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

ONE WISCONSIN INSTITUTE, INC., et al.,

Plaintiffs,

v. Case No. 15-CV-324

JUDGE GERALD C. NICHOL, et al.,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Count I (Voting Rights Act) and Count II (Undue Burden on the Right to Vote) as they relate to Wisconsin's voter ID law, all of Count III (Equal Protection), and all of Count IV (Partisan Fencing) for failure to state a claim on which relief can be granted.

Because the motion deals with three distinct claims, this brief addresses both the facts and argument related to each claim separately. The motion treats the factual allegations alleged in the complaint as true (although for purposes of this motion only). Legal conclusions contained in the Amended Complaint, however, are not bound to be accepted as true. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

COUNTS I AND II

I. Allegations related to the challenge to the voter ID law.

The plaintiffs challenge Wisconsin's voter ID law, which requires that voters present one of several forms of photo identification in order to vote: a Wisconsin driver's license (or an unexpired receipt for a license), a Wisconsin identification card (or an unexpired receipt for an identification card), an identification card issued by a U.S. uniformed service, a U.S. passport, a U.S. naturalization certificate issued within the past two years, an identification card issued by a federally recognized Indian tribe in the state, or an unexpired identification card issued by a university or college in the state. Wis. Stat. § 5.02(6m). Voters that do not present a qualifying form of identification can cast a provisional ballot that will be counted if they present the identification at the municipal clerk's office before 4:00 p.m. on the Friday following the election. Wis. Stat. §§ 6.79(3)(b) & 6.97(3)(b).

Plaintiffs allege that "[a] large number of registered Wisconsin voters do not have a form of ID that can be used for voting." (Am. Compl. ¶ 145.) The Amended Complaint relies upon the finding by the District Court in the *Frank v. Walker* case, which was reversed by the Seventh Circuit, that approximately 300,000 registered voters do not have qualifying ID. (Am. Compl. ¶ 145.) The Amended Complaint alleges that people without ID "are generally faced with the choice of undertaking the burden of obtaining an

ID that can be used for voting or being disenfranchised. And a number of these voters will be disenfranchised." (Am. Compl. ¶ 146.)

The plaintiffs allege that "the voter ID law" has "abridged and/or denied, and will continue to abridge and/or deny, the voting rights of African Americans and/or Latinos in Wisconsin on account of race." (Am. Compl. ¶ 156.) The plaintiffs also allege that the "challenged provisions," which includes the voter ID law, violate the First and Fourteenth Amendments because the "burdens imposed by the challenged provisions, individually and collectively, outweigh the benefits of these provisions." (Am. Compl. ¶ 163.)

II. The Court should dismiss Counts I and II as they relate to the voter ID law.

The plaintiffs claims related to the voter ID law under the Voting Rights Act (Count I) and the First and Fourteenth Amendments (Count II) must be dismissed under the Seventh Circuit's decision in *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) *cert. denied*, 135 S. Ct. 1551 (2015). The court in *Frank* rejected challenges to the voter ID law that are identical to the ones brought by the plaintiffs in this case. The Amended Complaint even recognizes that claims related to the voter ID law are controlled by the *Frank* decision and that plaintiffs are merely preserving these claims for appeal. (Am. Compl. ¶ 156 n. 5.)

A. *Frank* rejected a constitutional claim identical to the one raised in Count II of the Amended Complaint.

Frank rejected a challenge to the voter ID law as an unconstitutional burden on the right to vote based on the same facts and legal theories alleged in this case. The district court in *Frank* had ruled that the voter ID violated the constitution because (1) it placed a burden on the right to vote of the approximately 300,000 registered voters that did not have a qualifying photo ID and (2) the state interest in the prevention of voter impersonation fraud did not outweigh the burdens because such fraud was rare. 768 F.3d at 746.

The plaintiffs assert the same grounds for invalidating the voter ID law. With respect to the burden, they specifically plead the *Frank* district court's finding that 300,000 registered voters do not possess a qualifying ID and contend that these voters will be burdened and thus "disenfranchised." (Am. Compl. ¶¶ 145-46.) With respect to the state interest, they allege that that the "voter ID law does not materially benefit Wisconsin" because "[t]here is no material amount of voter-impersonation fraud, and, upon information and belief, the voter ID law has not increased and will not increase confidence in Wisconsin's election process." (Am. Compl. ¶ 151.)

In *Frank*, the Seventh Circuit rejected a claim identical to the ones made by the plaintiffs under *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), holding that the voter ID law did not impose an

unconstitutional burden because "the burden of getting a photo ID in Wisconsin is not greater than the burden in Indiana," whose voter ID law had been upheld in *Crawford*. 768 F.3d at 749. The Seventh Circuit rejected the claim of "disenfranchisement" because *Crawford* held that "'the inconvenience of making a trip to the [department of motor vehicles], 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.'" *Frank*, 768 F.3d at 748 (alteration in original) (quoting *Crawford*, 553 U.S. at 198).

The Seventh Circuit also rejected the plaintiffs' assertions with regard to the state interest supporting the voter ID law because *Crawford* established this state interest in promoting confidence in elections as a "legislative fact" for which "courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." *Id.* at 750. It held that "[p]hoto ID laws promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in Wisconsin." 768 F.3d at 750.

The plaintiffs have failed to state a claim on which relief can be granted because *Frank* holds that a constitutional right to vote claim based on the same factual and legal allegations as contained in the Amended Complaint fails as a matter of law.

B. *Frank* rejected a claim under Section 2 of the Voting Rights Act identical to Count I of the Amended Complaint.

The Seventh Circuit also rejected a challenge to the voter ID law based on Section 2 of the Voting Rights Act based on the same facts and legal theories asserted in this case. The district judge in *Frank* had ruled that the voter ID law violated Section 2 "because white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them," that "it would be harder for blacks and Latinos, on average, to get the documents they need" to secure photo identification, and African Americans and Latinos "are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." *Frank*, 768 F.3d at 752-53.

These are the same allegations contained in the Amended Complaint: that the voter ID law will "disproportionately [] abridge, deny, and burden the right to vote of African Americans and Latinos" because they are less likely to possess qualifying ID (Am Compl. ¶ 147) and this disparate impact is because "African Americans and Latinos in Wisconsin are disproportionately likely to live in poverty due to the effects of discrimination." (Am. Compl. ¶ 148.)

Frank rejected the claim under Section 2(a) of the Voting Rights Act (which forbids denial or abridgement of the right to vote "on account of race or color") because the voter ID law did not impose the denial of the right to vote even if there were disparate outcomes in the number of individuals that had

qualifying ID. 768 F.3d at 753. The Seventh Circuit rejected a difference in economic circumstances as basis for finding discrimination "on account of race or color" because it was not "attributable to discrimination by Wisconsin." *Id.* Discrimination that was not imposed by the State of Wisconsin itself was not probative because "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.* Like in *Frank*, the plaintiffs in this case rely on the economic circumstances not attributable to discrimination by the State itself.

The Seventh Circuit also rejected the claim under Section 2(b) of the Voting Rights Act (which prohibits giving protected groups "less opportunity than other members of the electorate to participate in the political process") because "Act 23 extends to every citizen an equal opportunity to get a photo ID." 768 F.3d at 753. The fact that because African Americans and Latinos "have lower income, these groups are less likely to *use* that opportunity" did not constitute a violation of Section 2. *Id.* Simply put, "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 755. As in *Frank*, the plaintiffs in this case do not allege that African Americans and Latinos do not have equal opportunity to obtain qualifying IDs.

The plaintiffs have failed to state a claim on which relief can be granted under *Frank*.

COUNT III

III. Factual allegations related to the equal protection claims.

The plaintiffs challenge three provisions of Wisconsin law as violating the equal protection clause of the Fourteenth Amendment, alleging that these provisions distinguish between groups of voters without a rational basis. (Am. Compl. ¶¶ 163-168.)

A. Treatment of military voters and overseas voters with respect to voting by party

The plaintiffs allege that "[t]here is no rational basis for permitting military voters to vote a straight ticket for non-national offices while refusing to permit overseas voters to cast such ballots." (Am. Compl. ¶ 167.) Some background on Wisconsin's electoral laws governing military voters and overseas voters is required to understand this claim.

1. Military electors

Wisconsin law defines a "military elector" as members of a uniformed service, members of the merchant marine, civilian employees that are attached to the uniformed services, and the spouses and dependents of people in these three categories that reside with or accompany them. Wis. Stat. § 6.22(1)(b). Military electors "shall vote in the ward or election district for

the address of his or her residence prior to becoming a military elector."[1] Wis. Stat. 6.22(2)(a). Military electors have the right to vote in federal, state, and local elections because they were state residents before becoming military electors and "no person loses residence in this state while absent from this state on business for the United States." Wis. Stat. § 6.10(6).

2. Overseas electors

Wisconsin law defines an "overseas elector" as

> a U.S. citizen who is not disqualified from voting under s. 6.03, who has attained or will attain the age of 18 by the date of an election at which the citizen proposes to vote and *who does not qualify as a resident of this state under s. 6.10*, but who was last domiciled in this state or whose parent was last domiciled in this state immediately prior to the parent's departure from the United States, and who is not registered to vote or voting in any other state, territory or possession.

Wis. Stat. § 6.24(1) (emphasis added). Wisconsin law further provides that overseas electors "may vote in any election for national office" but "may not vote in an election for state and local office." Wis. Stat. § 6.24(2).

3. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

Wisconsin law provides that military electors and overseas electors can vote using the "federal write-in absentee ballot prescribed under 42 U.S.C. § 1973ff-2." Wis. Stat. § 6.25(1)(a) & (b). This is a reference to the Uniformed

[1] There are some exceptions for the spouses and dependents of military electors. *See* Wis. Stat. § 6.22(2)(a).

and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20301 *et seq*.

The Wisconsin statute references the previous codification at 42 U.S.C. § 1973ff-2, which has now been transferred to 52 U.S.C. § 20303. UOCAVA requires States to "permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 20303 of this title) in general elections for Federal office." 52 U.S.C. § 20302(a)(3).

Military electors under Wisconsin law are "absent uniformed services voters" under UOCAVA, defined as members of a uniformed service or the merchant marine (and their spouses and dependents) who, due to active service, are "absent from the place of residence where the member is otherwise qualified to vote." 52 U.S.C. § 20310(1)(A)-(C).

An overseas elector under Wisconsin law qualifies as an "overseas voter" under UOCAVA, specifically "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5)(C).

Wisconsin allows military and overseas electors to vote for candidates by party because UOCAVA provides that "in completing the ballot, the absent uniformed services voter or overseas voter may designate a candidate by

writing in the name of the candidate *or by writing in the name of a political party (in which case the ballot shall be counted for the candidate of that political party).*" 52 U.S.C. § 20303(c)(1) (emphasis added).

It should be noted that the federal write-in absentee ballot is an option for military and overseas electors in addition to the option of using the ballot provided by the appropriate local election officials. If military and overseas voters secure ballots from the appropriate local clerk, they will receive a ballot that does not allow for party voting. *See* Wis. Stat. §§ 6.22(4) & 6.24(5).

B. Treatment of voters who moved to Wisconsin within 28 days of the election

The plaintiffs contend that "there is no rational basis" in allowing those "who move to Wisconsin from out of state within 28 days of an election to vote for president and vice president at their new ward or election district" while not allowing those "who moved within Wisconsin within 28 days of an election to vote for president and vice president at their new ward or election district." (Am. Compl. ¶ 169.)

Wisconsin grants the right to vote to "[e]very U.S. citizen age 18 or older *who has resided in an election district or ward for 28 consecutive days before any election*." Wis. Stat. § 6.02(1) (emphasis added). While the 28-day residency requirements could function to prohibit electors from voting if they moved within that time frame prior to an election, Wisconsin provides that

"[a]ny U.S. citizen age 18 or older who moves within this state later than 28 days before an election shall vote at his or her previous ward or election district if the person is otherwise qualified." Wis. Stat. § 6.02(2).

Otherwise eligible electors who move to Wisconsin from outside the state within 28 days of the election are not eligible to vote because they do not satisfy Wis. Stat. § 6.02(1). Wisconsin law, however, provides that an elector who moves from outside the state but otherwise satisfies the qualifications for voting "is entitled to vote for the president and the vice president but for no other offices." Wis. Stat. § 6.15(1).

C. Challenges to the failure to accept certain forms of photo identification under the voter ID law

The plaintiffs contend that "[t]here is no rational basis for Wisconsin's refusal to permit technical college, out-of-state, and all expired IDs to be used as voter IDs." (Am. Compl. ¶ 168.) The plaintiffs allege that "there is no reason to believe that technical college IDs, expired IDs, and out-of-state driver's licenses are any less capable of confirming identity that the documents that can be used as voter ID." (Am. Compl. ¶ 152.)

IV. The Court should dismiss all of the plaintiffs' equal protection claims.

The Court should dismiss all of the plaintiffs' equal protection claims because each of the challenged laws has a rational basis.

The plaintiffs allege that "[t]here is no rational basis for permitting military voters to vote a straight ticket for non-national offices while refusing to permit overseas voters to cast such ballots." (Am. Compl. ¶ 167.) Wisconsin does not allow overseas electors to vote by party in state and local elections because they are not eligible to vote in those elections; military electors can vote by party in those elections because they are eligible to vote in those elections.

The plaintiffs claim that Wisconsin has no rational basis for "permitting the class of voters who moved to Wisconsin from out of state within 28 days of an election to vote for president and vice president at their new ward or election district but not permitting the class of voters who moved within Wisconsin within 28 days of an election to vote for president and vice president at their new ward or election district." (Am. Comp. ¶ 169.) Wisconsin allows those that move from outside of the state within 28 days of the election to vote for president and vice president because the Voting Rights Act requires it.

The plaintiffs also claim that Wisconsin has no rational basis for not accepting technical college IDs, expired IDs and drivers' licenses from other states as qualifying ID under the voter ID law. (Am. Compl. ¶ 168.) These claims should be dismissed for several reasons. First, there is no case and controversy with respect to technical college IDs because Wisconsin now

accepts those as qualifying forms of ID. Second, the claims with respect to out-of-state license and expired licenses fail because there is a rational basis for not accepting expired identification or identification from other states. Lastly, if the court does not dismiss this part of the equal protection claim, it should be stayed because these issues are being litigated before the Eastern District of Wisconsin in the *Frank v. Walker* case.

A. Wisconsin is merely complying with federal law in the way it treats military and overseas electors.

The plaintiffs' claim with respect to the allegedly arbitrary distinction between overseas electors and military electors fails because overseas voters do not have the right to vote in non-national elections. Under state law, an overseas elector "may vote in any election for national office, including the partisan primary and presidential preference primary and any special primary election. *Such an elector may not vote in an election for state or local office*." Wis. Stat. § 6.24(2) (emphasis added). As a result, Wisconsin allows overseas electors to vote using the "federal write-in absentee ballot . . . for any candidate or for all candidates of any recognized political party for national office listed on the ballot at that election." Wis. Stat. § 6.25(1)(b).

Unlike overseas electors, military electors are not restricted to voting only in federal elections. *See* Wis. Stat. § 6.22. Military electors may not be physically present in the state, but Wisconsin law provides that "no person loses residence in this state while absent from this state on business for the

United States." Wis. Stat. § 6.10(6). As a result, military electors can vote in state and local elections and Wisconsin law allows these voters to use the "federal write-in absentee ballot . . . for any candidate or for all candidates of any recognized political party for the offices listed on the ballot at that election." Wis. Stat. § 6.25(1)(a).

Simply put, there is no equal protection violation in not accepting the votes of overseas electors for elections in which they have no right to vote. Equal protection does not "require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The distinction drawn by the State of Wisconsin is perfectly rational in allowing overseas electors and military electors to cast a federal write-in absentee ballot for the offices to which they are entitled to vote under state law. This easily satisfies the "lenient standard" of rational basis review. *Smith v. City of Chicago*, 457 F.3d 643, 650-51 (7th Cir. 2006).

The plaintiffs' real issue seems to be that Wisconsin does not provide overseas electors with the right to vote in state and local elections. The Second Circuit rejected such a challenge because states may constitutionally require that a State's voters reside in the State "subject of course to the provisions of the UOCAVA and the Supremacy Clause." *Romeu v. Cohen*, 265 F.3d 118, 126 (2d Cir. 2001). Overseas voters who do not reside in Wisconsin do not have the right to vote in Wisconsin's

state and local elections because states have the "unquestioned power to impose reasonable residence restrictions [on] the availability of the ballot." *Id.* (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (alteration in original).

B. Wisconsin has a rational basis for treating those that move within the state differently from those that move from outside the state.

The plaintiffs' claim related the differing treatment for those that move within the State and those that move from outside the State fails because Wisconsin has a rational basis for allowing those that move from outside of the State to vote for president and vice president at their new ward: it is required to do so by the Voting Rights Act. In addition, the plaintiffs cannot prove that those that move within the state have been disadvantaged because Wisconsin treats those who move within the State of Wisconsin better than those that move from outside of the State. Those that move from outside of the state are ineligible to vote with the narrow exception of presidential and vice presidential elections while those that move within the state can vote for all offices (federal, state and local).

1. The Voting Rights Act requires Wisconsin to allow those that move from outside of the state to vote for president and vice president without regard for durational residency requirements.

Otherwise-qualified electors that move to Wisconsin from outside the state within 28 days of the election are not eligible to vote in Wisconsin. Wisconsin grants the right to vote to "[e]very U.S. citizen age 18 or older *who*

has resided in an election district or ward for 28 consecutive days before any election." Wis. Stat. § 6.02(1) (emphasis added). Those that move to the state from outside of the state later than 28 days before an election cannot vote because they do not satisfy the durational residency requirement of Wis. Stat. § 6.02(1).[2]

Wisconsin has a narrow exception that allows those that have moved from outside the state, and satisfy the other qualifications for voting, "to vote for the president and the vice president but for no other offices." Wis. Stat. § 6.15(1). This provision is not arbitrary; it is required by the Voting Rights Act. Congress declared that it was necessary "to completely abolish the durational residency requirement as a precondition for voting for President and Vice President." 52 U.S.C. § 10502(b). Therefore, the Voting Rights Act provides that

> [n]o citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement.

[2] The plaintiffs do not directly attack Wisconsin's 28-day residency requirement in this claim. The Supreme Court has upheld a 50-day durational residency requirement. *See Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (per curiam).

52 U.S.C. § 10502(c). Wisconsin Stat. § 6.15(1) merely reflects that the Voting Rights Act overrides the State's 28-day durational residency requirement in elections for president and vice president.[3]

2. The equal protection claim fails because Wisconsin has a rational basis for treating voters that move in-state differently from those that move from out-of-state.

The State of Wisconsin's treatment of voters that move within 28 days of an election is not the type of "intentional and arbitrary discrimination" that the equal protection clause protects against. *Smith*, 457 F.3d at 643. The Supreme Court upholds durational residency requirements because "States 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." *Marston*, 410 U.S. at 680. Wisconsin's requiring those that move within 28 days of an election vote at the prior district is consistent with this interest because that is where the voter records would show them to be registered.

Further, the differing treatment is rationally related to the different voting rights these groups enjoy under Wisconsin law. *See Plyler*, 457 U.S. at 216 (holding that equal protection does not "require things which

[3] The Voting Rights Act does allow for the exclusion of voters who do not satisfy a voter registration deadline, 52 U.S.C. § 10502(e), but this does not apply to Wisconsin because it allows same-day registration.

are different in fact or opinion to be treated in law as though they were the same"). Voters that move within the State retain their right to vote for all local, state and federal offices so long as they vote at their prior ward. Voters that move from outside the State cannot vote, but the State recognizes their right to vote for president and vice president under the Voting Rights Act. They are allowed to vote at their new election district because they must vote for president and vice president somewhere in Wisconsin and they cannot vote at their old election district because that would be in another State.

The plaintiffs' claim fails to recognize that Wisconsin actually treats those that move within the State more favorably than those that move from outside the State by allowing them to vote for all offices. Equal protection claims ordinarily involve claims by those who are "disadvantaged" by a particular classification. *E.g.*, *Plyler*, 457 U.S. at 216-17. But in this case, those that move within the State are actually advantaged in relation to those that move from outside the State. Those that move from outside the State can only vote for president and vice president. Wis. Stat. § 6.15(1). Those that move within the State are able to vote for president and vice president and also for governor, state legislators, members of Congress, state judicial offices, and all local offices. Wis. Stat. § 6.02(2). Importantly, there is only one

presidential election every four years, whereas there are many state and local elections that occur between presidential elections.

Further, the one alleged "disadvantage" is not really a disadvantage. Plaintiffs claim that voters who move within the State are burdened by having to return to their old election ward or district in order to vote. (Am. Compl. ¶ 120.) Those that move inside the State, however, maintain the ability to vote at their prior election ward even if they cannot travel to the ward. If the cost or distance of travel to the old ward is an issue, these voters can vote by absentee ballot. Wis. Stat. § 6.85(1) ("An absent elector is any otherwise qualified elector who for any reason is unable or unwilling to appear at the polling place in his or her ward or election district."). The voter need not return to his prior ward because the voter can apply for an absentee ballot by mail, by email or facsimile, Wis. Stat. § 6.86(1)(a)1. & (a)(6)., and then return the completed ballot by mail so that it is received by 8 p.m. on election day. Wis. Stat. § 6.87(6).

The rationale behind Wisconsin's treatment of those that move within 28 days of an election more than satisfies the "lenient" standard of rational basis review. *Smith*, 457 F.3d at 643.

C. The court should dismiss issues related to the accepted forms of photo identification.

The plaintiffs contend that the state has no rational basis in refusing to accept technical college, out-of-state IDs, and expired IDs to satisfy the photo identification requirement. (Am. Compl. ¶ 168.)

1. There is no case and controversy with respect to technical college IDs.

The court should dismiss the case with respect to the technical college IDs because Wisconsin now accepts technical college ID cards as qualifying ID under the voter ID law. As a result, there is no dispute between the parties. This aspect of the case must be dismissed because there is no Article III case or controversy. Simply put, there is no need for this Court to enter an injunction requiring the defendants to do what the law requires.

Effective May 15, 2015, the Government Accountability Board implemented Emergency Rule 1515 which clarified that "[a] student identification card issued by a technical college is an acceptable form of identification under s. 5.02(6m)(f), Wis. Stat., and may be presented by an elector obtaining a ballot." EmR 1515, Text of GAB 10.02. As the plain language analysis stated, this rule "clarif[ied] that an identification card issued by an institution in the Wisconsin Technical College System is an acceptable form of photo identification for voting" so long as it meets

"the requirements for acceptable photo identification cards issued by other accredited educational institutions." EmR 1515, Plain Language Analysis.

The GAB implemented the rule by emergency rule under Wis. Stat. § 227.24 so that it could go into effect immediately. This was done "to clarify how voters must comply with the photo identification requirements in Wis. Stat. §§5.02(6m) and 6.79(2) for the May 19, and June 9, 2015, special elections and any other special or regularly scheduled elections that may occur shortly thereafter." EmR 1515, Finding of Emergency. The rule went into effect on May 15, 2015, and is effective for 150 days. EmR 1515, Text of Rule, Section 3.

The rule will be made permanent after it has gone through the required process for administrative rulemaking. *See* Wis. Stat. §§ 227.135 – 227.22. The permanent rule was submitted to the Legislative Council Rules Clearinghouse, see Wis. Stat. § 227.15, on May 27, 2015. (Wis. Admin. Register 714A3 (June 15, 2015) CR15-047.)

The Court need not address a claim requesting an injunction forcing the State to accept a form of ID that it has agreed it will accept.

2. Wisconsin has a rational basis for not accepting expired forms of ID and out-of-state IDs.

The court should dismiss the plaintiffs' claims with respect to expired IDs and out-of-state IDs because they fail to allege that the State's refusal to accept expired IDs or out-of-state IDs lacks a rational basis. Under rational

basis review, courts must uphold a law if "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation and internal quotation marks omitted).

The legislature could reasonably have concluded that it would be easier to procure a false form of identification if that identification is expired. Further, Wisconsin poll workers are much less likely to know whether an ID card from out-of-state was actually issued by a state government than they will be for IDs issued by Wisconsin, with which they will be familiar. This is enough to satisfy the lenient standard of rational basis review. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (legislative classifications survive rational basis review if based on "rational speculation unsupported by evidence or empirical data").

Further, Wisconsin has an interest in limiting the number of ID forms to a discrete number so that poll workers can implement the law in a way that ensures only the accepted forms are used. In the abstract, the State could accept any number of forms of ID that would benefit a small group of people by saving them the hassle of securing a new form of ID. In the real world, though, the State needs to put some limit on the acceptable forms of ID. The Legislature balanced this need with the interests of voters in being able to comply with the law and decided to accept the nine different

categories of IDs listed in Wis. Stat. § 5.02(6m)[4] rather than the 50-plus forms of ID that would be covered if out-of-state and expired ID cards were accepted.

The equal protection clause does not require a State to accept every form of picture ID that might be as good at confirming identity as the forms that are accepted. Compiling a list of acceptable forms of ID is classic legislative line-drawing, and the "restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *Beach Commc'ns,* 508 U.S. at 315 (internal quotations marks omitted). The difficulty facing a legislature is that

> [d]efining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 315-16 (internal quotation marks and alterations omitted). As the Seventh Circuit recently recognized, "'every line drawn by a legislature leaves some out that might well have been included.'" *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 655 (7th Cir. 2013) (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)). This is why statutes that are

[4] These nine categories encompass more than nine specific forms of ID because there are several different Indian tribes and branches of the armed forces with different ID cards.

both overinclusive and underinclusive can survive rational basis review "because 'perfection is by no means required' and the 'provision does not offend the Constitution simply because the classification is not made with mathematical nicety.'" *Id.* at 656 (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)).

The plaintiffs cannot sustain a claim that the State has no conceivable rational basis for refusing to accept expired ID cards and for not accepting ID cards issued by the other forty-nine states.

3. As an alternative, the court should stay consideration of these issues.

If the court does not dismiss the claims, it should stay consideration of this claim because these identical issues are being litigated before Judge Adelman in *Frank v. Walker*, No. 11-CV-1128 (E.D. Wis.). Following the Seventh Circuit's decision, the *Frank* plaintiffs filed a motion for a permanent injunction and a motion for class certification on claims that, among other things, Act 23 violates equal protection by as applied to technical college students in not accepting technical college identification and that the State should accept out-of-state drivers' licenses. (*Frank* Dkt. 222-223.) The court should therefore stay consideration of these issues until the *Frank* court has issued its ruling.

COUNT IV

V. Factual allegations related to partisan fencing claim

In their "partisan fencing" claim, the plaintiffs do not allege that a particular group of people has been denied the right to vote. Instead, the plaintiffs contend that "the challenged provisions disproportionately burden the right to vote of individuals who are likely to vote for Democratic candidates." (Am. Compl. ¶ 172.) The plaintiffs contend that "the State Legislature, in not modifying the rules limiting early voting to one location per municipality and in enacting other challenged provisions, acted with the intent disproportionately to suppress the vote of Democratic supporters without a compelling reason." (Am. Compl. ¶ 172.)

VI. The Court should dismiss the partisan fencing claim because no group has been "fenced out" of the electorate.

The court should dismiss Count IV, the plaintiffs' "partisan fencing" claim, because the challenged laws do not actually fence a group of citizens out of the electorate. The plaintiffs rely on *Carrington v. Rush*, 380 U.S. 89, 94 (1965), in which the Supreme Court struck down a Texas law that prohibited members of the military from voting because "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The plaintiffs' claim fails as a matter of law because they do not allege that Wisconsin has actually fenced anyone out of the franchise by forbidding them from voting.

In *Carrington*, the Supreme Court struck down a provision of the Texas Constitution that prohibited "'[a]ny member of the Armed Forces of the United States' who moves his home to Texas during the course of his military duty from ever voting in any election in that State 'so long as he is a member of the Armed Forces.'" 380 U.S. at 89. Texas attempted to justify this total exclusion from the franchise based on the interest in protecting small communities from being overwhelmed by the concentrated military vote. *Id.* at 93. The Court ruled that the first purported interest was invalid because it was unconstitutional to fence out a sector of the population based on how they would vote. *Id.* at 94. Notably, the "fencing out" in *Carrington* was the complete exclusion of servicemen from the franchise.

Both in *Carrington* and in cases applying the rule, the Supreme Court has required a "fencing out" claim to include a complete denial of the right to vote. When striking down a New York law that limited voting in school district elections to those that owned or leased real property in the district or were parents of children in the public schools, the Court held that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and *denies the franchise to others*, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (emphasis added). The Court similarly struck down

requirements of real property ownership to vote on whether bonds should be issued, *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and a Maryland law prohibiting those who lived in a federal enclave from voting. *Evans v. Cornman*, 398 U.S. 419 (1970).

A "fencing out" claim requires a total denial of the right to vote for a particular class of citizens (such as servicemen, non-property owners, or those that live on federal lands). There is no authority supporting "fencing out" claims based on a series of laws that allegedly impose burdens on voting that might cause some unknown percentage of voters, who tend to vote for a particular political party, to forgo their right to vote. The Northern District of New York rejected a "fencing out" challenge to residency requirements that allegedly imposed burdens on college students' right to vote because it was a "neutral" voting regulation regarding residency and did not, "like the statute discussed in *Carrington* that, by its very terms, disenfranchise[] a particular group of individuals living within the state's borders." *Levy v. Scranton*, 780 F. Supp. 897, 902 (N.D.N.Y. 1991).

The partisan fencing claim must fail because the Seventh Circuit likewise recognizes that laws that allegedly impose burdens making it somewhat more difficult to vote do not constitute "disenfranchisement." *Frank*, 768 F.3d at 748. Because the challenged laws do not prohibit a class of people from voting, they are not subject to a "fencing out" challenge.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts I and II as they relate to the voter ID law, and Counts III and IV in their entirety.

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BRAD D. SCHIMEL
Attorney General

s/Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020 (*Keenan*)
(608) 266-7477 (*Kawski*)
(608) 266-3067 (*Collins*)
(608) 266-5457 (*Murphy*)
(608) 267-2223 (fax)
keenanbp@doj.state.wi.us
kawskicp@doj.state.wi.us
collinsws@doj.state.wi.us
murphysm@doj.state.wi.us