 F.3d at 755. Under Plaintiffs' interpretation of Section 2, the fact that Wisconsin minorities may have experienced effects of past discrimination, entirely unrelated to the challenged laws, means that the voter photo ID law is illegal. This theory is refuted by the Seventh Circuit in *Frank*, which found the consideration of such private-party discrimination irrelevant. *See id.* at 753.

Plaintiffs' trial evidence offers no direct cause-and-effect relationship establishing that the voter photo ID 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*, 109 F.3d at 595).

None of the evidence Plaintiffs submitted at trial can show that the voter photo ID law violates Section 2 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 trial evidence 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' Section 2 claim as to the voter photo ID law fails.

**C. The challenged absentee voting laws do not violate Section 2.**

Under Section 2, Plaintiffs challenge the one-location rule for in-person absentee voting and the available days and times for such voting. (Second Am. Compl., Dkt. 141 ¶ 180.) These challenges fail because Plaintiffs did not prove that the laws cause a prohibited discriminatory impact on minority voters. On the contrary, a pre- and post-implementation comparison showed increased minority turnout for absentee voting. Plaintiffs offered no contrary evidence.

Dr. McCarty's conclusions regarding minorities' use of absentee voting are summarized on pages 23 through 25 of his report, and that analysis was described in this brief in the section above regarding Count 2 constitutional challenges to absentee voting laws.

Dr. McCarty's conclusions show that minority voters increased their use of absentee voting from 2010 to 2014, *i.e.*, pre- and post-implementation of the challenged laws. (DX5:23–25; Tr. 05-26-16, 9-A-77.) The findings also show

(based upon the odds ratio), that black registered voters were more than twice as likely to vote absentee in 2014 than in 2010, and Hispanic registered voters were 89% more likely to vote absentee in 2014 than in 2010. (DX5:24, Table 4.) These data do not show a negative impact on minority absentee voting turnout.

Plaintiffs can point to no contrary evidence to prove their Section 2 claims. For example, they can point to no expert testimony or reports to rebut Dr. McCarty's findings regarding minorities' use of absentee voting. Likewise, Plaintiffs can point to no evidence that, without the challenged laws, minority absentee voting rates would have increased *more*. As Dr. McCarty wrote in his report, "[w]hile [the] plaintiffs' might argue that the increase would have been even larger absent the reforms, such a claim is hard to square with the historical pattern of absentee voting in Wisconsin." (DX5:24.)

Plaintiffs have not shown that Wisconsin's one-location rule for in-person absentee voting or the changes to available days and times for such voting have caused minority voters to have "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). Plaintiffs' Section 2 claim fails, and the Court should grant judgment to Defendants.

**D. The 28-day durational residency requirement does not violate Section 2.**

Plaintiffs have failed to prove that the 28-day durational residency requirement will have cause a prohibited discriminatory impact on minority voters. Their Section 2 claim fails.

A state may impose reasonable voter residence-related restrictions. *Crawford*, 553 U.S. at 189. In the Voting Rights Act Amendments of 1970, Congress permitted states to close registration 30 days before elections for president and vice-president. *Dunn*, 405 U.S. at 334 (citing 42 U.S.C. § 1973aa-1).

In *Dunn*, the Supreme Court determined that a 30-day durational residency requirement passed constitutional muster. *Dunn*, 405 U.S. at 363 (Blackmun, J., concurring). The Court later found that a 50-day period “approaches the outer constitutional limits in this area.” *Burns*, 410 U.S. at 687. But the Court still identified a 50-day durational residency requirement as reasonable and a justifiable exercise of legislative judgment. *Marston*, 410 U.S. at 680–81. Thus, this Court must start from that premise when analyzing Plaintiffs’ claims.

Plaintiffs allege that the 28-day durational residency requirement violates Section 2 of the Voting Rights Act. But they fail to recognize that the Voting Rights Act itself permits states to have an even longer 30-day

durational residency requirement in presidential elections. *See* 52 U.S.C. § 10502(d) (30-day requirement); *see also Dunn*, 405 U.S. at 334 (Voting Rights Act Amendments of 1970). And the Supreme Court has permitted non-presidential elections to exceed even the Voting Rights Act's 30-day restriction. *Burns*, 410 U.S. 686; *Marston*, 410 U.S. 679. The Court's durational residency requirement cases cut directly against Plaintiffs' Voting Rights Act claim. The claim fails in light of the facts that the Voting Rights Act itself permits a longer durational residency requirement for certain federal elections than Wisconsin's 28-day requirement, and that the Supreme Court has found no problems with even longer requirements.

**E. The challenged voter registration laws do not violate Section 2.**

**1. The elimination of corroboration does not violate Section 2.**

Plaintiffs did not prove at trial that minority voters will be disparately impacted by the elimination of corroboration because they are more likely than whites to use corroboration as an option to register to vote. In fact, the evidence submitted on this point confirmed that the available data do not allow for a direct analysis of that salient question. Plaintiffs did not prove that the elimination of corroboration makes it "needlessly hard" to register vote or results in minority voters having "less opportunity" to vote than whites. *Frank*, 768 F.3d at 753; 52 U.S.C. § 10301(b). Minority voters, like all voters, still have

robust options to prove their residency to vote using documents like a driver license, utility bill, letter from a government agency, etc. Plaintiffs' Section 2 claim as to corroboration fails.

Dr. Lichtman testified at trial and wrote in his December 2015 expert report that, based upon available GAB data, 35,332 Wisconsin voters registered using corroboration between 2006 and October 2012. (Tr. 05-24-16, 7-A-35; PX36:40.) Dr. Lichtman did not know the total number of registrants for that time period, but testified that it "wouldn't surprise" him if there were millions. (Tr. 05-24-16, 7-A-35.) Dr. Mayer also detailed in his December 2015 report that 19,464 active voters used corroboration as of October 2012. (PX38:39.) He was not aware, however, of any individual voter who was unable to register based upon the elimination of corroboration as a method of verifying residence. (Tr. 05-19-16, 4-A-47.)

Importantly, Dr. Lichtman could not say how many of the registrants who used corroboration were minorities. He stated in his report: "*Although statistics are not available by race, corroboration is most likely to benefit homeless persons and persons who recently moved and may not yet have the documentation necessary to prove residence.*" (PX36:40 (emphasis added).) Dr. Lichtman then went on to cite data regarding how homelessness is correlated with socio-economic status, which is, in turn, correlated with race. (PX36:40.) Next, he cited data showing that African Americans and Hispanics are more

likely than whites to have lived in a different house the prior year. (PX36:40–41.)

Dr. Lichtman’s attenuated, step-wise analysis regarding minorities’ use of corroboration to register are insufficient to prove Plaintiffs’ Section 2 claim. He cited no data whatsoever regarding whether or how frequently minorities used corroboration. He relied only upon unrelated data regarding homelessness, socio-economic status, and relative mobility. Plaintiffs did not prove a direct causal connection between the elimination of corroboration and minority voters having “less opportunity” to register and vote. 52 U.S.C. § 10301(b). Their Section 2 claim as to corroboration fails.

**2. The elimination of statewide special registration deputies does not violate Section 2.**

Plaintiffs failed to prove their claim that the elimination of statewide special registration deputies violates Section 2. They can point to no trial evidence showing that minority voters were more likely than whites to register to vote with the assistance of a statewide special registration deputy. That said, they can show no relevant racial disparity caused by the law. The Court should grant judgment to Defendants.

None of Plaintiffs’ expert witnesses analyzed the specific question whether minority voters are disparately burdened by the elimination of statewide special registration deputies. Dr. Lichtman analyzed only whether

the elimination of special registration deputies *at high schools* has a disparate impact on African American and Hispanic voters. (See PX36:41.) He did no analysis that pertains to the Section 2 challenge to the elimination of GAB's ability to certify *statewide* SRDs, other than a single paragraph in his report and Table 15. (PX36:40–41, Table 15.) His analysis does not carry the day, however, as he failed to show through any data that minorities have experienced disparate burdens compared to whites due to this change.

Plaintiffs can point to no trial evidence other than perhaps scattered anecdotal evidence of when minorities used statewide special registration deputies, or that statewide SRDs did most of their work in areas with predominantly minority populations. But these are only anecdotes, and no hard data was presented to quantify the impact, if any, on minority voters' ability to register to vote. All voters in Wisconsin are impacted the same by the elimination of statewide SRDs, and there remain robust options to register to vote. Minority voters do not have less opportunity to vote because there are no longer statewide SRDS. Plaintiffs have failed to prove their Section 2 claim, and the Court should enter judgment in Defendants' favor.

**3. The documentary proof of residence requirement does not violate Section 2.**

Plaintiffs' claim under Section 2 challenging the documentary proof of residence requirement fares slightly better than their claim as to the



elimination of statewide SRDs, but not much. Plaintiffs offered virtually no trial evidence to substantiate this claim, and they were unable to prove that the change in the law creates a prohibited discriminatory impact on minority voters. The Court should grant judgment to Defendants.

The entirety of Plaintiffs' experts' analysis of this claim is found in Dr. Lichtman's report. His analysis was:

Act 182 passed in 2013 makes more onerous the elimination of corroboration by expanding the universe of potential voters required to present proof of residence when voting. As explained by the Wisconsin Legislative Council, this Act "eliminates the exemption for voters who register prior to the close of registration from having to provide proof of residence. Under prior law, a voter who registered before the close of registration (third Wednesday preceding an election) generally was not required to provide proof of residence when registering to vote. Act 182 requires all voters, except a military or overseas voter, to provide such proof of residence when registering. Under the Act, the requirement to provide proof of residence no longer depends upon the date an individual registers to vote."

(PX36:41.) Dr. Lichtman's analysis does not address whether there were racially disparate impacts caused by the expansion of the documentary proof of residence requirement. Thus, he does not begin to address the Section 2 question.

Plaintiffs will probably argue that minorities are more likely to be poor, more likely to be homeless, less educated, less healthy, more likely to change residences, and more likely to be unemployed; therefore, they are less likely than whites to have one of the many documents that satisfy the documentary proof of residence requirement. (See PX36:40.) But Plaintiffs have not shown

through any data that minorities actually lack proof of residence documents at rates that exceed whites. They have not proven their claim. Accordingly, the Court should enter judgment in Defendants' favor.

**F. The election observer laws do not violate Section 2.**

Plaintiffs' Section 2 claim as to election observer positioning rules fails because they have not shown that a three-to-eight-foot rule will cause a prohibited discriminatory result that abridges minority voters' right to vote. The fact that some, limited, anecdotal examples of unruly election observers occurred years ago in Milwaukee, Racine, or other minority-heavy areas of the State does not show a Section 2 violation. Plaintiffs did not prove any recent examples—under the *current* statutory rule for positioning election observers—to demonstrate that minorities are being intimidated by election observers. The anecdotes addressed at trial are from years ago, before the current rules were in place. Really, Plaintiffs are only speculating about the current rules and have no evidence of any problem.

Wisconsin Stat. § 7.41(2) does not “impose a discriminatory burden on members of a protected class” that would violate Section 2. *Frank*, 768 F.3d at 754–55. The “three-to-eight feet” rule in Wis. Stat. § 7.41(2) is not a “qualification or prerequisite to voting” or a “standard, practice, or procedure” relating to *voting*. 52 U.S.C. § 10301(a). It is about positioning observers and what they can and cannot do based upon what local election officials require.

Wis. Stat. § 7.41. It is not a barrier to or regulation of the process of voters casting a ballot on Election Day.

Wisconsin Stat. § 7.41(2) does not “draw any line by race.” *Frank*, 768 F.3d at 753. It applies equally to voters, election officials, and election observers regardless of their races. Plaintiffs did not prove that, because local election officials possess the authority to require election observers to stand no closer than three feet from voters, the result is that “members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* at 755 (citation omitted).

Where election observers stand does not impact minorities’ “opportunity” to cast a ballot whatsoever, let alone give them “less opportunity” to vote. 52 U.S.C. § 10301(b). Even if it could be argued that Plaintiffs proved at trial that Wis. Stat. § 7.41(2) has *some* impact on minority voters in Milwaukee or other minority-heavy areas, Plaintiffs cannot overcome the Seventh Circuit’s holding that Section 2 “does not condemn a voting practice just because it has a disparate impact on minorities” *Frank*, 768 F.3d at 753. They have failed to prove their Section 2 claim as to 2013 Wisconsin Act 177.

**G. The elimination of straight-ticket voting does not violate Section 2.**

Plaintiffs offered virtually no evidence at trial to prove that minorities are more likely than whites to use a straight-ticket option, making them disparately impacted by eliminating that option. Plaintiffs offered almost no expert testimony or evidence about straight-ticket voting. They did not prove their Section 2 claim.

2011 Wisconsin Act 23, § 6 does not “draw any line by race.” *Frank*, 768 F.3d at 753. Plaintiffs did not prove that eliminating straight-ticket voting causes minority voters to have less “opportunity” than other members of the electorate to vote. *See id.* Minority voters use the same ballot as non-minority voters and have the same opportunity to elect candidates of their choice regardless of whether there is a straight-ticket option on the ballot. The lack of a straight-ticket option impacts all voters the same.

Plaintiffs did not prove that racial minorities are or were more likely to vote straight-ticket than non-minority voters. The available data do not allow for that type of analysis and, even if they did, the analysis would not show a violation because Section 2 “does not condemn a voting practice just because it has a disparate impact on minorities.” *Frank*, 768 F.3d at 753. It is not enough to show that minorities are or were more likely than non-minorities to vote a straight-ticket.

Plaintiffs did not prove that eliminating straight-ticket voting causes longer lines in places where there are high concentrations of minority voters. (See Second Am. Compl., Dkt. 141 ¶ 143.) The available data do not support that allegation, and the reasons for long lines at a polling place could be due to many factors, including: unexpectedly high voter turnout, insufficient staff at the polling place, poor bottleneck management, technical glitches with vote-tabulating machines, and numerous other logistical issues that arise during almost every election. Dr. Lichtman opined regarding the elimination of straight-ticket voting having an “adverse impact on waiting times since it makes voting lengthier for those would otherwise use this option.” (PX36:44.) He offered no further analysis on the subject and did no further research or study of whether no straight-ticket voting led to longer lines in Milwaukee. (*Id.*) He showed no causal connection between the change to the law and longer lines.

One cannot blame long lines on the fact that there is no straight-ticket option on the ballot. Plaintiffs’ Section 2 claim fails because the factual premise for it—long lines in the City of Milwaukee—is not verifiable by data and, even if it were, it would not provide a basis for a Section 2 claim because disparate impact is never enough to prove a Section 2 claim. See *Frank*, 768 F.3d at 753. The Court should grant judgment to Defendants.

#### **IV. Intentional race discrimination claims under the Fourteenth and Fifteenth Amendments (Count 5)**

##### **A. Legal standard for intentional race discrimination claims under the Fourteenth and Fifteenth Amendments**

To prevail on their Count 5 claims, Plaintiffs must prove that the Legislature intentionally discriminated on the basis of race when it enacted the challenged laws.

The Fifteenth Amendment prohibits only “purposeful discrimination,” and does not prohibit laws simply because they “result[] in a racially disproportionate impact.” *City of Mobile*, 446 U.S. at 63, 70 (opinion of Stewart, J.) (quoting *Vill. of Arlington Heights*, 429 U.S. at 265); *cf. Davis*, 426 U.S. 229 (1976) (Fourteenth Amendment). Likewise, “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Vill. of Arlington Heights*, 429 U.S. at 265; *see also Davis*, 426 U.S. at 239; *City of Mobile*, 446 U.S. at 66; *Dunnet Bay Const. Co. v. Borggren*, 799 F.3d 676, 696 (7th Cir. 2015). “[O]fficial action will not be held unconstitutional solely because it results in a racially discriminatory impact.” *Vill. of Arlington Heights*, 429 U.S. at 264–65.

To determine whether the Fourteenth Amendment’s Equal Protection Clause has been violated by official action, the Supreme Court has stated that several factors may be relevant:

- “The impact of the official action whether it ‘bears more heavily on one race than another,’” *Vill. of Arlington Heights*, 429 U.S. at 266 (quoting *Davis*, 426 U.S. at 242);
- “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267;
- “The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” *Id.*;
- “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.” *Id.*; and
- “The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 268.

**B. The challenged laws do not violate the Fourteenth or Fifteenth Amendments.**

Plaintiffs challenged several laws as motivated by a racially discriminatory purpose:

The limitation on early voting to single location per municipality, the reductions in early voting, the elimination of corroboration, the expansion of the proof-of-residence requirement, the removal of authority from GAB to appoint statewide special registration deputies, the changes to the residency requirements, the provision requiring that election observers be permitted to stand within 3-8 feet of voters, the elimination of straight-ticket voting on the official ballot, and the voter ID law.

(Second Am. Compl., Dkt. 141 ¶ 180; *id.* ¶ 204 (alleging that “[t]he provisions challenged under Section 2” are also challenged in Count 5).)

Plaintiffs failed to prove their intentional race discrimination claims at trial. Their principal evidence was the testimony and December 2015 report of Dr. Allan Lichtman.

Dr. Lichtman's December 2015 report and testimony regarding purported to apply the *Arlington Heights* factors that are outlined above. (See PX36:4-5; Tr. 05-23-16 at 228.) Application of the factors to the trial evidence, however, does not show that the Legislature intended to discriminate on the basis of race when it enacted the challenged laws.

As an initial matter, Dr. Lichtman's analysis in his report and testimony is not very helpful in analyzing the legal question. The Court was correct to observe during trial that Dr. Lichtman's work on legislative intent "doesn't sound like the realm of expert testimony to me," (Tr. 05-19-16, 4-P-221), and that, while Dr. Lichtman disclaimed that his opinions were legal conclusions, "they look an awful lot like the conclusions that I'm going to have to draw." (Tr. 05-23-16 at 232.)

Dr. Lichtman's work attempted to decide the ultimate issue for the Court, namely, whether the Legislature intended to discriminate on the basis of race. The same criticism that was leveled against Dr. Lichtman's work by a U.S. district judge in North Carolina is applicable here:

Dr. Lichtman's ultimate opinions on legislative intent, like those of Plaintiffs' other two experts on legislative intent, Drs. Steven Lawson and Morgan Kousser, constituted nothing more than his attempt to decide the ultimate issue for the court, rather than assisting the trier of fact in understanding the evidence or any fact at issue. See Fed. R. Evid. 702(a). Basically, all of these experts gathered evidence, principally from newspaper and magazine articles, that they believed fit under each *Arlington Heights* factor. Then, they opined on how the *Arlington Heights* analysis, (or their variant of it) ought to be performed, but contended they were doing so to determine intent "as historians."



The court doubts seriously that this is the proper role for expert testimony. . . .

*N.C. State Conference of the NAACP v. McCrory*, Nos. 13-CV-658, 13-CV-660, 13-CV-861, 2016 WL 1650774, at \*140–41 (M.D. N.C. Apr. 25, 2016) (footnotes omitted); *see also Lee v. Va. State Bd. of Elections*, No. 15-CV-357-HEH, 2016 WL 294181, at \*27 (E.D. Va. May 19, 2016) (declining to adopt Dr. Lichtman’s opinions on intentional race discrimination as to the Virginia voter photo ID law).

Dr. Lichtman’s opinion regarding intentional race discrimination was not credible and should not be adopted. He testified about what he believed were contemporaneous statements made by Wisconsin legislators, which allegedly showed a racially discriminatory motive. (Tr. 05-23-16 at 287–88; PX36:51–52.) These statements did not prove that motive and served only to undercut Dr. Lichtman’s credibility as a witness.

One statement was a radio interview by former-State Senator Dale Schultz played during trial. (Tr. 05-16-16, 1-A-98; *see also* PX66 (audio recording).) The interview, given in March 2014, is ambiguous as to what race-related motive the Wisconsin Legislature had, if any, when it enacted the voter photo ID law in May 2011. These were the statements of a single legislator made *years* later on a talk-radio program. Their relevance to the question presented is specious, at best.

When Dr. Lichtman was cross-examined about the so-called “contemporaneous” nature of the March 2014 Schultz interview as it related to the voter photo ID law enacted in May 2011, he confirmed that the interview was not “contemporaneous,” (Tr. 05-24-16, 7-A-89), but that he did not “think contemporaneous has to be limited to that very narrow slice of time.” (Tr. 05-24-16, 7-A-89.) Dr. Lichtman’s concept of time does not square with “contemporary statements by members of the decisionmaking body.” *Vill. of Arlington Heights*, 429 U.S. at 269.

Related to the Schultz interview was the trial testimony of Todd Allbaugh, a former staffer to Schultz. Mr. Allbaugh worked for Schultz when Schultz sponsored and voted for a voter photo ID bill that passed the Legislature in 2005, but that was later vetoed by Governor James Doyle. (Tr. 05-16-16, 1-A-78.) That bill, 2005 Assembly Bill 63, was more restrictive than Act 23 in terms of the qualifying IDs permitted. *See* 2005 Assembly Bill 63, § 12, *available at* <http://tinyurl.com/zaod6l7>; (Tr. 05-24-16, 7-A-46–47.)

Schultz also sponsored a voter photo ID bill in 2001, 2001 Assembly Bill 12. (*See* Tr. 05-24-16, 7-A-43.) That bill would have permitted only three forms of qualifying ID: a Wisconsin driver license, a Wisconsin state ID card, or a copy of the voter’s birth certificate. *See* 2001 Assembly Bill 12, § 1, *available at* <http://tinyurl.com/h5khjto>; (Tr. 05-24-16, 7-A-44.) Either former-Senator

Schultz executed a 180-degree turn by the time of the March 2014 radio interview, or his positions on voter photo ID are irreconcilable.

Mr. Allbaugh testified to hearsay statements purportedly made by State Senator Mary Lazich and former-State Senator Glenn Grothman during a closed Republican caucus that was held on an unidentified date prior to the passage of the bill that became Act 23. (Tr. 05-16-16, 1-A-81–89.) While that day “changed [his] life,” Mr. Allbaugh could not remember the date when he heard the statements. (Tr. 05-16-16, 1-A-89.)

Mr. Allbaugh offered hearsay testimony about alleged statements of Senator Lazich regarding voters in neighborhoods around Milwaukee and on college campuses, (Tr. 05-16-16, 1-A-82), and of former-Senator Grothman about his concern for winning elections. (Tr. 05-16-16, 1-A-83.)

What can the Court glean from these hearsay statements about to the collective intent of the entire Wisconsin Legislature when it enacted Act 23? Not much. These statements are either, in the case of former-Senator Grothman, unrelated to race whatsoever or, in the case of Senator Lazich, almost-certainly unrelated to race and instead related to the likely partisan voting patterns of “neighborhoods around Milwaukee.” These statements do not inform the Court’s application of *Arlington Heights* to the intentional race discrimination claims. They do more to titillate than persuade.

Dr. Lichtman also relied in his trial testimony and report upon a statement made by former-Senator Grothman that he wanted to “nip this in the bud before too many other cities get on board.” (PX22:2, 6 (transcript of March 11, 2014, Wisconsin State Senate Floor Session); *see also* PX36:59; Tr. 05-23-16 at 288.) This statement by former-Senator Grothman referred to establishing statewide uniformity for the range of times in which in-person absentee voting may take place. (*See* PX22:2 (“We are getting to the gist of the bill which is some uniformity.”); PX22:6 (“Make the time somewhat uniform. . . . And around the state, I think it is fair if, to the degree possible, people who live, say, in the Town of Forest or the Town of Wayne or some of my rural townships, that it’s about as easy for them to vote as it is in areas with big municipal staffs.”).)

Similarly, Plaintiffs point to evidence of statements made by U.S. Representative Grothman, including a recent interview on WTMJ that was played at trial on May 16, 2016. (Tr. 05-16-16, 1-A-97; PX68 (video), 69 (transcript).) The statements were not contemporaneous with the passage of the voter photo ID law, and they do not allude to race at all.

Plaintiffs will also point to former-Senator Grothman’s positions on the holidays Kwanzaa and Martin Luther King, Jr. Day as evidence of the Legislature’s alleged racially discriminatory intentions in enacting the voter photo ID law and the other challenged laws. (*See* PX75 (*The Atlantic* article);

PX78 (*Wisconsin State Journal* article).) This evidence is far afield from the question presented. These are not the only instances of Plaintiffs relying upon evidence with an attenuated relationship to the pertinent issues.

Peculiarly, Dr. Lichtman pointed to a Wisconsin FoodShare-related photo ID bill that failed to pass in 2015 as evidence of the Legislature's supposed racially discriminatory intent to pass the voter photo ID law in May 2011. (See PX36:36, 59–60; Tr. 05-23-16 at 233–35.) When cross-examined about whether he thought that a bill that failed to pass in 2015 informs the legislative intent analysis for a law enacted in 2011, Dr. Lichtman doubled down, stating: “Absolutely, for the reasons that I laid out in my direct testimony.” (Tr. 05-24-16, 7-A-35.)

Dr. Lichtman attempted to analyze whether there were any of what he called “procedural or substantive deviations” in the Legislature's enactment of the challenged laws. (PX36:48–52.) On cross-examination, he agreed that the way to summarize these factors would be “bills were introduced late, the sheer magnitude of the number of bills, and that the Republicans had unified control of state government.” (Tr. 05-24-16, 7-A-41.) None of these so-called “deviations” shows an improper racial motivation on the part of the Legislature. Dr. Lichtman agreed that the Legislature complied with all of its own procedural rules when it enacted the challenged laws. (Tr. 05-24-16,

7-A-40.) He also agreed that voter photo ID had been debated publicly in Wisconsin for over one decade when it passed in 2011. (Tr. 05-24-16, 7-A-41.)

With regard to whether the “historical background . . . reveals a series of official actions taken for invidious purposes,” *Vill. of Arlington Heights*, 429 U.S. at 267, Dr. Lichtman and Dr. Burden could point to scant evidence of the State of Wisconsin engaging in any sort of official, state-sponsored discrimination in its history. Dr. Burden testified: “I won’t be able to identify for you a law that was enacted by the Legislature and connected directly to some discriminatory or disparate outcome.” (Tr. 05-17-16 at 147–48.) When cross-examined about whether Wisconsin’s history of discrimination compares in any way to a state like Virginia, Dr. Lichtman stated that he did not analyze that question, “[b]ut certainly, you know, states in the south would have more of a longer and more virulent history of racial discrimination. No doubt about that.” (Tr. 05-24-16, 7-A-16.) Dr. Lichtman relied entirely upon Dr. Burden’s analysis of state-sponsored discrimination in forming his opinion. (Tr. 05-24-16, 7-A-16.)

Dr. Burden’s analysis of Wisconsin’s official discrimination for Senate Factors One and Three pointed to only two examples: (1) blacks obtained the right to vote in 1866, based upon a 1849 referendum vote that was ruled upon by the Wisconsin Supreme Court; and (2) the “5,000 rule” that was in place until 2006 regarding which municipalities had to register voters. (PX37:10–

11.) Contrasting Wisconsin's move to black suffrage in 1866 (based, again, upon an affirmative 1849 referendum vote) with the unfortunate racial history of Virginia, which seceded from the United States of America and allowed slavery, shows that Wisconsin is not even in the same ballpark as far as a historical background of official, state-sponsored race discrimination is concerned.

The other examples of official discrimination that Dr. Burden cited were from the Cities of Milwaukee, Beloit, and Kenosha, and Rock and Kenosha Counties, all relating to the non-provision of Spanish-language ballots and other voting materials, such as voter registration forms. (PX37:10–11.) These are not examples of actions by the State of Wisconsin. It is not alleged discrimination by the State; therefore, it is irrelevant under *Frank*. See *Frank*, 768 F.3d at 753. Plaintiffs' evidence is unconvincing.

While under *Arlington Heights* there need not be “smoking gun”-type statements made by legislators evincing racially discriminatory intent, the trial evidence here is not sufficient to establish that the Legislature intended to disparately burden minorities' voting rights when it enacted Act 23 and the other provisions challenged in Count 5. The Court should enter judgment in Defendants' favor as to all Count 5 claims.

**V. Intentional discrimination claims under the Twenty-sixth Amendment (Count 6)**

**A. Legal standard for under the Twenty-sixth Amendment**

To understand the purpose of the Twenty-sixth Amendment, the starting point is the historical context and constitutional text.

*“You’re old enough to kill, but not for votin’.”*

Barry McGuire, *Eve of Destruction*, on *Eve of Destruction* (Dunhill Records 1965). This Vietnam War protest lyric sums up the sentiment that fomented in the mid-1960s on college campuses across the Nation. That sentiment ultimately led to the ratification of the Twenty-sixth Amendment on July 1, 1971. 18-, 19-, and 20-year-old American soldiers were fighting in Southeast Asia and dying for their country, but they had no constitutional right to vote.

In extending the Voting Rights Act of 1965 in 1970, Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to age 18. Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb. “The legislative history of title III of the Voting Rights Act of 1970 and the Twenty-Sixth Amendment reveals a rare consensus of concerns and objectives among Senators and Representatives who engaged in debate.” *Jolicoeur v. Mihaly*, 488 P.2d 1, 5 (Cal. 1971). Congress stressed three consistent themes:

[F]irst, that today’s youth is better informed and more mature than any other generation in the nation’s history. Second, Congress was influenced by the fact that over half the deaths in Vietnam have been of men in the 18–20 age group. Third, and perhaps of paramount immediate importance, Congressmen uniformly expressed distress at



the alienation felt by some youths, and expressed hope that youth's idealism could be channe[l]ed within the political system.

*Id.* (footnotes omitted).

Congress' efforts in 1970 to enfranchise all 18- to 20-year-olds were not entirely successful. In a divided decision, the U.S. Supreme Court held in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power. *Id.* at 118 (Opinion of Black, J.).

Confronted with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum qualification of age 18 for all elections, and ratified it promptly. S. Rep. No. 26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 37, 92d Cong., 1st Sess. (1971); see also Cong. Research Serv., *The Constitution of the United States of America—Analysis and Interpretation* 2273 (2013), at 2273, <http://tinyurl.com/j8644ws> (last visited June 20, 2016).

The complete text of the Twenty-sixth Amendment states:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. Const. amend. XXVI.

The Twenty-sixth Amendment “simply bans age qualifications above 18.” *Gaunt*, 341 F. Supp. at 1191, *aff’d* 409 U.S. 809 (1972). The Amendment does not forbid all age-based discrimination in voting. None of the laws Plaintiffs challenge create any qualification on voting that is based upon a voter’s age—the laws do not prevent 18-, 19-, or 20-year-olds from voting because they are 18, 19, or 20. The laws treat 18-year-old voters exactly the same as 80-year-old voters. The challenged laws, therefore, do not discriminate against voters “on account of age.” U.S. Const. amend. XXVI, § 1.

In alleging that the Wisconsin Legislature acted “in part” with the intent “to suppress the vote of young voters” (Second Am. Compl., Dkt. 141 ¶ 210), Plaintiffs invoke the “motivating factor” test for intentional discrimination established in *Village of Arlington Heights*, 429 U.S. at 265–66. Yet “no court has ever applied *Arlington Heights* to a claim of intentional age discrimination in voting.” *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 365 (M.D.N.C.), *aff’d in part, rev’d in part, and remanded on other grounds sub nom. League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224 (4th Cir. 2014). “Nor has any court considered the application of the Twenty-Sixth Amendment to the regulation of voting procedure.” *Id.*

**B. The challenged laws do not violate the Twenty-sixth Amendment.**

In the Second Amended Complaint, Plaintiffs challenged the following laws under the Twenty-sixth Amendment in Count 6:

the limitation on early voting to single location per municipality, the reductions in early voting, the elimination of corroboration, the expansion of the proof-of-residence requirement, the rule permitting dorm lists to be used in connection with voter registration only if college administrators certify that the students on the list are U.S. citizens, the elimination of the requirement that special registration deputies be appointed at public high schools and, in certain circumstances, be appointed at or sent to private high schools and tribal schools, the elimination of the requirement that applications for registration by enrolled students and high school staff be accepted at high schools, the law prohibiting local governments from requiring landlords to distribute voter-registration forms to new tenants, the removal of authority from GAB to appoint statewide special registration deputies, the changes to the residency requirements, the provision requiring that election observers be permitted to stand within 3-8 feet of voters, the elimination of straight-ticket voting on the official ballot, the elimination of the option to receive absentee ballots by fax or email, and the voter ID law.

(Second Am. Compl., Dkt. 141 ¶ 210.) Plaintiffs made allegations about these laws' impact on "young voters" and "the youth vote" without defining those terms. (Dkt. 141 ¶¶ 5, 53, 56, 57, 60, 63, 65, 66, 70, 84, 87, 94, 118, 119, 141, 160, 188, 210.)

Plaintiffs failed to prove at trial that the Legislature intentionally discriminated against "young voters" when it enacted the above list of challenged laws. The Court should enter judgment as to all of these claims in Defendants' favor.

First, the laws above apply to all voters, not just so-called “young voters.” None of the laws are targeted specifically at a particular group of voters who are “eighteen years of age or older.” U.S. Const. amend. XXVI, § 1. The laws do not discriminate “on account of age.” *Id.* Voters affected by the challenged laws *must* be 18 years of age or older, as that is a requirement to be a Wisconsin qualified elector. *See* Wis. Const. art. III, § 1.

Second, it is not clear, even after trial, what Plaintiffs mean by “young voters.” The Court heard testimony at trial from undeniably young voters, some of whom are attending college, some of whom are not. But that does not help define Plaintiffs’ Count 6 claims.

This is not a mere “quibble,” as the Court phrased it in its May 12, 2016, decision. (*See* May 12, 2016, opinion and order, Dkt. 185:29 n.8.) It is a fundamental problem with Plaintiffs’ Count 6 claims—they are undefined and ambiguous, and, accordingly, difficult to pin down and respond to. It is not enough to say that the “age discrimination claims principally concern how the challenged provisions affect high school and college students,” *id.*, because some high school students are not qualified electors (*i.e.*, they are not 18 years old), and some college students are 70 years old and not “young” by anyone’s definition except perhaps those who consider themselves “young at heart.” “Young voters” is a meaningless category unless defined, and definition is important when the text of the Twenty-sixth Amendment addresses the rights

of those “eighteen years of age or older” and the right to vote being denied or abridged “on account of age.” U.S. Const. amend. XXVI, § 1.

Setting aside the fundamental problems with the allegations underlying the Count 6 claims, the claims fail. Plaintiffs have not proven that any of the laws challenged in Count 6 violate the Twenty-sixth Amendment.

With regard to the voter photo ID law, Plaintiffs are likely to focus on aspects of the law that are specific to university and college students using their institutions’ student ID cards to vote. But the fact that the Legislature created different requirements for these qualifying IDs does not show a violation of the Twenty-sixth Amendment. “Young voters” still have a myriad of qualifying ID options under Act 23 and are not limited to student IDs.

Dr. Hood noted that, of states he studied with more-stringent voter photo ID laws, Wisconsin and Georgia are the only two that authorize ID cards issued by state universities or colleges. (*See* DX1:37–38.) North Carolina, Texas, and South Carolina do not authorize the use of such cards for voting. (*Id.* at 37.) The fact that Wisconsin authorized certain student ID cards as qualifying is itself significant proof that the Legislature was *not* targeting “young voters.”

Unexpired university and college ID cards are qualifying ID if they contain the date of issuance, a signature, and an expiration date indicating that the card expires no later than two years after the date of issuance. Wis. Stat. § 5.02(6m)(f). The student must also show proof of enrollment. *See id.*

GAB has also promulgated an administrative rule, Wis. Admin. Code ch. GAB 10, that interprets Wis. Stat. § 5.02(6m)(f) to allow for the use of technical college ID cards.

Plaintiffs will argue that the Legislature targeted “young voters” because none of the university or college ID cards that existed at the time of Act 23’s enactment would have complied with Wis. Stat. § 5.02(6m)(f), thereby providing these IDs no utility as qualifying ID. Plaintiffs did not actually prove this allegation at trial with evidence about the format of any of the UW System institution or Wisconsin private college ID cards in May 2011 (when Act 23 was enacted). And institutions have since brought their student ID cards into compliance with Act 23 or issued voting-specific student ID cards. (*See* Tr. 05-18-16, 3-A-44.)

For example, Plaintiffs’ fact witness Carmen Gosey testified at that UW-Madison issued Act-23 compliant student ID cards on campus both before and on Election Day. (Tr. 05-16-16, 1-P-188–89.) She also testified that UW-Madison students are offered a compliant student ID card during freshman orientation. (Tr. 05-16-16, 1-P-18.) Plaintiff Jennifer Tasse testified that UW-Madison was issuing free Act-23 complaint student ID cards leading up to the April 2016 election, both at Union South and Gordon Commons. (Tr. 05-18-16, 3-A-49–51.) UW-Madison even extended hours at the “Wiscard” student ID office in Union South beyond normal office hours in the lead-up to

the election. (Tr. 05-18-16, 3-A-50.) At least at UW-Madison, student IDs are Act 23-compliant.

Plaintiffs also relied upon expert evidence. Dr. Mayer attempted to show that, as of November 2014, registered voters who reside in what he termed “student wards” are less likely to possess the most common forms of qualifying ID, a Wisconsin driver license or state ID card. (*See* PX38:20, Table 3.) But Dr. Mayer’s analysis of so-called “student wards” was fraught with methodological problems. As Dr. Hood pointed out, Dr. Mayer did this analysis not by identifying the registered voters who were college students, “but by locating younger registrants (18-24 years of age) in wards that are in geographic proximity to college campuses.” (DX1:44.) “Professor Mayer’s average student ward contains less than a majority of 18 to 24 year olds.” (*Id.*) “On the low end, a ward whose population comprised only 7% of 18 to 24 year olds was classified as a *student ward* simply on the basis of geographic location.” (*Id.*)

Dr. Nolan McCarty also criticized Dr. Mayer’s methods. Dr. Mayer’s analyses of “student ward” turnout and ID possession rates were plagued by measurement errors related to using a 2015 SVRS “snapshot” to measure the state of affairs years earlier. (Tr. 05-26-16, 9-63–66; DX5:18–19.) There is no certain relationship that would suggest a person’s possession of (or lack thereof) an ID at the time of the snapshot would hold true in 2010 or 2014. (Tr. 05-26-16, 9-64; DX5:18–19.)

On cross-examination, Dr. Mayer confirmed the limitations of his “student ward” analysis. The “student ward” definition did not measure voting by 18 to 24-year-olds, was based only on geography or proximity to a university, required only that ten percent of registrants in the population of the ward be age 18 to 24, and would have counted a 50-year-old in a “student ward” as a “student ward” non-voter. (Tr. 05-19-16 at 42–43.) Dr. Mayer’s analysis of “student wards” and qualifying ID possession rates does not bolster Plaintiffs’ Twenty-sixth Amendment claims as to voter photo ID.

The only other trial evidence offered by Plaintiffs is anecdotal examples of “young voters” or students who experienced issues relating to qualifying ID. For example, Andrea Kaminski of the League of Women Voters testified about her group’s observations of long lines for voting at polling sites with larger student populations after the voter photo ID law was in place. But, as the Court has recognized, this type of evidence is “anecdotal, they are stories of individual circumstances and sometimes you tally up the number of events like that for the time that your observers happen to be at the polls.” (Tr. 05-18-16, 3-A-105.)

Strung-together anecdotes are not data. The testimony of fact witnesses like Ms. Kaminski does not prove that there is a widespread problem in Wisconsin for “young voters” trying to comply with the voter photo ID requirement.



With regard to Plaintiffs' Count 6 challenges to absentee voting laws, Plaintiffs offered little evidence geared toward proving that the challenged absentee voting laws impact "young voters" any differently than any other group of voters. The times and locations of in-person absentee voting impact students and "young voters" the same as other "busy" voters. And while faxing or e-mailing absentee ballots to students temporarily abroad is a convenient option, Plaintiffs did not prove that the current lack of this option amounts to a targeting of "young voters" that would violate the Twenty-sixth Amendment.

As for other voters, in-person absentee voting would benefit *some* student voters, certainly, but that is not evidence of a Twenty-sixth Amendment violation. In-person absentee voting is a convenience option, not a right. Students are no "busier" than other voters, and the relative "busyness" of a voter is not a criteria for evaluating whether a law violates the Constitution. The alternatives for those who cannot find the time to vote in-person absentee are mail-in absentee voting and voting on Election Day.

Plaintiffs presented only anecdotal evidence of "young voters" experiencing difficulty because of the limitation placed on when absentee ballots can be faxed or e-mailed to voters. This change in the law impacts not only "young voters" or students studying abroad, but also older voters who are temporarily overseas on vacation or for work. To say that the law "targets" "young voters" is not accurate because the change applies across the board to

all temporary overseas voters who must transmit their ballots by mail or another reliable carrier while abroad. Plaintiffs did not prove at trial that the use of fax and e-mail for absentee ballots in the past was predominated by students or young voters. There is no Twenty-sixth Amendment violation when “older” voters are impacted the same as “young” voters—neither group can transmit ballots by fax or e-mail when they are only temporarily abroad.

With regard to voter registration and residency laws, Plaintiffs presented some anecdotal evidence at trial about how changes to the use of certified dorm lists, the elimination of high school SRDs, and the impact of the law effectively outlawing a Madison ordinance about landlords giving new tenants voter registration forms *could* impact “young voters.” Plaintiffs did not present evidence (other than anecdotes) to prove how often “young voters” used corroboration or statewide SRDs to register, or that “young voters” are categorically more burdened by a 28-day durational residency requirement.

The evidence Plaintiffs produced is only anecdotal, and the options for voter registration in Wisconsin remain robust, even for students and “young voters.” Voters can still complete a paper voter registration application and submit it to their municipal clerk, or even register on Election Day at the poll or during in-person absentee voting. Likewise, the options for documentary proof of residence are still, as explained above, extensive and varied. Plaintiffs have failed to prove through admissible evidence that the Legislature targeted

“young voters” when the various changes to voter registration and residency were enacted.

With regard to the remaining challenges to the three-to-eight-foot rule for election observers and the elimination of straight-ticket voting, Plaintiffs have not proven these Twenty-sixth Amendment claims, either. These laws apply equally to all voters. There is nothing unique about how a “young voter” is impacted by where election observers stand at a polling place, or whether there is a straight-ticket option on the ballot. And Plaintiffs offered absolutely no evidence that these laws targeted young voters.

In sum, Plaintiffs’ Twenty-sixth Amendment claims fail. If the Court adopts Plaintiffs’ theory of the Twenty-sixth Amendment, the result will be an expansion of the Amendment that goes beyond the constitutional text, historical context, and meaning of the law. The Court should enter judgment in Defendants’ favor as to all Count 6 claims.

## **VI. “Partisan fencing” claims under the First and Fourteenth Amendments (Count 4)**

### **A. Legal standard for “partisan fencing” claims under the First and Fourteenth Amendments**

Plaintiffs’ “partisan fencing” claims in Count 4 arise under the First Amendment and the Fourteenth Amendment’s Equal Protection Clause. (Second Am. Compl., Dkt. 141 ¶ 199.) These are the same constitutional provisions that Plaintiffs cite to challenge laws in Count 2. (Dkt. 141 ¶ 188.)

As the Court has already recognized, there is significant (perhaps complete) overlap between how the Court should analyze the Count 2 and Count 4 claims.

As the Court observed in addressing Defendants' motion to dismiss the Count 4 claims, "the Equal Protection Clause is the mechanism through which to guard against" impermissible voting restrictions, and "the level of scrutiny that the court will eventually apply to these regulations will turn on how severely they burden the right to vote. *Burdick*, 504 U.S. at 434." (Dec. 17, 2015, opinion and order, Dkt. 66:10.) It is, therefore, unclear whether or to what extent, if any, Plaintiffs' claims in Count 2 are analyzed differently than their claims in Count 4. Both sets of claims arise under the same constitutional provisions. Courts apply the *Anderson/Burdick* test to analyze these claims. *Common Cause Ind.*, 800 F.3d at 917.

In its May 12, 2016, opinion and order on summary judgment, the Court agreed with Defendants that the Count 4 claims should be analyzed essentially like the Count 2 claims. "Defendants' approach is consistent with the limited case law that exists on this issue, and it incorporates the First Amendment principles that are necessary to evaluate plaintiffs' partisan fencing claims." (May 12, 2016, opinion and order, Dkt. 185:25.) As the Court cited on page 26 of its May 12 decision, "[w]hen a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'"

*Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (quoting *Timmons*, 520 U.S. at 358).

**B. The challenged laws do not amount to “partisan fencing” in violation of the First and Fourteenth Amendments.**

In the Second Amended Complaint, Plaintiffs allege that all the challenged laws violate the First and Fourteenth Amendments because they amount to “partisan fencing.” (Second Am. Compl., Dkt. 141 ¶ 199.)

Plaintiffs failed to meet their burden to prove their Count 4 constitutional claims. As explained above, their claims in Count 2 fail. Those claims arose under the First and Fourteenth Amendments. Because the legal standards for the Count 2 “undue burden” claims are effectively the same as those for Count 4 “partisan fencing” claims, the result should be the same. The Court need not engage in further analysis of the Count 4 claims. If it feels a need to engage further to explore whether the Legislature had a partisan motive to infringe upon protected associational interests, the evidence showed that such “partisan fencing” claims are unsubstantiated.

As an initial matter, some of the Count 4 claims are hard to fathom. Plaintiffs alleged that the challenged laws were passed with the intent to “suppress the vote of Democratic voters.” (Second Am. Compl., Dkt. 141 ¶ 199.) Yet Democratic legislators voted to enact challenged laws. The following table shows the laws passed with the support of Democratic legislators.

<u>Legislative Act</u>	<u>Legislative Bill</u>	<u>Bipartisan Votes</u>
2011 Wis. Act 23	2011 Assembly Bill 7	<ul style="list-style-type: none"> <li>●Rep. Peggy Krusick (D), 7th Assembly District;</li> <li>●Rep. Anthony J. Staskunas (D), 15th Assembly District; and</li> <li>●Rep. Bob Ziegelbauer (I), 25th Assembly District</li> </ul>
2011 Wis. Act 75	2011 Senate Bill 116	<ul style="list-style-type: none"> <li>●Rep. JoCasta Zamarripa (D), 8th Assembly District;</li> <li>●Rep. Leon D. Young (D), 16th Assembly District;</li> <li>●Rep. Christine Sinicki (D), 20th Assembly District;</li> <li>●Rep. Gordon Hintz (D), 54th Assembly District;</li> <li>●Rep. Robert L. Turner (D), 61st Assembly District;</li> <li>●Rep. Cory Mason (D), 62nd Assembly District; and</li> <li>●Rep. Amy Sue Vruwink (D), 70th Assembly District</li> </ul>
2011 Wis. Act 227	2011 Senate Bill 271	<ul style="list-style-type: none"> <li>●Rep. Peggy Krusick (D), 7th Assembly District; and</li> <li>●Rep. Bob Ziegelbauer (I), 25th Assembly District</li> </ul>
2013 Wis. Act 76	2013 Senate Bill 179	<ul style="list-style-type: none"> <li>●Rep. Andy Jorgensen (D), 43rd Assembly District</li> </ul>

(DX145:E through DX145:K (excerpts from the Wisconsin Blue Book, [http://docs.legis.wisconsin.gov/misc/lrb/blue\\_book](http://docs.legis.wisconsin.gov/misc/lrb/blue_book), and the legislative journals showing votes on the various bills, from the Wisconsin Legislative Reference Bureau's website, <https://legis.wisconsin.gov/lrb/>.)

To put these legislative acts in context with the challenged laws, 2011 Wisconsin Act 23 created the voter photo ID law, limited in-person absentee voting to 12 days, eliminated the use of corroboration for registering to vote, made changes to the use of "dorm lists" for registration, created the 28-day

durational residency requirement, eliminated straight-ticket voting, and eliminated statewide special registration deputies. 2011 Wisconsin Act 75 limited when absentee ballots can be faxed or e-mailed to voters. 2011 Wisconsin Act 227 required a copy of a photo ID for absentee ballots submitted by mail and limited the circumstances in which municipal clerks can return absentee ballots to voters to correct mistakes. 2013 Wisconsin Act 76 effectively overturned a Madison ordinance that required landlords to provide voter registration forms to new tenants.

Plaintiffs' expert recognized that there was some limited bipartisan support for Act 23. Dr. Lichtman observed in his December 2015 expert report that three Democratic legislators voted for Act 23. (PX36:25.) When asked at trial whether these legislators were committing "political suicide," Dr. Lichtman testified that they were not and that "You never know why an individual might break from the rule. . . . I don't know what deals were made. I don't know what were promised to these folks. But there are exceptions to the rule." (Tr. 05-24-16, 7-A-30.) He testified that, in his experience of "watching state legislators for 50 years . . . all kinds of backroom deals are made." (Tr. 05-24-16, 7-A-30.) But he did not know if any such "deals" were made as to Act 23 or any of the other challenged laws that Democratic legislators voted to enact. (Tr. 05-24-16, 7-A-30.)

Instead of hypothesizing about “backroom deals,” Dr. McCarty evaluated whether the challenged laws actually had a disparate impact on the turnout of Democratic voters between 2010 (pre-implementation) and 2014 (post-implementation), and he concluded they did not. (DX5:19–22.) Dr. McCarty compared turnout at the municipal level for the 2010 and 2014 Wisconsin gubernatorial elections. (DX5:20.) His bottom-line conclusion was that “[g]iven that the distribution of 2014 Republican vote shares is almost identical to that of 2010 and there was no systematic drop in turnout in Democratic municipalities, it is difficult to identify any partisan advantage obtained by the changes in electoral laws that occurred between 2010 and 2014.” (DX5:22.) If “partisan fencing” was afoot, it was wildly unsuccessful.

Dr. Hood also evaluated whether the voter photo ID law would have a disparate impact on Democratic voters, and he concluded it would not. (DX1:34–36.) Specifically, Dr. Hood concluded that Plaintiffs’ experts provided no empirical support for Plaintiffs’ claim that Democratic voters are disproportionately likely not to have a qualifying ID. (DX1:34.)

Dr. Hood estimated the number of Wisconsin partisans without a qualifying ID by analyzing data from the Cooperative Congressional Election Study (CCES) to construct a hypothetical electorate of 1,000 voters, by partisan and racial groups. (DX1:34–35.) Then, he used Dr. Mayer’s estimates of non-possession rates for Wisconsin driver license and state ID cards to determine



who in those groups are likely to lack a qualifying ID. (DX1:36; *id.* n.73.) Table 15 in Dr. Hood’s report summarized his findings:

Table 15. Estimating the Number of Wisconsin Partisans without Identification

Race/Ethnicity	Non-Possession Rate <sup>73</sup>	Democrat	Republican
White	.083	27.7	32.1
Black	.098	3.2	1.3
Hispanic	.111	2.6	0.5
Total without ID		33.5	33.9

(DX1:36.) With regard to the hypothetical electorate of 1,000 voters, and based upon the CCES data, Dr. Hood concluded: “In the end, 33.9 Republicans versus 33.5 Democrats are estimated to lack identification—a virtual wash.” (*Id.*) “This exercise demonstrates that Act 23 will not necessarily lead to a partisan advantage for the Republican Party in Wisconsin.” (*Id.*)

Setting aside the factual evidence, as a legal matter, Plaintiffs’ novel theory finds no support in the decisions Plaintiffs rely upon. Plaintiffs cite *Carrington v. Rash*, 380 U.S. 89 (1965), and Justice Kennedy’s concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), but neither case involved challenges to laws like the laws here. (Second Am. Compl., Dkt. 141 ¶ 198.)

In *Carrington*, the Supreme Court considered an Equal Protection Clause challenge to a Texas constitutional provision that prohibited any armed forces member of the United States who moves to Texas during the course of his military service from voting in a Texas election as long he was a member

of the armed forces. *Carrington*, 380 U.S. at 89–90, 89 n.1. The law uniquely disenfranchised an entire class of voters based upon a group in which they were members. *See id.* “[O]nly where military personnel [were] involved [was Texas] unwilling to develop more precise tests to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote.” *Id.* at 95. Accordingly, the Court found that any “remote administrative benefit” to Texas in singling-out service members could not justify disenfranchising those voters. *Id.* at 96.

The challenged laws here are nothing like the Texas constitutional provision at issue in *Carrington*. Wisconsin’s laws governing the time and location for in-person absentee voting, for example, do not “fence out” any sector of the voting population other than those voters who do not want to show up at the designated time and place to cast their absentee ballots. Wisconsin’s challenged laws do not target or uniquely impact Democrats—they necessarily apply to *all* voters, regardless of party affiliation.<sup>6</sup>

*Vieth* is similarly irrelevant. *Vieth* involved an Equal Protection Clause challenge alleging that Pennsylvania’s congressional districts constituted an “unconstitutional political gerrymander.” *Vieth*, 541 U.S. at 271. The Supreme Court had decided in *Davis v. Bandemer*, 478 U.S. 109 (1986), that political

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<sup>6</sup> *Carrington* applied a test under that does not apply now; *Anderson/Burdick* is the analysis courts apply today. *See Common Cause Ind.*, 800 F.3d at 917.

gerrymandering claims are justiciable, but the Court could not agree upon a standard to adjudicate them. *Vieth*, 541 U.S. at 271–72. *Vieth*, therefore, involved “the questions whether [the Court’s] decision in *Bandemer* was in error, and, if not, what the standard should be.” *Id.* at 272.

Four Justices in *Vieth* held that political gerrymandering claims are not justiciable and would have overruled *Bandemer*. *Vieth*, 541 U.S. at 305–06 (Opinion of Scalia, J.). Justice Kennedy wrote that he “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 307 (Kennedy, J., concurring in the judgment). Justice Kennedy also wrote that “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.” *Id.* at 314.

Justice Kennedy’s concurring opinion in *Vieth* does not provide support for Plaintiffs’ “partisan fencing” claims. Even if Justice Kennedy’s reading of the First Amendment were controlling, Plaintiffs have not proven that the challenged laws have the “purpose and effect” of subjecting Democrat voters “to disfavored treatment by reason of their views.” *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

In conclusion, both factually and legally, Plaintiffs’ “partisan fencing” claims in Count 4 fail. The claims are legally indistinct from the First

Amendment and Fourteenth Amendment Equal Protection Clause claims in Count 2. To the extent it could be argued that there is a distinction between Count 2 and Count 4 claims, the evidence at trial failed to prove that there was partisan motivation on the part of the Legislature to harm the voting prospects of Democrats. Plaintiffs' Count 4 claims should be dismissed, and the Court should enter judgment in Defendants' favor.

## **VII. Fourteenth Amendment rational basis claims (Count 3)**

### **A. Legal standard for Fourteenth Amendment rational basis claims**

“[R]ational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). “Nor does it authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’” *Id.* (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam)).

“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Heller*, 509 U.S. at 319; *see also Beach Commc’ns*, 508 U.S. at 314–15 (“On rational-basis review, a classification in a statute . . . comes to [the Court] bearing a strong

presumption of validity . . . and those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’”) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Equal Protection Clause is not violated “there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller*, 509 U.S. at 320.

“A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.” *Heller*, 509 U.S. at 320. “[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” *Beach Commc’ns*, 508 U.S. at 315. “Thus, the absence of ‘legislative facts’ explaining the distinction ‘on the record,’ has no significance in rational-basis analysis.” *Id.* (citation and brackets omitted). “In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.*

**B. The Legislature’s decision not to include expired college or university ID cards was rational.**

The only remaining Count 3 claim is that it was irrational for the State not to include expired college and university IDs as forms of qualifying ID. (*See* May 12, 2016, opinion and order, Dkt. 185:23–24.) In its May 12, 2016,

decision, the Court noted that it had dismissed Plaintiffs' Count 3 claims relating to the 28-day durational residency requirement and straight-ticket voting. (Dkt. 185:20.) Plaintiffs dropped their Count 3 claim as to the use of technical college ID cards as a form of ID to vote. (Dkt. 185:20.) The Court concluded that the State has a rational basis to exclude out-of-state driver licenses, expired driver license receipts issued under Wis. Stat. § 343.11, and expired state ID card receipts issued under Wis. Stat. § 343.50 from the list of qualifying IDs. (Dkt. 185:20–21.)

Plaintiffs failed to prove their remaining rational basis claim at trial. No Plaintiff proved she has standing to make the claim. Likewise, Plaintiffs presented no specific evidence regarding the efficacy or rationality of using an expired college or university IDs to prove one's identity to vote. For example, they did not present a witness who possessed an expired college or university ID card and wanted to use it to prove her identity to vote.

Ms. Tasse testified about the fact that her Wiscard does not meet the requirements of a qualifying ID because “[i]t doesn't have an expiration date with two years or less on it,” and “it does not have a signature on it of the individual who is on the card.” (Tr. 05-18-16, 3-A-41.) She testified that her driver license does not expire for seven or eight years. (Tr. 05-18-16, 3-A-42.) Finally, she testified that UW-Madison issued special student ID cards that are compliant with the requirements of the voter photo ID law. (See Tr. 05-18-

16, 3-A-42–44.) Ms. Tasse’s testimony was not that she would *prefer* to use an expired Wiscard to vote. She had other forms of qualifying ID, including a driver license and passport. (Tr. 05-18-16, 3-A-46.)

Clerk Witzel-Behl, testified that UW-Madison’s student ID cards are not compliant with the voter photo ID law and that the cards expire four or five years after they were issued. (Tr. 05-18-16, 3-A-156.) But Ms. Witzel-Behl did not testify that UW students *should* be able to use their expired student ID cards to vote. Plaintiffs’ evidence did not explain whether or why expired college or university ID cards *should* have been included in the list of qualifying IDs that the Legislature enacted.

It would not have been rational for the Legislature to include expired college and university ID cards as qualifying ID. An individual with a five-year-old Wiscard is very likely no longer enrolled at UW-Madison. Ms. Tasse is a good example of this—she graduated in four years and is no longer enrolled. (Tr. 05-18-16, 3-A-18.) Thus, even if Ms. Tasse wanted to use her expired Wiscard to vote, she could not meet the requirement under Wis. Stat. § 5.02(6m)(f) that she “establish[] that . . . she is enrolled as a student at the university or college on the date that the card is presented.”

It would have been irrational for the Legislature to include expired forms of college or university ID as qualifying ID when the law also requires that a student presenting such an ID establish her current enrollment at the

institution. Wis. Stat. § 5.02(6m)(f). Accordingly, Plaintiffs' remaining Count 3 rational basis claim as to expired student ID cards fails.

### CONCLUSION

For the reasons argued above, the Court should enter judgment in Defendants' favor.

Dated this 20th day of June, 2016.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

ONE WISCONSIN INSTITUTE, INC.,  
et al.,

Plaintiffs,

Case No. 15-CV-324-JDP

vs.

Madison, Wisconsin

May 19, 2016

GERALD C. NICHOL, et al.,

12:30 p.m.

Defendants.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF FOURTH DAY OF COURT TRIAL  
AFTERNOON SESSION  
HELD BEFORE THE HONORABLE JAMES D. PETERSON

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(Called to order.)

THE COURT: All right. Shall we just pick up where we left off?

MR. CURTIS: Yes. Thank you, Your Honor.

THE COURT: Very good.

(12:30 p.m.)

ADVERSE EXAMINATION

(Continued from lunch recess.)

BY MR. CURTIS:

Q. Hi again, Ms. Schilz.

A. Hi there.

Q. When we left off to take our break we were discussing Ms. Wells and we were just about to discuss the April 1st

1 fee letter that was sent to Ms. Wells and some others.  
2 Could you put the letter up? And again this has been  
3 redacted. And could you enlarge the text as much as  
4 possible?

5 I'm not going to read the whole thing, but referring  
6 you to the second paragraph, the letter indicates that  
7 CAFU would like to assist in obtaining documents. And  
8 then it says, "Based upon our records, it appears that in  
9 order to obtain a copy of the necessary documentation the  
10 document holder requires a fee." And then it says, "DMV  
11 will pay this document fee if you will provide the  
12 information required to make this request."

13 And I just wanted to focus on that language for a  
14 second. So if I'm Ms. Wells and I open up this letter and  
15 I read it, so it says the burden is on me. I need to, if  
16 I read this right, I need to contact CAFU and provide the  
17 information needed to get whatever document is in  
18 question? Am I reading that right?

19 A. You are, yes.

20 Q. Now, what's confusing me is we, right before lunch,  
21 we were looking at Ms. Wells' CAR, C-A-R, *Case Activity*  
22 *Report*, and it looked to me like CAFU had already  
23 researched this issue, knew exactly what Ms. Wells needs,  
24 has all the contact information, knows how much it's going  
25 to cost, has contact phone numbers. Do you recall that

1 from the report?

2 A. I do, yes.

3 Q. So why is CAFU asking the customer to tell CAFU what  
4 the customer needs if CAFU already knows?

5 A. We do have information on the customer. But in this  
6 case, in order to request a document that is needed and  
7 pay the fee, the customer has to fill out the form for us  
8 to submit it, so they have to enter that information.

9 So the letter suggests that they call us and work  
10 with us to be able to complete the necessary paperwork in  
11 order to file the request for the document and enclose the  
12 fee. That's what we're asking for there.

13 Q. As the supervisor of CAFU, can you understand how  
14 someone looking at this letter might say, "If I provide  
15 the information required to make this request, I don't  
16 know what I need," you know, and just toss -- could you  
17 see how someone might read it that way?

18 A. I don't.

19 Q. Okay.

20 A. I think that we try to be as clear as possible when  
21 we're communicating with the customers. And, you know, I  
22 proofed this letter. I felt like it was a reliable piece  
23 of information and we offered for them to contact us.

24 Q. Now, I noticed in going through the CARs for the  
25 people who received these April 1st letters that in some

1 instances CAFU has actually already obtained the request  
2 document, say an application for a Missouri birth  
3 certificate, it actually has that in the file; am I  
4 correct?

5 A. That is correct.

6 Q. So why not, again given the information you have on  
7 the customer, why not just fill it out and say, "Dear  
8 Ms. Wells: Great news. We're going to pay for the  
9 certificate and here's the form and just sign it and away  
10 we go"? Why not go that extra step?

11 A. In some cases we do complete the form minus the  
12 signature. But we need to engage the customer again and  
13 that's what this letter -- it's an introduction to a fee  
14 process.

15 Q. Okay.

16 A. So it's step one. Step two might be we complete the  
17 form and return it to them for signature.

18 Q. Okay. But just to make sure I'm clear, the burden is  
19 on them to get back in touch with you --

20 A. Yes.

21 Q. -- to let them know they've -- okay. I wanted to  
22 clarify something from before lunch that I believe you  
23 said. I believe you indicated, and I'm sorry if this was  
24 from your deposition, but how many folks did you identify  
25 who might benefit from the fees; was it about 15?

1 A. 15 at that point.

2 Q. Okay. Out of everyone who's participated in the  
3 petition process so far?

4 A. Yes.

5 Q. And tell me again how that determination was made,  
6 how you made the search.

7 A. We reviewed all the CARs.

8 Q. Mm-mm.

9 A. And I should say all of the Case Activity Reports  
10 where it didn't go to issue yet: it was suspended, denied,  
11 it didn't matter the status.

12 Q. Right.

13 A. If they were issued, we didn't look at them. But we  
14 looked at all of the pending CARs. For the word *fee* -- we  
15 searched them through the word *fee* through a database and  
16 came up with a list, and then with that list went and read  
17 all the CARs to see if they belonged in this list of  
18 people that would receive a letter.

19 Q. What if the word *fee* wasn't in there, for example?  
20 What if the CAR said that Chuck Curtis is going to have to  
21 pay for a birth certificate; would that search have picked  
22 that up?

23 A. It may not have. But we have -- since that time I  
24 have asked the investigators to go back and review other  
25 CARs, keeping in mind that we have a full workload.



1 Q. Sure.

2 A. And some have come forward because of that work that  
3 we're doing for review.

4 Q. And when you say "some have come forward," some new  
5 examples --

6 A. Yes.

7 Q. -- in addition to the 15?

8 A. Yes.

9 Q. Okay. And so you're searching using new terms  
10 like -- my example was *pay* or *cost*. What if, you know,  
11 this birth certificate is going to cost money; would that  
12 have been picked up in your search before?

13 A. No. The secondary search was a manual review.

14 Q. Okay.

15 A. Each investigator went through all of their case  
16 files and looked for some.

17 Q. And you said that's ongoing now?

18 A. It is.

19 Q. Okay.

20 A. Mm-mm.

21 Q. When people have time, given their other workload?

22 A. Yes. But any that come in and are -- if we do  
23 anything to add information to a CAR, we now identify if a  
24 fee could get them a document so they don't go to suspend  
25 or deny. We initiate a letter then.

1 Q. Okay. I don't want to put that May 13th letter back  
2 on the board if it's not necessary. But in the May 13th  
3 letter that went out is there any reference to the  
4 possibility of DMV paying for documents in that  
5 notification?

6 A. The May 13th letter that went out as a cover letter  
7 with the receipt --

8 Q. Correct?

9 A. -- is that what you're referring to?

10 Q. Correct.

11 A. I don't think so, because that was a template used  
12 for all pending CARs and we didn't identify which ones had  
13 also received a fee letter. That would be a separate  
14 mailing to the customer.

15 Q. Okay. So someone like Ms. Wells has, in the course  
16 of the last month and a half or so, received a fee letter  
17 and then the May 13th letter and the slip?

18 A. And the receipt for voting.

19 Q. And the receipt?

20 A. Yes.

21 Q. Again just to confirm, no information about how the  
22 receipts can be renewed; is that correct?

23 A. It says that they can be renewed, but it doesn't tell  
24 the customer.

25 Q. Okay.

1 A. Yes.

2 Q. And as you said though, no mention of possibly  
3 picking up the expense involved; paying for the birth  
4 certificate, for example?

5 A. In the --

6 Q. In the May 13th letter.

7 A. -- receipt? No --

8 Q. Okay.

9 A. -- because not all of them -- that wouldn't fit all  
10 of them.

11 Q. Okay. I'd like to move now and briefly talk about  
12 the cancellation process. And if we could put the --

13 MR. CURTIS: Your Honor, this is going to be  
14 another facial image -- or two images, I should say.

15 THE COURT: Okay.

16 MR. CURTIS: If we could just pull that up. And,  
17 Your Honor, I have a number of examples that I was going  
18 to go through. But just to keep this moving, I guess I  
19 propose to cut them back and maybe just give the Court one  
20 or two examples and then move on.

21 THE COURT: Sure. That sounds good.

22 MR. CURTIS: Okay.

23 BY MR. CURTIS:

24 Q. This is on the subject of cancellations. Just to  
25 frame this, these two individuals were petitioners for

1 voter ID and passed away during the process. I'm going to  
2 skip talking with you about Ms. Lee and just go directly  
3 to Ms. Young.

4 MR. MURPHY: Objection. Let's get a question  
5 there. I don't mind the leading, but...

6 THE COURT: I think it's just setting the stage.  
7 Also, if you would just make a record of the exhibit that  
8 you're showing here.

9 MR. CURTIS: Oh, sure. The record that we are --  
10 the exhibit that we're showing -- actually, this is a  
11 demonstrative that is based on PX 344 which contains the  
12 actual photographic images. And then the citation to  
13 PX 342 is to one of the charts that I referred the Court  
14 to. This is what we call the *other chart* because these  
15 individuals weren't denied. And so it's the chart that's  
16 found at PX 342. And these two individuals are Voter No.  
17 23 and Voter No. 24.

18 THE COURT: Thank you.

19 MR. CURTIS: Focusing on Ms. Young, could you  
20 pull up her CAR, please? And we have redacted this, Your  
21 Honor.

22 THE COURT: We can go public again?

23 MR. CURTIS: Yeah. You can flip the switch.

24 THE COURT: Okay.

25

1 BY MR. CURTIS:

2 Q. I want to just focus, Ms. Schilz, on the bottom two  
3 entries. And maybe we could enlarge those a bit. So I  
4 see on the March 8th entry that -- first of all, can you  
5 describe, the "customer appeared on the 180 suspend report  
6 for denial," what is that?

7 A. 180 is a code that's used to identify suspend records  
8 in our system.

9 Q. And the "180" is referring to so after they're been  
10 suspended for 180 days they're eligible for denial?

11 A. I'm sorry. I misspoke. 180 is the days. It's a 180  
12 suspend report. It tracks them to the 180th day. So --  
13 but it's all the suspend codes. Sorry.

14 Q. Okay. And but after day 180, the customer may be  
15 moved from suspended to denied?

16 A. Yes.

17 Q. Okay. And I see from the rest of the March 8th entry  
18 that the investigator learned that this petitioner had  
19 died several months earlier. And the investigator says,  
20 "I am suggesting this record be denied but no letter sent  
21 to the individual as she has since passed. Could you --

22 MR. CURTIS: Your Honor, I know you don't like  
23 people just quoting from exhibits, but I'm wondering if I  
24 could just ask the witness to quote the March 15th entry  
25 for two lines.

1 BY MR. CURTIS:

2 Q. Would you mind just --

3 A. Sure. "Per the request of the Kristina Boardman, DMV  
4 Administrator, the record of Ms. Young is going to be  
5 notated as a customer initiated cancel - notation 182. I  
6 sent an email to DEU requesting the notation update."

7 Q. A couple questions. A notation 182 is what?

8 A. Customer initiated cancel.

9 Q. And DEU is what?

10 A. Driver Eligibility Unit. They place notations on  
11 records for -- well, anyone but CAFU specifically.

12 Q. Okay. Is it usual for the administrator of the DMV  
13 to be involved in kind of deciding how to classify a  
14 particular petitioner?

15 A. Maybe not usual. But when we -- as we go down this  
16 road and learn how to do this, we want to do it right.  
17 And when we come across something that's new, you know, we  
18 wanted to make sure that customer initiated cancel was  
19 established so that a customer could choose to opt out if  
20 they found their birth certificate. That was originally  
21 why it was developed as a code.

22 And frankly, I didn't know what to do with someone  
23 who had expired during our process. And so rather than do  
24 something wrong, I went to Kristina. I reported to her  
25 for a number of years, so, you know, asked her opinion.

1 Q. And just for the record, the customer initiate -- the  
2 customer initiated event was she died?

3 A. Yes --

4 Q. Okay.

5 A. -- unfortunately.

6 Q. Yeah. Do you know how long she had been in the  
7 process at the time of her death?

8 A. Well, the petition date is 7/23/15. And, you know,  
9 things can happen to pull them in and out of suspend. But  
10 it looks like she was in suspend at least 180 days, at  
11 which time it appears that she expired.

12 Q. Okay.

13 A. So I'm not sure of the total amount of time.

14 Q. Okay.

15 A. But it looks like from July 15 to 3/8/16 or 3/9/16,  
16 right?

17 Q. So ballpark, nine months, give or take?

18 A. Yeah.

19 THE COURT: Before you move on from this, it  
20 says, "I noticed Inquiry had her listed as deceased."  
21 It's capitalized, so I assume that's some group or person?

22 THE WITNESS: Inquiry is our system where it's a  
23 launch from our data system where we can inquire on a  
24 record and read anything about a driver abstract or an  
25 identity document abstract. And so when SSA, for

1 instance, reports that someone has expired, it gets placed  
2 on the record and in Inquiry we can see that.

3 THE COURT: Oh, okay. So that's --

4 THE WITNESS: It's a system thing.

5 THE COURT: -- that's relatively automated. So  
6 you get the death list from the SSA and then it  
7 automatically is then fitted into your database, so that's  
8 how that shows up?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 BY MR. CURTIS:

12 Q. Could we put up Plaintiffs' Exhibit 377? I'm going  
13 to discuss one more example, Ms. Schilz, of a customer  
14 initiated cancellation. And if you could blow that up a  
15 bit. This is the CAR for a petitioner named Mr. Hobson.  
16 And I note that -- sorry. I note, looking at March 4th --  
17 the March 4th entry -- and let's include the 4/18 as  
18 well -- do I remember correctly a 177 notation means  
19 denied?

20 A. That's correct.

21 Q. So this gentleman was denied on March 4th and that  
22 was to end -- the process was terminated. And then April  
23 18th he returned to the -- what's CSC?

24 A. Customer Service Center.

25 Q. Okay. So he returned to the CSC with his birth



1 certificate?

2 A. Yes.

3 Q. So he either found it or he went out and bought it,  
4 purchased it --

5 A. Correct.

6 Q. -- and came back? And my question is, so he received  
7 his ID?

8 A. Yes, a noncompliant ID.

9 Q. And let's just, for the Court's benefit, talk about  
10 noncompliant. That kind of threw me off. What is a  
11 noncompliant ID?

12 A. It's not a REAL ID product.

13 Q. So you're referring to the federal REAL ID?

14 A. Yes.

15 Q. Okay. So, for example, my Wisconsin driver's  
16 license, which is not a REAL ID, but is valid --

17 A. Absolutely.

18 Q. -- would be a noncompliant ID?

19 A. Yes. It's an internal DMV term.

20 Q. Okay.

21 A. It helps us differentiate between the two.

22 Q. Okay. So it's a legal --

23 A. Yep.

24 Q. -- valid ID?

25 A. It's valid.

1 Q. But it just doesn't do anything for me under the  
2 federal REAL program?

3 A. Right.

4 Q. And so then the petition was cancelled. What was  
5 there left to cancel, because the process had been  
6 terminated?

7 A. Well, I'm not sure what the system did with this  
8 record or what was advised from Jim Logan, the  
9 investigator.

10 Q. Mm-mm.

11 A. I would have to look at the case file to determine  
12 that. But it may be a term he used that said they're no  
13 longer in the petition process because they're also --  
14 denials are live records, too, in this system. So he may  
15 have asked for a customer initiated cancel so that we  
16 didn't have to continue watching this record as a live  
17 record. I suspect that's what happened. He didn't apply  
18 the code number, so I can't be sure.

19 Q. Okay. But just to clarify --

20 MR. CURTIS: And, Your Honor, I'm referring to  
21 Exhibit 457 that we discussed this morning, the latest  
22 statistical summary.

23 THE COURT: Yes.

24 BY MR. CURTIS:

25 Q. Just to confirm; because Mr. Hobson's denial was

1 cancelled, his denial is not going to be reflected in this  
2 statistic on Exhibit 457 as a denial; am I correct?

3 A. If it was handled the way I just suggested where it  
4 was moved from the denial code to a customer initiated  
5 cancel --

6 Q. Okay.

7 A. -- that would be true then.

8 Q. We received a new production of documents from DMV  
9 last Friday and I noticed it looked to me like there had  
10 been several instances of what you just described of a  
11 denial kind of migrating into a cancellation sometime  
12 between April 19th and May 13th. Do you recall instances  
13 of that?

14 A. I do not.

15 MR. CURTIS: Okay. Your Honor, rather than go  
16 through these examples, if I could just give a couple of  
17 citations.

18 THE COURT: Okay.

19 MR. CURTIS: I refer the Court, for additional  
20 examples of denials that turn into cancellations, I refer  
21 the Court to Exhibit 341, which is our denial chart.

22 THE COURT: Mm-mm.

23 MR. CURTIS: -- Voter No. 10. And then also the  
24 denial chart, Exhibit 341, Voter No. 29.

25 THE COURT: Thank you.

1 BY MR. CURTIS:

2 Q. Could we pull up the graphic of the -- I'm not sure  
3 what to describe it as. This looks a little like the  
4 pinball game I spent too much time playing in college.  
5 But putting that aside, first of all, could you identify  
6 this record, Ms. Schilz?

7 A. No.

8 Q. You can't? Okay. I'll represent that this was a  
9 document produced to us by the DMV purporting to outline  
10 the -- can you zoom up onto the top part of the chart --  
11 purporting to outline the Wisconsin ID process as amended  
12 by the Supreme Court ruling. This is not something you're  
13 familiar with?

14 A. I don't believe it was produced in my area.

15 Q. Okay. Does it, just kind of working our way down,  
16 does it seem to track the process that DMV follows?

17 MR. MURPHY: Your Honor, she just testified she's  
18 never seen this before.

19 THE COURT: That's not the only basis for its  
20 admission. Do you have a paper copy of it? It might be a  
21 little more convenient for the witness to hold it in her  
22 hand.

23 MR. CURTIS: Let's see. I have a black and white  
24 paper copy.

25 THE COURT: Well, it lacks the virtues of the

1 color. But why don't you give that to the witness just in  
2 case it's more convenient to see the thing.

3 MR. CURTIS: Sure.

4 THE COURT: What Mr. Curtis is going to ask, it's  
5 kind of detailed, but the gist of the question is, does  
6 this reflect the process flow for the petition process,  
7 which your testimony is that -- I think it establishes  
8 you're pretty well familiar with it. So this is just a  
9 diagram that purports to represent it and so we just want  
10 to know if it actually does. And if you were to tell me  
11 that it would take you an hour to figure out whether it  
12 matches or not, then we'd move on.

13 THE WITNESS: No. Can you just give me a couple  
14 of minutes?

15 THE COURT: Sure.

16 THE WITNESS: Okay. Thank you.

17 A. Yes, this appears to be an accurate account of all  
18 the possible paths a petition can take.

19 Q. Okay. So the petitioner coming into the process, and  
20 I'm not going to waste the Court's time going through each  
21 and every step, but do I gather right that we stop at the  
22 top of this chart and it traces the petitioner? And it  
23 looks like that top part all deals with interaction with  
24 this -- you call it the *CSC*, the *Customer Service Center*?

25 A. Yes.

1 Q. Now, getting down to the point where the various  
2 arrows go off in different directions, we're still at the  
3 Customer Service Center, right, we haven't come to CAFU  
4 yet?

5 A. Correct.

6 Q. Okay. And then I see that there are several  
7 alternatives. One is for, putting aside the easy cases,  
8 either easy deny or easy grant, the three alternatives at  
9 the bottom are either *Customer Born In U.S.* -- I can't  
10 quite read that. Can you blow that up a little bit? My  
11 eyes are getting a little too old. Okay. -- *government*  
12 *Issued Documentation Unavailable.* So that's one  
13 possibility.

14 And then the middle is the *Customer NOT Born In U.S.*

15 And then the -- what is the one on the right? The  
16 *Customer Name Change*, what does that involve?

17 A. It could mean that they've changed their name and  
18 like the example we talked about this morning where  
19 there's nothing that goes from the Census record to what  
20 is being presented.

21 Q. This was when you were talking about Ms. Wells?

22 A. Ms. Wells, yes.

23 Q. There's nothing that connects the 1930 record with  
24 her now?

25 A. Right.

1 Q. And can I just ask just, off the top of my head, and  
2 there was nothing in the CLEAR report that would indicate  
3 that she ever went by the name *Wells*?

4 A. I don't remember the CLEAR report for Ms. Wells. But  
5 I can tell you that oftentimes the petitioners have very  
6 little in their CLEAR report. The CLEAR report would be  
7 reported information from financial institutions,  
8 ownerships, deeds. And that isn't always the case, so she  
9 may not have had a CLEAR report.

10 Q. Because she didn't own very much?

11 A. Yeah.

12 Q. Okay.

13 A. Maybe.

14 Q. Yeah. Can we go to the -- what I'll call the  
15 *left-hand branch* of the tree, the -- yeah, if you could  
16 just blow that up. Perfect. Okay. So this is what  
17 happens when the customer -- thank you -- doesn't have the  
18 necessary documentation. Can you just briefly take us  
19 through the steps there and what happens? And, by the  
20 way, are we still at the field level? Have we reached  
21 CAFU yet?

22 A. No. At this point, once it gets to *Customer Born In*  
23 *U.S.*, document isn't available, the field station or the  
24 service center -- Customer Service Center (CSC) -- should  
25 have decided that the customer should be in the petition

1 process and that would be a viable solution for them to  
2 issue and so then they would have submitted it. So we  
3 would have probably -- we may have this. It may go to DHS  
4 and they may find a birth record with the date of birth  
5 and the name and then CAFU would never see it.

6 Q. Right.

7 A. So there's that step in between, but very often it  
8 comes to us.

9 Q. Just help with one definition.

10 A. Sure.

11 Q. At field level I've seen lots of references to the  
12 BFS of the DMV. What's the BFS of the DMV?

13 A. Bureau of Field Services.

14 Q. Okay. So they're responsible for what goes on --

15 A. In the field.

16 Q. -- at various CSCs?

17 A. They have the face-to-face with the customers, mm-mm.

18 Q. Okay. And then we mentioned DEU. Where is DEU  
19 housed?

20 A. Driver Eligibility Unit. It's housed in Hill Farms  
21 here in Madison --

22 Q. But what is --

23 A. -- and it's in the Bureau of Driver Services.

24 Q. Okay. So there's a Bureau of Field Services and a  
25 Bureau of Driver Services and they're both involved in the



1 overall ID process?

2 A. Yes. They all have a piece in it.

3 Q. Okay. Okay. Continuing down, let's see, can you  
4 blow that up maybe even a little bit more, say the top  
5 two-thirds? Great. Okay.

6 So the petitioner fills out the petition form which  
7 we looked at. That's that 3012. The petition is reviewed  
8 for legibility and so forth. Then can we scroll up?

9 Perfect. *Notification Sent To QIS*, who is QIS?

10 A. In DMV we've changed the names of units like we  
11 change our clothes. And so it used to be QIS. And I  
12 think I saw on the bottom this was dated 2014. QIS stands  
13 for *Qualification Issuance Services* --

14 Q. Okay.

15 A. -- instead of *Driver Eligibility Unit*. So at the  
16 point where it says *Notification Sent To QIS*, that's the  
17 last step that the field services do and then it comes  
18 into --

19 THE COURT: Is QIS now DEU?

20 THE WITNESS: DEU, yes. Sorry about that. So  
21 they send an email.

22 THE COURT: Another way you're trying to emulate  
23 the federal government. I get it.

24 THE WITNESS: Maybe.

25

1 BY MR. CURTIS:

2 Q. A question now about the Bureau of Field Services and  
3 the hand-off then. So by the time we get here, this is  
4 centralized, this is here in Madison, right?

5 A. Yes.

6 Q. Okay. A question about the Bureau of Field Services  
7 before we leave them. I believe -- CAFU, I believe you  
8 said CAFU conducts investigations and audits of other  
9 agencies or subunits of the DMV?

10 A. Other bureaus --

11 Q. Other bureaus.

12 A. -- field services, driver services, vehicle services,  
13 revenue accounting, yeah, any work responsible to the DMV.

14 Q. And it was CAFU that conducted two -- I don't know  
15 what you call them -- error reports for the Bureau of  
16 Field Services?

17 A. Yes. And I wouldn't consider them an investigation.

18 Q. Okay. How should we describe them?

19 A. I would say it's an audit of their work product. It  
20 was intended to improve their accuracy rate. We managed  
21 the errors that came from BFS and we did what we could to  
22 fix them, along with DEU, and be able to work with the  
23 petitioners. They would come back to us as errors.

24 And we started, you know, because we're auditors in  
25 our hearts, we started documenting when it happened and

1 what the error was. And that information was provided --  
2 its sole purpose was to provide it to the bureau director  
3 in field services and their training officer.

4 Q. Mm-mm.

5 A. So --

6 Q. Without spending too much time on it, could you  
7 describe, say, the two or three errors that you run into  
8 most often?

9 A. Probably one of the biggest ones -- and I'm not sure  
10 I want to say it's the biggest because I can't remember --  
11 but taking the record to paid status, it's a system  
12 functionality that needs to be done in order for the  
13 error -- or the record notation to show up on the other  
14 side. So we take them to a status where the record is  
15 visible to everybody in the DMV and then it sits like that  
16 until we can figure out what we're going to do with the  
17 record.

18 Not scanning in everything that is needed, we have a  
19 scanning system where they digitize whatever is brought in  
20 to them. And in the very beginning that was a challenge  
21 because the field service people are experts in document,  
22 you know, authentication for everything else that we do.  
23 And in this project or this ID petition process they  
24 aren't the ones that decide whether it issues. Their job  
25 is solely to collect whatever is brought in. If there's

1 something written on a gum wrapper, scan it and put it in  
2 the system so that CAFU folks can look at it. And so that  
3 was a transition that was challenging for them.

4 Q. And so what would happen then if, say, the BFS failed  
5 to do a scan and then the document comes to CAFU; how does  
6 that get fixed? Does the customer have to go back in  
7 then?

8 A. Not always. Sometimes that did happen,  
9 unfortunately, thus the reason we were auditing on a  
10 regular basis.

11 Q. Mm-mm.

12 A. But sometimes what was scanned in we could make sense  
13 of. Sometimes we would talk to the agent that worked with  
14 the customer and find out things that they were told  
15 during the transaction. So not always did they have to  
16 come back in.

17 Q. Am I correct that CAFU has done two reports thus far  
18 on BFS error rate?

19 A. We have done them every six months since probably the  
20 beginning of '15.

21 Q. Okay.

22 A. So I think that would be two.

23 Q. Okay. That's what we have, we have two.

24 A. Yeah.

25 Q. Could we put up the error report?

1 THE COURT: Before we leave that, do you want to  
2 move the admission of 472?

3 MR. CURTIS: I move the admission.

4 THE COURT: Any objection?

5 MR. MURPHY: No, no objection.

6 THE COURT: That's admitted.

7 MR. CURTIS: Okay. And, Your Honor, this is  
8 Plaintiffs' Exhibit 321 which I believe is already in  
9 evidence, but I may be wrong.

10 BY MR. CURTIS:

11 Q. Could you identify this document, Ms. Schilz?

12 A. Yes. It's an error report.

13 Q. Okay. And this covers the period of August 2015  
14 through the end of January of this year?

15 A. No. This data is from 3/22/15 to 8/1/15.

16 MR. CURTIS: Oh, we need the other one. We have  
17 two. Sorry. Yeah, that's it. Yeah, 8/13. Yeah, that's  
18 the one. Sorry, Your Honor.

19 THE COURT: Okay. So now we've got PX 337. Is  
20 this one in?

21 MR. MURPHY: I believe it is. But no objection,  
22 at any rate.

23 THE COURT: Okay. It's admitted, perhaps twice.  
24 Dr. Mayer will be --

25

1 BY MR. CURTIS:

2 Q. Ms. Schilz, now did I get this right that this report  
3 covers the period August 2015 through January of this  
4 year?

5 A. That's correct.

6 Q. Okay. Could you turn to page 3 and blow up the one  
7 paragraph, *Conclusion*? I see that -- and these are the  
8 conclusions that your unit drew?

9 A. The auditor drew.

10 Q. Okay. The auditor drew. A city auditor concluded  
11 that the errors at this point, early 2016, "negatively  
12 impact the petition process and may affect a resident's  
13 ability to vote." I see then in the next line, "The  
14 accuracy rate is not improving greatly over time." Was  
15 that the finding?

16 A. That is true.

17 Q. So over a period of about a total of 12 months CAFU  
18 was finding an error rate in the range of 26 to  
19 27 percent?

20 A. That's true.

21 Q. Okay. Does that strike you as unusually high?

22 A. Honestly, I would say for a new process, no. We're  
23 challenged by the fact that this is not a daily task for  
24 us in the field and so they often don't get very good at  
25 it. And we developed a checklist -- you know, all the

1 things that an educator would do, a checklist -- follow  
2 this, do that. And it's made it a little easier, but it's  
3 not an easy process. It's so different from what we do.

4 THE COURT: And I'll read the report itself. But  
5 are they errors of varying magnitude and impact? In other  
6 words, some errors are ones that might prevent the  
7 customer from getting an ID and maybe some are just a pain  
8 in the seat they have to correct later; is that what  
9 you're getting at?

10 THE WITNESS: Yes. I would say most of them are  
11 the *pain in the seat*, you know --

12 THE COURT: Okay.

13 THE WITNESS: -- and would delay maybe one to  
14 five days and we've got them corrected. But there's still  
15 errors and they cost different areas of our business time.  
16 And, you know, we want to do it right the first time, you  
17 know.

18 THE COURT: Sure.

19 BY MR. CURTIS:

20 Q. Could we go back to the chart, the flow chart? Okay.  
21 And then again zeroing in on the lower left-hand part, and  
22 even more if we could just pick up with -- yeah, the  
23 *Notification Sent To* what is now -- it's BEU, right?

24 A. DEU --

25 Q. Correct.

1 A. -- Driver Eligibility.

2 Q. Sorry. My apologize. DEU sends a query to DHS for  
3 birth data and then, if not confirmed, that then goes to  
4 CAFU?

5 A. Yes --

6 Q. Okay.

7 A. -- as a no match.

8 Q. How often do CAFU and DHS kind of go back and forth  
9 trying to match names?

10 A. Often.

11 Q. So it's not unusual to see a process -- when the  
12 Court looks at some of these CARs the Court may notice DEU  
13 communicating with DHS, no match, goes back. And then  
14 CAFU tries, okay, Curtis, not -- let's try two S's, and  
15 then you have to go through the whole thing again, right?

16 A. Right.

17 Q. And so then it goes to CAFU, to DHS, but it gets  
18 channelled through DEU, right?

19 A. Yes.

20 Q. So every time there's kind of a match it's going  
21 CAFU, DEU -- I'm getting pretty good -- DHS and then DHS,  
22 DEU, CAFU, kind of back and forth?

23 A. Yes. And if there's a match at DHS, it goes to DEU  
24 and it goes out for issuance, we would not see it. We  
25 only see the no matches.



1 Q. Okay. But there are times when you see quite a few  
2 back and forth --

3 A. Yes.

4 Q. -- trying various matches?

5 A. Yes.

6 Q. And do each of those involve a little bit more delay?

7 A. Well, it depends on what state where DHS is looking  
8 for. Some states turn it around in a day and some are  
9 much longer.

10 Q. Okay. So let's say this --

11 THE COURT: I know this is outside your  
12 territory, but DHS, I have two visions. One I have people  
13 with file folders and green eye shades digging through the  
14 files and then maybe writing letters to people in another  
15 state doing the same thing. The other vision I have is  
16 that somebody is on a computer terminal and it's all  
17 digitized. You just log into the Alabama database and  
18 look it up there. Which story is more accurate?

19 THE WITNESS: I think both are accurate. But I  
20 think it leans more towards the digitized process. I can  
21 speak to DHS in terms of what they use as a tool. It's  
22 called *EVVE*. I don't know what it stands for. It's  
23 E-V-V-E. And they use that to ping the other states to  
24 see if they can find a record. Not all the states are up  
25 on *EVVE*, so then there is some of this paper copy digging

1 through and finding those vital records.

2 THE COURT: Okay. Thank you.

3 THE WITNESS: Mm-mm.

4 BY MR. CURTIS:

5 Q. So this really depends upon the out-of-state record  
6 holder in terms of how easy or difficult it can be?

7 A. Yes. The Wisconsin records, if they were born in  
8 Wisconsin, those turn around very quickly of course  
9 because that's their turf, you know.

10 Q. Sure. Let's say, despite best efforts, we haven't  
11 been able to get a match, so I'm in CAFU now. And, you  
12 know, so is it at this point that I'm told to go look for  
13 my Bible, my hospital records, things like that, my first  
14 grade report card?

15 A. It could have been before that.

16 Q. Okay.

17 A. And the way we're able to send additional information  
18 back through the loop to DHS is because we're talking to  
19 the customers. Some of it is the investigator adding an S  
20 to Curtis so that there are two S's and trying that just  
21 as a simple way of eliminating it. But it also means that  
22 we're talking to the customers usually and they're  
23 offering new information based on the questions that we  
24 ask. And sometimes it takes some long dialogue to get  
25 them thinking differently.

1 I can't remember the record, but there was one  
2 customer who said they were born in a certain city in a  
3 certain county in Louisiana. And when the investigator  
4 pulled it up on a map, that county and that city were  
5 in -- not in Louisiana, it was in Mississippi. So we ran  
6 it through and it matched. So sometimes the customer may  
7 remember things that may not be as accurate as is helpful  
8 for us to keep going.

9 Q. Sure. The Court asked about dealing with some  
10 out-of-state jurisdictions. In fact OOS is an acronym  
11 that you use, isn't it?

12 A. *Out of state*, yes.

13 Q. Yeah. So there are references throughout the CARs to  
14 OOS's. Let's talk about a few of those. The Court  
15 referred to there's the spectrum between *modern and*  
16 *digitized* versus the *green eye shades* and *file folders*.  
17 Where does South Carolina fit in there?

18 A. Well, South Carolina has privatized their vital  
19 records and so there's another barrier between DHS and  
20 records -- vital records that reside in South Carolina.

21 Q. Do you recall, in your -- in my deposition of you you  
22 indicated on page 21 that, "It's nearly impossible to get  
23 anything out of South Carolina at this point"?

24 A. That's accurate.

25 Q. So if I was born in South Carolina and I live in

1 Madison now and I want to vote, what do I do if I can't  
2 get at that South Carolina birth information?

3 A. Secondary documentation maybe. We're looking at  
4 working through the privatized system to send fees and fee  
5 letters and forms to see if what they're telling us is  
6 working works for this process. So we haven't given up.  
7 It's just at the point that I was deposed we had no luck.

8 Q. And is that still the case, you're still working on  
9 it?

10 A. We're still working at it, yep.

11 Q. Sure.

12 A. We have to play by their rules though.

13 Q. Is South Carolina one of the jurisdictions that, say,  
14 if I want to buy my birth certificate, is it one of those  
15 jurisdictions that requires a photo ID in order to get the  
16 certificate?

17 A. It is, mm-mm.

18 Q. So I noticed, for example, that some people who  
19 received those April 1st, 2016 offer-to-pay letters, some  
20 of them involved South Carolina birth certificates?

21 A. Mm-mm.

22 Q. How are they ever going to be able to get, even if  
23 DMV is willing to pay, how are they ever going to be able  
24 to get the birth certificates without a photo ID?

25 A. Well, now with the receipt, we'll be able to submit

1 that as their photo ID.

2 Q. For as long as the receipt is valid?

3 A. Yep.

4 Q. Okay. So what do I do when I want to vote next year?

5 A. Stay tuned. We'll just do what we're told, you know.

6 Sorry. We're just facilitating whatever we're told to do.

7 Q. Yeah. No, no. Sure, sure. Are there other states  
8 or jurisdictions that also require a photo ID in order to  
9 be able to get the birth document?

10 A. I think there are, yes.

11 Q. You can't name them off the top of your head?

12 A. Well, there are vital records and then there are  
13 nonvital records. And so the State of Illinois, Cook  
14 County specifically, requires that for some of their  
15 records, a photo ID.

16 Q. Okay.

17 A. So others I can't seem to recall, but I'm sure that  
18 there are rules in other areas, mm-mm.

19 THE COURT: Could you clarify that distinction  
20 for me? You said some states would require it for vital  
21 records. But for nonvital records, what's the difference?

22 THE WITNESS: We would consider a nonvital record  
23 a hospital birth record that isn't a certified birth  
24 record that's been submitted to a state or a county  
25 office. It may be the birth record document that shows

1 the baby's feet.

2 THE COURT: Yeah, the souvenir you get from the  
3 hospital, which is the one that gets filed with the  
4 county?

5 THE WITNESS: Right. And then no other document  
6 is available and so, you know, we would consider that a  
7 birth record.

8 THE COURT: Okay. So you would consider it. But  
9 just in the parlance of operating in the world of vital  
10 records storage or retrieval, the vital records are the  
11 official birth documents; nonvital documents are things  
12 that might be proof of the birth, but not necessarily the  
13 official one?

14 THE WITNESS: Yes.

15 THE COURT: Am I getting that distinction right?

16 THE WITNESS: You are. Also, proof of them being  
17 somewhere they say they are, like an early school record,  
18 would also be a nonvital record.

19 THE COURT: Okay. Good.

20 BY MR. CURTIS:

21 Q. You mentioned Cook County and I was going to get to  
22 that next. What is it like trying to obtain vital record  
23 information out of Cook County?

24 A. You know, we request it and we don't always receive  
25 return phone calls. It's challenging.

1 Q. Have some of your investigators been put on hold for  
2 indefinite periods of time?

3 A. Yes.

4 Q. Or a hold for indefinite periods of time and then  
5 they're just disconnected?

6 A. Yes.

7 Q. So it's difficult for the people you supervise to try  
8 to deal with Cook County vital records?

9 A. Well, I would say we discuss taking different  
10 approaches. Maybe with that record we could get to it  
11 another way. I try not to let them wallow in their  
12 discouragement too long. They are investigators, after  
13 all. They can figure out a different way, and they do.  
14 They're very creative.

15 Q. So you do a workaround?

16 A. We try to.

17 Q. Okay.

18 A. Yep.

19 Q. So Cook County vital records keeps hanging up on me;  
20 how do I work around?

21 A. Sometimes we call and we get somebody and we get  
22 success. So we can't give up, you know. Somebody just  
23 may have had a bad day or wasn't doing their job very  
24 well. So you can't just assume that's always going to  
25 happen.

1 Q. Okay.

2 THE COURT: All right. So that suggests you just  
3 keep trying. But are there other alternatives you can get  
4 to get --

5 THE WITNESS: Sure. We weekly have a staff  
6 meeting where all of the investigators bring the cases  
7 that they're working on. And there's a collaborative  
8 effort that happens there where one may not have had any  
9 luck and another might have said, "Well, I got this phone  
10 number from this person named Alice, try her." And sure  
11 enough it might work.

12 So there are other ways to get at maybe Cook County.  
13 But there are other things that we could do like looking  
14 for an early school record or we kind of run through the  
15 questions: did you say this to them, did you ask the  
16 customer this. You know, it's just a working process.

17 THE COURT: And I gather there's -- and you're  
18 being nice and I understand why you wouldn't want to just  
19 necessarily trash a unit of government in another state.  
20 So they have some customer service issues. Is there some  
21 more systematic or fundamental problem with the way Cook  
22 County has a history of keeping its vital records?

23 THE WITNESS: You know, I wouldn't say that. I  
24 think it's more their communication.

25 THE COURT: Okay.



1 BY MR. CURTIS:

2 Q. What about Mississippi, is Mississippi a difficult  
3 jurisdiction to deal with?

4 A. Yes.

5 Q. Why is it difficult? How is it difficult?

6 A. You know, and again I don't know what the protocols  
7 are for each state in their vital records area so I can't  
8 speak to that, but I can say that some are better at it  
9 than others. Some have a longer history of files that are  
10 accessible and others do not. You know, it just depends  
11 on how it's reported to them, I imagine, and how well  
12 they've kept the records. We don't have a lot of success  
13 with Mississippi.

14 Q. You don't have a lot of success?

15 A. Mm-mm.

16 Q. Are you aware, Ms. Schilz, that a large proportion of  
17 African Americans who live in Wisconsin come from  
18 Mississippi?

19 A. I do not know that.

20 Q. Okay. What about Puerto Rico, is that another  
21 difficult jurisdiction?

22 A. We've had a few that have been difficult there,  
23 mm-mm, that come to mind.

24 Q. What comes to mind?

25 A. Well, I know it's difficult to get birth certificates

1 for some people when we request them. Puerto Rico had a  
2 fraud event where, and this is what they've told us and it  
3 was reported to all of the national DMVs, that in 2010 the  
4 fraud event was so severe that they, in 2010, produced new  
5 birth certificates for folks. And, you know, if they  
6 could find the person, they submitted a new birth  
7 certificate and sent it to them.

8 So we had notification in the DMV outside of the  
9 petition process several years ago that this document was  
10 counterfeit and this one wasn't. So this was our new  
11 model to use and so that's come into this process. When  
12 it's a Puerto Rican birth certificate, it's a  
13 consideration that we make.

14 Q. You're aware that there are a number of citizens who  
15 were born in Puerto Rico who live in Wisconsin now?

16 A. I'm only aware of the petitions that I've had in  
17 front of me. I don't know the segment of our population,  
18 who's a certain ethnicity.

19 Q. We found one such person living here in Wisconsin and  
20 I was born a long time ago, so presumably my birth  
21 certificate in Puerto Rico was cancelled or nulled or  
22 whatever and I never received one. What do I do? What do  
23 you do for someone like me who doesn't have an official  
24 birth certificate from Puerto Rico?

25 A. It would be the same process: we would contact Puerto

1 Rico through DHS and we would see if we could match the  
2 birth record and sometimes we do. And if we couldn't, we  
3 would work it like any other case that we have.

4 Q. And that would involve the alternative documentation?

5 A. Yes.

6 Q. Okay. Let me turn to that. And the alternative  
7 documentation, we don't have to look at the list again,  
8 but the Bible, the school records, and so forth?

9 A. Yeah.

10 Q. Now, under the new emergency regulation that just  
11 went into effect, I just want to understand this, is DMV  
12 going to pay for all necessary documentation? I mean,  
13 will it, if I need school records from my school in  
14 Beloit, will DMV take care of that?

15 A. That's my understanding.

16 Q. Okay. Will you, and I'm referring to CAFU or DMV,  
17 will you do all the work necessary to find those? I mean,  
18 in other words, say if you come back and they say, sorry,  
19 no match. Can I say, I'll tell you what, I went to  
20 elementary school in Beloit, Wisconsin to Merrill School,  
21 here's the hospital I was born in and I was baptized in  
22 this church, good luck, and will you guys just go and take  
23 care of that for me?

24 A. We do that today, yeah.

25 Q. Now, that's new, isn't it?

1 A. Looking for a birth record like that, a secondary?

2 Q. In terms of secondary, because in looking at the  
3 various CARs, I've seen a lot of references to CAFU  
4 telling people, why don't you, you know, check with your  
5 relative or call the school or asking the customer to make  
6 some of the calls and the contacts?

7 A. I think there has been some of that. But I think  
8 we've also made those calls for them and had success in  
9 that. And that could be a school or, you know, a  
10 county -- we've made those calls -- a church. And if we  
11 can get them to fax us the record without the customer  
12 being involved filling out a form and applying a fee,  
13 we've done that.

14 Q. Now, a number of jurisdictions do require the  
15 customer --

16 A. Yes, to be involved in it.

17 Q. -- to participate?

18 A. Mm-mm.

19 Q. Okay. So that would be -- that will be additional  
20 work both for CAFU and the customer?

21 A. Yes.

22 Q. Okay. But you're saying, as you sit here today, that  
23 moving forward customers are not going to have to do any  
24 of this leg work anymore?

25 A. Well, I think the customer needs to participate and I

1 think the emergency rule defines that. You know, we need  
2 to talk to the customer and we need to ask them what they  
3 know, otherwise we would never have success. You know, we  
4 need to tell them to talk to their family and see what the  
5 family can provide.

6 So I would say we're going to continue down that path  
7 as best we can. I would say to date CAFU does most of  
8 that work for them and we'll continue to do whatever we  
9 can. But we do need the customer to participate and that  
10 isn't always the case.

11 Q. Mm-mm.

12 A. I know the emergency rule requires the customer to  
13 provide a valid address throughout this process -- that's  
14 been an issue -- and to continue to give us any additional  
15 information they find. So that will help us, mm-mm.

16 Q. And my recollection is you testified this morning  
17 that DMV picking up the tab for this, it even includes  
18 things like notarizing affidavits?

19 A. I'm not sure if we've discussed that yet. I don't  
20 think we've been there yet.

21 Q. Okay.

22 A. Okay.

23 Q. Could you bring up the exhibit on Mr. Randle's CLEAR?  
24 I don't think we need to spend too much time on this, but  
25 we've had some question --

1 THE COURT: I don't know if this is a redacted  
2 one or a public one.

3 MR. CURTIS: This is -- we're only showing the  
4 first and the last pages which have no confidential  
5 information.

6 THE COURT: Okay.

7 BY MR. CURTIS:

8 Q. And I just wanted to note, so this is -- am I correct  
9 that these are some of the subjects that if they're  
10 applicable to a certain person will get picked up in the  
11 CLEAR report?

12 A. Yes.

13 Q. Okay.

14 THE COURT: And could you make a record of what  
15 exhibit we're looking at?

16 MR. CURTIS: Yes. 367, Your Honor.

17 THE COURT: Okay. Good. And -- good. Thank  
18 you. And again, is that kind of an omnibus -- is it just  
19 Mr. Randle here in 367 or is it --

20 MR. CURTIS: Mr. Randle was just -- let me just  
21 double-check that. It's the whole thing, yeah.

22 THE COURT: So 367 and particularly the portion  
23 related to Mr. Randle?

24 MR. CURTIS: Right, right. So 367, Your Honor,  
25 is pretty much the entire IDPP file for that one

1 individual.

2 THE COURT: Okay. Good. And is there objection  
3 to 367?

4 MR. MURPHY: Not on admission. It's a big file.  
5 It includes a lot of emails. Some of the content of the  
6 email would be hearsay, not admissible for the truth, but  
7 I don't mind it coming in. But I want to make that note  
8 that there's hearsay in some of the emails.

9 THE COURT: All right. You can raise that issue  
10 as it comes up, but 367 will be admitted subject to  
11 whatever hearsay objections you end up raising. If you  
12 raise those, we'll rule on those as they come up. Okay.  
13 Go ahead.

14 BY MR. CURTIS:

15 Q. Okay. How much does the State of Wisconsin spend on  
16 a report like this for an ID petitioner?

17 A. Our subscription to CLEAR costs I think \$135 a month  
18 and we use it for many other things.

19 Q. Okay.

20 A. So per report I don't think it would have a cost to  
21 that.

22 Q. Okay. Okay. And --

23 THE COURT: Is there an additional charge for the  
24 report though?

25 THE WITNESS: No. It's unlimited. Well, it's

1 not unlimited. We have a cap and we never exceed it.

2 THE COURT: Got it. Thank you.

3 BY MR. CURTIS:

4 Q. And just to clarify, how many petitioners will CAFU  
5 run a CLEAR report on; is it everyone or a subset?

6 A. It's not everyone; it is a subset. And it's only  
7 when we're trying to find relational information. It's  
8 those cases where spellings on names may be wrong or they  
9 don't match; we're not sure if they're wrong, but they  
10 don't match; multiple date of births have been submitted  
11 and we're trying to figure out if the CLEAR report will  
12 give us one that matches with that and some history and  
13 where they've lived and for how long.

14 Q. Okay.

15 A. But not for everyone.

16 Q. Okay. Could we go back to the graphic of the  
17 process? And I'd like to go down the right-hand side now  
18 of the tree. You were just mentioning customer name  
19 change and I wanted to focus on that.

20 I guess here's my first question: I'm looking at the  
21 box over on the right-hand side there that says *If No*  
22 *Match Customer Will Be Referred To SSA To Get SSA Records*  
23 *Updated Needs To*. Can you talk a bit about how the birth  
24 records relate to social security records and the  
25 requirement that -- do I understand correctly that CAFU



1 requires there to be a match; am I right?

2 A. That's correct.

3 Q. And specifically -- so CAFU requires that my name on  
4 my birth certificate match my name in my social security  
5 file?

6 A. CAFU doesn't require that. DMV requires that if an  
7 SSM is presented, it has to match the name the customer  
8 gave us. And when it doesn't, then we have an issue. It  
9 has nothing to do with the birth record.

10 Q. Okay. But I've seen, for example with Mr. Randle --

11 A. Yep.

12 Q. -- for example, I've seen references to the  
13 suggestion that he might need to go to Social Security --

14 A. Yep.

15 Q. -- and change his name in the social security record?

16 A. Well, he has a birth record. He provided us a birth  
17 record. He chooses not to go by the name on his birth  
18 record.

19 Q. But that's because he -- I mean, he hasn't for the  
20 last 74 years.

21 A. That could be. But based on the process, we have an  
22 SSA document. We send everyone that provides an SSN to us  
23 through a system called *SSOLV*. It goes to SSA and says,  
24 yes, that SSN belongs to this person and this is how their  
25 name is spelled. That's how he presented to SSN -- or

1 SSA. And so then now in the petition process he's  
2 offering a different spelling of both his first and his  
3 last name and that's maybe not the same person, you know.  
4 We want to make sure it's the same person.

5 Q. Because the thinking is there might be two Johnny  
6 Randle's, age 74, from Tchula, Mississippi?

7 A. Or the thinking maybe that we don't want to allow  
8 somebody -- encourage somebody to create a new identity.

9 Q. I'm sorry. Could you say --

10 A. We don't want to allow someone to create another  
11 identity, so we want to make sure that we have the right  
12 person. That's the whole idea of what we do.

13 Q. Let me ask you -- let's put Mr. Randle aside and come  
14 back to my hypothetical.

15 A. Right.

16 Q. I've given you my birth certificate, my date -- I  
17 mean, date of birth, citizenship, all of that. But for  
18 whatever reason my social security name, say, is my middle  
19 name and my last name, okay? Same number, same social  
20 security number. Are you saying that in that instance I  
21 have to deal with Social Security to get that fixed?

22 A. In theory, yes, because if my name is Susan Schilz on  
23 my SSA account and now I'm coming to the DMV and I want to  
24 be Sally Miller or Suzanne Schulz with a U -- as in the  
25 case of maybe Mr. Randle, just slightly varied -- we're

1 going to create a government document as *Suzanne Schulz*  
2 and we have another government document SSA over here  
3 saying *Susan Schilz*. So how are we -- why would we do  
4 that?

5 Q. I guess my question is, why is it DMV's business what  
6 the social security records may or may not look like? I  
7 just want to vote.

8 A. It's what we do. We match that to the SSA. It's one  
9 of our indicators, especially when there's no birth record  
10 to prove who they are. I mean, that's our starting point.

11 Q. But my sense, from going through many many CARs, is  
12 that there have been instances, even with the birth  
13 record, where if there's a discrepancy with what's in the  
14 SSA, that's going to have to get fixed before I can get my  
15 free ID.

16 A. That's been our practice, yes.

17 Q. Now, is that written in a regulation or a law or is  
18 that just kind of custom; where does that come from?

19 A. I think it stems from the very practice of the DMV to  
20 make sure that we're working with the correct person.

21 Q. Working with the correct person?

22 A. With the person that -- I mean, he's presenting one  
23 thing and we're working with the right person.

24 Q. But I guess going back to Mr. Randle, our old  
25 standby, you've got a CLEAR report that I think, as we

1 discussed several days ago in court, has lots of  
2 information. We know what car Mr. Randle used to drive  
3 when he lived in Tchula, Mississippi, we know what his  
4 credit history was like, and he just has a glitch on his  
5 birth certificate. I mean, again I come back to what do  
6 my social security records have to do with whether or not  
7 I've proven my name, date of birth and that I'm a U.S.  
8 citizen?

9 A. It's our process.

10 Q. Okay.

11 THE COURT: Let me just ask one clarification.  
12 This will seem very -- we've dealt with these complicated  
13 examples. But if I show up and I have my birth  
14 certificate and I applied for an ID, do you check with the  
15 Social Security Administration then?

16 THE WITNESS: Yes, if you provide an SSN.

17 THE COURT: What if -- do I have to provide my  
18 social security number? What if I just show up and I say  
19 here's my birth certificate and I'd like my ID?

20 THE WITNESS: We would require you to fill out a  
21 religious exemption form. If you say I don't have one and  
22 I choose not to have one, we have other ways to do that.

23 THE COURT: Okay. So by default you ask me for  
24 my social security number?

25 THE WITNESS: Right. And it says on the

1 application that if you have one, you must provide it.

2 THE COURT: Okay. I see. And so then everybody  
3 goes through this same check --

4 THE WITNESS: Yes.

5 THE COURT: -- which is if my birth certificate  
6 and my record at the Social Security Administration don't  
7 match, I'm not going to be able to get my ID?

8 THE WITNESS: Yes.

9 THE COURT: So when I got my driver's license did  
10 do you the same thing?

11 THE WITNESS: Yes. Mm-mm. It happens with folks  
12 that have been married and divorced and take their name  
13 back. There's no match there then and they have to go to  
14 SSA and correct that. Now, that's outside of the petition  
15 process. But, yes, they do have to match.

16 THE COURT: All right.

17 BY MR. CURTIS:

18 Q. I'll move on in a second, but I'm still just trying  
19 to understand the state's interest that is served here and  
20 it sounds like you're trying to prevent multiple  
21 identities?

22 A. Mm-mm, and maintain integrity in our database, you  
23 know. It doesn't serve anyone to have multiple identities  
24 for one person, right?

25 Q. But if your database, again coming back using me

1 again, if I've given you my certified Wisconsin birth  
2 certificate and you've got all three of the statutory  
3 criteria -- name, date of birth, citizenship -- why isn't  
4 that the end of it?

5 A. In your example do they all match?

6 Q. Not with Social Security because my parents, for some  
7 reason, you know, used my middle name rather than my first  
8 name, but the numbers match. It's my social security  
9 number, but the name has a glitch in it.

10 A. It would be our practice to get them to match, yes.

11 Q. To get --

12 A. All those documents should match so that it's one  
13 spelling, one person.

14 Q. And until that happens, no free ID?

15 A. Or no driver's license, mm-mm.

16 MR. CURTIS: Could we put up Plaintiffs' Exhibit  
17 365? And this is a redacted exhibit.

18 THE COURT: Okay.

19 MR. CURTIS: And could you pull up -- let's look  
20 at the first paragraph first. This is the Case Activity  
21 Report, Your Honor, for Mr. Boyd, B-O-Y-D. And I'm trying  
22 to read the exhibit number on there and I'm having a hard  
23 time.

24 THE COURT: 365.

25 MR. CURTIS: Thank you. Oh, thanks.

1 BY MR. CURTIS:

2 Q. Do you remember Mr. Boyd?

3 A. Not well, no.

4 Q. Okay. Looking at the summary here, Mr. Boyd entered  
5 the process in March of 2015. It looks here like the  
6 problem was the date of birth, Mr. Boyd also from  
7 Mississippi. And I see references to the date of birth  
8 not matching with the date of birth of social security and  
9 a different date of birth on a school record. It says he  
10 has no other extraordinary proof and he was denied; am I  
11 correct?

12 A. I don't remember the case.

13 Q. You don't recall. I'll represent to you that he was  
14 one of the denials.

15 A. Okay.

16 Q. If my name is accurate and if I prove my citizenship,  
17 I guess I'm wondering, so what if my date of birth is a  
18 couple days off? And I'll represent to you that with  
19 Mr. Boyd there were some dates -- it was in the range of  
20 1948 to '49, unclear, you know, but it's sometime in the  
21 late 40s and we know he's from Mississippi. So what? I  
22 mean, are you saying we just -- because the date of birth  
23 is a little off there could be two Mr. Boyd's?

24 A. The date of birth is a vital piece to your identity.  
25 You know, we expect a match on the date of birth.

1 Q. Okay.

2 A. And as you can see, by what I've read on the screen,  
3 we've tried multiple ways and asked multiple different  
4 questions to try to determine what his real birth date  
5 was. It's a vital piece of information.

6 Q. So now there's a new emergency rule as of last  
7 Friday. How does that solve Mr. Boyd's problem, if at  
8 all?

9 A. From what I've been able to digest of the emergency  
10 rule so far, the date of birth is still going to be a  
11 requirement. That name may be modified, but --

12 Q. His name is okay; that's not a problem?

13 A. Right.

14 Q. I'm sorry. I didn't mean to interrupt you.

15 A. That's okay. This is a date-of-birth issue on his  
16 record.

17 Q. Okay.

18 A. I don't see a provision for allowing various dates of  
19 birth on the records in that emergency rule.

20 Q. I couldn't find one either. And I was wondering, for  
21 example, why not -- if you're going to allow an affidavit  
22 of common law name change so that Mr. Randle can say, you  
23 know, I've always gone by this spelling -- why not allow a  
24 similar affidavit so that Mr. Boyd can say, well, I was  
25 born in '48 or '49, but --



1 MR. MURPHY: Objection, Your Honor. Ms. Schilz  
2 doesn't set policy.

3 MR. CURTIS: I'm sorry. What was the --

4 THE COURT: I'll overrule the objection that  
5 Ms. Schilz doesn't set the policy.

6 MR. CURTIS: I understand, but I'm just trying to  
7 confirm that --

8 THE COURT: I overruled it. Go ahead.

9 MR. KAUL: He overruled the objection.

10 MR. CURTIS: I know. I was just --

11 THE COURT: Ask the question.

12 MR. CURTIS: We were --

13 THE COURT: Don't give me any longer to think  
14 about it.

15 MR. CURTIS: We're in violent agreement.

16 BY MR. CURTIS:

17 Q. But just to clarify though, so on the date-of-birth  
18 issue, people like Mr. Boyd may look like they still have  
19 a problem?

20 A. Yes.

21 Q. So if somebody, you know, has records with three  
22 different names -- I'm sorry, three different birth dates,  
23 does that mean they may never get the state ID? How are  
24 they ever going to prove which one?

25 A. They'll be able to vote through the emergency rule.

1 They have a receipt. But as far as --

2 THE COURT: That's the thing that confused me.

3 So he does get the receipt?

4 THE WITNESS: He got a receipt, absolutely,  
5 denied individual suspended. The only ones that didn't  
6 were the ones that were customer initiated cancel and  
7 there was one individual who wasn't eligible as a U.S.  
8 citizen, mm-mm.

9 THE COURT: Okay. So then I guess the next  
10 question is, I think you're either getting here or you  
11 should ask this -- if he don't ask it, I will -- how on  
12 earth can he ever fix this problem, because he's got these  
13 records with three different dates? And I suppose he's  
14 going to say that's the right one or he's going to say he  
15 doesn't know, but I don't see how he can ever resolve this  
16 conundrum.

17 THE WITNESS: I agree, Your Honor. That's the  
18 saddest part of this whole process because there is a  
19 percentage of people who they've went this far in their  
20 life and have never been able to prove their identity. I  
21 don't know what the answer is to that.

22 THE COURT: Okay.

23 BY MR. CURTIS:

24 Q. Let me offer one way perhaps that it could be solved.  
25 And could we go to the March 26th entry? So Mr. Boyd, you

1 know, clearly has a problem here, but he's got an older  
2 sister and his older sister calls and she says this is his  
3 birth date. "I'm his older sister, I ought to know."

4 And she says sometimes people mix it up, but she  
5 gives, you know, pretty specific details about his  
6 background, talks about the midwife, no hospital records,  
7 the Bible. Family Bible has been burned up, destroyed in  
8 a fire. But she says, "I'm his older sister. I know who  
9 this guy is."

10 As I understand your testimony this morning, you  
11 don't know allow her to vouch for him?

12 A. Well, we listened to what she said and we sent it to  
13 DHS for a match. Any information we get, we send it back  
14 to confirm it. And in this case it doesn't look like it  
15 confirmed. So again we're looking for the birth record  
16 and that includes the correct birth date and the correct  
17 name. And so based on her information, we tried to go  
18 with the information she gave us.

19 Q. But, for example, there are some jurisdictions, and  
20 the state department is one, that uses affidavits from  
21 older relatives for problems like this. So, you know, the  
22 mother or the older sister can say, you know, I swear, you  
23 know, under penalty of perjury this is my little brother  
24 and he was born on such and such a date. But that's not  
25 available?

1 A. We haven't done it for date of birth. We have -- and  
2 that's not to say we won't, but we haven't done it for  
3 date of birth. We have done it for a common law name  
4 change or *known in the community as*. And, for the record,  
5 we've done that in the DMV separate from the petition  
6 process. So we have record of doing that for other  
7 individuals.

8 Q. When you say "doing that," you're talking about the  
9 common law name change?

10 A. Common law name change.

11 Q. Oh, the name change.

12 A. Nothing about the date of birth.

13 MR. CURTIS: Okay. Your Honor, I'll move on now,  
14 but this does seem like a significant issue and I would  
15 just wonder if I could give the Court a couple other  
16 record citations.

17 THE COURT: Sure, sure.

18 MR. CURTIS: These all have to do with  
19 date-of-birth issues. And I'm referring to the denial  
20 chart, which is Exhibit 341. If you look at No. 1,  
21 Ms. Clark; No. 2, Ms. Colon; No. 3, Ms. Johnson; No. 25,  
22 Mr. Fair, F-A-I-R; those were four examples, in addition  
23 to the ones we've talked about, that have different kinds  
24 of birth date issues.

25 MR. MURPHY: Your Honor, that's not a DMV

1 document, just so we're clear on that.

2 THE COURT: The chart is the tabulation of the  
3 denials. That's one you created.

4 MR. CURTIS: The chart is the tabulation, yes.  
5 And then, Your Honor, in the chart -- I'm glad we brought  
6 this up -- so for example when you look at No. 1 in the  
7 chart you'll see the date of tabulation but also then the  
8 citation to the plaintiff's exhibit that has all --

9 THE COURT: That will be his file?

10 MR. CURTIS: The actual file, right, right.

11 THE COURT: Got it.

12 MR. CURTIS: Could we pull up Exhibit 308? And  
13 for the record, I'm referring to a document called *IDPP:*  
14 *Summary Of Interesting Cases*, dated June 1, 2015. Your  
15 Honor, this was produced from DMV files. I don't think  
16 it's been moved into the record yet. I would so move.

17 MR. MURPHY: No objection.

18 THE COURT: No objection. It's admitted.

19 BY MR. CURTIS:

20 Q. Could you identify this document, Ms. Schilz?

21 A. Yes. It's a document that was created in CAFU and it  
22 is a list of interesting customer cases in the petition  
23 process.

24 Q. And what makes a case interesting for these purposes?

25 A. Sure. Well, this list was created upon request of

1 our administrator. And we were -- when I'd go to meetings  
2 I'd talk about the cases that we were working on in the  
3 petition process and so we were asked by the  
4 administrator's office to create a list of some of them.  
5 And so that's what this is, just a summation of what we  
6 had on June 1st, 2015.

7 The first one, if I can just reference that one --

8 Q. Please.

9 A. -- 64-year-old male born in a concentration camp, you  
10 know. And his naturalized documents were verified, but  
11 there was a lot wrong with his -- what he presented to us  
12 in terms of how we could get him to issue. We worked with  
13 him. He were just surprised by the stories that we were  
14 hearing, to be honest with you. That's what *interesting*  
15 means.

16 Q. Right. If you don't mind, I'd like to pursue that  
17 just a little bit. Surprised by the stories how?

18 A. Well, honestly, we thought we'd get very few cases to  
19 investigate or adjudicate, or however you want to call it,  
20 and it turned out we got many. And, you know, the  
21 investigators in my unit also work as auditors and so we  
22 see a lot of bad behavior of customers and internal folks.  
23 And so when we see some of these things and we're able to  
24 have success, it started some, you know, great  
25 conversations in our unit. So -- in a good way.

1 Q. Yeah, yeah. Understood, understood. Do I understand  
2 correctly that there have been instances where, in order  
3 to get the free ID, somebody who was adopted had to track  
4 down their birth parents?

5 A. I don't think they needed to track them down. I  
6 think we stumbled onto it when we were trying to get their  
7 vital record.

8 Q. Okay. And why -- how did you -- again, how is that  
9 related to my name?

10 A. I don't remember the exact cases. There were a  
11 couple of them where we were trying to submit the  
12 information provided on the application. And DHS would  
13 come back and say, we don't have *this* information, but we  
14 might have *this* information. And then we would  
15 communicate that new information to the customer and they  
16 would say, you know, "I think I may have lived in foster  
17 care," or whatever. And I think that's how it was turned  
18 over --

19 Q. Okay.

20 A. -- you know.

21 Q. And just for the record, if you want to look at your  
22 deposition, I'm looking at page 33, line 4.

23 And my question to you there was: "Am I correct that  
24 on occasion the CAFU process has connected petitioners  
25 with their birth parents?"

1 And you answered, "Yes."

2 A. That is true.

3 Q. Okay.

4 A. But your original question on adoption was did CAFU  
5 send them to their adoptive parents --

6 Q. Okay.

7 A. -- and the answer is "no" to that.

8 Q. So not a physical reunion, but the adopted person  
9 discovered who their birth parents were?

10 A. Right.

11 Q. Okay.

12 A. Yeah.

13 THE COURT: But I think the original question was  
14 whether CAFU had required them to go find or contact their  
15 birth parents. And the answer to that is "no?"

16 THE WITNESS: Yeah, "no."

17 BY MR. CURTIS:

18 Q. You had not required that?

19 A. No. This was all discovery in trying to connect with  
20 a vital record.

21 Q. Okay. Okay. And this was not triggered by, say,  
22 someone's birth certificate not having the parents listed?

23 A. I don't recall the exact example.

24 MR. CURTIS: Okay. Your Honor, I'd just note  
25 again for the record there are a number of



1 adoption-related cases.

2 THE COURT: Okay.

3 MR. CURTIS: And just to give the Court some  
4 citations and the Court can kind of see for itself what  
5 the issues were, I'm referring to the chart, the denial  
6 chart, Exhibit 341. And I would refer the Court to No.  
7 15, Mr. Laduke; No. 17, Ms. David; No. 34, Mr. Santos;  
8 No. 35, Mr. Washington; and No. 38, Ms. Navarro.

9 THE COURT: Thank you.

10 BY MR. CURTIS:

11 Q. Could we now turn to the timeline? I have two more  
12 topics I want to cover, Ms. Schilz, so you know where I'm  
13 going. First I'd like to review the timeline of the last  
14 several months with the IDP process and then I'm going to  
15 turn to some of the benefits of the system.

16 Looking at the IDPP timeline, could you tell me when  
17 did someone, other than a lawyer -- I don't want to know  
18 anything about lawyer talk -- but when did somebody, other  
19 than a lawyer, talk with you about the ID petition process  
20 allegations that were being raised in this case; do you  
21 recall?

22 A. Can you repeat that?

23 Q. Do you recall when you found out about the  
24 allegations plaintiffs are making in this case about the  
25 ID petition process? And I'm not asking you about

1 discussions with your lawyer.

2 A. You know, I don't. I don't really read much of that.

3 Q. Okay.

4 A. It's not really -- I don't want to. I want to just  
5 do my job.

6 Q. Okay.

7 A. But I did see something on the television about it,  
8 about a case. And, yeah, I think that was the first that  
9 I saw anything or heard anything.

10 Q. Okay. Am I correct that beginning in February, the  
11 number of denials issued by CAFU went up --

12 A. Yes.

13 Q. -- significantly?

14 A. Yes.

15 Q. And specifically, as I look at the numbers, before  
16 the beginning of February there had been 23 denials and  
17 then afterwards, from February to the end of April, 38  
18 denials. Why the uptick? What happened in February and  
19 March to cause that?

20 A. I can't recall exactly when I discovered it. But in  
21 our instruction, and I've talked about it earlier, in our  
22 instruction to the investigators they were required to  
23 bring forward the cases that they were working on once  
24 they had expired 180 days in the suspend category. And  
25 they were supposed to bring them forward to me, the

1 supervisor, and the lead worker. And we would review them  
2 to see if there was anything else we could do with them  
3 before they went into the denial code. I learned after  
4 looking in the suspend category that there were some that  
5 had been sitting there for much longer than 180 days.

6 And so, in simple terms, I got after the team and  
7 said, what happened; why are these sitting here; we're not  
8 following our own rules -- review them as soon as you can,  
9 keeping in mind that we have a lot of other work to do,  
10 and bring them forward for approval to deny -- they're  
11 overdue; how did this happen; so on and so forth.

12 Q. How long had some of them been sitting?

13 A. I don't know. You know, longer than 180 days.

14 Q. Okay.

15 A. So -- and I'm not being facetious. I don't remember  
16 exactly how old they were, but they were old.

17 Q. I understand.

18 A. And so as they came forward we reviewed them and sent  
19 them forward to Jim Miller, the director of field  
20 services, for approval to deny. And then they went into  
21 deny status and a letter was sent to them telling them  
22 they were denying them unless we heard something new.

23 And so a lot of them went through to catch up on what  
24 we should have been doing all along. And before, as I  
25 said, before they went to the denial bin or code we do

1 look at them one more time. And some of them we were able  
2 to bring back into an active status as a result of that.

3 Q. Now, in early March DMV began to consider potentially  
4 paying for documents?

5 A. That's correct.

6 Q. Why didn't DMV pay for documents before that?

7 A. Honestly we thought DHS was responsible for that. We  
8 thought that they had received funds to do it and we were  
9 not given any funds to do it. So from my perspective I,  
10 you know, I didn't know there was money available.

11 Q. I just want to make sure I'm understanding. You're  
12 saying that people in the DMV thought that the DHS was  
13 already taking care of this?

14 A. I believed that, yes. I'm not sure if other people  
15 in the DMV believed that.

16 Q. Okay. Okay. But what about when people came back  
17 from DHS with a *no match* and they said, what do I do now;  
18 do I start looking for the Bible?

19 A. Right.

20 Q. Obviously --

21 A. Well, I understood that DHS was paying for vital  
22 records --

23 Q. Okay.

24 A. -- and that DHS was not paying for nonvital records.  
25 And in fact in a phone call that I had with a

1 representative from DHS early on, that was how I wrote my  
2 notes from that call; that nonvital records, and I think I  
3 defined those earlier, that it would be a school record or  
4 a hospital, you know, birth record that wasn't certified.  
5 So, yes, I didn't think that DMV had the money to pay for  
6 it on those items.

7 Q. Do you recall when you had that conversation and  
8 found out that DHS was not paying for vital records?

9 A. Well, no, I don't.

10 Q. Did the closest -- I mean, was it 2015 or 2016?

11 A. Probably 2014.

12 Q. 2014 --

13 A. Yeah.

14 Q. -- that you found out that DHS was not paying?

15 A. That I had that conversation with DHS and understood  
16 that they weren't going to pay for nonvital records.

17 Q. And when did you find out then that DHS was not doing  
18 what you had understood they would do?

19 A. I guess I don't know when I found that out.

20 MR. CURTIS: Okay. Could we pull up Exhibit 333?  
21 Your Honor, we've redacted the column of people's names.

22 THE COURT: Okay.

23 MR. CURTIS: So I believe the rest of this  
24 exhibit can safely be public.

25 THE COURT: All right.

1 MR. CURTIS: This is another document produced to  
2 us by DMV. I'd move for its admission into the record.

3 MR. MURPHY: No objection.

4 THE COURT: Okay. It's admitted.

5 BY MR. CURTIS:

6 Q. Can you identify Exhibit 333, Ms. Schilz?

7 A. Yes. I believe there might be more to it, but there  
8 are 15 records that are -- that we identified as needing a  
9 fee in order to proceed.

10 Q. Okay. And this is what you're referring to. So when  
11 you realized that there were some vital records not being  
12 paid for, you had people review the record and then this  
13 was a chart that was produced from that?

14 A. Yes.

15 Q. And then based on -- and then the column over toward  
16 the right with all of the April 1 dates, that indicates  
17 that these people received letters?

18 A. Yeah. They received a fee letter, all 15 of them, on  
19 April 1st.

20 Q. Now, there's some who didn't receive anything. I see  
21 there are no dates next to them. Have they since been  
22 taken care of?

23 A. I don't know. I'd have to look at the particular  
24 CARs.

25 Q. Okay. I am looking up. I just want to confirm this

1 now. I see at least one reference --

2 MR. CURTIS: I don't mean to be putting my hand  
3 right in front of your face.

4 MS. WILSON: That's okay.

5 BY MR. CURTIS:

6 Q. -- I see at least one reference to a South Carolina  
7 birth record which cost \$12 and this would be for someone  
8 who had been denied. And again just to clarify, in South  
9 Carolina you need not only \$12, but a photo ID, right?

10 A. Right. And we need the customer to participate in  
11 filling out the form --

12 Q. Sure.

13 A. -- and having it notarized.

14 Q. Sure. Understood. But if the customer doesn't have  
15 a photo ID, which is why he or she is with you, what are  
16 they going to do? I mean, isn't this a dead end?

17 A. I don't know.

18 Q. Okay. Again I'm not -- I'm going to ask you a  
19 question. I don't want to know about any conversations  
20 you had with your lawyers. But when did someone, other  
21 than a lawyer, talk with you about the emergency  
22 rule-making?

23 A. It was our administrator, Kristina Boardman, and it  
24 was a few weeks ago. I can't remember the specific date.  
25 She had had a meeting in the Governor's office and had

1 come back and come to my office and sat with me and talked  
2 to me about what might happen with the emergency rule.

3 Q. Mm-mm.

4 A. And we discussed how we'd be able to meet the  
5 obligation and what some options might be.

6 Q. What options did you discuss?

7 A. We discussed how we'd manage creating a receipt. It  
8 sounded like that was the direction it was going. There  
9 was discussion about how long the receipt would be valid,  
10 and all of that, and that wasn't all decided at that  
11 point. But the receipt seemed to be the common theme and  
12 how would we do that. She asked me what my idea was and  
13 that's when we talked about creating a *Word* document  
14 separate from our system.

15 In DMV, while probably any government entity, it  
16 takes a long time for a system to be upgraded to include  
17 something such as this and the receipt doesn't exist  
18 today.

19 THE COURT: It doesn't exist?

20 THE WITNESS: It needed to be integrated into our  
21 system.

22 THE COURT: Is it actually the *Word* document that  
23 you used for the receipt?

24 THE WITNESS: It is, yes.

25 A. So we talked about logistically how we'd manage that



1 and which records would be receiving the receipt and how  
2 we'd create it and where we'd get the signature and the  
3 photo from and the personal and physical description that  
4 appears on the receipt. So that was the dialogue we  
5 had -- I had with her.

6 BY MR. CURTIS:

7 Q. May I ask you this question? Again the receipt says  
8 it's good for 60 days but can be renewed. We heard  
9 testimony about how people might be able to vote with this  
10 in November.

11 A. Mm-mm.

12 Q. Why not just say the receipt is good for the next 180  
13 days?

14 A. That's not what the emergency rule came through with.  
15 If they would have said 180 days, we would have put 180  
16 days on there.

17 Q. I guess I'm trying to figure out, do you have any  
18 understanding of why just 60 days?

19 A. No.

20 Q. Okay.

21 A. It's just how it was written.

22 Q. Okay. Let me ask you this: let's say I get one of  
23 these receipts and it's good for 60 days and I say I want  
24 my petition adjudicated. Now, I've given you everything  
25 and I'm not going to give you this and I just want a

1 decision. In other words, I push to get a decision made  
2 and let's say a month from now I'm denied.

3 A. Mm-mm.

4 Q. Now, am I still going to be receiving that receipt --

5 A. Yes.

6 Q. -- after 60 days?

7 A. Yes.

8 Q. Even if I'm denied?

9 A. Yes.

10 Q. Then what's the purpose of requiring an ID? I mean,  
11 this seems like -- do you understand the basis for my  
12 question? These are people who haven't, to the  
13 satisfaction of the State of Wisconsin, haven't proven  
14 their name, date of birth and citizenship, but now you're  
15 going to let them vote --

16 A. Mm-mm.

17 Q. -- this time?

18 A. I'm not letting them vote. The system, as its  
19 written, is letting them vote.

20 Q. I was referring to you as the State of Wisconsin.

21 A. Yeah.

22 Q. But I don't understand what purpose is being served  
23 though. I mean, if you're just going to let -- when I say  
24 "you," I'm saying Wisconsin -- if Wisconsin is just going  
25 to let people vote anyway, what's the purpose of this?

1 MR. MURPHY: Objection. Asked and answered.

2 THE COURT: No, it hasn't really been answered.

3 Go ahead. I've overruled the objection.

4 A. I don't know how to answer your question. You know,  
5 it's not my place to decide those things. I really am  
6 just doing what I'm told to do. It sounds kind of lame,  
7 but it's the truth.

8 Q. No, it doesn't sound lame. I understand that.

9 THE COURT: And we take lame answers here all the  
10 time, unlike the ones that are not truthful, so I'm  
11 satisfied -- lame questions, too.

12 BY MR. CURTIS:

13 Q. Well, it sounds like we're both dumbfounded, so I'll  
14 just leave it at that. Could we bring up Exhibit 453?  
15 And specifically focus on page 14. This is the emergency  
16 rule. And if we could blow up the -- that first paragraph  
17 which makes a finding of emergency. Do you agree, by the  
18 way, that the IDPP is in an emergency status?

19 A. It appears that way, yes.

20 Q. And so the emergency rule-making is necessary to  
21 ensure that qualified applicants who may not be able to  
22 obtain acceptable photographic ID for voting purposes with  
23 reasonable effort before the next scheduled statewide  
24 elections, et cetera, et cetera will be able to obtain  
25 photo ID for use in those elections. Did I read that --

1 did I summarize that correctly?

2 A. Yes.

3 Q. Do you agree with the state's finding of emergency  
4 that under the current system, or the system as of Friday  
5 the 13th, qualified applicants might not be able to obtain  
6 acceptable photo ID and vote?

7 A. I need -- I need you to repeat that --

8 Q. Okay. Do you agree --

9 A. -- please.

10 Q. -- do you agree that, under the system as it existed  
11 up until last Friday, that there was a potential problem  
12 that qualified applicants would not be able to get the IDs  
13 they need to vote?

14 A. That's true, yes. I agree with that.

15 Q. You agree with that assessment?

16 A. Mm-mm.

17 Q. And now?

18 A. Now they have a receipt and they can vote.

19 Q. And what happens if then -- let's assume it's good  
20 for 180 days -- what happens then in mid November? I  
21 mean, what -- what do they do to vote in 2017 or 2018?

22 THE COURT: I think that one has been answered.  
23 I think your answer was "stay tuned"; am I right?

24 THE WITNESS: Yes, stay tuned.

25 MR. CURTIS: All right. Okay. Can we go to the

1 discrepancy document, 461? Your Honor, this is another  
2 document that was produced to us last Friday by the DMV.  
3 It is Exhibit -- Plaintiffs' Exhibit 461. I move for its  
4 admission.

5 MR. MURPHY: No objection.

6 THE COURT: It's admitted.

7 BY MR. CURTIS:

8 Q. Ms. Schilz, who wrote this document?

9 A. The training officer in the Bureau of Field Services  
10 I believe.

11 Q. What's that person's name?

12 A. Glenn Green.

13 Q. When was the first time you saw a draft of this  
14 document?

15 A. I believe last Friday.

16 Q. That's the date it was produced to us.

17 MR. MURPHY: Object to foundation.

18 A. I think it was the day.

19 THE COURT: I'm going to overrule the --

20 MR. MURPHY: Sorry.

21 THE COURT: -- objection. I'll take the question  
22 to be just clarifying. Are you sure it was last Friday?

23 THE WITNESS: It may have been Thursday or  
24 Friday. I saw it last week one day, late last week.

25

1 BY MR. CURTIS:

2 Q. Okay. Have you noticed any errors in the document  
3 yet?

4 A. I did print the document out and asked for a meeting  
5 to understand it better. And we did meet, the bureau  
6 director and the administrator, and we talked through when  
7 it would apply and whether it was associated with the  
8 petition process. I wasn't clear when I read this whether  
9 it was just for petition customers or if it was for all  
10 DMV customers.

11 Q. And what did you find out?

12 A. I learned that the common law name change affidavit  
13 has been used for all DMV customers. I'm not certain if  
14 this documentation was stored somewhere and I just didn't  
15 see it or -- but it's a function of BFS and apparently has  
16 went on for a number of years that way.

17 Q. Okay. I understand that there are -- there are two  
18 categories in this document -- situations. Situation 1,  
19 could we zoom in on that? Situation 1, I understand, is  
20 where there's a single letter discrepancy; is that  
21 correct?

22 A. That's correct.

23 Q. And then Situation 2 is where there are two or more  
24 letters that are off; is that correct?

25 A. Yes.

1 Q. Okay. Could we go to the bottom of page 1? Yeah,  
2 exactly. So these are examples, if I understand it, of  
3 instances where the name may be just one letter off?

4 A. Actually Merry and Mary, that is an error that we  
5 found in the meeting.

6 Q. I noticed that, too.

7 A. Yeah, it's an error. I think it was corrected. I'm  
8 not sure.

9 Q. Okay. Yeah, because Mary is -- Mary - Merry is, as  
10 you said, two letters, right?

11 A. Yes.

12 Q. And what about Glenn Green, if you're comparing Glen  
13 with one N to Glenn with two N's and Green with no E and  
14 Greene with E, that's one letter?

15 A. I know I questioned it, too, was it one letter in  
16 each name -- first, middle, last -- or is it one letter in  
17 the composition?

18 Q. And what was the adjudication?

19 A. Well, he wasn't there, but I think that we decided it  
20 was one letter in either or both.

21 Q. No, wait. When you say one letter in either, so if  
22 in Chuck Curtis, both first and last, if there's one  
23 letter off, I'm okay. But if there's one letter wrong in  
24 each, in first and last, then I go under the two-letter  
25 rule?

1 A. I didn't understand it that way in the meeting.

2 Q. Oh, okay. Tell me what -- I find this very  
3 confusing.

4 A. I know. I understood that this example, the *Glenn*  
5 *Greene* line, was not an error; that they would allow one  
6 letter in the first name and one letter in the second name  
7 to be off.

8 Q. Okay.

9 A. And then that could be at the discretion of the  
10 supervisor in the field service station in Section 1. And  
11 it wasn't particular to petitions; it was for anyone.

12 Q. Well, and it seemed like being able to get into  
13 Situation 1 is a pretty big deal because you said I can  
14 just have it taken care of at my local service center --

15 A. Right.

16 Q. -- if the supervisor agrees?

17 A. Right.

18 Q. And do I understand correctly that in that event,  
19 even if my name doesn't match my social security name,  
20 that DMV will do what's called a *one-time override*?

21 A. Yes.

22 Q. What's a one-time override?

23 A. One-time override can be -- it was my understanding  
24 that DMV/BFS used it when an individual was married and  
25 hadn't been to the SSA office yet. So they wanted their



1 product changed with us, but it was only one time. And  
2 then the next time they came in they would have had to go  
3 to SSA and fix it or change it and then with the next  
4 renewal it would have to match. So they would get one  
5 override.

6 Q. One override so I don't have to monkey around with  
7 dealing with Social Security to change my records?

8 A. You eventually have to because when you come back in  
9 for your license renewal you won't get another override,  
10 so that was the idea.

11 Q. Okay. But I can worry about that eight years from  
12 now, right?

13 A. That's up to you.

14 Q. Okay.

15 THE COURT: And again clarify that for me. So a  
16 Wisconsin driver's license is a compliant ID?

17 THE WITNESS: It can be a compliant REAL ID. It  
18 wouldn't apply to that. This only applies to  
19 noncompliant.

20 THE COURT: Okay. And so the -- is the Wisconsin  
21 ID nondriver's license, is that a compliant ID?

22 THE WITNESS: Is the Wisconsin driver's license?

23 THE COURT: Not the driver's license.

24 THE WITNESS: Not -- the identification card?

25 THE COURT: Yes.

1 THE WITNESS: It would be noncompliant.

2 THE COURT: That's noncompliant.

3 THE WITNESS: It would apply to this. It could  
4 be compliant.

5 THE COURT: Okay. What makes it compliant or  
6 not?

7 THE WITNESS: Documents have to be brought in to  
8 show legal presence and have to match the REAL ID  
9 requirement.

10 THE COURT: Okay. And so if I look at my  
11 driver's license can I tell whether it's a compliant ID or  
12 not?

13 THE WITNESS: Yes. If it has a star on it, it is  
14 REAL ID compliant; meaning eventually when the federal  
15 government adopts all of the REAL ID law, you would be  
16 able potentially to get on a plane just with your driver's  
17 license.

18 THE COURT: Okay. Next.

19 BY MR. CURTIS:

20 Q. And again now, just to confirm, what happens to Mary  
21 here? And we've agreed that this was a mistake because  
22 there are two letters wrong here. So if Mary falls under  
23 Situation 2, she has to go do the change with Social  
24 Security?

25 A. No. If you bring up Section 2, it will show you that

1 there are some examples below where, if there's more than  
2 one letter difference -- first, last or/and -- then they  
3 fall into Section 2.

4 Q. Right.

5 A. And then that would be brought forward to the bureau  
6 director in BFS, field services, and the training officer,  
7 Glenn Green to review because it would have more  
8 complexity to it and then they would have discretion to  
9 issue based on the information. That's what I understand.

10 Q. Okay. Okay. You say "more complexity." I'm -- we  
11 were talking about there was an earlier example in  
12 Situation 1 with Shaun, S-H-A-U-N. So you're telling me  
13 if it's -- if Shawn is instead spelled with a W rather  
14 than a U, that's one letter, so that goes under  
15 Situation 1. But if Sean is S-E-A-N, that's more complex  
16 and it's dealt with under Part 2?

17 A. Correct.

18 Q. What does that have to do with eligibility to vote?

19 A. This has nothing to do with eligibility to vote.  
20 This is something that BFS has done for a long time  
21 apparently. I don't know.

22 THE COURT: If I can -- that was my  
23 understanding. So the situation -- Situation No. 1 and  
24 Situation No. 2 occur if I show up to get a driver's  
25 license and I've got one letter or a certain kind of

1 two-letter discrepancy with my social security record. So  
2 I go in, I can get my driver's license if I'm one letter  
3 off. Has that same policy been applied to people who are  
4 getting Wisconsin IDs?

5 THE WITNESS: Outside of the petition process --

6 THE COURT: Yes.

7 THE WITNESS: -- or inside? Outside of the  
8 petition process, yes, I understand it has.

9 THE COURT: Okay. And now if I go in with the  
10 petition process, I'm not going to get the benefit of  
11 Situation 1/Situation 2 flexibility, that has not been  
12 applied within the petition process?

13 THE WITNESS: There is one difference. Very  
14 often the petitioners -- well, most times they don't have  
15 a birth record that we can match to. Outside of the  
16 petition process we can match to an identity document like  
17 that. The reason I was interested in this document is  
18 does it apply to the petition process. And the answer was  
19 "yes," it will going forward. So in this case, for  
20 Situation 2, that's probably a Johnny Randle situation --

21 THE COURT: I was going to say --

22 THE WITNESS: -- to be honest.

23 THE COURT: -- Mr. Randle would get the benefit  
24 of a Situation 2 flexibility --

25 THE WITNESS: Yes.

1 THE COURT: -- as long as it's within the  
2 discretion of the level of management that makes the call?

3 THE WITNESS: Right.

4 THE COURT: Okay.

5 THE WITNESS: And the bureau director for BFS is  
6 also the manager that makes the call on all petition  
7 records that are issued or denied.

8 BY MR. CURTIS:

9 Q. Oh, you're referring to Jim Miller?

10 A. Yes, referring to Jim Miller.

11 Q. Okay. Okay. I'm looking at page 3 of this document.  
12 I wanted to go back to social security. There's a  
13 provision here that says "Note: Social Security  
14 requirements have not changed as a result of this  
15 process." What does that mean?

16 A. That means they still have to match with Social  
17 Security.

18 Q. Okay. So I misunderstood. So if we're in  
19 Situation 2 with two letters I still have to take care of  
20 the match with Social Security?

21 A. Yep.

22 Q. So if my name is misspelled --

23 A. On your birth record.

24 Q. -- one letter, I can deal with it at the local  
25 service center and I don't have to worry about Social

1 Security. But if there are two letters off I not only  
2 have to deal with Madison, the central office, but now I  
3 have to deal with Social Security as well; is that your  
4 understanding?

5 A. It sounds like that, yes.

6 Q. Okay.

7 A. Again this isn't my area of responsibility, but I  
8 know the DMV is very particular about matching with the  
9 SSA. We spend -- every record goes through the SSOLV  
10 process to make sure we match with that government record.

11 Q. So --

12 A. So if I can just expand.

13 Q. Please, please.

14 A. In this case, if a customer wanted to go by a  
15 different name than appears on their birth certificate,  
16 they could do that. There may be an exception. I don't  
17 know what this discretion is going to mean to a petitioner  
18 as it relates to a name not matching with the SSA. It  
19 appears that it stays in effect.

20 Q. What do you mean, you don't know what this discretion  
21 is going to mean to the petitioner? Is there a big area  
22 of discretion here still?

23 A. No, I don't think so. I think that the field  
24 services are responsible overall for meeting the  
25 requirements of issuance. And so this is just something

1 that they've done throughout the history of DMV  
2 apparently. So I don't know. I don't think it's loose or  
3 arbitrary, but I think that they do look at the facts in  
4 front of them and make a decision.

5 MR. CURTIS: Let's -- could we pull up  
6 Plaintiffs' Exhibit 423? And, Your Honor, this has also  
7 been redacted. Oh, and what we did, we redacted this  
8 young man's last name, Your Honor, because his first name,  
9 Reginald -- is the problem?

10 THE COURT: Okay.

11 MR. CURTIS: Reginald, as the record will show,  
12 and I'll give the Court -- he's in the other chart that I  
13 mentioned, Exhibit 342. And we'll get you the exact  
14 number. But he's included here. His full ID petition  
15 process file is in the record.

16 THE COURT: Okay. Thank you.

17 BY MR. CURTIS:

18 Q. Reginald is a young African American boy -- a young  
19 African American who lives in my hometown of Beloit and he  
20 spells his name with a D at the end. And I'd refer --  
21 could you blow up the 2/19 and the 2/24? So Reginald's  
22 birth certificate dropped the D and so DHS says it's  
23 Reginal, not Reginald. As you can see from 2/24, he's in  
24 adjudication.

25 And, Ms. Schilz, I'm looking at the last sentence

1 there, which I will just quote: "I want to check with the  
2 customer to see if he wants me to verify SSA has both  
3 names on file or if he wants to do a name change affidavit  
4 form."

5 A. Mm-mm.

6 Q. Now, he shouldn't have to do either of those, right,  
7 because it's just one letter?

8 A. That one-letter provision was just introduced to us  
9 last week, so I didn't know we would allow for that.

10 Q. Okay. So under the new rule, Reginald ought to get  
11 his voter ID quickly, right?

12 A. Assuming everything else passes, yes.

13 MR. CURTIS: Okay. Could we go to Exhibit --  
14 Plaintiffs' Exhibit 405? And, Your Honor, this is --  
15 we've got this redacted, right? Okay. Your Honor, this  
16 is the record for a gentleman named Mr. Hines, H-I-N-E-S.  
17 And this comes from Plaintiffs' Exhibit 405. Mr. Hines is  
18 also in the other chart, Exhibit 342.

19 BY MR. CURTIS:

20 Q. Ms. Schilz, as I understand this situation, Mr. Hines  
21 was required to do a name change affidavit?

22 A. I'm not as familiar with this case as you may think.

23 Q. Okay. Okay. Well, just reading from the official  
24 record from December 11, the investigator felt -- so the  
25 problem was his name is Hines with an E, but his birth



1 record reads Hinds with a D, H-I-N-D-S, so it's one letter  
2 off.

3 MR. MURPHY: Objection. Counsel is testifying  
4 now.

5 THE COURT: He's just setting the stage for the  
6 question. So go ahead. I can see the document. I assume  
7 we're going to get to a question.

8 BY MR. CURTIS:

9 Q. So he was asked to do an affidavit of name change,  
10 but I see there was a problem with finding a notary?

11 A. Yes.

12 Q. And you said earlier DMV does not provide notary  
13 service?

14 A. No.

15 Q. And this was the one I guess where this gentleman  
16 tried to find a notary through a representative's office?

17 A. Yes, it appears so, yes.

18 Q. Do you know what happened with this case?

19 A. I do not. I don't remember every case.

20 Q. And putting aside the fact that the one-letter rule  
21 now may have taken care of this, is it your belief that  
22 the common law affidavit of name change now will be  
23 notarized by DMV or DMV will pay for the notarization?

24 A. I'm not aware of a plan for that.

25 Q. Okay.

1 A. There may be one. I'm not aware of it.

2 MR. CURTIS: The emergency rule, do we have that?  
3 Sorry, Your Honor. I'm just trying to put my hands on the  
4 emergency rule.

5 THE COURT: And then just as a check-in of where  
6 we're going, a couple of points ago you said that you had  
7 two points left.

8 MR. CURTIS: I'm almost done with the first and I  
9 promise the second one will be short. There are no  
10 exhibits.

11 THE COURT: All right. Since we had an early  
12 lunch break, we're in the range where we'd think about  
13 taking a break. But if you think you'll be done by three  
14 o'clock -- I encourage you to be done by three o'clock --

15 MR. CURTIS: I will.

16 THE COURT: -- we'll take it, either before your  
17 cross-examination or before your direct.

18 MR. CURTIS: Okay. I will finish it --

19 THE COURT: Okay.

20 MR. CURTIS: -- I'll tell you what. I don't want  
21 to waste the Court's Time. Oh, I'll waste just a bit of  
22 the Court's time.

23 THE COURT: All right.

24 MR. CURTIS: I'll tell you what, I won't hold the  
25 Court up. I'll come back to this on redirect. It's just

1 a small point.

2 THE COURT: Well, the other thing I was going to  
3 suggest, if it's helpful for you to organize yourself for  
4 the closing bit of your examination, if you want to take  
5 our break now and when you come back you'll be  
6 particularly pointed and succinct.

7 MR. CURTIS: We can do that, but I'm close to  
8 being done.

9 THE COURT: All right. Let's finish it up.

10 BY MR. CURTIS:

11 Q. I want to turn now, Ms. Schilz, to the justification  
12 for this whole system.

13 Could you pull up her deposition, page 72, beginning  
14 with "Do you agree," line 7?

15 MR. MURPHY: Object to this topic on foundation  
16 grounds.

17 THE COURT: I have my concerns, too, but let's  
18 see where we get. I don't think that -- well, let me put  
19 it this way: I think it's been abundantly clear that  
20 Ms. Schilz doesn't set the policy, she follows it, and so  
21 I have some concerns about her foundation about the  
22 justification here, but let's see where it gets us.

23 MR. CURTIS: Okay. Your Honor --

24 THE COURT: I think we've already exhausted the  
25 limits for knowledge on some of these --

1 MR. CURTIS: I think so.

2 THE COURT: -- but let's find out what else we  
3 can get.

4 MR. CURTIS: And I'm not going to be asking for  
5 her policy, but just her experience in the investigative  
6 process.

7 BY MR. CURTIS:

8 Q. Based on your experience in supervising CAFU since  
9 September of 2014, do you agree that most people who come  
10 through the process are not trying to commit fraud?

11 A. I agree with that.

12 Q. Have you encountered anyone coming through the  
13 process who you think was trying to defraud the state?

14 A. There was one female individual early on that  
15 indicated she was a U.S. citizen. And when we went to  
16 verify that we realized that no one had filed the papers  
17 for her. When we talked with her about that she said, "I  
18 thought they had filed them. I'm sorry. I'm going to  
19 withdraw."

20 So I think it was an error on her part. I think that  
21 she believed that someone had helped her through that and  
22 it turned out they hadn't. So initially we thought it was  
23 fraud, it looked like fraud on the face. But then after  
24 talking to the customer I really felt like it was just a  
25 mistake.

1 Q. And your testimony in your deposition was that you  
2 spoke with her directly?

3 A. Mm-mm.

4 Q. And you felt that she believed that her husband had  
5 helped her --

6 THE COURT: I think she already explained what  
7 she said, so I get the point. It doesn't sound like  
8 fraud.

9 BY MR. CURTIS:

10 Q. Okay. But you believed that was a good faith --

11 A. Yes.

12 Q. -- mistake?

13 A. Yes.

14 Q. Okay. Any other case? Putting that case aside, have  
15 you worked with any petitioners -- any other petitioners  
16 who you thought might be committing fraud?

17 A. No.

18 Q. Have you worked with any other petitioners who you  
19 thought might not be U.S. citizens?

20 A. I don't think so. But the reason I can say that with  
21 relative certainty is because of the process that we go  
22 through to authenticate the individual. Have they  
23 presented fraud? No. But if we didn't do what we do,  
24 they could.

25 Q. Of the individuals who CAFU denied, again putting

1 aside the one example we talked about, of those examples  
2 did you suspect that any of those denials were trying to  
3 commit fraud?

4 A. I don't believe so.

5 Q. And did you suspect that any of those people who were  
6 denied, other than the one we were talking about, are not  
7 U.S. citizens?

8 A. I didn't look at every one of them or I can't recall  
9 every one of them. But broadly I would say I believe they  
10 have produced the information that they have about their  
11 identity to the best of their ability.

12 MR. CURTIS: Thank you, Ms. Schilz.

13 THE WITNESS: Thanks.

14 THE COURT: All right. We're going to take our  
15 break now. We will reconvene at five minutes after three.  
16 And, Ms. Schilz, are you doing all right?

17 THE WITNESS: (Nodding head.)

18 THE COURT: 15 minutes is enough for you?

19 THE WITNESS: Yes.

20 THE COURT: All right. We'll see you in 15  
21 minutes.

22 (Recess at 2:52 p.m. until 3:10 p.m.)

23 THE COURT: All right. So just to be clear, you  
24 have the option of just doing a clean-up here for purposes  
25 of plaintiffs' case or, as a courtesy to the witness, just

1 doing all the examination you want. And so --

2 MR. MURPHY: If you put it that way. We'll be  
3 doing the cross-examination today, Your Honor, reserving  
4 our right to call on direct if necessary.

5 THE COURT: All right. Very good.

6 CLARIFICATION

7 BY MR. MURPHY:

8 Q. Ms. Schilz, let me ask you a number of questions, all  
9 within what you've been asked earlier. I'm going to  
10 apologize in advance. Some of them might come out of  
11 order. I'm just working off notes I took this afternoon.

12 Once -- if an application is put into the suspend  
13 category, what does it take to come out of that?

14 A. Activity from the customer or no activity and it  
15 times out the 180 days and can go to denial.

16 Q. So if a customer called in with another lead, what  
17 would be the effect of that?

18 A. We'd take them out of suspend and they would be back  
19 in an active research mode.

20 Q. And does the whole time cycle for suspend and timing  
21 out restart at that point?

22 A. In the past it was if they contacted us it started.

23 Q. Right.

24 A. Now, with the emergency rule, it will be only if they  
25 provide additional information.

1 Q. Okay. If an application is put into a denial  
2 category, is that denied forever?

3 A. No.

4 Q. Okay. What could cause that to be resurrected? What  
5 might result in that being an issuance?

6 A. An issuance?

7 Q. Yes.

8 A. Customer communicates with us and presents new  
9 information or a new lead that gets us to issuance, you  
10 know.

11 Q. Mm-mm. Does the application start over from scratch  
12 or does all the work that you've already got put into that  
13 roll into the new information and the new evaluation?

14 A. It all is in history and we would use anything that  
15 has been provided in the past.

16 Q. Okay.

17 THE COURT: But the customer has to start over at  
18 the Customer Service Center with the new petition?

19 THE WITNESS: If they present something at the  
20 service center, they would need to file a new petition.  
21 If they call us, because they've had a relationship with  
22 us throughout, we wouldn't require them to do that.

23 THE COURT: Okay. Even if it's in denial status?

24 THE WITNESS: Yep.

25 THE COURT: Okay. I think I understand. Good.



1 BY MR. MURPHY:

2 Q. Let's talk about the CLEAR reports. Are the contents  
3 of those reports made public?

4 A. No.

5 Q. Has information in a CLEAR report ever resulted in a  
6 denial? Let me elaborate on that just a little bit. Has  
7 there ever been someone who would have gotten a card, but  
8 because of something in a CLEAR report they didn't get a  
9 card?

10 A. No.

11 Q. So it can only help?

12 A. It's intended to help, yes.

13 Q. Let's talk a little bit about receipts and renewals.  
14 The example discussed with Mrs. Johnson, at the end -- at  
15 the expiration of her current receipt will she have to do  
16 anything at all to get a renewed receipt?

17 A. With the current receipt?

18 Q. Yeah.

19 A. No.

20 Q. What will happen?

21 A. CAFU will generate a new receipt and a new cover  
22 letter and it will be mailed to her.

23 Q. So she'll just get one in the mail, having done  
24 anything else?

25 A. Yep, before the 60 days expires.

1 Q. So there won't be a gap when she does not have a  
2 valid ID?

3 A. No.

4 Q. There was discussion of using that photo receipt as  
5 photo identification for getting documents from other  
6 states and you were asked the question about what happens  
7 next year. But if the photo receipt gets the document  
8 from the other state, what happens then?

9 A. You mean during this time if they get --

10 Q. No.

11 A. No.

12 THE COURT: I think I get it. If that -- if  
13 Mrs. Johnson were able to use her receipt to get her birth  
14 certificate, then she'd have the birth certificate and she  
15 could perfect her petition and get the standard ID?

16 THE WITNESS: Yes, standard ID, not the petition.

17 THE COURT: It doesn't last forever or however  
18 long they last.

19 THE WITNESS: Yes.

20 BY MR. MURPHY:

21 Q. There were discussions about states and cities and  
22 jurisdictions that can take longer to respond to your  
23 inquiries than others. During the time that you're  
24 waiting does investigation and activity on that file stop?

25 A. No.

1 Q. What happens in the meantime?

2 A. We're still trying to work with the information that  
3 was provided. And that may be at the point where we run a  
4 CLEAR report for more clues or contact the customer and  
5 see what else we can -- what other leads we can follow.

6 Q. And can those clues and leads lead to an issuance  
7 before that jurisdiction gets back to you?

8 A. Yes, and it has.

9 Q. And those delays caused by other jurisdictions, is  
10 that because of anything that Wisconsin or CAFU has done?

11 A. I don't believe so, no.

12 Q. Turning to some of the questions you were asked about  
13 petitioners and fees, does CAFU have a procedural document  
14 sort of commemorating its procedures?

15 A. Yes.

16 Q. Okay. Can we pull up Defense Exhibit 53? Is this  
17 that document?

18 A. I can't see a date on it, but yes, it is our  
19 document. It looks like.

20 Q. Can we zoom in on the bottom?

21 A. It may not be the most current one. Yes.

22 Q. Okay. Well, let's use this as a working draft and go  
23 to the top of page 4. I'm just going to read the note,  
24 first full paragraph. "Note: Do not direct customer to  
25 spend money in order to obtain additional documents.

1 Remember the entire premise for this process is to not  
2 require a customer to pay for documents in order to obtain  
3 a free voter identification card." Did I read that  
4 correctly?

5 A. Yes.

6 Q. Is that the current policy of CAFU?

7 A. Yes.

8 Q. Now, let's pull up Plaintiffs' Exhibit 472 that you  
9 were asked about. You testified you've never seen this  
10 before today, right?

11 A. I don't think I have.

12 Q. When did CAFU get involved in the ID petition  
13 process?

14 A. On 9/15/14.

15 Q. And before that CAFU was not involved in processing  
16 ID petitions, right?

17 A. ID petitions didn't occur before that.

18 Q. Okay. Let's go zoom in on the bottom of this page  
19 and I've had a section highlighted. What's the date of  
20 this document?

21 A. 9/5/14.

22 Q. So that was before CAFU was involved?

23 A. Yes.

24 Q. I looked up closely, but I'll give you a chance as  
25 well. Is CAFU or your department mentioned anywhere in

1 this document?

2 A. I don't think it is.

3 Q. You were asked a number of questions about Johnny  
4 Randle's situation. Do you know that case particularly  
5 well?

6 A. I remember pieces of it, yes.

7 Q. Okay. Do you remember the last correspondence that  
8 CAFU sent to Mr. Randle, what it was?

9 A. It was probably a receipt and a cover letter.

10 Q. Yes, you're right. I was thinking before that.

11 Let's pull up his CAR report. And it was one of  
12 their exhibits. I don't remember which one. We just had  
13 it opened.

14 I'm just going to ask you to review the highlighted  
15 section and see if it refreshes your recollection of how  
16 that application ended. Just read from here to here.  
17 Sorry about our lack of technology.

18 A. Okay.

19 Q. Did CAFU send him a pre-filled-out affidavit?

20 A. Yes.

21 Q. Did he return it?

22 A. It was returned by, I believe it was, his sister or  
23 someone related to him, but she had signed it.

24 Q. Was there another one sent to him after that?

25 A. Yes.

1 Q. Was that one returned?

2 A. No.

3 Q. If that was returned, would he likely have an ID now?

4 A. If he signed it, yes.

5 Q. If he signed it. Thank you.

6 A. Mm-mm.

7 Q. You were asked a number of questions about social  
8 security verification. Do you know either way if that's a  
9 statutory requirement for issuing an ID versus a CAFU  
10 procedure?

11 A. I don't know that.

12 Q. Okay.

13 A. It's a DMV procedure actually.

14 Q. Okay. Let's open up Plaintiffs' Exhibit 461. And  
15 zoom out.

16 You were asked a number of questions about this  
17 document, right? Is this a CAFU document?

18 A. No.

19 Q. What DOT department did this come out of?

20 A. Bureau of Field Services.

21 Q. Did you prepare this?

22 A. No.

23 Q. Does this govern CAFU procedures?

24 A. No.

25 Q. Who does this apply to?

1 A. Field offices. It's directed towards functions that  
2 they should perform.

3 Q. Okay. And so the Situation 1 and Situation 2  
4 discussion that we had at length here, that's something  
5 that's done in field offices?

6 A. In this document, yes.

7 Q. Yeah. And is that, procedurally, before an  
8 application gets to CAFU?

9 A. Yes.

10 Q. So any issuances coming out of these categories would  
11 be issuances before it ever got to CAFU, right?

12 A. Correct.

13 Q. You were asked some questions about whether CAFU has  
14 gotten applications that you thought were prepared  
15 fraudulently, right? Before -- never mind that line of  
16 questioning. I'm sorry.

17 You know of one person who got -- whose application  
18 got to CAFU who thought they were a U.S. citizen but they  
19 were not, right?

20 A. Correct.

21 Q. Without that work, that wouldn't have been  
22 discovered, right?

23 A. Probably. Correct.

24 Q. And without a review process, that person would have  
25 either gotten an ID or been eligible to vote without an

1 ID, right?

2 A. Correct.

3 Q. You were asked about if CAFU has ever recommended an  
4 issuance and that recommendation was returned, there  
5 wasn't an issuance; do you remember that?

6 A. I know there were a couple of times that happened,  
7 yes.

8 Q. Does that result in a denial?

9 A. No.

10 Q. What happens?

11 A. It would require the investigator to keep looking --

12 Q. And do you --

13 A. -- and keeping working. Oh, yes, yes.

14 Q. And can it result in an issuance even after that  
15 return?

16 A. Yes.

17 Q. Has that happened?

18 A. Yes, I think so.

19 Q. I think it's fair to say that late this morning and  
20 this afternoon there's been some criticisms of the CAFU  
21 processes. Are you proud of the work that CAFU does?

22 A. Yes.

23 Q. Why?

24 A. I think we were brought into the project so that we  
25 could authenticate customers that may not be able to



1 authenticate themselves.

2 Q. Mm-mm.

3 A. And while it isn't exactly the work that we do and it  
4 took some guiding for the investigators to think  
5 differently, I think we've done some good work.

6 Q. Do investigators -- sorry. I didn't mean to  
7 interrupt.

8 A. Yes.

9 Q. Do investigators like doing this sort of work?

10 A. They do.

11 Q. Are their other skills -- do the skills lend  
12 themselves well to doing this sort of work?

13 A. It does, mm-mm.

14 MR. MURPHY: Just give me a moment, please. No  
15 further questions.

16 THE COURT: Just a couple of clarifications  
17 before I ask if Mr. Curtis has any redirect. How did you  
18 find out that the person who thought they were a citizen  
19 was not actually a citizen?

20 THE WITNESS: I think that we tried to  
21 authenticate a birth record and what she had provided to  
22 us wasn't matching. And I don't remember exactly how we  
23 came to that, but -- I can't answer that. I'm not sure  
24 how the details of that occurred.

25 THE COURT: This was a person born outside the

1 United States?

2 THE WITNESS: Yes.

3 THE COURT: And so her birth record would have  
4 been outside the United States?

5 THE WITNESS: No. She was giving -- yeah, she  
6 was giving an out-of-country birth record, but she was  
7 saying that her -- she was naturalized. And when we  
8 checked that, she wasn't.

9 THE COURT: Okay. So if you have an  
10 out-of-country birth record, then you'd look for a  
11 certificate of naturalization --

12 THE WITNESS: Yes.

13 THE COURT: -- or a record of that person's  
14 naturalization?

15 THE WITNESS: Yes.

16 THE COURT: Again you're asked to remember. It's  
17 only a couple of thousand. I don't know how you've fallen  
18 short on remembering them all. But in this case do you  
19 remember particularly or is it sort of an inference of  
20 this is how it would have been detected?

21 THE WITNESS: That was probably how it was  
22 detected. I just remember that she -- it was at the very  
23 beginning honestly and I just remember she believed she  
24 was, the papers had been processed, so I'm assuming that's  
25 how we knew that.

1 THE COURT: So if a person comes and gets a  
2 driver's license, is that same check done? If I am not a  
3 native-born citizen, I apply for a driver's license  
4 record, then you'll look to verify a certificate of  
5 naturalization or some naturalization record before you  
6 issue the driver's license?

7 THE WITNESS: Absolutely.

8 THE COURT: Okay. Then I apologize if I missed  
9 this, but the CAFU Unit does the investigation and then  
10 they make a recommendation for either a grant or a denial  
11 at a certain point. And then who actually makes the  
12 decision? I don't know if we really covered that.

13 THE WITNESS: Sure. Jim Miller, the director of  
14 field services.

15 THE COURT: Mm-mm.

16 THE WITNESS: We -- the investigator produces a  
17 report and then I review it. And honestly, I'm reviewing  
18 it just if we've hit the benchmarks. And then I forward  
19 it on to Jim and he reviews it for the benchmarks and  
20 decides whether it's going into denial, going into an  
21 issuance, one of those two things.

22 THE COURT: Or a *keep working*, I guess?

23 THE WITNESS: Yeah, or it comes back and he says  
24 you're not working hard enough.

25 THE COURT: So really it's just him individually,

1 he's the person who decides all those that get -- so again  
2 in that first chart that we had adjudicated was some  
3 smaller number of those that --

4 THE WITNESS: Yes.

5 THE COURT: -- hadn't had a decision. Those are  
6 all Jim Miller's decisions; he adjudicated them?

7 THE WITNESS: Yeah. I believe there's a little  
8 over 240 of them right now, yes.

9 THE COURT: Okay. Any redirect, Mr. Curtis?

10 MR. CURTIS: I have just a few more questions,  
11 Your Honor. Thank you.

12 FURTHER ADVERSE EXAMINATION

13 BY MR. CURTIS:

14 Q. Ms. Schilz, counsel asked you to read from the latest  
15 guidance document.

16 A. Mm-mm.

17 Q. What date was that prepared, do you know?

18 A. The one from CAFU, the guidance, the instruction for  
19 CAFU? The one that was on the screen is 3/22/16. But I  
20 believe that we have updated it since then to include some  
21 of the emergency rule and the receipt process.

22 Q. Right. And that is dated May the 6th.

23 A. Mm-mm.

24 MR. CURTIS: So, Your Honor, the most recent  
25 operating procedures for CAFU, you'll be able to find them

1 at PX 460. And those are the revised regs -- or not regs,  
2 but procedures.

3 THE COURT: Okay.

4 BY MR. CURTIS:

5 Q. Counsel asked you about a statement in that document:  
6 "Remember the entire premise for this process is to not  
7 require a customer to pay for documents in order to obtain  
8 a free voter identification card."

9 Looking back at Exhibit 461 -- and maybe you could  
10 pull that up, the discrepancy?

11 THE COURT: I can do it.

12 MR. CURTIS: We won't pull it up. Is it coming  
13 up? Great. Thank you. Could we go to page 2, please?  
14 And the language right under the bullet points there.  
15 Yeah -- no, just the two lines under the bullet points.  
16 No, no, I'm sorry. You're right the first time. Yeah,  
17 exactly. And if you could enlarge those.

18 BY MR. CURTIS:

19 Q. This is what I was trying to find earlier. This is  
20 in connection with the affidavit of common law name  
21 change. You see, Ms. Schilz, at least the references that  
22 the customers will need to get the form notarized and then  
23 BFS/DMV staff are unable to witness?

24 A. That's what it says, yes.

25 Q. Okay. So in that instance the customer, unless they

1 can find a free notary, will have to spend money to get  
2 the ID, right?

3 A. I think you're referring to two different documents.

4 Q. Okay.

5 A. The statement in the CAFU instruction is a statement  
6 that I made in our training. And they, the investigators,  
7 are not to ask the customers to spend money to produce any  
8 documents needed to get to issuance.

9 Q. I understand.

10 A. This document is a BFS document. And it is true the  
11 affidavit of common law name change requires notarization.  
12 So if there's a fee, that would be BFS charging that, and  
13 it may not be a petition customer.

14 Q. I understand. But I mean just to clarify, BFS and  
15 CAFU are all part of the same division?

16 A. Right. But I can't speak to BFS procedure, is what  
17 I'm trying to say I think.

18 Q. I understand. But again they're not your procedures,  
19 but the common law name change -- let me ask you this:  
20 Would the rule be different in CAFU? In other words, if  
21 the customer wanted the affidavit of common law name  
22 change done at CAFU, it would or wouldn't?

23 A. Would or wouldn't what, charge them?

24 Q. Notarize, yeah, provide notary services.

25 A. I'm not sure if we're going to pay for notary

1 services and I think I talked about that earlier.

2 Q. Okay.

3 A. We haven't determined that yet internally.

4 Q. Okay. There were some questions about the voting  
5 receipt and I have two follow-up questions on that. First  
6 of all, there was discussion about Ms. Johnson again and  
7 you said that she'll be receiving additional receipts. Is  
8 anyone going to tell her what's going on?

9 A. We believe that was the spirit of the cover letter  
10 telling her what we're doing and giving her the receipt.  
11 That's how we communicated with all of the petitioners.

12 Q. Okay. So it ought to be in that letter?

13 A. Well, and it offers her a phone number, which she  
14 probably already has, directly to CAFU where she can call  
15 us and we can talk about it if she needs anything  
16 explained. And we have, for the record, had folks that  
17 received the cover letter and receipt call in and we've  
18 talked with them. It's a good thing because then we're  
19 back communicating again.

20 Q. Right. A question about the receipt for someone who  
21 gets a little closer to the election. Are you familiar  
22 with the term *provisional ballot*?

23 A. I am, yes.

24 Q. Okay. And you understand that if someone votes on  
25 Tuesday, but they don't have their ID, they have until

1 Friday to get that set up?

2 MR. MURPHY: Objection. Beyond the scope.

3 MR. CURTIS: I'm just trying to move it along.

4 THE COURT: I'll give you a little leeway. Go  
5 ahead.

6 MR. CURTIS: Okay. Thank you, Your Honor.

7 BY MR. CURTIS:

8 Q. Am I correct that CAFU will have five days to issue  
9 the receipt once the application -- once the petition is  
10 received?

11 A. That's what the emergency rule says.

12 Q. Okay. And specifically referring to Section 10 of  
13 the emergency rule, the department shall issue the receipt  
14 not later than the sixth working day after the applicant  
15 made the petition and the department shall issue a receipt  
16 under this subsection only by first-class mail?

17 A. That's what the rule says, yes.

18 Q. Okay. So if I'm that person who's just spaced out  
19 and forgotten about the ID and I come rushing in on  
20 Tuesday afternoon and said, "I've just cast a provisional  
21 ballot; I need to get an ID," am I out of luck?

22 A. You may not be. We've had some internal dialogue  
23 about that where we may implement a daily service where  
24 we're mailing it as it occurs at the service center.

25 Unfortunately the emergency rule says "U.S. mail," where



1 if it didn't, we might -- we've talked about -- we might  
2 be able to email the completed receipt to the service  
3 center and they could print it out and hand it to them.  
4 We have to do what the rule says.

5 Q. We're stuck with the rule for now. And the rule for  
6 now, as it's worded, gives the DMV five working days to  
7 issue the receipt?

8 A. Yes.

9 Q. So unless the DMV chooses to move more quickly, the  
10 person I was describing who cast the provisional ballot  
11 may be out of luck; is that right?

12 A. That's true.

13 MR. CURTIS: I have no further question, Your  
14 Honor.

15 THE COURT: Thank you, very much. My  
16 understanding from the defense is that they're reserving  
17 the right to call you again, so I might see you next week.  
18 Let the record reflect that the witness has expressed a  
19 willingness to return.

20 MR. SPIVA: Your Honor, this is a point at which  
21 I think we're going to take out of order. The defendants  
22 are going to call a witness and we'll cross-examine them  
23 and then we'll flip back to our case.

24 THE COURT: Okay. Very good. So the defense  
25 should call the witness then.

1 MS. SCHMELZER: Yes, Your Honor. We're going to  
2 call Diane Hermann-Brown.

3 **DIANE HERMANN-BROWN, DEFENDANTS' WITNESS, SWORN**

4 (3:38 p.m.)

5 DIRECT EXAMINATION

6 BY MS. SCHMELZER:

7 Q. Good afternoon, Ms. Hermann-Brown.

8 A. Good afternoon.

9 Q. Could you state your name and spell it for the  
10 record?

11 A. Diane Hermann-Brown; D-I-A-N-E, H-E-R-M-A-N-N hyphen  
12 B-R-O-W-N.

13 Q. And where are you currently employed  
14 Ms. Hermann-Brown?

15 A. With the City of Sun Prairie.

16 Q. And what do you do there?

17 A. I'm the city clerk.

18 Q. How long have you been the city clerk of Sun Prairie?

19 A. Over 21 years.

20 Q. And can you tell me a little bit about any  
21 certifications or professional organizations you belong to  
22 as city clerk?

23 A. I'm a member of WMCA, which is Wisconsin Municipal  
24 Clerks Association; I am a Wisconsin Certified  
25 Professional Clerk; I am a Master Municipal Clerk through

1 the International Association of Municipal Clerks; and I'm  
2 a Certified Public Manager.

3 Q. I should back up a little bit. How did you become  
4 the city clerk at Sun Prairie?

5 A. I started with the City 31 -- a little over 31 years  
6 ago. For ten years I worked in the City Administrator's  
7 Office. I started as a confidential secretary. We were a  
8 very small office then. Things evolved. We got bigger.  
9 I gained more job duties, job responsibilities, so my role  
10 changed.

11 We had a city clerk, but we did not have a deputy, so  
12 I assumed a lot of the roles of the deputy. So I started  
13 as a confidential secretary, eventually became  
14 administrative assistant, administrative assistant to the  
15 mayor, and various other titles over ten years before I  
16 became the clerk.

17 Q. Were you appointed as clerk?

18 A. I was appointed as clerk.

19 Q. Is that a partisan position?

20 A. It's nonpartisan.

21 Q. Okay. You were talking about -- you said you were a  
22 Certified Municipal Clerk, a Certified Public Manager and  
23 a Master Municipal Clerk?

24 A. Correct.

25 Q. What's a Master Municipal Clerk?

1 A. Master Municipal Clerk is the highest certification  
2 you can get as a clerk. And it's an international  
3 certification, so there's a criteria you have to go  
4 through. It takes eight to twelve years to get that.  
5 It's a combination of education and experience.

6 Q. And do you know how many Master Municipal Clerks  
7 there are in Wisconsin?

8 A. I believe there's less than 50.

9 Q. Do you know how many municipalities we have in  
10 Wisconsin?

11 A. 1,851.

12 Q. You talked a little bit about the Wisconsin Municipal  
13 Clerks Association. Is that what you refer to as WMCA?

14 A. Correct.

15 Q. Okay. And tell me about your involvement in that  
16 association.

17 A. I've been a member since I became a clerk. I've done  
18 various volunteer aspects of it. I've been a district  
19 director, which is over the southwest corner of the state,  
20 which is I believe 10 or 11 counties. And I've also been  
21 on the board of directors for probably about 17 years  
22 between being a district director. I've also held  
23 different offices: secretary, first vice president,  
24 president, and then first and second past president.

25 Q. Do you belong on any committees in that association?

1 A. I've been on a lot of committees, special projects,  
2 promotions. And we created an Election Communication  
3 Committee about five or six years ago and I've been chair  
4 of that since its inception.

5 Q. What do you do as the chair of the Elections  
6 Communications Committee?

7 A. We serve as a liaison between the clerks and the  
8 Government Accountability Board and the legislators  
9 basically educating on the concerns and the needs of the  
10 municipalities and of the clerks to do various functions  
11 of our jobs.

12 Q. When you say "educating," do you provide input on  
13 various bills or proposed laws?

14 A. Yes, we do.

15 Q. And can you tell me a little bit about Sun Prairie,  
16 what the population is, the demographics?

17 A. 31,810 the last they counted, one of the  
18 fastest-growing municipalities in the state of Wisconsin.  
19 We are a mayoric system where we have a mayor and eight  
20 council members. We have four districts, two council  
21 members per district, and we vote according to district,  
22 by aldermanic district.

23 Q. What are your duties as the city clerk?

24 A. Everything. We catch all. It's everything from  
25 official recordkeeper. All the documentations come

1 through the Clerk's Office. The clerk is the official  
2 signature of the municipality. I sign all documentation:  
3 Agreements, awards, bids, everything like that,  
4 resolutions, ordinances. And then responsible for  
5 publications and notification, keeping up our code of  
6 ordinances.

7 We -- the clerk also will do licensing. We do dog  
8 licenses, liquor establishments, bartenders, door-to-door  
9 sell, taxi, taxi businesses. And I'm sure I'm forgetting  
10 some of the licenses. There's quite a few licenses.

11 And we do elections.

12 Those are probably the top three categories.

13 Q. Tell me what your responsibilities are as far as  
14 elections go.

15 A. I'm the administrator of the elections on the  
16 municipality level, so on the local level. We're  
17 responsible for testing all election equipment, budgeting;  
18 organizing the elections so we have enough workers, we  
19 have enough equipment, we have enough ballots; and finding  
20 the workers, finding the poll workers, the election  
21 officials; training my staff, training the election  
22 officials.

23 And voter registration comes through our office,  
24 in-person absentee voting, mailing out ballots, the  
25 Election Day facilities and working with the election

1 officials on Election Day. And then after the election we  
2 gather all the data and enter all the voter registrations  
3 and we start the process over again.

4 Q. Do you know how many elections you've administered?

5 A. 95 I think. There might be one -- I'm hoping there's  
6 one I missed.

7 Q. I'm going to move on now to some of the law changes  
8 that we've been discussing this week. Let's talk about  
9 in-person absentee voting and let's talk about the  
10 limitation of one location per municipality. Is that  
11 something that the WMCA thought was advantageous?

12 A. Limiting it to one location is an advantage for most  
13 municipalities, yes.

14 Q. And why is that?

15 A. So we have better control over the process and we can  
16 have trained personnel working on it. As I said, earlier  
17 elections aren't the only thing we do. We do a lot of  
18 other things. We have very limited staff. My staff  
19 currently is only three staff members. We're in the  
20 process of adding more.

21 But if I have to have another satellite center, I  
22 have to divide my staff up. And it causes a problem with  
23 trying to keep everything staffed with enough people, it  
24 has a problem with security. You may not have a facility  
25 that provides security that is necessary, so now you're

1 transporting ballots back and forth.

2 Q. Can you talk a little bit about security, what kind  
3 of security do you need?

4 THE COURT: Before you do that, could you tell  
5 me, before the change in the law, did municipalities have  
6 more than one, were they required to have more than one?

7 THE WITNESS: No. We've always had one.

8 THE COURT: You've always had one?

9 THE WITNESS: Yes.

10 A. Security, we insure that the voter IDs are locked up  
11 every night. We insure ballots are locked up. We  
12 reconcile the ballots according to -- we run absentee  
13 logs. We can reconcile from the log to the ballots, make  
14 sure we have a ballot for every name on the log or that  
15 there is a ballot with a name on a log, and just insure  
16 that those ballots are properly taken care of and  
17 accounted for.

18 Q. So you talked about the cost with additional staff  
19 and ballot security issues. Are there any other issues  
20 that you think having only one location is an advantage?

21 A. It causes less confusion for the voters. We have a  
22 lot of voters that think City Hall, where we vote  
23 absentee, is their voting location. So if you had  
24 multiple locations there would be confusion of which one  
25 can they go to, can they go to either one, is that where



1 they'd always vote on Election Day. So it would cause  
2 some concern for voter confusion.

3 Q. I'd like to move on now to the restrictions that  
4 decrease the time period I guess for in-person absentee  
5 voting to the two weeks before or twelve days before or  
6 ten days, depending on who's asking the question. Is this  
7 something that the clerks association initiated?

8 A. I don't remember if we initiated it, but we did find  
9 advantages to it, yes.

10 Q. And what were those advantages?

11 A. With a shorter condensed period we have better  
12 control over the process, meaning we can have enough  
13 workers. When you have a full month of voting we may not  
14 have enough staff during that time. And during those two  
15 weeks before I can plan on having LTEs come in -- as I did  
16 this past election, as I will in November -- have funds  
17 that I can support having the LTEs come in.

18 And it provides us again better control, better  
19 access to the ballots and reconciling them, but also we  
20 have the ballots. When we had the three/four weeks before  
21 the election we didn't always have the ballots, which was  
22 hard to explain to the voters that we didn't have ballots.

23 Q. So when do you have ballots? You said it changes  
24 depending on what kind. Does it change depending on what  
25 kind of election it is?

1 A. If we're following where we had a primary that was  
2 contested we may have a delay in receiving ballots, yes.

3 Q. So when would you have the ballots, let's say, in the  
4 August election that's coming up?

5 A. Typically we get the ballots on the Thursday/Friday  
6 of the third week before the election.

7 Q. Okay. And do you recall, when you get ballots, do  
8 you get ballots at any different time for any other  
9 elections?

10 A. No. It's typically always that Thursday/Friday  
11 before that election.

12 Q. If there's no federal offices on the ballot would you  
13 get ballots at a different time then?

14 A. Typically not. There's typically a delay in getting  
15 them because of recount and coming out of primaries, yes.

16 Q. What are you doing for that time period from when you  
17 get ballots to when in-person absentee voting starts now?

18 A. Now, during that week we're doing our care facility  
19 voting. I have eight care facilities right now. We  
20 eventually will be going up to nine. So I'm organizing  
21 that. We make two to three trips, sometimes more to pick  
22 up stragglers that we have to go back and get. We're  
23 doing the mail-out ballots as well and we're doing our own  
24 duties.

25 THE COURT: Could you explain, what is that care

1 facility voting?

2 THE WITNESS: Care facility is also known as the  
3 *nursing home voting*. It's where we go to the nursing  
4 homes, the care facilities, and conduct in-person absentee  
5 voting to the residents.

6 THE COURT: Because I'm not sure I understood the  
7 question. Didn't you ask about the period while they're  
8 waiting for the ballots to arrive?

9 MS. SCHMELZER: I asked her when they get the  
10 ballots until when in-person absentee voting starts.

11 THE COURT: Okay. All right. I misunderstood.  
12 Okay.

13 THE WITNESS: Which would be the third week  
14 before the election.

15 THE COURT: Yeah.

16 BY MS. SCHMELZER:

17 Q. Is that a busy time in your office?

18 A. It's a very busy time in our office. I do send out a  
19 memo to all my staff and supporting staff that the three  
20 to four weeks before the election and four weeks after and  
21 the week of there's no vacations during that time because  
22 they are so busy.

23 Before the April election we're doing liquor licenses  
24 this year. Liquor licenses are due back by the 15th of  
25 April. So we have a large amount of establishments that

1 are coming in during that time during the voting period.

2 And during the November election we are doing  
3 budgeting and trying to wrap up budgets. A lot of the  
4 clerks across the state are clerk treasurers, so they are  
5 even more responsible for budgets than I am. So we're  
6 trying to do elections, but we're doing our other  
7 responsibilities as well.

8 Q. I guess a little bit later change in the law was  
9 eliminating the weekends and the Monday before the  
10 election for in-person absentee voting and also the hours  
11 from 8 a.m. to 7 p.m. Is that something that the clerks  
12 found that they wanted as far as the WMCA position went?

13 A. Yes. We advocated very strongly to eliminate that  
14 Monday before the election for in-person absentee. A lot  
15 of requirements have been placed on us for in-person  
16 absentee, for reconciling absentees, doing the poll books,  
17 doing supplemental poll books. So we had a lot more  
18 responsibilities added and we have no time to get those  
19 done.

20 I had a presidential election where we had a line at  
21 five o'clock that went for an hour and a half, so it was  
22 6:30 before the last person voted. And then we had to  
23 reconcile our ballots, make sure everything aligned up,  
24 make sure everything was signed on the ballots,  
25 certificates, and finalize our poll books and then go out

1 and set up one or two polling facilities. I got home  
2 after nine, ten o'clock at night and I was back at 5:30  
3 the next morning and I worked a 20-hour day.

4 Q. Does something have to be done with those absentee  
5 ballots before you can run the poll books?

6 A. We have to log them in that they have been issued and  
7 that they have been returned.

8 Q. So before Election Day all the absentee ballots --  
9 all the in-person absentee ballots have to be somehow  
10 entered?

11 A. Correct. They're all entered and they're reconciled,  
12 correct.

13 Q. Any other advantages that the WMCA found for  
14 restricting the hours and eliminating weekends?

15 A. We had consistency across the state. There was a lot  
16 of voter confusion during the recall in June of 2012 that  
17 some municipalities were open over the weekends, Saturday,  
18 Sunday and on the holiday on Monday. Voters -- we got  
19 phone calls on Tuesday after Memorial Day complaining that  
20 they came to our office and could not vote. Some actually  
21 went up to the city of Madison on Monday and tried to  
22 vote. Of course they didn't have our ballot style. So it  
23 caused some confusion when some municipalities are open  
24 and others aren't.

25 Q. Do you know how many in-person absentee votes you got

1 the last day of voting this last April of in-person  
2 absentee voting?

3 A. I do, 760.

4 Q. And if someone cannot get to the Clerk's Office to  
5 absentee vote, what other options do they have to vote?

6 A. They could request a ballot by mail, absentee ballot  
7 by mail.

8 Q. Let's talk about the change to the registration  
9 process. First of all, the elimination of corroboration,  
10 is this something that the clerks initially --

11 THE COURT: Could I just -- I'm having a little  
12 bit of a hard time tracking your position on behalf of  
13 Sun Prairie and then the position for the clerks  
14 association. So if we could, could we spell out what the  
15 difference is? It's not clear who you're speaking for  
16 entirely.

17 MS. SCHMELZER: Sure.

18 THE COURT: And so you had said I think that you  
19 had advocated strongly for eliminating the Monday voting  
20 before the election. But are the other things that you  
21 talked about also positions that the clerks association  
22 advocated for and took positions on?

23 THE WITNESS: Yes, we did. We advocated on those  
24 same positions, yes.

25 THE COURT: Okay. And then the clerks always

1 agree on everything?

2 THE WITNESS: No. It depends on the size.

3 There's 1,851 of us. We never 100-percent agree.

4 THE COURT: I suppose not.

5 THE WITNESS: And it depends on the size of your  
6 municipality. We can have everything from a very small  
7 township to a very large municipality. The large  
8 municipalities have lobbyists. The smaller communities,  
9 my community, does not have lobbyists, so we don't get  
10 heard. We decided, unless our association spoke up -- and  
11 that's why we created the committee.

12 And what we do is I'll survey the members. We'll  
13 have a roundtable discussion at a large election: what  
14 needs to change, what do we need to advocate, what needs  
15 to be complete before the next election cycle comes  
16 around. And then we also have district meetings a number  
17 of times during the year and conferences where we'll have  
18 round-robins and they will express their concerns. And  
19 we --

20 THE COURT: Here's what I'm trying to figure out:  
21 So when you say the larger municipalities have their own  
22 lobbyists, which ones are those?

23 THE WITNESS: Madison, Milwaukee, the large ones  
24 do.

25 THE COURT: Okay. So is the Municipal Clerks

1 Association -- I want to get the name right -- Wisconsin  
2 Municipal Clerks Association, is it, as a practical  
3 matter, the voice for the smaller municipalities?

4 THE WITNESS: We do -- all the members, we work  
5 with the members, large and small, correct.

6 THE COURT: Well, but here's my point, is that  
7 Madison and Milwaukee could say, you know, "To heck with  
8 you. We've got our own lobbyists. We don't need to get  
9 the association to agree with us." So is the voice of the  
10 association really the voice of smaller municipalities?

11 THE WITNESS: We try to be the voice of the  
12 majority.

13 THE COURT: Okay.

14 THE WITNESS: We listen to the concerns.

15 THE COURT: Because if there's 1,800 of them, I  
16 mean, almost all of them are going to be less-than-50,000  
17 communities.

18 THE WITNESS: Correct. We listen to the concerns  
19 and come up with the issues that we feel is the most  
20 prevalent. We don't go -- we *pick our battles*, is what we  
21 say, the ones that are of concern to the majority.

22 THE COURT: Okay. All right. With that --  
23 thanks for that clarification. Okay. Go ahead.

24 MS. SCHMELZER: Thank you, Your Honor.

25



1 BY MS. SCHMELZER:

2 Q. And we were talking about the elimination of  
3 corroboration for registration. And to take Your Honor's  
4 guidance, I'll make it clear. Was this a position that  
5 WMCA took one way or the other?

6 A. WMCA, the clerks of WMCA, had a concern with the  
7 elimination, yes.

8 Q. What was the concern?

9 A. That the elimination would cause a lot of provisional  
10 ballots if we lost corroboration, that we'd have a lot of  
11 provisional ballots because of it.

12 Q. And after implementation of corroboration did you, as  
13 clerk of Sun Prairie, see those concerns play out?

14 A. We did not.

15 Q. I meant after corroboration was eliminated did you  
16 see those concerns play out.

17 A. No, we did not have that many -- we had very few  
18 provisional ballots.

19 Q. Okay. Did you, as clerk of Sun Prairie, have  
20 instances where you were not able to register someone  
21 because they wanted to use corroboration?

22 A. Not that we were not able to register them; we had to  
23 work with them to find their proof of residence.

24 Q. Were they able to find that?

25 A. They were able to find it, yes.

1 Q. Let's move on to the proof-of-residency requirement  
2 now where everyone has to show proof of residency to  
3 register. Was this something that the clerks association  
4 had a position on or advocated one way or the other?

5 A. We had concerns with the original law or proposals  
6 that came through, yes.

7 Q. What were the concerns?

8 A. Our care facility, our nursing home people, would  
9 have to show a proof of residence.

10 Q. After the law came into effect did you see any  
11 problems registering the care facilities?

12 A. There was the first elections because our care  
13 facilities didn't have the documentation they needed.  
14 Some of the care facilities were very difficult to work  
15 with. They were protecting their patients because of  
16 HIPAA. We did find ways to implement a proof of  
17 residence.

18 Q. Do you see those problems continuing now with the  
19 care facilities providing proof -- the residents in care  
20 facilities providing that proof of residency?

21 A. That law has changed so we can use intake forms so  
22 it's made it a lot easier for us.

23 Q. And is there anyone in Sun Prairie that you have been  
24 unable to register because they just aren't able to come  
25 up with a proof of residency?

1 A. That are in care facilities or just anyone?

2 Q. Either way.

3 A. Not that I'm aware of, no. We've been working with  
4 them.

5 Q. Let's talk a little bit about the elimination of the  
6 requirement for special registration deputies in high  
7 schools. Was this something that you, as clerk of Sun  
8 Prairie, was responsible for overseeing?

9 A. Yes.

10 Q. And did you have any concerns about that requirement?

11 A. That it was being eliminated?

12 Q. Yes.

13 A. Not that it was being eliminated no concerns.

14 Q. Did you support, as the clerk of Sun Prairie, did you  
15 support that?

16 A. I was okay with it.

17 Q. And why?

18 A. We had some difficulties working with the high  
19 school. They had a change of personnel where staff  
20 members would come and go. They wouldn't always allow  
21 that staff member to come to training to learn how to  
22 register. They didn't always send their forms back in a  
23 timely manner.

24 Q. When you say "in a timely manner," what do you mean?

25 A. So we didn't get them before the election. And

1 sometimes they sent them to the wrong municipality between  
2 the Town of Sun Prairie and between the City of  
3 Sun Prairie.

4 Q. So you got high school students registered at the  
5 high school with these high school SRDs and they wouldn't  
6 send you the registrations until after the election?

7 A. We had that issue, yes.

8 Q. Do you know how often that high school SRD was  
9 utilized when it was in place?

10 A. When we had it, it would be less than ten times for  
11 the year. It was very seldom.

12 THE COURT: When you say "less than ten times,"  
13 less than ten --

14 THE WITNESS: Ten registrations for the entire  
15 year coming from that SRD.

16 THE COURT: Ten voters?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 BY MS. SCHMELZER:

20 Q. And if students, high school students, aren't able to  
21 register at their high school, what other options do they  
22 have in Sun Prairie?

23 A. They can go on the GAB website, pull the form and  
24 mail the documentation to us; they can come to the City  
25 Hall or they can do it in the polling place.

1 Q. Does your library in Sun Prairie have SRDs?

2 A. Our library also has SRD registration.

3 Q. Are there any of those methods that you've seen  
4 students utilizing now that they've eliminated SRDs at the  
5 high school?

6 A. Not that they're using it any more than they used to.  
7 Typically they like to come on Election Day or they like  
8 to come to our office because it's a Facebook  
9 picture-taking time.

10 Q. Let's talk about the elimination of statewide special  
11 registration deputies. Did the WMCA take a position on  
12 that proposal of the law?

13 A. Yes. The members saw advantages to it, yes.

14 Q. And what were those?

15 THE COURT: To eliminating the statewide  
16 deputies?

17 THE WITNESS: To eliminate the statewide.

18 A. The municipalities would have control over the SRDs.

19 Q. And what were the advantages besides having local  
20 control?

21 A. It was more difficult when the state was -- had  
22 control over the SRDs to disqualify or revoke an SRD,  
23 where now the municipalities have control over that and we  
24 can revoke if we have issues with an SRD.

25 Q. Did you have issues with statewide SRDs?

1 A. We have had issues in the past, yes.

2 Q. What kind of issues?

3 A. We weren't getting the registration forms in a timely  
4 manner. A lot of times they were sent to the wrong  
5 municipalities. In our case the township was getting ours  
6 and then they would have to -- they literally drove them  
7 into town because it would be near the end of the  
8 registration period that we could accept them. And they  
9 didn't always have the right number -- the big issue was  
10 the right number of digits in the driver's license, the  
11 correct driver's license numbers.

12 Q. Were these sort of isolated problems that you saw  
13 with statewide SRDs?

14 A. It was coming across the state.

15 Q. What do you mean by that?

16 A. Other municipalities across the state had the same  
17 experience.

18 Q. Were they just a few of these problems that you saw  
19 in Sun Prairie?

20 A. It was a continuous problem we saw.

21 Q. And when you say that you wanted more local control  
22 of SRDs, what do you mean by that?

23 A. So if we had an issue with a registration constantly  
24 coming from an SRD we could either work with that SRD or  
25 we could revoke their status.

1 Q. And why was that a more positive change?

2 A. Because we had control over it and we could react to  
3 it quicker.

4 Q. I know you mentioned that you had SRDs in the  
5 library. Do you have any other SRDs in Sun Prairie?

6 A. We have the ones that we've trained through the  
7 county. We do have about a hundred and -- it's over a  
8 hundred SRDs.

9 Q. When you say they train through the county, can you  
10 explain that?

11 A. Dane County does a countywide training where the  
12 municipalities can participate. We'll set up a training  
13 session on one night and invite people to come and become  
14 trained as an SRD. The municipal clerk will come and then  
15 do the required paperwork. So the county does the  
16 training, the deputy clerk does the training, and then  
17 after the training the individuals can come around to each  
18 of our stations and then we'll certify them as an SRD in  
19 our community.

20 Q. So municipalities go to this countywide training. Do  
21 you know how many municipalities are there at the Dane  
22 County training?

23 A. I believe it was between 13 and 16 in our last one.

24 Q. And so they provide the training and the SRDs can go  
25 get signed on for their --

1 A. Correct.

2 Q. -- signed on as deputies for various municipalities?

3 A. Correct.

4 Q. So they don't have to go to each municipality then  
5 and train to be an SRD?

6 A. Correct.

7 Q. Do you know any other counties that do these sort of  
8 mass SRD trainings?

9 A. There are other counties. I know Rock County is  
10 doing it. And there are some counties that are doing the  
11 same thing now. More county clerks are setting them up.

12 Q. And how many times does Dane County do this mass  
13 training for SRDs?

14 A. Lately I believe we've been doing about one every six  
15 months. We've probably been -- I think we've probably had  
16 three of them already.

17 Q. So have you seen a decrease in voter registration in  
18 Sun Prairie since they eliminated statewide SRDs?

19 A. No.

20 Q. Has there been any trend that you've seen in  
21 Sun Prairie as far as voter registration goes?

22 A. They're increasing.

23 Q. Do you know how much?

24 A. It seems like more than we can handle some days. The  
25 numbers are going up. I ran some numbers just to kind



1 of -- I have to run them in order to prepare my budget.

2 And out of curiosity I ran some numbers from October of  
3 '13 and then October of '15, which are nonelection cycles.

4 And in '13 I had 20 but for --

5 Q. You had 20 what?

6 A. 20 new registrations that came in. And then in  
7 October of '15 I had 60, which kind of gives me a  
8 barometer of what's going to happen next year for  
9 elections.

10 Q. And that was just in that month of October?

11 A. That was just for that month of October.

12 Q. Let's talk a little bit about the provision that  
13 prohibits local governments from requiring landlords to  
14 distribute voter registration forms to new tenants. Did  
15 the clerks association take any position on that?

16 A. No, we did not.

17 Q. Is that something that you, as clerk of Sun Prairie,  
18 would support landlords -- requiring landlords to  
19 distribute voter registration forms?

20 A. Our landlords weren't doing it. They weren't  
21 distributing the forms.

22 Q. Okay. If that provision was gone and there was a  
23 requirement for landlords to distribute voter registration  
24 forms, is that something that you think is a good idea?

25 MR. SPIVA: Objection. Calls for --

1 THE COURT: Overruled. I'll allow it. Is that a  
2 good idea?

3 THE WITNESS: It would be difficult because  
4 you're risking the possibility that they're handing out  
5 the wrong forms. They could be handing out forms that  
6 make no reference to sending along a copy of their ID,  
7 which means then we have to send -- or proof of residence,  
8 I'm sorry, that they did not send a proof of residence,  
9 which means we then have to send another letter back to  
10 them telling them that they need to resubmit this. And  
11 then they submit it and then we've got to match them all  
12 up and get them entered. So it really delays the process.  
13 So they could be using old forms would be the concern  
14 definitely.

15 THE COURT: Okay.

16 BY MS. SCHMELZER:

17 Q. Any other concerns with requiring landlords to  
18 distribute registration forms?

19 A. I think just using the correct form is the main  
20 concern.

21 Q. Let's talk now about the increased residency  
22 requirements from 10 to 28 days. Did the WMCA take a  
23 position on that change in the law?

24 A. I don't remember that we did. I can't remember that  
25 one.

1 Q. Can you think of any advantages as a clerk to  
2 requiring a longer period of residency before being able  
3 to register?

4 A. The advantage would be that they would have more  
5 time. If they didn't meet that standard they would have  
6 more time to go and get their absentee ballot from the  
7 previous municipality. If they were trying to register  
8 and vote with us it would be -- they would have more time  
9 to go back to their previous municipality to get that  
10 ballot.

11 Q. Would they have more time for anything else that they  
12 would need to register?

13 A. Well, if they didn't have their proper proof of  
14 residence, if they just moved in, they would have time to  
15 obtain utility bills or some other proof-of-resident  
16 documentation as well. It would allow more time to  
17 prepare.

18 Q. For this -- strike that. Have you had to turn  
19 anybody away because they were in that window from what  
20 the old law was, 10 days, to the 28 days under the new  
21 law?

22 A. I'm --

23 Q. Okay. Have you had to turn anyone away from  
24 registering because they couldn't establish that residency  
25 because they were 28 days to 10 days before the election

1 in the state?

2 A. That they have not met the 28-day --

3 Q. Right. Right.

4 A. Yes, we've had some.

5 Q. And what was their option? I think you said they can  
6 vote in their old --

7 A. They could go back to their previous municipality,  
8 request an absentee ballot from them or vote in person in  
9 that municipality.

10 Q. If they came from another state could they vote for  
11 president or vice president?

12 A. Correct.

13 Q. Do you know how many people you had to turn away  
14 because they didn't meet the residence requirements, where  
15 they would have under the old law?

16 A. We don't keep that number, keep track of them, but we  
17 don't see a lot of them.

18 Q. I want to move on to I guess Election Day and talk  
19 about observers, the change in the law that went from  
20 placing observers six to twelve feet away to three to  
21 eight feet away. Do you have any facilities in  
22 Sun Prairie where you're not able to place an observer six  
23 to twelve feet away?

24 A. I have one of my four that I cannot comply with that.

25 Q. And why can't you comply with that?

1 A. We don't have the space to do it, so they do have to  
2 be within -- it's about three feet from the poll books.

3 Q. And I guess I'll move on to my last topic, which was  
4 the elimination of straight-ticket voting. As clerk of  
5 Sun Prairie do you see any advantages to eliminating a  
6 straight-ticket voting option on the ballot?

7 A. Advantages, I'm not so sure. It allows the voter to  
8 pick and choose between the parties their candidate versus  
9 they could eliminate -- I'm sorry. Are you going to  
10 keep -- they're keeping the straight-party voting or you  
11 want to eliminate the straight-party voting?

12 Q. It's been eliminated. So I'm wondering what the  
13 advantages are, from a clerk's perspective, of eliminating  
14 straight-ticket voting.

15 A. From the clerk's perspective, the voter then could  
16 crossover vote. They could vote for either party,  
17 candidates of either party.

18 Q. Did they do that before the elimination of  
19 straight-ticket voting, did they overvote [verbatim]?

20 A. They could. They could vote either party.

21 Q. Do all elections have -- in the past did all  
22 elections have the availability of straight-ticket voting?

23 A. I believe they did, yes.

24 Q. Would a presidential primary, for example, have that  
25 option where you could only --

1 A. Presidential primary as we had in April?

2 Q. Yes.

3 A. Yes.

4 Q. You could vote straight ticket on that?

5 A. You could vote -- you could choose your party and  
6 then you could choose your candidate.

7 Q. Okay. So straight-ticket voting wasn't an option, a  
8 dot to fill in on all ballots, correct, for all elections?

9 A. Correct.

10 Q. Did that confuse voters at all, that you recall?

11 A. Yes.

12 Q. One last topic. I know I said this was the last one,  
13 but one more that I forgot. I'm going to talk about the  
14 elimination of faxing and emailing ballots to individuals  
15 besides permanent overseas and military voters. Can you I  
16 guess walk me through the process of what happens when you  
17 fax or email a ballot to a military voter or a permanent  
18 overseas voter?

19 A. How we do it?

20 Q. Yes.

21 A. Once we receive the ballot -- or the request for the  
22 absentee we would go into the current WisVote voter  
23 registration system, make sure they're a registered voter.  
24 We enter their request in there so it would generate a  
25 label. That label is held. And then we would -- from the

1 label you can decipher the correct ballot they should get.

2 In my April election I had seven different ballots.

3       You're going to scan it in. You're going to make  
4 sure the certification forms are filled out with my  
5 signature; the ballot is stamped with the correct  
6 municipality, the ward. And then you're going to scan  
7 that and then send it by email to the voter along with the  
8 instructions that they have to follow for doing the  
9 certification envelope and completing their ballot and  
10 then mailing it back as well.

11 Q. Once that ballot is mailed back, what happens to it?

12 A. We log it back into the system. We find the label  
13 that goes with it, affix it and then it's put into the  
14 appropriate district box and sent to the polling place on  
15 Election Day. Because it's a paper ballot, we have to  
16 remake the ballot onto the official ballot, which is done  
17 by two election inspectors, and then it's inserted into  
18 the machine.

19 Q. So it's a little bit more work to email ballots out?

20 A. It is a little more work.

21 Q. Does it lend itself more to human error when those  
22 ballots are recreated?

23 A. It could, yes.

24 Q. And a loss of privacy I guess for the voter?

25 A. It could, yes.

1 MS. SCHMELZER: Thank you, Ms. Hermann-Brown.

2 CROSS-EXAMINATION

3 BY MR. SPIVA:

4 Q. Good afternoon, Ms. Hermann-Brown. My name is Bruce  
5 Spiva. I represent the plaintiffs in this case. I just  
6 have a few questions for you. First I want to ask you  
7 about the Wisconsin Municipal Clerks Association. I think  
8 you mentioned that your association has 1,851 members?

9 A. There's 1,851 clerks across the state. The  
10 association has about 1,400 members.

11 Q. 1,400 members. And so is it each municipality is a  
12 member?

13 A. If they pay their dues, yes.

14 Q. Okay. There may be a few that don't pay their dues?

15 A. Yes.

16 Q. But you could have multiple people from a given  
17 municipality?

18 A. You could. Very few do. Most municipalities it's  
19 just the clerk.

20 Q. Okay. As I understand it, and you can correct me if  
21 I'm wrong, in terms of the various policy positions you  
22 mentioned, it's really one municipality gets one vote; is  
23 that fair?

24 A. Gets one vote for?

25 Q. If you're taking a position on a change in election



1 laws or rules; in terms of deciding that, each  
2 municipality, no matter how large or small, gets one vote  
3 in those kinds of decisions?

4 A. We don't put it to the members in that way. We ask  
5 the members what is of concern to them. And when we see a  
6 trend of the same issue coming up over and over or we'll  
7 ask for input on a proposed bill or on recently-enacted  
8 legislation, we'll ask them for positions, things that  
9 they would like to see changed, then we'll vent it out  
10 through the system.

11 Q. When you say "we," are you referring to an executive  
12 committee or some kind of board?

13 A. We have -- it will be the Election Communication  
14 Committee will vent it and put it out to members, discuss  
15 it at district meetings, conferences, whenever we work  
16 together.

17 Q. And then to decide whether to take a position, how do  
18 you come to that decision?

19 A. What we hear the majority saying.

20 Q. Do you take a vote of any kind within the committee?

21 A. We have in some situations, yes.

22 Q. Let me ask you --

23 THE COURT: I'm sorry to interrupt. How many  
24 members are in that committee?

25 THE WITNESS: Maybe about ten now, kind of up and

1 down.

2 THE COURT: And how do you get on that committee?

3 THE WITNESS: Volunteer. We're always looking  
4 for volunteers.

5 THE COURT: And so sometimes you vote, sometimes  
6 it's just the sense of the committee it just seems  
7 everybody's --

8 THE WITNESS: If we have to react quickly, then  
9 it's kind of the input from the committee because we have  
10 everything from large municipalities to small towns. So  
11 we have a cross-section on the committee. And if we have  
12 more time then we will vent it out through the network.

13 THE COURT: All right. Thanks.

14 BY MR. SPIVA:

15 Q. These decisions to make a policy position, they're  
16 not always unanimous; is that fair?

17 A. I don't know if it's always unanimous. But we do  
18 vent them through the system, so we hear all the angles,  
19 yes.

20 Q. Can you recall a single one of the policy changes  
21 that Ms. Schmelzer asked you about that the clerk of  
22 Milwaukee supported?

23 A. Neil Albrecht?

24 Q. Yes.

25 A. He's not a member of WMCA.

1 Q. Oh, I see. And do you know whether Milwaukee  
2 supported any of these changes?

3 A. I don't remember offhand.

4 Q. Okay. And is Ms. Witzel-Behl, the clerk of the City  
5 of Madison, a member?

6 A. Correct.

7 Q. Okay. Do you recall any of the policy decisions that  
8 you talked about a minute ago that she supported?

9 A. I don't remember exactly. But she's also on our  
10 committee.

11 Q. Do you recall whether she opposed any of them?

12 A. I don't know that she's ever stated that she was  
13 opposed to any of them, no.

14 Q. You just don't know one way or the other, I take it?

15 A. I can't confirm definitely. You know, I know she's  
16 commented and helped us draft concerns that we've needed  
17 to bring forward, yes.

18 Q. Let me ask you a little bit about voter ID and the  
19 proof-of-residence requirement, two of the topics that you  
20 spoke of on direct. If a person has had a name change  
21 since they've registered -- say they got married and  
22 changed their last name -- they'd have to reregister when  
23 they got to the polls if they wanted to show an ID that  
24 was still valid but that showed their previous name; is  
25 that correct?

1 A. They could vote under that previous name or they  
2 could change that name, yes. If they were already  
3 registered and on the books, yes.

4 Q. And would they be able to use that old -- the ID with  
5 the former name to prove their residence?

6 A. If it had their current residence on it, yes, they  
7 could.

8 Q. Okay. Let me ask you, you were deposed in this case;  
9 do you remember that?

10 A. Correct.

11 Q. Okay. Let me ask you to take a look at page 16. If  
12 we could pull up page 16 and focus in starting on line 20.  
13 Do you recall being asked the question and giving the  
14 following answer:

15 "How does the process work for a voter who has  
16 changed his or her name since he registered to vote?

17 "ANSWER: Okay. They will go to the registration  
18 table and then they will provide their proof of residence.  
19 And they also provide at that time their proof of" -- and  
20 then if we could turn to the next page -- "ID. The data  
21 is entered into our laptop system and then all the  
22 information is verified. And then they are given their --  
23 they will sign the supplemental list and they are given an  
24 *I Registered* sticker or a sheet of paper and then they go  
25 to the ballot table."

1 Do you remember giving that answer?

2 A. Mm-mm.

3 Q. Okay. And then so has your position changed in terms  
4 of whether or not they would need to reregister?

5 A. They could reregister under their new name if they  
6 had the documentation. But you asked if they were in the  
7 poll books.

8 Q. Right.

9 A. And if their name in the poll books is the same as  
10 their driver's license, they could use that name.

11 Q. What if it differs though, what if their license is  
12 in their maiden name -- or I don't know what you would  
13 call a man's name. A man might change his name as well,  
14 his previous name. We'll call them both the maiden name.  
15 -- the license is in the maiden name but they're  
16 registered and it shows up on the poll books in the --  
17 sorry, the poll book name is the maiden name and the  
18 license --

19 A. Is the new name?

20 Q. -- is the new name.

21 A. Then they would have to reregister.

22 Q. Thank you. So they couldn't use that license that  
23 had their previous name as a proof of residence, correct?

24 A. Not if it did not have the current address on it, but  
25 they could use it as their proof of ID. Then they would

1 have to have another document that shows a proof of  
2 residence.

3 Q. So if it has their current address on it, but their  
4 previous name, they could use that to establish proof of  
5 residence?

6 A. If they were going to register under that name, yes.

7 Q. Okay. This is a situation where they're registered  
8 under -- I think we just established that this is a  
9 situation where they're registered under the old name and  
10 the license is in the new name.

11 A. The new name.

12 Q. Could they use that as a proof of residence?

13 A. If the address has got their current residence on it  
14 they could.

15 Q. Okay. If the address is different, would they need  
16 some different proof of residence?

17 A. Then they would need their proof of residence, yes.

18 Q. Okay. That ID couldn't serve as a proof of  
19 residence?

20 A. If it did not have -- correct.

21 Q. And would the ID that they used have to -- would the  
22 name have to match the name in the poll book?

23 A. Yes.

24 Q. So they would have to have an ID that had their new  
25 name?

1 A. If that's what they're going to vote by, yes.

2 Q. Okay. And if the person did not have anything that  
3 had both their new address and their -- the name that  
4 they're registered in, they wouldn't be able to vote?

5 A. If they did not have a proof of address, we're going  
6 to work with them and try to find something. We have a  
7 long list that we can go through. They can show it  
8 electronically. So we do have a long list available that  
9 we can work through with them to try to find that proof of  
10 residence.

11 Q. Okay. But let's say they don't have a document that  
12 was in the new name, right --

13 A. Correct.

14 Q. -- and if they didn't have a document that was also  
15 at the current address.

16 A. Correct.

17 Q. If they were unable to find anything at the polls  
18 that works for proof of residence, that voter would not be  
19 able to vote, correct?

20 A. Correct.

21 Q. Let me turn to the topic of municipalities  
22 potentially having more than one in-person absentee  
23 location. You would agree with me that it may be an  
24 advantage for larger municipalities -- the Milwaukee's,  
25 the Madison's, the campus and university towns --

1 potentially to have more than one in-person absentee  
2 location?

3 A. Yes, there may be.

4 Q. And you would agree there's no harm in their having  
5 the option to adopt that if they choose as long as you had  
6 the option not to adopt it?

7 A. If the legislation includes the word *may*.

8 Q. Right. You would have no problem with that?

9 A. As long as they can provide the same security and the  
10 measures, no, no problem. We just don't want it mandatory  
11 for everybody that we would have to have it.

12 Q. Right. Now, you understand that it's mandatory that  
13 every municipality only have one?

14 A. Correct.

15 Q. And you know that -- you're aware that there are some  
16 other states that permit multiple early voting locations  
17 per municipality?

18 A. Yes.

19 Q. And are you aware of any security concerns that any  
20 of those localities in those states have encountered?

21 A. I have not talked to those clerks about that.

22 Q. You don't know one way or the other?

23 A. But next week I'm at an international conference and  
24 I can ask them.

25 Q. You can come back --



1 A. I can report it the week after.

2 Q. -- and lobby the Legislature to get more than one  
3 location?

4 THE COURT: Where is it? I'll go with you.

5 THE WITNESS: Omaha. We have room in our van for  
6 one more.

7 THE COURT: I might take you up on that.

8 MR. SPIVA: He's got to be with us, so he might  
9 take Omaha over us.

10 BY MR. SPIVA:

11 Q. Let me ask you about the changes. And I know there  
12 have been a number to early voting hours, in-person  
13 absentee hours. You would agree with me that before the  
14 changes that there was really no uniformity among the  
15 municipalities in terms of whether they -- you know, what  
16 types of in-person absentee hours they held?

17 A. Correct.

18 Q. And really no uniformity in terms of what types of  
19 weekend in-person absentee hours that they held?

20 A. Correct.

21 Q. And even now there are -- there's really no  
22 uniformity among municipalities in terms of the hours,  
23 in-person absentee hours, that they keep?

24 A. We have uniformity in the hours we can keep, but it's  
25 the municipality's choice -- typically budgetary by the

1 council -- if they want to have it during those hours. So  
2 you have a time period you can do it, but it's a choice by  
3 the municipality if they wish to do it.

4 Q. So there's kind of a maximum period in which you can  
5 do early in-person voting, but it's the municipality's  
6 choice if they want to have fewer hours or fewer days?

7 A. Correct.

8 Q. And that was true before, right? For instance, when  
9 there was a period of 30 days in which the municipality  
10 could hold in-person absentee voting instead of the now 12  
11 days, a municipality could choose to have fewer than 30  
12 days if they wanted to?

13 A. No. Once we had the ballots we had to have in-person  
14 voting during our normal business hours.

15 Q. Okay. But in terms of evening hours, you could  
16 choose whether or not --

17 A. Evening hours you could choose, but the day hours you  
18 could not choose.

19 Q. And in terms of weekend hours, you could choose  
20 whether or not to have that?

21 A. Yes, you could have that, you could choose.

22 THE COURT: Clarify that for me, too. So under  
23 the current law you could decide you're doing in-person  
24 absentee voting only eight until noon?

25 THE WITNESS: No, no. The current law -- well,

1 you would do it during your normal business hours. So if  
2 you're closed on Fridays, you have no voting.

3 THE COURT: Right.

4 THE WITNESS: But in the case of my municipality,  
5 previously I had a council that did not want extended  
6 hours, so we went from eight until 4:30. The council I  
7 have right now has done budgetary means. So for the April  
8 and November elections we will be open from eight until  
9 7 p.m. at night.

10 THE COURT: Okay. I'm going to guess that most  
11 municipalities will probably have voting during --

12 THE WITNESS: Normal business hours.

13 THE COURT: -- their Normal business hours.

14 THE WITNESS: Very few of us will be open until  
15 seven at night.

16 THE COURT: Right.

17 THE WITNESS: But it is a budgetary choice by the  
18 council.

19 THE COURT: But if you chose to do so, you could  
20 say, we're not going to have in-person absentee voting on  
21 that last Friday because we're going to start to get ready  
22 for the election anyway.

23 THE WITNESS: That last Friday we have to be  
24 available for absentee voting by state statute.

25 THE COURT: Okay. You have to be available?

1 THE WITNESS: In our case, April elections, a lot  
2 of times that last Friday falls on Good Friday. Our  
3 office is closed on Good Friday, but my staff and I are  
4 there because we're required to be for absentee voting  
5 until five o'clock.

6 THE COURT: So that's under the new law you have  
7 to be there?

8 THE WITNESS: I believe that's always been there  
9 for the last number of years.

10 THE COURT: So that part is not a feature of the  
11 new law. Okay.

12 BY MR. SPIVA:

13 Q. In fact before the elimination of weekend early  
14 voting Sun Prairie had some weekend hours, correct?

15 A. It would depend on the year and the council that had  
16 authorized it and funded it, yes.

17 Q. But in some years you did have limited weekend  
18 voting?

19 A. We had Saturday until noon.

20 Q. That was it, you chose to only go until noon on  
21 Saturday?

22 A. Yes.

23 Q. And you didn't have Sunday hours, I take it?

24 A. Never.

25 Q. And you never went past noon on Saturday?

1 A. We worked past noon, but we did not do absentee hours  
2 past noon on Saturday.

3 Q. I'm sorry?

4 A. We never did absentee voting past noon on Saturdays,  
5 but we would typically work getting ready for the  
6 election.

7 Q. That was the municipality's choice?

8 A. That was the municipality's choice.

9 Q. Let me ask you, before the elimination of in-person  
10 absentee voting on the last Monday before the elections --  
11 so the Monday before the election, the day before the  
12 election -- you had the option not to offer in-person  
13 absentee voting on that day; isn't that correct?

14 A. No, that is not correct. We had to be available for  
15 in-person absentee on that day before, until 5 p.m.

16 Q. The statute said what it said. If a municipality  
17 were allowed to have weekend voting, if it were an option  
18 for it to have weekend voting, you don't see any harm in  
19 that?

20 A. It would be up to the municipality to fund it, but it  
21 would cause confusion with the voters.

22 Q. And remind me again, what's the confusion that it  
23 would cause.

24 A. When one municipality does and another municipality  
25 doesn't have those extended hours, we get a lot of people

1 come from the township who want to vote at the *city of*  
2 because we're open and the township is not open on a  
3 Saturday; or we had some this election in April where they  
4 came and they wanted to vote because they were driving  
5 past City Hall. And of course we don't have their  
6 ballots, so they can't vote in our location.

7 Q. But they're in the wrong township, correct?

8 A. Exactly. So the difference between municipality and  
9 municipality does cause some confusion.

10 Q. That confusion really isn't due to the availability  
11 of in-person voting; it's due to the person being in the  
12 wrong place, right?

13 A. It's the confusion that one municipality may have the  
14 funds to broadcast and the news stations may cover it --  
15 in the situation Madison covers -- that they have voting  
16 until seven o'clock at night, where another small  
17 municipality doesn't. So the voters listen to the station  
18 that says, "Hey, there's," you know, "absentee voting  
19 tonight until seven o'clock. Don't forget to vote." And  
20 they show up at your doorstep and you get the phone call  
21 yesterday, "Why weren't you open? Because the news  
22 station said you were going to be."

23 Q. And that's true now, right, because some  
24 municipalities may stay open and some my choose to do  
25 normal business hours?

1 A. Correct.

2 Q. So that confusion --

3 A. That's just -- the confusion is to Monday to Friday.  
4 It doesn't include the weekends, no.

5 Q. But there's still that type of potential confusion?

6 A. There's still that factor, yes.

7 Q. Let me ask you about absentee mail-in voting. You  
8 receive, I take it, in every election some absentee  
9 ballots you have to reject because the people have failed  
10 to comply with the rules of the absentee -- to vote the  
11 absentee ballot, fair?

12 A. Correct. Yes.

13 Q. And I suspect that sometimes you have problems with  
14 the Post Office delivering the absentee ballots either to  
15 the person or back to you?

16 A. We do.

17 Q. Would you say the Post Office can be a bit of a  
18 challenge?

19 A. The Post Office can be a bit of a challenge, yes.

20 Q. Okay. And would you agree that voting absentee by  
21 mail may pose some difficulties for people who have  
22 trouble reading or filling out their ballots?

23 A. As far as they're confined to their home and they  
24 have difficulty?

25 Q. Not necessarily confined to their home, but somebody

1 who is either illiterate or has a very low level of  
2 literacy.

3 A. Could be a challenge. They could ask for assistance  
4 through from family or friends to assist them who would  
5 then sign the ballot that they have assisted.

6 Q. Right. But if you had somebody who didn't have that  
7 kind of a support network, it might be a challenge for  
8 them; would you agree?

9 A. Could be a challenge, yes.

10 Q. And there's no real program, you know, by your  
11 municipality or other municipalities that you know of to  
12 help people who are either illiterate or have a low level  
13 of literacy in filling out their absentee ballots?

14 A. Not that I'm aware of.

15 Q. And the absentee ballots and the instructions, those  
16 are sent and they are in English only; isn't that right?

17 A. The absentee instructions that we would send to the  
18 voter?

19 Q. Yes, and the ballot, yes.

20 A. Yes, those are in English for Sun Prairie. I don't  
21 know if other municipalities send them in other languages.  
22 But we only -- the registration forms are multilanguage,  
23 but instructions are in English.

24 Q. I'm going to ask you about some articles and I will  
25 put them up just in case you need help. Some of them are



1 from a number of years ago, but they're things where  
2 you've been quoted and I just want to verify that you were  
3 quoted accurately.

4 If we could put up Ms. Hermann-Brown's Deposition  
5 Exhibit 2. And, Ms. Hermann-Brown, this is a news article  
6 from the *Milwaukee Journal Sentinel* and I think it's dated  
7 November 13th, 2013. And I think in here I think you  
8 confirm that your office sometimes offered Saturday  
9 morning voting.

10 But what I wanted to confirm was -- actually if we  
11 can zoom in there's a quote that says, "It's difficult,"  
12 it begins "It's difficult." Let's see if I can give you a  
13 paragraph. I think it's on the second page of the exhibit  
14 and it's towards the bottom.

15 And actually start with the paragraph that says  
16 "Diane Hermann-Brown." And this says, "Diane  
17 Hermann-Brown, the Sun Prairie clerk and the chair of the  
18 Elections Committee for the state clerks association, said  
19 her office has sometimes offered Saturday morning voting,"  
20 et cetera. "She said the bill could complicate the jobs  
21 of clerks in both small towns and larger cities."

22 And this is where the quote is and if you could just  
23 confirm for me whether they quoted you accurately. It  
24 says, "It's difficult because you have 1,851 communities  
25 in the state of Wisconsin that you have too much diversity

1 to make them all standardized." Did they quote you  
2 accurately?

3 A. I believe they did, yes.

4 Q. Okay. And --

5 THE COURT: And what was the -- I'm not really  
6 expecting you to remember this, so I might have to get a  
7 foundational question from Mr. Spiva -- but what was the  
8 bill that was being discussed there?

9 MR. SPIVA: I can actually flip back and --

10 THE COURT: That would be great.

11 MR. SPIVA: This was concerning in-person  
12 absentee voting on the weekends. And let's see if I can  
13 find my place in here. If you maybe look at the --

14 THE COURT: I think it's the fifth paragraph.

15 MR. SPIVA: Yeah, I think that's right.

16 BY MR. SPIVA:

17 Q. The fifth paragraph on the first page says, "One  
18 measure would limit early voting in municipal clerk's  
19 offices to weekdays between 7:30 and 6 p.m., a move that  
20 would effectively end weekend voter drives." Do you  
21 recall making the statement in the context of that bill?

22 A. Right.

23 MR. SPIVA: Was that sufficient, Your Honor, in  
24 terms of foundation?

25 THE COURT: Yeah. Very good.

1 BY MR. SPIVA:

2 Q. If we could put up Ms. Hermann-Brown's Deposition  
3 Exhibits 3. I'm changing topics here. This is not on the  
4 issue of in-person absentee, but on the Voter ID bill.  
5 This appears to be a *Wisconsin State Journal* article from  
6 October 12th, 2011. Do you recall being asked about that  
7 at your deposition?

8 A. Yes.

9 Q. Okay. And that's before the Voter ID law was first  
10 implemented; is that correct?

11 A. Correct.

12 Q. Okay. And if we could turn to the second page of the  
13 article it refers to you. I don't know if it's a quote or  
14 a paraphrase, but it's saying that "The number of  
15 provisional ballots will likely jump into the thousands."

16 Let's see on the second page and it is the second  
17 paragraph. It's not a quote, but it says that "According  
18 to Diane Hermann-Brown, Sun Prairie City Clerk, that  
19 number likely will jump into the thousands in the next  
20 election." And it refers back to the provisional ballots.  
21 Do you recall giving that statement?

22 A. Yes.

23 Q. And then further down, I think two paragraphs down,  
24 it says that, again referring to the casting of  
25 provisional ballots, that "This presents two logistical

1 problems: first, filling out the long form provisional  
2 ballot slows down the polls; and second, thousands of  
3 provisional ballots could mean election results will take  
4 as long as a week to certify." And then they quote you  
5 saying, "This could create a lot of headaches." Do you  
6 recall the quote?

7 A. Yeah.

8 Q. You haven't had a presidential election with the new  
9 voter ID requirement in place; is that right?

10 A. We have not had a presidential, no.

11 Q. Okay. Would you agree that the provisional balloting  
12 process, that adds a lot of complication to the election  
13 process?

14 A. It's a very involved process, yes.

15 Q. I'm going to ask you about an article in which you  
16 talk about the corroboration issue. This one is  
17 Ms. Hermann-Brown's Deposition Exhibit 4. And this is a  
18 *Wisconsin State Journal* article dated October 21st, 2012.  
19 Do you remember talking about this at your deposition as  
20 well?

21 A. Correct.

22 Q. And if we could look at the -- zoom in on maybe the  
23 fourth paragraph where you're quoted as saying, "'Everyone  
24 focuses on voter ID, but I don't think they realize that  
25 loss of corroboration is the bigger issue,' said Diane

1 Hermann-Brown, past president and current communications  
2 chairwoman of the Wisconsin Municipal Clerks Association.  
3 'It's going to hit all ages, not just young people. That  
4 is a huge issue.'" Do you remember giving that quote?

5 A. Yes. Mm-mm.

6 Q. And it doesn't quote you, but it says in the next  
7 paragraph down, "In 2008 about 500 Sun Prairie residents  
8 used corroboration to register, said Hermann-Brown, clerk  
9 for the Dane County City" -- I guess they were quoting  
10 you, but they didn't put it in quotation marks. Do you  
11 recall saying that?

12 A. I don't recall saying that.

13 Q. Do you have any reason to believe that's inaccurate?

14 A. I don't.

15 Q. Okay. And then further down, towards the bottom of  
16 this first page, again it seems to be either a paraphrase  
17 or a quote from you, it says, "Some students and homeless  
18 people have used corroboration. But Hermann-Brown said  
19 new brides and elderly women who move in with their adult  
20 children are most likely to be hurt by the ban because  
21 they often don't have utility bills or other common proofs  
22 of residence in their names." Do you recall giving that  
23 statement?

24 A. Yes.

25 Q. Okay. And then it goes on to say, "Because of tough

1 economic conditions, many people need to reregister to  
2 vote after moving out of houses and into apartments or  
3 into homes of family members, Hermann-Brown said." Is  
4 that an accurate paraphrase of you?

5 A. Yes. Mm-mm.

6 Q. And then on the next page, and I believe here,  
7 correct me if I'm wrong, that you're discussing the new  
8 proof-of-residence requirement I think maybe together with  
9 the Voter ID law. But it says, "Even though" -- the  
10 paragraph begins "Even though," if we can call that out --  
11 "Even though it's still legal to register at the polls on  
12 Election Day, the changes in the law make it risky,  
13 Hermann-Brown said." Do you recall saying that?

14 A. I don't recall saying that, but --

15 Q. Do you have any reason to believe that's inaccurate?

16 A. I don't have reasons to believe.

17 THE COURT: You're talking about the quote?

18 MR. SPIVA: The quote, yes.

19 THE COURT: I'd really like to know more about  
20 whether you think it's a risky -- whether you believe that  
21 statement.

22 THE WITNESS: It is risky. If you're waiting  
23 until the last minute to go to register on Election Day  
24 and you don't have the documentation, you're risking not  
25 being able to register. We have voters that come to the

1 facilities with a magazine as their proof of residence and  
2 then they become frustrated because they can't use it. So  
3 if you're are not prepared, you're risking not getting  
4 registered properly.

5 THE COURT: Thank you.

6 BY MR. SPIVA:

7 Q. Okay. I want to ask you about the email/fax issue.  
8 I guess I actually want to put up one more. You've had  
9 instances -- before the option to email or fax an absentee  
10 ballot was eliminated you had had some instances where  
11 somebody was overseas temporarily, like a college student  
12 studying abroad, where you emailed them or faxed them  
13 their absentee ballot?

14 A. Overseas, yes. And we, at one point, could do it  
15 within the United States as well.

16 Q. Mm-mm. And so you took advantage of that option when  
17 it was available?

18 A. I did. I did fax and I did email.

19 Q. Okay. And why did you use email instead of mailing  
20 materials?

21 A. Because they were in Florida and Florida has  
22 challenges with their mail system. So we -- I might  
23 have -- some of them I recall did request the ballot by  
24 email. But some of them we had already mailed them a  
25 ballot, we're getting tight on our timeline. So if I put

1 another one in the mail, they may not have gotten it.

2 Florida, when we get our *snowbirds* in the senior  
3 trailer parks, they have very -- they have a challenge  
4 getting their mail. We had some that were in Mexico.  
5 I've had them all over the world and in the United States.  
6 And I took advantage of the fax and the email because it  
7 was their right to vote, so I took it very seriously, so I  
8 would email.

9 Q. That was a useful tool for you to insure their right  
10 to vote?

11 A. It was more time consuming and it was a challenge,  
12 but it was a useful tool, yes.

13 Q. Okay. And if you were to use regular mail, the  
14 timeline can get very tight for getting an absentee ballot  
15 back in time, particularly if you're mailing it overseas;  
16 is that fair?

17 A. Yes.

18 Q. But under the current law, you're not permitted to  
19 use that option?

20 A. Correct.

21 Q. And previously, before the law changed, you weren't  
22 required to use email and fax to send an absentee ballot,  
23 were you?

24 A. No. It was a *may*. You could choose to use it.

25 Q. It was an option?



1 A. It was an option.

2 Q. So to the extent that it created any extra burden of  
3 any sort, that was a burden the clerks could choose  
4 whether or not to take on; is that fair?

5 A. Right. It was the clerk's choice.

6 Q. Let me ask you; as I understand it, you had, in lead  
7 up to the passage of the Voter ID law, you had -- you were  
8 involved in meetings at that time with other clerks and  
9 Senator Lazich? I can never say her name right.

10 A. *Lazich*.

11 Q. Thank you. Is that right?

12 A. Right.

13 Q. And you provided recommendations to Senator Lazich,  
14 and I guess to the others as well, about what should be  
15 included in that registration; is that right?

16 A. Correct.

17 Q. And one of the things that you recommended is that  
18 the Legislature expand the types of IDs that were included  
19 in the draft bills; is that right?

20 A. Correct.

21 Q. And you recommended that the ID law permit student  
22 IDs issued by a state, college or university to be used;  
23 is that correct?

24 A. Correct.

25 Q. And you recommended that the Legislature not

1 eliminate corroboration, correct?

2 A. Correct.

3 Q. I'm going to ask you just briefly about the issue  
4 high school special registration deputies. When that was  
5 in place you really received very few of those per year;  
6 isn't that right?

7 A. Correct.

8 Q. So it really didn't take much of your time, I take  
9 it?

10 A. It did take time if they weren't completed properly.

11 Q. Let me -- but there were fewer than ten of those per  
12 year, correct?

13 A. Correct.

14 Q. Okay. Let me ask you about the issue of aggressive  
15 observers. Is it fair to say that you've had issues with  
16 aggressive observers at the polling place?

17 A. I have had issues, yes. Well, I haven't had issues,  
18 my election officials have had issues.

19 Q. Sure, sure. Is there an individual named Ardis  
20 Cerny, another name that I can't say, that has occurred in  
21 Sun Prairie?

22 A. Ardis has never been an observer in Sun Prairie, no.

23 Q. Okay. But you've had complaints from some of your  
24 fellow clerks about issues that she's created in other  
25 localities?

1 A. I don't recall that they were about her specifically.

2 Q. Okay. Let me ask you about Plaintiffs' Exhibit 149,  
3 if we can put that up. I don't know if there's a way to  
4 make it a little bigger, particularly at the top.

5 Now, I just wanted to -- you see this is an email  
6 string in which you were communicating with a person. I  
7 think it's a discussion about communications with Ardis  
8 Cerny. And then you communicated with Michael Haas, from  
9 the GAB, and then ultimately forwarded it.

10 I can let -- why don't we scroll through that. I  
11 don't want to read too much of the document, but just kind  
12 of refresh your recollection. After you've had a chance  
13 to read that, maybe we'll flip it to the second page. If  
14 we can flip to the second page. Is that the end of the  
15 second page? Yeah.

16 Does this refresh your recollection that you had some  
17 discussions with her about issues she was raising at the  
18 polling places?

19 A. I did. And I remember she, yeah, she had an issue.  
20 And I don't remember exactly what it was, but I referred  
21 her to the manual.

22 Q. Okay. And you recall that she was actually incorrect  
23 in some of the things she was asserting?

24 A. Correct. Yes.

25 Q. She was asserting that some of the poll workers were

1 doing things wrong?

2 A. Correct. And that's why I had asked for GAB's  
3 advice.

4 Q. Do you know whether Ms. Cerny, based on her comments,  
5 indicated that she influenced any legislation that's been  
6 passed in the last several years regarding elections?

7 A. I don't remember.

8 Q. Okay. But are you aware that she talks to the  
9 Legislature quite a bit?

10 A. I am aware of that, yes.

11 Q. Okay. If we could put up Plaintiffs' Exhibit 157.  
12 And I think I want to turn to the third page of this. And  
13 then maybe if we can make it a little bigger, the text and  
14 the *To/From*.

15 THE COURT: I'd like you to just make a record of  
16 what exhibits you're showing. For the record, the last  
17 one, Ardis Cerny email string, was Plaintiffs' 149.

18 MR. SPIVA: Sure. And actually I don't think  
19 there was an objection to that, but correct me if I'm  
20 wrong.

21 MS. SCHMELZER: No objection, Your Honor.

22 THE COURT: Okay.

23 MR. SPIVA: I'd like to move to admit that, Your  
24 Honor.

25 THE COURT: Plaintiffs' 149 is admitted.

1 MR. SPIVA: Plaintiffs' Exhibit 157, I can lay a  
2 foundation first, but I don't think there was an  
3 objection.

4 THE COURT: Let's see if there's any objection.  
5 If there's no objection, then we're done.

6 MS. SCHMELZER: No objection, Your Honor.

7 THE COURT: We're done. Then it's admitted.

8 MR. SPIVA: Thank you.

9 BY MR. SPIVA:

10 Q. Let me direct your attention to the third page.  
11 There's a reference to you having made an appearance  
12 before the GAB; is that right?

13 A. We're going to the north woods for a meltdown.

14 Q. Let's see. It says, "Also I think there will be some  
15 of us coming to the board meeting in August to voice our  
16 concerns with administering absentee voting in the  
17 long-term care facilities." Do you see that?

18 A. Okay.

19 Q. And let's see. I think there's a reference to you  
20 going on behalf of the Municipal Clerks Association, but  
21 maybe it's on the next page. I don't have a hard copy, so  
22 can we flip to the next page, the third page of it? No.  
23 Okay.

24 Let me just ask you -- forget the document because  
25 we're not finding the place -- do you recall that at one

1 time you appeared before the GAB and said that the  
2 majority of municipalities do not have polling-place  
3 issues with observers, but that some municipalities have  
4 more aggressive election observers, which is why rules for  
5 observers are necessary?

6 A. Correct.

7 Q. Okay. And which municipalities, by the way, were you  
8 thinking of?

9 A. The southeast portion of the state is known for their  
10 more aggressive observers.

11 Q. Okay. How about Milwaukee?

12 A. Milwaukee would be part of that section.

13 Q. Okay. And do you recall that one of the examples  
14 that you provided was that you had election observers that  
15 were so close to election officials that their hair --  
16 they were breathing on the poll worker's hair?

17 A. Yes. It was a high school student. I had an  
18 observer so close that the student's hair was moving. We  
19 had to ask him to step back.

20 Q. Okay. I take it that's not an ideal election  
21 administration practice?

22 A. Especially when you have high school students that  
23 are you election officials, that is not a good practice to  
24 have them so close.

25 THE COURT: So the poll worker was a high school

1 student?

2 THE WITNESS: Yes.

3 THE COURT: And the election observer, what kind  
4 of person was that?

5 THE WITNESS: He ended up being one of my council  
6 members. He's now much better educated about where he can  
7 stand during observation. But he felt compelled that he  
8 had to be close enough looking over the workers' shoulders  
9 so he could see the poll books from behind them, so he was  
10 very very close to them.

11 THE COURT: And if you would, would you give me  
12 your perspective on what the observer is entitled to see  
13 and how close they need to be to see it?

14 THE WITNESS: The observer should be close enough  
15 that they can see the documentation and hear what is  
16 happening. In some facilities that's a little more  
17 difficult than other facilities.

18 But the method that most municipalities -- most  
19 voting locations use is that they repeat the names twice  
20 so the voters don't have -- or the observer does not have  
21 to be on top of the poll workers or standing right next to  
22 the voters. So the election officials should be allowed  
23 their comfortable bubble or their space so that you're not  
24 in their space to the point where you're breathing their  
25 air, moving their hair.

1 THE COURT: And the voting process is open to  
2 observation, the observers have the right to be there.  
3 But the issue has come up, and we've discussed it with  
4 other witnesses, about the residual privacy that the  
5 voters should have because they might be providing proof  
6 of residence that's a bank statement and so there might be  
7 information on there that maybe is not something that the  
8 observer should be able to see.

9 THE WITNESS: Correct. Especially in the  
10 registration area the observer should be farther back than  
11 the three feet so that they don't see that information.

12 THE COURT: Mm-mm.

13 THE WITNESS: A lot of voters just take the stuff  
14 and throw it out on the table and they really don't care.  
15 And other ones, you know, they'll huddle to cover, they  
16 don't want to take it out of the envelope or anything. So  
17 people are very concerned about their privacy on  
18 registration.

19 THE COURT: So is the observer -- so in the  
20 registration area where the proof of residence, which is I  
21 suppose the most sensitive stuff --

22 THE WITNESS: Correct.

23 THE COURT: -- although your driver's license has  
24 your age, I suppose you could be sensitive about that,  
25 too -- are the observers entitled to actually see the



1 documents themselves?

2 THE WITNESS: They can look. They cannot touch.

3 THE COURT: Okay.

4 THE WITNESS: So we can show it to them, but they  
5 cannot take the poll books and start flipping through the  
6 pages themselves. They can say if they missed a poll --  
7 or if they missed a voter and we can flip back, but they  
8 aren't handed the books to go through them themselves.

9 THE COURT: And then for the documentation that  
10 the voters bring to document their residence --

11 THE WITNESS: They're not allowed to verify it,  
12 no.

13 THE COURT: Okay. Thanks.

14 BY MR. SPIVA:

15 Q. So it would be fair to say that you found the six to  
16 twelve-foot rule to be a good one?

17 A. My election inspectors were much more comfortable  
18 with that, yes.

19 Q. The last question I had for you really is about this  
20 rule about landlords giving out registration forms. You  
21 understand that prior to the prohibition on municipalities  
22 having a rule that landlords had to give out registration  
23 forms that there was no requirement that any municipality  
24 do that?

25 A. Correct.

1 Q. Okay. That would have been an -- you didn't do that  
2 and that was at your option, correct?

3 A. I don't know of any municipalities that did do that.

4 Q. Are you aware that Madison used to do that?

5 A. I'm not sure if they supplied it to all their  
6 landlords or if it was the landlord's choice to do it --

7 Q. Okay. You just don't know?

8 A. -- their own option to go and get the forms. That's  
9 correct.

10 MR. SPIVA: Okay. Thank you, very much,  
11 Ms. Hermann-Brown. I appreciate it.

12 THE COURT: Thank you. Any redirect.

13 MS. SCHMELZER: Yes, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. SCHMELZER:

16 Q. When Mr. Spiva was talking about the in-person  
17 absentee voting restricted time period and hours and days,  
18 he talked about there really being no uniformity amongst  
19 municipalities in any way, correct?

20 A. Correct.

21 Q. Do you believe that some uniformity is better than  
22 none?

23 A. From the clerk's perspective?

24 Q. Yes.

25 A. Yes.

1 Q. Are there any municipalities that can have voting on  
2 Saturdays?

3 A. Currently, no.

4 Q. Does that help I guess voters not be as confused  
5 amongst different municipalities?

6 THE COURT: We've already covered this. I've got  
7 her take on that already, despite Mr. Spiva's  
8 cross-examination. I heard you the first time.

9 MS. SCHMELZER: Thank you, Your Honor.

10 BY MS. SCHMELZER:

11 Q. And Mr. Spiva talked about individuals who might have  
12 some special needs that an absentee ballot by mail might  
13 be difficult for them to navigate; do you recall that?

14 A. Yes.

15 Q. If anyone had any questions about how to fill out  
16 their absentee ballot, could they call the Clerk's Office?

17 A. They could call the Clerk's Office. We also offer  
18 curbside voting where I would go out to the vehicle and  
19 explain the ballot to them.

20 Q. And they put up an exhibit here where you were quoted  
21 I think in an article talking about the provisional  
22 ballots that may result from the Voter ID bill or the  
23 Voter ID law --

24 A. Correct.

25 Q. -- where you thought it would jump into the thousands

1 possibly?

2 A. Correct.

3 Q. Was that true?

4 A. The statement was true at the time because we were  
5 looking at the numbers from other states that had gone  
6 through a similar scenario and their numbers did jump.  
7 And originally we thought we would have a lot. But there  
8 was additional legislation that allowed for some  
9 provisions, so we didn't see those numbers.

10 More of a concern for us was the timing to educate  
11 the voters. And we really only had the one election where  
12 we had the ID. Now we've had more time period for the  
13 voters to get their documentation, so we're not seeing  
14 those thousands of provisionals that we had feared.

15 THE COURT: Now, on the first time I understood  
16 your answer to be that in Sun Prairie you hadn't seen a  
17 dramatic number of provisional ballots.

18 THE WITNESS: Correct.

19 THE COURT: Now your answer seems to suggest that  
20 it's more of a statewide --

21 THE WITNESS: Correct, across the state. We're  
22 not seeing the -- we don't see them in Sun Prairie. I  
23 only had 11 in April and only five of them did not come  
24 back by Friday. And then across the state we're not  
25 seeing the numbers that we thought we would see.

1 THE COURT: Okay. Thanks.

2 BY MS. SCHMELZER:

3 Q. And does Voter ID create a lot of headaches? That  
4 was your quote in that article. Do you see that creating  
5 a lot of headaches now?

6 A. It's a headache and it's a challenge to train the  
7 election officials on how to do it. The system we use is  
8 we take it right out of the manual from the Government  
9 Accountability Board and we put check marks in front of  
10 each step as they go along. You have to document that  
11 voter ticket number six different places as you go through  
12 the process, so it's a very complicated process.

13 Q. Have you gotten any complaints from your co-workers  
14 about I guess the voter ID provision adding more time to  
15 that process?

16 A. As far as when they're checking in showing their ID?

17 Q. Yes, yes.

18 A. My election officials are across the board as  
19 believing in the voter ID or not believing in the  
20 requirement of voter ID, but they like the ability to take  
21 that driver's license and look at the name as to how it's  
22 spelled because they can't always figure out when the  
23 voter says their name how to spell the name.

24 I always use the example of *Kjenivet*, does it start  
25 with a J or a V, because it actually starts with a K;

1 whereas if they have the driver's license, you know, when  
2 they have the driver's license in front of them to look  
3 at, they can go immediately to the K-J section, they don't  
4 have to ask a voter to spell their name.

5 Q. So they've found that to be helpful having the voter  
6 ID?

7 A. They've found it to be very helpful, yes.

8 Q. Another article that was shown talked about a quote I  
9 think from you that the loss of corroboration was the  
10 bigger issue?

11 A. Correct.

12 Q. Was that what we talked about earlier, your concerns  
13 about the care facilities?

14 A. The care facilities, yes. And originally the Voter  
15 ID bill did not have the ability for electronic utility  
16 bills, cable TV bills, phone bills. And then that was  
17 added in later to allow that electronic form to also be  
18 shown, so that has helped with that as well.

19 Q. So the issue with the care facilities, you testified  
20 earlier, has been cured by -- your issues with care  
21 facilities, has that been resolved?

22 A. That has been resolved, yes.

23 Q. By what?

24 A. We can now use the intake forms. And then also they  
25 can receive a government letter, so I can issue them a

1 letter that says that they need to have a proof of  
2 residence when they need to vote and that just showed a  
3 proof of residence with that letter.

4 Q. And just to clarify, that occurred after this article  
5 came out?

6 A. Yes.

7 THE COURT: You cited some other in that quote in  
8 that article. Care facilities was one thing, but you  
9 cited some other examples of people who moved in with  
10 their parents, et cetera.

11 THE WITNESS: Correct. What we see is elderly  
12 adult -- we don't, in Sun Prairie, we don't have the  
13 issue, and in most municipalities we don't have the issue,  
14 of students and IDs. We have the issue of the older adult  
15 moving back in with their adult children. They don't have  
16 a utility bill, they don't have a lease agreement and the  
17 cell phone is on the family plan, so they don't have the  
18 required documentation for a proof of residence. That's  
19 where we were seeing it.

20 THE COURT: And the intake form doesn't solve  
21 that problem because they're just with their family?

22 THE WITNESS: Correct.

23 THE COURT: Is there a solution now to that  
24 problem?

25 THE WITNESS: If they come in early enough they

1 can go open a bank account, they transfer their banking  
2 account and open one, or keep the current one but change  
3 their address on that. So they need to do that in a  
4 timely fashion in order to be able to use that banking  
5 statement.

6 THE COURT: All right.

7 THE WITNESS: So there's an option, but they have  
8 to do it far enough ahead.

9 THE COURT: What about the clerk's letter, does  
10 work for them?

11 THE WITNESS: That would work, but it would be a  
12 lot more time for the clerks to have to do that, so we  
13 typically don't do that part of it.

14 THE COURT: You'd prefer they'd have a bank  
15 statement?

16 THE WITNESS: Yes.

17 THE COURT: Okay. All right.

18 BY MS. SCHMELZER:

19 Q. And I think Mr. Spiva talked about the elimination of  
20 the high school special registration deputies and I think  
21 you said that that didn't take much time on your part; is  
22 that correct?

23 A. Much time as far as when you only get a few of them.  
24 But when they're not done correctly, then it does take  
25 more time.



1 Q. And do you have to put any time into training those  
2 special registration deputies?

3 A. We do have to train the deputies. They're invited to  
4 the training with my other election workers, my other  
5 SRDs. What we saw is typically the SRD training was done  
6 nights and weekends, so that school staff member would not  
7 attend. I'd have to go to the high school specially to do  
8 that training.

9 Q. And that took more time on your part?

10 A. That did take more time.

11 Q. And did it take time making sure that that high  
12 school SRD was actually still employed at the high school?

13 A. That takes time to do that as well.

14 Q. And that was something that you incurred, that was a  
15 problem that you incurred?

16 A. Yes, I did experience that.

17 Q. And then I think the last thing that was talked about  
18 was the election observers. And you talked about a story  
19 of where a councilman was so close that the hair was  
20 moving on your poll worker. Was he closer than the three  
21 feet?

22 A. He was closer than the three feet.

23 Q. And would you agree that as far back as eight feet  
24 would be a comfortable *bubble*, I think you described it  
25 as?

1 A. Eight feet would probably work. It would still allow  
2 a path for the -- it wouldn't interfere with the path of  
3 the voters and should still be close enough that they  
4 should be able to hear what's happening.

5 Q. And of course six feet, which is under the old  
6 provision, that was okay?

7 A. Correct. And again you have to work with what's in  
8 your facility and what you can accommodate.

9 MS. SCHMELZER: Thank you, Ms. Hermann-Brown.

10 THE WITNESS: Thank you.

11 THE COURT: Thank you, very much. Do we have  
12 another witness to take out of order?

13 MR. SPIVA: Both sides have a witness that needs  
14 to go today. Ours is very short, he's from out of town,  
15 and theirs is from out of town, too.

16 THE COURT: Is yours short, too?

17 MR. KAWSKI: We think about a half hour. There's  
18 also an objection that needs to be addressed.

19 THE COURT: All right. I'll do that as fast as I  
20 can. So we have one short witness for plaintiffs and  
21 one -- so that answers the question about whether we're  
22 going to take an afternoon break. We're within striking  
23 distance of six o'clock anyway, so let's press on and move  
24 briskly.

25 MR. SPIVA: Okay. The plaintiffs call Mr. Ben

1 Krause.

2 **BEN KRAUSE, PLAINTIFFS' WITNESS, SWORN**

3 (5:14 p.m.)

4 DIRECT EXAMINATION

5 BY MR. SPIVA:

6 Q. Good afternoon, Mr. Krause. Can you state your name  
7 and I guess spell the last name for the record?

8 A. Yeah. My name is Ben Krause. My last name is  
9 spelled K-R-A-U-S-E.

10 Q. Sorry to butcher your name in the first question.  
11 Where do you currently live?

12 A. I live in Waukesha, Wisconsin.

13 Q. How long have you lived there?

14 A. I have lived there for just over a year.

15 Q. And what do you do for work?

16 A. I work for Festival Foods, which is a grocery store.  
17 I work in front-end operations and corporate coaching.

18 Q. Where are you from?

19 A. I'm from Chicago, Illinois and Eau Claire, Wisconsin.

20 Q. How old are you?

21 A. I'm 22.

22 Q. And just for the record, I know it's a little bit of  
23 a weird question, but what is your race?

24 A. I am Native American.

25 Q. Are you a member of the Ho Chunk Nation?

1 A. Yes, that's correct.

2 Q. And are you registered to vote?

3 A. Yes, I am.

4 Q. How long have you been registered to vote?

5 A. Since I was 18.

6 Q. Did you register in Eau Claire?

7 A. Yes.

8 Q. And when was the last time that you voted in  
9 Wisconsin?

10 A. This past April.

11 Q. April presidential primary?

12 A. Yes.

13 Q. And where did you vote?

14 A. Waukesha, Wisconsin.

15 Q. Was that the first time you voted there?

16 A. Waukesha, yes.

17 Q. Tell me what happened when you went to vote.

18 A. I went to my place to vote, which was a church in  
19 Waukesha. I presented a tribal ID in order to change my  
20 registration. My tribal ID had my photo, current address  
21 and date of birth on it.

22 The woman who was working the poll was unsure if that  
23 was the correct way that I could reregister, change my  
24 address. She asked me if my tribal ID was REAL and if --  
25 what it was, she also asked. She started asking other

1 poll officials around her if that was an acceptable form.

2 I pointed out that there was a bulletin in the lobby  
3 that stated that it was. And she was still unsure.

4 Around that same time she looked down into my wallet and  
5 saw that I had a Wisconsin driver's license and advised me  
6 that it would be "easier for everyone" to use my driver's  
7 license instead of my tribal ID.

8 Q. And what -- you mentioned that she had asked another  
9 poll worker whether the tribal ID was an acceptable ID.  
10 What did they say?

11 A. They had no idea. She asked, if I remember  
12 correctly, two other people near her and they didn't know.

13 Q. So what happened next?

14 A. If I gave her my driver's license. She changed  
15 everything she needed to change, had me sign it. She told  
16 me to take it to the next line, which was to receive a  
17 ballot. I presented my ballot again.

18 I tried using my tribal ID again to correspond with  
19 the form I had. There were two older poll workers that  
20 were sitting there and they were also unaware of what the  
21 ID was. And the guy pointed out, he's like, "Oh, I see  
22 used a driver's license. Let's just use your driver's  
23 license instead."

24 Q. And why did you present your Ho Chunk Nation ID to  
25 vote? Why was that important to you?

1 A. The Ho Chunk Nation encouraged all tribal members to  
2 use a tribal ID with this new law in order to exercise our  
3 sovereignty as a federally-recognized tribe in the state  
4 of Wisconsin.

5 Q. And how did you feel about not being able to use it?

6 A. I was mortified of the experience. I was mortified  
7 that nobody knew that it was acceptable and that there was  
8 a scene made out of it.

9 THE COURT: Describe the scene. So there's  
10 already a scene because they didn't know that it was  
11 acceptable and they had to have a conference to debate the  
12 subject. Was there more to it than that?

13 THE WITNESS: There is -- so in Waukesha at this  
14 church it's very constraint for space and they have -- one  
15 of the things that I mentioned was their mission is that  
16 we share a polling site with Ward 18 in Waukesha which has  
17 Carroll University and multiple large apartments. So  
18 there's, I'd say, at least 200 people that were all trying  
19 to register to vote and vote at the same time.

20 There was a very small table where they had people  
21 squished to reregister. And the scene was as soon as  
22 something doesn't go right, everybody is going to notice  
23 what's going on. And the people to my right and the  
24 couple to my left looked over and they were curious about  
25 what was going on. The other poll workers stopped what

1 they were doing as well.

2 BY MR. SPIVA:

3 Q. Why didn't you insist that they take your tribal ID?

4 A. I didn't want to make the scene worse than it already  
5 was.

6 Q. Okay. How did that whole experience affect your  
7 confidence in the election system.

8 A. It was horrible. I told the our attorney general of  
9 the Ho Chunk Nation that, you know, I was mortified of the  
10 experience and sad that this happened. And I said, "I  
11 hope you throw my ballot out." I made a comment about  
12 that.

13 Q. Do you typically vote for candidates of one party or  
14 the other?

15 A. Yeah. I vote for my own interests, but generally I  
16 vote Democrat, yes.

17 MR. SPIVA: Thank, very much, Mr. Krause. I  
18 appreciate you coming to testify.

19 THE WITNESS: My pleasure.

20 THE COURT: Cross-examination.

21 CROSS-EXAMINATION

22 BY MR. MURPHY:

23 Q. Hello, Mr. Krause. My name is Mike Murphy. I was  
24 the one who was filling your voicemail inbox this last  
25 week. Sorry about that.

1 A. Oh, that was you.

2 Q. The people you interacted with at the poll that day,  
3 did they work for the Government Accountability Board, as  
4 far as you know?

5 A. I have no idea.

6 Q. And you have, I gather, at least two forms of  
7 qualifying ID for photo ID voting; is that right?

8 A. I'm sorry?

9 Q. You have a tribal ID that's valid for voting  
10 purposes?

11 A. Mm-mm.

12 Q. You have a Wisconsin State Driver's License that's  
13 valid for voting purposes?

14 A. Mm-mm.

15 Q. Any others? Do you have a U.S. Passport?

16 A. Yes.

17 Q. So you have three forms of qualified ID. Your tribal  
18 ID is valid for voting purposes, right?

19 A. Yes.

20 Q. So your concern here is not with the law itself,  
21 right?

22 A. Oh, no, absolutely not. My concern is with this law,  
23 I know many Native Americans that do not have  
24 accessibility to obtain a state license either because of  
25 location, lack of transportation or getting the qualified



1 documents together.

2 Q. But they could get a tribal ID?

3 A. Yes, absolutely, assuming that they're a member of  
4 the tribe.

5 Q. And a tribal ID is valid for purposes of voting?

6 A. Assuming that it's not expired and it's current, yes.

7 MR. MURPHY: Nothing further.

8 THE COURT: Thank you, Mr. Krause.

9 THE WITNESS: Thank you.

10 THE COURT: Now, we've got another witness?

11 MR. SPIVA: We're flipping sides again.

12 THE COURT: You anticipate an objection?

13 MR. JOHNSON-GABE: We do.

14 THE COURT: I can hardly wait.

15 MR. JOHNSON-GABE: Defense would call Fred  
16 Eckhardt, Your Honor.

17 THE COURT: Fred Eckhardt. Okay.

18 MR. KAUL: Your Honor, we object to this witness  
19 testifying.

20 THE COURT: What's the basis for your objection?

21 MR. KAUL: It's our understanding that this  
22 expert is going to testify about database matching that he  
23 conducted for the Department of Transportation.

24 THE COURT: Okay.

25 MR. KAUL: He's not been disclosed as an expert.

1 There's no expert report or anything. I mean, not only is  
2 it a topic that we believe requires expertise, but it's a  
3 topic on which two experts in this case are testifying.  
4 So we think he's clearly not a permissible witness.

5 THE COURT: On the basis of the fact that he  
6 didn't meet the Rule 26 disclosure requirement?

7 MR. KAUL: That's right.

8 THE COURT: Okay. What's your response? I held  
9 their feet to the fire on Rule 26 earlier today.

10 MR. JOHNSON-GABE: Your Honor, Mr. Eckhardt isn't  
11 going to testify to any opinions or conclusions. He's  
12 going to testify to --

13 THE COURT: He's just a guy with lay knowledge?

14 MR. JOHNSON-GABE: Just telling what he did.  
15 He's going to explain how files came to him and what he  
16 did with those files and where he put those files when he  
17 was done.

18 THE COURT: So your position is this is really  
19 just the factual underpinning?

20 MR. JOHNSON-GABE: Correct.

21 THE COURT: This is kind of like the guy from  
22 Catalyst; is that what I'm to infer here?

23 MR. KAUL: I think that's similar, Your Honor. I  
24 mean, we wouldn't say that. Well, we disclosed him as an  
25 expert. I mean, he's -- it's similar to -- I mean, you

1 can't call it a factual analysis. It's like if somebody  
2 had ran a regression and said I'm just presenting my  
3 results. And that's an expert.

4 THE COURT: Yeah.

5 MR. KAUL: It requires specialized knowledge.

6 THE COURT: The fact that it's not in the form of  
7 an opinion doesn't save it; it's whether he's got  
8 technical knowledge.

9 But here's what I'm going to do: as a courtesy to  
10 this witness, I'm going to hear what he has to say just so  
11 that we can get him done and not inconvenience him. If I  
12 were to rule that he were able to testify, but it took us  
13 another 20 minutes to resolve it, that would be rude. So  
14 I'm going to hear his evidence.

15 I have my concerns. If you want to live by Rule 26  
16 as the Court does, you're going to have to live by Rule  
17 26, so -- but let's hear the witness.

18 MR. JOHNSON-GABE: Thank you, Your Honor. The  
19 defense calls Fred Eckhardt.

20 THE COURT: Don't thank me yet.

21 (5:26 p.m.)

22 **FRED ECKHARDT, DEFENDANTS' WITNESS, SWORN**

23 DIRECT EXAMINATION

24 BY MR. JOHNSON-GABE:

25 Q. Good afternoon, Mr. Eckhardt.

1 A. Good afternoon.

2 Q. Could you please state and spell your name for the  
3 record?

4 A. Fred Eckhardt, E-C-K-H-A-R-D-T.

5 THE COURT: Mr. Eckhardt, I'm going to ask you to  
6 roll your chair forward a little bit. Staying about a  
7 foot from the microphone would be great.

8 BY MR. JOHNSON-GABE:

9 Q. Mr. Eckhardt, what do you do for your employment?

10 A. I'm a computer programmer.

11 Q. And where are you a computer programmer?

12 A. I'm at the DOT.

13 Q. What does your responsibility as a computer  
14 programmer at DOT include?

15 A. I'm from the *old school*. I'm an old COBOL  
16 programmer. At 33 years programming I've been doing  
17 mainframe, website management. For the last 13 years at  
18 the DOT I've been a mainframe programmer.

19 Q. Does your work at DOT ever involve receiving and  
20 working on files from the Government Accountability Board?

21 A. Yes.

22 Q. And what does that include?

23 A. In 2005 there's the Help America Vote Act. I was  
24 assigned a task to write a program that edited, audited  
25 and validated their voter input and runs nightly today and

1 I'm responsible for it.

2 In 2005 they had an issue with their database being  
3 out of sync with our database and so I ran a -- wrote a  
4 program that was an audit program that compared the  
5 databases; not a name compare like are put out there  
6 today, but using a key, drivers ID number, and then I  
7 wrote an audit report that disclosed the differences in  
8 the databases.

9 Q. And you said you run that nightly?

10 A. That was a one-time deal that we wrote in 2005.

11 Q. Okay.

12 A. But then, as we know, in January of this year I wrote  
13 a program, which was kind of a copy of the one that I  
14 wrote in 2005, that used the driver's license to read the  
15 history records and to find a match in the DMV database  
16 which just returned the data back to them.

17 So I built the spreadsheet, an Excel spreadsheet,  
18 which they gave me, and put what I thought was the GAB  
19 data on the SVRS data -- yeah.

20 THE COURT: He's good. I think we're going to  
21 walk through this sort of step by step. But I get it.  
22 He's got a background as a programmer at the Department of  
23 Transportation, so I understand his qualifications. He  
24 knows what he's doing. I'm not going to disqualify him  
25 from that perspective. So now you're going to tell me

1 what he did in this case.

2 MR. JOHNSON-GABE: Right.

3 THE COURT: And just so I know, he did some  
4 processing on data that your other experts are going to  
5 explain how they analyzed. Am I reading the tea leaves  
6 correctly?

7 MR. JOHNSON-GABE: Correct. This refers to what  
8 Professor Mayer was discussing as to Professor Hood's  
9 secondary matter.

10 THE COURT: Right. Okay. Very good.

11 BY MR. JOHNSON-GABE:

12 Q. So at some point you were provided files or records  
13 related to this case?

14 A. Yes.

15 Q. And what did you receive?

16 A. It was an Excel spreadsheet -- Excel files, not Excel  
17 spreadsheet -- on a server. And I now don't know where it  
18 was from. I thought it was from the GAB, but I don't  
19 know if it's the -- it was the SVRS. It was called  
20 *Unmatches*. So from what I've listened today, I'm assuming  
21 it was a SVRS database that matched the GAB voters of that  
22 day and there was 119,420 records that were unmatched.

23 Q. Let me slow you down a little bit.

24 THE COURT: And what you call the *SVRS database*,  
25 that's the state voters registration system?

1 THE WITNESS: Voters registration, yes.

2 BY MR. JOHNSON-GABE:

3 Q. So you received this file with 119,000 lines; is that  
4 correct?

5 A. Yes.

6 Q. And when did you receive that?

7 A. December of 2015, the end of the year.

8 Q. Okay. And from whom did you receive --

9 A. It was -- I thought it was from GAB. I don't know  
10 now. It was on a server. My boss told me, download this  
11 file, run it against our database, send back a file with  
12 our data, their data, and an indication of a product: a  
13 driver's license or ID card being valid on 11/4 of 2014.

14 Q. If I could ask you to just flesh that out a little  
15 further as to what you were -- your understanding of what  
16 you were to do.

17 A. Well, I called it a *data dump*. It's more of a data  
18 extract. I was given a file on the spreadsheet. I took  
19 the driver's license number. I read the history record on  
20 DMV's database. With the history record I could find the  
21 current customer, get the data, the current data -- name,  
22 date of birth, gender, driver's license number -- and  
23 append it to the file that I was given.

24 And but also the program then checked for a DL or an  
25 ID that had not expired as of 11/4 of 2014. And so I put

1 a message on the file that I said *Valid, Valid on the Date*  
2 *or Not Found, Not Found Valid*. And there were also  
3 6,000-some records that the DL was not found at all.

4 THE COURT: Of that original data extract that  
5 you started with, 6,000 of them you couldn't match it up  
6 to a record in the --

7 THE WITNESS: On the DMV.

8 THE COURT: Gotcha.

9 BY MR. JOHNSON-GABE:

10 Q. Just to be clear, there was some unique identifying  
11 information on the initial file; is that right?

12 A. Yes.

13 Q. What was that?

14 A. That's the driver's license number --

15 Q. Okay.

16 A. -- or the ID cards, the same number. As the  
17 gentleman explained earlier today, you used the SOUNDEX to  
18 generate a number. And so when your name changes, it will  
19 generate a new number, a different driver's license  
20 number.

21 So the DMV keeps a history of all activity against  
22 the customer record. And there's many many history  
23 records. They're all tied together with the customer  
24 number and there's one current individual. So that's the  
25 data that I retrieved is the current individual data based



1 on the finding with the history ID.

2 Q. How are you able to access that history?

3 A. Well, it's a DB2 table. I don't know if you want to  
4 get into that.

5 THE COURT: I don't think that's necessary. Some  
6 sort of data.

7 THE WITNESS: I read the history database. And  
8 then on the history database there's a customer number, on  
9 the history database record there's a customer number. I  
10 read the current customer number.

11 BY MR. JOHNSON-GABE:

12 Q. And after you took the original file and compared  
13 that with the history number you had some results?

14 A. I used the history number to read the table and then  
15 I got 89,077 hits out of -- no, I got more than that. I'm  
16 sorry. That's the products. I got 112,000, you know,  
17 valid history records found out of the 119'. And if  
18 there's a history record there's a current record.

19 Q. So that's of the 119' you had 112,000 that were --

20 A. That I found, there's a valid history record for it.

21 Q. And those were matched with some DMV product?

22 A. I'm afraid they were matched because I'm not matching  
23 any names or comparing any -- I found it. I found a  
24 history record and then I found a current record with a  
25 current name and a current date of birth.

1 Q. And of the 112,000 -- forgive me if you just said  
2 this -- did they all have a valid product?

3 A. Out of the 112,000 -- 112,817, to be exact, out of  
4 that there was 89,077 that had a product on 11/4/14 and  
5 there was 23,740 that no product was found.

6 Q. And there were some that you weren't able to --

7 A. Let me clarify that better. When I say *No Product*  
8 *Found*, I mean I used the end date of the product, which is  
9 when it expires. It expires on the end date, which is  
10 generally eight years after it gets issued. So the end  
11 date was less than 11/4/2014.

12 THE COURT: And so that was a *No Product Found*?

13 THE WITNESS: That was a *No Product Found*. They  
14 had a product, but it was ending.

15 THE COURT: Yeah. Got it.

16 BY MR. JOHNSON-GABE:

17 Q. Just to kind of wrap it all up in one package, if you  
18 could give us the results of your process there, the  
19 numbers in each category.

20 A. It was 119,421 total unmatched on the input file.  
21 There were 112,817 that I found. There were 6,604 that  
22 were not found, no DL was found at all. There was 89,077  
23 that had a product on that date. And then there was  
24 23,740 where the product date was -- where they either  
25 didn't have a product or the product date -- the end date

1 was less than that.

2 Q. Okay. And when you had these results did you compile  
3 them in any sort of document?

4 A. Yeah. I put them back together on the spreadsheet  
5 that I was given. I built a spreadsheet of course. I  
6 appended my data to the same data they had. And then  
7 there's a message that I also appended to that line.

8 Q. And what did the message say?

9 A. The message was *Valid Product Found, Valid Product*  
10 *Not Found* or *Driver's License Not Found*, corresponding to  
11 the numbers I just gave you.

12 Q. And what did you do with that document?

13 A. I put it back on the server that I received and  
14 pulled the file from.

15 Q. Do you have any knowledge of who picked that up?

16 A. No, I don't. I also sent -- the reason I still have  
17 the ability to find that file is because I sent it to DMV  
18 to have it validated.

19 Q. So we did do some checking.

20 A. We had a local on our server, the DMV -- our server  
21 at the DMV and I had the DMV validate it.

22 THE COURT: What does that mean, you had the DMV  
23 *validate* it?

24 THE WITNESS: What does it mean in the server?

25 THE COURT: What does it mean to be validated.

1 THE WITNESS: Well, they would look up the  
2 customer that I had on the line; look at the end date of  
3 their product, see that it did correspond to what my  
4 message said; and see that the person was the same person.  
5 Because I got the old driver's license number and the new  
6 driver's license number on the file, they can look at the  
7 history and say, yeah, this is the same person.

8 THE COURT: Aren't you kind of pulling from the  
9 same database that they are?

10 THE WITNESS: Well, yes, yes.

11 THE COURT: So they're kind of bound to verify it  
12 because they confirmed it by looking at the same data that  
13 you looked at to do the --

14 THE WITNESS: No, no. But the history record,  
15 the old DL -- the old driver's license number and the new  
16 driver's license number are on two history records, but  
17 they all point to the same customer. So the customer  
18 record -- the customer is the master record. And that  
19 customer number on the customer master --

20 THE COURT: So let me make sure that I understand  
21 this then. So you get this set of records from -- we'll  
22 say it's from the GAB. We don't necessarily know, but  
23 it's a safe bet. So you get it from the GAB and there's a  
24 set of records that are unmatched for some reason. We  
25 don't know why you got this particular set.

1 THE WITNESS: I didn't know why.

2 THE COURT: But anyway, so each one of these has  
3 a driver's license number in it.

4 THE WITNESS: Mm-mm.

5 THE COURT: So with that driver's license number  
6 you can look up that customer number.

7 THE WITNESS: I can find the customer number from  
8 the history, correct.

9 THE COURT: Okay. And so that customer number is  
10 unique to that person even though they might have in their  
11 history a couple different driver's license numbers, for  
12 various reasons.

13 THE WITNESS: Right.

14 THE COURT: Then you compiled that -- well, you  
15 didn't compile. I guess what you did was -- well, I guess  
16 you pulled all the demographic information, I'll call it,  
17 the gender. Anything else? You said you had a name,  
18 gender.

19 THE WITNESS: Well, I gave back the customer  
20 number; the driver's license number of the current  
21 customer, the current individual; the name, known  
22 first/last name, suffix, date of birth and gender.

23 THE COURT: Okay. And so then you added that to  
24 the line in the spreadsheet for that --

25 THE WITNESS: Yes.

1 THE COURT: -- original driver's license number  
2 that came from the GAB.

3 THE WITNESS: Mm-mm.

4 THE COURT: And when you got it done you sent it  
5 over at some point. Somebody at the DMV said, "Yeah,  
6 let's check this and make sure that it matches the records  
7 that we have at the DMV" --

8 THE DEFENDANT: Yes.

9 THE COURT: -- because you had a different  
10 database that was the customer database, if you will.

11 THE WITNESS: I don't understand. I didn't have  
12 a different --

13 THE COURT: Where did you look to find the  
14 customer number?

15 THE WITNESS: It's all on our DB2 database, DMV  
16 database. The history and the current customer are all on  
17 that database. Different tables on the database.

18 THE COURT: Right. So when the DMV then went to  
19 validate what you had done, what did they look at; did  
20 they go to that same DB2 database?

21 THE WITNESS: Well, they look at -- yes. But  
22 it's -- you know, you can't question -- well, you can, but  
23 the validity of the database, if that was out of sync, the  
24 state would be in a lot of trouble. So we find a customer  
25 number on that database, the history, you can look at the

1 names on the history. It's programmatically built. It's  
2 the same person.

3 THE COURT: Okay. I guess I just wasn't quite  
4 understanding what the DMV had actually validated. I  
5 guess you put your spreadsheet together, right?

6 THE WITNESS: Yeah. I validated -- I mean, I  
7 validated previous programs I wrote for GAB. That was a  
8 validation because I was comparing their stuff to my  
9 stuff. But this time I didn't do validation. I just  
10 dumped DMV data on the same spreadsheet as theirs.

11 THE COURT: Okay. I think I understand.

12 MR. JOHNSON-GABE: I don't have any further  
13 questions.

14 THE COURT: Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. KAUL:

17 Q. Good afternoon, Mr. Eckhardt.

18 A. How are you?

19 Q. Good. Let me start out by asking you a few questions  
20 about how this process works. So I think you said that  
21 you wrote a program to run this analysis; is that right?

22 A. Yes.

23 Q. Can you explain how you did that?

24 A. It's a COBOL program. It's a computer language. I  
25 mean, what do I explain? It executes lines of code. It

1 executes database, reads, executes move data this. I

2 mean, I don't follow how --

3 Q. So did you have to include certain commands in that  
4 code?

5 A. Yeah. A line in COBOL I guess you would call a  
6 *command*.

7 Q. Okay. And what's a COBOL program?

8 A. *Computer Object Business Oriented Language*. It's  
9 been around since the 60s or before that.

10 Q. And is that something you sort of knew how to use the  
11 day you first set foot in the DMV?

12 A. I mentioned, when he asked me, I've been doing that  
13 for 13 years in the DMV, but I've got about 33 years of  
14 writing COBOL and various other things.

15 Q. Okay. So it's not the type of thing that I could  
16 just go and do tomorrow?

17 A. No. It's takes a little bit of training. I've got a  
18 bachelor's degree in computer science.

19 Q. Okay. And once you wrote that program, what was it  
20 that was being compared in the two databases?

21 A. I didn't compare anything.

22 Q. How did you determine if there was a match?

23 A. I didn't determine there was a machine. I read the  
24 data based on the driver's license number that I was  
25 given.



1 Q. So how did you determine that names on the list that  
2 you were given from the GAB, or whoever it was, matched  
3 names or people in the DB2 file?

4 A. That wasn't my task. My task was to build the  
5 spreadsheet with their data, our data, and a message about  
6 the product, which the DL ID is a product.

7 But I could look at the line and I could see the same  
8 first name, same date of birth, but a different last name.  
9 I mean, but that wasn't my task. I wasn't meant to  
10 analyze the data. So maybe could I say *strike that*?

11 THE COURT: You can, but then all the reporter  
12 does is write the word *strike that*.

13 A. That wasn't my role. My role wasn't to analyze the  
14 data. My role was to dump the data from the DMV database  
15 that corresponded to the driver's license number given to  
16 me on the input file.

17 Q. So what was it you were trying to connect between the  
18 list you were given and the DB2 file? How did you decide  
19 if it was somebody who was in the file or not?

20 A. I did find that out. There were 6,600 that weren't  
21 on our database.

22 Q. I'm asking you how you made that determination.

23 A. The program tried to read the database using the  
24 driver's license number from the input file, couldn't find  
25 the driver's license number, but 95% of them did find.

1 Q. Okay. So you create a program that tried to find the  
2 driver's license number?

3 A. Yes.

4 Q. Okay. So that's what was being -- you were trying to  
5 match between the two databases?

6 A. No. I wasn't trying to match anything. I was using  
7 an input driver's license number. What was on file that  
8 was given was probably a -- I'm sorry. What was on the  
9 input file given me was the historical driver's license  
10 number.

11 But I wasn't matching driver's license numbers. I  
12 was using one number to read data, to then move up the  
13 ladder and find the current or most recent customer  
14 record, and put that data on the spreadsheet.

15 Q. Okay. And you actually gave an example of a person  
16 with the same first name and date of birth but a different  
17 last name?

18 A. Yes, sir.

19 Q. Why did that example stand out to you?

20 A. Well, because when I wrote the audit program in 2005  
21 for the GAB, the strongest conclusion that the GAB and me  
22 came to was that people got married and they didn't go to  
23 Voters Registration and change the voter's database; they  
24 went to DMV and changed their driver's license.

25 Q. Okay. So most of these people you're saying are --

1 I'm going to use *Matches*, that's not the right word I  
2 know -- so most of the people you're talking about are  
3 people who have a different name in the DMV -- on their  
4 historical DMV record from the name that they have on  
5 whatever list you were given; is that right?

6 A. Well, in a way. But the name on the DMV database is  
7 the current name. The name on the SVRS, the voter  
8 registration database, could likely be the one they used  
9 when they registered to vote and they've been registering  
10 since 2005 using the software that I wrote. I'm not sure  
11 when exactly the GAB database was started or built, but  
12 sometime in that time frame.

13 Q. Okay. So the point is the names don't have to be the  
14 same on those two files, right?

15 A. I don't understand your question.

16 Q. The file you received from the GAB in --

17 A. It had no bearing on that file. I don't care about  
18 the name on that file. I cared about only the driver's  
19 license number.

20 Q. Right. So in many cases the name on that file was  
21 different from the name on the --

22 A. Yes.

23 Q. Okay. And you said that you read the history record  
24 in conducting this analysis?

25 A. Yeah. *Read* is kind of a COBOL term. It's a command

1 like you were saying a command. It's *Select* is the actual  
2 command. But I selected the data from the history record.  
3 Then I took the customer field, which is a column on that  
4 data, and I read -- I selected the current individual with  
5 that customer number to get the data: the name, date of  
6 birth and gender.

7 Q. And that's also something that takes some expertise  
8 to do; is that right?

9 A. It took a few years to learn.

10 Q. And is there anything about the DB2 database that's  
11 confidential in a way that the current DMV data is not  
12 confidential?

13 A. Current DMV data is generally on the DB2 database.

14 Q. Okay. Do you know what the purpose was of your doing  
15 this match?

16 A. Well, at the time, because I had done a similar thing  
17 in 2005, I thought it was discrepancies in the database.  
18 I didn't know what the *Unmatched* meant. But it was a  
19 task. My boss said, get the data. Went back in the file,  
20 put it on the server and that's it.

21 Q. So if the defense in this case was working with some  
22 sort of expert witness, is there any reason you couldn't  
23 have sent the data to him?

24 A. That's not my call. I don't know.

25 Q. Do you know a person named Dr. Hood?

1 A. I've read the information about the trial.

2 Q. What do you mean by that?

3 A. I read the expert witness from the plaintiff and I  
4 read part of Dr. Hood's response, because it was a little  
5 bit longer, and then I read the rebuttal.

6 Q. Okay.

7 A. And then I sat here today because I thought I would  
8 testify earlier, but it was kind of long-winded.

9 THE COURT: I take my responsibility for my part  
10 of that.

11 BY MR. KAUL:

12 Q. I'll cut to the chase on this one: you've never  
13 spoken to Dr. Hood, right?

14 A. No.

15 Q. Did you prepare a written report describing the  
16 methodology for your matching?

17 A. No, I didn't.

18 Q. Did you provide the source code to anybody?

19 A. Well, it's available. Source code is in our  
20 directories at DOT and all of our IT development staff  
21 uses source code that other people wrote. That's how we  
22 write programs.

23 Q. So the code you wrote is available on the DMV  
24 database?

25 A. Well, it's not on the database. It's in a directory

1 of code.

2 Q. Did you send it to anybody in connection with this  
3 effort?

4 A. No.

5 Q. Did you do anything to check the database for  
6 duplicate records?

7 A. There can't be duplicate records. It's a unique --  
8 the SOUNDEX -- and he's mentioned how the SOUNDEX also has  
9 two other bytes. One byte is a check digit and the other  
10 byte is a sequence number. When we generate a SOUNDEX  
11 number we check the database to see if it exists already.  
12 If it does, the sequence number isn't going to matter.  
13 I'm not sure what happens when you find ten people with  
14 the exact same date of birth.

15 THE COURT: You've only got one digit to use it.

16 A. Maybe it uses binarial. So, no, there can't be  
17 duplicates with the same driver's license number.

18 Q. Could there be duplicates on the list you got from  
19 the GAB or whoever that was?

20 A. I didn't read the list.

21 Q. So you don't know whether there were duplicates in  
22 that list?

23 A. No, I don't.

24 Q. And there was sometimes errors in the DMV database,  
25 correct?

1 A. No. Well, define *errors*. What do you mean by  
2 "errors?"

3 Q. Somebody's information is input incorrectly.

4 A. Well, someone comes in and applies for a driver's  
5 license and they spell their name wrong? Yes.

6 Q. How about a number generated incorrectly?

7 A. By a computer programmer that generates a number?

8 Q. Could there be mistaken numerals in some of the data?

9 A. You'll have to tell me which data. The two keys  
10 we're talking about here are the driver's license number  
11 or the customer number. Those are computer generated.  
12 One uses a SOUNDEX that has alphanumeric characters and  
13 the other is a random numeric number. They're both  
14 unique. They can't have an error in it.

15 Q. So the driver's license number you got from that list  
16 of 112,000, or whatever it was to start with, you don't  
17 know whether there were any errors in that list, right?

18 A. I don't know about that.

19 Q. So the driver's license number in the first place  
20 that you were matching to may have been an error, you  
21 don't know?

22 A. I don't know about the input, no. I can't attest to  
23 that.

24 MR. KAUL: No further questions.

25 THE COURT: So when you said, to follow up on

1 that check digit, I understand that you increment -- one  
2 of the digits is incremented every time they get a new  
3 driver's license.

4 THE WITNESS: No, no. It's incremented -- the  
5 last digit -- well, I'm not positive. The first 12 digits  
6 are built by SOUNDEX and maybe -- I'm not positive. I  
7 know the first characters were last names. So 12 digits  
8 SOUNDEX builds. I'm not positive. I think the thirteenth  
9 digit is the increment digit. If there's ten on the  
10 database that already have your same name and date of  
11 birth, then I don't know what happens.

12 THE COURT: Because sometimes, you tell me --  
13 this is your territory, not mine -- but sometimes if  
14 you've got kind of a *checksum* sometimes is a concept  
15 that's sometimes used in verification.

16 THE WITNESS: Right.

17 THE COURT: So you've got a ten-digit number that  
18 matters to you and then you have some formula that you  
19 apply to those first ten digits and that produces an  
20 eleventh digit that you append. And if somebody makes a  
21 mistake entering that data, when you later run the process  
22 on the first ten digits again you will produce a different  
23 eleventh digit and it's a check against data entry errors.  
24 Does a driver's license number have that?

25 THE WITNESS: I know that the fourteenth digit is



1 the check digit. I don't know of code that actually uses  
2 that check digit when it generates a new number.

3 THE COURT: Okay. All right. So the fourteenth  
4 one, is that kind of data check?

5 THE WITNESS: Put my down as about a 75%, in that  
6 ballpark.

7 THE COURT: All right. Good. I'm getting used  
8 to dealing with probabilities. All right. Thank you.  
9 Anything else?

10 MR. JOHNSON-GABE: Just briefly.

11 REDIRECT EXAMINATION

12 BY MR. JOHNSON-GABE:

13 Q. Mr. Eckhardt, is it fair to say that the program you  
14 used here was just a quick way to search this database for  
15 people with a previous product?

16 A. Yes.

17 Q. And do you know who you sent your final product to?

18 A. No.

19 Q. I should say, did you know at the time?

20 A. I thought I was doing this for GAB at the time only  
21 because I had done it twice before. So after sitting here  
22 today, I don't know who -- what it's for.

23 Q. And when did you learn that this was for Professor  
24 Hood?

25 A. When I got -- I think when I got the email from you,

1 or not? I thought my boss at the DOJ was going to come  
2 talk to me.

3 Q. When was that?

4 A. About a week, week and-a-half now.

5 MR. JOHNSON-GABE: No further questions.

6 THE COURT: All right. Very good. Thank you,  
7 very much. You're going to shudder every time the GAB  
8 asks you to do any work.

9 THE WITNESS: That's what I told my boss already.

10 THE COURT: Thanks for coming in.

11 THE WITNESS: Thank you.

12 THE COURT: All right. I'm going to assume  
13 we're -- if I release you today and we start up again at  
14 eight o'clock tomorrow everybody is going to be okay with  
15 that.

16 MR. SPIVA: Yes, Your Honor. I just want to let  
17 you know, we're ready to start Mr. Kennedy. Given that  
18 it's ten of, I don't know whether that makes sense. I do  
19 have a couple issues I wanted to raise just briefly. So I  
20 don't know, whatever --

21 THE COURT: Let's do that. We'll start with  
22 Mr. Kennedy -- it doesn't make a whole lot of sense to me  
23 to take six minutes of testimony here, so we'll start with  
24 Mr. Kennedy tomorrow. Would you check my calendar? I  
25 have one proceeding tomorrow and I think it's at 11.

1 MR. SPIVA: I'm sorry, Your Honor.

2 THE COURT: You've got some stuff to deal with,  
3 too?

4 MR. SPIVA: Not that, but our expert,  
5 Dr. Minnite, is slated to go first thing tomorrow. We're  
6 happy to take Mr. Kennedy tomorrow after her.

7 THE COURT: An 11 a.m. resentencing. So those  
8 are short, so why don't we just make that our morning  
9 break. It's probably going to be more than 15 minutes,  
10 but it won't be that long. And then we'll have something  
11 like a normal schedule. So we'll take our lunch break  
12 about 12:30-ish, 12:30 to one. We'll take a break for an  
13 hour for lunch and press on. So we'll start with whoever  
14 you want to put on tomorrow morning. So what can I help  
15 you with?

16 MR. SPIVA: Okay. So two things. I imagine the  
17 Court may have some concern about the schedule. And I  
18 just wanted to alert you that there are witnesses that  
19 were on our *will call* that we're not intending to call  
20 anymore. For instance, we had an agreement that  
21 Dr. Ghitza's report can go in without him coming to  
22 testify and then we've got Dr. Mayer to testify about, you  
23 know, et cetera. And there are some others as well that  
24 we've just -- you know, affected voters and that type  
25 thing -- that we've just decided that we probably have

1 enough on that. And so I wanted to alert Your Honor to  
2 that.

3 THE COURT: Good to hear that.

4 MR. SPIVA: And then secondly, you know, on  
5 Monday I said that we hadn't decided what kind of relief  
6 we might want in terms of the late disclosure of  
7 documents. Many things we got on Friday. We had kind of  
8 the interaction this morning with Dr. Mayer.

9 We had intended and had been planning to have  
10 Dr. Lichtman speak, you know, quite a bit about the IDPP  
11 and he had stuff in his rebuttal report. But there's  
12 obviously a lot of new material since his rebuttal report.  
13 And we wanted him to speak to the emergency rule and that  
14 type of thing. It's all within his competency.

15 And so I guess I would move to allow us to supplement  
16 their report. We're happy to do it in written form first  
17 and provide it to the other side. You know, obviously  
18 we're also happy to just have them --

19 THE COURT: Well, let's just talk about the gist  
20 of what you want to do. It's like there's certain  
21 provisions of the emergency rule that alleviate or are  
22 intended to alleviate some of the harsher results of  
23 the -- I call them the *deficiencies of the petition*  
24 *process*. What do you want to do with them from an expert  
25 perspective?

1 It doesn't seem, to me, to be amenable to the kind of  
2 statistical analysis or certainly doesn't warrant the kind  
3 of statistical analysis that we're talking about. So what  
4 do you want to say and need to say?

5 I'll tell you what I'm oriented to say is that I'm  
6 going to do something like a super-abbreviated Rule 26  
7 procedure so that you at least give the defense an idea of  
8 what you want your expert to say and then that at least  
9 gives them a chance to hear about it in advance.

10 I don't know that we have time to have him sit for a  
11 deposition. But if you read some of the Seventh Circuit  
12 precedent on Rule 26 reports, they're designed to  
13 alleviate the need for the deposition of the expert,  
14 another example of how the Seventh Circuit doesn't always  
15 have a very accurate idea of what happens at the district  
16 court.

17 MR. SPIVA: Right.

18 THE COURT: So but at least you can, you know,  
19 give the defense some notice of what you're going to try  
20 to say. I will also make this observation that I gather  
21 that some of what I might hear is not necessarily really  
22 the material that I would need to get from an expert.

23 So yesterday it seemed to me that Dr. Mayer was  
24 prepared to engage in a polemic about how the people who  
25 had struggled with the ID petition process had been

1 disenfranchised and it was an abomination and unfair, all  
2 of which may be very true. But I don't think that I need  
3 Dr. Mayer to guide me through that.

4 I see what has happened to the people in the ID  
5 petition process, so I don't know that I need anything  
6 from an expert on the subject. So I'm a little bit  
7 wondering what it is that you need an expert to tell me  
8 about the ID petition process.

9 MR. SPIVA: Sure. I mean, I think that first of  
10 all, Dr. Lichtman, although he has statistical background,  
11 his report of course is not just confined to statistics.  
12 He uses historical methodology.

13 THE COURT: Neither is Dr. Mayer.

14 MR. SPIVA: No, that's true. And they both are  
15 well qualified to talk about this. But Dr. Lichtman has  
16 historical methodology, political science methodology.  
17 And, you know, they can evaluate whether this kind of  
18 cures the problem.

19 Also, Dr. Lichtman can evaluate these various things  
20 in terms of his analysis of intent. He's given an opinion  
21 on intent. And there's some admissions frankly. I mean,  
22 usually when we got such late disclosure of materials in a  
23 case, my first reaction would be we need to move to  
24 exclude consideration of this, but we actually think  
25 there's a lot.

1 THE COURT: Well, that's the perennial problem  
2 when the disclosure is something that the proponent wanted  
3 to use all the time. Exclusion would be ideal for the  
4 late discloser.

5 MR. SPIVA: Right.

6 THE COURT: So I get that.

7 MR. SPIVA: Yeah, that's right. So we would be  
8 by biting off our nose to spite our face I think if we did  
9 that. But we need to have -- frankly there's a lot that  
10 an expert can explain, you know, in terms of, you know,  
11 why this is not something, you know, that would ameliorate  
12 the problems here. I mean, I think it --

13 MR. KAWSKI: Your Honor, I'd like to be heard on  
14 this as well.

15 THE COURT: Trust me, you'll get a chance. Let  
16 me just say this: I remain skeptical about the helpfulness  
17 of expert evidence on the subject. It's not inconceivable  
18 to me. I'm just not quite seeing it yet. So let's hear  
19 from Mr. Kowski.

20 MR. KAWSKI: So Dr. Lichtman will testify about  
21 his opinion that there was intentional racial  
22 discrimination with all these laws being passed by the  
23 Legislature.

24 THE COURT: Not a classic example of expert  
25 testimony. That seems a little outside the box for what

1 you would normally expect him to.

2 MR. KAWSKI: It is to begin with, right? I mean,  
3 how can you be an expert in legislative intent? That's  
4 the Court's job. So that's one thing. But I think what's  
5 going to happen is he's going to say -- this is what he  
6 said in his deposition -- the scope statement for the  
7 administrative rule had just come out the day before I  
8 deposed him. And he said, I've already looked at that and  
9 that's evidence of intentional racial discrimination. I'm  
10 paraphrasing greatly here. And the reason is because the  
11 Legislature knows that they could have done the thing that  
12 they're doing now and so that's all evidence of  
13 intentional racial discrimination. I'm again paraphrasing  
14 very greatly.

15 MR. SPIVA: And incorrectly.

16 MR. KAWSKI: And Mr. Spiva is entitled to that  
17 opinion. That is what you're going to hear and you can  
18 see how that is not useful in terms of expert opinion.  
19 It's not an expert opinion; it's just reading things the  
20 Court can do as well.

21 THE COURT: Let's talk about the time frame here.  
22 There are all sorts of reasons that we're -- I am  
23 motivated to get the evidence in and to get a decision.  
24 And so under normal circumstances I might decide that we  
25 need more time and maybe hold this off a little bit.



1 Obviously it's kind of not how this Court rolls  
2 anyway. Usually we have a trial date, we do it, you're  
3 done. If you don't get the materials I would sanction you  
4 monetarily or taking away a chunk of your case. And I'm  
5 just not going to do that here because none of those seem  
6 appropriate remedies.

7 So what I suggest is that you give a disclosure of  
8 exactly what Dr. Lichtman is going to say. And by  
9 "exactly," I mean kind of a Rule 26 *lite* -- give the  
10 essential elements of his opinion, give it to the other  
11 side, give it to me -- and then we can make a  
12 determination about whether that is testimony that I need  
13 to hear. I don't think that there's going to be time to  
14 do a deposition of it, so --

15 MR. KAWSKI: There won't be time to do a  
16 deposition. I think the Court is going to find that it's  
17 not going to be helpful.

18 MR. SPIVA: I mean --

19 THE COURT: Maybe I'll say, you know what? I  
20 don't think it's all that helpful, but I'm going to let  
21 you take a brief amount of time to do it and you'll have  
22 to cross-examine on --

23 MR. KAWSKI: I'm fine with cross-examining him on  
24 the fly. That's totally fine.

25 MR. SPIVA: We're the ones who are prejudiced

1 here by the late disclosures. So the idea that they won't  
2 get a deposition, you know, I mean, really --

3 THE COURT: I'm not feeling sorry for them.

4 MR. SPIVA: Okay. This is kind of a collateral  
5 attack on his initial report and rebuttal report, which we  
6 haven't had any kind of a motion on even. He's testified  
7 in 80 cases. He's been admitted many times to testify on  
8 the issue of intent using the methodology that he has.

9 And so really the only question is not really the  
10 validity of his initial report and his rebuttal report --  
11 I mean, honestly, Your Honor will have to evaluate what  
12 you think about that -- but is whether he has something to  
13 say that's useful within his brain of expertise that, you  
14 know, that would be helpful.

15 THE COURT: So without endorsing that, whether  
16 it's helpful or not, let's do that. So when do you expect  
17 to put him on?

18 MR. SPIVA: We were planning to put him on on  
19 Monday. My main concern is when can I touch base with him  
20 this evening and maybe that we could get a disclosure over  
21 the weekend.

22 THE COURT: I'm not looking for it tomorrow.

23 MR. KAWSKI: I'm totally fine with it. In fact  
24 I'm great with a disclosure. That's great. I can  
25 cross-examine him on the fly on these topics because I

1 don't think that they're going to be helpful to the Court.

2 THE COURT: Yeah. Well, let's -- maybe you don't  
3 even need the disclosure. It's as much for me as it is  
4 for anything. As I say, keep it brief, Rule 26 *lite*. I'm  
5 not going to, you know, be as rigorous as I might  
6 otherwise be on the scope of the report. And then it will  
7 take some of the late-breaking nature out of it, but still  
8 give you a chance to put the evidence in.

9 I will say this on the intent issue, is that this is  
10 a very peculiar kind of case to evaluate intent. I  
11 don't -- you know, I'm the trial judge, so I don't have to  
12 have a whole theory of judicial philosophy and I don't  
13 have to be a textualist or an originalist or anything like  
14 that.

15 I will say this, that legislative intent in Wisconsin  
16 is valuable only in certain ways and to a certain limited  
17 intent and usually it comes up when I'm trying to  
18 interpret the meaning of a statute --

19 MR. SPIVA: This is very different, Your Honor.

20 THE COURT: -- then legislative intent plays a  
21 minor role. But intent here plays a different role and a  
22 more significant role. And frankly, I feel somewhat  
23 unguided in the law figuring out what it is I'm supposed  
24 to look for for intent of discrimination when we're  
25 talking about a Legislature.

1 And so normally we handle these things within the  
2 rubric of Title 7 law and I draw inferences about intent  
3 and occasionally I have a stray comment. And frankly this  
4 case doesn't seem to be far off from that. I just don't  
5 feel that I have really strong guidance from appellate  
6 courts on how I'm supposed to process the information I  
7 have available about legislative intent in this context.

8 MR. SPIVA: Right.

9 THE COURT: So I'm not saying it's -- it still  
10 doesn't sound like the realm of expert testimony to me,  
11 but I'm open to persuasion on the subject.

12 MR. SPIVA: Can I just say a couple words on  
13 that?

14 THE COURT: Yeah.

15 MR. SPIVA: I think *Arlington Heights* is really  
16 the classic case on it, because here you're not looking at  
17 what do the words of the statute mean because Your Honor,  
18 you know, appreciates. And it's really not just the  
19 Legislature; it's the State, the Governor matters as well  
20 and even the executive agencies.

21 And so *Arlington Heights* sets forth a framework of  
22 things that you look to to determine. Sometimes it's  
23 statements, but also that Supreme Court case recognizes  
24 that it's going to be rare these days to have the kinds of  
25 overt statements. I think we've introduced evidence of

1 some of them. But you also look at the sequence of  
2 events, you look at motivation based on who has --

3 THE COURT: Let me check with Mr. Kawski. Is  
4 that the authority that I should appeal to?

5 MR. KAWSKI: Well, I think it probably is. And I  
6 just want to be clear: I don't want to come across as  
7 being be cocky or bloviating and say I'll just  
8 cross-examine him on the fly. What we need to keep in  
9 mind here is what he's going to talk about with this new  
10 rule is DMV's intentional racial discrimination. There's  
11 been no evidence of that. And every attempt to try and  
12 offer that kind of evidence has, in my view, failed.

13 THE COURT: I thought I heard Mr. Curtis  
14 expressly disclaim the question that the DMV --

15 MR. KAWSKI: Right. The implication of these  
16 demonstratives of "look at all the" -- "look what these  
17 people look like" and that type of thing, that is what  
18 we're getting at here is DMV engaged in intentional racial  
19 discrimination.

20 THE COURT: I don't think that's their theory.

21 MR. CURTIS: That's not true, Your Honor.

22 MR. KAWSKI: Then what is this going to be about  
23 if we're talking about the new rule?

24 MR. SPIVA: I can answer that.

25 THE COURT: Let me hazard a guess, then you can

1 correct me here. But the demonstrative exhibits show that  
2 at least for this very small cohort of people who have  
3 been struggling through to the bitter end of the petition  
4 process, the effect appears to be dramatically and  
5 unsettlingly disparately rested on African Americans and  
6 Latinos.

7 MR. KAWSKI: And I would agree with that. That  
8 is part of the *Arlington Heights* framework. If that is  
9 the correct framework, that is part of that framework, is  
10 disparate effects.

11 THE COURT: And again we're talking about a very  
12 small number of people here. So we're not talking about a  
13 significant percentage of the voting population, but we're  
14 still talking about enough people matter, each of which do  
15 have constitutional rights and they're all African  
16 American and Latino and, you know, startlingly large  
17 proportions given that it's small cohort anyway.

18 MR. SPIVA: When it was perfectly predictable,  
19 Your Honor, at the time these laws were enacted --

20 THE COURT: And the disparate impact was manifest  
21 to the Legislature and it's almost like a willful  
22 blindness theory of intent.

23 MR. KAWSKI: I think that is exactly their theory  
24 and I think that is, again from what I heard from  
25 Dr. Lichtman in his deposition, that is his theory about

1 the new rule. So in that respect, you know, the Court can  
2 look to that.

3 I guess my point is that we're talking about this new  
4 rule that just went into effect on Friday. That's what  
5 he's going to talk about. He's going to be opining about  
6 hypothetical things.

7 MR. SPIVA: The Governor initiated the rule, Your  
8 Honor, so this is not just about the DMV. And, you know,  
9 also there are issues of standardless discretion in an  
10 area where it was perfectly predictable; I mean, you know,  
11 that this was exactly how this was going to play out.

12 I mean, the only small thing -- I think Your Honor  
13 got it exactly right. And the only thing I would take  
14 issue with is the characterization of it as a small number  
15 because, as you probably appreciate, our theme is that  
16 this is the *tip of the iceberg* and also --

17 THE COURT: These are the people who are burdened  
18 and yet were so determined to vote that they put up with  
19 a, you know, a year's worth of struggle.

20 MR. SPIVA: Yes.

21 THE COURT: Imagine how many were dissuaded  
22 earlier.

23 MR. SPIVA: Absolutely.

24 THE COURT: Okay. So I get the theory.

25 MR. SPIVA: These were the people who were

1 targeted by the law.

2 THE COURT: The other thing that it seems to me  
3 is that the emergency rule, from what I gather, doesn't  
4 solve much of the problem, and so it kind of doesn't  
5 matter what the emergency rule is. I appreciate the  
6 gesture that at least for these people who tell such  
7 compelling stories they've got a means of voting in  
8 November does not solve the problem really in the least.  
9 I mean, it just kicks the can down the road. But it gives  
10 them a piece of paper that will allow, you know, 140  
11 people to vote in November but doesn't at all solve the  
12 problem.

13 And so at the moment I'm thinking my reaction is  
14 going to be, I don't care that much about the emergency  
15 rule. It just was a gesture to 147 individuals who make  
16 manifest the underlying problem.

17 MR. KAWSKI: And I think that it's our position  
18 to try and dissuade you of that obviously.

19 THE COURT: Yeah. Well, there's -- I mean, I see  
20 an underlying problem.

21 MR. KAWSKI: Sure.

22 THE COURT: I mean, we've got 147 people that you  
23 have the DMV on the stand and the person -- the head of  
24 that CAFU Unit saying none of these people were -- in the  
25 least had anything about them, with the exception of the



1 one noncitizen who turned up, none of them have any  
2 impediment to their -- should have any impediment to their  
3 right to vote.

4 MR. KAWSKI: And I would say --

5 THE COURT: So I think everybody recognizes it's  
6 a problem. What kind of a problem? Now you're most  
7 worried, and they're most helpful, that it's a problem of  
8 such scope that I'll invalidate the whole Voter ID law.  
9 That's almost wishful thinking because I don't think I  
10 have that within the framework.

11 But obviously there are some differences in the  
12 factual record at this point by comparison to *Frank*. I  
13 get that. *Frank* does not seem to encourage me to take  
14 another whack at the Voter ID law as a whole, I think we  
15 can all agree on that.

16 So the scope of the problem I think is very much in  
17 doubt here. I don't really know what kind of a problem it  
18 is, but it's plain enough that there's a big problem here  
19 with this perdition process.

20 MR. SPIVA: Can I say one more thing, Your Honor?  
21 One of the ways I think in which expert testimony can be  
22 helpful here is precisely that question. And it's just  
23 not a matter of statistics; it's a matter of the  
24 literature and the consensus.

25 I mean, at points, you know, when I hear testimony

1 about potential fraud and the number of people who have  
2 been disenfranchised I feel like, you know, it's like old  
3 Galileo, what he said after he was, you know, forced to  
4 recant that the Earth rotates around the sun. I mean, you  
5 know, that there is fraud.

6 THE COURT: I feel a little bit like Galileo  
7 myself.

8 MR. SPIVA: I mean, there's like consensus in the  
9 literature, Your Honor.

10 THE COURT: I know. Judge Easterbrook said that  
11 it doesn't matter if there are 20 political scientists  
12 that agree with the plaintiffs and so that's kind of the  
13 feeling that I have. Now, we make a good record here,  
14 perhaps you can be more persuasive at the Seventh Circuit.  
15 I just don't feel like I've got, within the *Frank*  
16 framework, that much room to move. But I certainly don't  
17 intend to impede the development of the record here.

18 MR. SPIVA: No, I appreciate that, Your Honor.  
19 And we intend to also present obviously in our briefing --

20 THE COURT: You're going to bring in 20 political  
21 scientists.

22 MR. SPIVA: Well, and also why we think you have  
23 options and, you know, why you have some breathing room,  
24 but I do appreciate what Your Honor is saying.

25 THE COURT: Yeah. And thank you for comparing me

1 to or suggesting the comparison to Galileo and Socrates.

2 MR. SPIVA: No, no, you'd be the Galileo, not --  
3 I don't mean to compare you to the church.

4 MR. KAWSKI: I just want to say, Your Honor, I  
5 just want to say on the record, I'm fine if Mr. Spiva  
6 wants to do a disclosure to us. It can be whenever before  
7 Monday, hopefully, you know, a couple hours before 8 a.m.  
8 on Monday. And I will cross-examine Dr. Lichtman and  
9 we'll go from there.

10 THE COURT: Thank you. All right. Enjoy the  
11 rest of your evening. We'll see you tomorrow morning.

12 MR. SPIVA: Thank you, Your Honor.

13 MR. CURTIS: Thank you, Your Honor.

14 (Adjourned at 6:15 p.m.)

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1 I, CHERYL A. SEEMAN, Certified Realtime and Merit  
2 Reporter, in and for the State of Wisconsin, certify that  
3 the foregoing is a true and accurate record of the  
4 proceedings held on the 19th day of May, 2016, before the  
5 Honorable James D. Peterson, of the Western District of  
6 Wisconsin, in my presence and reduced to writing in  
7 accordance with my stenographic notes made at said time  
8 and place.

9 Dated this 10th day of June, 2016.

10

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15

/s/

16

Cheryl A. Seeman, RMR, CRR  
Federal Court Reporter

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

ONE WISCONSIN INSTITUTE, INC.,  
et al.,

Plaintiffs,

Case No. 15-CV-324-JDP

vs.

Madison, Wisconsin

May 24, 2016

GERALD C. NICHOL, et al.,

1:36 p.m.

Defendants.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF SEVENTH DAY OF COURT TRIAL  
AFTERNOON SESSION  
HELD BEFORE THE HONORABLE JAMES D. PETERSON

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10 (Called to order.)

11 THE COURT: All right. You may call your next  
12 witness.

13 MS. SCHMELZER: Kathleen Novack.

14 **KATHLEEN NOVACK, DEFENDANTS' WITNESS, SWORN**

15 DIRECT EXAMINATION

16 BY MS. SCHMELZER:

17 Q. Good afternoon, Ms. Novack. Can you please state  
18 your name and spell it for the record?

19 A. Kathleen Novack; K-A-T-H-L-E-E-N and N-O-V-A-C-K.

20 Q. Where are you currently employed, Ms. Novack?

21 A. Waukesha County.

22 Q. And what's your position there?

23 A. Waukesha County Clerk.

24 Q. Is that an elected position?

25 A. Yes, it is. It's a four-year term.

KATHLEEN NOVACK - DIRECT

1 Q. And when were you first elected as county clerk?

2 A. We're selected in 2012 and started in 2013.

3 Q. And what did you do before becoming the county clerk  
4 in Waukesha County?

5 A. I had a 30-year career with the Internal Revenue  
6 Service.

7 Q. And did you do anything else after your career at the  
8 IRS?

9 A. Well, I did a couple -- I actually had been retired  
10 for nine years when I ran for county clerk, so I did a  
11 couple strange things. I worked at a hardware store and  
12 just did some kind of fun things.

13 Q. Did you serve as an alderman for the City of  
14 Milwaukee?

15 A. I'm sorry. Yes. I had two terms as alderman in the  
16 City of Pewaukee.

17 Q. When was that?

18 A. 2006 through 2009 and again 2010 through 2013.

19 Q. And can you tell me what your duties are as the  
20 county clerk?

21 A. Basically we have three primary areas. We serve as  
22 the county board clerk and have a lot of different  
23 interaction on the county board. We do licensing,  
24 marriage licenses, passports, domestic partnerships. And  
25 then probably the primary is in the election area.



1 Q. Let's talk about the elections area. What do you --  
2 we've heard from some municipal clerks. So could you tell  
3 us what you do as the county clerk as far as elections  
4 administration goes?

5 A. Our role is really right at the start and basically  
6 is wrapped up by Election Day. So we start out with  
7 actually accepting nomination papers for various  
8 positions, go through the draws for the ballot order, do  
9 the certifications with the GAB, and then we get into the  
10 process of programming all of our election contests.

11 We do the proofing. We do a number of different  
12 tasks to get -- to make sure that our ballots are correct.  
13 And then we coordinate with the printer and make sure that  
14 we have them printed and distributed in a certain manner  
15 to all of the municipalities.

16 Q. And is there a timeline that these duties that you  
17 have with the ballots have to be completed by?

18 A. Right. For the spring elections we have to have the  
19 ballots completed and to the clerks by a certain date. We  
20 are able to start our ballot preparations on about January  
21 12th I believe was the date I basically came to. And we  
22 have to have them to the municipalities in that case by  
23 January -- excuse me. Well, the 12th I said. January  
24 25th they have to actually be physically in the  
25 municipalities.

1 Q. Okay. I know you said you do draws and programming  
2 and proofing. But can you tell me what you do from, you  
3 said, January 2nd to January 25th?

4 A. Well, January 2nd, immediately after we get all of  
5 the paperwork in, it takes a considerable amount of time  
6 for all of the certifications to be done. So we're not  
7 even able to start preparing ballots until the 12th  
8 because of there are certain periods of time where  
9 contested nomination papers could be contested. And again  
10 then by state statute we can't actually do the draw -- the  
11 actual lottery or drawing for ballot order until the 12th.  
12 It is required no later than the 12th.

13 THE COURT: And just to be clear, the contested  
14 nomination papers, all this is for which election? So I  
15 gather the state offices are -- nominations are handled  
16 somewhere else?

17 THE WITNESS: Right. For the spring election the  
18 local offices are handled at the local level. We have --  
19 every other year we have every county board supervisor  
20 position open. We'll have multijurisdictional judges. We  
21 may have some other positions that we're responsible for.

22 THE COURT: Okay. So these are the county  
23 offices, not the local offices. So, like, city offices,  
24 the cities handle that themselves?

25 THE WITNESS: They do their own, yes.

1 THE COURT: Gotcha. Thank you.

2 BY MS. SCHMELZER:

3 Q. And do you follow any kind of calendar when you  
4 complete your duties as county clerk?

5 A. Correct. The GAB puts out a calendar, and it comes  
6 out late November, that lists all of the specific steps  
7 for not just county clerks but for the municipal clerks.  
8 It's very detailed and it's tied directly into state  
9 statute. So I have a reference if I need to go in and  
10 verify.

11 MS. SCHMELZER: Your Honor, I'm without my  
12 electronic copy right now, but I do have hard copies of  
13 Defense Exhibit 204. May I approach?

14 THE COURT: Yes. Thank you.

15 MR. SPIVA: Thank you.

16 BY MS. SCHMELZER:

17 Q. And can you identify what's been marked as Defense  
18 Exhibit 204, Ms. Novack?

19 A. Correct. This is the *Calendar of Election and*  
20 *Campaign Events for November 2015 through December 2016*  
21 and it's issued by the Government Accountability Board.

22 MS. SCHMELZER: I don't believe there was an  
23 objection.

24 THE COURT: Any objection?

25 MR. SPIVA: No objection, Your Honor.

1 THE COURT: 204 is admitted.

2 BY MS. SCHMELZER:

3 Q. And you said this is a calendar that you follow as  
4 far as completing your duties as clerk, county clerk?

5 A. Correct.

6 Q. Okay. And let's take a look at -- I think you  
7 started with the February election; is that what you  
8 talked about earlier?

9 A. Correct.

10 Q. Okay. And from this calendar, or even from your own  
11 recollection, when would you have completed that process  
12 that you do with the ballots to complete the ballots?

13 A. Well, we'd start it hopefully right after the draw,  
14 so you're talking January 12th. We have to get that  
15 information to the printers by basically the Wednesday  
16 before the deadline, which is the 25th, to get those  
17 ballots actually physically at the municipalities. So  
18 we're working on -- I think it comes out to about five  
19 business days and that's the time we have to do all of the  
20 inputting of the contests.

21 In February of this year we had something like 203  
22 different ballot styles that we had to program. We have  
23 to make sure all the spelling -- that they're in the right  
24 proper order. It's an extensive process. And then we  
25 have to get those to the printer and distribute it.

1 Q. Okay. That was my next question. So how many  
2 different ballots did you have to prepare for February?

3 A. For February I believe it was -- actually it was 203  
4 porting units and I think the ballots were actually 247 or  
5 something like that. I'm sorry, the specific numbers are  
6 kind of hard to pull up.

7 Q. And when would you have completed that task of  
8 getting the ballots to the printer?

9 A. We would hope, and I'd have to double-check on what  
10 the actual time was, but we'd hoped to get them by close  
11 of business on that Tuesday or sometime mid Wednesday of  
12 that week right before they're due in the municipalities.

13 Q. Do you know if different counties get ballots at  
14 different times?

15 A. For the spring elections the time frame is so tight  
16 that I can't imagine there'd be maybe more than a day  
17 difference. And that might have to do more with the  
18 printer and what their capabilities are. We sometimes get  
19 the ballots out on the Friday before versus that Monday.

20 So I think everybody tries to get them out as soon as  
21 humanly possible, because the municipalities, we get them  
22 to them on the 25th. The following day they must get all  
23 of their mailed-out absentee ballots in the mail that day.  
24 So it's one day to get the ballots, the next day they have  
25 to have those in the mail.

1 Q. And for the February 16th election this past year,  
2 how many days did the municipalities have the ballots  
3 before the election?

4 A. Well, they got them on the 25th and the election was  
5 February 16th.

6 Q. So if my math is right, that's 21 days?

7 A. Correct.

8 Q. And does that time span from when a municipality gets  
9 the ballots to when the election occurs, does that change?

10 A. In a four-year cycle there are basically 12 standard  
11 elections. And for seven of those this tight time frame  
12 exists. For the other five there is more time available  
13 because of the federal election and the 45-day rule.

14 Q. Can you explain what that means, the 45-day rule?

15 A. Well, for federal elections, under federal statute  
16 all of the ballots must be out 45 days before the election  
17 or 48 I believe is the actual number, but because of  
18 weekends it's 45. So those have to be out to all of the  
19 electorate. So obviously that pushes up all of the  
20 printing and programming so that we can meet that  
21 deadline.

22 Q. So depending on what kind of election it is, it could  
23 be somewhere around 21 days before the election that  
24 municipalities have the ballots or you said 40 --

25 A. I would have to double-check, but I think it's 48.

1 Q. Like 48 or 49?

2 A. It will be right in here somewhere. 48. That's  
3 ours. I'm sorry. As an example for the August election,  
4 we have to have ballots to the poll sites by June 22nd I  
5 believe and the election is actually August 9th.

6 Q. Let's look at the April election, the April 2016.  
7 Can you tell from or do you recall when the ballots were  
8 mailed to the municipalities in Waukesha County?

9 A. I can look at this real quickly. We actually had  
10 ballots go out at two separate times. We have to put out  
11 the presidential preference ballot, based on the 45 days,  
12 to the military and overseas voters and then the second  
13 ballot process is done for all of the other elections.

14 So I'm kind of double-checking. I wish I had my  
15 marked copy. The presidential preference were due out on  
16 February 17th. And I'm looking for where it says "full  
17 ballots." It would probably be about toward the end of --  
18 a little further into March.

19 Q. If I can direct you to page 7.

20 A. Page 7. Thank you. March 1st those would be out,  
21 the full ballots would have to be out.

22 Q. And the election --

23 A. I'm sorry. That's when the proofs go in. Yeah, I'm  
24 sorry, it's still March 1st.

25 Q. And with the election being April 5th, is that about

1 35 or 36 days before the election?

2 A. It's a little bit more time than normal.

3 Q. So sometimes it's 21 days before. Here it was 35.

4 Should we look at the next one?

5 A. Well, the next three for this year, this one and the  
6 next two, are part of that five total I told you of that  
7 has a longer period of time between the ballot delivery  
8 and the actual election.

9 Q. Okay. So let's look at, for the August election,  
10 when would the municipalities have the full ballot?

11 A. I'll have to look to June. I know it's -- I believe  
12 it's June 22nd, but let me double-check.

13 Q. I think you're right.

14 A. Yeah, June 22nd.

15 Q. And with the election being August 9th, correct?

16 A. Correct.

17 Q. That's about 48 or 49 days?

18 A. Yeah. The deadline is 48 days for us and 47 days to  
19 get the mailed-out absentees.

20 Q. So then as far as -- let's relate that. I think I'd  
21 like to talk about the in-person absentee-voting period.  
22 If we were to increase that time for whenever  
23 municipalities have the full ballots, would that vary?

24 A. Well, for the seven that I mentioned, it would  
25 actually be impossible. I think for the February I



1 computed something like the ballots need to be at the  
2 municipalities on January 25th, but the four-week period  
3 would be something like January 15th. So there would be  
4 no way that those ballots could be done and in their hands  
5 in time to do a longer in-person absentee.

6 Q. So it would be 21 days for that election, 35 days for  
7 the next election, and 48 days for the August and November  
8 election?

9 A. Correct.

10 Q. How many different municipalities do you have in  
11 Waukesha County?

12 A. We have 37.

13 Q. I guess I kind of skipped over this, but can you tell  
14 me about the population of Waukesha County?

15 A. The total population is just under 400,000. It's  
16 primarily -- I don't know if you want some demographics.

17 Q. Sure.

18 A. It's primarily white. I believe the last information  
19 I got was about 89.9%. It has just under a 5% Hispanic  
20 community, close to a 3% Asian, a relatively small  
21 African American community. And actually we've had a very  
22 large growth in Burmese population.

23 Q. Do you know how many registered voters you have in  
24 Waukesha County?

25 A. We had 264,000 as of the April election, but with

1 same-day registration I'd probably say it's close to  
2 280,000.

3 Q. So besides there being I guess different days or  
4 different time spans for when they would actually have  
5 ballots in hand at the municipalities, are there any other  
6 advantages that you can see for having that 12 days before  
7 the election period of time for in-person absentee voting?

8 A. Well, I think there is a lot of advantages to having  
9 it more compressed. Primarily a lot of our municipalities  
10 would have a staffing issue if it was longer. You have to  
11 have a deputy on-site to actually do the absentee  
12 balloting. If you look at something like the recent  
13 presidential preference, there was even a switch in the  
14 number of candidates that were still basically in the  
15 contest if you had moved it up to a longer period of time.  
16 Basically it just seems to be a time period that works  
17 well.

18 Q. So, like, if candidates drop out of the race, you  
19 don't correct the ballot?

20 A. No. In fact the April ballot had 12 different  
21 presidential candidates on it for the Republican party and  
22 three for the Democrat, even though by then it was just  
23 three candidates and two remaining.

24 Q. If a voter came in earlier I guess in the game and  
25 voted for a candidate that later dropped off, would they

1 have any remedy?

2 A. No remedy. In fact if the in-person had been pushed  
3 up to four weeks, Senator Rubio was still an active  
4 campaigner, although by the time of the election he had  
5 dropped out. There is no remedy.

6 Q. So your municipalities each have one location for  
7 in-person absentee voting, correct?

8 A. Correct.

9 Q. Do you see any advantages to that?

10 A. Well, I think there's a lot of advantages. On the  
11 county level we provide the ballots, as I mentioned. For  
12 a municipality like Waukesha, the city of Waukesha, they  
13 have 39 wards, which means at a minimum we're providing 39  
14 different types of ballots, could be as high as 40 or 45.

15 For in-person absentee they have to maintain a file  
16 by individual ballot style for each ballot in order to  
17 have enough or they have to have a significant amount of  
18 ballots there so that anyone that comes in they'll have  
19 that available for them to use.

20 If we were to go to two sites, now you're talking  
21 about 39 to 45 different ballots, an increase no doubt in  
22 the cost of ballots because each site would want to have  
23 almost a virtually identical number of ballots available.  
24 There's no saying where an individual would go to actually  
25 in person when you start splitting it up into different

1 locations.

2 Q. As a county clerk is the cost of a ballot something  
3 that you're concerned with?

4 A. Oh, extremely. The cost of a ballot right now -- we  
5 just got a new printer and thank goodness because it's  
6 saving us about 4 cents a ballot -- the cost of a single  
7 ballot is 16 cents. And when you multiply that, for  
8 example in April we ordered 290,000 ballots, so 15 cents  
9 is significant -- or 16 and it's a cost that we're very  
10 concerned about. The county pays for the cost of all  
11 ballots for county, state and federal elections. So it's  
12 significant.

13 THE COURT: Just to clarify that, the ballots  
14 that you used for in-person absentee voting are the same  
15 ballots you used on Election Day, right?

16 THE WITNESS: Yes, they are.

17 THE COURT: So if you don't use them all up for  
18 in-person, that same set of ballots can be used on  
19 Election Day?

20 THE WITNESS: They would be available, yes.

21 THE COURT: So you have to predict.

22 THE WITNESS: But you have to predict what's  
23 going to happen during that two-week period as to who's  
24 going to come in. So they do keep a -- we actually print  
25 about 35 to 40 percent absentee ballots for them to have

1 on hand for either the mail-out piece or the in-person.

2 THE COURT: Okay.

3 BY MS. SCHMELZER:

4 Q. If you miscalculate, can you order more ballots?

5 A. We had a concern in February on ordering additional  
6 ballots in Waukesha County. In general, yes. In our new  
7 printing situation our contract will allow same-day if we  
8 give them notification by noon.

9 Q. Does it -- does that affect the cost of them if you  
10 have to order more?

11 A. Again it's based on the printer on whether or not  
12 there's shipping costs. For the prior printer we ordered  
13 a smaller amount in February and it had a substantial  
14 shipping cost attached to it.

15 Q. Do you recall what that cost was?

16 A. We ordered 385 ballots and the shipping cost was  
17 \$347.

18 Q. So, what, a dollar ballot?

19 A. Basically a dollar a ballot.

20 THE COURT: Where's the printer, by the way?

21 THE WITNESS: That printer was -- well, they  
22 contract out their own printing. The company is in  
23 Nebraska. I believe they were printed primarily in  
24 Alabama. Our new printer is going to be in Fond Du Lac  
25 and we'll be able to have that same-day service.

1 BY MS. SCHMELZER:

2 Q. I'm going to move on now to some of the changes in  
3 the registration process. As a county clerk do you have  
4 any responsibilities for registering voters?

5 A. The actual registration is done at the municipal  
6 level. We do provide what we call *relier services* for 11  
7 neighboring municipalities. So while they get the  
8 paperwork from the individual, we get the actual piece  
9 once that's been signed and do the entering into the  
10 statewide voter registration system.

11 Q. Have you noticed a decrease in registrations in the  
12 past few years --

13 A. No.

14 Q. -- of the ones that you're entering?

15 A. Well, of the ones that we're entering, no. I mean,  
16 it's a steady climb.

17 Q. And do you have any knowledge of registration numbers  
18 for the county?

19 A. For the county I'd really have to -- I know what the  
20 total registrations are. As far as new registrations, we  
21 normally, between an April presidential year, it will jump  
22 about 25,000 between the April and the actual presidential  
23 election. And that's based on same-day registrations and  
24 primarily or significantly same-day registrations and then  
25 other people coming in during that interim.

1 Q. Do you have any sense of whether that's a greater  
2 amount now than was, let's say, in 2011?

3 A. Well, I don't have the numbers with me now.

4 Q. I'm sorry.

5 A. But I did basically a chart and it's keeping constant  
6 to a little bit up at this time, so there certainly hasn't  
7 been any decrease at all.

8 Q. Since 2012 I meant.

9 A. Since 2012, right.

10 Q. I want to talk about a provision in 2013 that passed  
11 that prohibits the requirement that landlords distribute  
12 registration forms to new tenants. Did Waukesha County  
13 ever have this kind of requirement?

14 A. To be honest, I'm not aware of it and I have been  
15 there since early 2013. No, I'm not aware of it.

16 Q. Is that something that you would support as county  
17 clerk?

18 A. No, I really wouldn't. I think we have landlords  
19 that aren't on the premises. I think that explaining a  
20 registration form to anybody is a very complicated  
21 situation. And I think we'd be putting, you know,  
22 individuals in a situation that they really aren't trained  
23 for. And there would be questions, I'm sure, if someone  
24 was handed a registration form.

25 Q. Would you have any issues with how to monitor a

1 provision that would require landlords to distribute  
2 registration forms?

3 A. I would think that it would be a very difficult  
4 system to put together. We have quite a bit of apartments  
5 and rental properties in Waukesha County. I'm not sure  
6 how you would even keep a list with additional units  
7 opening or closing. I think it would be very difficult.

8 Q. I want to talk about the elimination of  
9 straight-ticket voting. As someone who is responsible for  
10 preparing ballots, is that a change that you support?

11 A. Well, I mean, I definitely think not having that  
12 practice gives the voters a lot more opportunity to select  
13 based on their knowledge of the different candidates. I  
14 think straight-party eliminates that opportunity, so I'm  
15 not really in favor of it.

16 I also think a lot of times we'll see when I go  
17 through the election results, we'll see a much higher  
18 percentage of people that voted for the presidency than  
19 voted for the next position down and down and down. With  
20 straight-party you have people voting and contesting  
21 normally wouldn't have had a decision or know who it was  
22 they wanted to vote for.

23 Q. Let's break that down a little bit. Do all ballots  
24 have just straight-party elections on them?

25 A. We have nonpartisan in the spring elections. The



1 April presidential preference election is very complicated  
2 because we have a lot of nonpartisan elections and then we  
3 have tacked onto that the -- well, the presidential  
4 preference. But in general again spring is the  
5 nonpartisan. The fall, the general elections, are the  
6 partisan races.

7 Q. Do some of the general elections have nonpartisan  
8 races on them?

9 A. It could happen if there was a need for a special  
10 election and they could join that in with that November  
11 election or the August. And there may be a situation  
12 where referendum might be added to one of those.

13 Q. You said sometimes you see voters fill out the  
14 partisan one and not go further; is that what you said?

15 A. Well, what I'm saying is that I think with  
16 straight-party there may be a tendency just to vote one  
17 quick mark and then file it or have it processed with the  
18 tabulator. I think that without straight-party there will  
19 be more of a consideration of each contest and basically  
20 people voting on the ones that they have a real position  
21 with. And again if there is a special election on a  
22 referendum they won't see it if they just mark *straight*  
23 *party*, in all likelihood.

24 Q. Let's move on to the voter ID provision. Is this  
25 something that you've seen have an effect in Waukesha

1 County, implementation of the Voter ID law?

2 A. We actually started voter ID a year earlier than the  
3 rest of the state because we had five special elections  
4 the prior year that kicked in after the April election.  
5 From the start we have had virtually no problems at all.

6 Q. Have you seen an increase in wait times or lines?

7 A. We had wait-time issues in February that had nothing  
8 to do with voter ID. It had more to do with an  
9 implementation of a new election equipment system. I  
10 would say no. There might be a small couple-seconds  
11 delay, but nothing that would impact a line.

12 Q. Do you know how many provisional -- were there any  
13 provisional ballots cast in the April election in Waukesha  
14 County?

15 A. In the April election there were twelve countywide.  
16 Of those twelve, seven were tallied or counted, so only  
17 five weren't. And of those I believe four were related to  
18 a photo ID issue and one was a proof of residence.

19 Q. I want to talk a little bit about voter fraud. Have  
20 you, in your tenure as county clerk, referred any  
21 instances of voter fraud either to the GAB or to the  
22 district attorney?

23 A. I've referred several to the District Attorney's  
24 Office. Sometimes I get -- I'm made aware of a  
25 potential voter fraud issue from the GAB. And the

1 municipalities sometimes will make me aware of a situation  
2 but they'll do the referral.

3 Q. Can you talk about any specific instances that you  
4 can recall?

5 A. My first year I had some phone calls from a Sussex  
6 voter who went into the poll and someone had already  
7 signed his name.

8 We just had an instance in April, and I don't have it  
9 with me, but where an individual came in and represented  
10 themselves as a Michael Ward and signed the poll book.  
11 And later in the day the real Michael Ward came in and was  
12 easily recognized. He was a local coach of one of the  
13 school teams. So when he came in and went to sign and  
14 there's a signature already under his name and his  
15 address, that obviously raised a big problem. And clearly  
16 there was no question that he was the correct person.

17 Q. Let's talk about the first one, the Sussex incident.  
18 You said someone voted for someone else?

19 A. My understanding from the phone call I got, it was a  
20 complaint about the fact that when they went in there was  
21 another signature. We have had --

22 Q. Another signature in the poll book?

23 A. That the poll book had already been signed. We did  
24 have another situation --

25 THE COURT: And before you leave that one, let me

1 get at what I'm told, because there's some correspondence  
2 from the GAB earlier in the case that indicated that  
3 sometimes when you have a voter who complains about  
4 arriving at the poll and having a vote already recorded  
5 for that voter, it's because the poll worker simply  
6 recorded a previous voter on the wrong line. So my  
7 question about the Sussex voter is, was that voter's name  
8 recorded in that spot?

9 THE WITNESS: The poll book would have already  
10 had that person's name preprinted with the address  
11 directly below it.

12 THE COURT: I understand. So were you able to  
13 determine what was actually signed in that poll book?

14 THE WITNESS: I did not see that particular poll  
15 book. I did see the one from April.

16 THE COURT: Okay. And the one from April is the  
17 Michael Ward incident?

18 THE WITNESS: Right.

19 THE COURT: So in the Michael Ward case, somebody  
20 signed Michael Ward on the poll book where that voter  
21 expected to register?

22 THE WITNESS: Correct. And he was the only  
23 Michael Ward at that address, the identified and  
24 well-known individual.

25 BY MS. SCHMELZER:

1 Q. So obviously the Voter ID law was in place when that  
2 incident occurred, the April one. What did you do with  
3 that information?

4 A. Well, it has been referred to the District Attorney's  
5 Office. As far as voter ID, I can't tell you why it  
6 didn't get caught at the poll table when the two poll  
7 workers looked at an ID. Slim chance that was his name.

8 But in all likelihood -- we do have some poll  
9 workers, that in all seriousness, are -- they have  
10 eyesight issues or age or whatever. It somehow or other  
11 got through. Nobody certainly remembered later in the day  
12 when the real Michael Ward came in who was the individual  
13 earlier on. They had, you know, hundreds of votes that  
14 day.

15 Q. So you don't know if he presented an ID that said  
16 *Michael Ward* --

17 A. I don't know.

18 Q. -- or if it was just not checked correctly?

19 A. Yes, exactly. I don't know.

20 Q. And have you heard any updates on your referral of  
21 that case to the district attorney? Is that where it  
22 went?

23 A. Yes. No, that just went very recently. We had -- we  
24 have had other instances where, in one case, I believe it  
25 was a father that voted for a son or the other way around

1 that was also sent to the District Attorney's Office. I'm  
2 not sure what happened in that one.

3 Q. And when was -- so that's a third one, the father and  
4 the son. When was that incident?

5 A. That was about I think two years ago; a year  
6 and-a-half, two years ago.

7 We also had, in February and in April, situations  
8 where someone went into the poll site apparently that they  
9 used to live at and signed in a poll book that their name  
10 was entered into with their address and then the same day  
11 drove over to a different poll site in Waukesha County,  
12 same-day registered and voted a second time. And we  
13 believe we ran into that again at least two times in  
14 April.

15 THE COURT: So you had two of those in April and  
16 what --

17 THE WITNESS: I believe two in February, that I'm  
18 aware of now. And that may be, you know, the vast  
19 majority. I don't know if there were any more.

20 THE COURT: All right. Did you refer those?

21 THE WITNESS: Yes.

22 BY MS. SCHMELZER:

23 Q. I want to go back to the *father and the son*  
24 situation. You said you had a son that voted for a father  
25 or a father that --

1 A. It was one of those swings. I'm not sure which way  
2 it went.

3 Q. Okay. And you referred that to the district  
4 attorney?

5 A. That was referred, yes.

6 Q. Do you know what the status -- whatever happened with  
7 that referral?

8 A. That -- I got the feedback on only one referral since  
9 I've been there. And on that one they said it would be  
10 difficult for intent, but I'm not sure if that was the  
11 father and son. In general I don't share anything once  
12 something is referred.

13 Q. And with the *father and son* situation, voter ID was  
14 not in place at that time?

15 A. Correct, it was not.

16 MS. SCHMELZER: Thank you, Ms. Novack.

17 THE COURT: Cross-examination.

18 CROSS-EXAMINATION

19 BY MR. SPIVA:

20 Q. Good afternoon, Ms. Novack. My name is Bruce Spiva.  
21 I just have a few questions for you. Is it *Waukesha*  
22 *County*?

23 A. *Waukesha*.

24 Q. Okay. Ms. Novack, Waukesha has about a 1.3%  
25 African American population; does that sound about right?

1 A. Correct.

2 Q. And the median income, do you know approximately what  
3 that is?

4 A. I don't. I know we have about a 6% poverty rate.

5 Q. Does \$85,000 sound about right?

6 A. Yeah, that sounds about right.

7 Q. I think you said in your deposition that there's not  
8 much bus service in Waukesha?

9 A. Very little.

10 Q. Most families have a vehicle that they use for work  
11 and errands?

12 A. I would not necessarily say that. We have, in the  
13 city of Waukesha, a very large population; a large  
14 minority population, although it's Hispanic and not  
15 African American.

16 Q. I think you said that the Hispanic population was  
17 under 5%?

18 A. Just under 5%. And then again a Burmese population  
19 that's also growing.

20 Q. Do you have a percentage on the Burmese population?

21 A. No, I don't. I'm sure it's part of the Asian figure,  
22 which I think was right around three to four. I think  
23 it's around three.

24 Q. Okay. There's not a lot of public transportation, I  
25 take it?



1 A. Not a great deal, no.

2 Q. It's a fairly well-off community?

3 A. Pockets are very poor and pockets are very very  
4 wealthy.

5 Q. Okay. When you refer to *pockets*, are you talking  
6 about kind of the pockets of minority voters that you just  
7 talked about?

8 A. Yeah. There are several areas in the city of  
9 Waukesha, in the city of Pewaukee, I believe village of  
10 Pewaukee and a couple areas that are shown on a  
11 demographic thing as having a high -- or a very low income  
12 level.

13 Q. All right. Ms. Novack, you are a Republican?

14 A. Correct.

15 Q. And you were elected county clerk in 2012; is that  
16 right?

17 A. Correct.

18 Q. You took office in the beginning of 2013?

19 A. Right.

20 Q. And I take it that you're not that familiar with what  
21 the election laws were that were in place prior to your  
22 taking office?

23 A. I've probably done a lot of research over the last  
24 three and-a-half years about what the changes were. And  
25 as part of my -- I guess my background I tend to go into

1 the prior legislation to try to see what the curve was.

2 Q. Okay. But at the time of your deposition you didn't  
3 know that prior to the passage of Act 23 that state law  
4 permitted municipalities to have up to 30 days of  
5 in-person early voting; is that right?

6 A. My understanding is it was done on only one occasion  
7 and that was related to a presidential. I'm not sure. I  
8 can try and find -- you know, get some more information on  
9 that. It hasn't been done since I've been there.

10 Q. So I take it you don't know one way or the other  
11 whether the law prior to 2011 permitted municipalities to  
12 choose to have 30 days of --

13 A. No, I don't.

14 Q. -- in-person absentee voting?

15 A. I'm not aware, no.

16 Q. Okay. And at the time of your deposition you didn't  
17 know that certain municipalities actually had 30 days of  
18 early in-person voting prior to the change in the law?

19 A. Well, again -- not again, but what I would state is  
20 that for those seven elections that I mentioned that have  
21 the tight time frames, I don't know how anyone could have  
22 elected to have a 30-day in-person. Whether for the  
23 presidentials and the federal they elected to do that, I'm  
24 not aware whether they did or not. But for the majority  
25 of the elections, or seven out of twelve, it would not

1 have been an option.

2 Q. Okay. You mean as a practical matter it would not  
3 have been an option?

4 A. I mean it would have been impossible to have people  
5 in person vote if the ballots are not at the location.

6 Q. Just focusing on those federal elections where it  
7 would have been a possibility, I take it you don't know  
8 one way or the other whether, say, Milwaukee had a 30-day  
9 in-person early-voting period prior to the change in the  
10 law?

11 A. No, I don't.

12 Q. You just don't know that. Okay. And would you agree  
13 with me that it's good for municipalities to have a choice  
14 about the hours -- the number of hours and days that  
15 they're going to offer early in-person voting?

16 A. I think that it's critical that the voters in the  
17 state have equal access to voting. And I think that in  
18 order to do that you have to set a certain standard and  
19 not exceed it.

20 Q. When you say "standard," I take it -- and "not exceed  
21 it," I take you don't mean that the hours and days should  
22 be exactly the same for each municipality, correct?

23 A. No, and right now they're not. They do have a set  
24 ten-day, business-day time frame to work within. But each  
25 municipality issues what's called a *Type E Notice* that

1 tells all of their electors what specific days and hours  
2 they're open.

3 Q. Okay. So some can choose have to fewer than that?

4 A. Correct.

5 Q. Are you sure it's 10? I thought it was 12 business  
6 days -- or 12 days rather.

7 A. It's 12 days. Well, it's five days and five days.  
8 It's two weeks. So that's 10 business days.

9 Q. Okay. We're on the same page.

10 A. Same page, right.

11 Q. But within that frame, under existing law,  
12 municipalities -- one municipality can choose to have five  
13 days and another could choose to use the whole ten days?

14 A. Correct.

15 Q. Okay. And do you see there being any problem if  
16 municipalities were permitted to have up to 30 days of  
17 early in-person voting?

18 A. If you're asking if one county could have 30 while  
19 others are having less just because of basic cost  
20 restraints or budgets or whatever, I think that the  
21 current system is extremely flexible, that two weeks is  
22 plenty of time. And to put a burden on other counties to  
23 perhaps try to expand their service and cover an equal  
24 voter access I think is unreasonable.

25 Q. Okay. That actually wasn't my question.

1 A. I'm sorry.

2 Q. I wasn't suggesting that counties or cities should be  
3 forced to have up to 30 days. I was saying would you  
4 agree that there would be no harm in municipalities having  
5 that option to have 30 days.

6 A. No, actually I don't, because I think once somebody  
7 expands their voter hours that you'll have voters in other  
8 counties saying, "Why can't we do that?" And you'll get  
9 that internal pressure and buildup to meet that standard  
10 that someone else is holding.

11 Q. Okay. And that's true under the ten-day rule as  
12 well, isn't it?

13 A. I don't believe so. If you're talking about  
14 municipalities that have less time because they're small?

15 Q. Yeah. Under the reasoning that you're giving  
16 wouldn't there be equal pressure for those that don't have  
17 the full ten days to increase their --

18 A. Well, because those municipalities set their own  
19 budgets, which includes their election costs, they're  
20 deciding that they're willing to work within a tighter or  
21 a smaller time frame. The question to me comes to where  
22 you have a cutoff that is reasonable access for everyone,  
23 but you don't get into this one-ups and one-ups and  
24 one-ups that it gets to a point where there is unequal  
25 treatment and unequal access from one county to another.

1 Q. If Milwaukee -- the Milwaukee clerk, in his judgment,  
2 thought it would be -- there would be more equal access  
3 for the residents in Milwaukee if they had 30 days, who's  
4 decision should that be whether he's permitted to offer  
5 that or whether the City of Milwaukee should be permitted  
6 to offer that?

7 A. I think he's permitted to have that opinion and I  
8 think it's up to the state to decide how many days are  
9 reasonable so that it can be consistent across the state.  
10 And I don't know why there would be such a big difference  
11 in terms of how much time a person needs to get in to vote  
12 between an urban resident in Milwaukee or an urban  
13 resident in the city of Waukesha or New Berlin or  
14 Menomonee Falls or one of our larger municipalities.

15 Q. Are you aware that prior to a change in the law in  
16 2014 that municipalities had the option to offer weekend  
17 early voting, in-person absentee voting?

18 A. I am aware that there were counties that were open  
19 and providing a service above and beyond what was  
20 considered to be the norm or the standard statewide.

21 Q. Well, I'm talking about before the change in the law  
22 that they were permitted to open on weekends for early  
23 in-person voting.

24 A. My understanding -- I believe -- I agree with that,  
25 yeah.

1 Q. And you're saying that there was some standard or  
2 norm that they were not following?

3 A. Well, no. I think there is a norm that isn't a  
4 legislative situation. But I think the idea of having  
5 weekend hours in general was not one that was followed in  
6 other counties or one that was even a good idea. You have  
7 to have staffing, you have to have a lot of cost overhead,  
8 et cetera, and it was just not a practice. I think once  
9 it was somewhat highlighted that the general consensus was  
10 that it needs to be tightened up.

11 Q. Who sets that norm?

12 A. The norm or the statute?

13 Q. The norm. You mentioned a norm that was out there  
14 and I want to know who sets that norm.

15 A. Well, norms are done just by general consensus. So I  
16 would say that the norm was established by the voters  
17 themselves, by the -- just by voters themselves.

18 Q. Now, you understand, I take it, that Madison and  
19 Milwaukee actually had a different norm prior to the  
20 change in the law?

21 A. I do.

22 Q. Okay. And why is it that they shouldn't be permitted  
23 to, if they think that that's -- that their residents  
24 think that that is helpful for their citizens to vote, why  
25 shouldn't they be able to adopt weekend voter hours,

1 in-person early voting hours?

2 A. I think between mail-in absentee, in-person, same-day  
3 registration and voting day that the legislative standard  
4 right now is very flexible, very reasonable and that there  
5 isn't any reason or need to extend additional access,  
6 voter access, to particular pockets within the state.

7 Q. Yeah. I'm not asking you about the extending. I  
8 mean, this was access that was taken away; wouldn't you  
9 agree?

10 A. Well, I would assume that there were people that felt  
11 that access needed to be taken away in order to level the  
12 playing field or it would not have happened.

13 Q. When you say "level the playing field," can you  
14 explain what you mean by that?

15 A. Well, I think it's kind of self-explanatory. If  
16 there's an office open 30 days versus an office that's  
17 only open 10 work days, there are obviously voters that  
18 have a lot more access than someone else. So you're  
19 trying --

20 To me the process should be setting the standard that  
21 is reasonable, that has enough time and options to afford  
22 every interested voter in exercising their rights. But  
23 there has to come a point where it's just over -- giving  
24 *overaccess* I guess is the best word I can come up with,  
25 *overaccess* to particular parts of the state.



1 Q. So too much access to, say, Milwaukee and Madison to  
2 the ballot?

3 A. Too much access to the voters as far as  
4 opportunities.

5 Q. And I take it your view is that the state should set  
6 those rules for Milwaukee and Madison, not the people that  
7 live in Milwaukee and Madison?

8 A. Yes, absolutely.

9 Q. Let me ask you about mail-in absentee voting, voting  
10 by mail. Voting by mail does not appeal to you  
11 personally; is that correct?

12 A. No, it doesn't.

13 Q. And that's because that you have a little bit of a  
14 concern about the United States Postal Service?

15 A. I worked in Washington, D.C. for ten years and the  
16 postal headquarters was right near me. And I will tell  
17 you that when I said that, there was always a certain  
18 rivalry between federal employees and postal service, so  
19 it was really said tongue-in-cheek.

20 The reality is that anyone who asks for a mail-in  
21 absentee ballot that mails it back in can call the  
22 municipal clerk any day that they want to see that it was  
23 received. And there's now a tracking system that's  
24 required by the state that the minute they get that  
25 absentee ballot in they have to enter it into the WisVote

1 system and any individual can go in and see if it's been  
2 received. So there really is no reason to be concerned  
3 about postal delivery.

4 Q. And you, in Waukesha, get quite a few late-arriving,  
5 mail-in absentee ballots that don't have a postmark on  
6 them; isn't that correct?

7 A. We did notice that when we were doing I think the  
8 recount -- we had a recount in one of the  
9 municipalities -- that a number of the late absentee  
10 arrivals did not have a postal stamp on them or a  
11 postmark.

12 THE COURT: Does that mean that those wouldn't be  
13 traceable by the tracking system?

14 THE WITNESS: Well, this was prior to this new  
15 tracking system. The tracking system just went into  
16 effect in March of this year.

17 BY MR. SPIVA:

18 Q. I'm going to ask you a little bit about the new rules  
19 regarding observers. You're aware of course that it used  
20 to be that they had to stay six to twelve feet away from  
21 the poll workers, now it's three to eight feet; you're  
22 aware of that?

23 A. Yes.

24 Q. And you would agree that three feet is an awfully  
25 close -- it's awfully close to have somebody hovering over

1 someone while they're trying to do their job?

2 A. Yes.

3 Q. And you have heard complaints about that from  
4 municipal clerks?

5 A. I heard complaints from poll workers. And I will  
6 add, based -- you know, since the deposition, I will say  
7 that where I heard the most complaints was when it first  
8 came out. There was a lot of concern about people just  
9 being right over someone's shoulder and the impact it  
10 might have on the poll workers in addition to voters. I  
11 have heard of only a couple instances where it's been an  
12 issue. But I think people are still concerned about it  
13 and the fact that it is an option.

14 Q. And you don't think there's any need for observers to  
15 stand within three feet of a poll worker; isn't that  
16 right?

17 A. I think that if someone is standing within three feet  
18 of me that I feel they're invading my personal space. If  
19 I'm also trying to do something and work I think that it  
20 would be an issue to me.

21 Q. Now, we talked a little while ago about the fact that  
22 Waukesha is -- it has a growing Spanish-speaking  
23 population, correct?

24 A. Correct.

25 Q. And in fact there is already a fairly significant,

1 almost 5%, Spanish-speaking population in Waukesha?

2 A. Correct.

3 Q. But you do not provide Spanish-language ballots in  
4 Waukesha; is that right?

5 A. We will undoubtedly be providing them after the next  
6 census. There's a 5% requirement. Once a county reaches  
7 the 5% we will be preparing bilingual -- or I should say  
8 Spanish-speaking ballots, yes.

9 Q. You will be required to do that?

10 A. We will be required.

11 Q. Is that under federal law or state law?

12 A. Federal I believe.

13 Q. And the reason you're not providing them now, even  
14 though you're getting close to the 5%, is that it costs  
15 too much to provide dual-language ballots?

16 A. Cost is a very clear and it's probably the primary  
17 consideration.

18 Q. Let me ask you about the "one location of in-person  
19 absentee ballot per municipality" rule. And you of  
20 course -- I think you testified on direct -- understand  
21 that municipalities are now limited to one location per  
22 municipality?

23 A. Correct.

24 Q. And so Milwaukee, with approximately 320,000  
25 registered voters, has the same number of in-person

1 absentee ballot -- early in-person absentee ballot

2 locations as a municipality with 320 residents, correct?

3 A. Correct.

4 Q. And so that's not really equal access; wouldn't you  
5 agree?

6 A. I think that it's equal access in terms of -- I mean,  
7 if the issue is lines and waiting, then I think that the  
8 municipality needs to add more staffing and more lines. I  
9 don't think that there is any reason -- other than  
10 providing enough staff to handle the in-person voting, I  
11 don't understand why a second location would solve that  
12 problem.

13 Q. So in your judgment as an election administrator, the  
14 better way to deal with lines, in terms of in-person early  
15 voting, would be to add more staff to the location that  
16 you have?

17 A. At the location that they have.

18 Q. But that's your judgment, correct?

19 A. Yes.

20 Q. Do you think you should be able to enforce your  
21 judgment for Milwaukee?

22 A. I don't think I have that power to do anything. I  
23 think it's done at the legislative level.

24 Q. Okay. And I think you mentioned costs related to  
25 opening additional centers as one reason why you don't

1 think that additional centers should be required for  
2 municipalities, correct?

3 A. Well, I think if they're required it's an absolute  
4 disaster. If I could give an example, the City of  
5 Waukesha has currently 15 poll sites. Virtually all of  
6 them are either churches, schools or firehouses. They  
7 don't have a second location, from a municipal standpoint,  
8 to put personnel. They would have to find a location that  
9 would give them access for basically ten work days. Right  
10 now they have difficulty having access for election days.

11 Q. Understood. But I actually was asking about whether,  
12 if it weren't required but were an option for the  
13 municipality, Waukesha could choose not to open a second  
14 location; isn't that right?

15 A. Correct.

16 Q. And there shouldn't be any reason why, for instance,  
17 Milwaukee shouldn't be permitted to make a different  
18 judgment; wouldn't you agree?

19 A. I would say that if, based on a square-mileage-type  
20 approach, there was such an expansive distance from one  
21 point to another that there might be some benefit. If  
22 it's merely to just open up a second site somewhere  
23 relatively close to where the current site is or even just  
24 within a small circle, I don't think that they're  
25 solving -- I don't think the issue is access; I think the

1 issue is not enough staff at the city hall.

2 Q. If Milwaukee made the judgment that it thought it was  
3 necessary and it was willing to bear the costs of opening  
4 additional in-person absentee ballot sites, isn't that  
5 their judgment to make?

6 A. I'm saying that I believe that's a decision to be  
7 made at the state with the legislation.

8 Q. Is that because opening additional in-person early  
9 voting sites might provide too much access to the ballot  
10 for the residents of Milwaukee?

11 A. I don't know that it's too much access. I think that  
12 it's not too much access. One in-person voter is one  
13 whether they go to city hall or they go to another  
14 location. I think it's a matter of the impact on other  
15 counties, the pressure to also have second locations. I  
16 think in-person for ten days is a very reasonable period.

17 And I think if there are long lines -- and my  
18 understanding is, to take example the City of Milwaukee,  
19 they have free parking for voters who come in to do  
20 in-person voting. Apparently access is an easy thing or  
21 they wouldn't have long lines. So again if you're at the  
22 grocery store and there's long lines, they open up another  
23 line.

24 Q. But Milwaukee might make a different judgment, fair?

25 A. Oh, I'm sure they do.

1 Q. Let me ask you just briefly about the  
2 change-of-residency requirements from 10 days to 28 days.  
3 I think you spoke about that on direct. It wouldn't  
4 trouble you if the residency requirements were reduced  
5 back to its old time of 10 days, correct?

6 A. I personally don't have any strong inclination either  
7 way.

8 Q. All right. And let me ask you about the changes --  
9 you understand that it used to be that clerks could choose  
10 to email or fax absentee ballots to persons who were  
11 temporarily living abroad; that used to be the rule that  
12 they could do that?

13 A. I'm assuming it is if you're telling me it is.

14 Q. You don't know one way or the other?

15 A. I didn't -- all I have been concerned about is what  
16 the rules have been since I became county clerk.

17 Q. Fair enough. You don't have a disagreement with  
18 clerks being able to email an absentee ballot to someone  
19 who's temporarily living overseas?

20 A. I would say temporarily I'd really have to do a lot  
21 of analysis on whether I think that's a good idea. My  
22 initial reaction is no, I don't think it's a good idea. I  
23 think if they're temporary that means they have a  
24 permanent residential address in the United States that we  
25 can get a mailed-out ballot to them.



1 Q. Just to be clear, I was using the word *temporary* in  
2 contrast to a *permanent* overseas resident. You're  
3 familiar with that distinction, right?

4 A. Mm-mm. Sure.

5 Q. So say you had a student at the UW who was living in  
6 Africa for the year when the election that they wanted to  
7 vote in took place. You wouldn't have any disagreement  
8 with a clerk being able to email the ballot to that  
9 person?

10 A. Again, as I said, I think I'd have to really sit down  
11 and analyze what the possible pitfalls might be, if any,  
12 before I really make a statement on that.

13 Q. Can we pull up page 88 and 89 of Ms. Novack's  
14 deposition? And if you can highlight, once you get it up,  
15 line 23 on page 88. Well, actually first let's pull them  
16 both up because you may want to look at the context,  
17 Ms. Novack.

18 A. Yeah.

19 Q. Do you recall being deposed by my colleague,  
20 Mr. Martin, in this case? And I just want to see -- I  
21 don't want you to read it out loud and I won't read it out  
22 loud, but if you could take a look at page 88 for the  
23 context of the discussion that you had with Mr. Martin and  
24 just to confirm that you were discussing emailing ballots  
25 to temporary overseas residents.

1 And then I want to focus in, starting on line 23,  
2 where Mr. Martin asked the question:

3 "But they cannot be emailed or faxed the ballot. Do  
4 you see any reason why they shouldn't be faxed or emailed  
5 the ballot? It cures the very problem you just  
6 mentioned --

7 "ANSWER: Yeah.

8 "QUESTION: -- of trying to mail it to them?

9 "ANSWER: No. To be honest, I wouldn't have any big  
10 issue with that."

11 Do you remember giving that answer?

12 A. I would have no big issue with it being mailed, an  
13 absentee ballot. That was my belief in what I was  
14 answering at that time.

15 Q. You didn't realize you were answering the question  
16 about emailing?

17 A. No, no. I felt I was dealing -- if you look directly  
18 above that it says of trying to email it to them and  
19 that's what I answered.

20 Q. Okay. I'm going to ask you briefly about the  
21 question about the law that prohibits municipalities from  
22 requiring landlords to provide registration forms to new  
23 tenants. Do you recall that discussion on direct?

24 A. Yes.

25 Q. Okay. And you understand that prior to that law

1 being enacted that that was the choice of each  
2 municipality whether or not to require landlords to  
3 provide registration forms; did you know that?

4 A. No.

5 Q. Okay. I assume --

6 A. I'm assuming that that's correct.

7 Q. Okay. I take it from that you probably didn't know  
8 that there was only one municipality that actually had  
9 that requirement?

10 A. That would not surprise me.

11 Q. And that was Madison; did you know that?

12 A. No, but that would not surprise me.

13 Q. Okay. And on direct you mentioned that you were  
14 concerned that if a municipality asked -- required  
15 landlords to provide a registration form that the  
16 landlords wouldn't have enough training to explain the  
17 registration form; is that what you testified to?

18 A. Well, I think the minute someone hands someone else a  
19 form that questions are inevitable. And, no, I don't  
20 believe that an individual is -- should be giving any kind  
21 of instructions or directions to someone else that hasn't  
22 been through official clerk training.

23 Q. Mm-mm. And does the clerk's office give either  
24 instructions or guidance to every person who fills out a  
25 registration form?

1 A. They're there to answer questions and they do have  
2 the training to answer those questions.

3 Q. Okay. And a person who got a registration form from,  
4 say, their landlord, they could similarly either go to or  
5 call the clerk's office if they had questions?

6 A. I would suspect the likelihood is they would ask a  
7 question right there on the spot and it would be obviously  
8 going to the landlord.

9 Q. Okay. But there's no law that says the landlord  
10 can't say, "I don't know. You'll have to call the clerk's  
11 office"?

12 A. I don't -- no, there's -- I mean, there's nothing  
13 that would stop that, but there's nothing that would  
14 prohibit it either.

15 Q. Okay. You had talked about these alleged fraud cases  
16 in your direct and I wanted to get a little bit of clarity  
17 on time frame. You mentioned I think somebody named  
18 *Michael Ward* who came in in April. That was April of this  
19 year?

20 A. April of this year, yes.

21 Q. Okay. And the Voter ID law was in place in April of  
22 this year, right?

23 A. Correct.

24 Q. So if somebody actually did come in and impersonate  
25 the other Michael Ward or the real Michael Ward, they did

1 it with a voter ID?

2 A. I am assuming that -- well, they had to show some  
3 sort of ID.

4 Q. Okay. So the Voter ID law had nothing to do -- the  
5 existence of the Voter ID law did not prevent --

6 A. No --

7 Q. -- this person --

8 A. -- no did not prevent it.

9 Q. Let's get the whole question out for the record.  
10 It's hard for the court reporter. So the Voter ID law did  
11 not prevent, if in fact this was somebody committing  
12 fraud, it did not prevent them from accomplishing that?

13 A. Voter ID, no.

14 Q. Okay. And there's really no --

15 A. But the fact that they've committed alleged or very  
16 likely voter fraud obviously did occur.

17 Q. And the sole evidence of that is that somebody signed  
18 in the place of the Michael Ward who later came in that  
19 you all call the *real* Michael Ward?

20 A. Well, this person came in, said the name and repeated  
21 the address, based on the protocol, and took a ballot and  
22 voted. And, yes, the person was not a Michael Ward that  
23 lived at that address. There is no question that the  
24 Michael Ward that lived at that address was the later  
25 individual.

1 Q. Do you recall what the name under Michael Ward's name  
2 was?

3 A. It would be something similar, but I'd have to look  
4 at the poll sheet to see if somebody actually signed on  
5 the line below.

6 Q. Do you know what the name above Michael Ward's name  
7 was?

8 A. No, I don't.

9 Q. You don't know whether the name below might have been  
10 Michael Williams?

11 A. In order to sign you have to repeat your address. So  
12 if the line below is Michael Williams, he signed Michael  
13 Ward and he would have given the address on the line for  
14 Michael Ward. If his name was Williams he would have  
15 signed -- the line that should have been *Michael Ward*  
16 would say *Michael Williams*. It did not.

17 Q. I guess the point I was making is we don't know  
18 whether this was a mistake or not?

19 A. I don't believe it was a mistake.

20 Q. But you don't have any evidence of that?

21 A. No, I don't have any evidence of that. That would be  
22 something referred to the District Attorney's Office.

23 Q. And you mentioned I think a case in Waukesha?

24 A. *Waukesha*.

25 Q. *Waukesha*. Sorry. And you said somebody had gone to

1 a different location I think and voted a second time and  
2 you said it was either in April or February. Was that of  
3 this year?

4 A. Of this year we had two individuals -- or excuse me,  
5 two individuals in -- I think it was four, now that I  
6 think of it. In February there were four. In both  
7 instances they had the same last name, it was a male and  
8 female, who voted in one location, and obviously through  
9 the poll book or whatever, and then physically drove from,  
10 I believe it was, Milwaukee County into Waukesha County.  
11 One might have been New Berlin to the city of Waukesha.  
12 But same-day election registered and voted a second time.

13 Q. And that was in February of this year?

14 A. I believe that was February. Now, we had additional  
15 instances of that in April that I just came across in  
16 going through my provisional ballots.

17 Q. So in February the Voter ID law was also in effect,  
18 right?

19 A. Right.

20 Q. So whatever happened with these individuals who drove  
21 from Waukesha; what did you say?

22 A. I think in one instance it was from Milwaukee County  
23 to Waukesha County and the other I believe it was Waukesha  
24 County but from one municipality to another.

25 THE COURT: If you would, how did that get

1 discovered?

2 THE WITNESS: After the election -- and if you  
3 look on a poll book you'll see what looks like a barcode  
4 just like at a grocery store. Any vote or any name that's  
5 shown on there is basically what we call *banked*, but it's  
6 input to the Wisconsin voter system.

7 In this instance two different times there would have  
8 been two different entries into the system. And that will  
9 pop it out and say, wait a minute, it looks like we have a  
10 duplicate voter. And at that point then we start the  
11 investigation to see whether or not we do.

12 THE COURT: Okay. So basically the voter  
13 registration system that the GAB maintains --

14 THE WITNESS: Correct.

15 THE COURT: -- kind of flagged this as having  
16 somebody with the same voter ID number had voted --

17 THE WITNESS: But we would flag it first because  
18 at the time that whichever municipality put the  
19 information in second would get a flag that would pop up  
20 and say, wait a minute, this person already voted in,  
21 let's say, New Berlin. In those instances we pull the  
22 poll books from the two locations and compare signatures.  
23 And in those situations I looked at the poll book pages  
24 and the signatures --

25 THE COURT: But just the poll book was in



1 Milwaukee County?

2 THE WITNESS: Well, in one it was in Milwaukee  
3 County. And the New Berlin and City of Waukesha one, they  
4 were both in Waukesha County.

5 THE COURT: So just sticking with the Milwaukee  
6 County one, so you got the poll book from Milwaukee  
7 County?

8 THE WITNESS: No. I believe the District  
9 Attorney's Office may have. In that situation we just  
10 pulled our own.

11 THE COURT: Okay. So then in the one where you  
12 say it was New Berlin and Waukesha, that one you pulled  
13 the poll books and compared?

14 THE WITNESS: Correct.

15 THE COURT: And did the signatures match?

16 THE WITNESS: They looked very very similar.

17 BY MR. SPIVA:

18 Q. And those individuals had to show an ID at both of  
19 the locations where they voted?

20 A. Well, and their ID, the address on the driver's  
21 license does not have to be current. So at both locations  
22 they would have shown what would be acceptable voter ID,  
23 but it didn't stop them from basically committing voter  
24 fraud or signing anything that would be voter fraud.

25 Q. The Voter Photo ID law did not stop this alleged

1 fraud?

2 A. No, it did not.

3 Q. Okay. And in fact this couple -- I'm talking now  
4 about the New Berlin to Waukesha or Waukesha to New Berlin  
5 couple -- in fact they --

6 THE COURT: That's *New Berlin*.

7 MR. SPIVA: Sorry, *New Berlin*.

8 THE COURT: What is the city in which our NFL  
9 franchise plays?

10 MR. SPIVA: Green Bay.

11 THE COURT: Very good.

12 MR. SPIVA: I have a good friend who lives in  
13 Green Bay.

14 BY MR. SPIVA:

15 Q. But this couple did not -- they weren't pretending to  
16 be other people?

17 A. They were not intending to be other people. They  
18 were voting intentionally twice in one day. Neither one  
19 of them were in-person absentees. Both votes were cast on  
20 Election Day.

21 Q. And they boldly walked up with their IDs as  
22 themselves and voted twice?

23 A. Yes.

24 Q. You mentioned something about them driving from one  
25 place to another. Has this couple been arrested?

1 A. I don't know. It was referred.

2 Q. How do you know they drove from one to another?

3 A. Well, there's no real buses between New Berlin and  
4 the city of Waukesha. They had to get there somehow.

5 Q. And then I think the other example Your Honor was  
6 just asking about I guess was the Milwaukee to Waukesha.  
7 And I take it, I think we've already discussed it, that  
8 also was since the Voter ID law was in place?

9 A. I believe so, yes.

10 Q. And have any prosecutions resulted from any of those  
11 referrals?

12 A. You would have to talk to the District Attorney's  
13 Office.

14 Q. Okay. If they have, you don't know about it?

15 A. I do not know about it.

16 MR. SPIVA: Thank you, very much, Ms. Novack. I  
17 have no further questions.

18 THE COURT: Not quite.

19 MS. SCHMELZER: I have no redirect, Your Honor.

20 THE COURT: Very good. You're finished. Thank  
21 you, very much.

22 And you may call your next witness.

23 Mr. JOHNSON-KARP: Defense calls Leah Fix, Your  
24 Honor.

25 (2:44 p.m.)

1 LEAH FIX, DEFENDANTS' WITNESS, SWORN

2 Mr. JOHNSON-KARP: I've got a packet of exhibits.

3 THE COURT: Bring it up. Thank you.

4 MR. CURTIS: Thank you.

5 DIRECT EXAMINATION

6 BY Mr. JOHNSON-KARP:

7 Q. Good afternoon, Ms. Fix.

8 A. Hi.

9 Q. Could you please state and spell your name for the  
10 record?

11 A. Leah Fix; L-E-A-H, F-I-X.

12 Q. And, Ms. Fix, what's your place of employment?

13 A. I currently work at the Wisconsin DOT, Division of  
14 Motor Vehicles.

15 Q. And how long have you been there?

16 A. Since 2008.

17 Q. What positions have you held at DMV?

18 A. When I started at DMV I worked as the Bureau of Field  
19 Services processor in the DMV service centers. And then  
20 in 2012 I moved to the Compliance, Audit and Fraud Unit.

21 Q. Could you explain to us what your role is -- if I say  
22 CAFU, will you understand that?

23 A. I will.

24 Q. -- your role and responsibilities in CAFU?

25 A. Sure. I'm currently the lead worker in CAFU. I

1 monitor workload, assign duties and review work. I also  
2 meet with staff and am responsible for training staff.

3 Q. You review the work of all the other workers in CAFU;  
4 is that right?

5 A. Yes.

6 Q. And how many other workers are there?

7 A. Six.

8 Q. Could you explain, just generally, the categories of  
9 cases of work that come to CAFU, please?

10 A. Sure. In CAFU we're responsible for auditing all of  
11 the bureaus within the DMV. So we conduct the internal  
12 audits. We also investigate fraud cases, whether it's  
13 internal employee fraud within the DMV or external fraud  
14 such as identity theft, misrepresentation or fraudulent  
15 titles, misuse of registration, things like that.

16 Q. And where does the IDPP work fit into that?

17 A. Because of our work as investigators on fraud cases  
18 we have certain tools that are available to us that can  
19 help us to adjudicate the ID applications.

20 Q. Could you explain those tools or skills?

21 A. Sure. As investigators we're always looking to find  
22 solutions or reasons behind something. So we have, you  
23 know, kind of an engrained mission to solve cases. So  
24 when we're presented with a voter ID application we're  
25 trying to figure out who the person is and if the

1 information that they're providing to us is accurate on  
2 their record.

3 Q. What do you understand to be your mission as to these  
4 cases?

5 A. We want to issue voter IDs to anyone that is eligible  
6 to receive them.

7 Q. Now, as lead worker do you meet regularly with the  
8 other team members?

9 A. We do. I have weekly one-on-one meetings with each  
10 team member and then we also have a team meeting once a  
11 week where we discuss our Voter ID cases.

12 Q. What do those weekly meetings comprise of? And if  
13 there's a difference between the individual and the group  
14 meetings, if you could explain that.

15 A. Sure. During the team meeting we all meet to talk  
16 about just specifically our Voter ID cases. So we would  
17 talk about any new cases that we have received, our total  
18 number of cases. And any petitions that we're currently  
19 having difficulty coming up with a solution, we talk about  
20 that to troubleshoot and share ideas. We also talk about  
21 any updates to our procedures or changes to the law so  
22 that we're all on the same page.

23 Q. Go ahead.

24 A. I'm sorry. The weekly meetings I meet one on one  
25 with each individual to talk about all of their cases and

1 all of their workload, IDPP petitions being part of that.

2 Q. So it sounds like you meet at least twice weekly with  
3 everyone in the unit; is that correct?

4 A. That's correct.

5 Q. You mentioned troubleshooting. If you could expand  
6 on that, what kind of troubleshooting that you do.

7 A. So the petitions are often very unique in their  
8 situations, unique in their backgrounds. So when you're  
9 working on a particular case you might learn something  
10 that helped you in a certain case and then someone might  
11 come across a similar situation in a couple months. So by  
12 sharing the information, saying what you've done with your  
13 case as it might help someone in the future come up with  
14 ideas about solving their own cases.

15 Q. Given that you meet at least twice a week with  
16 everybody, is it fair to say you're familiar with  
17 everybody's caseload?

18 A. Yes.

19 Q. And do you participate in individual IDPP petitions  
20 or do you handle them, rather?

21 A. I do. I handle less than other staff members because  
22 of other workload. But I do handle a fair amount of  
23 petitions.

24 Q. Do you look at or oversee each individual petition to  
25 some extent?

1 A. I do. I review -- so besides the weekly meetings,  
2 any cases that are being suspended or denied, I review  
3 those cases. I also review cases to see if they --  
4 they're eligible for another form of communication or  
5 another letter to be sent. So I'm involved in all cases.

6 Q. Okay. What sort of training did you receive in  
7 relation to the ID petition process?

8 A. We didn't really have any training developed when we  
9 started because we were kind of thrown into it in a very  
10 short time frame. So the training was kind of an ongoing  
11 *learn as we go*. So I didn't -- we didn't have any formal  
12 training when I started the process.

13 Q. Has that changed?

14 A. Yes, definitely. I've created a procedure document  
15 that our unit uses. Kind of it goes over the background  
16 of the procedures and then it gets into specifics about  
17 how our unit handles each individual case.

18 Q. And I'm going to pull up Defense Exhibit 287. And  
19 this exhibit is not one, but I'll just remind you that  
20 we're going to just be using last names when we're  
21 discussing the specific cases.

22 A. Yes.

23 Q. Are you familiar with Exhibit 287?

24 A. I am.

25 Q. And is that the document you were just describing?



1 A. It is.

2 Q. Now, could you explain more how this document came  
3 into being?

4 A. We -- CAFU likes to have procedural documents for  
5 everything that we do so we can easily train everyone in  
6 the unit to handle all processes the same way. So once --  
7 as soon as we started the petition process we had the  
8 basic overview of this document, but it's been expanded  
9 upon as we learn about the process and as the process  
10 changes.

11 Q. And this document --

12 THE COURT: Excuse me. Clarify that for me. I  
13 thought you said when you first started you didn't really  
14 have anything because you didn't really have any training  
15 because it was a new process, but that you had since  
16 created a procedure document, which is the one that's  
17 marked as 287. So you're the primary author of this; is  
18 that right?

19 THE WITNESS: Yes. Members of CAFU also make  
20 updates if I'm out of the office.

21 THE COURT: Okay. And I see it has a revision  
22 date of May 6th, 2016. So that's the last time it was  
23 updated, right?

24 THE WITNESS: It has been updated since then.

25 THE COURT: Okay. Even since then?

1 THE WITNESS: Yes.

2 THE COURT: I presume in response to the  
3 emergency rule?

4 THE WITNESS: Yes.

5 THE COURT: Okay. When was it actually -- when  
6 was the first one?

7 THE WITNESS: The first one was probably  
8 September of 2014, shortly after we began.

9 THE COURT: All right. That was my question. Go  
10 ahead.

11 MR. CURTIS: Your Honor, could I just enter a  
12 continuing objection? This is the first we've heard that  
13 there's yet another update. We haven't received any such  
14 thing. And I just object to us talking about a document  
15 that apparently has now been superseded.

16 THE COURT: Okay. I'm not sure exactly what  
17 the -- what ruling would be required here during the  
18 examination. But I'll note that you more or less are  
19 requesting that you get the updated version of the  
20 document, which seems reasonable. But that's not an issue  
21 for us right here. Go ahead.

22 Mr. JOHNSON-KARP: I'll just note, this is the  
23 most updated version that we've seen as well at this  
24 point.

25 THE COURT: Okay.

1 BY Mr. JOHNSON-KARP:

2 Q. You mentioned that it is relatively regularly  
3 updated; is that right?

4 A. It goes through phases. There will be a couple  
5 months where there will be no changes. But then for  
6 instance with the emergency rule, that is requiring us to  
7 change and update until we get that figured out, how we'll  
8 handle that process.

9 Q. And how are updates developed; is it kind of a  
10 consensus or do you determine when an update is needed and  
11 you update the document?

12 A. A lot of our decisions come from the administrator.  
13 She will -- DMV administrator. She will make a change and  
14 then my supervisor and myself will decide that the  
15 training document needs to be updated. If it's something  
16 more specific about how CAFU handles a petition, then  
17 myself or my supervisor would decide that it needs to be  
18 changed.

19 Q. Does everybody in CAFU have easy access to this  
20 document?

21 A. Yes. It's stored on our share drive that we all have  
22 access to.

23 Q. And as far as you're aware, do people regularly refer  
24 to this document?

25 A. They do.

1 Q. Is this document ever handed to people or pointed to  
2 people when they start on the unit?

3 A. Yes. It is given to new employees when they start in  
4 CAFU.

5 Q. What else do new employees get as part of that  
6 training when they come to CAFU?

7 A. The training process is pretty extensive in CAFU. We  
8 go through, like, a two-month training period where every  
9 piece of work that they handle they're being shadowed or  
10 watched by another employee in CAFU. We also have a  
11 one-on-one mentorship where someone is assigned to work  
12 directly with that person and to answer any questions.  
13 And then, also, during that two-month time period they're  
14 reviewing procedure manuals or training documents.

15 Q. So during that two months do new employees have their  
16 own IDPP caseload?

17 A. Not generally until the very end, then they'll begin  
18 taking cases. But even then they're still being shadowed  
19 on the work that they do by someone else in the unit.

20 Mr. JOHNSON-KARP: Your Honor, I'd move to admit  
21 Exhibit 287.

22 THE COURT: Any objection?

23 MR. CURTIS: No objection.

24 THE COURT: Exhibit 287 is admitted. I do have a  
25 question before we move on though. If you look at page 2

1 of this document, it has the heading there, it says, *CAFU*  
2 *Temporary Receipt Process*.

3 THE WITNESS: Yes.

4 THE COURT: That seems to be the emergency rule  
5 procedure.

6 THE WITNESS: This is the beginning of the  
7 emergency rule. On the 6th is when we were notified that  
8 there was going to be a change, so we put something in  
9 there as a placeholder. Now it's much more specific about  
10 how we actually -- where we save the files, how we do a  
11 mail merge, much more specific to our unit.

12 THE COURT: Okay. Thank you for that  
13 clarification.

14 BY Mr. JOHNSON-KARP:

15 Q. I'd like to direct your attention to what's been  
16 marked as Plaintiffs' Exhibit 324. Are you familiar with  
17 this document? And we're on page 9 of that document.

18 A. Yes.

19 Q. Are you able to see it on the screen?

20 A. No.

21 Q. Okay.

22 A. Yes.

23 Q. What is this document?

24 A. This looks like it is meeting notes from an ID  
25 petition, a meeting that was held on the unit.

1 Q. At what point in the development of the ID process  
2 was this document created?

3 A. This looks like it was a couple weeks into the  
4 process.

5 Q. I'm looking at the first bullet point, rather under  
6 the first bullet point where it says *Adjudication*. It  
7 says, "Is a one way street, don't provide any  
8 information." What's your understanding of that  
9 statement?

10 A. That I believe is directionally originally received  
11 from the Department of Health. They didn't want us  
12 providing confidential information to a customer that  
13 wasn't aware of the information on something like that the  
14 person was adopted or, you know, that their father was  
15 someone different than they thought. They didn't want us  
16 sharing information if the customer didn't know it.

17 That has since changed. We try to provide as much  
18 information -- DHS won't even tell us that information, so  
19 we don't have to be afraid of telling someone they're  
20 adopted and then not realizing it. So we provide as much  
21 information as we can to find a match to the birth record.

22 Q. So DHS kind of leads you blind with a "no"; is that  
23 correct?

24 A. Yeah. In most situations, if it's something like  
25 adoption, they wouldn't tell us. Otherwise if it's

1 something like a father's last name, we would try to  
2 provide any information we could so that the petitioner  
3 was able to get the information we needed.

4 Q. On the next line you see, "Can't lead but can ask  
5 simple questions." What's your understanding of that?

6 A. Again I think that's saying -- you know, telling them  
7 that we thought we shouldn't tell them what the no-match  
8 concern was with DHS, like the father's last name or the  
9 mother's maiden name, but again we'll ask leading  
10 questions now.

11 If we find out that the mother's maiden name was  
12 Clark, we'll say, "Do you have any family members with the  
13 name *Clark*? Does that name sound familiar? Would you  
14 have any reason to have a birth record with that  
15 information?" So now this is updated. It's not to be  
16 followed anymore.

17 Q. We also see, in the second major bullet point  
18 reference, to the *Triad*. What's your understanding of  
19 that term?

20 A. I think that was a term used by the scribe on these  
21 notes. It's not something that we refer to. I didn't see  
22 it until I was shown this document as part of the court  
23 case. It's not something that we use or that we have -- I  
24 think it was used by this one person this one time.

25 Q. Now, you mentioned briefly about the process of

1 petitions going to and coming from DHS. Once the petition  
2 comes from DHS, do you make the assignments within CAFU?

3 A. Not specifically. The cases come to an internal  
4 team-shared email box and the assignment is that everyone  
5 is supposed to take them as they see them, kind of on a  
6 first-come, first-served basis.

7 I do monitor workloads, so I will notice if one  
8 adjudicator has ten cases and the other only has eight. I  
9 will say, you know, "Jim it's your turn to take the next  
10 case." But I don't specifically say this one is for you  
11 or this one is for you.

12 Q. Just whoever is on duty, on email duty that day?

13 A. Yeah.

14 Q. And is that outlined in the handbook?

15 A. I think so. I'm not positive.

16 Q. And I think you mentioned that you do also work on  
17 petitions?

18 A. I do.

19 Q. You have a lighter workload than your colleagues; is  
20 that right?

21 A. That's correct.

22 Q. What do you understand to be the goal of the ID  
23 petition process?

24 A. Our goal is to issue the voter IDs to whoever is  
25 eligible for that ID.



1 Q. Now, we've heard about the error report in CAFU and  
2 I'd like to discuss that a little bit. Do you have a role  
3 in monitoring errors in CAFU?

4 A. I do. That's one of my primary roles with the ID  
5 petition process -- sorry.

6 Q. Go ahead.

7 A. -- monitoring the errors and then creating this error  
8 report.

9 Q. And how did that come to be your responsibility?

10 A. That was direction I was given by my supervisor.

11 Q. And is that since the beginning of the petition  
12 process?

13 A. Yeah. It might have been a week or two before we  
14 started tracking the errors, but pretty much since the  
15 beginning.

16 Q. Now, I'm showing you what's been marked Defendants'  
17 Exhibit 61. Do you recognize this document?

18 A. I do.

19 Q. And what is it?

20 A. This is the error report that I create.

21 Q. What's the purpose of the error report?

22 A. We use this for tracking internal processing issues  
23 so that we can help to train the BFS (Bureau of Field  
24 Service) staff responsible for completing the IDPP  
25 transactions.

1 Q. Is this report that we're looking at the most current  
2 error report?

3 A. Yes, it is.

4 Mr. JOHNSON-KARP: Okay. Your Honor, I'd move to  
5 admit Defendants' Exhibit 61.

6 THE COURT: Any objection?

7 MR. CURTIS: No objection, Your Honor.

8 THE COURT: It's admitted. Just for  
9 clarification, it's the most current one, but do you know  
10 what date it was created on? I guess there's a date range  
11 on the chart, so I guess that tells us.

12 THE WITNESS: Yeah. So it was data through the  
13 end of January 2016.

14 THE COURT: Okay. So when you do new versions of  
15 these, they're cumulative, you just add on the new data  
16 and keep the old?

17 THE WITNESS: No. It's just for the six-month  
18 period.

19 THE COURT: Okay. I gotcha. And presumably you  
20 do one of these every six months?

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 BY Mr. JOHNSON-KARP:

24 Q. Now, I'd like to focus on this period of time that's  
25 captured in Exhibit 61. How many petitions were processed

1 in this, we'll call it, six-month period?

2 A. On this report there were 275 petition applications  
3 processed.

4 Q. And how many of those had errors?

5 A. 71.

6 Q. And those are the 71 noted in the report?

7 A. Correct.

8 Q. Are there errors that are not included in the error  
9 report?

10 A. There could be minor errors that the section that  
11 reviews all of the petitions might not notice, but those  
12 would be minor errors that have no effect on the actual  
13 petition.

14 Q. What would be an example of a minor error?

15 A. It could be something with the paperwork, you know,  
16 not completing all of the squares in the *Office Use*  
17 section or -- I think that's probably the only one that  
18 would get missed.

19 Q. What kind of impact would a minor error like that  
20 have on the processing of a petition?

21 A. None.

22 Q. That is to say, it wouldn't delay the issuance at  
23 all?

24 A. No.

25 Q. All right. Now, I'd like to just ask you about the

1 specific errors that are noted in the report at page 2.

2 And I'll just start with the leftmost bar in the chart.

3 It says *MV3012 Not complete (or completed incorrectly)*.

4 What does that mean?

5 A. The MV3012 is the petition application that the  
6 customer fills out. This would mean that either something  
7 that was needed was left off by the customer, they didn't  
8 complete it on the application; or, like I was talking  
9 earlier, about the *Office Use* section, the BFS processor  
10 might have forgot to fill in their squares or might have  
11 accidentally filled in the squares that are used by DHS.

12 Q. So this could be an error attributable to the  
13 customer or staff?

14 A. Correct.

15 Q. How common is this type of error?

16 A. Fairly common for this report period. It was the  
17 second most common error.

18 Q. Are you able to distinguish between which of those  
19 errors are attributable to staff and which are  
20 attributable to the customer?

21 A. Not from this report I'm not.

22 Q. Are you otherwise?

23 A. Looking at each individual application I would be  
24 able to tell.

25 Q. Do you have a sense of how it plays out?

1 A. Most of them are the errors on the part of the  
2 processor with the *Office Use* section.

3 Q. And that was the minor error you were talking about  
4 earlier?

5 A. Correct.

6 Q. How much time does it take typically for the MV3012  
7 error to get recognized?

8 A. It would be recognized by the Driver Eligibility Unit  
9 as soon as they were reviewing the petition, which they do  
10 every day. This error would not stop them from forwarding  
11 it to DHS, so it wouldn't delay the petition at all in the  
12 process.

13 They would report it to me and I would share it with  
14 DHS for training. But all they'd have to do is cross out  
15 if they accidentally filled in the spot for DHS. They'd  
16 just cross that out. Nothing else would be needed.

17 Q. Do these errors require an applicant to return to a  
18 service center?

19 A. No.

20 Q. Would this type of error ever result in an applicant  
21 not receiving an ID?

22 A. No.

23 Q. How long would this type of error delay the process?

24 A. A couple minutes.

25 Q. And I'll ask you kind of generally the same questions

1 about each of these columns. So if you want to just  
2 describe generally, moving into the *MV3012 Not scanned*  
3 *into L1*, if you could explain that.

4 A. So L1 is our central -- it used to be our central  
5 storage database for documents or applications submitted  
6 by all customers. So in this instance, five times the  
7 petition application was not scanned into the central  
8 storage system. So someone would have to manually pull  
9 that from the paperwork and scan it. It was still likely  
10 attached to the email to DEU, the Driver Eligibility Unit,  
11 so they were still able to forward it to DHS without a  
12 delay in the petition process.

13 Q. And are these errors exclusively attributable to  
14 staff?

15 A. Yes.

16 Q. Did I hear you say this is another couple minutes  
17 type of error?

18 A. That's correct.

19 Q. Would this type of error ever result in someone not  
20 obtaining an ID?

21 A. No.

22 Q. Would this type of error require the applicant to  
23 return to the service center?

24 A. No.

25 Q. Moving to *Customer record created with error (or not*

1 created), could you explain that?

2 A. Sure. This is when the BFS processor is actually  
3 creating the customer record in our database putting some  
4 sort of error into the record, maybe a spelling error. A  
5 lot of times they look at the petition application where  
6 it says *Customer name at birth* and they'll create the  
7 record with that name instead of using the customer's  
8 current name. So it's just a typo, a data entry error.

9 Q. And that also is exclusively attributable to staff?

10 A. Correct.

11 Q. And how much time does that usually take to get  
12 recognized?

13 A. Just a couple of minutes.

14 Q. Ever require an applicant to return?

15 A. No.

16 Q. Ever result in a denial of a petition?

17 A. No.

18 Q. Or I should say nonissuance.

19 A. No.

20 Q. *Petition not sent to central office correctly*, what  
21 does that mean?

22 A. So this could mean a couple different things, either  
23 the email on where they attach the petition and send that  
24 to the Driver Eligibility Unit they might have forgotten  
25 to send that email entirely or the email that they send

1 might not have the petition scanned and attached. I think  
2 those would be the potential of errors covered under that  
3 one.

4 Q. Also staff errors?

5 A. Correct.

6 Q. How much time would this type of error typically take  
7 to resolve?

8 A. This one could take until the next day to be  
9 discovered just because the report that is received by the  
10 Driver Eligibility Unit comes out daily. So the next day  
11 they would see that a petition was filed, but they didn't  
12 receive of email, in which case they would create the,  
13 email attach the documents and forward them on to DHS.

14 Q. So a day?

15 A. A day.

16 Q. Would this type of error require an applicant to come  
17 back to the service center?

18 A. No.

19 Q. And would this type of error ever result in a  
20 nonissuance of an ID?

21 A. No.

22 Q. *Envelope not created or taken to "paid" status*, what  
23 does that mean?

24 A. *Envelope* is a term we use for the work product, the  
25 computer system that's used to create a record and to



1 complete a transaction. So with the ID petition  
2 transactions, they take the process through to a certain  
3 point which is called the *paid status*. It's not complete,  
4 it's not printing the card yet, but it notifies the  
5 electronic systems that a record has been created. So if  
6 they haven't taken it to paid status, they forgot to press  
7 one button on that work envelope which would bring it to  
8 the next stage in the process.

9 Q. And how are those typically recognized, those type of  
10 errors?

11 A. Again that would be because the email was sent to DEU  
12 with the attachments and telling them to look for the  
13 product -- or to look for the transaction, but the  
14 transaction wasn't complete.

15 Q. How much time of delay?

16 A. Probably a day, at the most.

17 Q. Does this require an applicant to come back in?

18 A. No.

19 Q. Ever result in a nonissuance?

20 A. No.

21 Q. *MV3004 not scanned*, what does that mean?

22 A. So this is the application for an ID card. It means  
23 that this -- the paper application wasn't scanned into the  
24 electronic storage system for the customer. So staff has  
25 to be asked to go into their paper files and scan it into

1 the electronic storage -- excuse me, electronic storage  
2 system.

3 Q. And how long before that might get caught?

4 A. That would be done as soon as DEU is reviewing the  
5 process, which is either that day or following business  
6 day.

7 Q. Ever require an applicant to come back --

8 THE COURT: I'll tell you what on these, why  
9 don't we just go through the errors, and at the end you  
10 could ask if there are any ones that would require a  
11 return visit or might jeopardize that application.

12 Mr. JOHNSON-KARP: Sure.

13 BY Mr. JOHNSON-KARP:

14 Q. *No acceptable residency documents*, what does that  
15 mean?

16 A. This means that the customer didn't have all the  
17 required documents to start a petition, but the processor  
18 at the DMV service center errored in creating the  
19 transaction as if they had all the documents needed.

20 Q. And how long would that delay the process?

21 A. For that transaction the customer would have to  
22 return with residency documents to actually start their  
23 transaction, so it would depend on how long it took the  
24 customer to return.

25 Q. Is that then basically a restarting the process?

1 A. Correct.

2 Q. Fair to say that it's sort of a half-and-half  
3 error --

4 A. Right.

5 Q. -- between the applicant and the field service?

6 A. Right.

7 Q. *No acceptable identity documents*, what is that?

8 A. That's the same, similar to the one we just  
9 discussed. In this situation the customer didn't have a  
10 document, the list of acceptable identity documents that  
11 BFS accepts, and their petition was started without all of  
12 the required documentation needed to start the petition.

13 Q. And is that the same, that you'd have to wait for the  
14 customer to return?

15 A. Yes.

16 THE COURT: Just a clarification on this. Now,  
17 on most of these other ones you have internal processes  
18 that will kick these out and say -- somebody would notice,  
19 but I'm not quite sure how -- I know the resolution time  
20 is going to be when the customer comes back with the  
21 documents to get it properly started, but how long will it  
22 take for that problem to be discovered?

23 THE WITNESS: It would be discovered either the  
24 same day or the next day when the Driver Eligibility Unit  
25 is reviewing the transactions. They review everything

1 with petition transactions before they forward it on to  
2 DHS to make sure it's complete.

3 THE COURT: Okay. So that review then would send  
4 this back?

5 THE WITNESS: Yeah.

6 BY Mr. JOHNSON-KARP:

7 Q. Looking at *Requested docs not scanned by CSC, CAFU*  
8 *not notified*, so what is that?

9 A. That would be if the petitioner has told us that they  
10 tried to supply documents, but they weren't scanned or  
11 we're told that they were in a service center to supply  
12 documents they've asked for but we were never notified  
13 about it, so then we have to go and look for those  
14 documents.

15 Q. And that would require an applicant to come back to  
16 have those rescanned?

17 A. Occasionally, if they weren't scanned. Sometimes the  
18 service center has made photocopies and has decided to  
19 mail them to us. Maybe that was poor communication or  
20 something on our part. But in some situations the  
21 customer will have to return with those documents.

22 Q. And is that another one where it would be caught  
23 internally the next day?

24 A. Not always. And a lot of these, when it's us working  
25 with a petitioner, they'll tell us, "I'm going into the

1 service center on Monday," and then on Monday we'll check  
2 and we don't see that any documents were scanned.

3 And we'll call them on Tuesday and say, "Did you go  
4 into the service center?"

5 And they'll say, "Yes, I did. But there was a  
6 problem. They didn't scan it."

7 Then we'll ask them to return.

8 Q. Would it ever be longer than a day?

9 A. There could be a chance, you know, if something else  
10 came up or if we don't know for sure when the customer --  
11 sometimes they'll say, "I'll go in next week," but we  
12 don't know the exact date. So sometimes there could be a  
13 couple days or a week delay.

14 Q. So is somebody typically checking on these updates  
15 with customers as to documents submitted to the field  
16 office?

17 A. Yes. I know with my cases, if I'm expecting a  
18 customer to return, I check every day until they do or I  
19 hear otherwise. I'm assuming others in CAFU would do the  
20 same.

21 Q. OOS, is that *out of state*?

22 A. Yes.

23 Q. *Out of state ID "voided" when entering petition*  
24 *process, what is that?*

25 A. This is the BFS counter processor used the void stamp

1 that is used once a new Wisconsin product is issued to  
2 void the out-of-state product. They shouldn't have done  
3 that because they weren't issuing the product. After this  
4 situation they received an update telling them  
5 specifically in these situations do not void any products  
6 that you're presented with.

7 Q. What was the resolution of that error?

8 A. I'm not sure what ended up happening with that  
9 customer.

10 Q. Looking at the *Voter ID box not marked*, what does  
11 that mean?

12 A. There's a box on the MV3004, the application for ID,  
13 that says that the card is being used for voting purposes  
14 and is therefore issued free of charge.

15 Q. And when is that caught?

16 A. That would be caught by the review done by the Driver  
17 Eligibility Unit.

18 Q. So that's the one-day kind of error?

19 A. Correct.

20 Q. *Photo unacceptable or processing error caused 1:1*  
21 *FR* -- is that *facial recognition*?

22 A. Yes.

23 Q. -- *facial recognition issue*, what is that?

24 A. So if we notice that the photo is blurry or there are  
25 eye-glasses that are making the photo unacceptable for

1 other business reasons, we'll ask the customer to return  
2 for a new photo.

3 Q. And when would that be caught?

4 A. That would be caught the following day or the same  
5 day when DE does their review.

6 Q. *No Legal Presence selection made*, what does that  
7 mean?

8 A. On the MV3004 there's a box where the customer  
9 selects their legal presence status: U.S. citizen,  
10 permanent resident or temporary visitor. They have to  
11 self-certify as one of those. And not having this box  
12 marked, we wouldn't know if they were eligible for the ID  
13 for voting purposes.

14 Q. And when is that caught?

15 A. The following day or same day.

16 Q. Now, I think you've noted which require the applicant  
17 to return to the service center. Do any of these errors  
18 result in the product not being issued?

19 A. Only if the customer doesn't return to fully start  
20 the process.

21 Q. Why is your list of errors so broad?

22 A. These are all different internal processing steps  
23 that the front counter processors have to take. We use  
24 this as a training tool to make sure that everyone is  
25 handling the petitions the same way and that they're

1 following their on procedures.

2 Q. Did you decide on what would be included in this list  
3 of errors?

4 A. No.

5 Q. How is that?

6 A. I believe it came from the administrators.

7 Q. If you know, why were errors by the customer included  
8 in the errors for CAFU?

9 A. I'm assuming it's because the customer probably left  
10 the service center expecting that they were enrolled in  
11 the petition process, but they weren't. So, you know, we  
12 felt like it was our responsibility to try to communicate  
13 with the customer to get them to return to finish the  
14 process.

15 THE COURT: Also, the customer service counter  
16 person, I would assume, is checking these applications  
17 over before they're accepted; is that right?

18 THE WITNESS: Yes.

19 THE COURT: Okay. So the error might have  
20 initially been the customer's but the counter person is  
21 supposed to say, "Hey, you didn't check that box"; is that  
22 right?

23 THE WITNESS: Correct.

24 THE COURT: Okay.

25 BY Mr. JOHNSON-KARP:



1 Q. On page 3 you have *Target Training Items For IDPP*.

2 How did you choose those?

3 A. Those are just the top four errors in this case, the  
4 errors that occurred most frequently during the six-month  
5 period.

6 Q. And I think you mentioned this is a training tool.

7 Are you aware if this is something that's activity trained  
8 on with field staff?

9 A. I know that they recently prepared a new training  
10 module for the staff and they incorporated these items  
11 into the training module.

12 Q. I know we're in the interim between reports. Do you  
13 have any sense of the error rate?

14 A. It seems like there are less errors recently, but I  
15 don't know the exact rate.

16 Q. It looks like on page 2 the southeast region has the  
17 highest accuracy rate; is that correct?

18 A. Yes.

19 Q. Does that include Milwaukee?

20 A. It does.

21 Mr. JOHNSON-KARP: I'd like to turn to some  
22 individual petitions now. Your Honor, these are going to  
23 be unredacted versions, so I believe we have these  
24 confidential. Actually, the first will be Ms. Silas. But  
25 if we can --

1 THE COURT: That one -- well, is there any  
2 problem with displaying Ms. Silas's record.

3 MR. CURTIS: Your Honor, we have not -- I haven't  
4 had a chance to go through, so I don't know if there's  
5 additional private information.

6 THE COURT: Well, I will tell you that her birth  
7 date is on it, so we'll just keep it confidential.

8 MR. CURTIS: Just scanning this very quickly,  
9 Your Honor, the one-page adjudication report looks okay to  
10 me.

11 Mr. JOHNSON-KARP: I'll be putting up the 3012.

12 THE COURT: I'll put the adjudication report up  
13 publicly. But before you put up the application form  
14 3012, give me another chance to turn off the public  
15 monitor.

16 BY Mr. JOHNSON-KARP:

17 Q. You mentioned as lead worker you do have a role in  
18 overseeing individual petitions of other workers?

19 A. Correct.

20 Q. Did you have the opportunity to see and work on  
21 Ms. Silas's case?

22 A. Yes.

23 Q. And you've reviewed the documents relating to her  
24 petition?

25 A. Yes.

1 Q. I'm showing you now what's been marked Defense  
2 Exhibit 283. Are you familiar with this document?

3 A. I am.

4 Q. And if we could also just pop up 287, please. I'm  
5 sorry. 291. If we could keep 291 confidential.

6 THE COURT: I turned it off.

7 Mr. JOHNSON-KARP: Thank you.

8 THE COURT: You should be able to see it on your  
9 iPad. You have paper in front of you.

10 BY Mr. JOHNSON-KARP:

11 Q. Are you familiar with the MV3012 for Ms. Silas?

12 A. I am.

13 Q. Were there errors on Ms. Silas's petition?

14 A. There are.

15 Q. What were those errors?

16 A. First, the *Official Use Only*, you can see that there  
17 were three boxes left blank by the BFS processor. And  
18 then that looks like it's the only error that I'm seeing  
19 on here.

20 Q. I'm looking at Exhibit 291. There are a couple  
21 bubbles on there. Would those be considered errors?

22 A. No. Those are notes that the adjudicator puts in to  
23 try to find -- once a no-match is received from DHS, those  
24 would be notes to show what we were trying as additional  
25 matches with DHS. So, you know, clarifying the spelling

1 on the mother's maiden name and correcting, you know,  
2 where it says *County or equivalent*, putting in which  
3 county.

4 Q. So these wouldn't show up on the error report?

5 A. Likely not.

6 Q. Would they -- I'm sorry.

7 A. The bottom one, the *Official Use*, that one should  
8 have.

9 Q. Okay. Would the bubbles -- we'll call them  
10 *corrections* -- would those corrections have delayed the  
11 processing of the petition?

12 A. No. Those would be things that we were resubmitting  
13 to DHS to try to find the verification, so that's just  
14 part of the petition.

15 Q. What do you understand to be the difficulty that  
16 Ms. Silas faced in obtaining an ID? Why did she have to  
17 resort to the IDPP to get an ID?

18 A. She presented that she was unable to obtain a birth  
19 record to establish her name and date of birth and legal  
20 presence.

21 Q. And what were the efforts that CAFU staff took to  
22 help her obtain an ID?

23 A. According to the report we sent her a couple letters,  
24 we also spoke with her on the phone several times to try  
25 to verify information that she was providing, and then we

1 worked directly with Cook County Hospital to try to verify  
2 records that they might have for the petitioner.

3 Q. And were you able to obtain anything from Cook  
4 County?

5 A. We were not.

6 Q. Why is that?

7 A. They told us that they couldn't release the  
8 information to us and that they wouldn't be able to do it  
9 without a fee.

10 Q. How many times did CAFU investigators contact  
11 Ms. Silas?

12 A. It looks like two letters and maybe four phone calls.

13 Q. Why was her petition eventually denied?

14 A. The information that Ms. Silas was providing could  
15 never be verified with DHS. And eventually she stopped  
16 contacting us and there was nothing further we could do.

17 Q. And after that denial there were further  
18 developments; is that right?

19 A. That's correct.

20 Q. What else happened after the denial?

21 A. Once DMV learned that there were going to be fees  
22 available for petition customers we contacted her by  
23 letter saying that there were fees available and asking  
24 her to communicate with us so that we could continue to  
25 work with her petition.

1 Q. Has Ms. Silas been issued a photo receipt?

2 A. She has.

3 Q. So she has a photo receipt and CAFU communicated a  
4 willingness to pay fees?

5 A. Correct.

6 Q. Is it your understanding that she would now be able  
7 to obtain the necessary documents from Cook County?

8 A. Yeah. If she provided us with the release of  
9 information, signed forms that are required by Cook  
10 County, we would likely be able to get the documentation  
11 required to issue an ID.

12 Q. Has she contacted anyone at CAFU, as far as you know?

13 A. Not that I'm aware.

14 Q. If she contacted anyone, would her petition be  
15 reactivated?

16 A. It would be.

17 Q. I'd like to turn now to what's been marked as PX 380,  
18 also a confidential document, relating to Ms. Washington.  
19 Are you familiar with Ms. Washington's case?

20 A. I am.

21 Q. What's your understanding of the problem that  
22 Ms. Washington faced in obtaining an ID?

23 A. She did not have the available proof of name and date  
24 of birth or legal presence and we were unable to -- we  
25 received a match with DHS to the information -- to some of

1 the information she provided, but it didn't match all of  
2 the information.

3 Q. What steps were taken with Ms. Washington's petition?

4 A. When we received the no-match we contacted Social  
5 Security Administration to find out what information they  
6 had on file when they issued her a social security number.  
7 We also worked with Tennessee Vital Records and Tennessee  
8 Post-Adoption Services to try to find information about  
9 this customer. Eventually she stopped working with us, so  
10 her petition was suspended. But then we were able to look  
11 at more information in order to issue her an ID.

12 Q. So at some point Social Security confirmed that she  
13 was issued a social security number in the name of  
14 *Washington* --

15 A. Yes.

16 Q. -- correct?

17 A. Yes.

18 Q. Why couldn't you issue a product at that point?

19 A. We had been told by Tennessee Vital Records that the  
20 birth certificate used with the name *Washington* had been  
21 sealed or voided for some reason and that she wasn't to be  
22 using that name currently.

23 Q. Do you have any sense of why the record would be  
24 sealed, did you say?

25 A. Yeah. We were told that records could be sealed if

1 there was an adoption or an occurrence of domestic  
2 violence, something like that where they're protecting  
3 someone's information.

4 Q. So even though there was a birth record connected to  
5 that social security number, that wasn't enough at that  
6 point to issue a product?

7 A. Correct. We weren't comfortable issuing if we were  
8 being told that the customer shouldn't be using that name.  
9 We had also received information that the customer had  
10 began a legal name change, but we didn't know what name  
11 she was filing the name change under or what her name  
12 would be once that was complete.

13 Q. And on that basis -- was that the basis for the  
14 ultimate denial?

15 A. Yes.

16 Q. Have there been updates to Ms. Washington's petition?

17 A. There have been. In working with Social Security we  
18 found that she did not have a social security number  
19 issued or there was not a social security number issued to  
20 either of her other possible last names, which made it  
21 seem unlikely that she was trying to obtain multiple  
22 identities. And we used the information from Social  
23 Security on the voided or the sealed birth record as her  
24 secondary proof to issue the ID.

25 Q. At this point has she received an ID?



1 A. Yes.

2 Q. Distinguished from a receipt?

3 A. Correct. She received the actual card.

4 Q. Okay. I'd like to turn now to --

5 MR. CURTIS: Your Honor, may I just enter an  
6 objection or note before we leave Ms. Washington? I  
7 believe the materials that have been produced to us of  
8 this exhibit does not include the latest CAR that was  
9 produced to us on Friday, the 20th.

10 Mr. JOHNSON-KARP: My apologies.

11 THE COURT: Okay.

12 Mr. JOHNSON-KARP: There's a handwritten  
13 notation. I didn't note this. I apologize. It's 481 and  
14 that includes through May 10th and that has the issuance.

15 THE COURT: Is that PX 481?

16 Mr. JOHNSON-KARP: Yes.

17 THE COURT: So PX 481 then has the updated Case  
18 Activity Report and more or less completes Exhibit 380?

19 Mr. JOHNSON-KARP: Yes. I apologize for not  
20 noting that.

21 THE COURT: Okay. Thank you.

22 Mr. JOHNSON-KARP: I'd like to turn now to --  
23 we'll use what's been hand-marked -- I apologize. No,  
24 actually this one is not hand-marked -- yes, it is -- DX  
25 293. And that is the most updated, as far as I know, CAR

1 for Mr. Boyd.

2 MR. CURTIS: No objection, Your Honor.

3 THE COURT: Okay. 293 is admitted. I haven't  
4 really had a formal motion on 380 and 481.

5 Mr. JOHNSON-KARP: I move to admit those.

6 THE COURT: Any objection?

7 MR. CURTIS: No.

8 THE COURT: Okay. Those are admitted.

9 BY Mr. JOHNSON-KARP:

10 Q. What do you understand to be the problem in  
11 processing Mr. Boyd's petition?

12 A. We were unable to receive a match to the  
13 date-of-birth information that he provided on his petition  
14 application.

15 Q. Did he provide multiple birth dates?

16 A. Yes. According to these documents we submitted five  
17 different date of births -- dates of birth to DHS to look  
18 for verification.

19 Q. Did any of those verify?

20 A. They did not.

21 Q. Mr. Boyd's petition was ultimately denied on that  
22 basis?

23 A. Correct.

24 Q. Have there been recent updates to Mr. Boyd's  
25 petition?

1 A. This March we sent him a letter explaining that the  
2 DMV now had fees available that could be used to help  
3 assist him in his petition process and then he also  
4 received the temporary ID receipt earlier this month.

5 Q. Has Mr. Boyd contacted anyone from CAFU?

6 A. Not that I'm aware.

7 Q. What's your understanding of the current status of  
8 Mr. Boyd's petition?

9 A. If he would be willing to complete the  
10 release-of-information forms required, we could use that  
11 to attempt to find further documentation to issue his ID.

12 Q. Would that be based on DMV's payment of certain fees?

13 A. Yes.

14 Q. So with the receipt and the fees, CAFU could take  
15 further steps --

16 A. Correct.

17 Q. -- to obtain an ID? I'd like to turn now to  
18 Plaintiffs' Exhibit 362 relating to Mr. Davis. And I  
19 think -- I don't think I had hard copies of this one. You  
20 might have to use the screen. I apologize.

21 THE COURT: The source needs to be switched? All  
22 right. I don't see it up on Ms. Fix's iPad.

23 THE CLERK: Plaintiffs still have it.

24 THE COURT: Are we getting this from the  
25 plaintiffs' source?

1 MR. CURTIS: We're not, but I have a paper copy,  
2 Your Honor, so I can follow along.

3 THE COURT: Mr. Johnson, do you have it on --

4 Mr. JOHNSON-KARP: I don't have a hard copy.

5 THE COURT: Do you have the electronic copy?

6 Mr. JOHNSON-KARP: I have one here.

7 THE COURT: Is it displaying.

8 Mr. JOHNSON-KARP: Not on our screen, no.

9 THE COURT: Okay.

10 THE CLERK: Whenever you hit *Mute* it goes back to  
11 plaintiffs'.

12 Mr. JOHNSON-KARP: The other option would be, I  
13 could ask you questions if you're familiar with the case.

14 MR. CURTIS: No objections.

15 THE COURT: Well, I don't know --

16 THE WITNESS: I could try to make sure.

17 THE COURT: Can you pull it up on their side?

18 We're having, for whatever reason, a signal-flow problem.

19 I'll mute the public monitors so Ms. Fix can see it and  
20 then everybody should be able to see it.

21 And so in theory, I'll tell you what, here's what we  
22 can do: why don't we take our afternoon break and then  
23 Mr. Brown is going to apply his considerable technical  
24 expertise which he will use to call the IT department.

25 Mr. JOHNSON-KARP: Otherwise --

1 THE COURT: -- and we'll figure it out. We're at  
2 the point where we might as well take a break. We're at  
3 about a break range anyway. Let's reconvene at four and  
4 then we'll press on. And if the display business doesn't  
5 work out, find a paper copy of it somewhere and we'll  
6 proceed on that basis. All right. Thank you.

7 (Recess at 3:46 p.m. until 4:07 p.m.)

8 THE COURT: All right. We can continue. It  
9 looks like, based on the document on the bench here, that  
10 we've gone the low-tech route.

11 Mr. JOHNSON-KARP: Well, I think we're going the  
12 *belt and suspenders* route now.

13 THE COURT: Always wise. Very good.

14 Mr. JOHNSON-KARP: And I've learned my lesson  
15 now.

16 BY Mr. JOHNSON-KARP:

17 Q. We were talking about a Mr. Davis, which is  
18 Plaintiffs' Exhibit 362, page 006, and that's Mr. Davis's  
19 CAR. Do you remember this case?

20 A. I do.

21 Q. What was your understanding of the difficulty that  
22 Mr. Davis was facing in obtaining an ID?

23 A. According to the report, it looks like we had  
24 difficulty finding a date-of-birth match to the  
25 information he provided with Illinois Vital Records. And

1 because of an adoption, there was further complications  
2 with finding a match for his record.

3 Q. Now, in looking at the entry for February 3rd -- I'm  
4 sorry, February 13th, 2015, it says, "Requesting a CLEAR  
5 report." Why was a CLEAR requested?

6 A. The CLEAR background report was requested because  
7 often that report will give us additional clues when we're  
8 trying to adjudicate a record that might offer us other  
9 names that the customer has gone by. It might offer us  
10 names of family members or relatives. It might offer  
11 possible alternative date-of-birth information.

12 Q. Are you aware that CLEAR reports include criminal  
13 information?

14 A. I am.

15 Q. Does CAFU ever use the criminal history in a CLEAR  
16 report when processing a petition?

17 A. No.

18 Q. Why not?

19 A. That information really wouldn't help us to  
20 adjudicate the case one way or another, likely wouldn't  
21 provide any additional information. So we don't really  
22 look at that part at all.

23 Q. Have you ever denied a petition based on anything you  
24 found in a CLEAR?

25 A. No.

1 Q. In the case of Mr. Davis, did you find anything that  
2 led to useful information in the CLEAR?

3 A. In the CLEAR report for Mr. Davis there was an AKA  
4 entry that gave us additional information to try for  
5 verification.

6 Q. And was that fruitful?

7 A. It was not.

8 Q. And why not?

9 A. It didn't come back as a match.

10 Q. There were some communications with the Lake  
11 County -- the Vista Medical Center; is that correct?

12 A. Yes.

13 Q. What is your understanding of the information that  
14 they provided?

15 A. It looks like we contacted them on a couple different  
16 occasion to see if they were able to confirm birth  
17 information for Mr. Davis. It looks like we got different  
18 information when we called depending on who we spoke with.  
19 Sometimes they said they couldn't give the information,  
20 sometimes they could for a fee, but we couldn't find the  
21 information for Davis.

22 Q. And the Vista Medical Center would not release the  
23 information to CAFU; is that correct?

24 A. Correct. They said that they required a  
25 release-of-information form.

1 Q. Would Mr. Davis have had to provide that?

2 A. Yes.

3 Q. Did he provide any release of information?

4 A. He did not.

5 Q. I'm sorry. Was there a communication regarding the  
6 release of information between CAFU and Mr. Davis?

7 A. Yes. Once we realized there were fees available,  
8 that we would be able to request the records on his behalf  
9 paying for those records, we sent Mr. Davis a letter  
10 asking him to communicate with us so we could get the  
11 release of information completed.

12 Q. Just to be clear, this is after the fee letter?

13 A. Correct.

14 THE COURT: And the fee letter is the 3/31/2016?

15 THE WITNESS: Yes.

16 THE COURT: Okay.

17 THE WITNESS: I'm sorry. 3/30/2016.

18 BY Mr. JOHNSON-KARP:

19 Q. And has Mr. Davis been in contact since that letter  
20 was sent?

21 A. He has not.

22 Q. Given the current status of Mr. Davis's petition,  
23 what's your understanding of what next steps would be  
24 required to obtain an ID?

25 A. If Mr. Davis contacted us we would send him the



1 release-of-information for him to sign and complete and  
2 return to CAFU. Once we had that information we would  
3 submit the fees and that form to Vista Medical Center to  
4 try to obtain more information on the petitioner.

5 Q. And as far as you know, he has not responded or sent  
6 in that form?

7 A. Correct.

8 THE COURT: Just to clarify, I think you said the  
9 fee letter was sent 3/30?

10 THE WITNESS: No. You are correct, Your Honor,  
11 it was 3/31.

12 THE COURT: Okay.

13 BY Mr. JOHNSON-KARP:

14 Q. Just briefly I'd like to turn to Plaintiffs' Exhibit  
15 482. There's a hard copy of this one.

16 THE COURT: Before we move on to that one -- and  
17 I haven't looked at the whole form here, but I'm just  
18 looking at the fee review -- I understand that Vista  
19 Medical Records said that they wouldn't provide any  
20 information without a fee. But I'm looking to see whether  
21 there's an indication that the record -- that they had a  
22 record that they would release to you if you paid the fee.

23 THE WITNESS: Yeah. Most of the agencies that  
24 we've been working with won't even look until they have  
25 the fee. And so we might submit the fee and they still

1 might say, "We don't have the information."

2 THE COURT: It says here on the 3/30/2016 entry  
3 that "Morgan from Vista Medical Records called back. They  
4 looked into the system for both east and west and  
5 indicated that there are no records for the names." And I  
6 won't say them out loud because it's more than just the  
7 last name. But it seems to me there you have an  
8 affirmative representation from Morgan at least, I  
9 understand there's -- sometimes you got different stories,  
10 but Morgan at least says, "We don't have the record."

11 THE WITNESS: Right, at least with those  
12 combination of names. There could be something with  
13 unlisted first name or -- it looks like she searched for  
14 any baby by the name -- that first name. But if the first  
15 name were blank or if he was named *Babe Boy* at the time of  
16 birth, we would be asking for more information when we  
17 sent the fees.

18 THE COURT: Okay. So there's nothing very  
19 promising at this point?

20 THE WITNESS: Correct.

21 THE COURT: But I think I understand that at  
22 least if you got the release, you would be able to take it  
23 to the next step.

24 THE WITNESS: Yes.

25 THE COURT: I understand. Go ahead.

1 BY Mr. JOHNSON-KARP:

2 Q. Looking at Plaintiffs' Exhibit 482, are you familiar  
3 with this?

4 A. I am.

5 Q. What is this?

6 A. This is an email chain regarding an IDPP customer  
7 that wanted to withdraw from the process.

8 Q. And this is dated October 10th, 2014. That was  
9 pretty early in the IDPP process?

10 A. Yeah, a couple weeks into the process.

11 Q. So this is from you and you write, "We have to worry"  
12 -- "Do we have to worry if they are setting us up to look  
13 bad/fail?" And this is the second and third line in that  
14 first email. What did you mean by that?

15 A. I guess very early on we were worried that customers  
16 might provide us with bogus information to require us to  
17 do searches for records that didn't exist. And then as  
18 far as looking bad or failing, I feel like I fail every  
19 time we aren't able to find a record for a customer. I  
20 ultimately want to issue this ID to the customer. So if  
21 the customer decides to withdraw from the process, I feel  
22 like I haven't done my job.

23 Q. And does that apply to denials as well?

24 A. It does.

25 Q. As far as you understand, is that sentiment shared in

1 CAFU?

2 A. It is.

3 Mr. JOHNSON-KARP: No further questions.

4 THE COURT: I'm not quite understanding -- I  
5 understand how you feel that it's a failure if somebody  
6 withdraws or they fail to get the ID. I get that  
7 perspective. But why do you think somebody would set you  
8 up to look bad?

9 THE WITNESS: Since the Voter ID law has changed  
10 I know at DMV there's been customers who would come into  
11 service centers to cause an uproar or to videotape the  
12 happenings to try to make DMV look bad. So we've always  
13 had that kind of, like, fear in the background: is this  
14 something where someone is setting it up to fail, that  
15 someone is setting up just to prove a point.

16 THE COURT: I understand. Cross-examination.

17 MR. CURTIS: Thank you, Your Honor. Yes, a  
18 number of points to raise.

19 CROSS-EXAMINATION

20 BY MR. CURTIS:

21 Q. Good afternoon, Ms. Fix. My name is Charles Curtis.  
22 We haven't met before. For the record, one of my  
23 colleagues deposed you on April 12th. Do you recall that?

24 A. Yes.

25 MR. CURTIS: And, Your Honor, may I just, for the

1 witness's convenience, approach the witness and give her a  
2 copy?

3 THE COURT: Yes.

4 MR. CURTIS: Thank you.

5 BY MR. CURTIS:

6 Q. Ms. Fix, we'll try to put pertinent excerpts from  
7 that deposition up on the screen. But I just wanted you  
8 to have a full copy in case you wanted to refer to it.

9 And one other point I'd like to make for the record,  
10 with the Court's indulgence, I'd like to give you an  
11 instruction or an admonition similar to the one that my  
12 colleague gave you in the deposition, and that's this:

13 As you know, this case involves some serious  
14 allegations of intentional race discrimination. And I  
15 want you to know and we want the Court to know that those  
16 allegations of intentional race discrimination are not  
17 aimed at you. I think the record demonstrates that you  
18 are a very conscientious and very capable public servant.  
19 So our allegations are aimed at, as the phrase says, a  
20 *higher pay scale*.

21 A. I understand.

22 Q. -- *higher pay grade*. Okay. With that out of the way  
23 though, I'd like to begin on the subject of race. And  
24 could we pull up Ms. Fix's deposition, page -- let's begin  
25 with page 94.

1 THE COURT: I'm going to ask again, let's just  
2 ask the questions. And if we need to impeach the witness,  
3 we can use the deposition. But she's here to testify, so  
4 let's just ask her.

5 MR. CURTIS: Okay. That's fine.

6 THE COURT: It seems like she's inclined to tell  
7 the truth, as far as I can tell, so let's see if you  
8 agree.

9 MR. CURTIS: Fine, Your Honor.

10 BY MR. CURTIS:

11 Q. Ms. Fix, have you noticed that there's a higher  
12 percentage of African American applicants in the IDPP  
13 process?

14 A. I have.

15 Q. Have you noticed that -- let me back up. Have you --  
16 do you have a sense of how many, what's the percentage of  
17 African American applicants?

18 A. I wouldn't be able to give an accurate number on  
19 that.

20 Q. Okay. Does it seem like more than half, less than  
21 half or --

22 A. I really don't know.

23 Q. Okay. So that's focused on the ID petition process.  
24 What about the denials, have you noticed whether there's a  
25 larger proportion of African Americans in the pool of

1 people who have been denied?

2 A. I haven't.

3 Q. Okay. Have you noticed that, among people in the ID  
4 petition process, that there's a higher percentage of  
5 births that took place in the south?

6 A. I notice in the records that we adjudicate and  
7 nonmatches it seems like there's a higher percentage in  
8 the south.

9 Q. Okay. And in your deposition you used the phrase *Jim*  
10 *Crow era* or *Jim Crow south*?

11 A. Mm-mm. Yes.

12 Q. What did you mean by that?

13 A. Southern states that historically had Jim Crow laws.

14 Q. And have you noticed that a significant number of  
15 people in the ID petition process appear to have been born  
16 in Jim Crow states?

17 A. I don't know if it's a significant number. I know  
18 some of the petitioners that I've been closest to and  
19 working more closely with were from Jim Crow states.

20 Q. Do you have a sense of how many cases that you've  
21 worked on have involved citizens born in those states?

22 A. I don't have a number.

23 Q. Okay. In your deposition you indicated that there  
24 were several states in the south that, in your experience,  
25 were especially difficult to deal with; do you remember

1 that?

2 A. Yes.

3 Q. Do you recall which states you mentioned?

4 A. I mentioned South Carolina, Tennessee, Mississippi.

5 Q. We've heard in this trial a bit about South Carolina  
6 and less about Mississippi, I don't think anything about  
7 Tennessee. What kinds of problems have you encountered in  
8 trying to get records from Tennessee?

9 A. Right around the time of my deposition I had an IDPP  
10 customer who was born in Tennessee and he didn't have any  
11 documentation for his birth. We couldn't find a match. I  
12 was in the process of trying to contact his school to see  
13 if we could find early school records. And unfortunately,  
14 his school had been closed for years and no one in  
15 Tennessee was able to tell me where those records were now  
16 stored or if they were stored anywhere.

17 Q. What did you do to try to find out where they were?

18 A. I contacted -- he said the name of his school was  
19 *Tabernacle*, so I looked to see -- for a Tabernacle school  
20 in that area, found a church with that name. So I called  
21 to see if they still had a school. The school was under a  
22 different name now and they didn't have the early records.  
23 They directed me to the Tennessee Board of Education I  
24 believe. I contacted them and they said you would have to  
25 contact the individual school. So it was just a loop.



1 Q. And at that point did you kind of give up?

2 A. I gave up on that part of the search and started to  
3 try to find other ways.

4 Q. And does this involve an African American gentleman?

5 A. I believe it does.

6 Q. Okay. Other problems that you've encountered in  
7 dealing with Tennessee?

8 A. Not that I can recall.

9 Q. Okay. What about Mississippi?

10 A. I know that many of our petition customers that have  
11 been born in Mississippi were unable to find any sort of  
12 birth record, not even a partial match. Sometimes we'll  
13 be told that they weren't born in a hospital or the  
14 hospital where they were born was burned. Other schools  
15 or churches where they may have had records are no longer  
16 in existence, so we're not able to track down those  
17 records.

18 Q. So what do those voters do?

19 A. In some situations they're able to provide other  
20 documents that they do have. For some of the more  
21 elderly, the ones that appear in the 1930 and 1940 Census  
22 were able to search for those records on their own on the  
23 Internet. So we've used that option for a few of the  
24 petitioners, but otherwise they come up with some sort of  
25 secondary proof.

1 Q. Not to go over the list again, we heard testimony  
2 about secondary proof, but that would include things like  
3 the Bible, family Bible, school records?

4 A. Yes.

5 Q. Okay. And what about South Carolina, what sorts of  
6 problems have you encountered with South Carolina in  
7 trying to get vital records?

8 A. South Carolina's vital reports aren't held by a  
9 governmental agency anymore. We were told they were sold  
10 or given to a third-party business, so they don't have to  
11 negotiate with other states when they're trying to work  
12 with their Voter ID law changes.

13 So without paying a fee, without having identity  
14 documents, we were told we had a dead end. Luckily, now  
15 with the fee process and the ID receipt, we might be able  
16 to -- we're in the process of working with South Carolina  
17 to obtain more information.

18 Q. You mentioned the ID receipt. I wanted to ask about  
19 that. My understanding from earlier testimony was that  
20 South Carolina, in order to get a vital record requires  
21 both money and a photo ID?

22 A. Yes.

23 Q. Is that your understanding?

24 A. Yes.

25 Q. So what is a petitioner, who doesn't have a photo ID,

1 what's the petitioner supposed to do?

2 A. Well, with the emergency rule and the issuance of  
3 these temporary ID receipts, that contains a photo and  
4 we're hoping that that will be sufficient for  
5 South Carolina's photo ID requirements.

6 Q. That is a hope?

7 A. Yeah. We are sending the documents off. We haven't  
8 yet, so we haven't gotten a response. We don't know for  
9 sure.

10 Q. When you say you haven't sent the documents off yet  
11 to South Carolina --

12 A. Correct.

13 Q. Okay. -- when does that happen?

14 A. As soon as the fee -- the check gets cut from the  
15 budget office this week.

16 Q. This week?

17 A. That's what we've been told.

18 Q. Okay. I'll come back to that, but let me move to one  
19 or two other jurisdictions for a minute. Before we leave  
20 the *Jim Crow south*, any other particular states in that  
21 area of the country that come to mind that are  
22 particularly difficult to deal with?

23 A. Not off the top of my head.

24 Q. Okay. Let's go north to Cook County, Illinois. Have  
25 you worked on behalf of petitioners in trying to get vital

1 records out of Cook County?

2 A. Yes.

3 Q. What's that like?

4 A. It's difficult. You know, it's -- we're often  
5 waiting for information or we're told different things  
6 depending on who we talk to. But luckily the adjudicators  
7 are pretty persistent. And if we don't get the same  
8 answer that someone else on the team has gotten, we will  
9 keep working until we get the information we need.

10 Q. How much persistence has been required either by you  
11 or by some of your colleagues?

12 A. Multiple phone calls. I don't know. I wouldn't be  
13 able to say how many.

14 Q. Yeah. Any sense of the delay involved? I mean, are  
15 we talking about days of effort or weeks of effort or even  
16 more?

17 A. Probably days I guess.

18 Q. Okay. Any instances that you can think of that go  
19 even longer?

20 A. Well, some -- there are some instances, like the case  
21 that we talked about earlier, that we don't have a  
22 resolution on yet, but...

23 Q. Now, do Cook County or Illinois jurisdictions also  
24 require a photo ID in order to get a vital record?

25 A. I believe the hospitals that we've talked to have all

1 required it. I'm not sure if they all do or --

2 Q. We were talking about one of the petitioners, and I  
3 forget which one, and the Court referred to -- maybe that  
4 was Mr. Davis -- referred to one of the hospitals and  
5 dealing with the hospital. Have you checked with the  
6 hospital to see if they'll take the paper receipt that was  
7 issued?

8 A. I don't think we have checked --

9 Q. Okay.

10 A. -- on that specifically.

11 Q. Okay. So you don't know one way or another whether  
12 that will work?

13 A. Right.

14 Q. Okay. What about Puerto Rico, have you worked with  
15 any petitioners in trying to get vital records out of  
16 Puerto Rico?

17 A. A couple. I don't know specifics, specific ones.

18 Q. Okay. I'm going to ask you -- I noticed in your  
19 deposition you referred to -- you were asked about  
20 petitioners who you had worked with who you remembered off  
21 the top of your head and you referred to Ms. Wells. I'm  
22 not going to mention her first name, but do you know who  
23 I'm talking about?

24 A. I do.

25 Q. And do you recall Ms. Wells is the citizen who was

1 born in 1916?

2 A. I don't remember that specific fact. But if that's  
3 what --

4 Q. Okay.

5 THE COURT: It makes her a hundred years old, so  
6 it stuck out to me. Does that ring a bell?

7 THE WITNESS: No. Sorry.

8 BY MR. CURTIS:

9 Q. Okay. What do you remember about Ms. Wells? What  
10 was it that, you know, back on April 12th made you say, "I  
11 remember her"?

12 A. I know that the adjudicator that had worked on her  
13 record sought out guidance often from me, asked me about  
14 what to do on that record, so that was a name I had heard  
15 frequently. She was a customer that, you know, we tried  
16 hard to get the information we needed. We weren't able to  
17 get that information. We got pieces of the puzzle, but we  
18 couldn't fit them all together.

19 Q. Speaking of pieces of the puzzle, several days ago in  
20 court we looked on the screen at a 1930 Census record that  
21 one of the investigators had tracked down that had  
22 Ms. Wells identified on that. Why isn't that good enough?  
23 I mean, that's an 86-year-old record.

24 A. Yeah. Unfortunately, the Census record was her birth  
25 name, because it was from the 30s, so it had the last name

1 Woods. We had needed something to tie the two things  
2 together to say she was Ms. Wells and not Ms. woods.

3 Q. Do I recall correctly then that the hang-up is that  
4 Ms. Wells has been asked to find her second marriage  
5 certificate?

6 A. Or some other documentation that would help us prove  
7 that there was a marriage and that's how the name changed  
8 or that the name change occurred.

9 Q. So this is a request that's been made of Ms. Wells.  
10 Is CAFU doing anything to help her look?

11 A. Currently I don't think so. I don't think she's  
12 provided us with any new information. But if she did, we  
13 would be willing to.

14 Q. But my recollection was, from reading her CAR  
15 earlier, that she had said repeatedly, "I've given you  
16 everything that I have. I don't have anything more." So  
17 what new information might she be able to produce?

18 A. I wouldn't know that.

19 Q. Okay.

20 A. I just know that, you know, our direction that we are  
21 given is that we have to fit all the pieces together to  
22 come up with a solution before we issue an ID.

23 Q. Okay. Do you personally have any suspicion that  
24 maybe she is not a U.S. citizen?

25 A. I have no idea one way or the other since I don't

1 have the facts.

2 Q. Okay. Do you know how long Ms. Wells has been in the  
3 petition process?

4 A. No, I don't.

5 Q. Okay. Would you be surprised if I told you that she  
6 entered the process in January of 2015?

7 A. No.

8 Q. Would not be surprised?

9 A. Would not be surprised.

10 Q. Okay. But that's, if my math is right, that's 16  
11 months ago. Are there people who have been in the process  
12 even longer than 16 months ago?

13 A. Yeah. There are people that started, you know, the  
14 first couple weeks that we haven't been able to resolve.

15 Q. And when you say "the first couple weeks," that would  
16 have been September 2014 --

17 A. Yeah.

18 Q. -- 20 months ago, that still have not yet been  
19 resolved?

20 A. I don't know for certain. There could be, but --

21 MR. CURTIS: Okay. Your Honor, if I can just  
22 make a note: there is an exhibit, Plaintiffs' Exhibit 340,  
23 that is a list of petitioners currently in suspended  
24 status sorted by date of when they entered the process  
25 dating back to September and October of 2014.



1 BY MR. CURTIS:

2 Q. I'd like to turn to the process error document that  
3 we talked about and I'm just going to ask you a few  
4 questions. I'm going to try to keep fast forwarding and  
5 not focus on everything that you talked about with my  
6 friend on the other side. But do you still have the error  
7 report with you?

8 A. I do.

9 Q. Okay. And could you turn to page 3? And take your  
10 time. Just while you're looking, can I just clarify, is  
11 this a report that you drafted?

12 A. Yes.

13 Q. Okay. I'm looking at the conclusion that you  
14 drafted. And as I read this, you conclude that errors  
15 made by BFS in the ID petition process "negatively" -- and  
16 I'm quoting -- "negatively impact the petition process and  
17 may affect a resident's ability to vote." Do you -- and  
18 were those words you drafted?

19 A. Yes.

20 Q. Okay. Do you still believe that errors like that may  
21 affect a resident's ability to vote?

22 A. The customers that didn't supply all of the required  
23 documents to start the petition, those errors may affect  
24 the resident's ability to vote, yes.

25 Q. Okay. But you were referring here to errors made by

1 BFS for ID customers and you said those errors made by BFS  
2 "negatively impact the process and may affect a resident's  
3 ability to vote"?

4 A. Yeah. We call all of these errors errors by BFS. We  
5 didn't want to put blame on the customer in this document.

6 Q. Okay. Are you aware of any errors made by BFS that  
7 have negatively impacted a resident's ability to vote?

8 A. No.

9 Q. Okay. Turning to Ms. Silas, you testified about some  
10 of the recent actions that CAFU has taken for Ms. Silas.  
11 I noticed that she was -- her petition was denied on June  
12 18th of 2015. Do I read that correctly?

13 A. Yes.

14 Q. Now, as of that point had DMV or CAFU offered to pay  
15 any fees for her, as of June of 2015?

16 A. No.

17 Q. Okay. Prior to March of this year did DMV or CAFU  
18 contact Ms. Silas and say, "Hey, we changed our mind; we  
19 will help you pay for these documents"?

20 A. No. In March it was brought to our attention that  
21 that was going to be a possibility and that we should  
22 begin to contact the customers again.

23 Q. That was brought to your attention that it might be a  
24 possibility?

25 A. Correct.

1 Q. Okay. And by this point Ms. Silas was a -- had  
2 become a plaintiff in this case; is that correct?

3 A. I don't know. I guess I don't know when she became a  
4 plaintiff in the case.

5 Q. Okay. But you're aware she is one of the plaintiffs?

6 A. Yes.

7 Q. Okay. You said that you were told this had become a  
8 possibility. Who told you this?

9 A. My supervisor said that the administrator in the  
10 secretary's office was discussing possible funding for  
11 some of these petitioners.

12 Q. Okay. And I'll come back to that in a moment. Just  
13 to clarify, your supervisor is Ms. Schilz?

14 A. Correct.

15 Q. Okay. Let's talk briefly about Ms. Silas -- I'm  
16 sorry, Ms. Washington. And I'm referring to Plaintiffs'  
17 Exhibit 487.

18 THE COURT: Before we leave that, I didn't really  
19 understand the answer there. But Mr. Curtis asked about  
20 whether you were aware of Ms. Silas potentially becoming  
21 one of the plaintiffs in this lawsuit. And your answer I  
22 think is that Ms. Schilz had said that there would be some  
23 funding available for Ms. Silas to get her documents. I  
24 misunderstood something. Did you ask about whether  
25 Ms. Silas was going to become a plaintiff in the lawsuit?

1 MR. CURTIS: I asked whether as of, I guess it  
2 was, late March, when the offer to pay was made, whether  
3 the witness was aware that Ms. Silas was one of the  
4 newly-added plaintiffs, at least that's what my intended  
5 question was.

6 THE COURT: Okay. And I'm not sure we got an  
7 answer to that. Did you understand the question that way?

8 THE WITNESS: I did. I said I didn't know. I  
9 didn't know when she became a plaintiff. I don't know --  
10 I don't know where that was in the timeline of --

11 THE COURT: You had made a reference to  
12 Ms. Schilz discussing funding for her documents. Did  
13 Ms. Schilz talk to you about Ms. Silas's potential status  
14 as a plaintiff at all?

15 THE WITNESS: Not before the fee letters were  
16 drafted, that I can recall.

17 THE COURT: Okay. All right. Thank your for  
18 clarifying.

19 MR. CURTIS: Sure. So turning to  
20 Ms. Washington -- and, Your Honor, I'm not sure if the  
21 Court recalls, Ms. Washington is a petitioner who we've  
22 heard testimony about before, the young women who's 19  
23 years old. This is her first election here.

24

25 BY MR. CURTIS:

1 Q. Now, looking at her CAR, am I correct in reading this  
2 that Ms. Washington's petition was denied on March the 7th  
3 of this year?

4 A. Correct.

5 Q. Okay. And then 23 days later a fee letter was  
6 drafted and sent to her; is that correct?

7 A. That's correct.

8 Q. Okay. And then the -- I believe you indicated that  
9 her problem was resolved by checking with Social Security?

10 A. Correct.

11 Q. Okay. And that was -- and just tell me if I'm  
12 getting this right: someone from CAFU checked with Social  
13 Security and confirmed, and this was in early May, that  
14 Ms. Washington's social security number was not associated  
15 with either of the other two last names that were or  
16 potential last names that were of concern; am I stating  
17 that right?

18 A. The adjudicator at CAFU contacted SSA to make sure  
19 that there hadn't been a different social security number  
20 issued to either of the other names.

21 Q. Okay. And the other names -- I think we've already  
22 used the other names in court -- one I believe was Taylor  
23 and one was Hines?

24 A. Correct.

25 Q. So the question is, who is this woman; is she

1 Washington, Taylor or Hines? And you were able to confirm  
2 that the Washington social security number was not used in  
3 connection with either of those other last names?

4 A. That there was no social security number with either  
5 of those other last names.

6 Q. Okay. Got it. So that as of -- on May 10th then an  
7 email was sent to Mr. Miller, who we heard from yesterday,  
8 and he approved issuance of the product.

9 A. Correct.

10 Q. Now, is there anything that was done by CAFU in early  
11 May of this year that couldn't have been done when  
12 Ms. Washington petitioned on November 6th of 2014? What's  
13 changed?

14 A. I think that in reviewing the case we found that our  
15 original concern that she might be able to have multiple  
16 identities, because there are birth records and there's a  
17 court-ordered name change, that we were concerned that she  
18 might attempt to commit fraud by creating multiple  
19 identities.

20 But, you know, in reviewing the case we decided to  
21 look to see if she already had a social security number in  
22 either of the other names that would show some intent to  
23 create multiple identities. But because she hadn't, we  
24 felt that it was safe to send her forward for issuance.

25 Q. Okay. You've lost me now in a couple levels.

1 A. Okay.

2 Q. Level number one, why would you think, just because  
3 she had been adopted and there was a question about what  
4 her adopted name was, why would you have reason to think  
5 that she might commit fraud?

6 A. If she had two different social security numbers  
7 under two different names, that would be a cause for  
8 concern.

9 Q. Okay.

10 A. It doesn't necessarily mean that that's what she was  
11 intending to do. But there would be the potential for her  
12 to create multiple identities if she had those documents.

13 Q. But why couldn't CAFU have determined whether she had  
14 two different social security numbers under two different  
15 names back in November of 2014?

16 A. I guess we could have. We missed that.

17 Q. You missed it?

18 A. We didn't think of that route at that time.

19 Q. And so this young woman who I mentioned, this is her  
20 first presidential election here. She's missed her first  
21 presidential primary; is that correct?

22 A. Yes.

23 MR. CURTIS: Okay. Your Honor, we've heard --  
24 you've heard a lot of -- the Court has heard a lot of  
25 testimony about Mr. Boyd, the gentleman with several

1 potential birth dates. And in the interest of moving  
2 things along, I'm going to skip over that. I think the  
3 Case Activity Report and other materials in Mr. Boyd's  
4 file, you know, are sufficient. I hope they're sufficient  
5 for the Court.

6 THE COURT: I think they will be, yes. I've got  
7 a note on Mr. Boyd and I've got a CAR here.

8 BY MR. CURTIS:

9 Q. Okay. I'd like to bring up one other person we  
10 talked about, Mr. Davis. And I'm wondering, do you still  
11 have the Case Activity Report for Mr. Davis?

12 A. I do.

13 Q. Okay. And I'm not going to repeat the question the  
14 Court brought up about Vista Medical Records. But I did  
15 want to note, also, there's a second entry under March 30,  
16 2016 -- do you see that there? -- dealing with the  
17 possibility of getting vital records from the State of  
18 Illinois itself?

19 A. Yes.

20 Q. I'm sorry. I didn't mean to interrupt.

21 A. Yes, I see it.

22 Q. And do I read this correctly that whoever made this  
23 entry noted that "A copy of a valid government issued  
24 photo ID must be provided with a completed Application for  
25 Search of Birth Record Files form"? And that "The website



1 states: '(if an ID is not provided, unreadable, or  
2 expired, the request will be returned unprocessed)'; did  
3 I read that correctly?

4 A. Yes.

5 Q. Okay. So how does the offer to pay potentially help  
6 Mr. Davis either through the Vista Medical Records or  
7 through the State of Illinois?

8 A. According to the website there's an excerpt below  
9 that shows other documents that could be used in place of  
10 the photo ID. So by contacting him and telling him that  
11 we had the fees available we might be able to work with  
12 him to see if he had any of those other documents that  
13 could be submitted in place of the photo ID.

14 Now that we have the emergency -- the temporary,  
15 sorry, ID receipts, those could be used as the  
16 government-issued photo ID.

17 Q. Okay. Do you recall in your deposition mentioning  
18 that there was some displeasure among your co-workers  
19 about the workload with CAFU?

20 A. Yes.

21 Q. And describe the nature of that displeasure. This  
22 was as of April 12th?

23 A. Yeah.

24 Q. What was the displeasure?

25 A. Well, it was a great amount of new work that was

1 taken on by our unit. And we weren't given any additional  
2 staff, so we had to figure out a way to manage the rest of  
3 our workload around this. And this process definitely  
4 took priority over all of our other work, so we had to  
5 figure out a way to manage.

6 Q. Can I just zero in on that? When you say that this  
7 process created a great deal of additional work, at what  
8 point; are you talking about beginning in September of  
9 2014 or this spring when DMV began to do more?

10 A. No, in September of 2014. At the beginning of the  
11 process it created additional work.

12 Q. Okay. So has your experience been, for the last 18  
13 months or so, there's been quite a bit of additional work  
14 as a result of this?

15 A. Yeah. There's a flux. You know, when there's  
16 elections, there's a spike in interest in the petition  
17 process, and then it will get a little bit quieter. But  
18 for the most part, yes, there is additional work.

19 Q. Are you seeing a spike this year?

20 A. There was a spike in April.

21 Q. Mm-mm.

22 A. I imagine there will be a much greater spike in the  
23 fall. Luckily we've just been granted one more position  
24 to help with some of the IDPP work.

25 Q. When did that happen?

1 A. Last week.

2 Q. Last week.

3 A. Yeah, along with the emergency rule.

4 Q. I'm sorry?

5 A. Along with the emergency rule. So actually it's been  
6 two weeks.

7 Q. Okay. And are there any documents relating to the  
8 creation last week of this new position? I'm sorry, this  
9 is the first time we're hearing about this.

10 A. Any documents?

11 THE COURT: How did you find out about it?

12 THE WITNESS: My supervisor told me that we were  
13 granted a limited-term employee.

14 BY MR. CURTIS:

15 Q. So in addition to the creation of a new position, any  
16 other additional resources or plans to deal with the spike  
17 that's coming?

18 A. We've extended deadlines for other work to make  
19 concessions for other work not getting completed in a  
20 timely manner so that we're able to work on this.

21 Q. Okay. So what else is getting pushed off to the side  
22 because of this process?

23 A. Our internal audits, those -- we've extended the time  
24 period that the deadline is for those. Other cases,  
25 people might have more cases at a time because they're not

1 able to close. I'm talking about external fraud.

2 Q. I was just going to ask, are you talking about  
3 because CAFU -- by the way, we've heard different  
4 pronunciations. Is it *CAFU*, *CAFU* or *CAFU*?

5 A. I say *CAFU*. Everyone that works with me says *CAFU*.

6 Q. Okay. Okay. CAFU does a lot of fraud investigation,  
7 right, outside -- I mean, completely unrelated to this?

8 A. Yes.

9 Q. And, I mean, what, like odometer fraud or title  
10 fraud?

11 A. Title fraud, identity theft, falsified applications.

12 Q. And so those cases are kind of getting put on hold or  
13 put to the side for this?

14 A. Not necessarily. Where we used to only have five  
15 open cases, we changed that to say now you can have ten  
16 open cases without having to have an extra meeting with  
17 me. But, you know, it's not -- there's still time  
18 available to work on those things. It's not like the ID  
19 process is taking up the full workday for everyone.

20 MR. CURTIS: Okay. Could we put up Plaintiffs'  
21 Exhibit 333, the redacted version?

22 And, Your Honor, this is an exhibit already in  
23 evidence.

24 THE COURT: Thank you. You need to change  
25 source?

1 MS. SCHULTZ: Yeah.

2 BY MR. CURTIS:

3 Q. Ms. Fix, as you can see, we've redacted the names out  
4 of this document to protect people's privacy. Have you  
5 seen this document before?

6 A. Yes.

7 Q. Could you briefly describe it for the Court?

8 A. It's the spreadsheet that we used to record  
9 information about petitioners that might be helped with  
10 the fee procedure.

11 Q. Okay. And the document identifies what type of  
12 record might be needed and how much it might cost?

13 A. Correct.

14 Q. Okay. Now, it looks from this document like a number  
15 of the documents are not -- let me put it this way: it  
16 looks like a number of the documents are what we would  
17 call *true vital records*, like birth certificates; is that  
18 right?

19 A. Yes, some of them are.

20 Q. Okay. So at least for these people, as of March of  
21 this year, the State of Wisconsin had not paid for vital  
22 records or offered to pay for vital records for these  
23 individuals; is that right?

24 A. DMV had not. I don't know if DHS paid any fees for  
25 their search.

1 Q. Presumably if DHS had picked up the fees, these folks  
2 wouldn't be on this list, would they?

3 A. Like we talked about with South Carolina, they  
4 weren't able to pay those fees, and Maryland is the same.

5 Q. For the same reason because Maryland says you have to  
6 have a photo ID even if you pay the money?

7 A. Correct.

8 Q. Okay. So that's South Carolina and Maryland. Are  
9 there other states you can think of in that category?

10 A. Those are the only two we know of right now. That  
11 doesn't mean we might encounter -- those are the two we  
12 know of.

13 Q. When this list was sent out on or about April 1st,  
14 did you know where the funding -- where the money was  
15 going to come from?

16 A. I didn't. I don't know if administrators had an idea  
17 at that point or not.

18 Q. Okay. It wasn't disclosed to you where they were  
19 going to come up with the money?

20 A. No.

21 Q. Okay. Do you know if they've since come up with hard  
22 money to --

23 A. Yes.

24 Q. -- cover these?

25 A. Yes.

1 Q. And where does that money come from?

2 A. I'm not sure exactly. I know how we go about  
3 requesting it, but I'm not sure where it comes from the  
4 budget line. I'm not sure.

5 Q. Okay. You know, I was just going to ask you about,  
6 you mentioned how you request it. Could I go to the or  
7 could you get the May 6th version of the -- what do you  
8 call these, *processing guidelines*?

9 A. Yes.

10 Q. Okay. And could you look in particular at pages 8  
11 and 9?

12 Could we put that up on the screen? I have  
13 Defendants' Exhibit 287. And begin with *Fee Based*  
14 *Resolution* and maybe just blow that up a little bit.

15 Ms. Fix, as I look at the steps here on pages 8 and 9  
16 of this document, it looks to me like including the  
17 various subparts, you've created a 16-step process for  
18 obtaining money to pay for records. And I'm counting the  
19 subparts and the sub-subparts. I don't have to confirm  
20 the actual number, but it looks like this is quite an  
21 involved process, isn't it?

22 A. It's -- our instructions are usually highly detailed.  
23 But per --

24 Q. But, for example, referring back to the earlier  
25 chart, I noticed that there were some things like some

1 petitioner needs \$1.66 per page for vital records. So in  
2 order to get a buck 66 per page you need to bring forward  
3 a proposal to the supervisor and team leader; is that  
4 right?

5 A. Correct.

6 Q. Okay. And then there's quite a bit of required  
7 information. It says here you've got to make contact with  
8 the entity to gather information from the entity?

9 A. Right. Most of that has been done before they're on  
10 the fee chart because that's where the \$1.66 and the  
11 additional documents, that's where that --

12 Q. So that work has already been done?

13 A. Correct.

14 Q. Maybe you can help me with this. It looked like most  
15 of that work had already been done before they went on the  
16 fee chart. But the April 1st letters that went out to all  
17 of these folks said -- asked them to contact CAFU to tell  
18 them what they need. But CAFU -- I mean, from what you  
19 just said -- CAFU knows exactly what they need?

20 A. I don't know the exact wording on the letter. It was  
21 my understanding that the letter said to contact us so we  
22 can begin working with you to obtain what we need, because  
23 most of the places require some sort of release of  
24 information to be completed.

25 Q. I won't dig out the letter right now, but we can



1 confirm that one way or another by looking at the text of  
2 the April 1st letter. And then I see, going down this  
3 list, that the investigator has to schedule a 30-minute  
4 meeting to review the case with the supervisor and team  
5 leader; is that right?

6 A. Yeah. It's not -- we tell them to schedule a  
7 30-minute time block so it's on our calendar, but it's not  
8 a full 30-minute meeting.

9 Q. So if it's a buck 66 for a page, maybe it could be a  
10 faster meeting?

11 A. Most of these have been faster meetings.

12 Q. Okay. And then I see that before the fee goes out,  
13 then there's a letter sent to the customer asking the  
14 customer to get back to CAFU; is that right?

15 A. Correct.

16 MR. CURTIS: Okay. And, Your Honor, again this  
17 is DX 287, page 8 to 9. I won't go through the rest of  
18 the process, but...

19 BY MR. CURTIS:

20 Q. How many such fees do you expect to pay, say, between  
21 now and the election?

22 A. I have no way of guessing that. Any that we can. I  
23 don't know what that would be.

24 Q. Right. Okay. Have any estimates been prepared or --

25 A. Not that I've seen. I'm sure that the budget area

1 has done some work on that, but I have not seen that.

2 Q. When you say one additional worker has been brought  
3 on, is that a limited-term employee?

4 A. Yes.

5 Q. Okay. And do you know for how long then, what's the  
6 term?

7 A. I don't know.

8 Q. Okay. Let me ask you to turn to the emergency rule  
9 itself. And I'd ask you to --

10 THE COURT: I don't know if you have a copy of it  
11 up.

12 MR. CURTIS: I'm sorry. Could we put up the  
13 emergency rule? And this is Plaintiffs' Exhibit 453 and  
14 I'm looking in particular for page 14. And could you blow  
15 up the *Finding of Emergency*?

16 BY MR. CURTIS:

17 Q. Ms. Fix, if you could look at that quickly and then  
18 I'll ask you one or two questions about it.

19 A. Okay.

20 Q. All set? Do you agree that the ID petition process  
21 is in a state of emergency?

22 A. I guess. I've never called it that myself --

23 Q. Okay.

24 A. -- but...

25 Q. Do you agree that qualified applicants may not be

1 able to obtain Voter ID with reasonable effort under the  
2 petition process as it's existed up to Friday the 13th?

3 A. I'm sorry. Can you ask that again?

4 Q. Sure. Do you agree with the finding here that  
5 qualified applicants may not be able to obtain ID with  
6 reasonable effort?

7 A. Yes.

8 Q. You do agree with that finding?

9 A. Yes.

10 Q. Okay. Let me move on to Plaintiffs' Exhibit 445.  
11 And could you put both the May 13th letter to Mr. Randle  
12 and the receipt on the screen.

13 THE COURT: Is this a confidential one?

14 MR. CURTIS: It should be. Let's see.

15 THE COURT: I've muted that because it's got a --  
16 the receipt has some confidential information on it.

17 MR. CURTIS: Did we have a redacted version?

18 THE COURT: It's good enough for now.

19 MR. CURTIS: Your Honor, since he's one of the  
20 plaintiffs, we've only redacted driver's license number.

21 The other information on here we're authorized to --

22 THE COURT: Including his birth date?

23 MR. CURTIS: Including the birth date; yes, sir.

24 THE COURT: All right. It would have to be  
25 redacted. I think the date of birth has to be redacted if

1 it goes on ECF, but we'll deal with that later.

2 MR. CURTIS: Okay.

3 BY MR. CURTIS:

4 Q. Ms. Fix, can you identify this letter and this  
5 receipt?

6 A. Yes.

7 Q. And what are they?

8 A. This is the cover letter and the receipt that was  
9 mailed out after the emergency rule was put into place.

10 Q. When did you find out that the emergency rule was  
11 going to be put into effect?

12 A. I heard that there was discussion about the emergency  
13 rule on May 6th. I remember that just because that's when  
14 I updated the procedures.

15 Q. Okay. So you found out on the Friday before the  
16 Tuesday that the emergency rule was put into effect?

17 A. I found out that there was a discussion that there  
18 was something that was going to be --

19 Q. Looking at the letter to Mr. Randle -- in the first  
20 paragraph, last sentence -- it states that "This receipt  
21 is valid for 60 days and can be used only for Wisconsin  
22 voting purposes"; is that right?

23 A. Yes.

24 Q. Okay. And then looking at the receipt, there's some  
25 language at the bottom of the receipt that also says,

1 "This receipt is valid for 60 days and can be renewed,  
2 unless otherwise cancelled by WisDOT"; is that right?

3 A. Yes.

4 Q. Now, we've heard testimony that the intent of this  
5 letter and the receipt is to make sure that petitioners  
6 who haven't received their IDs yet can vote in November;  
7 is that your understanding?

8 A. Yes.

9 Q. So if the intent is to insure that they can vote in  
10 November, why does it say the receipt is only valid for 60  
11 days?

12 A. The emergency rule is that it's good for 60 days. I  
13 believe that's based on a law -- a statute that's already  
14 in existence at DMV about receipt renewals. And then the  
15 emergency rule is that it should be renewed two additional  
16 times unless the card has been issued.

17 Q. Referring to the receipt for Mr. Randle, there's a  
18 notation that says "Valid until: July 12th, 2016"; do you  
19 see that?

20 A. Yes.

21 Q. Now, whatever the intent may be that you've  
22 described, where is it the DMV says to Mr. Randle, "Good  
23 news: you can vote in November"?

24 A. I mean, I guess we're giving him the receipt that  
25 says for voting purposes.

1 Q. But that receipt only says it's good until July 12th  
2 and there aren't any elections between now and July 12th,  
3 are there?

4 A. No. But it says that it can be renewed and that's --

5 Q. Okay. But it doesn't tell Mr. Randle how it can be  
6 renewed?

7 A. No.

8 Q. Okay. Looking at the letter, the bottom paragraph --  
9 the last paragraph of the letter, it begins, "If you are  
10 able to provide new or additional information to assist  
11 the DMV in verifying proof of your name and date of  
12 birth/or citizenship, please contact the DMV"; did I read  
13 that right?

14 A. Yes.

15 Q. So what about a person who believes they've already  
16 given the DMV everything they have and they have no new or  
17 additional information to provide, what do they do?

18 A. They'll get the three receipts.

19 Q. But they're not told that in this letter?

20 A. Correct.

21 Q. Okay. And are they expected to get back in touch  
22 with CAFU to assist with the process?

23 A. The receipt renewal process or --

24 Q. The process of trying to get their ID. What  
25 happened -- what happens if one of the people we've been

1 talking about sees this and says -- well, let's say  
2 Ms. Wells, because I think the record indicates she's  
3 already given everything she has -- so Ms. Wells see this  
4 and says, "Okay, I don't have anything new or additional  
5 to give to DMV," and so she's not going to call. So what  
6 happens to her?

7 A. The petition stays in the denied status unless the  
8 customer can provide additional information.

9 Q. So Ms. Wells, if things work as you describe, will  
10 get two more paper receipts, but she's not going to know  
11 that from here, right?

12 A. Correct.

13 Q. Okay. She's going to get two more paper receipts and  
14 then what? Is she going to be -- well, you said she's  
15 already denied?

16 A. Correct.

17 Q. So if --

18 THE COURT: I think there's a question pending.  
19 What's going to happen after the second renewal receipt  
20 expires?

21 THE WITNESS: I don't know that. You know, I  
22 think that in the emergency rule it says something about  
23 making it a permanent rule or making -- so I don't know if  
24 there's something that will change, but that's a decision  
25 that I wouldn't be involved in or would know about.

1 THE COURT: Okay. Thank you.

2 MR. CURTIS: Excuse me just a moment, Your Honor.

3 BY MR. CURTIS:

4 Q. I noted that there's no discussion in the letter or  
5 the receipt about the new payment option where DMV will  
6 help pay for a document. Why isn't that -- why isn't  
7 there any reference to that in this letter?

8 A. That was a different letter that was sent to --  
9 that's sent to customers when there's a fee that might be  
10 helpful in obtaining their information.

11 Q. I believe it was Ms. Schilz -- when Ms. Schilz  
12 testified she said that investigators in CAFU have been  
13 asked to go back and review their files to see if there  
14 are any additional people who may be helped by a fee.

15 A. Correct.

16 Q. Is that correct?

17 A. Yes.

18 Q. Has CAFU found any additional people yet?

19 A. The whole fee list that was brought up, that's how  
20 that list was established. We went through existing  
21 cases --

22 Q. Right.

23 A. -- suspended or denied cases. Active cases we review  
24 continuously as we're working on them.

25 Q. But are there going to be any additional reviews of



1 all the files?

2 A. That were already reviewed?

3 Q. Right.

4 A. I don't think so.

5 Q. Okay. So as far as you know, the people who have  
6 already gone through the system, the review has been done  
7 and the universe of people who will be offered fees for  
8 vital records is summarized in that chart?

9 A. Not including any new petitions, right --

10 Q. Right.

11 A. -- I believe.

12 Q. The print at the bottom of the receipt indicates that  
13 the receipt can be renewed unless otherwise cancelled by  
14 WisDOT. What would be the grounds for cancellation?

15 A. If we found that there was fraud in the application  
16 or if we determine that the customer was not of age to  
17 vote or not a U.S. citizen.

18 Q. What if a month from now the pending petition is  
19 denied?

20 A. They still receive the renewals.

21 Q. All the way through November?

22 A. Correct, unless the reason for their denial is  
23 because of one of the reasons that I stated.

24 Q. Looking again at the latest procedure -- I'm sorry,  
25 not the latest. This is not the latest procedure

1 document, right; this is the May 6th version?

2 A. Correct.

3 Q. Okay. And just -- we talked a little bit earlier,  
4 you indicated that there is a later version of this  
5 document?

6 A. Yes. We've been updating this document. We update  
7 this document ongoing.

8 Q. Do you know the date -- the revised date of the  
9 latest document?

10 A. I worked on it on Monday; so...

11 Q. So Monday, the 23rd?

12 A. 23rd, yes.

13 Q. Okay. Looking at page 3, under the heading *Receipt*  
14 *Renewal Process* -- do you see *Receipt Renewal Process*?

15 A. Yes.

16 Q. And I'll just read this very briefly: "All petition  
17 customers issued a receipt for voting purposes only will  
18 be reissued a receipt valid for an additional 60 days  
19 period. If they have since been customer-initiated  
20 cancelled or issued, they will not receive a second  
21 receipt or third receipt." Is that right?

22 A. Correct.

23 Q. Okay. Now, the first sentence I read, "will be  
24 reissued a receipt valid for an additional 60 days,"  
25 there's no mention there of further renewals after that,

1 but that's the implicit -- that's the intended message?

2 A. Correct.

3 Q. Okay. Can I ask you to look again at the emergency  
4 rule?

5 MR. CURTIS: I'm almost done, Your Honor.

6 THE COURT: Good.

7 BY MR. CURTIS:

8 Q. I guess we have to pull that up. Could we pull up  
9 the emergency rule, page 20, Section 10? And this is  
10 Exhibit 453. And could you highlight -- go down to the,  
11 oh, the third line from the bottom there beginning "The  
12 department shall issue"? And you can just stop right at  
13 that citation. We don't need to highlight all. Okay.

14 Now, as I read this, it says, as part of the rule,  
15 "The department shall issue no receipt to an applicant  
16 after the denial of a petition." Did I read that right?

17 A. Under sub.(5m) I'm not sure if that discusses the  
18 fraudulent application, I'm not sure.

19 Q. Okay. As I read this, no receipt after a denial, but  
20 you're saying the rule functions that even after a denial  
21 the receipts will continue to be issued through Election  
22 Day?

23 A. Unless they were denied because it was determined  
24 that they're not a U.S. citizen, they're not of legal  
25 voting age.

1 Q. I'm stumped. If the -- if people can continue to  
2 vote after the DMV has denied their ID petition;  
3 presumably because they haven't met the requirements for  
4 proving name, date of birth and citizenship, the DMV has  
5 found they're not eligible; why did they get to continue  
6 to vote then?

7 A. I guess that would be a question not for me. I don't  
8 know who's behind the emergency rule.

9 Q. I understand you don't make the rules; but do you  
10 understand that seems somewhat perplexing?

11 A. I do.

12 Q. And I'm wondering, particularly in light of all the  
13 other work that you and your colleagues do, what's the  
14 justification for pouring all of these resources into this  
15 process if you're just going to be issuing pieces of paper  
16 to people who may or may not be eligible to vote?

17 A. I can't answer that. I don't know.

18 Q. Okay. One thing we have not discussed with any other  
19 witness is a provision in the emergency rule, page 19,  
20 that I just wanted to flag for the Court's attention. And  
21 this is toward the bottom of the page, six lines up from  
22 the bottom, the sentence beginning "The administrator."

23 So this emergency rule says, "The administrator shall  
24 grant a petition when he or she concludes, on the basis of  
25 secondary documentation or other corroborating

1 information, that it is more likely than not that the  
2 name, date of birth or U.S. citizenship provided by the  
3 applicant is correct." Did I read that right?

4 A. Yes.

5 Q. Just a couple questions: one, there's a reference to  
6 secondary documentation. We know what that is. What's  
7 other corroborating evidence or corroborating information?

8 A. I'm assuming that it means other information provided  
9 by the petitioner through the adjudication process.

10 Q. Okay. And then the standard "it is more likely than  
11 not" -- let's focus on *the name* -- "more likely than not  
12 that the name ... provided by the applicant is correct."  
13 Is that a new standard as of May 13th or is this just a  
14 codification of the standard that CAFU has been applying  
15 all along?

16 A. I believe it's just putting the process that we've  
17 been using all along into word -- into the rule.

18 THE COURT: I mean, well, you review the work  
19 here. Is that really the standard you were using? Is  
20 that something that you consciously thought of when you  
21 were evaluating the petitions; that I've got to get to a  
22 point where I believe that it's more likely than not that  
23 the name is right?

24 THE WITNESS: More likely than not that the  
25 information that they've provided is truthful and we have

1 information that --

2 THE COURT: The question is, was that what you  
3 specifically had in mind when you were evaluating  
4 petitions before, "more likely than not?"

5 THE WITNESS: Yes.

6 THE COURT: Okay. Thanks.

7 BY MR. CURTIS:

8 Q. So how does the requirement for an exact match square  
9 with the "more likely than not?" Let me give you an  
10 example.

11 Johnny Randle says, "This is my name that I've been  
12 using for 74 years and you have a CLEAR report that proves  
13 I've been using my version of my name, Johnny Randle, for  
14 74 years." Isn't it more likely than not that that's  
15 probably truthful?

16 A. You know -- I don't know. The information that we  
17 received is different than the information that he gave  
18 us. If he would sign his common law name change form,  
19 that would be enough information for us to say that it's  
20 more likely than not.

21 Q. Several of your senior colleagues testified about  
22 various individuals who have gone through the process and  
23 been denied and indicated that they didn't question that  
24 these particular individuals were U.S. citizens. But so  
25 under the "more likely than not" standard, is that what

1 governs the citizenship: all you have to do on citizenship  
2 is ask, is it more likely than not that Johnny Randle was  
3 a U.S. citizen, and then if he answers "yes" we can move  
4 on?

5 A. I know that we like to have proof for our decision.  
6 If we just say, "I feel like he's telling the truth,"  
7 that's probably not going to be substantial enough when we  
8 forward it to management for review. The harder pieces to  
9 find are the name and date of birth because those we often  
10 have information that conflicts with what the petitioner  
11 is telling us.

12 MR. CURTIS: Okay. Do you have the -- Heather,  
13 do you have the affidavit of common law name change for --  
14 I think we have, what, Mr. Walker? And this can be on the  
15 screen, Your Honor.

16 THE COURT: Okay.

17 MR. CURTIS: That was up I believe yesterday.  
18 And can you go to the letter? Do you also have the  
19 letter?

20 BY MR. CURTIS:

21 Q. You mentioned the common law name change and that  
22 prompted a question or two I had for you. Looking first  
23 at the letter, and if I can see this -- it's a little  
24 far -- it's dated May 16th, I believe. Yeah, May 16th, so  
25 just a week ago Monday. So on Monday, the 16th, DMV

1 contacts Mr. Walker. Can you highlight the second  
2 paragraph?

3 So DMV sends Mr. Walker the common law name change  
4 affidavit and says, "The affidavit needs to be notarized.  
5 So you should not sign it until you are in the presence of  
6 a notary." That was Monday the 16th. Is that still  
7 accurate?

8 A. I've heard discussion from our legal department  
9 about whether or not they're going to allow BFS processors  
10 to witness a statement, but I don't know what the final  
11 determination was on that.

12 Q. Can we go to the affidavit, also? And can you go to  
13 the notary block? There we go. So the affidavit that was  
14 sent to Mr. Walker a week ago asks him to sign this and to  
15 have the -- have his signature notarized; is that correct?

16 A. Correct.

17 Q. Now, I'll represent that we, on Sunday, two days ago,  
18 48 hours ago -- is it Tuesday or Wednesday?

19 THE COURT: Close enough.

20 BY MR. CURTIS:

21 Q. I've lost track. -- we were advised that the  
22 notarization rule has been changed or dropped. You're not  
23 aware of that?

24 A. Like I said, I have heard discussion of that. I  
25 didn't know there was a final decision yet.



1 Q. Okay. Assuming there's a final decision, is DMV  
2 going to send out correction letters to everyone who's  
3 been told that they have to go out and find a notary?

4 A. Yes.

5 Q. And is DMV going to have to revise the REAL ID  
6 affidavit to get rid of the references to having it  
7 notarized?

8 A. I'm assume so, yeah.

9 Q. What about the people like Johnny Randle? Johnny  
10 Randle, actually he had his daughter fill out one of these  
11 affidavits five or six months ago, sent it in. I  
12 understand the affidavit was not being correctly filled  
13 out, but they filled it out and had to pay for a notary.  
14 For people like that, who have had to pay for notaries, is  
15 the DMV going to reimburse them?

16 A. I don't know about that.

17 Q. Okay. Just one more round of questions and it's just  
18 about what's been happening in recent weeks.

19 THE COURT: I'm going to direct you, Mr. Curtis,  
20 to make your questions pointed and succinct for this  
21 witness because you've exhausted her knowledge on  
22 emergency rules and such, so let's bring this to a close.

23 MR. CURTIS: Okay. Let me just focus on this.

24

25 BY MR. CURTIS:

1 Q. So we're now in the week of May 23rd and we've been  
2 advised that there's a new set of guidelines. Are you  
3 aware of any additional changes that are under  
4 consideration that may get implemented in the next several  
5 days?

6 A. Not that I know of.

7 MR. CURTIS: Okay. That's all, Your Honor.  
8 Thank you.

9 THE COURT: All right. Good. Now, despite my  
10 interest in wrapping this up, I did have a couple of  
11 clarifications that I needed to ask myself. You indicated  
12 that you met with all your team. And I think there are  
13 600 employees in the CAFU Unit?

14 THE WITNESS: Yes.

15 THE COURT: Do you also meet regularly with Jim  
16 Miller?

17 THE WITNESS: No.

18 THE COURT: Do you meet at all with him?

19 THE WITNESS: Very rarely. Most of our work with  
20 him is done through -- most of my work with him is done  
21 through email.

22 THE COURT: Okay. And so you don't discuss cases  
23 with him?

24 THE WITNESS: No.

25 THE COURT: Okay. On the -- this is just an

1 example here. On Mr. -- I don't think you'll need the  
2 paperwork. But if you do, let me know. But Mr. Davis has  
3 a notation in his case activity report that there was a  
4 *no FR match*. So FR I think is *facial recognition*?

5 THE WITNESS: Correct.

6 THE COURT: I don't know that anybody has really  
7 explained what you do with a facial recognition.

8 THE WITNESS: All of the petitioners' photos that  
9 come in, because they're not processed a transaction like  
10 an ordinary ID or a driver's license, their photos don't  
11 go through our facial recognition database. So we  
12 manually enter these photos and do a comparison to see if  
13 they've applied under another name.

14 THE COURT: Okay. So within the facial  
15 recognition database, that's just --

16 THE WITNESS: All DMV photos from driver's  
17 licenses or IDs.

18 THE COURT: So it's not outside the DMV,  
19 Wisconsin DMV at all?

20 THE WITNESS: No.

21 THE COURT: Okay. So that's not going to provide  
22 an avenue to connect him to another bit of identity  
23 somewhere else?

24 THE WITNESS: No.

25 THE COURT: Nobody has asked this: are any of the

1 CAFU employees African American or Hispanic or other  
2 racial or ethnic minorities?

3 THE WITNESS: No.

4 THE COURT: Okay. You indicated that you had  
5 noticed that a significant number of applicants through  
6 the petition process were members of minorities. It  
7 wasn't clear to me the time frame. It wasn't clear to me  
8 whether you had noticed that since your deposition or at  
9 your deposition or whether you had noticed it while you  
10 were processing the petitions.

11 THE WITNESS: I noticed it while I was processing  
12 the petitions.

13 THE COURT: Did you tell anyone or talk to anyone  
14 about that?

15 THE WITNESS: No. It doesn't affect the way that  
16 we do our work. We're still trying to issue the product;  
17 so...

18 THE COURT: You didn't raise it to Ms. Schilz and  
19 say, "It seems like a lot of our petitioners are members  
20 of minorities"?

21 THE WITNESS: No.

22 THE COURT: Okay. You had also indicated, and I  
23 wasn't clear, you had talked a little bit about  
24 South Carolina. Did you look into the South Carolina  
25 situation to try to figure out why it was difficult

1 getting information from South Carolina?

2 THE WITNESS: I didn't personally, but one of the  
3 members of CAFU did.

4 THE COURT: I thought you had suggested that you  
5 had gotten to some understanding about why South Carolina  
6 had privatized its vital records.

7 THE WITNESS: I don't know why they privatized,  
8 but we were told that they had and that is why it was  
9 difficult.

10 THE COURT: What you had said made me think that  
11 you were suggesting that the reason they had privatized it  
12 may have been related to voter ID requests?

13 THE WITNESS: No, I didn't say that.

14 THE COURT: Okay. I misunderstood that. That's  
15 all I had. But I will say this to the defense side: I'd  
16 like you to get the current policy. Well, it's the  
17 *Processing ID Petition Process Applications* document. Get  
18 that to the plaintiffs as soon as possible. By that I  
19 mean by tomorrow morning.

20 Mr. JOHNSON-KARP: Okay.

21 THE COURT: All right. Very good. And now a  
22 brief redirect.

23 Mr. JOHNSON-KARP: Very brief.

24 THE COURT: I can't imagine there's anything  
25 left.

1 Mr. JOHNSON-KARP: Just a few points to clear up.

2 REDIRECT EXAMINATION

3 BY Mr. JOHNSON-KARP:

4 Q. Early on in the cross-examination you were asked  
5 about working with slower states. In your work on  
6 petitions, or if you're aware when others in the unit are  
7 working on petitions with those slower states, are there  
8 other avenues that you can pursue while you're waiting on  
9 those states?

10 A. Yes. You know, if it's a state agency, that's one  
11 state agency that's causing problems. We can try for  
12 school records. If we're having problems with the school  
13 records, maybe we can talk to a church, see if there's a  
14 baptismal record. We go for any route available.

15 Q. Have you done that?

16 A. I personally don't believe that I have. I am  
17 assuming other petitioners have.

18 Q. The other --

19 A. Sorry, the other adjudicators.

20 Q. You were also asked about why you would worry about  
21 fraud in the ID petition process. Is that a concern in  
22 CAFU's work that's specific to the ID petition process,  
23 the concern about fraud?

24 A. No, because we deal with fraud outside of petition  
25 work, since we're dealing with external fraud and internal

1 employee fraud. That's something that we're used to  
2 looking for and used to finding in our cases.

3 Q. So it's not specific to ID petitions?

4 A. No.

5 Q. You were also asked how many fee requests you expect  
6 to pay. Do you remember that question?

7 A. Yes.

8 Q. Does that depend on how many petitioners respond?

9 A. Yes.

10 Q. Final question: Even if a petitioner who's received a  
11 receipt throws that receipt away or never contacts CAFU,  
12 is it your understanding that they'll still receive the  
13 two renewals?

14 A. Yes.

15 Mr. JOHNSON-KARP: No further questions, Your  
16 Honor.

17 THE COURT: Thank you, very much.

18 Mr. JOHNSON-KARP: Thank you, Ms. Fix.

19 THE COURT: We still have an hour.

20 MR. KAWSKI: Your Honor, the defense would then  
21 call M.V. Hood, III.

22 THE COURT: Very good.

23 **M.V. HOOD, III, DEFENDANTS' WITNESS, SWORN**

24 MR. KAWSKI: Your Honor, I have copies of  
25 exhibits for this witness. May I approach?

1 THE COURT: Yes. Please do.

2 MR. KAWSKI: Got a little water spill here, so we  
3 want to be careful before we get started.

4 THE COURT: Go ahead and mop up. Do you need  
5 paper towels or something?

6 MR. KAWSKI: I can do some preliminary things  
7 before we get into anything with the computer. In this --  
8 with this witness I plan to introduce and discuss Defense  
9 Exhibits 1, 2, 3, 4, 169, 170, 171 and 265. And those  
10 should all be in the packets that I handed out.

11 THE COURT: Thank you.

12 MR. KAWSKI: I think we're pretty good here, so  
13 I'll get started.

14 THE COURT: I can get your security deposit back.

15 (5:32 p.m.)

16 DIRECT EXAMINATION

17 BY MR. KAWSKI:

18 Q. Good afternoon, Dr. Hood. How are you?

19 A. Fine. Good afternoon.

20 Q. Could you please state your name and spell your name  
21 as well for the record?

22 A. Sure. M.V. Hood, III. M period, V period, Hood,  
23 H-O-O-D, the third.

24 Q. And what is your occupation?

25 A. I'm a professor of political science.



1 Q. Okay. And where do you do that work?

2 A. At the University of Georgia.

3 Q. How long have you been doing that?

4 A. At Georgia, 16 years.

5 Q. And you have tenure?

6 A. Yes.

7 Q. What department?

8 A. Political Science.

9 Q. Okay. What degrees do you hold?

10 A. I hold three degrees in political science: a BS from  
11 Texas A&M, an MA from Baylor, and a Ph.D. from Texas Tech.

12 THE COURT: I'm going to give you the same  
13 instruction, which I expect you're anticipating, which is  
14 I've reviewed his curriculum vitae and his report, so you  
15 can be very high level on his qualifications.

16 MR. KAWSKI: Great.

17 BY MR. KAWSKI:

18 Q. Why don't you please first take a look at Defense  
19 Exhibits 1 and 2. Bring 2 up first. We're going to bring  
20 2 up on the screen. So looking at Exhibits 1 and 2, what  
21 are those documents?

22 A. Well, 1 -- or I guess this is 2, that's my curriculum  
23 vitae.

24 Q. Okay. And that's current as of when?

25 A. That's dated December 2015.

1 Q. Okay. And then Exhibit 1 is what? You have a paper  
2 copy of it.

3 A. This is my expert report I submitted in this case.

4 MR. KAUSKI: I move to admit both of those  
5 exhibits.

6 THE COURT: Any objection?

7 MR. KAUL: No. We have no objection to anything  
8 in this packet.

9 MR. KAUSKI: Okay. Very good.

10 THE COURT: Excellent. All those that Mr. Kauski  
11 inventoried are admitted.

12 MR. KAUSKI: Very good.

13 BY MR. KAUSKI:

14 Q. As a professor of political science, what are your  
15 areas of scholarly interest and expertise?

16 A. Generally I do research and teach courses in American  
17 politics and policy. More specifically I both perform  
18 research and teach courses in southern politics, in  
19 election administration, in American government in  
20 general. I also teach *Honors Experience of the American*  
21 *Government* course.

22 I've taught graduate courses on election  
23 administration in southern politics. And the reason I  
24 mention southern politics, it may seem strange in  
25 Wisconsin, but we have a very heavy dose of voting rights

1 strayed over in that course.

2 Q. You've done some research and writing in the area of  
3 election administration?

4 A. Yes.

5 Q. Specifically Voter ID laws?

6 A. That's one of the areas, yes.

7 Q. Okay. Let's take a look at the physical copies of  
8 Exhibits 3 and 4. And just take a look at what those are  
9 and tell the Court, first of all, what Exhibit 3 is.

10 A. These are two peer-reviewed journal articles that I  
11 wrote or co-authored specifically on the Georgia Voter ID  
12 statute.

13 Q. Okay. And the one called *Worth a Thousand Words*?  
14 what was that one about?

15 A. That was preimplementation, so the law had not been  
16 implemented at that point. And most of that article  
17 focuses on trying to determine in Georgia who has a  
18 qualifying ID and who doesn't.

19 Q. Okay. And then the *Much Ado About Nothing*? article,  
20 could you describe what that one is about?

21 A. Now, there we're really trying to get at what are the  
22 effects, if any, of the Voter ID law. And so we have a  
23 preimplementation and a post-implementation point that  
24 we're looking at. And I can be more specific later. But  
25 that's what we're really trying to gauge is the impact of

1 the law because it had been implemented at that point.

2 Q. And then turning to Exhibit 2, which is your CV, if  
3 you want to look at the physical copy of that. There are  
4 some other articles in here that address election  
5 administration. And I'd like to have you just talk  
6 briefly about the *Achieving Validation* article. What was  
7 that article?

8 A. Okay. That's -- I wouldn't really consider that an  
9 election administration article. That's an article that  
10 we wrote about -- specifically about black registration  
11 and turnout rates and part of that article focuses on  
12 Georgia. And I guess the tie-in here for this particular  
13 case perhaps for that article is that we look at black  
14 turnout across a time period that saw the implementation  
15 of the Georgia Voter ID statute.

16 Q. And then the article *They Just Don't Vote Like They*  
17 *Used To*, what is that one about?

18 A. That's about voter fraud. Specifically we introduced  
19 a methodology to study voter fraud or tried to detect  
20 voter fraud and we used a real-life example from the state  
21 of Georgia where we go out and we're actively searching  
22 for those voting on behalf of the dead.

23 Q. And these are all peer-reviewed publications?

24 A. Yes. Everything in this section should be peer  
25 reviewed.

1 Q. And then there are a number of many other  
2 peer-reviewed publications in this CV, correct?

3 A. Correct. There's at least one or two more since  
4 then.

5 Q. Let's talk about the extensive work you've done in  
6 terms of testifying with regard to Voter ID and other  
7 election laws in court.

8 A. Okay.

9 Q. Let's talk first about examples where you have  
10 testified in cases about Voter ID laws.

11 A. Okay. I've testified concerning Voter ID laws in a  
12 number of states: Georgia, Texas, South Carolina, North  
13 Carolina, and multiple times in the state of Wisconsin.

14 Q. And those examples in Wisconsin were which cases?

15 A. One was a state court case, *Milwaukee Branch of the*  
16 *NAACP/Zack* case, and then the other was the *Frank* case, at  
17 the federal level.

18 Q. And just so it's clear, you represented the  
19 defendants in all of those cases that you just mentioned?

20 A. Well, except the Georgia case.

21 Q. Okay. In the Georgia case you represented the  
22 plaintiffs?

23 A. Yes.

24 Q. Okay. And just to bring this right out, in the  
25 Georgia case is that the only example of a case in which

1 someone had moved to exclude you and that was granted to  
2 some extent?

3 A. Yes.

4 Q. Okay.

5 A. Yes, that's correct.

6 Q. Do you know the details of that instance?

7 A. Well, I'm not a judge or an attorney. I understood  
8 part of it. I was apparently qualified to give an  
9 opinion, but the judge didn't agree with some of my  
10 methodology. I think that's the best way I could explain  
11 it.

12 Q. And that was the first of any of the cases that you  
13 mentioned, correct?

14 A. In terms of time, yes.

15 Q. And about when was that?

16 A. That would have been in, I guess we could look this  
17 up, but I think about 2006 approximately.

18 Q. And then since that time you have not had -- you have  
19 not had a motion to exclude filed against you that was  
20 successful in court, correct?

21 A. Correct.

22 Q. You've done some work in cases other than  
23 Voter-ID-related cases, right?

24 A. Yes. I've done some other  
25 election-administration-type cases. I've done some cases

1 on redistricting and Section 2 vote dilution. But I've  
2 also done some cases more recently.

3 There's a case in Ohio that dealt with quite a few  
4 election administration issues, including early voting,  
5 same-day registration, absentee-by-mail balloting,  
6 provisional balloting. And there are actually two cases  
7 in Ohio that dealt with some of the same issues that I  
8 worked on recently. And, also, the North Carolina case,  
9 part of that was Voter ID, but another part were other  
10 challenges to North Carolina's election code, including  
11 things like early voting.

12 Q. So there's definitely some overlap between the Ohio  
13 and North Carolina cases and some of the non Voter ID  
14 challenges in our case?

15 A. Yeah. I think that's fair.

16 Q. Okay. Going back to these cases, in the  
17 South Carolina case you provided an opinion to the court  
18 and that was a three-judge panel in the D.C. District,  
19 correct?

20 A. Correct.

21 Q. And is that an example of your work being cited in a  
22 judicial decision?

23 A. I think the court -- again this is from memory, I  
24 haven't looked at that opinion in quite a while -- but I  
25 think I am or at least one of the figures I came up with

1 was cited in a footnote.

2 Q. Okay. And then --

3 THE COURT: You said there was -- is that the  
4 South Carolina case on Voter ID that you're talking about?

5 MR. KAWSKI: Yes.

6 THE COURT: That was a three-judge panel case?

7 MR. KAWSKI: It was because it was a preclearance  
8 case I believe.

9 THE COURT: All right.

10 BY MR. KAWSKI:

11 Q. And that was --

12 A. That's true, that was a Section 5 case.

13 Q. Okay. And was there a Texas case that was also a  
14 preclearance case or was it a Section 2 case?

15 A. There were multiple cases. I was not part of the  
16 Section 5 Texas case.

17 Q. So you were part of the Texas case that was heard by  
18 an *en banc* panel oral argument today, correct?

19 A. Yes, yes.

20 Q. And you were also a part of the Ohio case that was  
21 decided by a district judge today, correct?

22 A. Well, I just found out. I mean, I don't really know  
23 what happened.

24 Q. I just found out about it, too.

25 A. Yes, that's the case.



1 Q. And going back to the *NAACP Branch v. Walker* case,  
2 that was from 2012?

3 A. Yes, that sounds correct. I think that was in the  
4 spring of 2012.

5 Q. That case focused only on Voter ID?

6 A. Yes. It was very specific.

7 Q. Okay. And in that case, and in some of these others,  
8 you performed a certain kind of matching analysis with  
9 regard to Voter ID, correct?

10 A. Beginning with that case, yes. I mean, I've done it  
11 in Wisconsin. I've done matching analyses for other  
12 states as well. This is my fifth effort in the state of  
13 Wisconsin.

14 Q. And so when you say it's your fifth effort, can you  
15 break down how many times you did it in these various  
16 cases?

17 A. It was two in the *NAACP* case and two in the *Frank*  
18 case and then one in this case.

19 Q. Okay. In all of those instances --

20 THE COURT: This is speaking specifically about  
21 the matching analysis?

22 MR. KAWSKI: Correct.

23 THE WITNESS: Yes, Your Honor.

24 BY MR. KAWSKI:

25 Q. So you've done the matching analysis, very similar

1 analysis, now five times using the same type of Wisconsin  
2 data, correct?

3 A. Yes, although I hope I've improved on the process as  
4 I've moved along; let me say that.

5 Q. Okay. And you've done a similar matching analysis in  
6 which other states?

7 A. South Carolina. I didn't do the actual analysis in  
8 Texas, but I submitted algorithms that I wanted run in the  
9 state of Texas. I did a matching analysis in Georgia.

10 Q. And when you say "matching analysis," we're going to  
11 jump right to that as the first topic because I think it's  
12 the most important. But just generally, what does that  
13 involve?

14 A. Well, essentially -- for instance, we'll just talk  
15 about Wisconsin because that's what's germane today -- I'm  
16 trying to match voter registrants back to a DMV file. So  
17 we're trying to get two databases to communicate with each  
18 other that really aren't designed to communicate with each  
19 other very well. So we're trying to figure out which  
20 registrants in Wisconsin had a valid Act 23 driver's  
21 license or state ID card.

22 Q. Okay. And then before I skip to that, just one more  
23 set of formalities. You are familiar with the laws that  
24 are challenged in this case, correct?

25 A. Yes.

1 Q. So you're familiar with the Voter ID law?

2 A. Yes.

3 Q. And the changes to in-person absentee voting?

4 A. Yes. I studied that.

5 Q. You're familiar with the changes to registration and  
6 residency requirements?

7 A. Yes.

8 Q. And you're familiar with the other challenged laws in  
9 this case? There are a lot of miscellaneous things, but  
10 you've looked at all those laws, correct?

11 A. Yes.

12 Q. You're prepared today to give some opinions about  
13 these changes, correct?

14 A. Yes. I think the only thing I might not have  
15 specifically addressed in my opinion, my written opinion,  
16 I don't think I talked about special registration  
17 deputies.

18 Q. Okay.

19 A. Just about everything else I tried to touch on.

20 Q. Okay. All right. Well, why don't we -- we're going  
21 to jump right into the report and I'd like to skip ahead.

22 THE COURT: If you would do one thing --

23 MR. KAWSKI: Sure.

24 THE COURT: -- just to clarify one little bit  
25 about your background and qualification. It wasn't

1 exactly apparent to me what part of your expertise and  
2 your professional work led you to doing the kind of  
3 matching analysis that you did on the databases. I don't  
4 see, like, a computer science background. Again I don't  
5 think it's -- you don't have to be a computer programmer  
6 to do the work that you did, although presumably somebody  
7 was. But give me a little bit about the background that  
8 prepared you to do that matching analysis.

9 THE WITNESS: I'm trained in journalism and  
10 empirical social scientist. Now, it's true that I'm not a  
11 computer programmer. I'm essentially self-taught. And I  
12 got interested in this or having to perform that  
13 particular task when Georgia passed or was in the midst of  
14 trying to implement its Voter ID law and I had to figure  
15 out how to do some of this and it's just scrounge since  
16 then.

17 THE COURT: Okay. All right.

18 THE WITNESS: It's like a lot of things I guess.  
19 You know, sometimes you're required to take on new skills  
20 and learn new things. But I don't have any formal  
21 training in it, that's true.

22 BY MR. KAWSKI:

23 Q. Maybe to round out some of those qualifications. You  
24 do -- some of your academic work, both teaching and  
25 writing, involves dealing with statistics and data,

1 correct?

2 A. Almost all of it, yes.

3 Q. Okay.

4 A. Almost anything I write is empirical.

5 Q. And so you're -- empirically you are testing data,  
6 correct?

7 A. Yes, all the time.

8 Q. And it can involve large databases, correct?

9 A. I have made use, quite a few times, of large  
10 databases, yes, especially things like voter registration  
11 databases.

12 Q. Okay. And so it's fair to say -- go ahead.

13 THE COURT: I'm sorry. This is probably a pretty  
14 coarse carving up of your field, your discipline. But  
15 among -- some people would cut it into the quantitative  
16 sorts and then the sort of narrative history sorts. Does  
17 that division make sense to you in your field, and if it  
18 does, where do you fit into that kind of a picture?

19 THE WITNESS: And I'm definitely on the  
20 quantitative side. I mean, I think you're correct, there  
21 is a divide. I think the overriding school of thought is  
22 quantitative in the discipline now, at least in political  
23 science.

24 THE COURT: That's kind of a relatively recent  
25 discipline?

1 THE WITNESS: Well, it goes back a number of  
2 decades. I don't know how you might define *recent*. It  
3 predates me definitely.

4 THE COURT: Yeah. I mean, like, in the 1960s  
5 this wasn't a particularly predominant mode of doing  
6 political science or history?

7 THE WITNESS: It was beginning. It was  
8 beginning, yes. And I'm not an historian; I'm a political  
9 scientist.

10 THE COURT: Okay.

11 BY MR. KAWSKI:

12 Q. We're going to look at the report. And before we do  
13 that -- and I talked to you about the data that were used  
14 in the report -- it's fair to say that this report that's  
15 Exhibit 1 contains your opinions in this case, correct?

16 A. Yes, yes.

17 Q. And that the data you relied upon to create this  
18 report is described therein; is that right?

19 A. Yes. I tried to be very thorough about that.

20 Q. You have formed some additional opinions based on  
21 more current data though, correct?

22 A. And I have collected some more current data since I  
23 submitted this report, yes.

24 Q. Right. And that would include the plaintiffs'  
25 experts' rebuttal reports that were submitted in February

1 2016?

2 A. Yes. I've read those.

3 Q. And then it also includes recent GAB data about two  
4 2016 elections in February and April, correct?

5 A. Correct.

6 Q. And then also recent data that the DMV compiled with  
7 regard to free ID issuance, correct?

8 A. Correct.

9 Q. That would be current through April 2016?

10 A. I believe that's correct, yes.

11 Q. And you're prepared today to give opinions about  
12 those additional data as well?

13 A. Right. I created some demonstratives concerning  
14 those data.

15 MR. KAUL: Your Honor, this may be premature, but  
16 I don't think any of that was disclosed, so we would  
17 object to it under Rule 26.

18 THE COURT: We'll take it as it comes. I have my  
19 Rule 26 concerns, so we'll address it as we go.

20 MR. KAUSKI: Right. And I'll say that all the  
21 other plaintiffs' experts who have testified in this case  
22 about those recent data have not produced supplemental  
23 reports with regard to it and they were allowed to testify  
24 about it.

25

1 BY MR. KAWSKI:

2 Q. Another item that I'll say that is a recent item is  
3 the May 13th emergency rule. You took a look at that,  
4 correct?

5 A. I did read it, yes.

6 Q. Okay. And I'm not going to ask you many questions  
7 about that because I know you didn't form very fulsome  
8 opinions about it. Before we start in on the matching  
9 analysis I just want to ask you, in general, when you  
10 approach a problem in your -- in academia or in your  
11 election law expert work, what is the most effective way  
12 to test hypotheses or theories about the impact of  
13 election laws?

14 A. Well, I mean, what I'm going to try to do is to go  
15 out and look for data to specifically formulate a test and  
16 execute that test and formulate a hypothesis; collect  
17 data, execute a test, see if the hypothesis can be upheld  
18 or not. And I think it's especially pertinent when  
19 anytime you're talking about changes to election law,  
20 which has especially been implemented, to take a before  
21 and after look to those changes.

22 Q. And so you did try and do that in this case, correct?

23 A. Everywhere possible I did, yes.

24 Q. Can you comment generally upon what you did, how it  
25 compares to what the plaintiffs' experts tried to do?



1 A. Well, I guess you could say Professor Mayer tried to  
2 do this to some extent. I had disagreements about whether  
3 he accomplished that. Some of the other experts really  
4 didn't execute a lot of testing of data related  
5 specifically to the potential effects of these election  
6 administrative changes though.

7 Q. Okay. Why don't we then turn to the section of your  
8 report that's entitled *Wisconsin's Voter ID Statute*. And  
9 it starts at page 23 of Defendants' Exhibit 1. So it's up  
10 on the screen and you have a physical copy. Could you  
11 tell the Court, first of all, what data sources you used  
12 to do the matching analysis with regard to Voter ID and  
13 why you were doing this at all?

14 A. Well, I was asked to do it to try to determine the  
15 percentage of registrants in Wisconsin that didn't have a  
16 driver's license or state ID card and that was my primary  
17 purpose.

18 Q. Okay. And then beyond that you also tried to look at  
19 other forms of qualifying ID, but the data sources were  
20 more limited, correct?

21 A. Well, I didn't have access to some of the data  
22 sources that might have helped us reduce the no-match  
23 list, for instance the State Department's database on  
24 passports or DOD's database on the military IDs or the  
25 VA -- Veterans Administration's database on VA cards, for

1 instance; although, you know, in fairness, that wasn't a  
2 qualifying form of ID I don't think when I wrote this  
3 report. I think that's something that's changed since I  
4 wrote this report.

5 Q. And that change occurred in, like, March of 2016?

6 A. I think that's right, yes.

7 Q. So tell us about the two main data sources, what they  
8 were and how you obtained them and kind of when the data  
9 were created.

10 A. Well, through counsel I received two databases  
11 essentially: one, a copy of the Wisconsin voter  
12 registration database that contained active registrants;  
13 and second, another file or another database from the  
14 Department of Transportation or the Motor Vehicle Bureau  
15 that contained the record of everyone that had a driver's  
16 license or state ID card that's current.

17 Q. Okay. And again, this is not the first time you had  
18 done this particular type of analysis with these data  
19 sets, correct?

20 A. Well, not those exact data sets. But this is my  
21 fifth effort at basically the same problem, if you will.

22 Q. Okay. And you had to come up with a way to link  
23 these two uncommon databases together. And before you  
24 even did that, you knew that there were going to be some  
25 issues with the data because you had done this a number of

1 times. And at page 25 of your report you lay out those  
2 known issues about the Wisconsin data, correct?

3 A. Correct.

4 Q. Could you tell the Court about some of those issues?

5 A. Sure. There are a number of these. I think there  
6 are four or five I highlight. One, one of the biggest  
7 ones, is that there's no unique and permanent identifier  
8 between the two databases.

9 So, for instance, an example would be in South  
10 Carolina the voter registration database had a full social  
11 security number for every record and the DMV database I  
12 received in South Carolina had a full social security  
13 number, and social security numbers are permanent and  
14 unchanging. So it was relatively -- I won't say  
15 completely easy, but straightforward to link those two  
16 databases to try to achieve matches in that particular  
17 case.

18 There's nothing like that. You know, the DMV  
19 database is much more complete. The DMV database has the  
20 state ID number or driver's license number for every  
21 record and a social security number. But the issue is  
22 that the voter registration database doesn't have a state  
23 ID number for every record; it only has some partial  
24 social security numbers for a few records.

25 Q. And so that also -- does that also create an issue?

1 If you were able to have access to federal databases and  
2 you had social security numbers, you could do a more  
3 fulsome analysis; is that right?

4 A. Well, it would be easier, you know, to do a match  
5 with federal databases. Now, you can do a match with  
6 federal databases using other fields, like name and date  
7 of birth, for instance. But, you know, with any database  
8 it would be much more forward to have access to some  
9 unique identifier.

10 Q. Okay. Another -- at the bottom page 25 you identify  
11 another limitation of the data?

12 A. Right. I think I mentioned this in passing. The  
13 voter registration database, the field for state  
14 identification numbers is not fully populated. So let's  
15 see here. Oh, just over a quarter of everyone in the  
16 voter registration database doesn't have an entry in that  
17 field, they don't have a state ID number. And if I say  
18 "state ID number," that's analogous to a driver's license  
19 number, same thing.

20 THE COURT: When you say "analogous," it  
21 actually -- I mean, literally it's a driver's license  
22 number here, right?

23 THE WITNESS: It's the same.

24 THE COURT: Right.

25 THE WITNESS: I'm just talking about language.

1 It's the same thing.

2 BY MR. KAWSKI:

3 Q. On page 26 there are at least three more examples of  
4 limitations that you face. So what is the next one?

5 A. Right. So another one is, well, if you don't have  
6 some kind of unique identifier you can draw on -- and I  
7 did make use of state ID numbers, but it's not going to  
8 cover all the records -- so then you turn to other fields  
9 that you can use for matching, like name and date of  
10 birth, for instance.

11 Well, again, if you're using name and date of birth,  
12 for instance, in one database and you create a match  
13 string and you do the same thing in the other database,  
14 but there are any inconsistencies between those two fields  
15 across the database -- it's, like, one database has a  
16 middle initial and the other has a middle name -- well,  
17 those aren't going to match. Then you can make some  
18 alterations, for instance. But again, if someone has a  
19 III after their name in one of the databases and they  
20 don't in the other, it's going to be hard to achieve a  
21 match.

22 Q. I think you've already mentioned the next one which  
23 is you only had partial social security numbers?

24 A. Right. I had the last four for some of the records.  
25 35% of the records in the voter registration database had

1 at least a partial social security number record and I did  
2 make use of that.

3 Q. Okay. And then the last limitation, describe that  
4 one, on page 26.

5 A. So here I'm just saying that there are other forms of  
6 qualifying ID under Act 23, like a passport or now a VA  
7 card or a military ID or tribal ID or USCIS. I didn't  
8 have access to those forms of identification.

9 From my work in other cases and work that other  
10 experts have done in other Voter ID cases on both sides,  
11 both the plaintiffs' side and the state's side, there are  
12 a certain number -- a certain subset of registrants who  
13 are going to have a passport, but not a driver's license  
14 or state ID card. I mean, there just are.

15 Now, I can't tell you the exact number in Wisconsin  
16 because I wasn't able to calculate that. But what I'm  
17 saying is the actual no-match rate should be lower than  
18 what we're able to calculate just using driver's licenses  
19 and state ID cards.

20 THE COURT: But you have no way of --

21 THE WITNESS: Your Honor, I didn't have access to  
22 those other databases in this case.

23 THE COURT: I mean, it seems intuitive, although  
24 intuitions can lead into some pretty silly errors  
25 sometimes I think, but I don't know that there'd be that

1 many people who have a passport but don't have some other  
2 form of -- don't have a driver's license particularly, but  
3 at least either that or a Wisconsin ID.

4 THE WITNESS: Well, that's certainly going to be  
5 the most prevalent forms of ID, no argument there. I do  
6 have some examples on page 26 of, you know, additional  
7 matches that were achieved using other forms of data. And  
8 I think that goes over onto page 27 as well.

9 THE COURT: Yeah. And I had noticed the military  
10 ID. And I'm going to guess in states like Texas and North  
11 Carolina you probably have a very large population of  
12 people with military IDs. That's probably not such a safe  
13 assumption in Wisconsin.

14 THE WITNESS: Certainly fewer military personnel  
15 in Wisconsin compared to those states. I still think we  
16 probably would achieve additional matches with passports  
17 certainly, for instance, and now perhaps VA cards. I  
18 looked in the census recently. There are more than  
19 400,000 veterans in Wisconsin, so it's not an  
20 insignificant number.

21 THE COURT: Okay.

22 BY MR. KAWSKI:

23 Q. And just to round out that issue; in other states  
24 where the analysis was done of passports or military IDs,  
25 how is that accomplished?

1 A. Well, I would -- the court would essentially have to  
2 order -- this was usually a federal court -- would have to  
3 send out an order to the State Department to allow this to  
4 happen. And I would send records that I had that were  
5 unmatched to, say, the State Department, transmit those  
6 records. They would undergo a matching algorithm and they  
7 would append data onto that data file and send it back  
8 to me.

9 So, I mean, I never -- no one had direct access to  
10 the DOD's, you know, computer system or the State  
11 Department's computer system, for instance. But we were  
12 allowed to send the data off to those agencies.

13 Q. In those cases, were those cases in which the U.S.  
14 Government was a party, the United States was a party?

15 A. In all the cases I've been a part of where we were  
16 able to access federal databases I think that would be  
17 correct. That would be in North Carolina, South Carolina  
18 and Texas are the cases I'm thinking about.

19 Q. And just to highlight for the Court, what you just  
20 described about sending data off and getting something  
21 appended to it and returned to you, how does that relate  
22 to something in this case and the analysis you did?

23 A. Well, I guess we'll get to this in a more fuller  
24 explanation, but I had the Department of Transportation in  
25 Wisconsin perform a secondary match for me in which I sent



1 them a set of unmatched records securely. They ran some  
2 matching algorithms, appended some data and sent it back  
3 to me securely. And then I updated my larger database I  
4 was working with.

5 Q. Turning back to the report at page 27 there's -- I  
6 think this is the last limitation that you noted.  
7 Describe that one, please.

8 A. The database I was sent from DOT in Wisconsin didn't  
9 have expired driver's licenses or ID cards. Now, that's  
10 important because someone could vote with an expired  
11 driver's license or ID card in Wisconsin as long as it had  
12 expired after the day of the last general election. So we  
13 would have picked up additional matches from that.

14 Q. Okay.

15 A. Now, let me say one other thing. I think we'll get  
16 into this. But about the state ID numbering system in  
17 Wisconsin, your state ID number can change if certain  
18 facts about you change. And that's also problematic when  
19 you're trying to do these matching algorithms. Now, in  
20 some states --

21 THE COURT: I believe Mr. Eckhardt explained that  
22 to us a little bit.

23 THE WITNESS: I'm sorry.

24 THE COURT: That's the -- sort of the bootstrap  
25 of the unmatching that you're talking about?

1 THE WITNESS: Yes.

2 BY MR. KAWSKI:

3 Q. Let's look at the record matching analysis you did  
4 and let's put Table 5 up on the screen. And could you  
5 walk the Court through the various matching attempts that  
6 you made?

7 A. So I came up with five different matching algorithms,  
8 if you will. 1 just uses the state ID number, so it's a  
9 one-to-one match that's in -- the match strings are  
10 numbered there. And then Match String 2 consisted of last  
11 name, date of birth and social security number or the last  
12 four digits of the social security number. Match String 3  
13 was last name, first name and date of birth. 4 was last  
14 name, first name, date of birth and ZIP Code. And 5 was  
15 last name, first name, middle initial and date of birth.

16 Q. Okay.

17 A. So those were the match strings that I used to try to  
18 achieve a linkage between the two databases.

19 Q. Okay. And then turning to Table 6, which is on page  
20 29 --

21 THE COURT: Before you move on with that --

22 MR. KAWSKI: Sure.

23 THE COURT: -- and these are successive passes of  
24 matching, I take it?

25 THE WITNESS: Yes, these are --

1 THE COURT: How can there be anything left after  
2 you match on String No. 3 where you have last name, first  
3 name, date of birth? If you do that, anything that  
4 matches on those three is going to be caught up and deemed  
5 a match. And then you run it again with looking for four  
6 variables. How is there going to be anything left to  
7 match?

8 THE WITNESS: Well, I'm not taking match cases  
9 out, for one thing. These are just matches I'm running.  
10 Now, you're correct in that 4 and 5 would be essentially  
11 subsumed by 3. But you can see the results of each one of  
12 these match strings individually.

13 THE COURT: Yeah. Okay.

14 THE WITNESS: But you're right about that  
15 assumption, Your Honor.

16 THE COURT: Okay. All right.

17 BY MR. KAWSKI:

18 Q. And I think that was in fact the criticism that  
19 Dr. Mayer made of your work in that there's some  
20 overlapping?

21 A. Well, someone could have matched potentially on all  
22 five of these. Now, they're only going to be counted as a  
23 match once.

24 THE COURT: Right.

25 THE WITNESS: But if they matched on at least one

1 of these match strings, I'm going to count them or I  
2 counted them as having an ID.

3 THE COURT: Okay. Because I understood -- and  
4 maybe this is the difference between your approach and  
5 Dr. Mayer's approach -- I understood Dr. Mayer to run the  
6 state ID number against the databases. And if there was a  
7 match, he took that set of records out and then he ran the  
8 next criterion --

9 THE WITNESS: That's correct.

10 THE COURT: -- and then took those out. Now, you  
11 didn't do it that way; you ran all these against all of  
12 the databases and then just tabulated how many times you  
13 had a hit on one of the five?

14 THE WITNESS: Correct. And if it had at least  
15 one, I mean obviously I'm not counting five as five  
16 matches, but if it had at least one hit, then it would be  
17 a match. So I'm not renaming cases every time there's a  
18 match. It's a little bit different approach.

19 THE COURT: And as a matter of logic, I don't  
20 know that it makes a difference in the result, but if you  
21 could illuminate that for me if it does.

22 THE WITNESS: It really shouldn't. At least  
23 sitting here I can't think how it would.

24 BY MR. KAWSKI:

25 Q. Taking a look at Table 6, which is the results of

1 these five match efforts, could you describe what, after  
2 running those five matches, what you came up with at that  
3 point in the analysis?

4 A. I don't think I've mentioned this. There was a  
5 separate file for driver's licenses and one for state ID  
6 cards and I just didn't combine those. So I'm running  
7 these match strings against both of those databases. And  
8 again it doesn't matter how many times someone matches, as  
9 long as they match once. It's either zero or one or  
10 greater, right? So you can see the results of all the  
11 match strings there specifically. That's what Table 6 is  
12 showing.

13 Q. And then the text immediately below Table 6 describes  
14 sort of what -- at this point in the analysis how many  
15 were left unmatched, correct?

16 A. Correct. That's a summation essentially of Table 6.

17 Q. And how many at this point were left unmatched both  
18 in terms of raw number and as a percentage of registrants?

19 A. I had 242,393 unmatched records, which is 7.17%.

20 Q. Okay. And so then you didn't stop there. You went  
21 further and why was that?

22 A. Well, primarily because of my previous attempts at  
23 matching in Wisconsin in which I knew that someone's state  
24 ID number could change. And one of the biggest reasons  
25 someone's state ID number might change is because if they

1 get married and change their last name, well, not only  
2 does their last name change but it changes their state ID  
3 number.

4 And that's going to be updated and reflected in the  
5 DMV file, but it's not necessarily going to be directly  
6 updated with any immediacy in the voter registration file.  
7 And so because of that it's very hard to match either  
8 using name strings or the state ID number.

9 So I think the first time I ever attempted this I  
10 noticed there were a certain subset of unmatched numbers  
11 that had a state ID number in that field. So the logical  
12 question is why is there a state ID number in that field  
13 and I can't match it. And then I started digging in about  
14 how state ID numbers were derived in Wisconsin and those  
15 kinds of things.

16 Q. Let me stop you there because I think this refers  
17 back to your gaining this knowledge. I think it was in  
18 the *Frank* case that you first started to tune into this  
19 and wanted to talk with some DMV employees about that  
20 issue, right?

21 A. Yes. And that case occurred after the *NAACP* case, so  
22 it was moving down that road, if you will, yes. And I  
23 wasn't able to perform a secondary match in the *Frank*  
24 case, but I was able to talk to some DMV officials and  
25 sort of figure out what was going on probably.

1 Q. And so by the time you got to our case you knew there  
2 was something going on and that there was more you had to  
3 do, correct?

4 A. I felt like there was more to do, yes.

5 Q. So what was then the next thing that you did in your  
6 analysis?

7 A. So I sent my set of unmatched records that had a  
8 state ID number back to DOT securely.

9 Q. Okay. And you did that by an FTP site?

10 A. Right. It was a secure FTP site.

11 Q. And to be clear, what is it that you sent to the DMV?

12 A. Well, specifically I sent 119,421 records. So this  
13 is in Table 8 on page 30. I sent a spreadsheet with these  
14 records with name, date of birth -- any kind of  
15 information that might be there for state ID number, for  
16 instance -- and asked the DOT to search for records that  
17 may be linked to that state ID number that may have a  
18 newer state ID number and may be attached to an Act 23  
19 product.

20 Q. Okay.

21 A. So they were searching primarily just on the state ID  
22 number field.

23 Q. Okay. And so you sent it off to DMV and what  
24 happened next?

25 A. Well, I asked them to perform this match and they

1 did. They appended some information onto the spreadsheet  
2 that I had sent them and sent it back to me securely and  
3 the results are in Table 8.

4 Q. Okay. And describe Table 8 and what the results  
5 were.

6 A. Well, they were -- by the state ID number they were  
7 able to -- they were not able to match about 5.5% of the  
8 cases, about 6,600 cases. They were able to match the  
9 remainder of these cases. And 89,077, or just under 75%,  
10 had a current driver's license or state ID card, so they  
11 had an Act 23 compliant ID.

12 Q. And I see there's also a row there for *Associated*  
13 *with an Invalid Act 23 Product*. What does that signify?

14 A. Right. So that would mean they had a driver's  
15 license or state ID card that was -- had been expired  
16 before the day of the last general election. So they  
17 had -- that wouldn't be valid for use with the Voter ID  
18 law.

19 Q. Okay. And so at this point in the analysis then you  
20 have reached what you feel fairly confident about is the  
21 actual number of registrants in the GAB database who are  
22 without one of the two DMV IDs, either a driver's license  
23 or state ID card, right?

24 A. To the best of my ability, yes.

25 Q. And turning then to Table 9, what did you report



1 there?

2 A. Well, this is the report of -- I guess I would phrase  
3 it as the *primary and secondary match combined*.

4 Q. Okay.

5 A. So, you know, from Table 8 you can see that there  
6 were 89,077 records that had a valid Act 23 ID. So I  
7 added those in as matches back into my primary database.

8 Q. Okay. Which brought you to again what is the raw  
9 number and the percentage of registrants that lacked one  
10 of these two forms of qualifying ID?

11 A. Okay. So now I'm down to 153,316 no matches or  
12 4.54%.

13 Q. Okay. And then in Table 10 you did a comparison of  
14 Dr. Mayer's work, correct?

15 A. Correct.

16 Q. And what did you find were the differences in terms  
17 of a conclusion?

18 A. Well, I mean, just in a nutshell, my match rate -- or  
19 my no-match rate is much lower than his. He has a  
20 no-match rate of 283,346, again compared to mine of  
21 153,316.

22 Q. Okay. And if I could --

23 A. It's about 130,000 fewer.

24 Q. Okay. And if you recall in the *Frank v. Walker* case,  
25 what was the number that the district court found,

1 approximately in terms of raw number and percentage  
2 number, of registrants without one of those two forms of  
3 ID?

4 A. Well, this is from my memory. So if I'm wrong I'm --  
5 I'll be more than glad to be corrected.

6 THE COURT: We know where to look it up, so go  
7 ahead.

8 A. I remember about 300,000 and about 10% of  
9 registrants.

10 Q. It was 9.

11 A. Okay.

12 Q. So based on knowing that finding in the *Frank* case,  
13 what can you observe about the differences between then  
14 and now?

15 A. Well, it's possible that the actual number of  
16 no-matches may have been following over that time period,  
17 so that's one possibility. And some of that may be due to  
18 the free ID program, for instance.

19 It's also possible, I would like to think hopefully,  
20 that my matching algorithm has gotten better as well and  
21 that's reduced the number of -- in other words, the number  
22 of no-matches may have been artificially inflated actually  
23 in those calculations in the *Frank* case as compared to  
24 this case.

25 THE COURT: Because of your not having the

1 opportunity to do the secondary match?

2 THE WITNESS: Yes, sir. Yes, sir.

3 THE COURT: Okay. Because that seems to me that  
4 Mayer is within shouting distance of the district court  
5 finding in *Frank*. And just confirm this for me, but was  
6 Judge Adelman's finding on that based on Dr. Hood's work?

7 MR. KAWSKI: Actually it was -- I think it was  
8 actually based on the expert that testified in the *LULAC*  
9 *v. Deininger* case who actually did a matching analysis.  
10 That's my recollection.

11 THE COURT: Now, one of the criticisms that  
12 Dr. Mayer has for you is that he did some data cleanup on  
13 the Department of Transportation database before he did  
14 the matches and he says you didn't. And so --

15 THE WITNESS: I did data cleanup on both  
16 databases.

17 THE COURT: So, like, he has the -- I can't  
18 remember. I thought of it as sort of dummy entries where,  
19 like, the driver's license was 11111, or whatever. Did  
20 you do that kind of stuff?

21 THE WITNESS: I didn't do some of that. But, I  
22 mean, that's not going to match. That's just an  
23 irrelevant number. I did a lot of data cleaning with name  
24 strings and dates of birth.

25 THE COURT: These are relevant numbers because if

1 they have 20,000 dummy records that they have put in  
2 there, those driver's license numbers are not going to be  
3 in the state voter registration database.

4 THE WITNESS: Right. I mean, I'm not going to  
5 get a match from those.

6 THE COURT: So you're not going to get -- okay.  
7 I follow you. Yes, that's right. Okay.

8 THE WITNESS: But I did undertake a lot of data  
9 cleaning in general, yes.

10 BY MR. KAWSKI:

11 Q. And I think rather than jumping to the criticisms you  
12 have of Dr. Mayer's match analysis, I'm going to save that  
13 for when we get to your overall criticisms, which are at  
14 the end of this report.

15 So why don't we talk next about the free ID program  
16 in Wisconsin for voters. And could you just describe your  
17 understanding of that and how it works?

18 A. Sure. Since the law was put in place there was a  
19 mechanism whereby those that did not have a qualifying  
20 form of Act 23 ID could go get a free state ID card. Now,  
21 that program has changed a little bit in relation to  
22 support decisions in other matters. But you can go to the  
23 DMV and get a free ID card for the purpose of voting.  
24 It's a state ID card.

25 Q. And in your opinion, what impact does this have on

1 voters who are affected by Act 23?

2 A. Well, it's meant to be a mitigating -- it's meant to  
3 help mitigate any negative effects of the law that may be  
4 present.

5 Q. And in your report you relied on the data that were  
6 then available, correct, in terms of analyzing the free ID  
7 program?

8 A. Correct. I had various pieces of data concerning the  
9 free ID program more recently and I created a  
10 demonstrative concerning this. I was able to pull  
11 together a lot of these disparate pieces of data into one  
12 table.

13 Q. So why don't we take a look at Exhibit 265. This is  
14 a demonstrative that you just described. This is going to  
15 be -- the Court has seen this a number of times. I think  
16 this is about the third time seeing something like this.  
17 So could you describe what Exhibit 265 describes?

18 A. These are free IDs for the purpose of voting that  
19 have initiated in the state of Wisconsin from July 2011 to  
20 almost the present, to April of 2016. But the chart or  
21 the table does break down things, but it does break down  
22 things by race and ethnicity and by the type of issuance.  
23 So these are all free IDs in this table. And I also have,  
24 for purposes of comparison, the citizen voting age  
25 population over to the far right over there in that

1 column.

2 Q. Okay.

3 A. Because there have always been questions, too, in  
4 some of these previous cases about how many of these free  
5 IDs were original issuances and I have also not really  
6 been able to get at that until very recently.

7 Q. And why is that a significant issue in terms of  
8 looking at original issuances?

9 A. Well, again this might be the group -- I would  
10 hypothesize that this would be the group that would be  
11 most served by the free ID program because apparently  
12 maybe they didn't have any kind of qualifying Act 23 ID  
13 and this is the first form of Act 23 ID that they've  
14 obtained. But I will say that even if it's a duplicate or  
15 renewal or some other category that everyone in this table  
16 that was issued a free ID, they are Act 23 compliant.

17 Q. So then you've highlighted or you've bolded some text  
18 here. And I see that one of the numbers bolded is 28.1%  
19 and another 9.2%. Could you describe for the Court why  
20 you did that bolding on the left-hand -- or under the  
21 *Original* column?

22 A. Right. So these are the percentages of the original  
23 free IDs that were issued to black and Hispanic  
24 Wisconsinites.

25 Q. And then on the right-hand side you bolded 42.0% and

1 8.7%. Why did you do that?

2 A. Well, again those are -- that's the total number of  
3 free IDs of any category that were issued to black and  
4 Hispanic Wisconsinites.

5 Q. Why are those numbers significant?

6 A. Well, they're significant to me because the numbers  
7 of free IDs, either original or in total being issued to  
8 racial and ethnic minorities in Wisconsin, exceeds their  
9 share of the citizen voting age population.

10 Q. In terms of whether the program is having a  
11 mitigating effect, I mean, what opinion do you have about  
12 that in light of these numbers?

13 A. Well, I would say that it is. Now, I'd like to  
14 respond just quickly to something Professor Lichtman said  
15 in court yesterday. I've never said that there wasn't a  
16 racial gap in ID possession in Wisconsin. I have  
17 criticized Professor Mayer in trying to figure out what  
18 that gap may be. It wouldn't surprise me if there was a  
19 gap, because I've calculated it myself in other states.

20 So I'm not saying that there's not a gap. To the  
21 extent to which there may be a gap, a racial gap in ID  
22 possession, what I would say about these numbers in this  
23 table is that the issuance of these free ID cards is  
24 helping to close that gap which exists.

25 Q. You also talked a little bit in your report about the

1 underlying documentation issue in the ID petition process,  
2 right?

3 A. Correct.

4 Q. And that discussion starts at page 32. In your  
5 opinion, what impact does the ID petition process have on  
6 those who need free IDs to vote?

7 A. Well, there's a mechanism now, at least for most of  
8 those individuals, whereby they're not going to have to  
9 pay for underlying documentation. Most often -- for most  
10 of those people that would be a birth certificate. So  
11 there's a means by which they can get a free copy of their  
12 birth certificate to satisfy this criteria.

13 Q. Do you have any opinions about the size of the  
14 population that's taking advantage of this program?

15 A. Just the petition --

16 Q. Right.

17 A. -- process? Well, it's a fairly small subset of even  
18 the free ID issuances.

19 Q. So describe for the Court then how you look at this  
20 in the big picture down to the small picture.

21 A. Okay. Well, I guess we can -- I sort of think of it  
22 as a funnel. If my numbers are correct, more than 95% of  
23 Wisconsin registrants have a driver's license or state ID  
24 card. Then if we add in passports, USCIS, tribal IDs, VA  
25 cards, military IDs, et cetera, university IDs that



1 qualify, the funnel is going to get smaller. 400,000 --  
2 420,000 free IDs have been issued, including just under  
3 128,000 original free ID issuances.

4 So then you get down to those that are seeking a free  
5 ID and they're in the petition process. I can't remember  
6 the numbers off the top of my head, but we're only talking  
7 about a couple thousand people there. Most of those  
8 people are successful, even those that issue -- enter the  
9 petition process and eventually getting the free ID.

10 I mean, so then you get down to the very bottom of  
11 the funnel and we're looking at a very very small group of  
12 people who are having trouble getting an ID even through  
13 the petition process even using extraordinary proof or  
14 trying to use extraordinary proof. The number 52 denials  
15 comes to my mind. It may be more than that now. But it's  
16 a small group of people down at the bottom of that funnel.

17 Q. And so in fact --

18 THE COURT: One question about that. It seems to  
19 me that you're double counting the free IDs though. I  
20 mean, I take your point that your explanation is in part  
21 that the free ID program helps ameliorate the racial  
22 disparity and holding of the qualified IDs in the first  
23 place, I get that point, but your data matching matched on  
24 free IDs as well as it did on IDs that were paid for.

25 THE WITNESS: True.

1 THE COURT: And so as we do come down the funnel  
2 you've already accounted for the free IDs in your first  
3 level.

4 THE WITNESS: To the extent to which I was able  
5 to successfully match those, yes.

6 THE COURT: Yeah. Okay.

7 BY MR. KAWSKI:

8 Q. By the time you get down to -- and again in the  
9 report the data are quite stale at page 33. But you did  
10 discuss the number of individuals, at least as of the time  
11 of your report, based on available data, who -- as a  
12 percentage, those who used the extraordinary proof in  
13 terms of a percentage of all original ID issuances; do you  
14 see that? It's in the first full paragraph on 33 at the  
15 end of that paragraph. And the part I'm looking at is  
16 0.06% of all original ID issuances.

17 A. Right.

18 Q. And so is that what you're talking about at the  
19 bottom of the funnel?

20 A. Yes. I mean, that's just -- it's a very small subset  
21 of people that are relying or having to rely on  
22 extraordinary proof to substantiate their case.

23 Q. Okay.

24 THE WITNESS: So I guess your point is well  
25 taken, Your Honor. I guess I'm just trying to say most

1 Wisconsinites already have a qualifying ID. The free ID  
2 program is enacted to enclose that gap, you know, for  
3 those that don't.

4 You're really looking at a fairly small group of  
5 people that are having trouble. Most people that even go  
6 through the free ID program can navigate it. They have a  
7 birth certificate, they show up, they fill out the form,  
8 check the box and get a free ID. So we're talking about a  
9 small subset of people who are having difficulty beyond  
10 that level.

11 THE COURT: Now, the other issue that's raised  
12 here is the, I'll call them, the *discouraged population*,  
13 people who -- and I suppose they come in two varieties.  
14 One, you've got people who recognize -- they understand  
15 the ID petition process and they recognize that they're  
16 going to come up short on the documents. Now, I know that  
17 we've got the heroic efforts that the people at the CAFU  
18 Unit made. But nevertheless, some people might say, "I  
19 don't have a birth certificate or family Bible," and so  
20 they're discouraged in that way.

21 We've also got a population of people who maybe have  
22 some of the documents but think the process is too  
23 burdensome. And so they're either one of those -- either  
24 they think they're going to fail or they think it's not  
25 worth the ordeal you're going to have to go through -- and

1 sometimes it is an ordeal -- so they're discouraged from  
2 participating. They wouldn't show up in your data.

3 THE WITNESS: Correct.

4 THE COURT: I mean, again, it's a tiny fraction  
5 of the voting population.

6 THE WITNESS: Right. I mean, there are people  
7 undoubtedly that fall into those categories. I'm in no  
8 way denying that.

9 THE COURT: Yeah. Okay. All right.

10 BY MR. KAWSKI:

11 Q. On that count, you were here for Dr. Lichtman's  
12 testimony earlier?

13 A. Yes.

14 Q. And you saw in cross-examination he talked about the  
15 Stephen Ansolabehere article from 2008 in the business  
16 symposium article?

17 A. Yes, in *PS*.

18 Q. In *PS*. And *PS* is a peer-reviewed journal?

19 A. Yes, it is.

20 Q. And you have no reason to doubt that that particular  
21 article was pure reviewed, correct?

22 A. I would be shocked if it wasn't. I've published in  
23 *PS* a couple of times.

24 THE COURT: I guess my concern with it is, it's  
25 labeled a -- and I didn't look at the whole journal --

1 it's labeled as a *symposium* piece. So it kind of takes  
2 that kind of presentation outside the realm of the normal  
3 peer-review process because it's not going to be blind;  
4 it's going to be probably a paper that he delivered at  
5 some symposium and which they've now published.

6 THE WITNESS: That may be true. I think it may  
7 have been an invited article, but it doesn't mean that it  
8 wasn't peer reviewed. No, I can't testify to that.

9 THE COURT: Well, and there's all sorts of, you  
10 know, great scholarship that's published without the  
11 benefit of peer review. But if we're looking at that as  
12 an indicator of validity; for whatever it's worth, I'll  
13 also note there's plenty of BS that got published under  
14 peer review.

15 MR. KAWSKI: Your Honor, I'm going to shift  
16 gears; still on Voter ID, but different topics. I have  
17 only about one minute left. I won't even break the  
18 surface of this. Would you like me to continue or  
19 should --

20 THE COURT: I think we'll probably -- I'll give  
21 you one minute off for good behavior.

22 MR. KAWSKI: Thank you.

23 THE COURT: This would be a fine place to break.  
24 We'll start tomorrow -- if you will, we'll take our last  
25 minute to just give me a reassessment of where we are in

1 your schedule.

2 MR. KAWSKI: We're behind. We were expecting to  
3 be done with Dr. Hood today. So now the plan is to have  
4 Dr. Hood complete his testimony tomorrow morning first.  
5 The options there depend on timing. Bruce Landgraf is a  
6 witness that is only available from 9:30 to noon, so he's  
7 got to fit in there. And the next witnesses would be Mike  
8 Haas, Meagan Wolfe, Allison Coakley, Becky Beck. It's a  
9 pretty aggressive schedule for tomorrow.

10 THE COURT: But we've gone pretty quickly with  
11 some of those witnesses --

12 MR. KAWSKI: Right.

13 THE COURT: -- in the past.

14 MR. KAWSKI: Right. I'll tell you that I'm  
15 doing --

16 THE COURT: Mr. Curtis isn't doing the  
17 cross-examination?

18 MR. KAWSKI: -- I'm doing the direct examination  
19 for most all of those witnesses. So hopefully, I don't  
20 know, that impacts.

21 THE COURT: All right. Sounds good. We'll move  
22 this as quickly as possible. All right. Thank you. Have  
23 a good evening.

24 MR. KAWSKI: Thank you. You too.

25 (Adjourned at 6:30 a.m.)

1 I, CHERYL A. SEEMAN, Certified Realtime and Merit  
2 Reporter, in and for the State of Wisconsin, certify that  
3 the foregoing is a true and accurate record of the  
4 proceedings held on the 24th day of May, 2016, before the  
5 Honorable James D. Peterson, of the Western District of  
6 Wisconsin, in my presence and reduced to writing in  
7 accordance with my stenographic notes made at said time  
8 and place.

9 Dated this 16th day of June, 2016.

10

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12

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14

15

/s/

16

Cheryl A. Seeman, RMR, CRR  
Federal Court Reporter

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

ONE WISCONSIN INSTITUTE, INC.,  
et al.,

Plaintiffs,

Case No. 15-CV-324-JDP

vs.

Madison, Wisconsin

May 24, 2016

GERALD C. NICHOL, et al.,

8:00 a.m.

Defendants.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF SEVENTH DAY OF COURT TRIAL  
MORNING SESSION  
HELD BEFORE THE HONORABLE JAMES D. PETERSON

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<u>PLAINTIFFS' EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
Ex. 36 - Lichtman CV	10	-
Ex. 41 - Lichtman Rebuttal Report	66	-
Ex. 345 - IDPP Petitions	81	-
Ex. 472 - Flow Chart	78	-
Ex. 478 - IDPP Places of Birth	86	-

	<u>DEFENDANTS' EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
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2	Ex. 8 - Ansolabehere Article	55	96
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3	Ex. 10 - <i>McCory</i> Decision	21	x
	Ex. 101 - GAB 131 Form	92	98
4	Ex. 142 - Marquette Poll	62	97
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5	Ex. 254 - Marquette Poll	62	97
	Ex. 281 - <i>Lee</i> Opinion	13	x
6	Ex. 474 - Lichtman Table	78	-
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(Called to order.)

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THE CLERK: Case No. 15-CV-324-JDP, *One Wisconsin Institute, et al. v. Gerald Nichol, et al.* Court is called for the seventh day of court trial. May we have the appearances, please?

14

15

MR. SPIVA: Good morning, Your Honor. Bruce Spiva for the plaintiffs and the usual team.

16

17

18

19

20

THE COURT: All right. Very good. Good morning.  
MR. KAWSKI: Good morning, Your Honor.  
THE COURT: Good morning. And the defense team is here, too. Are we ready to proceed with the cross-examination of Dr. Lichtman?

21

22

23

MR. KAWSKI: Yes, Your Honor. Before we do that, I just want to tell you about the upcoming schedule for the next three days of witnesses.

24

25

THE COURT: Okay. Good.  
MR. KAWSKI: So today we'll have the

1 cross-examination of Dr. Lichtman and any further direct.  
2 The next three witness will be Kathleen Novack, Constance  
3 McHugh and Susan Westerbeke. They are municipal clerks.

4 THE COURT: Okay.

5 MR. KAWSKI: I would that expect McHugh and  
6 Westerbeke will be the first two. And then we're going to  
7 present Leah Fix, who's a DMV witness, and then Dr. Hood  
8 will be last today.

9 THE COURT: Okay.

10 MR. KAWSKI: I understand we're going until 6:30.  
11 I think that could take us until 6:30. It depends on how  
12 long Dr. Hood goes.

13 THE COURT: Okay.

14 MR. KAWSKI: Tomorrow we'll have -- first witness  
15 will be Michael Haas from the GAB, Bruce Landgraf from the  
16 Milwaukee County DA's Office, Meagan Wolfe from the GAB,  
17 Allison Coakley from the GAB, and then Becky Beck from the  
18 GAB -- excuse me, DMV.

19 THE COURT: Okay.

20 MR. KAWSKI: If we go really fast today we might  
21 try and call Becky Beck at the very end of the day.

22 THE COURT: Okay.

23 MR. KAWSKI: And then Thursday the only witness  
24 scheduled will be Nolan McCarty, our last expert.

25 THE COURT: All right. Very good. I hope it

1 does go fast. All right.

2 MR. SPIVA: Your Honor, I wanted to note that we  
3 did hand into the clerk the exhibits that we --

4 THE COURT: I saw them already. Thank you for  
5 doing that. Okay. Dr. Lichtman.

6 THE WITNESS: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. KAWSKI: Your Honor, I have paper copies of  
9 most of the exhibits I'm going to use for cross. So may I  
10 approach?

11 THE COURT: Sure.

12 MR. KAWSKI: Here you go, Dr. Lichtman.

13 THE WITNESS: Thank you.

14 THE COURT: Thank you.

15 MR. KAWSKI: Your welcome. What I've handed you  
16 is quite a binder. And just for the record, I'll say  
17 which defendants' exhibits are in that packet. It's going  
18 to be Defendants' Exhibits 8, 9, 10, 142, 153, 254 and  
19 281. And then I've added yesterday Exhibit No. 101. And  
20 it's not in that packet, but it's -- we'll bring it up on  
21 the screen.

22 There are also two assembly bills in there, a copy of  
23 a *Frank v. Walker* decision, and then a copy of  
24 Dr. Lichtman's deposition transcript. I believe there's  
25 one website as well that's not Bate stamped at very end of

1 the packet.

2 THE COURT: Okay. And as far as the defendants'  
3 exhibits, plaintiffs may not be in a position to say at  
4 this time, but are they objected to?

5 MR. SPIVA: Your Honor, I have -- I was actually  
6 just reaching for the list. A number of these appear to  
7 contain hearsay, but I'm not positive whether we objected  
8 to them. I can take a quick look.

9 THE COURT: Let's just proceed. And as they come  
10 up, we'll deal with them at the time.

11 MR. SPIVA: Sure.

12 (8:10 a.m.)

13 CROSS-EXAMINATION

14 BY MR. KAWSKI:

15 Q. Good morning, Dr. Lichtman.

16 A. Good morning.

17 Q. You and I talked in Washington, D.C. on April 20th,  
18 correct?

19 A. We did.

20 Q. And we had a lovely time. I really enjoy talking to  
21 you.

22 A. Same here. You were very straightforward.

23 Q. So the first question I want to ask you is that you  
24 have made a lot of money from your work, correct?

25 A. Yeah.

1 Q. It's not *LeBron James* money, but it's in the  
2 millions, correct?

3 A. Over 30 years I'm sure it is.

4 Q. Okay. It's not as much as 5 million, but it is  
5 millions?

6 A. Over 30 years, yes.

7 Q. Okay. And it's fair to say that your expert work  
8 over the last 30 years has focused on challenges to  
9 election-related laws?

10 A. I'm not sure what you mean by "challenges." I've  
11 been on -- I've worked for both plaintiffs and defendants  
12 in election-related law. That has not been the only thing  
13 that I've been doing, but that is the majority.

14 Q. Okay. And the majority of the expert work you've  
15 done has been for plaintiffs, correct?

16 A. I'm not entirely sure that's true. Probably. But  
17 I've done quite a bit of defendants work as well.

18 Q. Okay. Let's take a look at page 41 of the deposition  
19 transcript, line 13.

20 A. I've got to find the transcript.

21 Q. I think it's buried at the bottom there in that  
22 packet of material.

23 A. Yeah. Page 41?

24 Q. Correct.

25 A. Yeah.

1 Q. And it's going to be up on the screen, too,  
2 highlighted in yellow.

3 A. Sure.

4 Q. I'll let you get there.

5 So I asked you during your deposition: "So the  
6 approximately 85 cases in which you have served as a paid  
7 expert, can you estimate how many in which you've  
8 testified for the state of the defendants?"

9 And your answer was: "I'd say a minority, but, you  
10 know, I certainly have, as you've seen, even recently  
11 testified for state defendants."

12 Do you see that?

13 A. Absolutely.

14 Q. I then I asked you: "Have you done five, ten, 15  
15 cases for the defendants?"

16 And if you'll scroll down that to page 42.

17 You see it's highlighted there, you said: "I'm sure  
18 it's not 25, but it's probably ten."

19 Is that right?

20 A. For state defendants. Of course I've testified for  
21 other defendants as well besides states.

22 Q. Okay. So the vast majority of the cases in which you  
23 testified have been for plaintiffs, correct?

24 A. I don't know what you mean by "vast majority,"  
25 because I said there have been other defendants other than

1 state defendants. I have testified on behalf of local  
2 jurisdictions, commissions. But certainly the majority,  
3 that's correct.

4 Q. Okay. You're a Democrat, correct?

5 A. Correct.

6 Q. You're a former politician?

7 A. You know, not really. I ran in the 2006 Democratic  
8 primary for U.S. Senate against the grain of the party as  
9 a maverick. I've been very critical of the democratic  
10 party in the state of Maryland. That's my one most  
11 unsuccessful foray into politics other than, you know,  
12 many years ago, as we discussed, consulting both for the  
13 Republicans and Democrats, by the way.

14 Q. And the thrust of your expert opinion here deals with  
15 intentional racial discrimination?

16 A. Right, although with other matters as well.

17 Q. Right. But the vast or most of your report is about  
18 that issue, intentional racial discrimination?

19 A. Right, but a lot of my rebuttal report is on other  
20 issues as well.

21 Q. And you haven't written much peer-reviewed work on  
22 the topic of racial discrimination?

23 A. Not a whole lot on that particular topic. I've  
24 written a lot on intent of course.

25 Q. Okay. Let's take a look at your CV which is attached



1 to PX 36.

2 A. Yes. Got it.

3 Q. Could you please point the Court to any examples of  
4 work in which you -- of peer-reviewed work that is  
5 published that's involves the topic of intentional or  
6 racial discrimination?

7 A. Okay. Certainly I dealt with that in my book *White*  
8 *Protestant Nation: The Rise of the American Conservative*  
9 *Movement*, which was a finalist for the National --

10 Q. I'm going to stop you there. That was a  
11 peer-reviewed publication?

12 A. Absolutely. Books in fact are much more rigorously  
13 peer reviewed than articles.

14 Q. What does peer reviewed mean?

15 A. It means fellow scholars review your work and offer  
16 you criticisms and comments.

17 Q. So what fellow scholars were reviewing that book?

18 A. You don't get the names. You get anonymous.

19 Q. Okay.

20 A. And it was pretty thoroughly reviewed. And there's a  
21 good reason why books get thoroughly vetted. It's a much  
22 bigger investment than a journal article.

23 Q. Sure. What other --

24 THE COURT: Clarify this for me. It's been a  
25 while since I've been involved in the process, but are the

1 reviews of book manuscripts done blind --

2 THE WITNESS: Yeah.

3 THE COURT: -- meaning that the reviewers don't  
4 know who the author is?

5 THE WITNESS: Probably not, although I'm not  
6 certain of that. It might differ from publisher to  
7 publisher.

8 THE COURT: Well, when a well-known scholar does  
9 it --

10 THE WITNESS: Yeah.

11 THE COURT: -- it's probably not.

12 THE WITNESS: Probably blind blind. I was  
13 certainly blind to who the reviewers were of my books.

14 THE COURT: Sure. I understand.

15 THE WITNESS: So we can move on from there.

16 BY MR. KAWSKI:

17 Q. When was that book written?

18 A. 2008.

19 Q. Any other peer-reviewed work in your CV that deals  
20 with the topic of intentional racial discrimination?

21 A. Yeah. We're moving on. We're just at the top of the  
22 -- *The Federal Assault Against Voting Discrimination in*  
23 *the Deep South.*

24 Q. What year was that from?

25 A. 1969.

1 Q. Okay.

2 A. A refereed journal.

3 Q. Okay.

4 THE COURT: In fact your CV then has *Ref* for  
5 refereed publication?

6 THE WITNESS: That's right, that's right,  
7 refereed journals.

8 A. I don't remember whether this -- I guess the *National*  
9 *Journal* is not refereed, so we'll pass over that.  
10 *Black/White Voter Registration Disparities in Mississippi*,  
11 it's a long time ago, I don't remember, but it might well  
12 have dealt with intentional racial discrimination because  
13 I was talking about the dual registration system in  
14 Mississippi, which was clearly intentional racial  
15 discrimination in Mississippi. Let's move on.

16 Kind of indirectly my article in the *Journal of Legal*  
17 *Studies -- What Really Happened in Florida's 2000*  
18 *Presidential Election*. I didn't reach a conclusion about  
19 intentional discrimination, but I certainly came up with  
20 information relevant to that topic with respect to racial  
21 disparities in discarding ballots in that election.

22 Q. Any others?

23 A. I'm moving on.

24 Q. Okay.

25 A. That's probably it.

1 Q. Okay. So it's been more than ten years since you've  
2 written a refereed publication on the topic of intentional  
3 racial discrimination, correct?

4 A. Incorrect.

5 Q. No? Incorrect?

6 A. Yes.

7 Q. And that's because of the book?

8 A. Yes. You seem to be dismissive of the book.

9 Q. The book is not refereed, is it?

10 A. I think it is.

11 Q. Okay. Fair enough. And so most of your work  
12 writings on that topic have been as an expert in court  
13 cases, correct?

14 A. I don't know about most. I think we identified four  
15 or five here and I think I testified five times directly  
16 on intent and one time indirectly, so it's a close  
17 balance.

18 Q. You have not had a very good history of success  
19 recently in your court cases, have you?

20 A. Well, it depends what you mean by "recently."

21 Q. How about in the last two months?

22 A. You know, you're calling it *my success*. Let's just  
23 say the side that engaged me did not win the last two  
24 cases, both of which are on appeal.

25 Q. And so the court did not adopt your opinion in either

1 of those cases? And we're going to talk about them in  
2 some detail.

3 A. That's correct. But in all the others the court did,  
4 the other four.

5 Q. Okay. Let's take a look at Defense Exhibit 281,  
6 please.

7 A. Sure.

8 Q. And that's in the packet.

9 A. Can you tell me what it is?

10 Q. Yeah. It's the May 19th decision -- memorandum of  
11 opinion in *Barbara Lee v. Virginia State Board of*  
12 *Elections*. It's a case in the Eastern District of  
13 Virginia.

14 A. I got it. It was right at the bottom.

15 Q. All right. So you're holding that document. What is  
16 it?

17 A. It purports to be the memorandum opinion. I'm sure  
18 it is.

19 Q. Okay. You've read this before?

20 A. Yes.

21 Q. Okay.

22 A. Briefly. It just came out and I've been busy with  
23 other things.

24 Q. Right. It came out during our trial?

25 A. Yes. Exactly.

1 Q. So you testified in this Virginia case, correct?

2 A. Correct.

3 Q. And it dealt with the Virginia Voter ID law, correct?

4 A. Correct.

5 Q. And Dr. Lorraine Minnite also testified in that case?

6 A. I believe that's right.

7 Q. Okay. And so the opinion you're holding actually  
8 addresses both your work and Dr. Minnite's work, correct?

9 A. I would presume it addresses Dr. Minnite, too. I  
10 don't recall exactly.

11 Q. Okay. And you gave an opinion in the Virginia case  
12 that the legislature intentionally discriminated on the  
13 basis of race when it enacted Virginia's Voter ID law?

14 A. Correct.

15 Q. And the judge did not rule in plaintiff's favor on  
16 that claim, correct?

17 A. Correct.

18 Q. Let's take a look at the decision. So looking at  
19 page -- pages 2 and 3.

20 A. Okay.

21 Q. The point I want to make is that the same legal  
22 claims that were at issue in that case are at issue in our  
23 case, correct?

24 A. I'm not going to give you a legal opinion.

25 Q. All I'm asking you is if the same claims were at

1 issue. And you can look at the yellow highlighted portion  
2 on the screen and it describes the exact legal claims that  
3 were made in that case.

4 A. I'll take your word for it. I've not compared legal  
5 claims. I don't do that.

6 Q. Okay. But you do know what legal claims were at  
7 issue in the Virginia case, correct?

8 A. Yeah, in a general sense.

9 Q. Okay. And what were they?

10 A. The claims of violation of the Voting Rights Act and  
11 the Constitution.

12 Q. Okay. And so some of the same attorneys that are in  
13 the courtroom today were working on that Virginia case,  
14 correct?

15 A. Correct.

16 Q. And that would be Mr. Kaul and Mr. Spiva?

17 A. I believe that's right.

18 Q. Okay. And so let's turn to page 62 of this exhibit.

19 A. Okay.

20 Q. And this is kind of the overall conclusion. You see  
21 the highlighted portion here on the screen?

22 A. I can't see this. Oh, I can see it here, yes. Thank  
23 you.

24 Q. So here the district judge rejected all of the  
25 plaintiffs' claims and ruled in favor of the defendants,

1 correct?

2 A. Correct.

3 Q. And you said this decision is now under appeal to the  
4 Fourth Circuit?

5 A. That's my understanding. If it's not already, it  
6 certainly is going to be very soon. It just came out.

7 Q. And again the district judge did not credit your  
8 opinion in this case, correct?

9 A. I'm not sure that's true. If you look at opinion, he  
10 went through a lot of my findings.

11 Q. Sure.

12 A. He just reached a different conclusion. He didn't  
13 discredit my findings.

14 Q. Virginia, as a state, has had a very unfortunate  
15 history of official discrimination; is that correct?

16 A. That is correct.

17 Q. And Virginia was a covered jurisdiction under Section  
18 5 of the Voting Rights Act?

19 A. That is correct.

20 Q. Would it be fair to say that Wisconsin and Virginia  
21 are not in the same ballpark as far as the history of  
22 official state-sponsored discrimination?

23 A. I didn't do the history of state-sponsored  
24 discrimination for this case; Dr. Burden did.

25 Q. Okay. So you have no opinion in this case about



1 whether Wisconsin has a history of state-sponsored  
2 intentional discrimination?

3 A. That's a different question.

4 (Reporter clarification.)

5 BY MR. KAWSKI:

6 Q. I'll ask it a different way, so I'll strike that  
7 question. You did not give an opinion in this case that  
8 Wisconsin -- on Wisconsin's history of state-sponsored  
9 discrimination, correct?

10 A. I did. It was based on Dr. Burden's work. But  
11 Dr. Burden's work was more than persuasive enough for me  
12 in areas like segregation, the dual --

13 THE COURT: I think I get that. But really the  
14 question to you is, even though it wasn't the heart of  
15 your analysis, you looked at Dr. Burden's analysis.

16 THE WITNESS: I did.

17 THE COURT: And so now the question is in  
18 comparison between Wisconsin and Virginia, who's got the  
19 worst history of discrimination and how much of a gap is  
20 there between those two histories.

21 THE WITNESS: I didn't do that specific of an  
22 analysis and there was no reason to. But certainly, you  
23 know, states in the south would have more of a longer and  
24 more virulent history of racial discrimination. No doubt  
25 about that.

1 BY MR. KAWSKI:

2 Q. Point is made. I'll move on. So the district judge  
3 in that case ultimately did not adopt your conclusion that  
4 there was intentional racial discrimination in Virginia?

5 A. That's correct.

6 Q. Okay. And I asked you in your deposition a little  
7 bit about the Virginia case and I specifically asked about  
8 the free ID program they had this Virginia, right?

9 A. Correct.

10 Q. And I asked you if you knew how many free IDs were  
11 issued in Virginia under that program, right?

12 A. Yes.

13 Q. And you said at the time you didn't know?

14 A. I didn't.

15 Q. Could we look at page 60 of Exhibit 281, please?

16 Excuse me, page 16.

17 A. Page 16.

18 Q. And it will be highlighted on the screen. You see  
19 here that the district judge found that approximately  
20 4,500 free photo IDs were issued in Virginia?

21 A. That sounds about right.

22 Q. Okay. And you would agree that the evidence in our  
23 case shows that approximately 420,000 free state ID cards  
24 have been issued by the Wisconsin DMV for voting?

25 A. Two entirely different kinds of cards.

1 Q. But you would agree that Wisconsin has issued  
2 approximately 420,000 free state ID cards for purposes of  
3 voting, correct?

4 A. No.

5 Q. You do not agree with that?

6 A. No.

7 Q. Well, we'll get to the table in which you add up to a  
8 number that's almost 420,000.

9 A. It's not just a number that's the problem; it the  
10 premise of your question.

11 Q. Okay. Well, we'll get to that later.

12 A. Fair enough.

13 Q. And you did receive the most recent data from the  
14 DMV, correct?

15 A. Yes, and I think I presented a table on that.

16 Q. Okay. Let's shift to the North Carolina decision?

17 A. Sure.

18 Q. And this one was even more problematic for your  
19 opinions, correct?

20 A. Correct.

21 Q. So you testified in the North Carolina voter ID case,  
22 correct?

23 A. I did.

24 Q. And it wasn't just about voter ID; it was about many  
25 different changes in North Carolina election law, correct?

1 A. In fact the bulk of my testimony was on these other  
2 changes.

3 Q. Okay. And the case is called *North Carolina*  
4 *Conference of the NAACP v. McCrory*, right?

5 A. That's right.

6 Q. And some of your testimony in the North Carolina case  
7 was not admitted, correct?

8 A. I'm not certain of that, but I think that's true.

9 Q. It was in fact excluded by the court?

10 A. I think that's right.

11 Q. Okay. And there was a motion in limine granted to  
12 exclude certain testimony by you in that case, correct?

13 A. I don't know exactly what the motion was, but I think  
14 that's right.

15 Q. Okay. Let's look at Exhibit 10, please. On the  
16 screen it will be highlighted and you can look at your  
17 copy and hard copy if you would like.

18 A. Sure.

19 Q. So up on the screen I've put page 478 of the decision  
20 here. And first, what is this exhibit that you're  
21 holding?

22 A. That's the *McCrory* case.

23 Q. That's the decision in the *McCrory* case that came out  
24 on April 25th, 2016 correct?

25 A. Correct.

1 Q. And if we look at Page 478, No. 6, I've highlighted  
2 it on the screen here. You see in No. 6 it states,  
3 "Defendants' Motion in Limine to exclude certain testimony  
4 of Dr. Allan Lichtman is granted in part and denied in  
5 part"?

6 A. Yes.

7 Q. And then if you go down in the same paragraph it  
8 states, "Defendants' motion to exclude certain conclusions  
9 by Dr. Lichtman as to discriminatory intent is granted for  
10 the reasons addressed in this memorandum opinion"; do you  
11 see that?

12 A. Correct.

13 Q. And so the court went through and gave extensive  
14 comments about your work on intentional racial  
15 discrimination, correct?

16 A. Correct.

17 MR. KAWSKI: I'm going to start with page 293.  
18 And, Your Honor, if you get tired of it, just let me know.  
19 I just want to point out the pages that you can review  
20 later.

21 THE COURT: Sure. To make the record clear, the  
22 Defense Exhibit 10 is actually just excerpts from the  
23 *North Carolina*.

24 MR. KAWSKI: Right. The one I gave the Court on  
25 a disc is the entire opinion. But this is 485 pages long,

1 so I only gave you an excerpt.

2 THE COURT: I don't think mine will be 485 pages,  
3 just preview of coming attractions.

4 BY MR. KAWSKI:

5 Q. We're looking at -- I believe it's page 293 there was  
6 a footnote here. And it describes that "There are several  
7 problems with Dr. Lichtman's late-disclosed testimony,"  
8 right?

9 A. Yes.

10 Q. And the Court went on to address some testimony you  
11 gave about, I believe it was, absentee voting?

12 A. I don't believe it was.

13 Q. No. Okay. What was it about?

14 A. Again, assuming this is exactly what it was referring  
15 to, I did give some rebuttal testimony about their process  
16 for registration verification.

17 Q. Okay. If you could turn to the next page. I've  
18 highlighted on the screen another comment from the court  
19 about your testimony. Do you see where it says -- and  
20 this is at the bottom of page 284 -- "Moreover, even if  
21 the court were to consider it, the court would not find it  
22 credible for the reasons discussed above and those stated  
23 in Defendants' objection to his testimony." And the court  
24 is talking about your testimony there, correct?

25 A. I don't know all the things that it's referring to,

1 but that is correct.

2 Q. So he did not find you credible in that regard?

3 A. That's what he said, correct.

4 Q. Okay. Then we'll skip ahead to page 392. And I've  
5 highlighted on the screen. Starting at page 392 of the  
6 decision is where the court gets into describing your work  
7 in detail, correct?

8 A. That's correct.

9 Q. And the court stated, "This court does not credit  
10 Dr. Lichtman's opinions for several reasons," right?

11 A. Correct.

12 Q. "Dr. Lichtman's ultimate opinions on legislative  
13 intent, like those of plaintiffs' other two experts on  
14 legislative intent, constituted nothing more than his  
15 attempt to decide the ultimate issue for the court, rather  
16 than assisting the trier of fact in understanding the  
17 evidence or any fact at issue," correct?

18 A. Correct. And then he goes on to explain that.

19 Q. And then on the next page the court states, "The  
20 court doubts seriously that this is the proper role for  
21 expert testimony." And that is in reference to your  
22 historical analysis?

23 A. Yes, but he mischaracterizes fundamentally my  
24 analysis in the part you skipped.

25 Q. Okay. And then if you'll keep going down. On the

1 next page here highlighted for the Court, this is page 394  
2 of the decision. The court stated, "The court disregards  
3 Dr. Lichtman's opinions because his approach was  
4 single-minded and purposefully excluded evidence that  
5 contradicted his conclusions," correct?

6 A. That's what it says. But if you look at the next  
7 sentence it talks about that I had not looked at the  
8 two-year rollout and the public relations campaign. And  
9 in fact I had extensively discussed the two-year rollout  
10 explaining why it did not alleviate the law and why they  
11 had cut the publicity campaign at the time they adopted  
12 the new bill after *Shelby*. So what you've read is  
13 correct, but it did not, in my view, correctly  
14 characterize my testimony.

15 Q. And then the next page, 395, I've highlighted another  
16 comment from the district judge: "Although quick to  
17 compare North Carolina's law to that of other  
18 jurisdictions, Dr. Lichtman did so selectively, comparing  
19 only claimed negative aspects and omitting any positive  
20 aspect, such as the photo-ID soft roll out and voter  
21 education campaign." Do you see that?

22 A. Yes. And that was what I was just explaining to you;  
23 that in fact if you look at my report and my testimony,  
24 you'll see I did discuss the soft photo-ID rollout, why it  
25 was not effective, and I did discuss the evisceration of



1 the public campaign.

2 THE COURT: I get the point.

3 MR. KAWSKI: I'll move on then. This goes on and  
4 on for many pages and the Court can read it.

5 THE COURT: Okay. I got your point and I get  
6 Dr. Lichtman's response.

7 BY MR. KAWSKI:

8 Q. Bottom line is the North Carolina judge did not rely  
9 on your opinion, correct?

10 A. Absolutely not.

11 Q. He in fact excluded portions of it?

12 A. Yes. Not the central portions, but -- yeah, he did  
13 exclude quite a bit.

14 Q. Okay. I want to shift gears quite a bit to the topic  
15 of absentee voting by mail.

16 A. Okay.

17 Q. You would agree that voting absentee by mail is a  
18 convenient method for voters, correct?

19 A. For some voters; for others it's difficult.

20 Q. It's convenient because if you're not in a state it's  
21 a way of making your vote count, right?

22 A. That is correct.

23 Q. And if you don't have time to vote on Election Day,  
24 absentee voting by mail would also be convenient, right?

25 A. Correct, although you can also vote early in person.

1 Q. If you're working on Election Day, voting absentee by  
2 mail would be convenient for you, right?

3 A. Correct, although you can also vote early.

4 Q. And you would agree that in Wisconsin a voter can  
5 avoid lines that might exist for absentee voting in person  
6 by requesting an absentee ballot by mail, correct?

7 A. You can do that anywhere.

8 Q. Your expert opinion here does not cover all the  
9 topics that all the plaintiffs' other experts covered,  
10 right?

11 A. I can't speak to that, but certainly not.

12 Q. Specifically one of the things that you do not offer  
13 an opinion on is the number of registered voters in  
14 Wisconsin who lack a qualifying ID to vote under the Voter  
15 ID law?

16 A. I believe other experts addressed that.

17 Q. So you did not?

18 A. No.

19 Q. And you're not giving an opinion about the percentage  
20 of registered voters in Wisconsin who lack a qualifying ID  
21 either?

22 A. Who lack it when, at the time of adoption of 2011 of  
23 Act 23 or today? I'm not sure what you are referring to.

24 Q. Today.

25 A. No.

1 Q. Okay. You talked in your -- in direct examination  
2 about how Wisconsin had ranked No. 2 and No. 4 based on a  
3 Pew Charitable Trust survey of election performance in  
4 2008 and 2010, right?

5 A. Correct.

6 Q. Did you look at the Wisconsin's ranking for 2012?

7 A. I did not.

8 Q. Okay. Are you aware of what it is?

9 A. No, because my point was the system wasn't broken at  
10 the time you adopted not just Act 23, but a whole series  
11 of changes, many of which occurred after 2012.

12 Q. So did you not include in your report Wisconsin's  
13 ranking by Pew for 2012, correct?

14 A. Correct.

15 Q. Let's put up on the screen an exhibit. This is not a  
16 numbered exhibit. I pulled it off a Pew website. Take a  
17 look at this exhibit. If you could zoom in. The  
18 highlighted portion shows the overall EPI average 2012  
19 rank for Wisconsin; do you see that?

20 A. I do.

21 Q. And that's No. 3?

22 A. I do.

23 Q. And if we could zoom out and go down on the page. Do  
24 you see circled in a red circle there Wisconsin's rank  
25 overall for turnout in 2012; do you see that?

1 A. I do.

2 Q. What is that?

3 A. 72.47.

4 Q. And what rank out of all 50 states is Wisconsin?

5 A. Second.

6 Q. Okay. And so in 2012 the Wisconsin Voter ID law was  
7 in effect for one election, correct?

8 A. I don't believe it was in effect for the presidential  
9 election.

10 Q. But it was in effect for the February 2012 primary,  
11 correct?

12 A. I'll take your word for that, yes. But this is not  
13 the primary turnout; this would be the general election  
14 turnout.

15 Q. Right. In 2012 when Pew did this ranking the Voter  
16 ID law had been in effect for one election, correct?

17 A. Not the election they look at though.

18 Q. Okay. What election did they look at?

19 A. Presidential election.

20 Q. Okay. So Wisconsin was ranked No. 3 overall in 2012?

21 A. Correct.

22 Q. Okay. In your report you refer to Wisconsin in the  
23 past tense in terms of having great election results,  
24 correct?

25 A. Correct. I was looking at the information available

1 to the decision makers.

2 Q. Is it your opinion that today Wisconsin is not a  
3 national leader in election administration?

4 A. I didn't give an opinion on that one way or the  
5 other.

6 Q. What I mean is by implication you said Wisconsin had  
7 been a leader in turnout and you use the past tense a lot  
8 in your report?

9 A. Correct, because I was looking at what was facing the  
10 Legislature. And my point was, it wasn't a broken system  
11 that needed fixing.

12 Q. So is it your opinion today that Wisconsin has a  
13 broken election system?

14 A. I didn't offer opinions on that. My opinions were  
15 offered with respect to burdens on particular groups  
16 within Wisconsin, not within the entirety of the election  
17 system.

18 Q. Okay. And then you already covered this, but you  
19 didn't do any analysis in Wisconsin with regard to  
20 state-sponsored discrimination, correct?

21 A. That was done by Dr. Burden.

22 Q. You only adopted Dr. Burden's findings and did  
23 nothing further?

24 A. Except for the recent sequence of events from 2004  
25 on. I didn't go back into the history the way he did.

1 Q. Okay. So in the recent sequence of events then, what  
2 were the items that you found were state-sponsored  
3 discrimination?

4 A. Well, we talked about the 2000 -- I wasn't putting it  
5 in the context of state-sponsored discrimination; I was  
6 putting it in the context of the sequence of events  
7 leading to Act 23 and subsequent acts. But I certainly  
8 think it would qualify as intentional state  
9 discrimination.

10 Q. So is it your opinion then that there are events  
11 since 2004 that amount to state-sponsored discrimination  
12 in Wisconsin.

13 A. Yes. I think the whole sequence of Acts starting in  
14 2011 amount to that.

15 Q. What do you mean by the whole sequence of events?

16 A. Acts, all the Acts I've discussed in my report.

17 Q. And you're talking about the laws that are challenged  
18 in this case?

19 A. Correct.

20 Q. Each one of those Acts is an example of  
21 state-sponsored discrimination?

22 A. I think cumulatively they are. It's hard to say each  
23 one individually. Certainly the Voter ID. And in context  
24 I would say, yes, the whole sequence of Acts are.

25 Q. Okay. In your expert report, the initial report, at

1 page 24, you observe that three Democrats voted to enact  
2 the bill that became the Voter ID law, correct?

3 A. That is correct.

4 Q. Yet you concluded that the Legislature had a partisan  
5 motive in passing that law, correct?

6 A. Correct.

7 Q. And that motivation, in your opinion, was to harm the  
8 prospects of Democratic candidates?

9 A. Correct.

10 Q. So were these three Democratic legislators committing  
11 political suicide then?

12 A. No. We discussed that earlier. You never know why  
13 an individual might break from the rule. Certainly almost  
14 all of these pieces of legislation were passed directly  
15 along party lines or very close. I don't know what deals  
16 were made. I don't know what were promised to these  
17 folks. But there are exceptions to the rule.

18 Q. So you would agree that it would have harmed their  
19 prospects as Democrats then?

20 A. Not necessarily their particular prospects. They may  
21 have come from all-white districts. They may have made  
22 certain deals not to have strong opposition from  
23 Republicans. I've been watching state legislators for 50  
24 years and all kinds of backroom deals are made.

25 Q. You don't know if any backroom deals were made here,

1 correct?

2 A. No, no, of course not. That's what I'm saying, I  
3 don't know what particular arrangements may or may not  
4 have made.

5 Q. And you can't speculate about why these three  
6 Democrats voted for Act 23, correct?

7 A. No. All I can say is if you look at all the Acts,  
8 the vast bulk of Democrats have voted against them, in  
9 most cases, right along party lines.

10 Q. And although you didn't address it in your report,  
11 you would agree that there are other laws challenged in  
12 this case that were passed with some Democratic support,  
13 correct?

14 A. Some, yeah, but very little.

15 Q. I asked you at your deposition what it would -- what  
16 kind of support there would have to be for a bipartisan  
17 bill. Do you recall that discussion?

18 A. We did, we did discuss that.

19 Q. Could you tell the Court what you believe there has  
20 to be for bipartisan support?

21 A. Substantial support from both sides, not just token  
22 support from one side. There's no *hard and fast* rule.  
23 Ideally you'd want a majority to have a true bipartisan  
24 bill. But you could argue it doesn't quite have to be a  
25 majority, but there's no absolute rule on that.



1 THE COURT: So something choice to a majority?

2 THE WITNESS: Yeah, to be a true bipartisan bill.

3 And there's another element to that. Often you call a  
4 bill *bipartisan* when it is sponsored and pushed by members  
5 of both parties. For example, I think it was McCain and  
6 Kennedy got together on the immigration reform bill in  
7 Congress. It never passed, but they tried to sell it as a  
8 bipartisan effort because members of both parties were  
9 very much involved in sponsoring the bill and pushing the  
10 bill. I didn't see that here.

11 BY MR. KAWSKI:

12 Q. We're going to look at page 30 of your initial  
13 report. And this is where you addressed the Rice  
14 University research about Texas Congressional District 23.

15 A. Let me get to that. I think that's right. Okay.

16 Q. We're going to zoom in on the bottom part. So you  
17 did no similar research for this case that is like the  
18 Rice University study that was done, correct?

19 A. No. I certainly was not in a position to do that  
20 kind of study here.

21 Q. You did no research here regarding whether there was  
22 a deterrent effect on voters of the Voter ID law, correct?

23 A. No, I didn't do any individual separate studies of my  
24 own.

25 Q. But presumably you could have done such a study based

1 on data from the February 2016 and April 2016 elections?

2 A. It's possible, but it would be very difficult. You'd  
3 have to plan it well ahead of time and nobody knew exactly  
4 when this law would go into effect.

5 Q. So the Voter ID law wasn't in effect for those  
6 elections, right?

7 A. Yes.

8 Q. You're not aware of any study in Wisconsin that is  
9 similar to this Texas study, correct?

10 A. Given how recent the law went into effect, no, I'm  
11 not aware.

12 Q. And obviously the results of the Texas study could  
13 not have had an impact on whether the 2011 Legislature  
14 passed Act 23 with an improper purpose?

15 A. Right. I didn't cite it for that purpose. I cited  
16 it for the effects of Voter ID law to show the effects are  
17 not limited to those who don't have acceptable ID. But  
18 the effect spills over because these laws are very  
19 confusing and voters may not vote because they don't  
20 believe they have acceptable IDs.

21 Q. But again, most of your analysis deals with what the  
22 Legislature knew at the time it passed the Voter ID law,  
23 correct?

24 A. Yes. But I also look at some of the effects of Voter  
25 ID law as well.

1 Q. Those effects would not inform the legislative intent  
2 in May 2011 though, correct?

3 A. Of course not, not a 2014 study.

4 Q. So this Texas study is not very helpful?

5 A. I think it is helpful. It may not be helpful for one  
6 thing, but it's helpful for others.

7 Q. Let's look at page 45 of the initial report. And  
8 this is where you talk about the Food Share bill. I was  
9 confused by this and I know we talked about it at your  
10 deposition.

11 A. We did.

12 Q. The Food Share bill never became law, correct?

13 A. Correct.

14 Q. And in Wisconsin there is currently no photo ID  
15 requirement for Food Share recipients, correct?

16 A. Correct.

17 Q. You're saying that a bill that was proposed, but  
18 never became law, has relevance to the Legislature's  
19 intent, correct?

20 A. Direct relevance.

21 Q. So it's your position that a bill that the  
22 Legislature failed to enact in 2015 bears upon whether the  
23 Legislature intentionally discriminated on the basis of  
24 race when it enacted Act 23 in 2011?

25 A. You're mischaracterizing my testimony. My testimony

1 had nothing to do with whether the bill passed or it  
2 didn't pass because the amendment to --

3 THE COURT: Wait for a question, because I  
4 remember your testimony on some things, so I didn't need  
5 to hear it again. I need to give Mr. Kowski a chance to  
6 ask questions about it.

7 THE WITNESS: Sure.

8 BY MR. KAWSKI:

9 Q. So bottom line is you think that a bill that failed  
10 to pass in 2015 informs the legislative intent analysis  
11 for a law that was enacted in 2011?

12 A. Absolutely, for the reasons that I laid out in my  
13 direct testimony.

14 Q. Okay. Take a look at page 39 of the report. This is  
15 the topic of corroboration.

16 A. Yes.

17 Q. And I'll let you get there.

18 A. I'm there.

19 Q. You noted at this page that 35,332 Wisconsin voters  
20 registered using corroboration between '06 and October  
21 2012, right?

22 A. That's correct.

23 Q. You do not in the report note the total number of  
24 registrants during that time, correct?

25 A. Correct.

1 Q. And it could be in the millions?

2 A. It wouldn't surprise me. But the significance here  
3 is not the percentage; it's the fact that large numbers of  
4 citizens were involved.

5 Q. And you acknowledged that there were no statistics  
6 available by race, correct?

7 A. I say that in my report, absolutely.

8 Q. And the Section 2 of the Voting Rights Act analysis  
9 and the intentional racial discrimination claims of this  
10 case deals specifically with racially-disparate impacts,  
11 correct?

12 A. And I discuss that in the next several sentences of  
13 my report.

14 Q. But you were not able to make any conclusion based on  
15 data about corroboration that showed a voter's race,  
16 correct?

17 A. As I explained right here, you don't register by  
18 race. But the kinds of people most directly impacted by  
19 corroboration are in fact African Americans and Hispanics  
20 in the state of Wisconsin and I supply specific statistics  
21 and data that is available to prove that.

22 Q. Okay. In the next few sections of the report you  
23 talk about kind of more limited issues -- for example,  
24 SRDs at high school -- on page 40?

25 A. I do.

1 Q. Is it true that pages 40 and 41 of the initial report  
2 would constitute the entirety of your expert opinion on  
3 the issue of elimination of SRDs at high schools?

4 A. That's correct.

5 Q. And then on page 41 you talk about restrictions on  
6 registration for college and university students, correct?

7 A. No. I talk about restrictions -- I talk about the  
8 abrogation of the ordinance in Madison for distributing  
9 registration forms for renters and supply racial  
10 information on that.

11 Q. So the information though on page 14, the paragraph  
12 that starts with the words *In addition*; do you see that?

13 THE COURT: Not on page 14.

14 A. 41.

15 Q. I'm sorry. Page 41. The paragraph that starts, "In  
16 addition."

17 A. That's correct.

18 Q. That paragraph and the table above it would  
19 constitute the entirety of your expert opinion in this  
20 case on the issue of registration for college and  
21 university students?

22 A. No. You're mischaracterizing the table. The table  
23 above is a table on public high schools. I have a  
24 different table --

25 Q. My mistake. Sorry.

1 A. -- which was discussed in my direct testimony,  
2 documenting enrollment in colleges.

3 Q. And just to give you -- cut to the chase, what I'm  
4 doing here is I'm trying to confirm that this paragraph  
5 and Table 14 are the entirety of your expert opinion on  
6 the topic of registration by college and university  
7 students.

8 A. And think I have some other general discussion about  
9 college and university students, but that's the crux of  
10 it; you're right.

11 Q. Okay. And then the second full paragraph on page 41  
12 and Table 17 would constitute the entirety of your  
13 analysis of the issue of abrogating the Madison ordinance  
14 that provided for distribution of voter registration  
15 forms?

16 A. Correct.

17 Q. Okay. Page 42 of your report you start off talking  
18 about decision making about early voting, right?

19 A. Yes.

20 Q. And pages 42 through 45 of this report are the  
21 entirety of your opinion with regard to reductions in  
22 in-person absentee voting and how it's impacted  
23 minorities, correct?

24 A. Incorrect.

25 Q. Okay. What else did you address and where is it?

1 A. I addressed it quite extensively in my rebuttal  
2 report.

3 Q. Okay. We'll get there. On page 46 you talked about  
4 the durational residency requirement, correct?

5 A. Yes.

6 Q. Ant that's the 28-day requirement?

7 A. Yes.

8 Q. The table that you cite there, if we can zoom in on  
9 it, talks about living in a different house in the prior  
10 year, right?

11 A. Yes.

12 Q. But the conclusion in the text above that paragraph  
13 is about moving to Wisconsin from a different state?

14 A. I have another table on that because this ordinance  
15 relates both to those who move in from outside the state  
16 and those who move within the state. So I have another  
17 table documenting the racial disparities that I discussed  
18 in my direct testimony on those who move into the state  
19 and that's what this is. This is moving from another  
20 state.

21 Now that I've looked at it, you didn't quite get it  
22 right. This one is moving from another state by race.  
23 The other table is moving within the state by race. Both  
24 of those tables are relevant to this ordinance.

25 Q. And those tables in this paragraph are the entirety



1 of your expert opinion in this case on this topic of the  
2 durational residency requirement, correct?

3 A. I believe that's correct. Again some of these issues  
4 I do address in my rebuttal report, particularly early  
5 voting. I don't recall addressing this one in my rebuttal  
6 report.

7 Q. And then -- this is the last one on this area of  
8 questioning -- on page 47 you talk about absentee ballot  
9 corrections and how they're more limited now; is that  
10 right?

11 A. Correct.

12 Q. And under subheading (f), this is the entirety of  
13 your analysis about that legal challenge, correct?

14 A. Correct, although I do address absentee ballots also  
15 in my rebuttal report.

16 Q. Okay. Let's talk about your conclusions about  
17 procedural and substantive deviations that the Legislature  
18 did or didn't do.

19 A. Yes.

20 Q. That starts at page 47 of the initial report?

21 A. Yes.

22 Q. You would agree that the Wisconsin Legislature  
23 complied with all of its own procedural rules when it  
24 enacted the challenged laws, correct?

25 A. Absolutely. I so testified because the Republicans

1 had control of the Legislature.

2 Q. And you talked about what you viewed as three  
3 procedural or substantive deviations, correct?

4 A. At least three, yes.

5 Q. Those would be bills were introduced late, the sheer  
6 magnitude of the number of bills, and that the Republicans  
7 had unified control of state government, correct?

8 A. Correct, although that's -- the last one is much  
9 broader than that.

10 Q. Okay. So none of these are procedural  
11 irregularities; is that right?

12 A. I think maybe addressing it late and not having time  
13 for debate on something as fundamental as voting rights --  
14 while not a violation of the rules, you're correct about  
15 that -- could be characterized as an irregularity.

16 Q. Happens all the time though, doesn't it?

17 A. I don't know if it happens all the time on something  
18 this fundamental unless you're trying to, you know, push  
19 it through without adequate consideration, you believe  
20 it's going to be controversial with the public, and you  
21 want to get it by as quickly as you can.

22 Q. Voter ID had been debated for over a decade at that  
23 point, hadn't it, in 2011 when it was passed?

24 A. Yes, and it was very controversial in the state.

25 Q. So there was robust debate about voter ID for nearly

1 a decade, correct?

2 A. Certainly public debate. I'm not sure there was  
3 robust consideration within the Legislature. For example,  
4 in other states you've had extensive hearings on voter ID  
5 bills. They brought in people from Indiana, Georgia, the  
6 secretary of state. They've had extensive public  
7 commentary on the legislation. They brought in experts.  
8 They brought in advocacy groups. Nothing like that  
9 occurred here, and it was no less controversial in other  
10 places.

11 Q. But Act 23 was not the first Voter ID law to pass in  
12 Wisconsin; is that right?

13 A. That is correct.

14 Q. And you talked in your report about a 2005 bill that  
15 passed and was vetoed by Governor Doyle, correct?

16 A. Right. That had been six years earlier and obviously  
17 circumstances in 2011 are not the same as circumstances in  
18 2005. So the fact that a bill passed six years earlier  
19 does not obviate the need for full consideration in 2011  
20 of an Act which not only was a Voter ID Act.

21 THE COURT: I think we got your answer. Go  
22 ahead, Mr. Kowski.

23 BY MR. KAWSKI:

24 Q. There was another bill that was introduced, a voter  
25 ID bill, in 2011, correct?

1 A. Another voter ID bill?

2 Q. Another one.

3 A. Besides Act 23?

4 Q. Right.

5 A. There may well have been, but Act 23 was the one that  
6 was passed.

7 Q. Let's take a look at that bill. And we're going to  
8 look at 2001 Assembly Bill 12. And that's this your  
9 packet as well, but I put it up on the screen.

10 A. I thought you said there was another bill in 2011.

11 Q. I meant 2001.

12 A. Oh, okay. That's why I was confused. You confused  
13 me with some page numbers and some dates here.

14 Q. So if you want to take a look at that one either on  
15 the screen or hard copy.

16 A. I can't see it on the screen. Do I have it in hard  
17 copy? That's much better, yes.

18 Q. Let's take a look at this one. You see it's bill  
19 introduced on January 16th, 2001? And I have highlighted  
20 that.

21 A. Yes.

22 Q. And you see I've circled the name *Schultz* right?

23 A. Yes.

24 Q. And that's a name you're familiar with --

25 A. Yes.

1 Q. -- because you had commentary about -- opinions about  
2 Dale Schultz in your initial report, correct?

3 A. Correct.

4 Q. Let's scroll down the first page. And I believe I've  
5 highlighted some more here. You see this bill was an act  
6 to amend certain statutes relating to requiring  
7 individuals to present identification in order to vote at  
8 a polling place, right?

9 A. Correct.

10 Q. And then there's some analysis below by the  
11 Legislative Reference Bureau, correct?

12 A. Yes.

13 Q. And it states, "This bill requires an elector, in  
14 addition, to present a valid Wisconsin driver's license  
15 issued to the elector that contains a photograph of the  
16 license holder, a valid Wisconsin identification card  
17 issued to the elector, or a copy of the elector's birth."  
18 Did I read that right?

19 A. You did.

20 Q. And so Senator Schultz was sponsoring a voter ID bill  
21 that was much more strict than Act 23, correct?

22 A. I can't say that because this is just piece of the  
23 bill. For example, the part you didn't read said the bill  
24 does not affect the absentee voting procedure. Let me  
25 finish, whereas Act 23 does. This bill says "a valid

1 Wisconsin identification card." That would include lots  
2 of identification cards not included with Act 23, like a  
3 government employee identification card. You can also use  
4 a nonphoto ID here.

5 Q. I'm not sure where you're seeing that, Dr. Lichtman.

6 A. A copy of the elector's birth certificate, that's not  
7 a photo ID.

8 Q. So my understanding of this, and tell me if I read it  
9 wrong, is that there are only three forms of ID permitted  
10 under this bill -- that would be a Wisconsin driver's  
11 license, a Wisconsin state ID card, or the elector's birth  
12 certificate -- correct?

13 A. Correct.

14 Q. And so that would be a much more strict voter ID law  
15 than what was enacted in Act 23, correct?

16 A. Not correct. I cannot conclude that just from those  
17 few sentences. As I said, it's mixed. A valid Wisconsin  
18 identification card covers lot of identifications. A  
19 birth certificate is a nonphoto ID and it doesn't affect  
20 absentee voting.

21 I don't know if this is a strict law or not. I don't  
22 know if there's an alternative means by which you can vote  
23 other than this, like they have in South Carolina, North  
24 Carolina, and all those states.

25 THE COURT: I think we're probably exploring the

1 details of this bill beyond the needs of this trial.

2 MR. KAWSKI: I'll move on then.

3 THE COURT: So we've got the bill, so ask  
4 whatever questions you want to -- whatever points you want  
5 to make about the bill, go ahead. The strictness of it is  
6 probably a subject for debate.

7 BY MR. KAWSKI:

8 Q. Let's take a look then at the other bill that was the  
9 2005 bill you did write about in your report. And zoom in  
10 on this one please, too. This is 2005 Assembly Bill 63.  
11 You see I've highlighted it was introduced on February  
12 1st, 2005, right?

13 A. Correct.

14 Q. And I've circled in red that it was sponsored b  
15 Senator Schultz, correct?

16 A. Absolutely.

17 Q. And that's the same Senator Dale Schultz that you  
18 opined on in your report?

19 A. Yes. That's one of the reasons I think Schutt's is  
20 so credible, because he had supported these bills,  
21 including Act 23.

22 Q. And if you'll scroll down. I've highlighted again --  
23 this is a description -- "relating to: requiring certain  
24 identification in order to vote at a polling place or  
25 obtain an absentee ballot," right?

1 A. That's what it says.

2 Q. And then if you'll scroll to the next page. Again  
3 some LRB (Legislative Reference Bureau) analysis talks  
4 about the forms of ID: "a valid Wisconsin driver's license  
5 issued by the Department of Transportation to the person;  
6 a valid current identification card issued to the person  
7 by a U.S. uniform service, or a valid Wisconsin  
8 identification card issued by DOT to the person." Do you  
9 see that?

10 A. Correct.

11 Q. Did I read that correctly?

12 A. You did.

13 Q. So this bill that was passed by the Legislature had a  
14 much shorter list of qualifying IDs than Act 23, correct?

15 A. If that's the sole list, that's correct.

16 Q. And Senator Schultz again sponsored this bill?

17 A. That's why Senator Schultz is so credible. He's not  
18 someone who has a history of opposing the bills.

19 THE COURT: That point is made. Go ahead.

20 BY MR. KAWSKI:

21 Q. And so you would agree there was debate in Wisconsin  
22 about voter ID laws for about a decade, going back to this  
23 2001 bill that I showed you, correct?

24 A. I would not agree that it was subjected to the kind  
25 of analysis scrutiny hearings that has been the case in



1 other states. You haven't shown me that. You've shown me  
2 bills.

3 Q. Okay. Were you -- you were not in the court for the  
4 testimony of Todd Allbaugh, correct?

5 A. Correct.

6 Q. Did you read about it in the news?

7 A. I read the testimony actually. I read a transcript.

8 Q. Do you know if Mr. Allbaugh was employed by Senator  
9 Schultz during the time that he sponsored the 2001 and  
10 2005 voter ID bills?

11 A. I don't know if he was employed back then.

12 Q. Okay. Let's talk about what you called the *common*  
13 *sense argument* at page 52 of your initial report.

14 A. Sure.

15 Q. And that's again relating to voter ID. I just want  
16 to make two brief points.

17 A. I'm there.

18 Q. You talked about how the TSA does not require you to  
19 show an ID, correct?

20 A. Correct.

21 Q. Were you asked to show an ID when you got on your  
22 flight to Madison?

23 A. Absolutely. I never said here you weren't asked. I  
24 just said there are alternatives, whereas there aren't  
25 under the Act 23.

1 Q. Can you think of a time in flying around the country  
2 for your expert work that you have never not been asked  
3 for a photo ID after September 11th?

4 A. I've always been asked. But as I said, if you're  
5 asking my personal experience, my wife got on with without  
6 any ID.

7 Q. Okay. And then you also addressed the issue of  
8 whether a photo ID is required for other things, such as  
9 getting a marriage license, correct?

10 A. Correct. That's one of, like, ten.

11 Q. We talked about this issue at your deposition. If  
12 you could pull up Exhibit 9, please.

13 A. We did.

14 Q. You would agree that getting married is a very  
15 important right, correct?

16 A. Yes, but it's very different from voting. You can  
17 get married anywhere.

18 Q. Both have been characterized as a fundamental right  
19 by some, correct?

20 A. It's not the same as voting. As I said, you can get  
21 married anywhere. You've got to vote where you live.

22 Q. Take a look at Exhibit 9. I put it up on the screen  
23 and it's in your packet, too, if you want to look at the  
24 packet.

25 A. I don't need to look at this. We discussed this in

1 deposition. I remember.

2 Q. Right. So if you could go to page 3. And I've  
3 highlighted a portion here. In Milwaukee there are  
4 marriage license application requirements, correct?

5 A. Yes.

6 Q. And each applicant must show valid photo ID, such as  
7 a valid driver's license, correct?

8 A. That's what it says.

9 Q. Not only that, but the applicant must bring in a  
10 certified birth certificate, one that has been issued by  
11 government agency. Photocopies, "Certificates of Birth"  
12 issued by hospitals, and "Birth Registrations" are not  
13 acceptable, correct?

14 A. Correct.

15 Q. So in Milwaukee County, to exercise the right to  
16 marry by license, you have to show photo ID and have a  
17 certain form of your birth certificate, correct?

18 A. Yes. But as we discussed in deposition, these kinds  
19 of laws often have exceptions. And I don't know if  
20 there's an exception to this or not. And, you know, you  
21 can get married outside of Milwaukee because there's no  
22 state law requiring photo ID.

23 Q. Sure. And turning to page 54 of the initial report,  
24 you address the issue of whether Voter ID laws increase  
25 voter confidence, right?

1 A. Yes.

2 Q. And in the report, at page 54, and then in Footnote  
3 71, you talk about an article by a Stephen Ansolabehere  
4 and Nathaniel Persily, correct?

5 A. Correct.

6 Q. And you rely on their work in forming your opinions  
7 about increased voter confidence -- or decreased voter  
8 confidence, I guess?

9 A. Only in part because, as I testified, I did my own  
10 study of that.

11 Q. Okay. Have you read the Seventh Circuit's decision  
12 in *Frank v. Walker*?

13 A. I think there were two of them, so I'm not sure which  
14 you're referring to.

15 Q. I'm talking about the 2014 decision.

16 A. I did not recently, but I have read it.

17 Q. Okay. Let's pull that up on the screen. That's in  
18 your packet, too. The one on the screen is going to be  
19 highlighted.

20 A. It's in my packet?

21 Q. Yes. I'm looking at page 6.

22 THE COURT: Maybe you can see it on the screen.  
23 I think he's going to ask you about a very pointed --

24 A. It's a little hard for me to see on the screen, but  
25 I'll try.

1 Q. We can make it a little bigger.

2 A. I like to see the whole context, too --

3 Q. Sure, I understand.

4 A. -- and what this is all about, because pulling a line  
5 or two -- go ahead.

6 Q. Sure. So I'm just really making the point that the  
7 Seventh Circuit has looked at this article as well,  
8 correct?

9 A. Yes, absolutely.

10 Q. Judge Easterbrook wrote that "The political scientist  
11 who testified at trial relied not on his own work, or even  
12 on work in a refereed scholarly journal, but on the  
13 Ansolabehere and Persily article," correct?

14 A. Right, but that's not what I did.

15 Q. You did not rely on the same article?

16 A. I did my own work.

17 Q. Okay. And so the political scientist who Judge  
18 Easterbrook is referring to in this quote is Dr. Barry  
19 Burden, Correct?

20 A. I don't know. If you say so, I will accept that.  
21 But that characterization does not apply to me.

22 Q. But Seventh Circuit didn't find the Ansolabehere  
23 article very convincing, correct?

24 A. I haven't looked at the whole context. But I didn't  
25 stop there, I went and did my own work.

1 Q. And the article was in the *Harvard Law Review*, which  
2 is not a refereed journal?

3 A. I believe that's right. But these are very highly  
4 respected political scientists. They're leaders in the  
5 field.

6 Q. So the journal there was reviewed by law students,  
7 correct?

8 A. Correct.

9 Q. I'm going to turn actually to another article by  
10 Stephen Ansolabehere, which is Exhibit 8. And we talked  
11 about this one in your deposition.

12 A. We did. I'm quite familiar with it, but I'd like to  
13 have it, if I can find it.

14 Q. It should be the first item in your packet.

15 A. Yeah. But I've shuffled my packet, unfortunately.  
16 Just give me a moment. This is why computers have saved  
17 my life. I cannot deal with paper.

18 THE COURT: I think you almost had it.

19 THE WITNESS: Really?

20 THE COURT: It's in your right hand.

21 THE WITNESS: Got it. Yes. It was hidden.

22 Thank you, Your Honor. I have it. I'm familiar with the  
23 article.

24 BY MR. KAWSKI:

25 Q. So you know that this is the article by Stephen

1 Ansolabehere, of Harvard University, entitled *Effects of*  
2 *Identification Requirements on Voting: Evidence from the*  
3 *Experiences of Voters on Election Day*. And this article  
4 appeared in a January 2009 publication of *PS: Political*  
5 *Science & Politics*, correct?

6 A. Yes.

7 Q. And that is a journal published by the American  
8 Political Science Association?

9 A. Yes.

10 Q. It is a peer-reviewed journal?

11 A. I'm not sure. I haven't published there. It may not  
12 be, because sometimes these journals published by the  
13 associations are not peer reviewed. Their main journal is  
14 the *American Political Science Association*, which is peer  
15 reviewed. I'm not sure this is.

16 Q. Okay. And so --

17 THE COURT: In fact if I can interrupt here.  
18 It's a symposium report, I gather.

19 MR. KAWSKI: That's right.

20 THE WITNESS: I don't think it was peer reviewed.

21 THE COURT: Unlikely it is peer reviewed.

22 THE WITNESS: Stephen Ansolabehere is a  
23 well-known political scientist and I'm not here to  
24 criticize his work.

25 THE COURT: Yeah. I understand.

1 BY MR. KAWSKI:

2 Q. And so being a symposium, there were other pieces  
3 written by voter ID in the same symposium, correct?

4 A. I'm not sure. I wasn't there.

5 Q. Okay. Would it be fair to say you disagree with some  
6 of the conclusions in this case?

7 A. I don't think that characterizes my analysis of it.  
8 I would say the conclusions are obsolete.

9 Q. Okay. This PCU surveys were conducted in 2006 and  
10 2008 to reach its conclusions?

11 A. Yes. But the 2008 did not do the general election,  
12 just did a primary. A critical election to look at always  
13 for voter ID is the general election when you have the  
14 greatest degree of turnout. And as we know, it's general  
15 elections that attract minority turnout as well. So I  
16 don't think the particular elections -- and I'm not  
17 criticizing, this is what he said -- are particularly  
18 informative.

19 Q. Okay. And in Wisconsin again we haven't had a  
20 general election with the Voter ID law, correct?

21 A. Correct. But we have had surveys on general  
22 elections like this, which, you know, are later and come  
23 to very different conclusions.

24 Q. Let's take a look at page 3 of the exhibit, which is  
25 page 129 of the article.



1 A. Okay.

2 Q. And we'll zoom in. Actually, going back up to page 2  
3 there's a heading highlighted here. It states, "What Is  
4 the Effect of Voter ID Requests on Access." Do you see  
5 that on page 2?

6 A. Yes. I'm familiar with it.

7 Q. And then spilling over to page 3 are the conclusions  
8 and analysis, right?

9 A. When you say "page 3," you mean 129.

10 Q. Correct, 129 of the article.

11 A. Yes.

12 Q. And do you see at the top Dr. Ansolabehere asked the  
13 question: "How many people were denied the vote as a  
14 result of voter-identification requests?" And he says,  
15 "The answer is - very few." Do you see that?

16 A. Of course.

17 Q. And then he says in the 2006 survey, the Court can  
18 read this, but his conclusions were that there are very  
19 few people that were denied the right to vote as a result  
20 of voter identification requests, correct?

21 A. Requests, yes.

22 Q. And he found that this is an exceptionally low rate  
23 of denial of access to the vote, correct?

24 A. I'm sure he says -- yes. That's the next paragraph,  
25 correct.

1 Q. Okay. If we could scroll down then, there will be  
2 another highlighted portion. Again, referring to the same  
3 survey, he found that all told then, only seven out of  
4 4,000 people, less than two-tenths of 1% of the  
5 electorate, could be considered nonvoters, at least in  
6 part because of voter identification, right?

7 A. That's what he says, yes.

8 Q. His conclusion was, Voter ID does not appear to  
9 present a significant barrier to voting, correct?

10 A. Correct.

11 Q. Okay. But you don't agree with that?

12 A. No, for the following reasons: one, as I said, this  
13 did not look at the best elections; two, only one state in  
14 the union, at the time this survey was conducted --

15 THE COURT: I don't mean to cut you off here. I  
16 heard your testimony. But let me focus it this way,  
17 because it seems to me there are kind of two questions.  
18 One is to look at the aggregate level and see if voter ID  
19 has a significant or even a measurable impact on, we'll  
20 call it, turnout.

21 THE WITNESS: Fair enough.

22 THE COURT: It's sort of a court's term. But  
23 whether looking at the aggregate we can measure the impact  
24 of the voter ID requirement looking at aggregate election  
25 results.

1 The second question is looking at the level of the  
2 individual voter, are there some people who individually  
3 have trouble getting voter ID. We have a lot of  
4 information about the ID petition process which shows, in  
5 some cases, it has imposed a very substantial barrier to  
6 some people getting the ID, meaning that they didn't get  
7 to vote.

8 THE WITNESS: Gotcha.

9 THE COURT: This seems to be speaking to the  
10 aggregate level.

11 THE WITNESS: It's strictly at the aggregate  
12 level. It doesn't parse it down to any particular  
13 burdened group within the electorate.

14 THE COURT: So with that proviso that it's only  
15 dealing with aggregate question, not the individual  
16 question, you disagree with this still, recognizing it as  
17 the aggregate level?

18 THE WITNESS: Yes, because there was only one  
19 state at the time. And so, yes, only a small proportion  
20 of the national electorate is going to be denied because  
21 they didn't have an ID, particularly when they're asked  
22 for it. But there's only one state with a strict Voter ID  
23 law at the time.

24 THE COURT: Well, I take it, and I haven't  
25 reviewed this in detail, but I take it that the suggestion

1 here is a little more pointed than that. It's not  
2 suggesting that, well, there's only one state that has it,  
3 so nationally it doesn't have much of an impact. I think  
4 it's saying, within the jurisdiction where there is a  
5 voter ID requirement, it doesn't have a significant impact  
6 on the aggregate.

7 THE WITNESS: I don't think that's what he's  
8 saying, because I think his denominator is the entire  
9 survey. I don't think he's only looking at what's going  
10 on in Indiana, because the sample for Indiana is nowhere  
11 close to the kinds of numbers he's talking about.

12 He's talking about, if I take all of those 25 who  
13 were asked for ID and didn't have it and divided it by all  
14 of the respondents, then I would get these very low  
15 percentages. So it's a bit of an apple-and-orange  
16 comparison.

17 And when you look at the results for 2008 general  
18 election, 2.2 million were spotted as being  
19 disenfranchised because of a lack of appropriate ID. And  
20 I've gone over a whole bunch of other studies that found  
21 this. And the subsequent studies, unlike this one, also  
22 focused on the racial disparities. When you look at those  
23 who didn't get a chance to vote, African Americans and  
24 Hispanics are very substantially --

25 THE COURT: Okay. And that goes to your --

1 THE WITNESS: Yeah. Exactly.

2 THE COURT: Okay. Thank you. Mr. Kawski.

3 BY MR. KAWSKI:

4 Q. Let's move on to the issue public support for voter  
5 ID. And you address that at page 56 of your report. We  
6 don't have to bring that up though.

7 A. Okay.

8 Q. You would agree that there is majority support  
9 nationally for Voter ID laws, correct?

10 A. Absolutely. I testified to that effect. When you  
11 take a generic poll though.

12 Q. Right. And so there is majority support in Wisconsin  
13 for voter ID, correct?

14 A. I'm sure there is. There's majority split everywhere  
15 because most people have IDs and we're not talking about  
16 something that has an impact on most people.

17 Q. And in your packet I have put Defense Exhibits 142  
18 and then 254, which are Marquette Law School polls  
19 conducted October 23rd through 26th, 2014. And those are  
20 of likely voters and registered voters, correct?

21 A. Yes.

22 Q. You've at least seen the likely voters one before  
23 because it was used at your deposition?

24 A. I think I do. I don't remember the guts of it, but  
25 yes.

1 Q. Just take -- we'll put up on the screen page 13.

2 This poll from 2014 shows that 60.4% of likely voters in  
3 Wisconsin who were polled favored a requirement of a  
4 government-issued photo ID to vote, right?

5 A. Yes.

6 Q. And I've circled that on the screen. Then if we turn  
7 to Exhibit 254, this is the --

8 A. Before you go off that, if you'll go to the next one  
9 you'll see almost as many supported raising the minimum  
10 wage. So there's support for lots and lots of things that  
11 never get enacted.

12 Q. Of course. And then Exhibit 254 is the poll of  
13 registered voters. And if you'd look at page 13 of that  
14 one, please.

15 A. Yeah.

16 Q. Again I've highlighted on the screen that 59.8%  
17 favored requiring a government-issued photo ID to vote,  
18 correct?

19 A. That's correct. And I don't mean to quibble, but  
20 obviously these polls are long after Act 23 was adopted.

21 Q. Right. And during the time this poll was conducted,  
22 Act 23 was not in effect, correct?

23 A. I believe that's right.

24 Q. But it was in that time frame where the law was on  
25 again, off again and this was a time when it was off

1 again?

2 A. I believe that's right. But this could not have been  
3 something that the Legislature took into account in 2011  
4 obviously.

5 Q. Okay. Let's take a look at Exhibit 143. That's also  
6 in your packet. That's the Pew Research Center.

7 A. Yes.

8 Q. You've seen this before, also?

9 A. I have seen all of these. I don't dispute public  
10 support.

11 Q. Okay. Let's zoom in on that one and I've highlighted  
12 a portion.

13 A. I do think you need to drill beyond the generic  
14 polls, which I've done.

15 Q. On the first page I've highlighted where it states,  
16 "By 77% to 20%, voters favor a requirement that those  
17 voting be required to show a photo ID," right?

18 A. Yes.

19 Q. And you don't dispute that?

20 A. I don't dispute any of the polls showing majority  
21 support. This is not something I'm quarreling with. But  
22 generically I do quarrel that you need to go beyond that.

23 Q. If you go to page 2, please, I've highlighted another  
24 portion. Do you see at the top there it states, "Fully  
25 95% of Republican voters say a photo ID should be required

1 to vote, as do 83% of Independents. By comparison, 61% of  
2 Democrats who say photo identification should be required;  
3 34% say it should not." Have I read that right?

4 A. Yes, so there is a partisan divide here.

5 Q. And you don't disagree with those poll numbers at  
6 all, do you?

7 A. Do I disagree with that's what the poll found?  
8 Absolutely not.

9 Q. Okay. And the Pew Research Center is a source that's  
10 regularly relied upon by social scientists, correct?

11 A. Absolutely. But again I'd note, this is a 2012 poll.  
12 So for what it's worth, it could not have been taken into  
13 account at the time of the passage of Act 23.

14 Q. Are you saying that at the time of the passage of  
15 Act 23, if a poll were done it would be totally different  
16 results?

17 A. No, I'm not saying that at all. I'm not sure what  
18 you're presenting these polls for and they certainly don't  
19 show that there was evidence before the Legislature in  
20 2011 about this public support.

21 Q. So you would disagree that the Legislature could have  
22 been responding to constituents' desire for a voter ID  
23 bill in Wisconsin when it passed Act 23?

24 A. I don't think it was established that they were. Let  
25 me make two points about that: one, you haven't shown me a



1 poll at the time; and two, constituent responses are a  
2 very tricky issue. Yes, people may say, "Sure, I want to  
3 have photo ID," but it may be of no importance to them.  
4 It may not be, what we call, a *salient* issue.

5 And I've yet to see polls showing that it's a --  
6 anywhere that it's a salient issue for voters, the kinds  
7 of things that a legislature would be responding to  
8 because it's of real importance and it can influence  
9 outcomes of elections.

10 Q. Why don't we move on to the rebuttal report then,  
11 which is Plaintiffs' Exhibit 41.

12 A. Can you give me a moment? I need to get some more  
13 water.

14 Q. I don't have a lot of questions about it.

15 A. I have the rebuttal exhibit.

16 Q. Okay. So on page 1 of the rebuttal you talked about  
17 Dr. Hood's analysis of the partisan breakdown of racial  
18 groups, correct?

19 A. No. It's beggar than that. It's not just the  
20 partisan breakdown of racial groups. What Dr. Hood tried  
21 to do was demonstrate the partisan impact of racial  
22 disparities in DMV ID possession.

23 Q. So but what you did do in this section was you looked  
24 at the 2014 gubernatorial election Wisconsin as a proxy to  
25 determine how many African Americans were Democrat?

1 A. I replicated what he did, because what he did was  
2 purporting to show that the partisan effects were  
3 basically neutral. I took his same methodology, the same  
4 election, and showed in fact the partisan effects were 10  
5 percentage points more impactful on Democrats than  
6 Republicans.

7 THE COURT: And just to I make sure I understand  
8 that, Dr. Hood based his data on whether the surveyed  
9 voters self-identified as Republicans or Democrats; you  
10 did your analysis based on exit polls showing whether they  
11 voted for Scott Walker or not?

12 THE WITNESS: I used exactly the same data and  
13 exactly the same methodology as Dr. Hood, the *Cooperative*  
14 *Congressional Election Study*. There are other analyses  
15 where I relied on exit polls.

16 The problem with Dr. Hood's analysis, he was  
17 drastically underestimating the percentage of African  
18 Americans that identified as Democrats. He had it around  
19 59%. The correct figure is around 75%. So his data was  
20 implausible and incorrect.

21 THE COURT: That's what I'm not understanding. I  
22 thought you said he used the exact same data, just  
23 replicated his analysis.

24 THE WITNESS: Yeah. For some reason, if you look  
25 at his tables, they just have percentages. They don't

1 have the actual numbers that underlie those percentages  
2 from the survey. So I went back to the actual numbers. I  
3 didn't rely on his percentages, although I followed -- I  
4 used the same database. But I recomputed the percentages  
5 because I couldn't believe only 59% of African Americans  
6 in Wisconsin identified as Democrats. That had to be, you  
7 know, 15, 10 --

8 THE COURT: So he's got some sort of arithmetic  
9 error?

10 THE WITNESS: Yes, or a data retrieval error.  
11 Somewhere the analysis misfired. And when you use the  
12 corrected percentage of African Americans, which is  
13 critical, who identify as Democrats, you then get an  
14 entirely different answer.

15 THE COURT: I understand. Let Mr. Kowski ask his  
16 question.

17 BY MR. KAWSKI:

18 Q. So just with regard to that exit poll data issue  
19 about the governor's race, that wasn't the entirety of  
20 your analysis. But you did look to exit poll data to  
21 correlate whether someone voted for Mary Burke with  
22 self-identifying as a Democrat, right?

23 A. I didn't use any exit poll data. I used the same  
24 data for this analysis. I used exactly the same data,  
25 same source that Dr. Hood did, but I went back to the

1 actual numbers to correct the party identifications and  
2 that led to a fundamentally different answer.

3 Q. I'm looking at the bottom of page 1. It reads, "The  
4 exit poll data for the 2014 general election for governor  
5 demonstrates that only 10% of African Americans voted  
6 Republican and correspondingly, 90% voted Democratic," and  
7 then you cite your initial report, correct?

8 A. That was simply to show -- that was not to conduct  
9 the analysis with exit polls. That was just to show the  
10 implausibility of coming up with African Americans  
11 identifying as Democrats at 59%. I then went on to do the  
12 analysis using the CCES, the *Cooperative Congressional*  
13 *Elections Study*, that Dr. Hood used.

14 Q. To wrap up this topic, you would agree that someone  
15 who voted for Mary Burke is not necessarily going to  
16 self-identify as a Democrat, right?

17 A. Absolutely. And I said right here, "The percentage  
18 of African Americans identifying as Democrat need not  
19 match those voting Democratic, but it should be higher  
20 than 59%."

21 Q. Okay. Let's look at page 10 of the rebuttal report.  
22 And I just want to confirm with you that the table there  
23 has I guess an addition, which is that in Wisconsin the  
24 Veterans Affairs ID is now permitted as a form of ID?

25 A. That's right. And we talked about that. That was in

1 the midst of litigation on that.

2 Q. And that was a legislative change, correct?

3 A. That's right. But during a process of litigation I  
4 believe the change was made in between the trial court  
5 ruling and the appeal to the circuit.

6 Q. Okay. And then we also -- or you talked in your  
7 direct examination about the technical college ID rule  
8 that the GAB promulgated?

9 A. Correct.

10 Q. And is it your understanding that the Legislature  
11 could have stopped that rule?

12 A. Yes. But that would have been, you know, a pretty  
13 condemnatory act on the part of the Legislature that  
14 really would have weakened any position they had in  
15 litigation to stop a rule that benefited  
16 disproportionately African Americans.

17 Q. And the GAB's authority to promulgate such a rule  
18 dependent upon an interpretation of the law, that  
19 concluded that technical college IDs were a permissible  
20 form of ID, right?

21 A. I don't know all the fine details of it, but that's  
22 probably right. That's how the GAB would operate. But  
23 the Legislature didn't come to that conclusion; the GAB  
24 came to that conclusion independently. And as we know,  
25 the GAB and the Legislature, there's been some real

1 friction there.

2 Q. On page 14, let's like at Table 7. So here you  
3 looked at the percentage of newly issued, renewal and  
4 duplicate nondriver IDs from July 2011 to September 2015,  
5 right?

6 A. Yes.

7 Q. And that was based on the data that were available to  
8 you at that time?

9 A. Everything dealing with DMV is data provided to us by  
10 the state, so we're -- let me finish -- so we're dependent  
11 on data submissions by the state. And I asked the  
12 attorneys to ask the state for everything. Everything  
13 they have that's available, we should have. So this is  
14 not something I worked up; this is something I got from  
15 the state, that's right.

16 Q. At the very bottom of the last box of this table you  
17 state, "The vast majority of IDs included in this  
18 analysis, 80%, are free IDs," correct?

19 A. That's right.

20 Q. And so you found that there were 498,244 total IDs  
21 issued?

22 A. That includes though new duplicate and renewals.  
23 Those are not new. That was kind of what our colloquy was  
24 about a little while ago when we said when we looked at  
25 this table it would clear it up.

1 Q. So you would agree that multiplying 80% by 498,244 is  
2 about 400,000, correct?

3 A. Counting duplicates and renewals, nor does that mean  
4 that they were getting these IDs for voting.

5 Q. You would agree that multiplying 80% by 498,244 is  
6 about 400,000 correct?

7 A. Of course. I'm not going to dispute the math. I  
8 just dispute the interpretation.

9 Q. So based on your table then, there were at least  
10 400,000 free IDs issued for purposes of voting as of  
11 December 2015, correct?

12 A. No. This is where we have a fundamental  
13 disagreement.

14 Q. Explain that disagreement.

15 A. And this is analyzed extensively in my report here.  
16 Even before Act 23 the state was issuing these kinds of  
17 IDs. And I believe there were more than 400,000 that had  
18 been issued even before a photo voter ID law was put into  
19 effect. Why? Because these are standard nonoperator IDs.  
20 In other words, if I want an ID --

21 THE COURT: I understand that.

22 THE WITNESS: And so it is absolutely mistaken to  
23 say that these were issued for purposes of voting. And  
24 this is why --

25 THE COURT: Well, let's just drill down right to

1 the --

2 THE WITNESS: To the guts.

3 THE COURT: -- nub of it. The only way to get a  
4 free ID is to check the box and say, "I want this for  
5 purposes of voting."

6 THE WITNESS: No. If you check the *Free ID*, you  
7 get the same ID. In other words, it's not as if I don't  
8 check the box.

9 THE COURT: I understand. It's the same ID. It  
10 gets tested to the same level of rigor. But the only way  
11 that I can get it for free is to check "I need this for  
12 voting."

13 THE WITNESS: Let's see exactly. No. It just  
14 says, "All" -- yeah -- "All ID cards used for voting are  
15 free." But then it just says, "Check the box ID for  
16 free." It doesn't say, "If you check that box, this is  
17 only to be used for voting." That's a very important  
18 distinction.

19 THE COURT: I get it. And some people might be  
20 just taking advantage of the system. They don't have any  
21 intention to vote, but they --

22 THE WITNESS: Or they may already have IDs, other  
23 IDs. But I'm saying, hey, you know, 400,000 of these have  
24 been issued. But last time I got mine issued, I had to  
25 pay for it. So now I'm going to get mine renewed or



1 duplicated -- and that's, by the way, the vast bulk of  
2 these -- so why don't I do it for free. It doesn't change  
3 the ID I get; it just means I don't have to pay.

4 THE COURT: I understand.

5 THE WITNESS: That's why these are not for  
6 purposes of voting necessarily.

7 THE COURT: I understand that distinction. Okay.

8 THE WITNESS: Okay.

9 BY MR. KAWSKI:

10 Q. You're really speculating about whether people are  
11 checking that box insincerely, correct?

12 A. I don't know if it's insincerely. The way it's  
13 worded is not crystal clear. It doesn't say, "The free  
14 IDs are only used for voting"; it just says, "Check the  
15 box ID for free"; and it has misleading information on it.

16 It says, "An unexpired Wisconsin driver license is  
17 acceptable photo ID for voting." That's incorrect. It  
18 could have expired, as long as it didn't expire previous  
19 to the last general election. So people aren't even  
20 getting correct information when they go to the DMV.

21 Q. I'm not really sure what you're looking at right now.

22 A. I'm looking at the *Wisconsin Identification Card (ID)*  
23 *Application, Wisconsin Department of Transportation,*  
24 *MV3004*, the thing you fill out when you walk into the DMV.  
25 Got it right off their website.

1 BY MR. KAWSKI:

2 Q. We've been -- we've talked about that exhibit, so I  
3 don't really have any questions for you about it.

4 A. Okay.

5 Q. Again just to put a -- wrap it up, based on your  
6 Table 7 in your rebuttal report, it's fair to conclude  
7 that there were 400,000 approximately IDs issued by  
8 September 2015 for free for the purposes of voting?

9 A. No. We don't agree on that.

10 Q. Okay. But those are your own numbers?

11 A. I agree on the numbers. I don't agree on the way you  
12 put it for all the reasons I just articulated.

13 THE COURT: I understand --

14 THE WITNESS: Just let me finish.

15 THE COURT: -- the point. There's 400,000 in  
16 which that box was checked.

17 THE WITNESS: Exactly.

18 THE COURT: Got it.

19 BY MR. KAWSKI:

20 Q. It sounds like Dr. Lichtman will not agree that  
21 there's a certain number of free IDs issued; is that  
22 right?

23 A. No. These numbers are correct. They are free IDs.  
24 If you want to leave it at that, that they check that box,  
25 I'm there.

1 Q. Okay. And there's actually another table that you  
2 put in your supplemental disclosure that gets at this  
3 issue anyway. Before we go there, I just want to -- this  
4 is an interesting point. Yeah, put this one on the  
5 screen. So you did an analysis of the IDPP in your  
6 rebuttal report; is that right?

7 A. Yeah, based on what I had at the time.

8 Q. So you had the data as of December 2015 that was  
9 provided by the defendants, correct?

10 A. Correct.

11 Q. And you put together a table here, Table 8, which is  
12 on page 15?

13 A. I did.

14 Q. And you analyzed where the petitioners were from,  
15 correct?

16 A. I did.

17 Q. And there were a total of 1,062 petitioners as of  
18 December 2015, correct?

19 A. I believe, based on what we were given. You know, I  
20 can't say that's the exact number. This is based on what  
21 DMV gave to us, yes.

22 Q. So you agree that your Table 8 is accurate?

23 A. Accurate in so far as what the DMV gave to us is  
24 accurate, correct. I do not disagree with that.

25 Q. Fair enough. Why don't we take a look at the

1 supplemental disclosure.

2 A. Yes.

3 Q. And that was from May 22nd.

4 A. Okay.

5 Q. So in the supplemental disclosure you did not address  
6 the text of the May 13th, 2016 emergency rule, correct?

7 A. I think I cited it, but I didn't -- I didn't really,  
8 you know, in this disclosure do much more than give a line  
9 or two and cite the source. But I think I did cite the  
10 emergency rule.

11 THE COURT: You did cite it on these three. I  
12 see it.

13 BY MR. KAWSKI:

14 Q. You not address the procedures that the May 13th,  
15 2016 emergency rule creates, correct?

16 A. No. I didn't go into detail into the procedures,  
17 that's correct.

18 Q. And you did not address how the May 13th, 2016  
19 emergency rule provides that IDPP petitioners will be  
20 getting a state ID card receipt, correct?

21 A. I did address that and I addressed that quite  
22 specifically.

23 Q. Okay.

24 A. If you want me to repeat what I said, I will, but I  
25 gave extensive testimony about that.

1 Q. Okay. On page -- I guess it's an exhibit, PX 472,  
2 which is a chart, flow chart.

3 A. Yeah.

4 Q. Take a look at that one. This has already been  
5 addressed and perhaps you were here for this testimony.  
6 But this flow chart is from September 5th, 2014, correct?

7 A. I'm not sure what it says on it, but I won't dispute  
8 that.

9 Q. Okay. See in the bottom right-hand corner there?  
10 It's up on the screen. It's very small print though.

11 A. Yes, I see it in small print.

12 Q. So this flow chart does not reference the May 13th,  
13 2016 emergency rules, correct?

14 A. Certainly not. This is what's been in effect up to  
15 that point, that's right.

16 Q. So it's not really fair to say that the flow chart is  
17 current with the current emergency rules, correct?

18 A. I haven't seen a new flow chart from the state. This  
19 is the latest we've gotten from the state. So I don't  
20 know if the state has revised or not revised its flow  
21 chart. I certainly -- I'm not going to revise the state's  
22 flow chart based on a very confusing May 13th order.

23 Q. Then if we go to the next exhibit, which is 474, this  
24 was a table you created, correct?

25 A. That's right.

1 Q. And it's entitled *IDPP Petitions by Race - All*  
2 *Petitioners Compared to Citizen Voting Age Population*,  
3 correct?

4 A. Right. And again that's based on what we got from  
5 the state. It says, "Data on petitioners provided by  
6 Wisconsin DMV as of April 19th, 2016." This represents  
7 every single scrap of paper that we got from the state.  
8 My instructions to Perkins Coie was digitize every scrap  
9 of people so that we can --

10 THE COURT: I think we've got the point.

11 THE WITNESS: Okay.

12 BY MR. KAWSKI:

13 Q. I'm very confused by this, Dr. Lichtman. So we  
14 talked about how, in your rebuttal report, you said that  
15 as of December 2015 there were 1,062 petitioners, but in  
16 this exhibit you're saying the total is 981?

17 A. Not at all.

18 Q. No?

19 A. No. I'm saying we got individual records from the  
20 state so that we can prepare this extensive --

21 Q. What is that you're holding?

22 A. PX 345.

23 Q. Could you turn to the last page of PX 345, please?

24 A. Hold on. I'm in the middle of a sentence.

25 Q. Sure.

1 A. This number represents every single individual record  
2 that we got from the state. If the number is short from  
3 some other number that the state published, it's because  
4 we didn't get all of the individual records. But we  
5 utilized all the records we got from the state as of just  
6 a few weeks ago.

7 THE COURT: Okay. So I just want to make sure I  
8 understand. So PX 474, which is your table of IDPP  
9 petitions by race, this represents your analysis of the  
10 individual files that had been provided to you?

11 THE WITNESS: Yes. We have a record here -- this  
12 is the Exhibit I -- that is foundational for this table of  
13 every single individual upon whom we applied our record.

14 THE COURT: I know the document you're referring  
15 to. But just so that the transcript is clear, just give  
16 me the number of that document you have there.

17 THE WITNESS: Yes. PX 345.001.

18 THE COURT: Okay. And that's the comprehensive  
19 table that lists the individual petitioners that the  
20 plaintiffs have put together as guidance to the individual  
21 records.

22 THE WITNESS: And we had to do this on our own  
23 because --

24 THE COURT: I understand.

25 THE WITNESS: -- because the state did not

1 publish this data by race.

2 THE COURT: I understand that. But then the data  
3 from your Table 8, in which you identified the 1,062 as  
4 number of petitions, that's from the DMV's own  
5 comprehensive report of the number of petitions that they  
6 had processed?

7 THE WITNESS: Correct. That's just a summary  
8 report. They did not give us 1,062 individual records.

9 THE COURT: All right. Okay. Back to you,  
10 Mr. Kawski.

11 BY MR. KAWSKI:

12 Q. So we're going to go back to the number 981 and how  
13 it shifts to the number 988 multiple times. So looking  
14 at -- I don't want 345 to go up on the screen, but could  
15 you look at the last page of Exhibit 345, please? And  
16 this is a confidential exhibit.

17 THE COURT: Okay.

18 A. I'm there.

19 Q. What is the count on the last page in terms of the  
20 number of IDPP petitioners in Exhibit 345?

21 A. It says 988.

22 Q. So why is your number 981?

23 A. There may have been some individuals for whom we did  
24 not have complete documentation and could not be included  
25 in this table. It's a very tiny difference; you know,



1 less than a 1% difference. That could not have any  
2 impact. But that's probably the reason, not -- for  
3 example, if you look at No. 19 on this spreadsheet on the  
4 very first page, Alvarado, Figure 0, there isn't a race  
5 listed.

6 Q. So I just want to be clear though. In your rebuttal  
7 report you said that as of December 2015 the number was  
8 1,062. Now you're saying that as of April 19th, 2016, the  
9 number is 981?

10 A. I'm not saying that at all. I don't think you  
11 understood what I'm saying. I'll say it again.

12 THE COURT: Don't say it again. I understood.

13 BY MR. KAWSKI:

14 Q. So again the discrepancy between 988 and 981, which  
15 category do those seven individuals fall into on the  
16 categories on Exhibit 474?

17 A. That's my point. We wouldn't know because we don't  
18 have -- there's a very small number here. We did our  
19 best. Let me tell you, this was a monumental job. We did  
20 our best to identify the race.

21 THE COURT: Let me interrupt. The fact that you  
22 don't know the race of the person on the spreadsheet  
23 doesn't explain it because you have a category in the  
24 table Exhibit 474 --

25 THE WITNESS: The *Unknown*.

1 THE COURT: -- that is the *Unknown* category, so  
2 that can't be there.

3 THE WITNESS: That's a good point.

4 THE COURT: I'm going to guess that at this point  
5 you can't really what happened to the eight.

6 THE WITNESS: It's seven people. And I'm not  
7 sure, I'll have to say. I thought it was because there  
8 wasn't information on them. And I don't know where that  
9 type of discrepancy --

10 THE COURT: All right. We're not going to sort  
11 it our right here. Go ahead, Mr. Kowski.

12 BY MR. KAWSKI:

13 Q. I think the point is moot. And again, to reiterate,  
14 if we look at PX 478, do you see that one? It's called  
15 *IDPP Petitions by Place of Birth*.

16 A. Yes.

17 Q. Here the number 988 appears, correct?

18 A. Yes.

19 Q. Okay. And why is that?

20 THE COURT: "I don't know" is a good answer  
21 sometimes.

22 A. I'm not certain, you know.

23 THE COURT: Political scientists don't like that  
24 answer, but it's a good one.

25 A. I'm being honest.

1 THE COURT: I understand. It's a good answer.

2 A. It's a tiny tiny number out of a thousand people.

3 Q. But it does call into question whether all of your  
4 calculations are accurate, correct?

5 A. I don't think so. Not at all.

6 Q. Okay.

7 A. This is the state's data. If the state -- and the  
8 state produced lots of stuff.

9 THE COURT: We've covered it. Let's let Mr.  
10 Kawski ask his next question.

11 BY MR. KAWSKI:

12 Q. I'll move on.

13 A. If you thought it was inaccurate, you could produced  
14 your own.

15 Q. And we did produce this data to you, correct?

16 THE COURT: Okay. Enough on this subject. Move  
17 on.

18 BY MR. KAWSKI:

19 Q. In 474 I just have a question. When you say,  
20 "percent in citizen voting age population," that is for  
21 Wisconsin, correct?

22 A. Yes.

23 Q. Okay. On 477 you address suspensions, cancellations  
24 and approvals, correct?

25 A. Yes.

1 Q. And suspensions in the IDPP can be due to customer  
2 inaction, correct?

3 A. Yes. This is a very very trying, lengthy, difficult  
4 process. And I'm not -- wouldn't be surprised to see  
5 customer inaction.

6 Q. So the answer is yes?

7 A. Yeah, it could be, sure.

8 Q. And cancellations can be due to a customer's  
9 initiated cancellation, correct?

10 A. For the same reasons I've just outlined, yes.

11 THE COURT: You're not testifying, but I think  
12 the testimony was that they're all customer initiated,  
13 aren't they? Have I misunderstood something?

14 MR. KAWSKI: Suspension I guess, if there's  
15 inactivity, I mean, I guess that's customer inaction  
16 rather than --

17 THE COURT: No, I just mean the cancellations.  
18 All of the cancellations were customer initiated. With  
19 the exception of the deaths, it's customer-initiated  
20 cancellations.

21 THE WITNESS: That's my understanding, too,  
22 although, as we know, there are gray areas here. These  
23 are not absolute categories.

24 THE COURT: Yeah.

25

1 BY MR. KAWSKI:

2 Q. Okay. On Exhibit 478 you highlighted petitioners  
3 born in Illinois, correct?

4 A. Yes.

5 Q. Is there -- do you have some opinion about Illinois'  
6 process for providing vital records?

7 A. I don't have an independent opinion. But I read the  
8 depositions and the very people who do this cited  
9 particular problems with Cook County. They highlighted  
10 Cook County and they highlighted southern states, which is  
11 why I prepared the table the way I did.

12 Q. When you said *Born in Illinois*, did you mean only  
13 born in Cook County?

14 A. We don't have data about only born in Cook County.  
15 But, you know, this is just -- we may have data on Cook  
16 County. I don't think so. Yeah, we just have birth place  
17 by state. We don't have birth place by county. But my  
18 examination of individual records indicates that, not  
19 surprisingly, there's a preponderance in Cook County of  
20 those born in Illinois.

21 Q. Okay. And just so to clarify, when you said "the Jim  
22 Crow South" and you put an asterisk, do you know what  
23 states in particular you were referencing?

24 A. I do. 17 states. It's the 11 states of the old  
25 Confederacy plus six border states, unfortunately

1 including my home state of Maryland.

2 Q. Okay. So I guess maybe to clarify the record then,  
3 could you say which of the states are the nonborder states  
4 so we can figure out which the 17 are maybe?

5 A. I don't think I can name you all 43 other states.  
6 But I think the border states are Oklahoma, Missouri,  
7 Kentucky, Delaware, Maryland, West Virginia. I think  
8 that's close. I may be off by one or two, but that's  
9 pretty close.

10 Q. There's one thing I've learned about you: you have an  
11 excellent memory.

12 A. I'm amazed at my age sometimes. Gosh.

13 Q. And then turning to Exhibit 480, this is a chart  
14 showing free state ID cards issued for purposes of voting  
15 by race and ethnicity from July 2011 through April 2016,  
16 right?

17 A. Right.

18 Q. Did you not provide a grand total, correct?

19 A. I believe this just came from the state, if I'm not  
20 mistaken.

21 Q. Okay.

22 A. I think the state did this chart.

23 Q. I added up the numbers in the bottom row and it adds  
24 up to 419,593, correct?

25 A. None of us are disputing that.

1 THE COURT: I want to know where it comes from,  
2 if we can.

3 BY MR. KAWSKI:

4 Q. Could you explain where you got these data?

5 A. I think this was prepared by the state, if I'm not  
6 mistaken.

7 Q. And in the state's exhibit though there was a grand  
8 total roll or grand total of they added up all of the  
9 totals, correct?

10 A. I don't remember, but I wouldn't -- I'm not disputing  
11 the totals.

12 Q. So you would agree that there were 127,938 original  
13 free state ID cards issued for purposes of voting between  
14 July 2011 and April 2016, correct?

15 A. That's what the state says, although -- I'm not going  
16 to go over it again -- we have disputes over purposes of  
17 voting.

18 Q. Okay. All right. Let me just look over my notes  
19 from yesterday and I think we're almost done. You  
20 talked -- obviously your opinion was about intent. You  
21 would agree that intent requires someone to take  
22 individual action, correct?

23 A. I'm not sure I understand your question, because a  
24 legislature takes individual and collective action.

25 Q. Okay. I guess I'm not focusing on the Legislature

1 with that question; I'm focusing on the DMV.

2 A. Okay. Sorry.

3 Q. You would agree that if the DMV was engaged in some  
4 kind of behavior that had a disparate effect that in your  
5 opinion, someone would have to be acting intentionally?

6 A. Not at all. I think the DMV people are caught in a  
7 very bad system. These DMV people, they --

8 THE COURT: I think I understand that. We've  
9 talked about it extensively. I want to get -- I want  
10 Mr. Kowski to get the questions he wants answered by you.  
11 Go ahead.

12 BY MR. KAWSKI:

13 Q. So what I'm driving at is, are there individual  
14 actors at the DMV that are engaged in bad behavior?

15 A. I'm not contending that at all. I haven't even  
16 looked at that. But I think they are in a very bad system  
17 that leads to bad results.

18 Q. There's no one person at DMV that you're pointing the  
19 finger at?

20 A. No.

21 Q. And when I say "pointing the finger at," I mean  
22 pointing the finger at in terms of engaged in intentional  
23 racial discrimination.

24 A. I haven't looked at the intent of any individual DMV  
25 person. I've looked at the system.



1 Q. Okay. When you say "the system," you mean the ID  
2 petition process?

3 A. And what underlies it, which is the driver's license  
4 process. And that's part of the whole problem here  
5 because these people were trained to give out driver's  
6 licenses. That's why they always talk about legal  
7 presence, which has no relevance whatsoever to voting,  
8 because you can be legally present and not a citizen. And  
9 that's why you have this backdoor citizenship requirement,  
10 because that's a driver's license requirement, and they've  
11 just carried over inappropriate driver's license  
12 procedures for something entirely different that's  
13 identification for voting. That's the problem with the  
14 DMV. I haven't, you know, accused any individual of  
15 anything.

16 Q. Going back to your initial report -- it's Exhibit 36,  
17 page 51 -- and this is back to the topic of Dale Schultz  
18 and the statements he made on *92.1 The Mic* --

19 A. Yes. I'm there.

20 Q. -- you say that this is evidence of contemporaneous  
21 viewpoints?

22 A. Absolutely. Remember, this legislation that we're  
23 talking about goes from 2011 to 2014. This is a time that  
24 litigation, as you pointed out to me, litigation is going  
25 on. There's still great controversy over this. This is

1 not, you know, something that was said long after the  
2 fact. This is still a lively controversy.

3 Q. Let me stop you there. So this statement was made in  
4 May 2014, correct?

5 A. I think it's March 2014.

6 Q. Okay. It was made in March 2014, right?

7 A. Yes.

8 Q. But, in your view, that's contemporaneous with the  
9 Legislature, for example, passing the Voter ID law in May  
10 2011?

11 A. No. But it's contemporaneous with passing other laws  
12 and with the debates and conflict and controversy over the  
13 passage of the law. And he's also talking about the  
14 passage of the law, something he was directly and  
15 personally involved with. So I don't think  
16 contemporaneous has to be limited to that very narrow  
17 slice of time. I think at a time when the controversy is  
18 still going on and someone is talking about something they  
19 were personally involved in I think it's relevant.

20 Q. But you were very careful to say in your testimony  
21 earlier that you limited your analysis to events, data,  
22 statistics that occurred before Act 23 was passed,  
23 correct?

24 A. No. Recall I also looked at effects beyond the  
25 passage of Act 23, like the GAO study and the Texas study.

1 But in terms of assessing what was before the Legislature,  
2 what information they had, I looked at things that were  
3 available in 2011. This is something different than that.

4 Q. Okay. And so you also, in your direct examination,  
5 talked about a statement by Senator Grothman at the time  
6 regarding nipping something in the butt, right?

7 A. Early voting.

8 Q. And when was that statement made?

9 A. It was during the debate over early voting. I don't  
10 remember exactly, maybe 2013.

11 Q. Okay.

12 A. And that was when the early voting stuff was being  
13 debated and enacted.

14 Q. Let's look at Defense Exhibit 101. This is the GAB  
15 131 Form for registering to vote. And in your direct  
16 examination you talked --

17 A. Hang on. I haven't found it.

18 Q. I'm sorry. It's not in the packet. You'll have to  
19 look at the screen.

20 A. Good. I won't have to shuffle paper.

21 Q. Have you seen this before?

22 A. I might have. I've seen so many of these. I can't  
23 read it on the screen, but...

24 Q. I've highlighted a portion that we're going to zoom  
25 in on. You testified in your direct examination that you

1 were troubled by the fact that the DMV products basically  
2 require someone to affirm their citizenship?

3 A. No.

4 Q. What did you say then?

5 A. Required documentary proof.

6 Q. Documentary proof of citizenship?

7 A. Let me finish. And that's fundamentally different  
8 than affirming your citizenship. So someone, you know,  
9 like Johnny Randle, or whoever, these folks, you know,  
10 plaintiffs and others.

11 THE COURT: I get the distinction.

12 THE WITNESS: Okay.

13 BY MR. KAWSKI:

14 Q. So my question for you then is, when someone has to  
15 affirm under oath, or under penalty punishable by a Class  
16 I felony that they are a U.S. citizen, you're saying  
17 that's different in kind from the DMV requirements?

18 A. Fundamentally. If you change the law so that I could  
19 vote just by affirming I'm a registered voter and a U.S.  
20 citizen, that would fundamentally change the whole voter  
21 ID process in the state of Wisconsin, absolutely.

22 Q. And this will be the final question. So back to the  
23 IDPP. You are not -- you are not taking the position --  
24 do not have the opinion that minorities who enter that  
25 process were denied an ID product because they were

1 minorities, correct?

2 A. Let me explain. I don't think a minority walked in  
3 and a DMV examiner said, "Oh, my gosh, that's a minority;  
4 I'm going to treat them differently." I have no evidence  
5 of that. What I am saying is, this was all predictable,  
6 because minorities tend to be, as we see, from the south,  
7 from Cook County, from out of state. They have lower  
8 education, lower socioeconomic standing. Those are the  
9 very kind people who are going to have great difficulty  
10 coming up with the documents and navigating this kind of  
11 system. That's why we're not talking about aggregates;  
12 we're talking about particular segments of the electorate  
13 foreseeably impacted in this way.

14 Q. So the answer is *no*?

15 A. Well, not directly, but indirectly, yes.

16 MR. KAWSKI: Okay. I have no further questions.  
17 Thank you.

18 THE COURT: Okay. Let's do the redirect.

19 MR. SPIVA: May I have just a moment to confer  
20 with my colleagues, Your Honor?

21 THE COURT: Yes. Doctor, how are you doing? We  
22 could take a break now.

23 THE WITNESS: I do need a break, but I'll try to  
24 grit it out if it's a brief redirect.

25 THE COURT: I expect it to be brief.

1 MR. KAWSKI: Your Honor, before the redirect,  
2 could I move the exhibits into the record?

3 THE COURT: Yes.

4 MR. KAWSKI: I could read the list again. One  
5 moment. Those would be Defense Exhibits 8.

6 THE COURT: Hold on one second here. Mr. Spiva  
7 needs a chance to talk.

8 MR. KAWSKI: Okay. I'll wait.

9 (Discussion held off the record.)

10 MR. SPIVA: I think I just have one question,  
11 Your Honor.

12 THE WITNESS: Then I'll grit out for you.

13 REDIRECT EXAMINATION

14 BY MR. SPIVA:

15 Q. Dr. Lichtman, you were asked a number of questions  
16 about the North Carolina decision.

17 A. Indeed.

18 Q. And you also were involved in the preliminary  
19 injunction stage of that proceeding, were you not?

20 A. Yes, indeed.

21 Q. And are you aware of what happened on appeal of the  
22 same judge's denial of the plaintiffs' motion for  
23 preliminary injunction in that case?

24 A. It was reversed and overturned.

25 Q. And you're aware that the Fourth Circuit Court of

1 Appeals found that the district court had made eight  
2 different errors in its --

3 A. I remember the term *eight different errors*, yes.

4 MR. SPIVA: Thank you. No further questions,  
5 Your Honor.

6 THE COURT: All right. Wonderful.

7 MR. KAWSKI: Your Honor, would now be a good time  
8 to address these exhibits?

9 THE COURT: Yes. Let's see if we can do this  
10 with Dr. Lichtman on the stand in case anything comes up  
11 that needs to be addressed, but I think it's unlikely. Go  
12 ahead.

13 MR. KAWSKI: I would move Defense Exhibit 8 into  
14 the record.

15 THE COURT: 8 and then just tell me very briefly  
16 what it is.

17 MR. KAWSKI: That's the Stephen Ansolabehere  
18 article in *PS: Politics*. And I can't remember what the *PS*  
19 stands for, but the Exhibit 8.

20 THE COURT: Any objection?

21 MR. SPIVA: No objection, Your Honor.

22 THE COURT: Okay. 8 will be admitted.

23 MR. KAWSKI: Exhibit 9 is the excerpt from the  
24 Milwaukee County website.

25 THE COURT: Is that on the marriage licenses?

1 MR. KAWSKI: Yes.

2 MR. SPIVA: No, objection, Your Honor.

3 THE COURT: Okay. That's admitted.

4 MR. KAWSKI: Exhibit 10, the copy that the Court  
5 has on disc, is the entire North Carolina decision in the  
6 *NAACP v. McCrory* case.

7 THE COURT: We'll mark that for identification  
8 purposes. It doesn't need to be admitted into evidence.

9 MR. KAWSKI: Exhibit 142, which is one of the two  
10 Marquette Law School polls. The other is Defense Exhibit  
11 254. I would move both of those in.

12 THE COURT: So that's 142 and 254, Marquette  
13 University polls. Any objection?

14 MR. SPIVA: No objection, You Honor.

15 THE COURT: 142 and 254 are admitted.

16 MR. KAWSKI: Exhibit 143, Pew Research Center  
17 October 11, 2012 poll.

18 THE COURT: Is it 143 or 153?

19 MR. KAWSKI: It's 143.

20 THE COURT: 143 is the Pew poll. Any objection?

21 MR. SPIVA: I can't find it, but no objection,  
22 Your Honor.

23 THE COURT: Okay. Good.

24 MR. KAWSKI: Exhibit 281 is the *Barbara Lee v.*  
25 *Virginia State Board* decision.



1 THE COURT: Okay. Again I'll mark that for  
2 identification purposes, but it doesn't need to be in  
3 evidence.

4 MR. KAWSKI: The only other exhibit was Defense  
5 Exhibit 101, which is the GAB 131 Voter Registration Form.

6 MR. SPIVA: No objection, Your Honor.

7 THE COURT: Okay. I'll admit 101.

8 MR. KAWSKI: Okay. I think that's it. Thank  
9 you.

10 THE COURT: Very good. Thank you all. Let's  
11 take our morning break now. So we'll reconvene at ten  
12 minutes after 10.

13 (Recess at 9:53 until 10:10 a.m.)

14 THE COURT: All right. So just a couple of  
15 housekeeping matters. One is truly housekeeping. And  
16 it's awkward and unfortunate that we have to do this. But  
17 we have a full house with trials going on today, so my one  
18 o'clock criminal proceeding will have to be in here. So  
19 that's going to be particularly difficult for you folks  
20 because you have to make that table clear for a criminal  
21 matter, which means that you have to have it substantially  
22 cleaned off at one.

23 MR. KAWSKI: We will.

24 THE COURT: So the marshals will not let you have  
25 pencils and pens and stuff sitting there. Hopefully an

1 unreasonable concern for the safety of everybody in the  
2 courtroom, but that's how they do it. So, anyway, you'll  
3 have to do that.

4 Second thing is I know there are motions pending on  
5 Dr. Lichtman's testimony. The fundamental objection,  
6 which I don't believe has really been presented to me in  
7 the form of a motion, the one that the North Carolina  
8 court dealt with, is whether his -- it's one that I  
9 expressed, which is whether Dr. Lichtman's testimony  
10 really goes to the ultimate issue in the case. I will  
11 deal with that in my opinion.

12 As I said, I thought Dr. Lichtman's testimony was  
13 very interesting. But the weight that I will give his  
14 conclusions will be a matter that I'll consider at more  
15 length and after I have time to reflect on it and after I  
16 have time to hear your input on it. But at the beginning  
17 I expressed my concern about whether it really was  
18 certainly not the ordinary terrain of an expert. But more  
19 fundamentally whether it's the proper terrain of an expert  
20 I think is a serious question.

21 And just to frame it a little bit more, I think that  
22 the work that historians do are of immense value, but it's  
23 so fundamentally different from the work that courts do.  
24 And just to give you one particularly salient example is  
25 that historians rely on hearsay evidence all the time. I

1 don't know how they could do their work without relying on  
2 hearsay. Of course that's strongly disfavored in the  
3 courts of law. That's just one example.

4 And so the kind of causal theories that an historian  
5 relies on, very valuable in their realm but not really cut  
6 to the same pattern of rigor that courts of law require.  
7 As I said, just one example.

8 I recognize though that the tension between the  
9 evidentiary rigor that I would ordinarily reply becomes  
10 complicated when I'm applying the *Arlington Heights*  
11 factors, which open up broad vistas of factors to consider  
12 under that framework. So that's an issue that I'll deal  
13 with in the opinion.

14 There is the difficulty that is posed by the  
15 untimeliness of the disclosure, at least the potential  
16 untimeliness of the disclosure. And here are my concerns  
17 with the supplemental disclosure:

18 It's out of the ordinary and so it's off the schedule  
19 for Rule 26 disclosures. And so the exclusion is  
20 automatic and mandatory unless I find that the  
21 supplementation was either justified or harmless. I see  
22 that it is partly justified.

23 The emergency rule itself is not really so much the  
24 topic of the supplemental disclosure. It seems that it's  
25 really more driven by the update of the data from the DMV

1 regarding the petition process and there was late-breaking  
2 updates. I especially don't fault the DMV for it.  
3 They're continuing to work on it. They have new data.  
4 They produced it. I think you're entitled to respond to  
5 it.

6 But in the main, Dr. Lichtman really didn't update  
7 his charts with the newest data. He really redid some  
8 newer calculations more or less on the older versions of  
9 the ID petition process data, so I have some concerns  
10 about whether his supplemental report is actually  
11 justified because he didn't use the newest data. On the  
12 other hand, I don't really see much harm from it because  
13 it seems to me that it kind of says the same thing that he  
14 had already said.

15 So of course I'll start really with the defense.  
16 Substantively, what is the prejudice from the supplemental  
17 report? I don't see that he adds very much frankly.

18 MR. KAWSKI: I just cross-examined him. It's  
19 very hard to argue prejudice. I mean I think if the  
20 cross-examination was effective to the Court, then I can't  
21 argue any prejudice.

22 I think that the fact that it was untimely is always  
23 prejudicial. It gives us very little chance to prepare  
24 for it. I was prepared to go yesterday on less than  
25 24-hours notice of Dr. Lichtman's supplemental disclosure.

1 It doesn't allow me to do much in the way of digging into  
2 DMV records.

3 For example, the issue of the 981 count, if I had  
4 more time I could go back and try and duplicate the count  
5 at the time of April 19th perhaps. I had no time to do  
6 anything like that, so I had to do the best I could.

7 THE COURT: Arguably you're better off having me  
8 sitting here wondering what the heck happened to the other  
9 seven voters rather than answering the question for me.

10 MR. KAWSKI: I agree.

11 THE COURT: I'm going to deny the motion to  
12 exclude the supplemental report. It's not necessarily  
13 good news for plaintiffs because I'm basing this on the  
14 conclusion that there really wasn't anything with any  
15 punch to it that was added, so I find that there's no  
16 prejudice to giving Dr. Lichtman the opportunity to  
17 supplement his report. But, also, it alleviates whatever  
18 prejudice the plaintiffs had for the late disclosure of  
19 the data because they had the chance to deal with it  
20 however they chose to. And what they chose to do with  
21 Dr. Lichtman was more or less up to them.

22 So I'm going to deny the motion to suppress -- or  
23 motion to strike the supplemental report, so that's in.  
24 It's all part of what we'll decide, so it's all fodder for  
25 your briefing later. So there's no evidentiary

1 restriction on Dr. Lichtman's testimony.

2 MR. SPIVA: Thank you, Your Honor. There were a  
3 couple things that I wanted to raise before we kind of  
4 passed the button.

5 THE COURT: Sure.

6 MR. SPIVA: One, one of our witnesses that we  
7 were going to call is actually a plaintiff, Scott Trindl.  
8 He's had serious health issues. He's authorized me to  
9 alert the Court that he's been in the hospital for heart  
10 problems and so we're not going to be able to call him as  
11 a witness.

12 I talked to Mr. Kowski about it and he's agreed.  
13 Obviously if this is acceptable to the Court we would like  
14 to designate -- he was deposed -- we would like to  
15 designate portions of his deposition. And of course the  
16 defendants would have the opportunity to cross-designate  
17 and submit that in lieu of his testimony.

18 THE COURT: Okay. I'll accept that.

19 MR. SPIVA: Thank you, Your Honor.

20 MR. KAWSKI: Thanks.

21 THE COURT: Very good.

22 MR. SPIVA: And there's one other thing on  
23 exhibits. I know I think Your Honor had asked us to kind  
24 of provide a list of exhibits that had been admitted and  
25 we were going to deal with exhibits kind of towards the

1 end. I wanted to make a proposal. And I think this was  
2 acceptable to Mr. Kowski and we talked about it briefly.  
3 We now have a list of exhibits that have been admitted.  
4 We have a list of exhibits to which there was at least not  
5 an objection as of the time of the pretrial, but that we  
6 haven't obviously moved explicitly into evidence during  
7 the trial.

8 THE COURT: Sure.

9 MR. SPIVA: And then a list of exhibits that, you  
10 know, where there is an objection or at least there was an  
11 objection as of the time of the pretrial. We also had  
12 removed some exhibits that we're not going to any longer  
13 seek to move into evidence.

14 I'd like to exchange similar lists with Mr. Kowski.  
15 And if we could have a little more time to confer. Today,  
16 for instance, Your Honor, there were exhibits that they  
17 put in that we had originally objected to that I withdrew  
18 the objection on and I think we may be able to make some  
19 more progress on that.

20 THE COURT: I'll allow that. And I'll tell you  
21 that I had hoped at the beginning of the trial that, for  
22 the most part, you could tell me when you brought up an  
23 exhibit that it's not objected to. That didn't seem to  
24 play out. And so starting on the second day of trial I  
25 tried to encourage people to make motions on the exhibits

1 as they were going.

2 So that means that starting on the second day of  
3 trial I kept pretty good notes of what was moved and what  
4 was objected to and my rulings. First day of trial is  
5 somewhat ambiguous to me. So if you do this procedure I  
6 think that would be very helpful to the Court and I'll  
7 give you more time to do it.

8 MR. SPIVA: Okay. I appreciate that. And I  
9 think it is a fairly limited universe of documents on  
10 either side that are still objected to, so I don't think  
11 there's, like, a mass of stuff.

12 THE COURT: I agree. At least it will help focus  
13 us and we can rule on objections. So I'll -- your case  
14 will be held open in order to get that done.

15 MR. KAWSKI: Your Honor, I have one more thing.  
16 And, Bruce, I apologize, this just came to mind. The  
17 parties have added a number of exhibits as we've gone  
18 along. So the lists that were filed with the Court on the  
19 first day of trial are not current. I know that in  
20 looking at our lists there were typographical errors in  
21 four of the entries that we were going to correct anyway.

22 I'm wondering what the Court's expectation is as far  
23 as when we'll submit a final list that has everything and  
24 then a disc that has exhibits that were not on the first  
25 disc that have been added as we've gone along.



1 THE COURT: I'd be happy to have you do that.  
2 The reason, the pretrial disclosures to me really serve  
3 two purposes: one, it's to allow the sides to lodge  
4 objections and resolve them and have the Court resolve  
5 them. Usually the ultimate determination is done during  
6 trial and there is no real final exhibit list. We just --  
7 we've gone through the trial and people keep track and  
8 when we have the exhibits they're boxed up and sent in.

9 In this case, because we have a trial to the Court,  
10 one, I'll rely on the parties to get me this updated list,  
11 I'll rule on any objections that are still pending, and  
12 then you can compile a comprehensive disc of documents  
13 that you can submit to me.

14 MR. KAWSKI: My concern is that there are a  
15 number of exhibits that were shown on screens that the  
16 Court just doesn't have at all, so we're going to need to  
17 give the Court a disc.

18 THE COURT: Good. Okay. That makes sense. So  
19 I'll allow you some more time to work out what exhibits  
20 are still contested and a comprehensive list of what  
21 actually has been submitted to the Court.

22 MR. KAWSKI: Thank you.

23 THE COURT: I mean, what has been offered in  
24 evidence and then will subsequently be submitted to the  
25 Court.

1 MR. KAWSKI: Thank you.

2 MR. SPIVA: Thank you.

3 THE COURT: Anything else before the defense  
4 begins its case?

5 MR. SPIVA: Not from us.

6 MR. KAWSKI: Your Honor, and I'm not forcing the  
7 issue here, but are the plaintiffs resting their case  
8 currently?

9 THE COURT: I think, as I understand, it's  
10 subject only to the submission of the deposition  
11 designations for the plaintiff. I think you are resting;  
12 is that right?

13 MR. SPIVA: The exhibits, the Trindl  
14 designations, and then there is this one deposition that's  
15 happening -- I think we have a date later this week --  
16 Thursday morning and so we'd like to be able to submit  
17 from that. This was the woman who lives in Laos I  
18 believe.

19 THE COURT: Yeah. And you're looking for your  
20 opportunity to make a motion?

21 MR. KAWSKI: Well, I mean, we were considering  
22 it, so it would be good to know if there's an official,  
23 on-the-record *plaintiffs rest*.

24 THE COURT: Well, let's do it this way: we still  
25 have some open materials here, but let's say, at the end

1 of the day today, let's just take a little bit of time and  
2 you can make your motion.

3 MR. KAWSKI: And it's still in debate whether  
4 we're going to or not. You know, it will relate to  
5 standing issues basically. So whether we make it or not,  
6 it will be an oral motion regardless.

7 THE COURT: Okay. All right. Then I'll just  
8 check in with you at the end of the day. And if you want  
9 to sleep on it overnight, we can do it tomorrow.

10 MR. SPIVA: And I think this was clear, but in  
11 terms of this list process, our intention would be to move  
12 in additional exhibits *en masse*, the ones that are not  
13 objected to, and then we would obviously have some debate  
14 on the ones that are objected to.

15 THE COURT: Yes. I understand. We will need  
16 some court time to go over whatever exhibits are still  
17 objected to.

18 MR. SPIVA: Okay. Thank you.

19 THE COURT: All right. So with that --

20 MS. SCHMELZER: Yes, Your Honor. We're going to  
21 call Constance McHugh.

22 THE COURT: Okay. Very good.

23 (10:28 a.m.)

24 **CONSTANCE MCHUGH, DEFENDANTS' WITNESS, SWORN**

25

DIRECT EXAMINATION

1  
2 BY MS. SCHMELZER:

3 Q. Good morning, Ms. McHugh.

4 A. Good morning.

5 Q. Could you state your name and spell that for the  
6 record?

7 A. Constance McHugh, C-O-N-S-T-A-N-C-E, last name is M-C  
8 capital H-U-G-H.

9 Q. And where are you currently employed, Ms. McHugh?

10 A. The City of Cedarburg.

11 Q. What is your position there?

12 A. City clerk.

13 Q. How did you get that position?

14 A. I applied for the position about nine years ago.

15 Q. And what did you do before becoming the City Clerk of  
16 Cedarburg?

17 A. Prior to working in Cedarburg I was the village clerk  
18 and assistant village manager for the City of Fox Point.

19 Q. And how long were you the assistant village clerk and  
20 city manager at Fox Point?

21 A. Village clerk and assistant village manager. I was  
22 in Fox Point about 20 years.

23 Q. And can you, I guess with your experience at  
24 Fox Point and Cedarburg, can you explain your experience  
25 in elections administration?

1 A. I've been working in elections since I believe 1989.  
2 I supervise voter registration and manage elections. I  
3 equip the polling place, order supplies, set up the  
4 polling places, order ballots. I mail out absentee  
5 ballots, assist with in-person absentee and supervising  
6 in-person absentee voting, review and certify nomination  
7 papers. I hire and train and discipline poll workers and  
8 election staff.

9 Q. Did you do that at both Fox Point and in Cedarburg?

10 A. Yes.

11 Q. And what are your other duties as City Clerk of  
12 Cedarburg?

13 A. My office and myself provide support staff for the  
14 common council and other boards and commissions. We work  
15 a lot in licensing, board of appeals, board of review  
16 cases, and a variety of other duties in terms of public  
17 service and customer service.

18 Q. Do those other duties stop at election time?

19 A. Pretty much, yes.

20 Q. Can you tell me a little bit about Cedarburg?

21 A. Population of about 11,500 people, about 20 miles  
22 north of Milwaukee in Ozaukee County, predominantly a  
23 white population, very close-knit community.

24 Q. How many registered voters do you have in Cedarburg?

25 A. About 8,000.

1 Q. I'd like to talk now about some of the changes that  
2 were made back in 2011. Let's start with the in-person  
3 absentee voting process. We've heard testimony about that  
4 process, so I don't think we need to repeat that. But  
5 focusing on the limit of one location per municipality for  
6 in-person absentee voting, did that have any effect in  
7 Cedarburg.

8 A. It did not.

9 Q. They only had one location to begin with?

10 A. We only permit in-person absentee voting at City Hall  
11 in the City Clerk's Office.

12 Q. If do you see any advantages to having just one  
13 location for in-person absentee voting?

14 A. Not really.

15 Q. You don't see any advantages to that?

16 A. Oh, I'm sorry. I see advantages to having only one  
17 location for in-person absentee voting, yes.

18 Q. What are those advantages?

19 A. I have more control over the process, my staff is all  
20 in one location, more security in terms of keeping the  
21 absentee ballots, and I would need less resources and less  
22 staff if I only have one place for absentee voting.

23 Q. How much staff do you currently have?

24 A. I have one full-time deputy clerk and a very  
25 part-time administrative assistant.

1 Q. And do you have the ability to hire more staff?

2 A. No.

3 Q. You mentioned ballot security. What do you mean by  
4 that?

5 A. I mean in terms of what happens to ballots, after  
6 they are voted in our office or at any location, being  
7 kept in a secure location without being transported, you  
8 know, many times or to many different places.

9 Q. Do you think voters would be confused if you had more  
10 than one location for in-person absentee voting?

11 A. I think they probably would be. I have a lot of  
12 absentee voters, in-person absentee voters. They know to  
13 come to City Hall for that.

14 Q. Let's talk about you said you had a lot of in-person  
15 absentee voting. Do you know how much you had in the  
16 April election?

17 A. In April I had about 749 absentee ballots that were  
18 actually returned and cast. 489 of them were in-person  
19 absentee voters.

20 Q. Do you happen to know how many of those were actually  
21 on the last day of in-person absentee voting?

22 A. I would guess it would be about 100 at least.

23 THE COURT: And just to make sure that I don't  
24 misunderstand, the 749 absentee ballots, that includes  
25 both in-person and mail-in?

1 THE WITNESS: That were returned, yes.

2 THE COURT: So 489 is the in-person count?

3 THE WITNESS: Yes.

4 THE COURT: So if I subtract that, then I've  
5 found the number of mail-in ballots?

6 THE WITNESS: That were returned, yes.

7 BY MS. SCHMELZER:

8 Q. Let's talk about what goes on in the Clerk's Office  
9 in the weeks before in-person absentee voting starts.  
10 Let's start the week before that; what's going on at that  
11 time?

12 A. Generally we're fulfilling requests for mail-out  
13 ballots that come in. They come in at a pretty steady  
14 speed. We are also entering registrations that we get  
15 during that time, voter registrations. I also prepare the  
16 ballots for the care facilities that are taken by the  
17 special voting deputies. And then I try to get as much  
18 other unrelated election work done prior to the start of  
19 in-person voting.

20 Q. When in-person absentee voting starts are you able to  
21 do those other duties as well?

22 A. I'm able to do them at night or on the weekends.

23 Q. So it occupies a lot of your time?

24 A. Yes.

25 Q. The so let's talk about the period of time that is



1 allowed for in-person absentee voting. Has Cedarburg ever  
2 had a longer period of time for in-person absentee voting  
3 than the 10 days before -- the 12 days before I guess the  
4 election?

5 A. We have always complied with the law. So since the  
6 law changed people have voted in that period, two-week  
7 period before an election. Prior to that we allowed  
8 absentee voting wherever we received the ballots.

9 Q. You say "wherever you received the ballots." Was  
10 that at a designated time every election?

11 A. It varied from one election to another election.  
12 Primaries we might get ballots 21 days ahead of time.  
13 Other elections we were supposed to get ballots 30 days  
14 ahead of time. Sometimes that doesn't always work and we  
15 would get it in a smaller time period.

16 Q. Did that ever cause any -- the different times that  
17 the ballots came before the law changed, did that ever  
18 cause any confusion amongst voters of when they could come  
19 and vote in-person absentee?

20 A. I think it might have before the law changed because  
21 there were no set dates as to the when in-person absentee  
22 voting started. If somebody called and wanted to know  
23 when they could cast a ballot, we said wherever the  
24 ballots were available. We couldn't give them a specific  
25 date. Now if people call or e-mail we can tell them that

1 absentee voting starts on Monday morning at eight o'clock.

2 Q. Do you know if all the municipalities get the ballots  
3 at the same time on the same day?

4 A. I don't believe they do even in the same counties.  
5 Even in the county we don't all get them on the same day  
6 or the same time.

7 Q. So let's talk about that change in the law that put  
8 that 12-day period before the election into place as well  
9 as the restriction on the hours from 8 to 7 p.m., no  
10 weekend before and no Monday before. Is that something  
11 that, as a clerk, you support?

12 A. I do support that because I think it's a very  
13 consistent time frame.

14 Q. Are there any benefits to having that, I guess, no  
15 weekends, no Monday before the election, and cutting --  
16 setting those hours?

17 A. There is a benefit in terms of the hours because I  
18 don't have staff to assist with in-person absentee voting  
19 at night or on the weekends. My deputy and I both attend  
20 frequent night meetings, so we don't have staff to really  
21 hold in-person voting outside of the -- in-person voting  
22 outside of the weekdays.

23 Q. What about the Monday before Election Day, what's  
24 going on in the Clerk's Office?

25 A. There's an awful lot that goes on in terms of getting

1 ready for the election the next day. And that might be  
2 getting absentee ballots ready to get over to the polling  
3 location. I spend a good part of the day actually setting  
4 up the polling location. We have a good number of phone  
5 calls about where people vote, what time the polls open,  
6 so it's a lot of customer service. And, you know, it's a  
7 full day of getting ready for the election the next day.  
8 And actually it's a continuation of the work that I've  
9 done on Saturday and Sunday to get ready for Tuesday  
10 morning.

11 Q. And let's talk a little bit about the absentee  
12 ballots by mail. There was a change in Act 75 that  
13 eliminated faxing or emailing ballots. Is this a change  
14 that you supported?

15 A. Yes.

16 Q. Why?

17 A. It's very time consuming to fax and e-mail ballots,  
18 especially trying to juggle it with people that are coming  
19 to vote in person. And, you know, I would have to devote  
20 a lot of resources to stand at a fax machine or to stand  
21 at a copier and scan ballots and then hope that they get  
22 to the person on the other end.

23 I also did have problems emailing ballots to some  
24 military voters who were on a ship. And they often did  
25 not have enough bandwidth, enough Internet resources on

1 the ship to get the ballots.

2 Q. So you're at the mercy of the Internet resources?

3 A. Right. So many times it required emailing or faxing  
4 two or three or four times.

5 Q. Do you have any concerns about security I guess of  
6 faxing or emailing ballots to individuals?

7 A. Yes, in the sense that it has happened that emailed  
8 ballots have been forwarded to other people who have not  
9 requested an absentee ballot.

10 Q. And that happened in Cedarburg?

11 A. It happened in the town of Cedarburg I know.

12 Q. Do you know what result -- what resolution that came  
13 to or what happened as a result?

14 A. Their ballot, at the end of the night on Election  
15 Day, was rejected. They didn't have a written request on  
16 file for that ballot.

17 Q. And when those ballots are returned have you had an  
18 instance where a military or permanent overseas voter was  
19 faxed a ballot by you?

20 A. And had them returned?

21 Q. Yes.

22 A. Mm-mm.

23 Q. What happens when those are returned?

24 A. They're dated and they're recorded in the system as  
25 being returned and they're filed with the rest of the

1 ballots in a secure room.

2 Q. And do you have to recreate that on another ballot  
3 when it's opened on Election Day?

4 A. The election workers will remake that ballot on  
5 Election Day because it's on paper and the paper ballots  
6 cannot be fed through the voting equipment.

7 Q. Is that one election worker that does that?

8 A. It's two election workers.

9 Q. Let's talk about some of the changes to the  
10 registration process. The elimination of corroboration,  
11 is that something that you've seen have a large effect in  
12 Cedarburg or any effect at all?

13 A. I don't think it has had any impact on the city of  
14 Cedarburg at all.

15 Q. Why do you say that?

16 A. I rarely saw corroboration used frequently in the  
17 past, either in Cedarburg or in Fox Point. It was just  
18 something that was not used -- wasn't used very often, in  
19 my opinion.

20 Q. Okay. Have you observed any instances where you  
21 thought corroboration was being abused?

22 A. I witnessed one situation many years ago in the  
23 former community I worked for where somebody did come in  
24 to register to vote without proof residence and he did ask  
25 for corroboration among many voters there. Many voters

1 knew him; however, they did not know that he resided at  
2 that new address.

3 Q. Did you get an impression that voters felt pressured  
4 to corroborate?

5 A. I think they did. I think they kind of shied away  
6 from that situation.

7 Q. Have you seen a decrease in voter registrations in  
8 Cedarburg since corroboration was eliminated?

9 A. No.

10 Q. Have you seen anyone come to you or been aware of  
11 anyone who was unable to provide a proof of residency  
12 without corroboration?

13 MR. MARTIN: Objection, Your Honor. We've had a  
14 fair amount of leading questioning here.

15 THE COURT: I don't think so. Overruled. Go  
16 ahead.

17 BY MS. SCHMELZER:

18 Q. Have you seen anyone in Cedarburg that has not been  
19 able to register because they have not had a proof of  
20 residency where they would have had someone to corroborate  
21 for them?

22 A. No.

23 Q. Let's move on to the proof-of-residency requirement  
24 now for all registrants. Have you seen -- I guess have  
25 you seen requiring a proof of residency for everyone, has

1 that had an effect in Cedarburg?

2 A. Not at all.

3 Q. Why do you say that?

4 A. Because I continue to have many elections  
5 throughout -- excuse me, many voter registrations  
6 throughout the year prior to the elections and on Election  
7 Day.

8 Q. Do people come to you with problems with providing a  
9 proof of residency?

10 A. They can sometimes come to us or on Election Day  
11 without proof of residence, but most generally they  
12 usually get it to us in very short order.

13 Q. Have you known of anyone who has not been able to  
14 provide a proof of residency and wanted to register and  
15 vote?

16 A. No.

17 Q. I want to talk now about the elimination of the  
18 statewide special registration deputies. Did you have  
19 experience with SRDs and the registrations that they  
20 provided to you in Cedarburg prior to the elimination?

21 A. Only my own special registration deputies that go to  
22 care facilities, not other statewide registration deputies  
23 in Cedarburg. I did in Fox Point.

24 Q. Okay. And what was your experience in Fox Point with  
25 statewide special registration deputies and the

1 registrations that they submitted?

2 A. Well, I think they mean well. Their heart is in the  
3 right place. I know what they're trying to do. However,  
4 many of the forms were incomplete, lacking information,  
5 perhaps not signed, driver's license missing, birth date  
6 missing, things of that order, which complicates things  
7 and requires follow-up on our part.

8 Q. Okay. Does Cedarburg have -- you mentioned that you  
9 do have some special registration deputies?

10 A. My own for the care facilities, yes.

11 Q. Okay. And have you heard any complaints about not  
12 being able to register with a statewide special  
13 registration deputy?

14 A. No.

15 Q. What other options do individuals have to register in  
16 Cedarburg?

17 A. They can register on Election Day, register in the  
18 Clerk's Office, or they can register online on *My Vote*  
19 *Wisconsin*.

20 Q. I want to move on to the change in the residency  
21 requirement from 10 to 28 days. Did that have an impact  
22 on registrations in Cedarburg?

23 A. No.

24 Q. Do you see any advantages to increasing the residency  
25 requirement to 28 days?



1 A. I think going from 10 days to 28 days gives people a  
2 few more weeks of cushion to get the adequate proof of  
3 residence they need to register.

4 Q. Have you encountered any incidences where someone  
5 came in I guess between that window, the old law which was  
6 10 days to the 28 days, and not been able to register?

7 A. I've probably seen about a handful of people in the  
8 last -- since the law changed in the last couple of years.  
9 We've had maybe three or four or five or six that have  
10 come in.

11 Q. And what were their options?

12 A. Their options were to return to their former  
13 community in Wisconsin and vote.

14 Q. So let's move on to I guess Election Day changes. I  
15 want to talk about the change in the parameters I guess  
16 for election observers from six to twelve feet down to  
17 three to eight feet. In your experience with elections  
18 administration do you have any -- were there any polling  
19 places, that you're aware of, that were not able to  
20 accommodate the six to twelve feet?

21 A. I have not had any polling places that could not  
22 accommodate that.

23 Q. Were there any in Fox Point, that you're aware of  
24 when you worked there, that could not accommodate the six  
25 to twelve feet?

1 A. There was one polling place that was very tight  
2 quarters. So they probably had to stand closer than  
3 three -- closer than six feet.

4 Q. Do you take a position on whether you support the  
5 three to eight feet change?

6 A. I don't think it has had much impact. Typically  
7 observers generally don't even want to be that close.  
8 We'd like to be about a good six feet away or sometimes  
9 even more. I've had observers that will stand or sit  
10 quite a ways back from the registration table or the  
11 polling table.

12 Q. Have you had any problems with intimidating observers  
13 in Cedarburg?

14 A. Not at all.

15 Q. Let's talk about the Voter ID law that's been in  
16 place for three elections, correct?

17 A. Yes.

18 Q. And have you seen any effect on the implementation of  
19 that law in Cedarburg?

20 A. No.

21 Q. Have you had any longer wait times or lines?

22 A. There has not been longer lines at all. There has  
23 mostly been positive comments, either from people voting  
24 in-person absentee or on Election Day, that we're glad or  
25 relieved that we're finally accepting photo ID.

1 Q. How many provisional ballots have -- was cast I guess  
2 in the April election?

3 A. I had one provisional ballot in April.

4 Q. Did that person come back?

5 A. The person did not have photo ID on Election Day. It  
6 was a high school student. She was under the impression  
7 she could use a high school ID and she could not. Her  
8 parents actually wanted her to cast a provisional ballot  
9 and she did. Her parents said they were going to take her  
10 to the DMV prior to Friday by four o'clock. If they did,  
11 I don't know. She did not come back with a copy of photo  
12 ID.

13 Q. One quick follow-up. Have you had instances where  
14 somebody inquired about voting for somebody else?

15 A. Yes.

16 Q. Can you describe that?

17 A. If I -- in the recall election in 2012 I had a mother  
18 call and ask if she could cast her ballots for her son and  
19 daughter-in-law who happened to be out of town, out of  
20 state at the time.

21 Q. Were these the absentee ballots by mail?

22 A. Yes.

23 Q. And how was that resolved?

24 A. I told her that she could not cast the ballots for  
25 her son and daughter-in-law or anybody else; that they had

1 to return them themselves.

2 Q. How would that work now with Voter ID in place; how  
3 would those ballots have to be cast?

4 A. Well, probably the difference now is those people  
5 that are casting absentee ballots by mail, most all of  
6 them have to provide a copy of their photo ID. So if I  
7 would have got the call this time around and received the  
8 absentee ballots back in the mail, of course I'm not a  
9 handwriting expert, but I probably could have checked  
10 their signature against what was on the certificate  
11 envelope.

12 Q. And they would have to --

13 THE COURT: Hold on a second here. Are you  
14 saying that this voter who called in and asked about  
15 casting ballots for her, was it, son and daughter-in-law?

16 THE WITNESS: Mm-mm.

17 THE COURT: And you told the voter no, that they  
18 had to be done by the voters?

19 THE WITNESS: That's correct.

20 THE COURT: Are you suggesting that this voter  
21 went ahead and cast those ballots anyway?

22 THE WITNESS: I am not, because I don't know if  
23 she did it or not. But I would really have no proof -- no  
24 way of verifying that.

25

1 BY MS. SCHMELZER:

2 Q. Would it be more difficult for her to do that now  
3 that Voter ID is in place?

4 A. It might be a little more difficult, yes. I'd have a  
5 signature probably on her photo ID and I'd have a  
6 signature on the absentee certificate envelope.

7 Q. And you'd have to have photo ID either on file or  
8 mailed in with the request?

9 A. Yes.

10 MS. SCHMELZER: Thank you, Ms. McHugh.

11 THE COURT: One follow-up. You said that you'd  
12 have to have a signature on the request and on the ballot  
13 envelope, right?

14 THE WITNESS: On the certificate envelope, yes,  
15 and a signature on the photo ID.

16 THE COURT: I gather if they didn't match, that  
17 would be something that could be investigated. But you  
18 don't have a routine where you compare signatures, do you?

19 THE WITNESS: No, no.

20 THE COURT: Okay. Cross-examination.

21 CROSS-EXAMINATION

22 BY MR. MARTIN:

23 Q. Good morning, Ms. McHugh.

24 A. Good morning.

25 Q. It's good to see you again. You were asked a few

1 questions about the size and demographics of Cedarburg.

2 How would you say that compares to other cities in

3 Wisconsin? Is it a mid-size population, a small, large?

4 A. I would consider it to be a mid-size population,

5 perhaps a little bit on the smaller side.

6 Q. Okay. There are several cities much much larger than

7 Cedarburg, right?

8 A. And several towns much much smaller than Cedarburg,

9 yes.

10 Q. Right. Would you agree that the needs of election

11 administration would vary, you know, among those various

12 cities according to their population size?

13 A. Yes.

14 Q. Okay. So what might be best for one city and its

15 population or one town and its population might not work

16 somewhere else?

17 A. For the most part, yes.

18 Q. Okay. You were asked about the period for in-person

19 absentee voting. Am I correct that your answer on direct

20 was that you used to provide in-person absentee voting as

21 soon as you got the ballots?

22 A. Yes.

23 Q. Could we pull up Ms. McHugh's deposition, page 13?

24 Do you recall me asking you about this at your deposition?

25 A. Yes.

1 Q. I have paper copies if you'd prefer.

2 A. No, that's okay.

3 Q. Is that okay? All right. And at line 3 I asked:  
4 "Okay. And do you offer early voting for the entire  
5 two-week period?"

6 And this is in reference to currently, right?

7 A. Mm-mm.

8 Q. And you said: "Yes, we do."

9 And then I said: "Okay. Have you ever offered more  
10 days than that for early voting or in-person absentee  
11 voting?"

12 And you said: "No."

13 Is that right?

14 A. Yes, I did say that.

15 Q. Okay. Was that the accurate response or --

16 A. It was not the accurate response. I think maybe I  
17 thought that you had meant had we ever offered more  
18 in-person absentee voting outside of that ten-day period  
19 from when the law changed.

20 Q. Okay. All right. Now, when you were asked about the  
21 differences now compared to the old system, were you  
22 implying that you were required to provide in-person  
23 absentee voting as soon as the ballots arrived, under the  
24 old law?

25 A. Yes. I just assumed that's when we would start

1 in-person absentee voting.

2 Q. And it's your understanding that the law then  
3 required that?

4 A. Yes.

5 Q. And if it did not in fact require that, but allowed  
6 you to provide as much or as little as you wanted, would  
7 that impact any of your testimony about the changes in the  
8 laws with respect to the reduced in-person absentee voting  
9 period?

10 A. No.

11 Q. And why is that?

12 A. If it wasn't the law that required it, then we were  
13 likely directed by the Government Accountability Board or  
14 the state elections board at that time to start in-person  
15 absentee voting whenever we got the ballots, just like we  
16 are directed now to send out ballots the moment we get  
17 them, not sit on them.

18 Q. And do you have any recollection that you were ever  
19 actually directed by the Government Accountability Board  
20 to do that?

21 A. I believe so, yes.

22 Q. Okay. But if in fact it turned out you weren't  
23 required by anyone to do that, would that change your  
24 opinion?

25 A. No.



1 Q. Okay. And under the new law is it your understanding  
2 that or do you have an understanding about when you have  
3 to provide in-person absentee voting?

4 A. Yes.

5 Q. And what is that?

6 A. It's the 12-day period prior to an election,  
7 weekdays, no holidays, no weekends, and between the hours  
8 of 8 a.m. and 7 p.m.

9 Q. And it's your understanding that you have to provide  
10 that in-person absentee voting during that period?

11 A. During that time frame, yes, perhaps not those hours.

12 Q. And each day within that time frame?

13 A. I would assume so.

14 Q. So you don't know whether you're required to do that?

15 A. I think I am required to hold it on every one of  
16 those business days.

17 Q. Do you know whether every other town or municipality  
18 holds in-person absentee voting during those days and  
19 hours?

20 A. I don't know.

21 Q. And for -- can we go back to the deposition at page  
22 13 for a moment? You just said that you provide in-person  
23 absentee voting until seven o'clock during that period?

24 A. No. I provide it until 4 p.m., with the exception of  
25 the Thursday and Friday prior to the election until 5 p.m.

1 Q. But you could provide it until seven?

2 A. I could provide it until seven. I don't have the  
3 resources to provide it until seven.

4 Q. Do you feel the need to do that?

5 A. I do not.

6 Q. Do you see how another city might feel the need to  
7 provide it until seven or even later?

8 A. Well, I'm not there. I'm not in other communities.  
9 I, you know, really can't address that or, you know, I  
10 can't really answer that question.

11 Q. You have no personal knowledge about the election  
12 administration needs in other cities and towns?

13 A. I do not.

14 Q. Okay. You were also asked about corroboration as a  
15 means of proving residence. And you mentioned the example  
16 of something you observed, I think it was, when you were  
17 at Fox Point, right?

18 A. Yes.

19 Q. And the man was asking people to corroborate for him?

20 A. Yes.

21 Q. Just to clarify, was anyone actually willing to do  
22 that?

23 A. No.

24 Q. So you didn't register using corroboration?

25 A. No.

1 Q. And as far as you know, he wasn't misrepresenting  
2 where he lived either, right?

3 A. He was not.

4 Q. Okay. So he wasn't trying to commit fraud?

5 A. I don't believe so.

6 Q. Okay. And the reason that you gave I believe that  
7 other people were unwilling to corroborate was that they  
8 just in good faith didn't know where he lived and so they  
9 wouldn't swear?

10 A. They knew him. They did not know that he moved from  
11 a previous community to Fox Point to that address.

12 Q. Okay. And at your deposition do you remember me  
13 asking about corroboration by family members or people in  
14 care facilities?

15 A. Yes.

16 Q. And do you recall saying that you thought that that  
17 actually would be a good thing if family members or people  
18 in care facilities could corroborate the residency?

19 A. Yes.

20 Q. And do you still agree with that?

21 A. Those are the only two situations I agree with  
22 corroboration.

23 THE COURT: Excuse me. What are the two  
24 situations?

25 THE WITNESS: If a person is in a care facility

1 or if they come with a relative that lives at that  
2 address.

3 THE COURT: Okay.

4 BY MR. MARTIN:

5 Q. And do you recall me asking you about any instances  
6 of fraud related to corroboration at your deposition?

7 A. Yes.

8 Q. And do you recall saying that you're aware of no  
9 instance of fraud?

10 A. Yes.

11 Q. Okay. You were also asked by counsel on direct some  
12 questions about in-person versus mail-in absentee voting.  
13 And I believe the numbers were something like 489 voted in  
14 person and 300 voted by mail this past election?

15 A. Yes.

16 Q. Why do you think in-person absentee voting is more  
17 popular?

18 A. It's easier to do.

19 Q. In what ways?

20 A. In order to cast a vote by mail you must submit a  
21 written request and provide a copy of your photo ID,  
22 unless you already have it on file, and you have to mail  
23 that in or drop it off or email or fax it; whereas  
24 in-person absentee requires a few less steps and it just  
25 requires people come to City Hall to do that.

1 Q. Okay. So it's easier. Have you observed any  
2 problems with the Post Office in delivering absentee  
3 ballots to your voters?

4 A. I sometimes have experienced a delay in getting  
5 ballots to voters in other states. East and the West  
6 Coast sometimes there's a little bit of a delay.

7 Q. And there was an example in Arizona; is that right?

8 A. Yeah.

9 Q. Can you tell me about that one?

10 A. I had I think three calls prior to the April election  
11 that people in Fountain Hills, Arizona didn't get their  
12 ballots in a timely fashion. It wasn't like they didn't  
13 get them at all. But it took a little bit longer for some  
14 reason for their ballots to get to them, so I had to send  
15 them all another ballot.

16 Q. Okay. And going back to the moments when we were  
17 discussing the differences between Cedarburg and, you  
18 know, other cities and towns in Wisconsin and how there  
19 might be different election administration needs, I  
20 understand that you testified that having more than one  
21 early voting or in-person absentee voting location  
22 wouldn't make sense for you in Cedarburg; is that right?

23 A. Correct.

24 Q. Do you see any reason not to allow another city to  
25 have more than one location if in fact they thought it

1 made sense for them?

2 A. Maybe if they thought it made sense for them, if they  
3 had ballot security procedures in place. You know, I'd  
4 have to wonder about transporting ballots back and forth,  
5 that sort of thing. You know, it's probably best that's  
6 something that's left to them, best left to them.

7 Q. All right. If they figured out those logistics then  
8 that's their business?

9 A. Yes.

10 Q. All right. And you also mentioned confusion that  
11 might happen if you had more than one in-person absentee  
12 voting location. How many polling locations does  
13 Cedarburg have on Election Day?

14 A. One.

15 Q. It only has one?

16 A. Yes.

17 Q. Is that a multiprecinct location?

18 A. It is.

19 Q. Okay. So have you had any experience, either at Fox  
20 Point or Cedarburg, observing multiple locations on  
21 Election Day?

22 A. In Fox Point I had two polling locations.

23 Q. Was that hard to navigate for your voters?

24 A. Sometimes, yes, especially new voters to the village.  
25 They didn't know which place they voted at and sometimes

1 they'd go to the wrong place. Oftentimes they'd go to the  
2 wrong place.

3 Q. Do you see that as a reason for eliminating one of  
4 those locations in Fox Point?

5 A. No.

6 Q. Okay. So that's not an argument against having more  
7 than one location; is that right?

8 A. Yes.

9 Q. Okay. Let's talk about registrations at care  
10 facilities. It's my understanding that as of March of  
11 this year residents at private care facilities can use  
12 their intake documents to register; is that correct?

13 A. Yes.

14 Q. Now, have you had problems -- and you have special  
15 registration deputies who -- that you deputize and send to  
16 care facilities, right?

17 A. To register voters, yes.

18 Q. And you also have deputies that go to help them  
19 absentee vote; is that correct?

20 A. Special voting deputies, yes.

21 Q. Now, have you had experience or have you experienced  
22 difficulties with the administrators of those care  
23 facilities in allowing their residents to register or to  
24 vote?

25 A. I had one instance I believe in 2012 with an employee

1 of a care facility.

2 Q. And was that the Cedar Gardens facility?

3 A. It's now called *McKinley Place*.

4 Q. Okay. And what happened there?

5 A. It was really not a situation of her attempting to  
6 not allow them to register voters there; she simply  
7 thought that many of her -- of the residents there were  
8 incompetent and shouldn't be voting.

9 Q. And so she was denying your deputies access; is that  
10 right?

11 A. She was not denying them; she perhaps made it a  
12 little harder for them.

13 Q. Okay.

14 A. She placed a couple of calls to me about it. But in  
15 the end she did --

16 Q. And how did she make it harder?

17 A. She made it harder by, you know, just perhaps giving  
18 my registration deputies a little bit of a harder time in  
19 trying to get people registered.

20 Q. Okay. So she was impeding these efforts?

21 A. A little bit, yes.

22 Q. Do you know if she was ever reported to law  
23 enforcement or investigated?

24 A. She was not on my part.

25 Q. Okay.



1 A. After a couple of discussions with her and a couple  
2 of discussions I had with the Government Accountability  
3 Board things were rectified on very short order.

4 Q. Okay. And do you know whether the Government  
5 Accountability Board investigated her --

6 A. No.

7 Q. -- or referred her for investigation?

8 A. I don't believe so.

9 Q. Okay. Now, the proof-of-residency requirements are  
10 different than the voter ID requirements, right?

11 A. Yes.

12 Q. There's a pretty extensive list of qualifying items  
13 for each category, right?

14 A. Yes.

15 Q. Now, have you observed either confusion on the part  
16 of voters or poll workers trying to understand the  
17 differences between proof of residency for registration  
18 and proof of ID for voting?

19 A. There's been some confusion, yes.

20 Q. And can you describe that confusion?

21 A. We've had some confusion. People think passports  
22 might be a proof of residence when they can be used as  
23 photo ID. We've had some voters who have brought in other  
24 forms of photo ID -- Costco membership or YMCA membership  
25 with a photo ID on it -- and thought that was acceptable.

1 Q. And does this require you to train your poll workers  
2 to keep these categories clear in their head?

3 A. It is a training effort, yes, just like all other  
4 election laws, all other aspects of election, yes.

5 Q. And have your poll workers complained about the sort  
6 of complexity of trying to understand these two  
7 requirements?

8 A. No.

9 Q. And have you observed any difficulties administering  
10 them on Election Day?

11 A. Not really. We've seen people try to provide the  
12 unacceptable types of proof of residence. But generally I  
13 have the list of acceptable proof of residence right  
14 there. So if it's not on there, my poll workers won't  
15 accept it. It's there for the public to see.

16 Q. Have you observed any poll workers who were confused  
17 about this and had to ask you questions or --

18 A. Sure.

19 Q. Okay.

20 A. Yes.

21 Q. Does that require you to take time out of your duties  
22 to go explain?

23 A. Well, they either had to ask me or they might have  
24 asked another poll worker, they might have asked the chief  
25 inspector. It's better to ask questions than to not and

1 accept something that's not acceptable.

2 Q. Okay. Let's talk about the 28-day durational  
3 residency requirement. Can you remind me why you said you  
4 thought that was a good idea on direct?

5 A. I think because it gives people a couple more weeks  
6 when they move to a new location to get the appropriate  
7 proof of residence that they need. You don't always get a  
8 utility bill right away, you don't always get your bank  
9 statements changed over and you certainly don't get a  
10 driver's license right away.

11 Q. Oh, so you think it makes it more convenient for  
12 them?

13 A. The 28 days?

14 Q. Mm-mm.

15 A. Yes.

16 Q. Does it make it more convenient for someone who moves  
17 to Cedarburg 20 days before an election?

18 A. Well, I think it makes a little bit more difference  
19 between 10 and 28 days. It gives them a little bit more  
20 time to get that proof of residence.

21 Q. Well, what I'm asking is that someone who, say, moves  
22 to Cedarburg 20 days before an election and who gets their  
23 lease in order and has their utility bills and all of the  
24 other things that you can use, it's not really helping  
25 them though because they can't vote in Cedarburg, is that

1 right, or register to vote in Cedarburg; is that correct?

2 A. Well, it's a timing issue. If they come into my  
3 office and if I say to them, have you been here 28 days on  
4 Election Day, then they can register. But if they say  
5 "No, I will not have lived there 28 days," 20 days --

6 Q. That's what I'm saying, someone who moves 20 days  
7 before an election.

8 A. Yeah, then they can't register in the city of  
9 Cedarburg.

10 Q. So this isn't making it more convenient for them,  
11 right?

12 A. I'm not sure I have an answer to that.

13 Q. Okay. Would they have been able to vote under the  
14 20-day rule to register?

15 THE COURT: Your point is made.

16 BY MR. MARTIN:

17 Q. Okay. Now, people in the situation who, say, move 20  
18 days before an election still have the option to go back  
19 to their old location to vote; is that right?

20 A. Yes.

21 Q. Can you understand why someone who has moved to a new  
22 town like Cedarburg might not be interested in voting for  
23 their old mayor or old school board, particularly if they  
24 have a family, kids in school, might be very interested in  
25 voting for those offices in their new town?

1 A. I suppose.

2 Q. Could we pull up Defense Exhibit 101? I think I have  
3 this right. This is the registration form. Does this  
4 look familiar?

5 A. Very.

6 Q. And at paragraph 10, can we blow that up? And it's  
7 the -- there are many clauses here. But you see the part  
8 in the first sentence where it says, "I hereby certify...  
9 That I have resided at the above residential address for  
10 at least 28 consecutive days with no present intent to  
11 move"?

12 A. Yes.

13 Q. So in the situation where someone has moved to  
14 Cedarburg, say, 20 days before an election and they're  
15 told, "Well, you can go back to your old city to vote,"  
16 and they have to register at their old city, do you think  
17 that they can honestly in good faith sign this?

18 A. I would say they probably would sign it. You know,  
19 it does seem a little strange, "with no present intent to  
20 move," when they have already moved.

21 Q. So can you imagine why some people might feel  
22 uncomfortable or unwilling to sign that?

23 A. But I would wonder why they weren't registered in the  
24 first place.

25 Q. Well, there could be any number of reasons. But do

1 you agree that some people might have difficulty honestly  
2 signing that?

3 A. Maybe.

4 Q. Okay. And on this point, when someone signs this, is  
5 there any verification that you undertake that the person  
6 has in fact lived where they claim to live for 28 days?

7 A. There is not. We're not required to see a document  
8 that says that they've lived there 28 days.

9 Q. So is there any document that you could require?  
10 Would that even be feasible?

11 A. I don't know.

12 Q. So do you think that someone who's out to commit  
13 voter fraud or voter registration fraud is going to be  
14 deterred by signing this, whether it says 28 or 50 or 5 or  
15 10 days?

16 MS. SCHMELZER: Objection. Calls for  
17 speculation.

18 THE COURT: I will allow it. The witness has  
19 already offered estimates and predictions about what  
20 people would do when faced with this form, so go ahead.

21 A. Can you repeat that question, please?

22 Q. Do you think that, whatever the durational  
23 requirement is, do you think that someone who's actually  
24 going -- has woken up and said, "I want to commit voter  
25 registration or voter fraud," is going to be deterred by

1 this paragraph?

2 A. No.

3 Q. Okay. So do you think that this furthers your  
4 interest in election administration in any way?

5 A. That paragraph?

6 Q. Mm-mm, or specifically the durational requirement in  
7 the paragraph.

8 A. I guess I don't have an answer for that.

9 Q. Okay.

10 A. I don't know.

11 Q. And you were also asked about how it had actually  
12 impacted voters in Cedarburg, on direct, right?

13 A. Yes.

14 Q. And I think you said there have been a handful of  
15 people that -- at your deposition do you recall saying  
16 that it was about 12?

17 A. I would say it has been less than a dozen over the  
18 last couple of years, more around five or six people --

19 Q. Okay. Well, five or six or twelve --

20 A. -- that I have observed.

21 Q. -- that you personally have observed who have been  
22 unable to vote or to register to vote in Cedarburg because  
23 of this law?

24 A. Register to vote, yes.

25 Q. Right. Let's talk about the fax-in or emailing of

1 absentee ballots for a moment. Do you recall at your  
2 deposition telling me about a woman from Canada in a --  
3 was this it April --

4 A. Yes.

5 Q. -- is that right?

6 A. Yes.

7 Q. Tell me that story again, if you remember.

8 A. It was just a situation where a woman in Canada, a  
9 temporary overseas -- perhaps a college student, I don't  
10 know, wanted an absentee ballot mailed to Canada.

11 Q. Mm-mm.

12 A. I didn't get it back in time. However, she didn't  
13 make the request until less than a week before the  
14 election.

15 Q. Fair enough. I think you said five days before the  
16 election?

17 A. I think it was, yes.

18 Q. And if you could have emailed her the ballot, do you  
19 think she would have been able to get the ballot back in  
20 time?

21 A. She might have, but I have no way of knowing that.

22 Q. It would have increased her chances, would you say?

23 A. Perhaps.

24 Q. Okay. And you also mentioned that you've had  
25 difficulty transmitting ballots via email to military



1 voters who are on ships because the bandwidth is faulty or  
2 narrow?

3 A. Yes.

4 Q. You still have to do that, right? You still send  
5 email ballots to military voters?

6 A. And permanent overseas voters, yes.

7 Q. Okay. And if they're having difficulty receiving an  
8 email transmission, is it likely that they'd also have  
9 even greater difficulty receiving a mail package?

10 A. Perhaps, but I don't know that either.

11 Q. Okay. You were also asked about provisional ballots  
12 in these recent elections and the one provisional ballot  
13 you had with this high school student or young person I  
14 think, right?

15 A. Yes.

16 Q. And she didn't come back to cure her provisional  
17 ballot; is that right?

18 A. She did not.

19 Q. So her vote was not counted?

20 A. It was not.

21 Q. Okay. Also, you were asked about, for mail-in  
22 ballots, to tell the story of this woman who called in and  
23 said she wanted to vote for her daughter and son-in-law,  
24 or something like that, right?

25 A. Yes.

1 Q. And you said, well, you know, you could compare the  
2 signatures on the certification envelope; is that right?

3 A. Yes.

4 Q. And you also have signatures on file apart from the  
5 photo ID that they send in, correct?

6 A. Yes.

7 Q. Okay. So you could use the signature that you  
8 already have on file to make that comparison, correct?

9 A. From the registration form, yes, I suppose.

10 MR. MARTIN: Okay. Just a couple more questions,  
11 Your Honor.

12 BY MR. MARTIN:

13 Q. For the special registration deputies, you mentioned  
14 that they mess up the registration sometimes; is that  
15 right?

16 A. Yes.

17 Q. Okay. But a fair number of the registrations that  
18 they submit are effective in registering those voters,  
19 right?

20 A. Some are, yes.

21 Q. And that provides a benefit to those voters, right?

22 A. To those voters that everything is done properly,  
23 yes. It does disservice for everybody else.

24 Q. Well, about the disservice, so walk me through what  
25 happens when you get a registration that is incomplete,

1 either now or under the old law, because it lacks the  
2 underlying documentation -- well, they're not required to  
3 send that in, are they, if they're deputized?

4 A. Everybody now must provide proof of residence.

5 Q. Okay. So walk me through what happens when there's a  
6 mix-up with that.

7 A. Generally it requires myself or my staff to send that  
8 person a letter telling them how they can correct the  
9 problem.

10 Q. Okay. And so you're now engaged with that voter; is  
11 that correct?

12 A. Yes.

13 Q. And that voter is now participating with you in the  
14 election process; is that correct?

15 A. Sometimes yes; sometimes no.

16 Q. Okay. And that increases their opportunity to  
17 register to vote; isn't that right?

18 A. If they follow through on the letter that we send  
19 them, which very seldom happens.

20 Q. But overall that's another shot that they have  
21 register to vote; is that right?

22 A. If they do it correctly, yes.

23 Q. And that's a benefit to them, isn't it?

24 A. Perhaps.

25 Q. Okay. So it's not really a disservice to them?

1 A. Depends how you look at it.

2 MR. MARTIN: Okay. Fine. I think that's all I  
3 have. Just one moment. That's all I have, Your Honor.

4 THE COURT: Just a couple clarifications. On the  
5 *special registration deputy* business, the first question  
6 was about the statewide registration deputies. And those  
7 are the ones that, in response to Ms. Schmelzer's  
8 questions, you had said they mess it up sometimes. Is  
9 there anything special about the statewide registration  
10 deputies that cause them to mess up more than the --

11 THE WITNESS: The ones that I have for my care  
12 facilities?

13 THE COURT: Yeah.

14 THE WITNESS: I'm guessing because they, you  
15 know, maybe are doing a lot of them all at once. They  
16 don't pay attention as closely as they should, you know,  
17 trying to get them done. You know, they're at farmers'  
18 markets. They're, you know, all over.

19 When my deputies take registration forms to the care  
20 facilities, a lot of the information is filled out ahead  
21 of time. So they simply go over it with the voter and  
22 make sure that it's correct and have the voter sign off on  
23 it and they see their proof of residence. Other special  
24 registration deputies are often in a hurry or simply  
25 careless or don't fill out the form completely.

1 THE COURT: So would it be true about -- because  
2 the people at the farmers' market, for example, under the  
3 old law they could be statewide registration deputies, but  
4 they could also be municipal registration deputies. They  
5 all have that same problem if you're out at the farmers'  
6 market doing that kind of work?

7 THE WITNESS: Yes.

8 THE COURT: I think I understand that. Then  
9 Ms. Schmelzer asked you some questions and you saw some  
10 benefits to some of the changes in the election laws, like  
11 shortening the window for in-person absentee voting.

12 THE WITNESS: Yes.

13 THE COURT: Did you participate in communicating  
14 your concerns and views on those issues to the Legislature  
15 in any way?

16 THE WITNESS: I did not.

17 THE COURT: Okay. All right. Redirect?

18 MS. SCHMELZER: Yes.

19 REDIRECT EXAMINATION

20 BY MS. SCHMELZER:

21 Q. You mentioned a voter in Arizona that had a problem  
22 getting the mailed absentee ballot and you said that you  
23 followed up with sending them another ballot; is that  
24 correct?

25 A. After they contacted me, yes.

1 Q. Do you know if that voter was able to return that  
2 absentee ballot in time?

3 A. It was actually three voters and all three of them  
4 were able to return the ballot in time. One came back  
5 with a certificate problem. In fact I even had time to  
6 send the ballot back again a third time and it came back  
7 on time. Two of them called and said they did get the  
8 first ballot I mailed out.

9 Q. And you talked a little bit about the problem at the  
10 McKinley Place care facility and I think you said it was  
11 rectified on very short order. Did I get that right?

12 A. Yes.

13 Q. Were you aware of, because of the issue there, were  
14 there ever any residents there that weren't able to  
15 register --

16 A. No.

17 Q. -- that you're aware of? Or are you aware of any  
18 residents that are not being able to vote because of the  
19 issues with the administrator there?

20 A. No.

21 Q. And I think Mr. Martin talked a little bit about the  
22 confusion between proof of residency and the voter ID  
23 requirements at the polls.

24 A. Yes.

25 Q. And are you aware of whether or not that confusion

1 has ever caused, in Cedarburg, someone not to be able to  
2 register because of the confusion between the requirements  
3 of proof of residency versus voter ID?

4 A. No.

5 Q. What about has that confusion between the two ever,  
6 that you're aware of, ever caused someone not to be able  
7 to vote?

8 A. No.

9 Q. Okay. You also talked about a high school student  
10 that cast a provisional ballot in April --

11 A. Yes.

12 Q. -- because she didn't have a voter ID?

13 A. Yes.

14 Q. Do you know whether or not that girl was unable to  
15 get an ID?

16 A. No.

17 Q. Did the parents express any problems that they would  
18 have getting an ID for that girl?

19 A. No. They did inform us that they were going to take  
20 her to the DMV and get an ID.

21 Q. Then with the problems that you've had with statewide  
22 special registration deputies, you said that you send a  
23 follow-up letter where you get a registration form that's  
24 not complete for some reason, correct?

25 A. Yes.

1 Q. Does that take additional time and resources for the  
2 staff in the Clerk's Office?

3 A. It does take time. Many of these come in shortly  
4 before an election, so it takes time that I have to -- you  
5 know, I try to get to it the same day I get them in. But  
6 sometimes, with in-person absentee voting or with other  
7 duties, I can't get to it until at night or the next day.  
8 And it of course requires letterhead, envelopes, postage.

9 MS. SCHMELZER: Thank you, Ms. McHugh.

10 THE COURT: Ms. McHugh, thank you, very much.  
11 Okay. You can call your next witness.

12 MS. SCHMELZER: Susan Westerbeke.

13 (11:30 a.m.)

14 **SUSAN WESTERBEKE, DEFENDANTS' WITNESS, SWORN**

15 DIRECT EXAMINATION

16 BY MS. SCHMELZER:

17 Q. Hello, Ms. Westerbeke. Could you just please state  
18 your name and spell it for the record?

19 A. Susan Westerbeke; S-U-S-A-N, W-E-S-T-E-R-B-E-K-E.

20 Q. And where are you currently employed?

21 A. City of Port Washington.

22 Q. And what is your position there?

23 A. City clerk.

24 Q. How long have you been city clerk in Port Washington?

25 A. Approximately six years.



1 Q. And what did you do before becoming the city clerk in  
2 Port Washington?

3 A. I was the Town of Port Washington clerk for nine  
4 years.

5 Q. And can you tell me, with both the Town and the City,  
6 what your experience has been with elections  
7 administration?

8 A. I provided election administration for both  
9 municipalities, as I do currently with the City of Port  
10 Washington.

11 Q. How do you do that?

12 A. By providing the public with opportunities to  
13 register to vote, applications for absentee ballots by  
14 mail or in-person voting, managing the voter records.

15 Q. Do you train or do any training in your position both  
16 in the Town and at the City?

17 A. Yes. The election inspectors are trained by myself.

18 THE COURT: Ms. Westerbeke, I'm going to ask you  
19 to roll your seat forward about half a foot forward or so.  
20 So you stay close to the microphone. Thank you. That  
21 should be good.

22 BY MS. SCHMELZER:

23 Q. Tell me what some of your other duties are as clerk  
24 in Port Washington.

25 A. My other duties include -- I'm custodian of the

1 records, so I manage agreements, ordinances, resolutions.  
2 I take care of all the licensing, the different types of  
3 licenses which we have, which goes on year long. And I  
4 provide support to the city administrator, common council,  
5 some of the committees, the mayor and obviously the  
6 public.

7 Q. And can you tell me a little bit about  
8 Port Washington?

9 A. It's approximately 11,400 in population,  
10 predominantly white. We do have some Hispanic and  
11 African American population, but predominantly white.

12 Q. Do you know how many registered voters you have in  
13 Port Washington?

14 A. Approximately 7,300.

15 Q. And when I talk about Port Washington, unless I  
16 clarify, it will be the city of Port Washington.

17 THE COURT: Is that what you were talking about  
18 now, the city of Port Washington?

19 THE WITNESS: Yes.

20 BY MS. SCHMELZER:

21 Q. Let's move on to talk about the changes in the  
22 election law that's happened over the last few years and  
23 we'll start with in-person absentee voting. How many  
24 absentee voters do you have in Port Washington?

25 A. We have -- are you speaking about the April election

1 specifically or just in general?

2 Q. Let's go with the April election.

3 A. Okay. We have, for mail-out absentee ballots that go  
4 to individuals that request them for specific elections or  
5 year long, it may be a hundred of those we send out.

6 Obviously in a large election like a presidential it will  
7 be substantially more than that. We have a list of  
8 indefinitely confined or what I call *permanent mail-out*.

9 Of those individuals probably about 75 and they receive  
10 them for all elections.

11 Q. So in April you had about 175 mail-out absentee  
12 ballots?

13 A. Approximately, yes.

14 Q. Do you know how many in-person absentee voters you  
15 had?

16 A. We had, I would say, probably about 500.

17 Q. You said for a presidential election it would be  
18 substantially more. Can you give me an estimate on what  
19 that would be for both mail, absentee votes and in-person?

20 A. For a presidential election we may have a thousand,  
21 probably more.

22 Q. And has Port Washington ever had more than one  
23 location for in-person absentee voting?

24 A. Not to my knowledge.

25 Q. Do you support having only one location for in-person

1 absentee voting?

2 A. I do for my situation. I do not have support staff  
3 or very little. It allows me to manage the entire program  
4 from my location where all the records are kept.

5 Q. Okay. Do you see any problems if you had more than  
6 one location?

7 A. Well, it would require obviously more staff,  
8 supplies, setting up, securing ballots and documents. It  
9 would be a cost to the City which -- and staff that I do  
10 not have available.

11 Q. Let's talk a little bit about the period for  
12 in-person absentee voting. Has Port Washington ever had  
13 more than the 12 days before the election? Has it ever  
14 had more than that for in-person absentee voting, that you  
15 recall?

16 A. For in-person absentee voting prior to the law  
17 change --

18 Q. Yes.

19 A. -- individuals would be able to come in and do that.

20 Q. And did that have an impact, when the law changed to  
21 isolate that period to the 12 days before, did that have  
22 an impact in Port Washington?

23 A. Not that I noticed. I think the structure of the  
24 two-week or ten-day business-day period makes it a little  
25 easier for voters to be certain when they're allowed to do

1 that.

2 Q. Would you want to go back to the old system where  
3 they came in before the ten days?

4 A. I would not be interested in that, no.

5 Q. Why not?

6 A. That would require more staffing. We're not able --  
7 I'm not able to get much of anything else done during that  
8 two-week period because the voters are coming in  
9 consistently all day long the hours we're open registering  
10 and voting. And so none of the other work is able to get  
11 done, which requires -- and of course it has to be done,  
12 so that requires weekends and evenings on top of setting  
13 up the rest of the election.

14 Q. What is the other work that has to be done that you  
15 just referenced?

16 A. The rest of my job. As I said, I'm support for the  
17 city administrator. I put the council and committee  
18 packets together pulling all the documentation together  
19 for meetings, I attend meetings. The licensing still has  
20 to be taken care of. We still have to assist the public  
21 with their various situations and questions.

22 Q. Let's talk specifically about the elimination of the  
23 Monday before the election. Is that something that was  
24 beneficial for your office?

25 A. Very much so.

1 Q. Why?

2 A. That allows us -- that Monday is very important. I  
3 have three polling locations, so we spend that entire day  
4 preparing and packing to move to location. Our street  
5 department has to come and move all of the materials to  
6 the locations and set up the locations.

7 Q. Is there any information that has to be I guess  
8 entered, data entry that has to occur before Election Day?

9 A. All of the registrations certainly do along with the  
10 absentee ballots. Those records have to be set up in the  
11 system. Ballots that are received have to be marked as  
12 received.

13 Q. And when are you doing that kind of data entry?

14 A. That goes on throughout that period of time that  
15 they're coming in. Mail-out, we're taking care of that as  
16 that comes in as well. And then what's not able to be  
17 done during the day is done at night and on weekends so  
18 that we're prepared. Our poll books get printed on the  
19 weekends.

20 Q. And tell me how having in-person absentee voting  
21 during the weekends and on that Monday before would affect  
22 that aspect of your job to have that entered into the  
23 system before Election Day?

24 A. When you have registration and absentees coming in,  
25 in my case I want to have that all in the system before

1 the poll books are printed because the designation on the  
2 poll book appears at the voter's name that they are an  
3 absentee voter. And your registrations you want to make  
4 certain are in the supplemental section of your poll books  
5 to make sure everything is accurate and up to date.

6 The longer the process goes on, the later and more  
7 delayed in preparing, so then you may find yourself  
8 working late in the night the night before an election,  
9 which is how it used to be.

10 Q. How does allowing a different municipality like  
11 Milwaukee extend hours, do weekends, extend absentee  
12 period -- does that have any effect on Port Washington?

13 A. If it was something that another municipality was  
14 able to do that I was not also required to do as maybe a  
15 law change or something like that, I think the concern I  
16 would have would be confusion of the voters.

17 The voters in my area obtain a lot of their  
18 information from the Milwaukee media and that's where they  
19 get their news from. And whatever they see on TV is their  
20 perception of how it is taken care of everywhere.

21 Q. Do all municipalities have the same hours and days  
22 within that 12-day period that they do in-person absentee  
23 voting?

24 A. For myself we're open Monday through Friday from  
25 8 a.m. to 5 p.m. That's the standard hours for City Hall.

1 You might have smaller communities that have more limited  
2 hours. Their clerks might have certain days only they're  
3 open.

4 Q. Given that there's some discrepancy with some of  
5 those smaller towns that you mentioned, do you still think  
6 that there's any advantage to having some uniformity I  
7 guess within the period and the ceiling hours and days the  
8 weekend and Monday before; do you still think there's some  
9 advantage to that?

10 A. I think it does help with consistency for the voters.  
11 I've had town of Port Washington voters come to City Hall  
12 and attempt to register and vote at City Hall because they  
13 were unable to do so at the town because of their limited  
14 hours and they were confused as to why they're not able to  
15 do that at the polls.

16 Q. Do you think that would be a larger scale if the time  
17 periods were different for in-person absentee voting as  
18 well?

19 A. I think there could be more confusion.

20 Q. Let's talk about the registration -- the changes in  
21 the registration laws. The elimination of corroboration,  
22 was that something that you, as a clerk, support?

23 A. I think that what we have now is more consistent and  
24 I do, I do support that actually.

25 Q. You said you thought it was more consistent. Is



1 there any other reason why you would support that, why  
2 you've supported that?

3 A. I think with the public if you're concerned about the  
4 accuracy of someone's residency corroboration, to have  
5 someone sitting behind the person or standing behind a  
6 person in line registering to vote and saying, you know,  
7 "Could you corroborate that I live at this address or you  
8 know me?" that type of thing would be pretty easy to do.  
9 I'm not sure that it would always be accurate.

10 Q. Have you seen any effect in Port Washington since  
11 corroboration has been eliminated, any effect on people's  
12 ability to register?

13 A. I have not, no.

14 Q. I want to talk a little bit about the November 2014  
15 election. Was there any I guess concerns about wait time  
16 or length of your lines during that election?

17 A. That was our first election where we had two new  
18 polling locations. We, prior to that, were in the public  
19 schools. But they no longer wanted us in their buildings  
20 for security reasons, so we had set up two new locations  
21 at two of the local churches. One of them in particular,  
22 with the amount of the area we were allowed to use in that  
23 building and the setup of the registration area that we  
24 had to utilize, was part of the reasons we had longer  
25 lines, wait times. After eight o'clock on that election

1 at this particular location we had approximately 50  
2 individuals still in line to vote.

3 Q. Did -- was there some press, was that in the press,  
4 at least the concern about the wait lines for that  
5 election?

6 A. The Ozaukee press did contact me about that and asked  
7 me what the situation was, so I explained that to them.

8 Q. To what did you attribute the wait lines or did you  
9 come to any conclusion about what caused those wait lines?

10 A. It's Election Day voter registration. That's  
11 commonly the issue.

12 Q. Did you find that the elimination of corroboration  
13 was a contributor to those voter lines or those  
14 registration lines?

15 A. No.

16 Q. Did you see that same problem in any subsequent  
17 elections with the wait times?

18 A. Not since then, no. That particular location we were  
19 able to have a discussion with the church council and they  
20 allowed us to utilize another area of the building. So in  
21 the election we just held in April we reconfigured our  
22 layout, moved the registration to the other end so that we  
23 didn't have the problem with people in registration  
24 skipping to the poll books and not getting back in the  
25 line.

1 Q. So it was a layout issue?

2 A. Definitely.

3 Q. Let's talk about the --

4 THE COURT: Just to be clear -- I want to make  
5 sure I understand -- so in November 2014 you had the long  
6 wait lines. If I understand correctly, you're saying that  
7 there were two things that happened. One was that you had  
8 this new space that was ill-suited for the traffic flow  
9 that you needed.

10 THE WITNESS: Correct.

11 THE COURT: But I gather what you're saying is  
12 that the reason that the space was ill-suited is that you  
13 needed some space to handle Election Day registration.

14 THE WITNESS: We needed a different area to put  
15 Election Day registration. You'll have some wait time due  
16 to Election Day registration in any large election, so  
17 that will always occur. But that was compounded by the  
18 fact that the layout was not ideal.

19 The individuals, when they're registering, were in  
20 the room where the poll books were lined up and the rest  
21 of the individuals were in a hall in a waiting pattern.  
22 And they would leave registration and rather than get back  
23 into the line, they would cut straight to the poll book.  
24 And then the line in the hall would never proceed --

25 THE COURT: Right, right.

1 THE WITNESS: -- because they were cutting.

2 THE COURT: Okay. So if you got an appropriate  
3 space where you could manage that traffic and make the  
4 traffic flow clearer to the voters, then that eliminated  
5 the long wait line?

6 THE WITNESS: I think you would still have wait  
7 times, because Election Day registration is very time  
8 consuming. Voters, they'll come and they're not always  
9 prepared with the proper documentation because they have  
10 not researched it. You sometimes have to problem solve  
11 with them for a period of time over what types of  
12 documents they could use to register.

13 Then once they get to the poll book they're not in  
14 the poll book because they're registering on Election Day.  
15 They have to be created by hand in the back of the poll  
16 books and that again takes time. So the whole process  
17 does slow this down a bit.

18 THE COURT: Okay. So jump then to the April  
19 election where we had presumably kind of a -- well, you  
20 tell me, was it a similar kind of turnout in the April  
21 election as to the November 2014 election?

22 THE WITNESS: We had approximately 64 percent.  
23 That November 14 election we were probably in the 70  
24 percentile.

25 THE COURT: In April it was 70 percent?

1 THE WITNESS: 64 percent this past April.

2 THE COURT: 64 percent in April, 70 percent in  
3 November '14?

4 THE WITNESS: Yes.

5 THE COURT: So did you have long wait lines in  
6 the April election?

7 THE WITNESS: Not extremely long. Individuals  
8 did have to wait in line, but we didn't have individuals  
9 waiting for an hour in line --

10 THE COURT: But you did in November?

11 THE WITNESS: -- the flow was much better.

12 THE COURT: So in November the wait times were  
13 over an hour?

14 THE DEFENDANT: Mm-mm. Yes.

15 THE COURT: April 16th was better?

16 THE WITNESS: Was better. Turnout was a little  
17 bit lower. Registrations, we did have 500 Election Day  
18 registrations, so that was a pretty sizable amount. But I  
19 would expect more in a presidential election on  
20 Election Day, so those lines will be longer.

21 THE COURT: They will be -- they'll inevitably be  
22 longer, is the gist of it, just because turnout is going  
23 to be higher?

24 THE WITNESS: Mm-mm. Yes.

25 THE COURT: The problem was somewhat better in

1 April because you had a little bit less turnout and you  
2 had a better space layout?

3 THE WITNESS: Mm-mm.

4 THE COURT: Thank you.

5 BY MS. SCHMELZER:

6 Q. Let's talk about the Election Day registration. You  
7 say that's time consuming?

8 A. Yes.

9 Q. That hasn't changed with the proof-of-residency  
10 requirements, correct; they always had to show proof of  
11 residency on Election Day?

12 A. Yes.

13 Q. I think you said 500 Election Day registrations in  
14 April?

15 A. Yes.

16 Q. Do you know how many Election Day registrations you  
17 got in November?

18 A. Of 2014?

19 Q. Yes.

20 A. Probably about that, maybe 700.

21 Q. Do you know how many Election Day registrations you  
22 get in a presidential election generally?

23 A. Probably -- we probably would be 700, 800.

24 Q. Do you know if that's gone up or down since 2008,  
25 since the 2008 presidential election?

1 A. Election Day registration?

2 Q. Yes.

3 A. I don't know that there's been that much of a change.

4 A lot of individuals will wait until the day of to

5 register to vote.

6 Q. And have you noticed any difference in registrations

7 that come in before Election Day since the

8 proof-of-residency requirement has come into play since

9 2012?

10 A. The volume of them ahead of time?

11 Q. Yes.

12 A. Not a large amount, no. I think it's been pretty

13 consistent.

14 Q. How -- have you encountered any issues with people

15 not having proof of residency in Port Washington when

16 they've wanted to register?

17 A. Very few, less than a handful.

18 Q. Have you encountered anyone who has not been able to

19 come up with any proof of residency?

20 A. There have been maybe a few. And I'm not certain

21 that it wasn't the individual deciding that they did not

22 want to go and get it.

23 Q. So you don't know if they had it and didn't want to

24 get it or was unable to get it?

25 A. Correct.

1 Q. Do you continue to hear any complaints about having  
2 to show proof of residency in Port Washington?

3 A. No, I really haven't had.

4 Q. Let's move on to the elimination of the requirement  
5 for high school special registration deputies. Was the  
6 elimination of high school SRDs something that you  
7 supported?

8 A. I had the vice principal of our high school was an  
9 SRD and I had trained him and he never utilized it at the  
10 high school.

11 Q. So you never had anyone register at the high school?

12 A. No.

13 Q. What period of time are we talking about for that?

14 A. That was a short period of time a few years ago when  
15 that was required.

16 Q. Have you heard any complaints about high school  
17 students not being able to register because there's no one  
18 at the high school to register them?

19 A. I have not. Generally their parents bring them in.

20 Q. Bring them into the Clerk's Office?

21 A. Clerk's Office, yes, or on Election Day.

22 Q. And let's talk about now the elimination of the  
23 statewide special registration deputies. Did you have any  
24 experience with statewide special registration deputies,  
25 their registration forms coming into your office, when you



1 were clerk?

2 A. A number of years ago the League of Women Voters  
3 would do registrations, so I did have some.

4 Q. Was this in the city of Port Washington or the town?

5 A. I believe in both actually.

6 Q. And did you have any issues with those registrations  
7 that came in from statewide special registration deputies?

8 A. We do have issues with them. They're not complete  
9 sometimes. They'll be missing information that's required  
10 and then we have to follow up with that to make sure it's  
11 corrected so they can be properly registered.

12 The registration deputies, statewide special  
13 registration deputies, a number of years ago would go into  
14 the high school and do that. And that was problematic  
15 because our high school supports four different  
16 communities and frequently they were not aware of what  
17 community they were registering someone in. They would  
18 show up at the wrong municipal office, the individuals  
19 would not know where to go to vote, that type of thing.

20 Q. Are you aware of any situations where voters would  
21 show up thinking they were registered but they weren't?

22 A. That has occurred, yes.

23 Q. Did they think they were registered because they had  
24 registered with the statewide special registration  
25 deputies?

1 A. If their registration was not corrected and we were  
2 not involved with that, that's a possibility. Offhand I  
3 can't recall a special situation. I mean, I'm sure that  
4 the individual that's registering at the time is assuming  
5 those will get handed into the proper municipality.

6 Q. Do registration forms coming from special  
7 registration deputies, does that save your office time?

8 A. Not a great amount of time. Actually it takes time  
9 because when there's an issue, which would be the case  
10 many times, it takes time to contact the voter, that we  
11 have to generate a letter. And if the voter doesn't  
12 respond, the situation is still not rectified and then  
13 you'll be dealing with that on Election Day.

14 Q. Do you still do something with those registration  
15 forms when they come into your office?

16 A. The ones that are incomplete?

17 Q. The ones that are complete, properly completed.

18 A. Those voters are put into the -- what is now WisVote,  
19 which is the state voter registration system. And they  
20 have a file or record that is created for them so they  
21 appear on the poll book.

22 Q. Do you have any special registration deputies in  
23 Port Washington?

24 A. I do for my care facility voting that I train.

25 Q. Have you trained anyone else to be a special

1 registration deputy?

2 A. Not recently, no.

3 Q. Have you trained anyone who's requested it for  
4 purposes of registering voters in Port Washington?

5 A. A number of years ago I had an individual that  
6 contacted me and they did train. He wanted to hold a  
7 voter registration himself as a service to the community.  
8 So he booked the police department community room and then  
9 did some advertisement that he'd be available for that.

10 Q. Do you know if he got any registrations from that  
11 drive?

12 A. I don't recall receiving any.

13 Q. Let's move on to the increased residency requirements  
14 in Wisconsin from 10 to 28 days. Is that something that  
15 you see has created a problem for anyone in  
16 Port Washington?

17 A. I have not noticed that it's been -- there's been a  
18 big difference other than the 28 days does allow an  
19 individual more time to obtain proof of residency through  
20 a bank statement, utility bill, cable bill, something like  
21 that.

22 Q. Have you had anyone come and try and register who  
23 hasn't been a resident -- who fell into that window I  
24 guess from 10 to 28 days?

25 A. I've had a few individuals, not a great amount. Then

1 they're instructed that they can return to their previous  
2 community where they resided. And I would assist them  
3 with that, give them the contact information from their  
4 clerk from that community and inform them that they can go  
5 back and vote in their community on Election Day or  
6 contact the clerk for an in-person absentee ballot.

7 Q. If they come from out of state, are they still able  
8 to vote for president or vice president?

9 A. They are for president, yes, presidential ballot.

10 Q. Let's talk about the Voter ID law. I know we talked  
11 a little bit about lines in the November 2014 election.  
12 That was when Voter ID was not in place, correct?

13 A. Mm-mm. Yes.

14 Q. Do you see Voter ID, implementation of the Voter ID  
15 law, increasing the wait time in Port Washington at all?

16 A. I did not see an increase of wait time with Voter ID.  
17 We had election inspectors stationed at the doors. So  
18 they address the voters when they come in and ask them if  
19 they have their voter ID, because it is required. We have  
20 signage outside as well. If they have questions, then  
21 they're answered right then and there so that they can get  
22 photo ID if they don't have it, so there's someone  
23 available to assist them with that.

24 And as far as at the poll book, I did not notice a  
25 great amount of time added to it. It was a pretty steady

1 flow because the voters had it in their hand. So it's a  
2 matter of just visually looking at it between the two poll  
3 book inspectors and then they follow through with the rest  
4 of the procedure to obtain their ballot.

5 Q. Did you have any provisional ballots cast in the  
6 April election because the individuals did not have a  
7 voter ID?

8 A. No.

9 Q. Are you aware of anyone saying, "I can't produce" --  
10 "I don't have a valid voter ID," and coming to any  
11 election inspector or anyone at the polls for that reason?

12 A. Two of my chief inspectors informed me that they each  
13 had an individual that did not have photo ID. And they  
14 went through the options for the different types that they  
15 were able to use. And from what I was told, those  
16 individuals said that they were not interested in going to  
17 get that and that they would just make note of that next  
18 time they decide to vote. And they were offered a  
19 provisional ballot, as required, but they chose not to.

20 Q. So when you say they weren't able to get that, do you  
21 mean they had it and they didn't want to go home and get  
22 it or they just weren't able to obtain that?

23 A. That was the perception of my chief inspectors, was  
24 that they did not have it with them, but I don't think  
25 that it was specifically said. But that was the

1 impression from the conversation.

2 MS. SCHMELZER: Okay. Thank you.

3 THE COURT: Cross-examination.

4 CROSS-EXAMINATION

5 BY MR. MARTIN:

6 Q. Good afternoon, Ms. Westerbeke.

7 A. Hello.

8 Q. How are you?

9 A. Good.

10 Q. You were asked a few questions about the sort of size  
11 and makeup of the city of Port Washington, is that right,  
12 not the town?

13 A. Yes.

14 Q. I'll try to keep the distinction clear in my head,  
15 although I find it confusing a little bit. And because of  
16 the difference in sizes of Wisconsin's towns and  
17 municipalities, you would agree that the needs of election  
18 administration vary from city to city, right?

19 A. Yes.

20 Q. And do you recall me asking you about this at your  
21 deposition and you saying, you know, right, one size  
22 doesn't fit all --

23 A. Yes.

24 Q. -- right? So let's talk about the in-person absentee  
25 voting for a moment. If a city were allowed to set its

1 own early voting or absentee voting schedule, would you  
2 have any problem with that as long as you had the  
3 discretion to set your own schedule to meet the needs of  
4 your constituents?

5 A. Well, I think if it's within a reasonable time frame  
6 or parameter.

7 Q. Mm-mm.

8 A. I think if we're all allowed to do our own scheduling  
9 completely, that would be very confusing for the public.

10 Q. Okay. And is it your understanding that -- is there  
11 any particular schedule that the law requires you to set  
12 now?

13 A. Well, the two weeks prior to the election. And  
14 you're referring to in-person voting?

15 Q. Right. What I'm asking is, does the law require you  
16 to provide anything in particular, not the limits the law  
17 sets on what you can provide, but are you required to  
18 provide any in-person absentee voting at all?

19 A. It does not require us to do certain extent  
20 [verbatim] of that two-week period, no.

21 Q. Okay. You mentioned on your direct examination that  
22 the Town of Port Washington offers fewer days of in-person  
23 absentee voting than you do --

24 A. Yes.

25 Q. -- right?

1 A. Yes.

2 Q. And that's nearby?

3 A. Yes.

4 Q. And how many does the Town of Port Washington offer?

5 A. She has office hours two days a week.

6 Q. Two days a week? And can you come in throughout the  
7 work day? Is there a narrow window of time?

8 A. I believe she has hours from eight until four.

9 Q. Okay. And you said that has confused voters in the  
10 town of Port Washington who have come to the city of Port  
11 Washington trying to vote with you?

12 A. Correct, I've had some.

13 Q. That's under the current law, right?

14 A. Yes.

15 Q. Okay. How has the limitation on the early voting --  
16 and I know it's not technically early voting, but if I say  
17 "early voting," I mean in-person absentee -- how has that,  
18 you know, alleviated this problem of confusion that you  
19 say is a reason why everyone has to do the same?

20 A. Would you repeat that one more time?

21 Q. Yeah. So under the new law, in-person absentee  
22 voting cannot begin earlier than 12 days before the  
23 election. So how has that, given that there's confusion  
24 under the current law, how has that changed, remedied this  
25 problem of confusion that you see?



1 A. Well, I think it does set a parameter --

2 Q. Okay.

3 A. -- which the voters that are researching this or  
4 checking into our -- are able to remember and there's  
5 consistency there. And your mid-sized municipalities and  
6 larger municipalities I would imagine have daily hours  
7 because their city halls are open. Townships would be an  
8 exception.

9 Q. Let's talk about that a little bit. You say  
10 "consistency," but nothing prevents you from changing the  
11 schedule for the next election, right?

12 A. I could add hours in the evening up until 7 p.m.

13 Q. Or you could reduce it?

14 A. I could do that, yes.

15 Q. So the law isn't requiring you to be consistent  
16 within the city of Port Washington, right?

17 A. No.

18 Q. Okay. And it doesn't require any consistency between  
19 you and any other town for the reasons we just discussed,  
20 right?

21 A. No.

22 Q. So --

23 THE COURT: Let me -- I'll give the witness back  
24 to you in just second. But I'm trying to figure out this  
25 consistency issue because, as Mr. Martin indicates,

1 there's still -- it's a pretty big inconsistency between  
2 the Town of Port Washington, which has two days, and  
3 you've got five. So that seems to me, if there's  
4 potential for confusion, that's a big one.

5 Is the big deal about confusion the weekend voting,  
6 because that seems the thing that's now cut off for  
7 everybody? Nobody can have voting on the weekend. And I  
8 gather you're not going to do -- you didn't do weekend  
9 voting before, right?

10 THE WITNESS: I did not.

11 THE COURT: But the issue that has come up in  
12 some of the testimony is that the bigger cities like --  
13 and in particular Milwaukee, they can do voting on the  
14 weekend or they could before the law eliminated it.

15 So is there something special about the confusion  
16 that comes from the weekend, because I'm not really seeing  
17 that as substantively that different than the confusion  
18 that you have between the town and the city?

19 THE WITNESS: Well, I think the general public  
20 has a perception of the business hours, what a weekly or a  
21 daily business hour would be. And I think that's part of  
22 why I do receive people from the town, because they assume  
23 Monday through Friday they would have hours like most  
24 businesses or municipalities would have. And then she's  
25 not open, so that causes some confusion.

1 The weekends, if you have the larger communities  
2 doing that -- the jumbos, the very large ones -- the  
3 confusion that would cause for the majority of the rest  
4 that would not, you know, I don't know how the public  
5 would, you know, perceive that; also, why are they  
6 offering it and you're not.

7 As I said, our area, they obtain their information  
8 from the Milwaukee media. That's where they get their  
9 news from. So what they see on the Milwaukee news  
10 stations and what the reporters are reporting is their  
11 perception how elections happen throughout the state or in  
12 their areas.

13 THE COURT: And again not to put words in your  
14 mouth, but what I'm gathering here is that voters kind of  
15 think that that's the state rule. When they see on TV in  
16 Milwaukee the polls are open on Saturday, they think, oh,  
17 that's the state rule, so then they --

18 THE WITNESS: So they think that should be --  
19 that would be something that would be offered. And I  
20 don't think they necessarily make the distinction from  
21 municipality to municipality.

22 THE COURT: Yeah, apparently not. Apparently  
23 people don't even know that if they live in the town of  
24 Port Washington they've got to go vote at the town clerk.

25 THE WITNESS: No. Some of them are baffled that

1 it would matter. They don't understand the ballot either.

2 THE COURT: All right. Thank you.

3 BY MR. MARTIN:

4 Q. So explain to me how the confusion you're describing  
5 is an actual problem that disenfranchises a voter, because  
6 if someone thinks they have an opportunity that they  
7 don't, like they could vote on a Saturday, they could  
8 still come back and vote on Election Day, right?

9 A. They certainly could if they chose to.

10 Q. So how does that confusion minimize in any way their  
11 opportunity to vote?

12 A. Well, you will have individuals that they may be  
13 traveling, they may be away on business, they may not be  
14 able to be present on Election Day; that in their mind  
15 have a perception that, well, I have this many days and  
16 this is the end of early voting -- because it's  
17 consistent -- and they allow for that in their schedule to  
18 be able to absentee vote maybe early.

19 Q. Because they think something is there that is in one  
20 town and so they think it's in theirs. And not to beat  
21 this to a pulp, but that is still the law, right, that  
22 inconsistency?

23 A. Yes.

24 Q. And are there any particular instances of people not  
25 being able to vote for this reason when cities like

1 Milwaukee could have more than, you know, the current two  
2 weeks of in-person absentee voting?

3 A. I would not be able to give you that information.

4 Q. Right. Okay.

5 THE COURT: I mean, here's one way you might find  
6 out: if a voter called you after the election and said,  
7 "Hey, I was counting on voting absentee on Saturday. I  
8 showed up at the City Clerk's Office. You were closed, so  
9 I missed this election." Anything like that ever happen  
10 to you?

11 THE WITNESS: We've had individuals who tried to  
12 vote on Monday, the day before the election, because they  
13 were used to being able to do that and were not available  
14 on Tuesday and have complained about that --

15 THE COURT: Okay.

16 THE WITNESS: -- that they were not going to be  
17 available then.

18 THE COURT: All right. How many times? And was  
19 that at the city of Port Washington that that happened?

20 THE WITNESS: Yes, a handful of times over the  
21 past few years.

22 THE COURT: Okay.

23 THE WITNESS: And there was confusion with that  
24 change. Anytime there's a change, which there has been a  
25 lot of, it just muddies it even more for the voters --

1 THE COURT: Yeah.

2 THE WITNESS: -- and the poll workers.

3 THE COURT: And again that's a little bit  
4 different than the confusion between having one  
5 municipality having it and one other not having it,  
6 because this is confusion based on the last election  
7 versus the current election on the Monday day, right?

8 THE WITNESS: It could be, yes, in that case.

9 THE COURT: Anybody ever say, "I thought you were  
10 open on Saturday"?

11 THE WITNESS: I've had people say that --

12 THE COURT: And how many?

13 THE WITNESS: -- years ago. A few. And I don't  
14 know, voters frequently get their information confused.  
15 Especially when they talk amongst each other, they don't  
16 always get accurate information.

17 THE COURT: All right. Thank you.

18 BY MR. MARTIN:

19 Q. Following up on this idea about the differences in  
20 the municipalities in terms of their size and  
21 demographics, I assume you heard Ms. McHugh's testimony  
22 about the early voting locations. And you would agree  
23 that if a city could figure out the logistics of it and  
24 thought that it was a good thing for its constituents  
25 doesn't hurt you to have more than one voting location if

1 a city wanted to open up more than one; is that right?

2 A. It would not directly affect me as far as my setup,  
3 no.

4 Q. Do you see any reason a city should not be able to do  
5 that if it wants to?

6 A. Other than confusion to voters, I guess that would be  
7 something that they would be best suited to answer.

8 Q. Okay. Let's talk about in-person versus mail-in  
9 absentee voting for a moment. I take it that Port -- in  
10 Port Washington in-person absentee voting is the more  
11 popular form of absentee voting compared to mail; is that  
12 right?

13 A. Yes.

14 Q. And why do you think that is?

15 A. I think that individuals, some of them like the  
16 process of coming in and getting that ballot themselves  
17 and taking care of it right there at City Hall. They can  
18 see the whole process with the envelope and the  
19 certificate and taking care of that there and handing it  
20 back to an individual. Some of them, it's for their  
21 schedule. They're out and about, so to speak, so they'll  
22 stop by.

23 Q. Okay. And if -- and you've had problems with mail-in  
24 ballots where, for instance, the certification envelope  
25 didn't have the proper signatures or the addresses for

1 either the voter or the witness were incorrect in some  
2 way; is that right?

3 A. I have had. Generally it's the witness signature  
4 that's missing.

5 Q. I see. So they just don't put it on at all?

6 A. Correct.

7 Q. And if that mistake happens in person and when  
8 they're in your office, it's caught right then and there  
9 immediately, right?

10 A. Correct, because we're witnessing.

11 Q. So you do the witnessing?

12 A. Yes.

13 Q. Okay. So it may be another reason why in-person  
14 absentee voting is more popular perhaps?

15 A. Perhaps.

16 Q. You were asked on direct about the 28-day durational  
17 residency requirement for voting. You didn't discuss this  
18 in your declaration that you submitted in support of the  
19 state's motion for summary judgment, right?

20 A. I don't recall.

21 Q. Okay. But it is the case that some people have been  
22 unable to register and vote in Port Washington because of  
23 that rule, right?

24 A. There have been a few that have not registered and it  
25 would be on Election Day. If they register early they



1 have time to either obtain the proper proof of residency,  
2 which sometimes is the case, it's just the ability to or  
3 their desire to go and do that, to obtain the right form.  
4 On Election Day, you know, then there's less time for  
5 that. In either case, they would be directed to go back  
6 to their previous municipality.

7 Q. Maybe I wasn't clear. I'm not discussing the  
8 documentary proof-of-residency requirement. I'm talking  
9 about the new requirement that there be 28 -- that you  
10 have to live in your location for at least 28 days before  
11 an election before you can register and vote in your --  
12 the city where you live. It's my understanding, from your  
13 deposition, that there have been people in Port Washington  
14 who have been unable to register and vote under this new  
15 28-day rule?

16 A. Yes, there have been a few.

17 Q. Okay. And you testified on direct that you thought  
18 that this rule helps people because it gives them more  
19 time to get their documents in order; is that right?

20 A. Yes.

21 Q. But if someone, and you probably heard this previous  
22 example with Ms. McHugh, if someone moves 15 or 20 days  
23 before the election and are able to get their  
24 documentation in order, they can't register to vote in  
25 that election, right?

1 A. Correct.

2 Q. So it's not convenient for them, right?

3 A. I would guess not at that point.

4 Q. Okay. And let's talk about your experience with  
5 election observers. I think at your deposition you told  
6 me about an experience you had when you were at the Town  
7 of Port Washington with an election observer who was  
8 getting too close to the polling table?

9 A. Yes.

10 Q. Can you describe that incident for me?

11 A. One of the parties had sent an individual. He was an  
12 elderly gentleman. And he was severely hard-of-hearing.  
13 So when the individuals came to the tables stating their  
14 name and address, he could not hear what they were saying,  
15 so he would shout out for them to repeat. He couldn't  
16 hear. "Could you say that again?"

17 And then he finally was standing and getting closer  
18 and closer to where he was hovering over the poll book,  
19 poll book workers. And he became a little intimidating  
20 for the voters because they don't really understand whose  
21 job is what and why there's an individual questioning who  
22 they are and asking them to repeat that.

23 Q. Right. And in that particular example was the chief  
24 elections inspector -- did he or she take charge of the  
25 situation and feel comfortable dealing with the observer

1 or is that something where the observer also intimidates  
2 the poll workers and the chief election inspector?

3 A. In that instance I was present, so the chief  
4 inspector deferred to me and then I had a discussion with  
5 the individual. We actually ended up moving him to the  
6 side where he could hear a little bit better. And then  
7 after the election I contacted the party and explained the  
8 situation to them and that this was an issue. And no  
9 fault of his own obviously that he was hard-of-hearing.  
10 And he was a very pleasant individual. But that was a  
11 little bit of a problem.

12 Q. And in your experience, assuming you're not present,  
13 would a poll worker or chief election inspector -- some of  
14 them at least do not feel confident in opposing an  
15 election observer?

16 A. No, I think they would -- they would take care of  
17 that. When the observers come they're signing in and  
18 obtaining a badge and they're given a pamphlet that  
19 describes what their parameters are.

20 Q. Okay.

21 A. And, you know, they're kind of informed of where  
22 they're able to sit, because that will be set up for them,  
23 and that type thing.

24 Q. And you were also asked some questions on direct  
25 about corroboration as a means of proving residency. Are

1 you aware of any instance where anyone ever fraudulently  
2 registered?

3 A. I have had none and I have had two refer.

4 Q. Okay. And corroboration, registrations through  
5 corroboration, are also -- were also confirmed in the way  
6 that, you know, someone who registered with an SRD or  
7 something were confirmed, right; you would send out a  
8 confirmation notice?

9 A. Would you repeat that again?

10 Q. When someone registered through corroboration, would  
11 you send out a confirmation notice to verify their  
12 registration?

13 A. Oh, a follow-up to once it's received?

14 Q. Right.

15 A. Yes.

16 Q. Okay. So you would know if there was a mechanism in  
17 place to detect fraudulent corroborations before they were  
18 eliminated, right?

19 A. Well, the corroborator or the individual registering?

20 Q. The confirmation notice system where you mail out the  
21 postcard --

22 A. Right.

23 Q. -- that was in place to detect people who --

24 A. That would be returned if they were not there, mm-mm.

25 Q. Okay.

1 A. That does not stop an issue on Election Day though.

2 Q. But you're not aware of any -- that ever having  
3 happened, right?

4 A. No. The possibility is definitely there on Election  
5 Day.

6 THE COURT: And I want to be clear about that.  
7 So the vote would be cast on Election Day, but the card  
8 would still be sent out later?

9 THE WITNESS: Much later. The issues would be on  
10 Election Day.

11 THE COURT: The vote would count and then you'd  
12 only find out about it later?

13 THE WITNESS: Correct.

14 THE COURT: On that subject, as long as we're  
15 there, on direct it seemed to me you were expressing  
16 something like a fundamental skepticism about  
17 corroboration. Did I misperceive your answer?

18 THE WITNESS: I think that having proof of  
19 residency is very straightforward and very consistent for  
20 everybody. Corroborators, you know, not everyone is going  
21 to have someone with them and that's less consistent.  
22 And, you know, I don't want to be -- you know, you don't  
23 want to be skeptical, but --

24 THE COURT: It sounds like you're a little  
25 distrustful. I don't want to --

1 THE WITNESS: A little -- you know, it concerns  
2 me. The signing of that declaration on the voter  
3 registration, I don't know how much of a deterrent that  
4 would be for someone to -- you know, even individuals  
5 registering.

6 THE COURT: And again, we had the story from the  
7 previous witness about, you know, a corroboration incident  
8 where the voter asked for corroboration and nobody was  
9 willing to do it.

10 THE WITNESS: Right.

11 THE COURT: Do you have any examples that have  
12 made you feel like there's something untrustworthy about  
13 the circumstance?

14 THE WITNESS: Nothing comes to mind. I think  
15 just clerks speaking with each other about situations and  
16 concerns there might be.

17 THE COURT: Okay. All right. Thank you.

18 BY MR. MARTIN:

19 Q. Let's talk briefly about the voter ID. You mentioned  
20 earlier, I think it was in April you had two voters who  
21 didn't have ID, were advised about their right to cast a  
22 provisional ballot and refused or weren't interested,  
23 didn't cast a provisional ballot, right?

24 A. Mm-mm.

25 Q. Where -- at what point in the process is the voter

1 informed of the right to cast a provisional ballot? Is it  
2 on the signage you see when you walk in or is it only  
3 after you're sort of trying to check in, you're at the  
4 poll book, you've waited in line, you've processed through  
5 the system that then you have the conversation about the  
6 lack of ID and the right to cast a provisional ballot?

7 A. The election inspectors we have posted at our  
8 check-in area usually address the voters upfront about  
9 photo ID or "Do you need to register today?" and then  
10 direct them to the registration table, "Do you have proof  
11 of residency?" They try to do a lot of that ahead of  
12 time.

13 Q. So it's when people are in line they're interacting  
14 with them?

15 A. Yes. Should they get to the poll book without that,  
16 they would address that at the poll book as well,  
17 obviously.

18 Q. Okay. And for the two people in April that you  
19 mentioned, at what point -- do you know at what point in  
20 the process they raised the issue of the lack of ID and --

21 A. I do not.

22 Q. Okay. Let's talk briefly about registration on  
23 Election Day. You discussed the November 2014 wait times  
24 and how that was the result in part of the layout of the  
25 church and the new location, right? But it's my

1 understanding that even when that problem is corrected,  
2 you still have wait times of 30 minutes to an hour; is  
3 that right?

4 A. Possible. Mm-mm. Yes.

5 Q. And are those all because of people who need to  
6 register or is that the source of the wait times, same-day  
7 registration?

8 A. It would -- it definitely contributes to the delay.

9 Q. Okay. And so it eases that pressure, the more people  
10 who register before Election Day, right?

11 A. Certainly.

12 Q. Okay. And this relates to the special registration  
13 deputies and registration drives: you mentioned that other  
14 than this one incident, I think it was one with the League  
15 of Women Voters, there haven't really been registration  
16 drive activities in Port Washington, right?

17 A. Not recently, no.

18 Q. Not recently. When did it end?

19 A. That was a number of years ago. I don't know the  
20 date.

21 Q. Okay. Like, three years ago or two?

22 A. I'm not certain.

23 Q. Okay. If there were registration activities in  
24 Port Washington, do you think that that would reduce the  
25 number of people who needed to show up on Election Day and



1 take care of their registration problem?

2 A. I'm not certain over time we've seen a change in  
3 that. I think individuals, just by nature, will handle  
4 things last minute and we see that with Election Day  
5 registration. And many times their lack of preparedness,  
6 having the proper documentation, understanding the  
7 process, it's a choice they make.

8 Q. And for people who lack the proper documentation --  
9 do most people know each other in Port Washington?

10 A. To some extent. You know, the community is growing  
11 and so not always. I mean, they don't know people by name  
12 necessarily.

13 Q. Okay. The four people who lacked the right  
14 documentation, are there instances you've observed where  
15 corroboration would have allowed them to take care of the  
16 problem on the spot?

17 A. Many times it's a matter of spending the time to go  
18 through the options for documentation.

19 Q. Mm-mm.

20 A. And you can resolve the problem if they're willing to  
21 put forth the effort.

22 Q. Right.

23 A. And it's as simple as the option of a government  
24 document can be their vehicle registration in the glove  
25 box in their car, which they would not have thought of.

1 But if you spend the time to problem solve, 99.9 percent  
2 of the time you can come up with a solution. You know,  
3 you will get those that will say, "Well, I don't want to  
4 go out there and get it."

5 Q. Right.

6 A. "I just don't want to." And I don't -- I don't know  
7 that -- I don't know the answer to that question actually,  
8 whether or not they would happen to have somebody with  
9 them at that moment, if they would have thought that out  
10 far enough in advance, because they haven't obviously.

11 Q. But if they see a neighbor or something and they  
12 could say, "Hey, could you corroborate that I am who I say  
13 I am and I live here?"

14 A. If they knew someone there, possibly.

15 Q. And that would alleviate the need to spend the time  
16 going through the process you're describing?

17 A. If that person just happened to be available --

18 Q. Right.

19 A. -- that they could contact them.

20 MR. MARTIN: Okay. That's all I have, Your  
21 Honor.

22 THE COURT: Okay. Any redirect?

23 MS. SCHMELZER: Just one quick question.

24

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REDIRECT EXAMINATION

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BY MS. SCHMELZER:

Q. You talked a little bit about some certifications on absentee ballots coming back without a witness signature --

A. Yes.

Q. -- correct? What do you do in that situation?

A. In that situation, the very same day that we receive that the voter is contacted. And the ballot, in most cases, is sent back and there's usually time. It's not a problem.

Q. And one more. I lied. For election observers you talked about a problem with the gentleman who is hard-of-hearing and that you were there to move him to the side and that resolved the issue of him hovering; is that correct?

A. Yes.

Q. If an election observer -- and he was in front of the three-foot barrier; is that correct?

A. Yes.

Q. So when election observers violate that restriction, that three-foot restriction, do your inspectors -- do they take some action with that?

A. They would have a discussion with them about the impact of what they're doing and that they need to sit

1 back so they aren't affecting the poll book workers or the  
2 registration workers doing their jobs or intimidating.

3 Q. Besides that incident with the gentleman that was  
4 hard-of-hearing, have you had any other reports of  
5 harassing or intimidating the election observers?

6 A. No, I have not. Generally they're very -- they're  
7 well trained. They understand what their job is.

8 MS. SCHMELZER: Thank you.

9 THE COURT: Just one follow-up on the observer  
10 issues. I'm not sure you were really asked this directly.  
11 But the law changed the range from six to twelve feet to  
12 three to eight feet. And I'm not sure you were asked  
13 whether you had a view about whether that change was  
14 needed or what the purpose of the change was, whether the  
15 old range posed any particular problem or the new one had  
16 any advantage.

17 THE WITNESS: I think the current law is fine.

18 THE COURT: The three to eight?

19 THE WITNESS: Yes. I think we have a polling  
20 location -- we actually have two polling locations where  
21 the farther back they would sit, in order to accommodate  
22 that we would have to push our poll book tables forward,  
23 which shortens the space that we can get individuals  
24 inside the voting area.

25 THE COURT: On the voter side of the table?

1 THE WITNESS: On the voter side, right.

2 THE COURT: Okay. All right. Thank you.

3 THE WITNESS: Sure.

4 THE COURT: Okay. Thank you, very much. And  
5 we're at our break and so I'll remind people that we'll  
6 have to clear off -- although the defendant will sit over  
7 here, I'm sure the marshals will insist that we clear off  
8 that table as well. So sorry about that inconvenience.  
9 But we will reconvene at 1:30.

10 And since we're going to be in here, you're going to  
11 know whether I'm finished or not because you'll just see  
12 us still working here. But I expect that it will take  
13 probably less than half an hour or so. But if we're still  
14 working, you'll just have to hold your horses until we're  
15 done. All right. We'll see you at about 1:30.

16 MR. SPIVA: Thank you.

17 (Lunch recess at 12:33 p.m.)

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