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

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

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

BRAD D. SCHIMEL
Attorney General

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

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INTRODUCTION

"We often call summary judgment, the 'put up or shut up' moment in litigation . . . by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case." *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010) (citations omitted). This is the "put up or shut up" moment for Plaintiffs' case. Plaintiffs will come forward now with the evidence that can prove every one of their dozens of pending claims, or the claims should be dismissed.

This case involves challenges to Wisconsin election laws enacted since 2011. These laws are part of a Wisconsin election system that is fundamentally fair, easy-to-navigate, and open to all. Defense counsel has prepared a chart to assist the Court (and themselves) to help visualize which laws are challenged under which legal theories. (Kawski Decl., Ex. A.) More than 50 separate claims are pending. That said, this case is not so factually and legally sprawling that summary judgment is inappropriate. It is appropriate because Plaintiffs cannot offer evidence to prove they can prevail.

To start, there are jurisdictional and standing problems. Plaintiffs lack standing to challenge the voter photo ID law and reforms to voter registration. All individual voter Plaintiffs have a qualifying ID and are registered to vote, and the two corporation Plaintiffs have no standing independent from the individual voter Plaintiffs. This Court has no subject

matter jurisdiction over claims for which Plaintiffs lack Article III standing. Similarly, the corporation Plaintiffs have no statutory standing to make claims under the Voting Rights Act of 1965 because they are not "aggrieved person[s]." 52 U.S.C. § 10302(a), (b). Corporations cannot assert Voting Rights Act claims because they have no race and no right to vote.

Setting aside jurisdictional and standing issues, Wisconsin's current election system is constitutional and is consistent with Section 2 of the Voting Rights Act of 1965. All pending claims fail as a matter of law.

Some of Plaintiffs' claims are, as they acknowledge, an effort to re-litigate issues that have been settled well by the federal courts. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1551 (2015) (rejecting Voting Rights Act and constitutional challenges to Wisconsin's voter photo ID law). Other claims, such as Plaintiffs' "partisan fencing" theory in Count 4 and their age-discrimination claims in Count 6, find no support in the cases upon which Plaintiffs rely. In particular, several "partisan fencing" claims fail as a matter of law because the challenged laws, including the voter photo ID law, were passed by Republican *and* Democratic legislators.

Plaintiffs cannot show through admissible evidence that the challenged laws will have the unconstitutional impacts asserted. In their Count 5, Plaintiffs allege that the challenged laws were enacted to intentionally discriminate against minorities. It is the "put up or shut up" moment for

those bold allegations, and Plaintiffs cannot "put up" admissible evidence to prove them.

Similarly, Plaintiffs cannot show through admissible evidence that the challenged reforms violate Section 2 of the Voting Rights Act of 1965 by causing a prohibited discriminatory result for minority voters. Without admissible evidence to support their constitutional and statutory claims, Plaintiffs cannot survive summary judgment.

Plaintiffs' shotgun approach to their case makes for complex litigation, but the law is not on their side. The defenses asserted and evidence filed with Defendants' summary judgment motion will show that Plaintiffs' claims lack merit. This Court should grant Defendants' summary judgment motion.

FACTUAL BACKGROUND

This case challenges many election laws, including the voter photo ID law, reforms to voter registration and residency requirements, changes to absentee voting rules, reforms to election observer rules, and many more. Defendants include a chart that illustrates the many legal theories that Plaintiffs raise. (Kawski Decl., Ex. A.) There are 59 separate claims pending.

A non-comprehensive overview of the in-person and absentee voting process in Wisconsin follows. In addition to this short overview, Defendants are filing the Declaration of Michael Haas, Elections Division Administrator at the Wisconsin Government Accountability Board. Mr. Haas's declaration

includes copies of Government Accountability Board documents prepared to assist voters and election officials to participate in and administer elections.

I. Voter qualifications

Only certain people are qualified to vote in Wisconsin. The Wisconsin Constitution provides that: "Every United States citizen age 18 or older who is a resident of an election district is a qualified elector of that district." Wis. Const. art. III, § 1. The Wisconsin Constitution also provides that the Wisconsin Legislature may enact laws regarding voting:

> (1) Defining residency.
> (2) Providing for registration of electors.
> (3) Providing for absentee voting.
> (4) Excluding from the right of suffrage persons:
>
> > (a) Convicted of a felony, unless restored to civil rights.
> > (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.
>
> (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

Wis. Const. art. III, § 2. The legislature has enacted many such laws.

II. Voter registration and residence

One must register to vote in Wisconsin. Wis. Stat. § 6.27. "Registering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748. The Seventh Circuit summarized the Wisconsin voter registration process:

> In order to register, a person must provide proof of residence (such as a driver's license, utility bill, bank statement, or residential lease) and anyone of (1) the applicant's driver's license number and expiration date, (2) a Wisconsin Department of Transportation ID number and its expiration date, or (3) the last four digits of the applicant's Social Security number. Residents can register by mail or through a Special Registration Deputy (someone trained by a municipality to collect voter registration forms) until 20 days before an election. They can register in a municipal clerk's office until the Friday before an election. And they can register at a polling place on election day.

Id. at 748 n.2; *see also* Haas Decl., Exs. A (voter registration guide), B (proof of residence for voter registration), and C (acceptable proof of residence examples). GAB form GAB-131 is the Wisconsin Voter Registration Application, which is completed by a voter and returned to the municipal clerk. (Defendants' Proposed Findings of Fact 1, *hereinafter* "DPFOF ___.") Photo identification is not required when registering to vote.

A Wisconsin voter must reside in the ward in which he or she votes for at least 28 days before an election in which he or she intends to vote. Wis. Stat. § 6.02(1). If a voter moves within Wisconsin later than 28 days before an election, he or she is required vote at his or her last ward's polling place when voting in person on Election Day. Wis. Stat. § 6.02(2).

A voter's residence in a ward "is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return." Wis. Stat. § 6.10(1). Wisconsin Stat. § 6.10(1) is the general rule to determine a voter's residence, and Wis. Stat. § 6.10(2) through

(13) establish rules that apply to specific situations. For example, Wis. Stat. § 6.10(8) provides that "[n]o person gains a residence in any ward or election district of this state while there for temporary purposes only."

III. Election Day procedure and proof of identification

There are three things that a registered voter must do to obtain a ballot at the polling place on Election Day: (1) "State it": state his or her full name and address to election officials, (2) "Show it": present election officials with a proof of identification document, and (3) "Sign it": sign the poll list. (DPFOF 2); Wis. Stat. § 6.79(2)(a).

Voters must show qualifying proof of identification at the polling place to prove that they are who they claim to be. (DPFOF 3); Wis. Stat. §§ 5.02(6m), 6.79(2)(a). There are nine forms of qualifying identification: (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 that was issued not earlier than two years before the date of the election at which it is presented; (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; and (9) an unexpired identification card issued by an accredited college or university in Wisconsin, if it meets certain criteria. Wis. Stat. § 5.02(6m)(a)–(f).

With certain exceptions, *see* Wis. Stat. § 6.87(4)(a)–(b), Wisconsin requires that an elector must present an acceptable form of photo identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph on the identification reasonably resembles the elector. Wis. Stat. § 6.79(2)(a). If an elector does not have acceptable photo identification, he may vote by provisional ballot pursuant to Wis. Stat. § 6.97. Wis. Stat. § 6.79(2)(d) and (3)(b). The provisional ballot will be counted if the elector presents acceptable photo identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners by 4 p.m. on the Friday after the election. Wis. Stat. § 6.97(3)(b). If an in-person voter presents photo identification bearing a name that does not conform to the voter's name on the poll list or a photograph that does not reasonably resemble the voter, that person may not vote. *Id.*

To accommodate eligible electors who do not yet possess an acceptable photo identification and to ensure that no elector is charged a fee for voting, the Wisconsin Department of Transportation is required by law to issue an identification card to such electors free of charge if the elector satisfies all other requirements for obtaining such a card, is a U.S. citizen who will be at least 18 years of age on the date of the next election, and requests that the

card be provided without charge for purposes of voting. Wis. Stat. § 343.50(5)(a)3.

IV. Absentee voting

Wisconsin does not permit early voting. Most Wisconsinites vote in-person at the polling place in their ward on Election Day, but a growing number of Wisconsinites vote by absentee ballot.

"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 on election day." Wis. Stat. § 6.85(1). Absent electors, as defined in Wis. Stat. § 6.85(1), may vote by absentee ballot. Wis. Stat. § 6.85(3). Wisconsin has "no excuse" absentee voting, and it has been that way since the year 2000. *See* 1999 Wis. Act. 182 § 90m (amending Wis. Stat. § 6.85).

GAB form GAB-121 is the Wisconsin Application for Absentee Ballot. (DPFOF 4.) A voter can indicate on the GAB-121 form his or her preference to receive an absentee ballot in the mail or to vote the ballot in-person at a municipal clerk's office. (DPFOF 5); Wis. Stat. § 6.86(1). A voter can request an absentee ballot to be mailed to him or her for elections on specific dates, for all elections that year, or for every election after the date the GAB-121 form is signed if the voter certifies that he or she is "indefinitely confined because of age, illness, infirmity or disability." (DPFOF 6); Wis. Stat.

§ 6.86(1), (2). A military or permanent overseas voter can request that an absentee ballot be sent to him or her via fax or e-mail. (DPFOF 7.)

Voters applying for an absentee ballot in-person at a municipal clerk's office are required to present a proof of identification document. Wis. Stat. § 6.86(1)(ar). A voter applying for an absentee ballot by mail must include a copy of proof of identification with his or her mailed application. Wis. Stat. § 6.87(1). The proof of identification requirement does not apply to indefinitely confined voters, voters who have previously shown proof of identification to receive absentee ballots, or military and permanent overseas voters who request an absentee ballot. Wis. Stat. §§ 6.86(2)(a), (4)(b)2., (4)(b)3., 6.87(1).

In-person absentee voting occurs at the office of the municipal clerk or board of election commissioners, and mailed, completed absentee ballots are also returned there. Wis. Stat. § 6.855(1). However, the governing body of a municipality may designate an alternate absentee ballot voting and return site. *Id.* If the municipality's governing body designates an alternate site, "no function relat[ing] to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners." *Id.*

The times for in-person absentee voting are prescribed by law, but the law gives local election officials some discretion to determine precisely when

voters may vote an in-person absentee ballot. If an application for an absentee ballot is made in-person, "the application shall be made no earlier than the opening of business on the 3rd Monday preceding the election and no later than 7 p.m. on the Friday preceding the election." Wis. Stat. § 6.86(1)(b). "No application may be received on a legal holiday." *Id.* "An application made in person may only be received Monday to Friday between the hours of 8 a.m. and 7 p.m. each day." *Id.*

Absentee ballots are not counted until Election Day. There is a difference between an absentee ballot being "cast" and it being counted on Election Day. An absentee ballot is "cast," in one sense, when it is marked by a voter. But that does not mean that it will be counted on Election Day. Wisconsin Stat. § 6.88, and specifically Wis. Stat. § 6.88(3)(a), outlines the procedures that Wisconsin election officials must use to count ballots of absentee voters. The process of "casting" an absentee ballot in Wisconsin involves "deposit[ing] the ballot into the proper ballot box," which is an act done by an election official on Election Day. *Id.* Depositing the ballot occurs only after election officials have confirmed that there are no deficiencies in the absentee ballot. *Id.*

Counting of absentee votes occurs only when the absentee ballot is run through a vote-tabulating machine and ends up in a ballot box. Wis. Stat. § 6.88(3)(a). The absentee ballot is not cast until that point on Election Day.

An absentee ballot that has been marked by a voter (*i.e.*, "cast") could be defective and not *counted* on Election Day for many reasons. Examples include: (1) election officials have reliable proof than the absentee voter has died before Election Day, *see* Wis. Stat. §§ 6.21, 6.88(3)(b); (2) the absentee ballot envelope has been opened and resealed, *see id.*; or (3) the signature of the voter or a witness is missing from the absentee ballot envelope. *See id.*

Additional specifics regarding the many challenged laws and the facts will be described in the Argument sections of this brief.

LEGAL STANDARDS

I. Jurisdiction

"Subject matter jurisdiction is, as we know, an issue that should be resolved early but must be considered at any stage of the litigation." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). "[I]f the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion." *Id.* The burden of proof on an issue of subject matter jurisdiction is on the party asserting jurisdiction. *See id.*

"The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (quoting *Capitol Leasing Co. v. Fed. Deposit Ins. Corp.*, 999 F.2d 188, 191 (7th Cir. 1993) (per curiam)).

A. Article III case or controversy 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)).

B. Associational standing

An organization has associational standing and may bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted, nor the relief requested, requires participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see also*

Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors, 522 F.3d 796, 801–02 (7th Cir. 2008).

C. Mootness

"Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)).

II. Summary judgment standards

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celetox Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). If the evidence submitted in opposition to a summary judgment motion "is merely colorable . . . or is not significantly probative, . . . summary judgment may be

granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (citations omitted).

"We often call summary judgment, the 'put up or shut up' moment in litigation, by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case." *Goodman*, 621 F.3d at 654 (citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986)). "The mere existence of a scintilla of evidence in support of the nonmoving party's position will be insufficient to survive a summary judgment motion; there must be evidence on which the jury could reasonably find in favor of the nonmoving party." *Id.* (citing *Anderson, Inc.,* 477 U.S. at 252).

"Once a party has made a properly-supported motion for summary judgment, the nonmoving party may not simply rest upon the pleadings but must instead submit evidentiary materials that 'set forth specific facts showing that there is a genuine issue for trial.'" *Siegel*, 612 F.3d at 937 (quoting Fed. R. Civ. P. 56(e)).

III. Statutory claims: Section 2 of the Voting Rights Act of 1965 (Count 1)

In Count 1 of their amended complaint, Plaintiffs assert a series of claims under Section 2 of the Voting Rights Act of 1965.

A. Statutory standing

The Voting Rights Act does not authorize non-voters to sue to enforce its guarantees. Only an "aggrieved person" or the U.S. Attorney General may sue. 52 U.S.C. § 10302(a), (b). Therefore, statutory standing under the Voting Rights Act for private litigants—those other than the U.S. Attorney General—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" under the Voting Rights Act are those persons who claim that their right to vote has been infringed because of their race. *Id.*

B. Legal standards for claims arising under Section 2 of the Voting Rights Act of 1965

Section 2(a) of the Voting Rights Act of 1965 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 of 1965 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).

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 here 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.[1] A Section 2 claim "based purely on a showing of some relevant statistical

[1]*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).

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*

In *Frank v. Walker*, the Seventh Circuit held that "a Section 2 vote-denial claim consists of two elements:"

- 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 or 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 compared 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 Parish 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. (Am. Compl., Dkt. 19 ¶¶ 52, 79.)

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, properly understood.

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. Metrop. 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 both 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 so 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). Of course, 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 had authorized the federal judiciary to override state election laws as extensively as Plaintiffs claim, Congress would have said so clearly.

IV. Constitutional claims: First, Fourteenth, Fifteenth, and Twenty-sixth Amendments (Counts 2 through 6)

In Counts 2, 3, 4, 5, and 6, Plaintiffs raise 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.

A. "Undue burden" claims and the *Anderson/Burdick* test (Count 2)

Plaintiffs' claims in Count 2 assert that the challenged laws violate the First and Fourteenth Amendments by unduly burdening the right to vote.

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." *Id.* at 190.

The Seventh Circuit recently 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. Rational basis claims (Count 3)

Plaintiffs' claims in Count 3 allege that some of the challenged laws are irrational in violation of the Fourteenth Amendment's Equal Protection Clause.

"[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)). "Such a classification cannot run afoul of the Equal Protection Clause if 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.*

C. "Partisan fencing" claims (Count 4)

Plaintiffs' claims in Count 4 assert that the challenged laws violate the First Amendment and the Fourteenth Amendment's Equal Protection Clause because they amount to "partisan fencing."

As this Court observed in addressing a motion to dismiss 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." (Opinion and Order, Dec. 17, 2015, 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.

Defendants' argument regarding the legal standards that Plaintiffs allege should be applied to their Count 4 "partisan fencing" claims is in Argument section V below.

D. Intentional racial discrimination claims (Count 5)

Plaintiffs' claims in Count 5 assert that the challenged laws violate the Fifteenth Amendment and the Fourteenth Amendment's Equal Protection Clause because the legislature discriminated against minority voters on the basis of their race.

To prevail on Count 5, Plaintiffs must prove that the Wisconsin Legislature intentionally discriminated on the basis of race. The Fifteenth Amendment prohibits only "purposeful discrimination." *City of Mobile*, 446 U.S. at 63 (Opinion of Stewart, J.). "Proof 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).

E. Twenty-sixth Amendment claims (Count 6)

In Count 6, Plaintiffs make a series of claims under the Twenty-sixth Amendment that the legislature intentionally discriminated against young voters. "[T]he Twenty-sixth Amendment does not grant the right to vote to 18-year-olds and was not intended to. It simply bans age qualifications above 18." *Gaunt v. Brown*, 341 F. Supp. 1187, 1192 (S.D. Ohio 1972), *aff'd* 409 U.S. 809 (1972). Plaintiffs' Count 6 will be addressed below.

ARGUMENT

I. Plaintiffs lack Article III standing to challenge the voter photo ID law; therefore, the Court has no subject matter jurisdiction over these claims.

The Court lacks subject matter jurisdiction over Plaintiffs' claims challenging the voter photo ID law because Plaintiffs lack Article III standing. All individual voter Plaintiffs have qualifying ID, and the corporation Plaintiffs have no standing. The Court should dismiss all pending claims challenging the voter photo ID law.

Each of the individual voter Plaintiffs has a form of qualifying ID under the voter photo ID law. (DPFOF 8.) The following table summarizes the facts regarding Plaintiffs' qualifying IDs:

Plaintiff	Forms of qualifying ID
Renee M. Gagner	Wisconsin DOT-issued driver license and U.S. passport
Anita Johnson	Wisconsin DOT-issued driver license
Cody R. Nelson	Wisconsin DOT-issued driver license
Jennifer S. Tasse	Wisconsin DOT-issued driver license and U.S. passport
Scott T. Trindl	Wisconsin DOT-issued driver license and U.S. passport
Michael R. Wilder	Wisconsin DOT-issued driver license and U.S. passport

(DPFOF 9.) None of the individual voter Plaintiffs can show that they will be injured by the voter photo ID law. These Plaintiffs will be able to use their

qualifying ID to vote on Election Day. They cannot show that they meet even the first element of the *Lujan* three-part best for standing, an injury-in-fact. *See Lujan*, 504 U.S. at 560–61. The individual voter Plaintiffs cannot meet the other two *Lujan* elements, either. *Id.*

The corporation Plaintiffs lack standing to challenge the voter photo ID law. These Plaintiffs are two Wisconsin corporations, One Wisconsin Institute, Inc. and Citizen Action of Wisconsin Education Fund, Inc. (DPFOF 10.) The voter photo ID law does not apply to them because they are not voters. "No one has standing to object to a statute that imposes duties on strangers." *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011).

The corporation Plaintiffs have no associational standing to sue on behalf of their members. Plaintiffs One Wisconsin Institute, Inc. and Citizen Action of Wisconsin Education Fund, Inc. have no members. (DPFOF 11.) An organization has associational standing and may bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted, nor the relief requested, requires participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343. Here, the two corporation Plaintiffs cannot meet the *Hunt* three-part test. They fail as to all three elements.

There are no Plaintiffs in this case with Article III standing to challenge the voter photo ID law. Accordingly, the Court should dismiss all pending claims challenging the voter photo ID law because the Court lacks subject matter jurisdiction over these claims.

II. Plaintiffs lack Article III standing to challenge changes to voter registration requirements; therefore, the Court has no subject matter jurisdiction over these claims.

The Court lacks subject matter jurisdiction over Plaintiffs' claims challenging changes to voter registration requirements because Plaintiffs lack Article III standing. The Court should dismiss all pending claims challenging changes to voter registration laws.

Each of the individual voter Plaintiffs is registered to vote. (DPFOF 12.) None of the individual voter Plaintiffs can show that they will be injured by the changes to voter registration laws because these Plaintiffs (1) are registered to vote; (2) have not alleged that they will need to change their voter registration in the future. The individual voter Plaintiffs cannot show that they meet even the first element of the *Lujan* three-part test for standing, an injury-in-fact. *See Lujan*, 504 U.S. at 560–61. The individual voter Plaintiffs do not meet the other two *Lujan* elements, either. *Id.*

The corporation Plaintiffs lack standing to challenge voter registration laws. These Plaintiffs are two corporations, and the voter registration laws do

not apply to them because they are not voters. "No one has standing to object to a statute that imposes duties on strangers." *Freedom from Religion Found.*, 641 F.3d at 805. Corporations cannot register to vote.

The corporation Plaintiffs have no associational standing to sue on behalf of their members because they have no members. (*See* DPFOF 11.) The corporation Plaintiffs cannot meet the *Hunt* three-part test. *See Hunt*, 432 U.S. at 343. They fail as to all three elements.

There are no Plaintiffs in this case with Article III standing to challenge changes to voter registration laws. Accordingly, the Court should dismiss all pending claims challenging changes to voter registration laws because the Court lacks subject matter jurisdiction over these claims.

III. Plaintiffs' claims challenging the 28-day durational residency requirement are moot.

Plaintiffs' pending claims challenging the 28-day durational residency requirement are moot. Plaintiffs have not challenged the durational residency requirement via a putative class action in which they are the class representatives, so the claims are not subject to the "capable of repetition, yet evading review" exception to mootness. *See Berg v. LaCrosse Cooler Co.*, 548 F.2d 211, 213 (7th Cir. 1977).

There are only two Plaintiffs who allege facts about themselves relevant to the challenges to the 28-day durational residency requirement.

Plaintiff Renee M. Gagner alleges that on March 21, 2015, she moved from Waukesha to Milwaukee and that she was required to vote in Waukesha due to the 28-day durational residency requirement. (Am. Compl., Dkt. 19 ¶ 8.) Ms. Gagner cast an absentee ballot by mail. (*Id.*)

Plaintiff Jennifer S. Tasse is a college student at the University of Wisconsin-Madison. (Am. Compl., Dkt. 19 ¶ 12.) She resides in Madison, is registered to vote in Wisconsin, and "is nearly certain to move after she graduates." (*Id.* ¶¶ 12–13.)

None of the other Plaintiffs allege facts about their plans to move that would raise concerns about how the 28-day durational residency requirement applies to them, and Plaintiffs' claims against the requirement are not presented as a putative class action.

In *Berg*, the Seventh Circuit addressed the mootness doctrine and two U.S. Supreme Court decisions regarding challenges to durational residency requirements, *Dunn v. Blumenstein*, 405 U.S. 330 (1972), and *Sosna v. Iowa*, 419 U.S. 393 (1975). The Seventh Circuit stated:

> We have learned from two recent Supreme Court opinions, *Dunn v. Blumstein*, 405 U.S. 330, 333, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) and *Sosna v. Iowa*, 419 U.S. 393, 399-400, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), that when plaintiffs challenge the constitutionality of durational residency requirements, and the period of residency of plaintiff is satisfied during the pendency of the appeal, the cases are moot unless they are brought as class actions. In *Sosna*, supra, at 400, 95 S.Ct. at 557, the court explained that once the residency requirement had elapsed for an individual plaintiff the case is not

> "capable of repetition, yet evading review" because that plaintiff is no longer barred from seeking the desired relief by that requirement. The case is not moot only if the controversy remains for the class which the named plaintiff represents. *Dunn*, supra, 405 U.S. at 333, n. 2, 92 S.Ct. 995.

Berg, 548 F.2d at 213; *see also Valentino v. Howlett*, 528 F.2d 975, 979–80 (7th Cir. 1976) (regarding *Sosna*, stating that "[e]ven though the case was no longer alive for the named plaintiff, the Court stated, it remained alive for the class of persons she was certified to represent.").

Under *Dunn*, *Sosna*, and *Berg*, Plaintiffs' challenges to the 28-day durational residency requirement are moot, and they are not subject to the "capable of repetition, yet evading review" exception to mootness. No Plaintiffs other than Ms. Gagner and Ms. Tasse have alleged facts to show that the durational residency requirement will impact their right to vote whatsoever. Ms. Gagner and Ms. Tassee have alleged facts that show that their claims, if any, are moot—they were subject to the durational residency requirement and were able to vote with no problems.

Plaintiffs have not pled a putative class action. "The case is not moot only if the controversy remains for the class which the named plaintiff represents." *Berg*, 548 F.2d at 213. Here, Plaintiffs cannot escape the mootness doctrine because they have not pled that they are representing a putative class. Accordingly, Plaintiffs' pending claims challenging the 28-day durational residency requirement are moot and should be dismissed.

IV. The corporation Plaintiffs lack statutory standing to assert claims under the Voting Rights Act.

The corporation Plaintiffs lack statutory standing to assert claims under the Voting Rights Act. These Plaintiffs have no race and, more importantly, have no right to vote. Corporations have no statutory standing to raise claims under the Voting Rights Act; therefore, the Voting Rights Act claims asserted by Plaintiffs One Wisconsin Institute, Inc. and Citizen Action of Wisconsin Education Fund, Inc. must be dismissed because they fail as a matter of law.

Statutory standing is different from Article III standing. The U.S. Supreme Court and the Seventh Circuit have recognized the difference. The Supreme Court in *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979), distinguished between the concepts of "standing" and "cause of action":

> s*tanding* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, see *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court[.]

The Supreme Court has since noted that "statutory standing" and the existence of a cause of action are "closely connected" and "sometimes identical" questions. *Bond v. United States*, 131 S. Ct. 2355, 2362 (2011); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377,

1387 n.4 (2014); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96–97 and n.2 (1998).

In *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011), the Supreme Court explained that Article III standing requirements and statutory standing are different. The *Thompson* Court interpreted the language "person claiming to be aggrieved" in Title VII of the Civil Rights Act of 1964. *Id.* at 867. The Court concluded that the language should not be equated with conferring a right to sue on all who satisfy Article III standing requirements. *Id.* at 869–70. Instead, the Court reiterated that statutory standing inquiries focus on whether the prospective plaintiff falls within the "zone of interests" sought to be protected by the statutory provision. *Id.* at 870; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting that statutory standing "may properly be treated before Article III standing"). Statutory standing must be addressed separately from Article III standing.

In *Kohen v. Pacific Investment Management Company, LLC*, 571 F.3d 672, 677 (7th Cir. 2009), the Seventh Circuit explained statutory standing and how it differs from other types of standing:

> The term "statutory standing" is found in many cases, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96–97 and n. 2, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *United States v. U.S. Currency, in Amount of $103,387.27*, 863 F.2d 555, 560-61 and n. 10 (7th Cir. 1988), but it is a confusing usage. It usually refers to a situation in which, although the plaintiff

> has been injured and would benefit from a favorable judgment and so has standing in the Article III sense, he is suing under a statute that was not intended to give him a right to sue; he is not within the class intended to be protected by it. *Steel Co. v. Citizens for a Better Environment, supra,* 523 U.S. at 97, 118 S.Ct. 1003; *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Harzewski v. Guidant Corp.,* 489 F.3d 799, 803–04 (7th Cir. 2007).

See also Graden v. Conexant Sys., Inc., 496 F.3d 291, 294–95 (3d Cir. 2007) ("Though all are termed 'standing,' the differences between statutory, constitutional, and prudential standing are important.").

Standing under the Voting Rights Act for a private litigant—namely, a person other than the U.S. Attorney General—is limited to an "aggrieved person" seeking to enforce his right to vote. 52 U.S.C. § 10302(a), (b); *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989); *Assa'ad-Faltas v. S. Carolina*, No. 3:12-1786-TLW-SVH, 2012 WL 6103204, at *4 (D.S.C. Nov. 14, 2012); *Clay v. Garth*, No. 1:11CV85-B-S, 2012 WL 4470289, at *2 (N.D. Miss. Sept. 27, 2012) ("The Voting Rights Act authorizes a private cause of action for individuals who are 'aggrieved persons.'"); *McGee v. City of Warrenville Heights*, 16 F. Supp. 2d 837, 845 (N.D. Ohio 1998) ("Standing under the Act is limited to 'aggrieved persons,' and that category is confined to persons whose voting rights have been denied or impaired."); *Ill. Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1267, 1270 (N.D. Ill. 1991). "Aggrieved persons" under the Voting Rights Act are those

persons who claim that their right to vote has been infringed because of their race. *Roberts*, 883 F.2d at 621.

Standing under the Voting Rights Act does not extend to non-persons like the two corporation Plaintiffs that have no race and no right to vote. They cannot be "aggrieved persons" under the plain language of the Voting Rights Act. 52 U.S.C. § 10302(a), (b). Accordingly, the Court should dismiss the corporation Plaintiffs' Voting Rights Act claims.[2]

V. Plaintiffs' First and Fourteenth Amendment "partisan fencing" claims in Count 4 fail.

In Count 4 of their amended complaint, Plaintiffs allege that all of the challenged laws violate the First Amendment and the Fourteenth Amendment's Equal Protection Clause because they amount to "partisan fencing." (Am. Compl., Dkt. 19:51.) Plaintiffs allege that "the challenged provisions disproportionately burden the right to vote of individuals who are likely to vote for Democratic candidates." (*Id.* ¶ 172.) They further allege that "the State Legislature, in not modifying the rule limiting early voting to one location per municipality and in enacting the other challenged provisions, acted with the intent disproportionately to suppress the vote of Democratic

[2]42 U.S.C. § 1983 cannot save the corporation Plaintiffs' Voting Rights Act claims because § 1983 does not create a cause of action to assert the rights of third parties. "§ 1983 claims are personal to the injured party." *Ray v. Maher*, 662 F.3d 770, 773 (7th Cir. 2011)

voters without a compelling reason." (*Id.*) Plaintiffs' claims in Count 4 fail as a matter of law.

First, Plaintiffs' claims are illogical because some of the challenged laws were passed with the support of Republicans and Democrats. (DPFOF 13.) The following chart shows which of the challenged laws were passed with bipartisan support (DPFOF 14):

Legislative Act	Legislative Bill	Bipartisan Votes
2011 Wis. Act 23	2011 Assembly Bill 7	•Rep. Peggy Krusick (D), 7th Assembly District; •Rep. Anthony J. Staskunas (D), 15th Assembly District; and •Rep. Bob Ziegelbauer (I), 25th Assembly District
2011 Wis. Act 75	2011 Senate Bill 116	•Rep. JoCasta Zamarripa (D), 8th Assembly District; •Rep. Leon D. Young (D), 16th Assembly District; •Rep. Christine Sinicki (D), 20th Assembly District; •Rep. Gordon Hintz (D), 54th Assembly District; •Rep. Robert L. Turner (D), 61st Assembly District; •Rep. Cory Mason (D), 64th Assembly District; and •Rep. Amy Sue Vruwink (D), 70th Assembly District
2011 Wis. Act 227	2011 Senate Bill 271	•Rep. Peggy Krusick (D), 7th Assembly District; and •Rep. Bob Ziegelbauer (I), 25th Assembly District
2013 Wis. Act 76	2013 Senate Bill 179	•Rep. Andy Jorgensen (D), 43rd Assembly District

It is inaccurate for Plaintiffs to allege that when Democrats in the Wisconsin Legislature passed the above laws they "acted with the intent disproportionately to suppress the vote of Democratic voters without a compelling reason." (Am. Compl., Dkt. 19 ¶ 172.) Democrats did not cast their votes to enact the challenged laws to "fence out" or suppress the votes of Democrats. That would be foolish. Plaintiffs' "partisan fencing" claims challenging the above laws fail as a matter of law because their theory is inconsistent with common sense and reason.

Second, the novel legal theory that Plaintiffs attempt to advance in Count 4 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 of those cases involved challenges to laws like the laws here. (Am. Compl., Dkt. 19 ¶ 171.) Furthermore, the equal protection and First Amendment principles described by the Supreme Court in *Carrington* and by Justice Kennedy in *Vieth* cannot reasonably be extended in the way that Plaintiffs allege in Count 4. Plaintiffs' authorities do not support their claims.

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. "This Texas constitutional provision . . . is unique." *Id.* at 91. It 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. Other citizens with special residency circumstances, like college students, patients in hospitals and other institutions, and civilian employees of the United States government, were not singled out by Texas like service members. *See id.* 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 "fenc[e] 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. *See Carrington*, 380 U.S. at 94. Wisconsin's challenged laws do not target or uniquely impact Democrats—they necessarily apply to *all* voters, regardless of party affiliation. Unlike the "unique" law challenged in *Carrington*, the

Wisconsin laws challenged in Plaintiffs' Count 4 do not target for exclusion an entire group of voters. *Id.* at 91.

In addition, *Carrington* applied a legal test that has now been superseded. The case was decided before the Supreme Court announced the *Anderson/Burdick* test that is now applied to challenges to election laws that are advanced under the First Amendment and the Equal Protection Clause. *See Common Cause Ind.*, 800 F.3d at 917. The Supreme Court in *Carrington* applied a different sort of constitutional test that was akin to a rational-basis inquiry: "The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose." *Carrington*, 380 U.S. at 93 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)). Thus, *Carrington*'s Equal Protection Clause analysis does not apply here and, even if it did, it has been superseded by the *Anderson/Burdick* analysis that courts are bound to apply today. *See Common Cause Ind.*, 800 F.3d at 917.

Vieth is similarly irrelevant. *Vieth* involved an Equal Protection Clause challenge (and other constitutional claims) 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 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, writing for himself, stated 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.

The laws challenged in *Vieth* concerned legislative districting. The instant case does not involve legislative districting or any election law that is remotely comparable. *Vieth* is not relevant because it is distinguishable.

Justice Kennedy's concurring opinion in *Vieth* does not provide support for Plaintiffs' "partisan fencing" claims in Count 4. Justice Kennedy's views have not gained the support of a majority of the Court. And even if Justice Kennedy's reading of the First Amendment were controlling, Plaintiffs cannot show through admissible evidence 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).

Finally, 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." (Opinion and Order, Dec. 17, 2015, 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.

Each of Plaintiffs' Count 2 "undue burden" claims under the First Amendment and the Equal Protection Clause is analyzed in detail in the Argument sections of this brief that follow. Plaintiffs' Count 4 adds nothing additional to the constitutional analysis; therefore, the Count 4 "partisan fencing" claims all fail as a matter of law for the same reasons that the Count 2 "undue burden" claims fail.

VI. Plaintiffs' Fourteenth and Fifteenth Amendment claims in Count 5 based upon allegations of intentional racial discrimination fail.

In Count 5 of their amended complaint, Plaintiffs allege that the laws challenged under Section 2 of the Voting Rights Act also violate the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. (Am. Compl., Dkt. 19 ¶¶ 173–77.) They allege that "the provisions challenged under Section 2 [of the Voting Rights Act] disproportionately abridge and deny the right to vote of African Americans and/or Latinos in Wisconsin." (*Id.* ¶ 177.) They further allege that "the State Legislature, in not modifying the rule limiting early voting to one location per municipality and in enacting the other provisions challenged under Section 2, acted with the intent, at least in part, disproportionately to suppress the vote of African Americans and/or Latinos in Wisconsin." (*Id.*) Plaintiffs' claims lack merit and should be dismissed.

To prove their claims in Count 5, Plaintiffs must show through admissible evidence that the Wisconsin Legislature intentionally discriminated against minority voters because of their race. The text of the Fifteenth Amendment includes an "explicit prohibition on intentional discrimination." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223 (2009). Thus, the Fifteenth Amendment prohibits only "purposeful discrimination." *City of Mobile*, 446 U.S. at 63 (Opinion of Stewart, J.).

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. "[O]fficial action will not be held unconstitutional solely because it results in a racially discriminatory impact." *Id.* at 264–65.

To determine whether the Equal Protection Clause has been violated by some official action, the U.S. 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,'" *Id.* 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.

Here, Plaintiffs are unable to offer the admissible evidence necessary to prove that Wisconsin's lawmakers acted with the intent to discriminate against voters on the basis of race. When asked in written interrogatories to identify and describe all the facts that support the allegations of intentional racial discrimination asserted in their amended complaint, Plaintiffs responded by first objecting and then referring Defendants back to the allegations in the amended complaint, none of which show evidence of

intentional racial discrimination that would meet the standards under the Fifteenth Amendment and Equal Protection Clause. (DPFOF 15.) Plaintiffs apparently have no evidence supporting their claims in Count 5.

This is the put up or shut up moment for Plaintiffs' claims of intentional racial discrimination. *Goodman*, 621 F.3d at 654. Plaintiffs cannot "put up" the evidence to prove their claims in Count 5. Accordingly, the Court should dismiss these claims.

VII. Plaintiffs' Twenty-sixth Amendment claims of age-based discrimination in Count 6 fail.

In Count 6 of their amended complaint, Plaintiffs allege that the challenged laws violate the Twenty-sixth Amendment. (Am. Compl., Dkt. 19 ¶¶ 178–81.) They assert that "the State Legislature, in not modifying the rule limiting early voting to one location per municipality and in enacting the other provisions challenged under the Twenty-Sixth Amendment, acted with the intent, at least in part, disproportionately to suppress the vote of young voters in Wisconsin." (*Id.* ¶ 181.)

Plaintiffs' claims misconstrue the Twenty-sixth Amendment and ask this Court to apply it in a way that has never been done before. A starting point in the analysis is the historical context of the Twenty-sixth Amendment.

"***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. Eighteen-, nineteen-, and twenty-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*, 5 Cal. 3d 565, 488 P.2d 1, 5 (Cal. 1971). "Congressmen stressed three consistent themes." Those themes were

> [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 eighteen- to twenty-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 Jan. 11, 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.

Plaintiffs claim that the Twenty-sixth Amendment should be interpreted as a tool to weed out intentional age-based discrimination resulting from regulations that, on their face, apply the same way to voters of all ages. (*See* Am. Compl., Dkt. 19 ¶ 181.) Their theory has no foundation in the text or history of the Amendment, and courts that have interpreted the Twenty-sixth Amendment do not embrace Plaintiffs' premise.

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, as Plaintiffs claim, 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 XVI, § 1.

In alleging that the Wisconsin Legislature acted "in part" with the intent "to suppress the vote of young voters" (Am. Compl., Dkt. 19 ¶ 181), Plaintiffs invoke the "motivating factor" test for intentional discrimination established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–66 (1977). Yet "no court has ever applied *Arlington Heights* to a claim of intentional age discrimination in voting." *N. Carolina 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.*

Plaintiffs will ask this Court to be the first federal court in the Nation to recognize an intentional age-discrimination claim that challenges voting procedures. This Court should decline that invitation because it is inconsistent with the text, history, and meaning of the Twenty-sixth Amendment.

Even if Plaintiffs' intentional age-discrimination theory of the Twenty-sixth Amendment were tenable, Plaintiffs can offer no admissible evidence that the Wisconsin Legislature acted with the motivation to intentionally discriminate against young voters when it passed the challenged laws. Accordingly, this Court should dismiss all Plaintiffs' claims in Count 6.

VIII. Plaintiffs' claims challenging the voter photo ID law fail as a matter of law.

The Court should dismiss all Plaintiffs' claims challenging Wisconsin's voter photo ID law. The Court dismissed Plaintiffs' Section 2 Voting Rights Act and "undue burden" First and Fourteenth Amendment claims in Counts 1

and 2. (Opinion and Order, Dec. 17, 2015, Dkt. 66:2.) Plaintiffs also challenge the voter photo ID law under the following legal theories:

(1) It was irrational, in violation of the Fourteenth Amendment, not to authorize technical college ID cards, out-of-state driver licenses, and many expired ID cards for voting (Count 3);
(2) The voter photo ID law is unconstitutional "partisan fencing," in violation of the First and Fourteenth Amendments (Count 4);
(3) The voter photo ID law is intentional racial discrimination, in violation of the Fourteenth and Fifteenth Amendments (Count 5; and
(4) The voter photo ID law violates the Twenty-sixth Amendment rights of young voters (Count 6).

(Am. Compl., Dkt. 19 ¶¶ 143–53 and Counts 3–6.)

Plaintiffs' pending claims challenging the voter photo ID law fail and should be dismissed.

A. Rational basis claims

Plaintiffs' rational basis claims in Count 3 fail. (*See* Am. Compl., Dkt. 19 ¶ 168.) With regard to technical college ID cards, an emergency rule is in effect that authorizes the use of these cards for voting. The Government Accountability Board is in the process of promulgating a permanent rule that will permit voters to use technical college ID cards to vote. (DPFOF 16.) The permanent rule regarding technical college ID cards for voting will be published in the Wisconsin Administrative Register and become effective on February 1, 2016. (DPFOF 17.) Plaintiffs' claim with regard to technical college ID cards will soon be moot.

Plaintiffs claim that it was irrational for the Wisconsin Legislature not to include out-of-state driver licenses in the list of qualifying IDs. (Am. Compl., Dkt. 19 ¶ 168.) The U.S. District Court for Eastern District of Wisconsin rejected a similar claim. *See Frank v. Walker*, No. 11-C-01128, 2015 WL 6142997, at *4–*6 (E.D. Wis. Oct 19, 2015) (rejecting a claim that the legislature's failure to include out-of-state driver licenses is a poll tax in violation of the Twenty-fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment).

The legislature's choice to not include out-of-state driver licenses as a qualifying ID was rational. It would make no sense to include out-of-state driver licenses because one cannot be a resident of Wisconsin for purposes of voting and a resident of another state for purposes of driving. Those who move to Wisconsin and intend to reside in the state and drive here must surrender their out-of-state driver licenses when they take up residence in Wisconsin. Wis. Stat. § 343.05(3)(a). Likewise, residents of other states cannot vote in Wisconsin. Wis. Stat. § 6.10(1). The criteria in Wis. Stat. § 6.10(1) for determining a voter's residence are materially indistinct from the criteria in Wis. Stat. § 343.01(2)(g) for determining one's residence for purposes of obtaining a driver license in Wisconsin. It would have made no sense for the legislature to make out-of-state driver licenses a qualifying ID

when Wisconsin residents who want to both vote and drive here would have to get a Wisconsin driver license to continue driving anyway.

There are theoretical people who "(a) are qualified to vote in Wisconsin, (b) never drive in Wisconsin, (c) possess a driver's license issued by another state, (d) occasionally drive in that other state, and (e) do not already possess a form of Act 23-qualifying ID." *Frank*, 2015 WL 6142997, at *6. The Eastern District of Wisconsin doubted whether many of these people exist, and none testified at trial in *Frank*. *Id.* Accordingly, it was rational for the legislature not to include out-of-state driver licenses in the list of qualifying IDs because the number of voters who could potentially benefit from them is very small.

Under rational basis review, the Court must uphold the law "if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 320 (quoting *Beach Commc'ns*, 508 U.S. at 313). Here, the legislature was reasonable to conclude that it would provide little benefit to include out-of-state driver licenses in Wis. Stat. § 5.02(6m) when (1) including them would be nonsensical because one cannot be a resident of Wisconsin for voting and a resident of another state for driving, and (2) even if there is a theoretical group of voters who will benefit from including out-of-state driver licenses, it is unnecessary to authorize them because the likely small number of potentially benefited voters already have one or more of the many forms of qualifying ID.

With regard to Plaintiffs' rational-basis claim regarding expired ID cards, it is not clear which expired ID cards Plaintiffs believe the Wisconsin Legislature should have included as qualifying IDs for voting. Plaintiffs do not specify in their Amended Complaint which forms of expired ID they believe should have been authorized. (Am. Compl., Dkt. 19 ¶¶ 143 ("many expired IDs"), 152 ("many expired IDs"), 168 ("many expired IDs").) Assuming Plaintiffs mean that the legislature should have included those forms of expired ID *not* listed in Wis. Stat. § 5.02(6m), the legislature was rational in including the expired IDs that it did and excluding those that it did not.

The legislature authorized the following expired IDs for voting:

- A Wisconsin driver license, if expired after the date of the most recent general election;
- A Wisconsin state ID card, if expired after the date of the most recent general election;
- A U.S. uniformed service ID card, if expired after the date of the most recent general election;
- A U.S. passport, if expired after the date of the most recent general election; and
- An ID card issued by a federally recognized Indian tribe in Wisconsin.

Wis. Stat. § 5.02(6m)(a), (e).

The following expired IDs are *not* authorized for voting:

- A driving receipt issued under Wis. Stat. § 343.11;
- An identification card receipt issued under Wis. Stat. § 343.50; and
- An unexpired identification card issued by an accredited Wisconsin university or college that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a

> student at the university or college on the date that the card is presented.

Wis. Stat. § 5.02(6m)(c), (d), (f). The legislature's selection of the authorized forms of expired IDs makes sense.

First, U.S. naturalization certificates do not expire, so the legislature could not have included an expired form of them. Wis. Stat. § 5.02(6m)(b).

Second, paper driver license and state ID card receipts are replaced by plastic driver licenses and state ID cards when the customer's plastic cards are created by the DMV and mailed to the customer. Driver license and state ID card receipts are meant to be temporary documents that can be used for a period of up to 60 days while DMV processes the customer's card application. Wis. Stat. §§ 343.11(3), 343.50(1)(c). It would not have made sense for the legislature to include expired versions of such temporary paper documents as a form of qualifying ID because they are intended only for their prescribed, temporary purposes for 60 days. The legislature was rational to exclude these forms of expired ID.

Third, with regard to expired ID cards issued by accredited Wisconsin universities and colleges, the legislature rationally excluded them. It would not make sense to include such cards when the legislature *also* required students to show proof of enrollment on the date that the card is presented at the polling place. Wis. Stat. § 5.02(6m)(f). If a student's ID card is expired, it

is likely that he or she is not enrolled at the school any longer. Therefore, students presenting expired ID cards likely could not meet the legislature's *additional* requirement of proving their current enrollment, which Plaintiffs have not challenged in this case.

In sum, the legislature's choice of qualifying ID cards was not irrational. The legislature authorized a great number of options for voters to prove their identity, and it was not necessary for them to include more options. To do so would have increased the administrative burden for local election officials while creating no real benefits. The legislature authorized the most common forms of ID, driver licenses and state ID cards, and even permitted expired versions of these cards to be used for voting. The rational basis test is not an opportunity for this Court to second-guess the legislature's reasonable policy choices. *See Heller*, 509 U.S. at 319. Plaintiffs' Count 3 claims as to the voter photo ID law should be dismissed because they fail as a matter of law.

B. "Partisan fencing" claims in Count 4.

Plaintiffs' "partisan fencing" claim in Count 4 as to the voter photo ID law is meritless for the reasons explained in Argument section V.

In addition, the claim is illogical because two Democratic legislators, Rep. Anthony Stanskunas, 15th Assembly District, and Rep. Peggy Krusick,

7th Assembly District, and one Independent legislator, Rep. Bob Ziegelbauer, 25th Assembly District, voted to enact 2011 Assembly Bill 7. (DPFOF 18.) 2011 Assembly Bill 7 was the bill that created 2011 Wisconsin Act 23 and the voter photo ID requirement.

It is not rational to assert that there was a partisan motivation for the voter photo ID law when it was passed with the support of Republicans *and* Democrats. Under Plaintiffs' theory of Count 4, two Democrats in the Wisconsin Assembly voted to pass 2011 Assembly Bill 7 to "fence out" Democratic voters. Plaintiffs' claim that the voter photo ID law violates the First and Fourteenth Amendments because it was intended to "fence out" Democratic voters fails as a matter of law.

C. Intentional racial discrimination and Twenty-sixth Amendment claims

Finally, Plaintiffs' intentional racial discrimination and Twenty-sixth Amendment claims (Counts 5 and 6) fail for the reasons explained in Argument sections VI and VII of this brief.

This is the put up or shut up moment for Plaintiffs to come forward with admissible evidence to prove these claims. *See Goodman*, 621 F.3d at 654. Plaintiffs cannot submit sufficient evidence to prove that the legislature had the intent or purpose of discriminating against minorities or young

Wisconsinites when it passed the voter photo ID law. The voter photo ID law is constitutional, and Counts 5 and 6 fail.

IX. Plaintiffs' claims relating to in-person absentee voting and absentee ballots fail.

Plaintiffs challenge certain rules relating to the logistics of absentee voting. They challenge:

- Rules setting the available times for in-person absentee voting, challenged under: Section 2 of the Voting Rights Act, and the First, Fourteenth, Fifteenth, and Twenty-sixth Amendments, (Am Compl., Dkt. 19 ¶¶ 52, 62, 79–88 and Counts 1, 2, 4–6);
- The rule establishing a single location for in-person absentee voting, challenged under: Section 2 of the Voting Rights Act, and the First, Fourteenth, Fifteenth, and Twenty-sixth Amendments, (*Id.* ¶¶ 62, 64–77 and Counts 1, 2, 4–6);
- Rules for transmitting ballots to voters by fax or email, challenged under: the First, Fourteenth, and Twenty-sixth Amendments, (*Id.* ¶¶ 53, 137–39 and Counts 2, 4, & 6); and
- Rules for returning to voters completed absentee ballots that may have mistakes, challenged under: the First and Fourteenth Amendments, (*Id.* ¶¶ 53, 140–42 and Counts 2 & 4).

Plaintiffs describe their absentee-voting claims in terms of "early" voting, which does not exist in Wisconsin. (*See, e.g.*, Am. Compl., Dkt. 19 ¶¶ 22, 26.) 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 absentee voting is common and is used by 27 states.[3] It is often referred to as "no excuse" absentee voting.

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

[3]National Conference of State Legislatures, Absentee and Early Voting, http://tinyurl.com/k6faxfw (last visited Jan. 11, 2016).

> 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 "In essence the plaintiffs [were] claiming a 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 denied, abridged, or unconstitutionally usurped because of Wisconsin's absentee voting

procedures fail as a matter of law. And 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 or violate Section 2 of the Voting Rights Act of 1965. But each of the changes was prudent, nondiscriminatory, and within the scope of permissible management of elections that States conduct consistent with the Constitution and federal law. None of the reforms to absentee voting involved any unlawful discriminatory purpose or effect.

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.

A. Overview of Wisconsin's robust opportunities for electors to obtain and cast an absentee ballot

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 email, or by fax. Wis. Stat. § 6.86(1)(a). An elector can even mail, fax, or email

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).

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 facilitate 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 themselves. Wis. Stat. §§ 6.24(4)(d), 6.87(3)(d).

Absentee voters submit their ballots by returning them to the municipal clerk. Wis. Stat. § 6.87(6). Ballots must be received by 8 p.m. on Election Day, or must be received by 4 p.m. on the Friday following the election if postmarked no later than Election Day. Wis. Stat. §§ 6.87(6); 7.515(3). Absentee ballots are secured by the municipal clerk until Election Day. Wis. Stat. § 6.88(1). The ballots are then cast, and counted, on Election Day. Wis. Stat. §§ 6.88(3), 7.52.

B. Wisconsin's regulation of in-person absentee voting time periods is proper, nondiscriminatory, and does not violate the Constitution or Section 2 of the Voting Rights Act.

Plaintiffs challenge the reasonable time limits to vote an absentee ballot in person under Section 2 of the Voting Rights Act and as an "undue

burden" on the right to vote. (Am. Compl., Dkt. 19 ¶¶ 78–88, 154–63 and Counts 1–2.) Both claims fail as a matter of law.

Prior to 2011 Wisconsin Act 23, there was no limit on the time to apply for an absentee ballot in person, as long as it was done before 5 p.m. the day before an election. *See* 2011 Wis. Act 23, § 57. Act 23 set a reasonable time limit that applies statewide. It gives electors two weeks to vote in-person absentee. 2011 Wis. Act 23, § 57. This establishes a time period for municipal clerks to be ready to handle in-person absentee applications, which is an important practical concern and State interest for the orderly administration of elections.

1. Wisconsin's time frame for voting in-person absentee is consistent with Section 2 of the Voting Rights Act.

Wisconsin's time frame for voting in-person absentee is consistent with Section 2 of the Voting Rights Act. The challenged laws do not deny or abridge the right to vote based on race. Section 2(a) of the Voting Rights Act prohibits any law "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). Section 2(b) provides that a violation of subsection (a) is established if "it is shown that the political processes leading to nomination or election in the State . . . 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). Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities," but instead is "an equal-treatment requirement." *Frank*, 768 F.3d at 753.

The challenged in-person absentee voting laws do not draw any distinctions based on race. They can only serve as a "denial" of the right to vote under Section 2(a) if the laws "make[] it *needlessly* hard to" vote an absentee ballot. *Frank*, 768 F.3d at 753 (emphasis in original).

Plaintiffs cannot show that it is hard to vote an absentee ballot in Wisconsin, let alone *needlessly* hard. As explained above, Wisconsin provides robust opportunities for all absentee voters, including racial minorities.

In Wisconsin, absentee voting is "no excuse" absentee voting. Voters can request an absentee ballot by mail, in person, by email, or by fax. Voters can vote absentee in-person or return their completed ballots by mail. Voters can request that absentee ballots be mailed to them for all elections in a calendar year. If requiring photo identification to vote (which requires some voters to obtain a birth certificate) is not a violation of Section 2, then surely an absentee voting system as permissive as Wisconsin's does not violate Section 2. *See Frank*, 768 F.3d at 755. Absentee voting in Wisconsin is both easy and

readily available, and Wisconsin's time frame for absentee voting does not "deny" or "abridge" the rights of minorities to vote. 52 U.S.C. § 10301(a).

Apart from the lack of any racially discriminatory burden, Plaintiffs' Section 2 claims fail because there is no evidence that any alleged disparate impact was caused by the State of Wisconsin. States "are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753. Section 2(a) of the Voting Rights Act "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.*

Plaintiffs likewise cannot prove under Section 2(b) of the Voting Rights Act that Wisconsin's absentee voting times give African Americans or Latinos "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). They cannot show through admissible evidence that racial minorities are voting in-person absentee at such diminished rates compared to non-minorities to prove that Wisconsin's time frame for in-person absentee voting has created a prohibited discriminatory result. Their Section 2 claim fails because "in Wisconsin everyone has the same opportunity to" vote in-person absentee. *Frank*, 768 F.3d at 755.

Finally, Plaintiffs' claim challenging the times for in-person absentee voting fails because Section 2 does not require the State to show that its current law has less of an impact on minorities than its prior law. This type

of "retrogression" analysis has no part in the Section 2 analysis, as argued in Legal Standards section III.B.3. of this brief. Wisconsin's time frame for absentee voting passes muster under Section 2 because it is an objectively reasonable time frame that does not result in the denial or abridgement of the right to vote on account of race.

2. Wisconsin's time frame for voting in-person absentee does not unduly burden the right to vote in violation of the Constitution.

Wisconsin's time frame for voting in-person absentee does not unduly burden the right to vote in violation of the First and Fourteenth Amendments, as Plaintiffs allege in Count 2. (Am. Compl., Dkt. 19 ¶¶ 78–88, 161–63.) This claim fails as a matter of law because Wisconsin's time frame for absentee voting minimally burdens the right to vote and is supported by significant State interests in orderly election administration and maintaining cost-efficient elections.

The first step in the analysis is to determine whether Wisconsin's laws create a "severe" burden on the right to vote. As explained above, Wisconsin's timeframe 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, and in-person absentee voting is a privilege that the Wisconsin Legislature did not have to enact. Accordingly, Wisconsin's timeframe 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 law. *See Burdick*, 504 U.S. at 434. They do.

First, 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 deadlines are helpful to local election officials. (DPFOF 19.) They also make elections more cost-effective to administer. (DPFOF 20.) In the case of the City of Sun Prairie, the breathing room allowed by the deadlines saves the money it would cost to hire additional limited term employees. (DPFOF 21.)

The deadlines are also important to keeping elections orderly and making sure the many critical tasks get done. The logistical complexities and workload faced by Wisconsin's local election officials is enormous in the weeks before an election. (DPFOF 22.) Clerks work nights and weekends before an election just to get ready. (DPFOF 23.) Election officials do much more than just hand out absentee ballots. (DPFOF 24.) Statewide databases of

registration must be coordinated, and ballots need to be prepared. (DPFOF 25.) Election officials also mail absentee ballots and coordinate voting at nursing homes before in-person absentee voting begins. (DPFOF 26.)

Consider, for example, Waukesha County, where many municipal clerks are part-time workers. (DPFOF 27.) For the upcoming spring primary election, Waukesha County anticipates printing as many as 190 different types of specific ballots for the elections unique to each voting district. (DPFOF 28.) The county clerk's preparation schedule is as follows:

- January 12 – clerk finalizes the order of candidates that will appear on the ballot.
- January 19 – print test batches of 20 to 25 ballots of each ballot type to make sure each will work on Election Day.
- January 25 – deliver ballots to voting locations by coordination with the municipal clerks.
- January 26 – special voting ballots delivered to nursing homes.
- January 26 – mail all absentee ballots that are being delivered by mail.
- February 1 – start of in person absentee voting
- February 12 – the last day for in person absentee voting
- February 15 – final preparation for February 16, 2016, Election Day, including finalizing ballots and getting them to the printer.

(DPFOF 29.) Doing all this, and returning to the 30-day in-person absentee voting timeline proposed by Plaintiffs, would be a strain on local election officials' staff and time. (DPFOF 30.) The current deadlines give clerks time

to do their jobs and lead directly to better election accountability. (DPFOF 31.)

2011 Wisconsin Act 23 instituted many important improvements to administering Wisconsin's elections—but there was one additional problem. The law following Act 23 permitted voters to apply in-person to get a ballot anytime between the morning of the third Monday before the election and the close of business on the Friday before the election. *See* 2011 Wis. Act 23, § 57. A strict reading of the statute hypothetically authorized a voter to go to a clerk's office at midnight on a holiday and request a ballot. It also lacked any uniform standard for when registration would be available, causing potential confusion among electors over when registration was available for any particular location.

2013 Wisconsin Act 146 clarified and simplified the process. It requires that absentee registration applications will be received on weekdays between 8 a.m. to 7 p.m., excluding legal holidays. *See* 2013 Wis. Act 146, § 1. This created uniformity for voters and is important to municipalities who cannot staff their offices on weekends and evenings. (DPFOF 32.) The standardized election hours help coordinate the many tasks required to collect and process absentee ballots, such as getting ballots ready and mailing them. (DPFOF 33.)

The version of 2013 Wisconsin Act 146 passed by the Wisconsin Legislature would have restricted the total hours of in-person absentee voting to 45 per week. (*See* Letter from Governor Scott Walker to Senate (March 27, 2014) (the "Veto Letter").)[4] Wisconsin's governor vetoed that portion of the bill. (*Id.*) He found the bill important to "ensure the integrity of the voting process" and "help ensure consistency of the voting process throughout the state" but objected to limiting to total hours a voting office can be open. (*Id.*) Consistent with the goal of promoting uniformity and order, the application hours became law without a cap on the total number of available hours.

Wisconsin's 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 for in-person absentee voting. Plaintiffs' Count 2 fails as a matter of law and should be dismissed.

Plaintiffs also challenge Wisconsin's timeframe for in-person absentee voting under a "partisan fencing" constitutional theory in Count 4 of their amended complaint. This claim fails as a matter of law, as argued in Argument section V of this brief. Additionally, this claim is a non-starter,

[4]The Veto Letter is available at http://tinyurl.com/gqvvc6b (last visited Jan. 11, 2016).

because 2011 Wisconsin Act 23—which reduced the period of in-person absentee voting from 30 to 12 days—was passed with bi-partisan support from Republicans *and* Democrats, as explained in Argument section V.

Finally, Plaintiffs' challenges to absentee voting times under Count 5 and 6 also fail as a matter of law for the reasons explained in Argument sections VI and VII of this brief. This is the put up or shut up moment for Plaintiffs' intentional discrimination claims. *Goodman*, 621 F.3d at 654. They cannot "put up" the evidence to prove these claims. All Plaintiffs' statutory and constitutional challenges to Wisconsin's reasonable time frame for in-person absentee voting fail as a matter of law.

C. Wisconsin's absentee voting location rule is proper, nondiscriminatory, and does not violate the Constitution or Section 2 of the Voting Rights Act.

Plaintiffs allege that "Wisconsin limits early voting within a given municipality to a single location." (Am. Compl., Dkt. 19 ¶ 64.) Plaintiffs challenge the location rule for in-person absentee voting under both Section 2 of the Voting Rights Act and as an "unconstitutional burden" on the right to vote. (Am. Compl., Dkt. 19 ¶¶ 64–77, 154–63 and Counts 1 & 2.) Both claims fail as a matter of law.

There is no protected right to in-person absentee voting at multiple locations, and States may regulate election mechanics, such as voting

locations. *See Burdick*, 504 U.S. at 433 ("States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' . . . and the Court therefore has recognized that States retain the power to regulate their own elections.") Wisconsin's rules for the location of in-person absentee voting are one such permissible regulation of election mechanics.

In-person absentee voting normally happens at the municipal clerk's or board of election commissioners' office, but a municipality may designate an alternative site if it gives appropriate public notice. Wis. Stat. §§ 6.87(3), 6.855. Municipalities may also conduct in-person absentee voting in residential care facilities and retirement homes. Wis. Stat. §§ 6.875, 6.885. Likewise, in-person Election Day voting occurs at only one location per ward, Wis. Stat. § 5.25(5)(a), which is a sensible logistics rule that Plaintiffs do not challenge. There is no legal support for Plaintiffs' position that in-person absentee voting—which does not have constitutional protection to begin with—is required to be held at more locations than ordinary voting at polling places on Election Day.

1. Wisconsin's rule regarding the location of in-person absentee voting is consistent with Section 2 of the Voting Rights Act.

Wisconsin's rule regarding the location of in-person absentee voting is consistent with Section 2 of the Voting Rights Act. The Section 2 analysis as to the absentee-voting location rule is the same as the analysis above as to

Wisconsin's time frame for in-person absentee voting. In sum, the location rule does not deny or abridge the right to vote based on race. Count 1 should be dismissed.

The challenged law regarding in-person absentee voting location does not draw any distinctions based on race. Thus, the law can only serve as a "denial" of the right to vote under Section 2 if it "makes it *needlessly* hard to" vote an absentee ballot. *Frank*, 768 F.3d at 753 (emphasis in original).

Plaintiffs cannot show that it needlessly hard for minorities to vote absentee in Wisconsin simply because there is only one location for in-person absentee voting. As explained above, Wisconsin provides robust opportunities for *all* voters to vote absentee, including racial minorities. If requiring photo identification to vote (which requires some voters to obtain a birth certificate) is not a violation of Section 2, then surely an absentee voting system as permissive as Wisconsin's does not violate Section 2. *See Frank*, 768 F.3d at 755.

Plaintiffs' claim based on the number of locations for in-person absentee voting is inconsistent with the fact that a voter is required to vote in person on Election Day at the specified polling place for his or her ward. If the absentee-voting location rule is a violation of Section 2, the general rule requiring one to vote at his or her ward's polling place on Election Day might also violate Section 2. "[I]t would be implausible to read § 2 as sweeping away

almost all registration and voting rules." *Frank*, 768 F.3d at 754. Absentee voting in Wisconsin is both easy and readily available, and Wisconsin's location rule for in-person absentee voting does not "deny" or "abridge" the rights of minorities to vote any more than the rule that voters must vote at the polling place for their wards. 52 U.S.C. § 10301(a).

Plaintiffs cannot prove under Section 2(b) of the Voting Rights Act that Wisconsin's in-person absentee location rule gives African Americans or Latinos "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). They cannot show, through admissible evidence, that racial minorities are voting in-person absentee at such rates that prove that Wisconsin's absentee voting location rule has created a prohibited discriminatory result. Their Section 2 claim fails because "in Wisconsin everyone has the same opportunity to" vote in-person absentee. *Frank*, 768 F.3d at 755.

2. Wisconsin's location rule for in-person absentee voting does not unduly burden the right to vote.

Plaintiffs' Count 2 "undue burden" constitutional claim challenging the location rule for in-person absentee voting fails as a matter of law. The rule does not unduly burden the right to vote. It is constitutional because it minimally burdens the right to vote while furthering legitimate State

interests in orderly and cost-efficient election administration, avoiding voter confusion, and increasing ballot security. Count 2 should be dismissed.

Holding in-person absentee voting in one location serves compelling and practical State interests. It helps orderly administration of elections and saves costs. (DPFOF 34.) And having all absentee ballots in one location increases ballot security and decreases voter confusion over where to vote. (DPFOF 35.)

Having multiple locations for in-person absentee voting would mean less control over election procedures and over the absentee ballots. (DPFOF 36.) Adding additional locations would create additional logistical problems for municipalities that are already under a tight schedule to distribute and collect ballots. (DPFOF 37.) Just for example, consider that voters may arrive at an absentee voting site before an election intending to both register and apply for an in-person absentee ballot. (DPFOF 38.) But access to the registration computer system is separate from absentee-voting applications, resulting in potential confusion for a person who shows up at a location where he or she can get an absentee ballot, but cannot register. (DPFOF 39.)

Plaintiffs focus their location-based argument on 2013 Senate Bill 91.[5] (Am. Compl. Dkt., 19 ¶¶ 76–77.) Proposed Senate Bill 91 would have changed

the language of Wis. Stat. § 6.875 to permit the designation of "one or more" alternative sites for in-person absentee voting. 2013 Senate Bill 91. That bill never became law. Municipalities did not have multiple locations for in-person absentee voting prior to 2013. (DPFOF 40.) Municipalities have one location now, just as they did before Senate Bill 91 was not passed.

Plaintiffs make the argument that the legislature's failure to enact Senate Bill 91 somehow unduly burdens and suppresses the vote of African Americans, Latinos, young voters, and Democrats. (*See* Am. Compl., Dkt. 19 ¶ 77.) There is no support for invalidating a law just because it was not changed. And Plaintiffs will not be able to prove that the non-change in the law had an improper discriminatory effect. Their apparent challenge to the non-enactment of 2013 Senate Bill 91 accordingly must fail.

Plaintiffs' additional challenges to the in-person absentee voting location rule in Counts 4 through 6 of their amended complaint fail for the reasons explained in Argument sections V through VII of this brief.

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[5]2013 Senate Bill 91 is available at http://tinyurl.com/j7mefqu (last visited Jan. 8, 2016).

D. Wisconsin's rules regarding transmitting absentee ballots in-person or by mail for electors other than overseas and military voters are proper, non-discriminatory, and constitutional.

Plaintiffs challenge the law requiring non-military and non-overseas absentee voters to obtain a ballot in-person or by mail, instead of by fax or email. (Am. Compl., Dkt. 19 ¶¶ 137–42.) To clarify, this is a challenge to the transmission of absentee *ballots* to voters, not the transmission of registration forms or applications to receive absentee ballots. (*See id.*)

Under current law, a voter receives a physical absentee ballot that can be completed and returned to the municipal clerk and that can *also* be run through a vote-tabulating machine. Under prior law (what Plaintiffs apparently want), the voter could receive via fax or email an electronic copy of a ballot, which could be printed, filled out, and returned to the municipal clerk. Plaintiffs allege that the current rule constitutes an unconstitutional burden on the right to vote, amounts to unconstitutional "partisan fencing," and violates the Twenty-sixth Amendment rights of young voters. (Am. Compl., Dkt. 19 ¶¶ 137–39 and Counts 2, 4, & 6.) Their claims fail as a matter of law.

Plaintiffs suggest that this Court should recognize a constitutional right to receive absentee ballots by fax or email. No such right exists, and courts have declined to mandate analogous specific voting logistics, such as

Internet voting. *See Griffin*, 385 F.3d at 1130. Plaintiffs' suggestion that this Court should mandate a rule for obtaining ballots by email or fax would run afoul of Wisconsin's right to regulate the manner of its elections. *See Burdick*, 504 U.S. at 433. Fax and email ballot transmission for all voters is not constitutionally mandated, and Plaintiffs' legal challenges here are a policy preference masquerading as a non-meritorious constitutional claim.

First, not providing ballots to all voters by fax or email is not a severe burden on the right to vote. *See Burdick*, 504 U.S. at 434. It is a reasonable and non-discriminatory election regulation that imposes a minimal burden on voting rights. *See id.* Voters can obtain absentee ballots by mail or vote an in-person absentee ballot. They can also vote in-person on Election Day. It is merely an additional convenience to provide absentee ballots via electronic means like fax or email. As explained below, the convenience is not justified in light of the extra work and potential mistakes that electronic ballot transmission and voter-printed ballots can create for local election officials.

Second, the State has a significant interest in efficient and orderly election administration that is promoted by limiting the amount of electronic ballot transmissions. Electronic transmission of ballots to voters creates extra steps for local election officials, both in sending the ballots and in tabulating them. The prior system that authorized the provision of absentee ballots to all voters by fax or email was burdensome on municipal clerks because, when

such ballots were returned by voters, election officials needed to re-create the ballots before they could be run through the vote-tabulating machine and deposited into the ballot box. (DPFOF 41.) In other words, if a voter received a ballot by fax or email, printed it and filled it out, and then mailed it back to the clerk, the 8 ½ by 11 inch piece of paper that the voter printed and mailed could not be run through the vote-tabulating machine by the municipal clerk.

Re-creating ballots creates a possibility of human error on the part of the election official. (DPFOF 42.) Fax and email transmission caused many ballots to be disqualified because of certification problems. (DPFOF 43.) Voters also forwarded their electronic ballots to others, resulting in non-compliant ballots being received by municipal clerks. (DPFOF 44.) Clerks reported that the change to in-person or mail delivery of absentee ballots has not resulted in ongoing problems, and that voters are now aware of the change and have adjusted to the current process. (DPFOF 45.)

Plaintiffs do not allege that Wisconsin's current rule regarding fax and email ballot transmission is unconstitutional as an irrational classification, but the exception in the law for emailing or faxing absentee ballots to military and overseas voters is common sense. Those electors may have more difficulty getting ballots by mail because they are out of the country, or are occupied with military service. This exception does not deny voting rights to anyone—it is an accommodation to groups of people who would otherwise have more

practical difficulty casting their votes. The exception is justified because the number of permanent military and overseas voters is not substantial in comparison to the number of other voters who could request a ballot by fax or email if it were permitted for all voters.

In sum, Plaintiffs' claim in Count 2 that it is an unconstitutional "undue burden" on the right to vote not to fax or email ballots to all Wisconsin voters fails as a matter of law. The rule creates a minimal burden on the right to vote, and it is justified by the State's legitimate and significant interests in orderly election administration, including avoiding human error on the part of local election officials when they are required to re-create ballots before running them through vote-tabulating machines. Count 2 fails as a matter of law and should be dismissed.

Plaintiffs additional claims of "partisan fencing" (Count 4) and a Twenty-sixth Amendment violation (Count 6) fail as a matter of law for the reasons explained in Argument sections V and VII of this brief. These claims should also be dismissed.

E. Wisconsin's rules regarding returning damaged absentee ballots or ballots with certain technical defects protect against vote-loss and are constitutional.

Finally, Plaintiffs challenge Wisconsin's rules relating to returning damaged ballots or ballots with certain technical defects. (Am. Compl., Dkt. 19 ¶¶ 140–42.) They assert that the challenged laws unconstitutionally

burden the right to vote (Count 2) and amount to unconstitutional "partisan fencing" (Count 4). Both claims fail as a matter of law.

Under current law, if a municipal clerk receives an absentee ballot with an improperly completed certificate, or if the certificate is missing, the clerk may return the ballot to the voter so that the defect may be corrected. Wis. Stat. § 6.87(9). Likewise, if the municipal clerk receives a spoiled or damage absentee ballot, the clerk is required to give the elector a new ballot and destroy the old one. Wis. Stat. § 6.86(5). These are the circumstances in which a municipal clerk is authorized to reach out to an absentee voter to correct a mistake they made.

Plaintiffs allege that not requiring the return of ballots under additional circumstances, such as errors in marking the ballot, is unconstitutional. (Am. Compl., Dkt. 19 ¶¶ 140–42.) But their claim does not implicate access to an absentee ballot. Their claim presumes that the elector was *already* provided an absentee ballot. (*See id.* ¶ 140.) In other words, the challenged laws do not create a "severe" burden on the right to vote, let alone *any* burden on the right to vote. *See Burdick*, 504 U.S. at 434.

There is no reasonable argument to be made that Wisconsin's rules for returning absentee ballots prevent *any* voter from voting and submitting a ballot to be counted. The law places the impetus on the voter to make sure that he or she completes his or her absentee ballot correctly. The burden is

not on the municipal clerk to screen absentee ballots for perceived voter "mistakes." And there is no recognized constitutional right to change or correct an absentee ballot after it has been submitted. Plaintiffs assert no connection whatsoever between the challenged laws and any protected constitutional right.

Wisconsin's rules regarding when absentee ballots can be returned to voters to remedy technical defects furthers important State interests. *See Burdick*, 504 U.S. at 434. Wisconsin's laws carefully protect against vote-loss due to damaged ballots and technical certificate problems. What Plaintiffs seem to want are further requirements for returning absentee ballots that were not filled out the way the elector intended. (*See* Am. Compl., Dkt. 19 ¶ 140.) But their rule presumes that local election officials can read minds.

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. (DPFOF 46.)

Also, 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. (DPFOF 47.) This is unworkable and illustrates why Plaintiffs' claim in Count 2 makes no sense.

Count 2 fails as a matter of law because the challenged laws do not burden the right to vote, and because they further important State interests in orderly election administration and preventing vote-loss. The current system regarding when absentee ballots may be returned to a voter to correct errors is constitutional and makes sense.

Finally, Plaintiffs' claim in Count 4 regarding "partisan fencing" fails as a matter of law for the reasons explained in Argument section V of this brief. Additionally, 2011 Wisconsin Act 227, which created the challenged laws, was passed with the bipartisan support of Republicans *and* Democrats. Rep.

Peggy Krusick, a Democrat, voted for the law. (*See* DPFOF 14.) It is nonsense to suggest that the law was intended to harm Democrats when a Democrat voted for it. (Rep. Ziegelbauer, an Independent legislator, also voted for the law. (*See* DPFOF 14.)

X. Plaintiffs' claims challenging voter registration reforms fail.

Plaintiffs allege that various voter registration laws are unconstitutional and violate Section 2 of the Voting Rights Act. Plaintiffs' claims fail as a matter of law.

A. 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 & 6.18, and military electors are not required to register. Wis. Stat. § 6.22.

1. 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.

a. Election-day registration

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.

b. 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). 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. (DPFOF 48.)

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. It can be accessed at the following link: 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 website, along with instructions on how to register to vote: http://www.cityofmadison.com/election/voter/pre.cfm.

When registering by mail, the form must be postmarked or delivered to the municipal clerk by the third Wednesday preceding the election (which equates to 20 days prior to the election). Wis. Stat. § 6.28(1).

c. Registering in person

If voters prefer, they can 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).

d. 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. 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. (DPFOF 49.)

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 twelve different 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; and
(12) A check or other document provided by a unit of government.

Wis. Stat. § 6.34(3)(a).

B. Plaintiffs' claims relating to voter registration laws

Plaintiffs challenge several aspects of Wisconsin's voter registration laws under several different legal theories. Plaintiffs challenge each of these provisions as an undue burden on the right to vote under the First and Fourteenth Amendments (Am. Compl., Dkt. 19 ¶ 163), as unconstitutional "partisan fencing" in violation of the First and Fourteenth Amendments (*id.* ¶ 172), and as a violation of the Twenty-sixth Amendment. (*Id.* ¶ 181).

As noted below, only particular voter registration laws are challenged as violating Section 2 of the Voting Rights Act (Count 1), or as violating the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count 5) because they were allegedly enacted with the intent to discriminate based on race.

1. Claims relating to proof of residence

a. Corroboration as proof of residence

Prior to 2011, voters could also establish residency through "corroboration," in which another elector of the municipality could corroborate the registrant's residence by a signed statement. In 2011, Wisconsin eliminated corroboration as a way to prove residence. *See* 2011 Wis. Act 23, §§ 17, 29, 40–41.

Plaintiffs allege that the failure to accept corroboration violates Section 2 of the Voting Rights Act (Am. Compl., Dkt. 19 ¶ 156), and constitutes

intentional discrimination based on race in violation of the Equal Protection Clause and Fifteenth Amendment. (*Id.* ¶ 177.)

b. All voters must provide documentary proof of residence

In 2013 Wisconsin Act 182, the legislature amended Wis. Stat. § 6.34(2) so that all voters must now prove their residence. 2013 Wis. Act 182, § 2H. Plaintiffs also challenge the fact that all voters must provide documentary proof of residence when registering to vote; previously, only those who registered within twenty days of the election were required to provide documentary proof of residence.

Plaintiffs allege that requiring all voters to prove their residence violates Section 2 of the Voting Rights Act (Am. Compl., Dkt. 19 ¶ 156), and constitutes intentional discrimination based on race in violation of the Equal Protection Clause and Fifteenth Amendment. (*Id.* ¶ 177.)

c. "Dorm lists"

Plaintiffs challenge a change made to one of the methods that university, college, and technical college students can use to prove their residence. Currently, the law allows these students to use their school photo identification card along with either (a) a fee receipt, or (b) a certified list of students who are U.S. citizens (which Plaintiffs refer to as a "dorm list"). Wis. Stat. § 6.34(3)(a)7.

In 2011, the law was amended so that the "dorm list" must list only U.S. citizens. 2011 Wis. Act 23, § 33m. Plaintiffs claim this type of "dorm list" is not feasible because schools are prevented from disclosing students' citizenship status by the Family Educational Rights and Privacy Act (FERPA). (*See* Am. Compl., Dkt. 19 ¶¶ 52, 106.)

2. Claims relating to special registration deputies

a. Special registration deputies at high schools

Plaintiffs challenge Wisconsin's decision to stop mandating that high schools serve as voting registration locations. (Am. Compl., Dkt. 19 ¶ 108.) In 2011, the legislature amended Wis. Stat. § 6.28 to remove a provision that required high schools to accept voter registration forms for students and staff. 2011 Wis. Act 240, §§ 1–2.

b. Lack of statewide special registration deputies

Plaintiffs lastly challenge that Wisconsin law does not allow for statewide special registration deputies. Current Wisconsin law requires special registration deputies to apply to a particular municipality to register voters in that municipality, although an individual can be appointed by more than one municipality. Wis. Stat. § 6.26(2)(a). Previously, the Government Accountability Board could appoint special registration deputies who could

register voters throughout the entire state. In 2011 Wisconsin Act 23, the legislature eliminated statewide registration deputies. 2011 Wis. Act 23, § 26.

Plaintiffs allege that the failure to allow statewide special registration deputies violates Section 2 of the Voting Rights Act (Am. Compl., Dkt. 19 ¶ 156), and constitutes intentional discrimination based on race in violation of the Equal Protection Clause and Fifteenth Amendment. (*Id.* ¶ 177.)

3. City of Madison ordinance

Plaintiffs also challenge a Wisconsin law providing that "[n]o 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." Wis. Stat. § 66.0104(2)(d)1.a. While it is not a voting regulation, Plaintiffs challenge this law because it preempted a City of Madison ordinance that required "landlords to provide new tenants with a voter-registration form when they moved in." (Am. Compl., Dkt. 19 ¶ 111.)

C. Wisconsin's voter registration laws are constitutional and consistent with Section 2 of the Voting Rights Act.

Wisconsin's voter registration system does not deny or abridge the right to vote on account of race or place an unconstitutional burden on the right to vote. As the Seventh Circuit recognized, "[r]egistering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748. Thus, Plaintiffs' claims in Counts 1 and 2

fail because the challenged voter registration provisions do "not even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

Wisconsin allows registration on Election Day at the polling place, provides numerous avenues for voters to register prior to Election Day (including by mail or by providing the forms to a special registration deputy), and allows twelve different documentary forms for proving residence. The features of registration complained of by Plaintiffs constitute no unlawful infringement on the right to vote.

1. Wisconsin's voter registration laws do not deny or abridge the right vote on account of race in violation of Section 2 of the Voting Rights Act.

The challenged voter registration laws do not deny or abridge the right to vote under § 2(a) of the Voting Rights Act. The challenged voter registration laws can only serve as a "denial" of the right to vote under Section 2(a) if the laws "make[] it *needlessly* hard to" register to vote. *Frank*, 768 F.3d at 753 (emphasis in original). They draw no distinctions based upon race.

Plaintiffs cannot show that it is even hard to register to vote, let alone *needlessly* hard. "Registering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748. Wisconsin accepts twelve different categories of documents as proof of

residence, which is even more permissive than the photo identification law that was upheld in *Frank*. If requiring photo identification (which requires some voters to obtain a birth certificate) is not a violation of Section 2, then surely a registration system that merely requires the production of a bank statement, utility bill, paycheck, or any document mailed by the government to a voter does not violate Section 2. Nor could it violate Section 2 for Wisconsin to require special registration deputies to apply to individual municipalities rather than to a statewide agency.

Apart from the lack of any racially discriminatory burden, Plaintiffs' Section 2 claims fail because there is no evidence that any alleged disparate impact was caused by the State of Wisconsin. States "are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753. Section 2(a) of the Voting Rights Act "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Id.*

Plaintiffs likewise cannot prove under Section 2(b) of the Voting Rights Act that Wisconsin's voter registration laws give African Americans or Latinos "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). Their claims fail because "in Wisconsin everyone has the same opportunity to" register to vote. *Frank*,

768 F.3d at 755. As explained below, Wisconsin's system for voter registration does not impose severe burdens on voters who need to register.

2. Wisconsin's voter registration laws place no unconstitutional burden on the right to vote.

In Count 2, Plaintiffs are attempting to expand the level of scrutiny that courts apply to state election laws under the "right to vote" found in the First and Fourteenth Amendments. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730). In contrast, Plaintiffs would have the federal courts micro-manage each change that a State makes to its election laws.

The Supreme Court recognizes that all "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. The Court applies strict scrutiny only to regulations that impose "severe" burdens on the right to vote, "[b]ut 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.* at 434 (quoting *Anderson*,

460 U.S. at 788). Voter "registration requirements . . . are 'classic' examples of permissible regulation." *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 196 n.17 (1999).

The challenged voter registration laws do not impose severe burdens on the right to vote, so they should be upheld because the State's interest in orderly administration of elections, verifying voters' residences, and controlling costs justify the regulations. The Supreme Court has upheld voter registration laws that impose much heavier burdens than the laws challenged here, including fifty-day pre-election deadlines for registration, *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam); *Burns v. Fortson*, 410 U.S. 636, 686–87 (1973) (per curiam).

a. The challenged voter registration laws do not impose severe burdens on the right to vote.

Wisconsin's voter registration system does not impose "severe" burdens on the right to vote. "Registering to vote is easy in Wisconsin." *Frank*, 768 F.3d at 748.

The alleged "burdens" are much lesser burdens than those at issue in obtaining a qualifying photo identification for voting, which can require securing a birth certificate and traveling to a government office to obtain an identification card. The Supreme Court has held that obtaining a photo identification card is not a substantial burden on the right to vote because

"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." *Crawford*, 553 U.S. at 198.

Plaintiffs claim that their right to vote is burdened by (1) having to produce any documentary proof of residence (after corroboration was eliminated and all voters were required to produce documentary proof of residence); (2) being limited to the twelve forms of documentary proof of residence in Wis. Stat. § 6.34(3)(a) (*i.e.*, colleges cannot provide a "dorm list"); (3) high school students having to follow the same procedures for registering to vote as all other voters (*i.e.*, no high school special registration deputies); (4) special registration deputies having to apply to all the municipalities in which they want to register voters (*i.e.*, no statewide special registration deputies); and (5) Madison tenants having to follow the same procedures for registering to vote as all other voters (*i.e.*, the Madison ordinance preemption). These burdens are all less severe than the burden in *Crawford*, which was held not to be severe for purposes of the First and Fourteenth Amendments.

(1) Proof of residence

In this case, the burdens are less severe than those at issue in *Crawford*. Wisconsin requires voters to provide documentary proof of residence, but this can be satisfied more easily than obtaining a driver license or state identification card for voting. Wisconsin voters can prove residence by, among other things, a utility bill that is less than 90 days old, a bank statement, paycheck, or any document provided by a unit of government (including a check). Wis. Stat. § 6.34(3)(a)8.–11. If having to obtain a birth certificate or qualifying ID for voting is not a substantial burden, then neither is having to obtain one of the twelve forms of proof of residence authorized by Wis. Stat. § 6.34(3)(a).

Students at colleges and universities that do not provide a "dorm list" to election officials still have twelve different ways they can prove their residence. They can use any of the eleven documentary forms available to non-students. Wis. Stat. § 6.34(3)(a)1.–6., 8.–11. Students at public universities can use any document sent to them by the university under the "government document" category. Wis. Stat. § 6.34(3)(a)11.

Students at colleges and universities that do not provide a "dorm list" to election officials are even granted another way to prove residence that is not available to non-students. They can use the photo identification card issued by their university, college, or technical college with a fee payment receipt

issued within the past nine months. Wis. Stat. § 6.34(3)(a)7.b. The "burden" a student faces in going to the university office to obtain a fee payment receipt "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." *Crawford*, 553 U.S. at 198.

(2) Special registration deputies

Wisconsin's requirement that special registration deputies apply to all the different municipalities in which they want to register voters does not burden the rights of any voter. Plaintiffs take issue with the fact that Wisconsin's system of special registration deputies is not as expansive as they would like. But there is no constitutional obligation for States to authorize any special registration deputies. *See Coal. for Sensible & Humane Sols. v. Wamser*, 771 F.2d 395, 399–400 (8th Cir. 1985) (city election board's refusal to appoint qualified volunteers as deputy registrars did not unconstitutionally infringe the right to vote); *Latin Am. Union For Civil Rights, Inc. v. Bd. of Election Comm'rs of City of Milwaukee*, 349 F. Supp. 987, 988 (E.D. Wis. 1972) (denying a request for a preliminary injunction that would require the City of Milwaukee to appoint registered electors from the city as special registration deputies).

The elimination of statewide special registration deputies was a change that local election officials requested. (DPFOF 50.) Statewide special registration deputies made mistakes and showed inconsistency with voter registration forms. (DPFOF 51.) They could be difficult for local election officials to track down to try to fix errors. (DPFOF 52.) Some voters became upset when they thought they had been registered by a statewide special registration deputy, when in fact they were not. (DPFOF 53.) Returning to local control over the accuracy and consistency of the voter registration process improves accountability and is supported by local election officials. (DPFOF 54.)

Wisconsin provides ample opportunities to register to vote, even apart from special registration deputies, which are essentially a supplement to registration done by mail and in-person registration at municipal clerks' offices or at the polls on Election Day. There is no burden on voters caused by special registration deputies having to apply to multiple different municipalities if they wish to register voters in different locations.

(3) High school registration

There is likewise no severe burden placed on the right to vote by not automatically providing special registration deputies at high schools. The old system of having special registration deputies at high schools created extra work without much benefit. (DPFOF 55.) This change in the law merely

requires high school students and employees to follow the same registration procedures as all other voters in the State—they can register by mail or in-person at the county clerk's office, at the polls on Election Day, or via a special registration deputy. The "burdens" faced by high school students in registering like other voters simply "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

(4) Madison tenants

Similarly, no severe burden is placed on the right to vote by Wis. Stat. § 66.0104(2)(d)1.a., which prevents municipalities from requiring landlords to make any communications not required by state or federal law. This law preempts a City of Madison ordinance requiring landlords to give voter registration forms to tenants. The ordinance, however, merely mandates the giving of a form that is freely available online at http://myvote.wi.gov and http://www.gab.wi.gov/forms/voters.

Given the ubiquitous availability of the voter registration form online, Plaintiffs cannot show that any voter suffers a substantial burden on the right to vote by not getting the form from a landlord. In any event, the preemption of the Madison ordinance merely requires Madison tenants to follow the same voter registration procedure as every other voter who needs to register. This so-called "burden" to registering like all other voters simply

"does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

b. State interests justify Wisconsin's voter registration system.

Wisconsin has legitimate interests in orderly election administration and promoting voter confidence in the integrity of the election process, particularly by verifying that individuals registering to vote are qualified electors. The challenged voter registration laws further those State interests.

(1) Proof of residence

One of Wisconsin's qualifications for voting is having "resided in an election district or ward for 28 consecutive days before an election." Wis. Stat. § 6.02(1). The proof-of-residence requirement in Wis. Stat. § 6.34(1) ensures that voters (1) meet the residency requirement, and (2) confirm that they are registering at the correct address. In addition, the requirement that dorm lists only contain U.S. citizens is related to voter qualifications because being a "U.S. Citizen" is a qualification to vote. Wis. Const. art. III, § 1; Wis. Stat. § 6.02(1).

Further, the State has an interest in making voters provide some documentary proof of residence (rather than mere corroboration or no document at all) so as to protect the integrity of elections and promote

confidence in the election process. The Supreme Court recognized these interests in *Crawford*, 553 U.S. at 194–96, and the Seventh Circuit relied on them in upholding the voter photo ID law in *Frank*, 768 F.3d at 750–51. These interests are sufficient to justify the slight burdens imposed on voters.

(2) Special registration deputies

In Wisconsin, voters register at the local level. Thus, it makes sense for special registration deputies to be appointed by the various localities rather than at the state level. Further, Wisconsin does not prohibit anyone from serving as a special registration deputy in multiple jurisdictions. Someone who wishes to do so must simply apply to each municipality. These state interests justify the non-existent burden on voters and the small burden on special registration deputies that resulted when Wisconsin eliminated statewide special registration deputies.

(3) High school registration

Wisconsin also has an interest in reducing the costs and expense of the voter registration system. Mandating special registration deputies at high schools costs money and time. In an ideal world, there could be special registration deputies in all kinds of places: public libraries, malls, churches, etc. But given the ease of registering by mail or in person at the polling place

on Election Day, the state interest in maintaining costs and expense justifies not mandating special registration deputies at high schools.

(4) Madison ordinance

The state interest justifying Wis. Stat. § 66.0104(2)(d)1.a. is an interest in having uniform laws for mandated landlord/tenant communications throughout the State. This interest is not related to voting because the statute would ordinarily have no effect on voting, except that the City of Madison mandated landlords to give voter registration forms to tenants. The State's interest in uniform laws with regard to mandated landlord/tenant communications is more than sufficient to support the miniscule burden on the right to vote created by the law.

In sum, Plaintiffs' claims in Counts 1 and 2 challenging a variety of voter registration laws fail as a matter of law.

3. Plaintiffs' challenges to voter registration laws under the First, Fourteenth, Fifteenth, and Twenty-sixth Amendments in Counts 4, 5, and 6 also fail.

As explained above, Plaintiffs' challenge various voter registration laws under the theories alleged in Counts 4, 5, and 6 of their amended complaint. These claims fail for the reasons stated in Argument sections V through VII.

Additionally, with regard to Plaintiffs' "partisan fencing" claims in Count 4, these claims make no sense because 2011 Wisconsin Act 23 was

passed with bi-partisan support from Republicans *and* Democrats, as argued in Argument section V of this brief. Act 23 eliminated corroboration for proving residency to vote, made changes to the use of "dorm lists," and eliminated statewide special registration deputies. 2011 Wis. Act 23, §§ 17, 26, 29, 33m, 40–41. None of these laws can reasonably be perceived to have been motivated by a desire to "fence out" Democrat voters.

Plaintiffs' challenges to voter registration laws in Counts 5 and 6 fail as a matter of law for the reasons explained above. Plaintiffs cannot show through admissible evidence that the legislature passed these laws to intentionally discriminate against minority and young voters. This is the put up or shut up moment for Plaintiffs' intentional discrimination claims. *Goodman*, 621 F.3d at 654. Plaintiffs cannot "put up" the evidence to prove these claims; therefore, they should be dismissed.

XI. Plaintiffs' claims challenging other specific election laws fail.

A. The claims relating to election observers and 2013 Wisconsin Act 177 fail.

Plaintiffs challenge 2013 Wisconsin Act 177, which amended Wis. Stat. § 7.41, a statute concerning election observers. Plaintiffs assert that 2013 Wisconsin Act 177 violates Section 2 of the Voting Rights Act; unduly burdens the right to vote and is "partisan fencing" in violation of the First and Fourteenth Amendments; and intentionally discriminates against minorities

and young Wisconsin voters in violation of the Fourteenth, Fifteenth, and Twenty-sixth Amendments. (Am. Compl., Dkt. 19 ¶¶ 125–31 and Counts 1, 2, 4, 5 & 6.) Plaintiffs' claims lack merit and should be dismissed.

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' concern is with the possibility that election observers could be permitted to stand as close as three feet from voters. (*See* Am. Compl., Dkt. 19 ¶ 125.) Plaintiffs allege that, prior to 2013 Wisconsin Act 177, "observers were required, pursuant to GAB policy, to maintain a six-foot distance from voters." (*Id.*) 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." (*Id.* ¶ 128.) They assert that 2013 Wisconsin Act 177 "burdens, abridges, and denies the voting rights of young persons, African Americans, and other voters who have been or will be the targets of intimidation and harassment by election observers." (*Id.* ¶ 130.) Plaintiffs also claim that the legislature acted "with the intent to discriminate against young, African-American, and Democratic voters."

2013 Wisconsin Act 177 and Wisconsin Stat. § 7.41(2) do not violate Section 2 of the Voting Rights Act or the U.S. Constitution. And Plaintiffs'

allegations of intentional discrimination against minorities and young voters are unfounded.

1. Plaintiffs misunderstand how the law works.

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. *Id.* The State officials who are named Defendants in this case do not control where election observers stand at a polling place. *See id.* 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. Plaintiffs' Section 2 claim fails.

Further, Wis. Stat. § 7.41(2) does not "impose a discriminatory burden on members of a protected class" that would violate Section 2 of the Voting Rights Act. *Frank*, 768 F.3d at 754–55. As an initial matter, 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 election 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 cannot prove that, because local election officials possess the authority to require election observers to stand no closer three feet from voters, the result will be that "members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.'" *Frank*, 768 F.3d 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 Plaintiffs can show through admissible evidence that Wis. Stat. § 7.41(2) has *some* impact on minority voters, 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 cannot prove their Section 2 claim as to 2013 Wisconsin Act 177.

3. Wisconsin Stat. § 7.41(2) does not violate the Constitution.

Third, Wis. Stat. § 7.41(2) also does not violate the Constitution (*see* Counts 2, 4, 5, and 6). As to Count 2, the law does not unduly burden the rights of voters in violation of the First and Fourteenth Amendments. 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.

The second step in the analysis is to determine whether the law is "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). As the Supreme Court recognized in *Crawford*, states have legitimate and important interests in orderly election administration. *Id.* at 196.

Wisconsin Stat. § 7.41 gives local election officials the authority to tell election observers precisely where to stand, Wis. Stat. § 7.41(2), *and* the authority to eject them from the polling place for being unruly. Wis. Stat. § 7.41(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 Wisconsin 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. (DPFOF 56.) Not all polling places have the space to move election observers further away from voters. (DPFOF 57.) 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 v. Rockefeller*, 410 U.S. 752, 761 (1973). 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.

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 and does not violate the First and Fourteenth Amendments. Count 2 should be dismissed.

Plaintiffs' remaining constitutional claims in Counts 4 through 6 also fail, as explained in Argument sections V through VII of this brief. Plaintiffs' "partisan fencing" constitutional claim in Count 4 fails for many of the same reasons that their Count 2 constitutional claim fails. Count 4, like Count 2, arises under the First and Fourteenth Amendments. (Am. Compl., Dkt. 19:51–52.) Addressing "partisan fencing claims," this Court stated in its opinion and order granting, in part, the State's motion to dismiss that "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." (Dkt. 66:10.)

2013 Wisconsin Act 177 applies to Democrats and Republicans equally; there is no partisan discrimination. The law results in little to no burden on the right to vote and, given such a slight and tolerable burden, the Court cannot conclude that the law violates the First and Fourteenth Amendments when it balances the small burden imposed on voting against the State's significant interests in orderly election administration and promoting voter confidence in the integrity of the election process. *See Anderson*, 460 U.S. at 788. 2013 Wisconsin Act 177 is constitutional, and Count 4 fails for the same reasons that Count 2 fails.

Finally, Plaintiffs cannot prove their claims in Count 5 (under the Fourteenth and Fifteenth Amendments) and Count 6 (under the Twenty-sixth Amendment) that 2013 Wisconsin Act 177 was enacted to intentionally or purposefully discriminate against minorities and young Wisconsin voters. There is no racial or age-based component to the challenged law, and it does not impact minorities or young people differently than non-minorities or older voters. This is the put up or shut up moment for Plaintiffs to come forward with the evidence that supports their intentional discrimination claims. *See Goodman*, 621 F.3d at 654. They have no evidence that would prove these claims; therefore, the claims should be dismissed.

B. The claims challenging the elimination of straight-ticket voting for certain voters fail.

Plaintiffs cannot prevail on their claims relating to straight-ticket voting. They challenge 2011 Wisconsin Act 23, § 6 under six legal theories:

(1) It violates Section 2 of the Voting Rights Act (Count 1);
(2) It creates an "undue burden" on the right to vote in violation of the First and Fourteenth Amendments (Count 2);
(3) There is no rational basis for the law under the Fourteenth Amendment (Count 3);
(4) It is unconstitutional "partisan fencing" in violation of the First and Fourteenth Amendments (Count 4);
(5) It is intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments (Count 5); and
(6) It is a violation of the Twenty-sixth Amendment rights of young voters (Count 6).

(Am. Compl., Dkt. 19 ¶¶ 132–36 and Counts 1–6.) The Court dismissed Plaintiffs' rational basis claim in Count 3. (Opinion and Order, Dec. 17, 2015, Dkt. 66:2.)

Plaintiffs' pending claims as to straight-ticket voting fail as a matter of law. Plaintiffs have no constitutional right to vote a straight-ticket. Not having straight ticket voting for most Wisconsin voters does not offend the Constitution or Section 2 of the Voting Rights Act. Counts 1, 2, 4, 5, and 6 should therefore be dismissed.

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."

The prevailing trend nationally is away from providing a straight-ticket option on the ballot. Wisconsin is one of a large majority of states that do not have straight-ticket voting. According to the National Conference of State Legislatures, as of July 2015, only ten states offered a form of straight-ticket voting: Alabama, Indiana, Iowa, Kentucky, Michigan, 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, December 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 cannot prove their Section 2 of the Voting Rights Act claim in Count 1. 2011 Wisconsin Act 23, § 6 does not "draw[] any line by race." *Frank*, 768 F.3d at 753. Plaintiffs cannot show through admissible evidence that eliminating straight-ticket voting causes minority voters to have less "opportunity" than other members of the electorate to vote. *See Frank*, 768

F.3d at 753. 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 cannot show through admissible evidence 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 of the Voting Rights Act "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 also cannot show through admissible evidence that eliminating straight-ticket voting causes longer lines in places where there are high concentrations of minority voters. (*See* Am. Compl., Dkt. 19 ¶ 133.) 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. 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 Section 2 claim in Count 1 should be dismissed.

Plaintiffs' "undue burden" constitutional claim in Count 2 also fails as a matter of law. Plaintiffs can point to no decision that holds that there is a constitutional right to vote a straight-ticket, nor 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. *See Common Cause Ind.*, 800 F.3d at 917. The first step in the analysis is to determine the character and magnitude of the asserted injury to the right to vote. *See Anderson*, 460 U.S. at 789.

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; therefore, the next step in the analysis is

to determine whether the State's interests justify the law. *See Burdick*, 504 U.S. at 434.

Some voters find straight-ticket voting confusing. (DPFOF 58.) The State has legitimate interests in preventing "confusion, deception, and even frustration of the democratic process at the general election." *Jenness 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. (DPFOF 59.) "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 the voter to 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.

Plaintiffs' "partisan fencing" claim in Count 4 as to straight-ticket voting is meritless for the reasons explained in Argument section V of this brief. In addition, the claim is illogical because two Democratic legislators (Rep. Anthony Staskunas, 15th Assembly District, and Rep. Peggy Krusick, 7th Assembly District) and one Independent legislator (Rep. Bob Ziegelbauer, 25th Assembly District) voted to enact 2011 Assembly Bill 7, which created 2011 Wisconsin Act 23 and eliminated straight-ticket voting for most voters. (*See* DPFOF 14.) There was no Republican partisan motivation for eliminating straight-ticket voting for many voters when that reform was passed with bi-partisan support. Count 4 fails as a matter of law.

Finally, Plaintiffs' claims as to straight-ticket voting in Counts 5 and 6 also fail as a matter of law for the reasons explained in Argument sections VI and VII of this brief. 2011 Wisconsin Act 23, § 6 is a law that is facially race-neutral and neutral as to the age of the voter. This is the put up or shut up moment for Plaintiffs to come forward with evidence that can prove their intentional discrimination claims. *See Goodman*, 621 F.3d at 654. Plaintiffs cannot show admissible evidence that the legislature had the intent or purpose to discriminate against minorities or young Wisconsinites when it eliminated straight-ticket voting for voters other than military and overseas voters. 2011 Wisconsin Act 23, § 6 is constitutional, and Counts 5 and 6 should be dismissed.

C. The claims challenging the 28-day durational residency requirement fail.

Plaintiffs challenge Wisconsin's 28-day durational residency requirement. (Am. Compl., Dkt. 19 ¶ 119 (citing 2011 Wis. Act 23, §§ 10–12).) As argued above, Plaintiffs' claims challenging the requirement are moot. If they are not moot, Defendants are nonetheless entitled to summary judgment because the claims fail as a matter of law.

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* Am. Compl., Dkt. 19 ¶¶ 119–24.) Instead, they assert that the additional 18 days "severely burdens those voters who move shortly before an election." (*Id.* ¶ 120.)

Plaintiffs make one statutory and five constitutional challenges to the requirement:

(1) Section 2 of the Voting Rights Act claim (Count 1);
(2) First Amendment and Equal Protection Clause of the Fourteenth Amendment "undue burden" claim (Count 2);
(3) Equal Protection Clause of the Fourteenth Amendment rational basis claim (Count 3);

(4) First Amendment and Equal Protection Clause of the Fourteenth Amendment "partisan fencing" claim (Count 4);
(5) Equal Protection Clause of the Fourteenth Amendment and Fifteenth Amendment intentional racial discrimination claim (Count 5); and
(6) Twenty-sixth Amendment claim (Count 6).

(Am. Compl., Dkt. 19 ¶¶ 113–24 and Count 1–6.) The Court dismissed Plaintiffs' rational basis claim in Count 3. (Opinion and Order, Dec. 17, 2015, Dkt. 66:2.) The Court should grant summary judgment to Defendants on each remaining claim.

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.

Defendants are entitled to summary judgment on Plaintiffs' Count 1 claim under Section 2 of the Voting Rights Act. 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.

Defendants are also entitled to summary judgment on Plaintiffs' constitutional claim in Count 2. 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. (Am. Compl., Dkt. 19 ¶¶ 161–63.) Plaintiffs cite to *Anderson*, 460 U.S. 780, and *Burdick*, 504 U.S. 428, for support.

(Am. Compl., Dkt. 19 ¶ 162). 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—presents no injury to nearly all voters, creating only a minimal risk of injury to a small number of potential voters who might move. The Supreme Court already has upheld durational residency requirements of a similar character to Wisconsin's 28-day requirement. *Burns*, 410 U.S. at 687 (50-day requirement); *Marston*, 410 U.S. at 680–81 (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 do not identify the number of moving voters potentially impacted by the 28-day requirement, but they concede it only impacts those who move shortly before an election (Am. Compl., Dkt. 19 ¶ 120.) The change from 10 to 28 days has no impact on voters who take up a new residence by the first of the month in advance of the spring and fall general elections. Wis. Stat. § 5.02(5) (general election), § 5.02(21) (spring election). Most voters take up a new residence by the first of the month. (DPFOF 60.) These elections take place on the first Tuesdays in April and November, so a voter who moves to a new residence on the first of the month would be impacted the same by a 10-day or 28-day residency requirement.

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.

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 by preserving the integrity of the election process that maintains a stable political system and insuring the purity of the ballot box to safeguard voter confidence and avoid voter confusion. *See Crawford*, 553 U.S. at 197 (voter confidence); *Rosario*, 410 U.S. at 761 (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.

Under the *Anderson-Burdick* test, the interests served by the 28-day durational residency requirement outweigh the modest injury Plaintiffs allege. Defendants are entitled to judgment as a matter of law on Plaintiffs' constitutional claim in Count 2.

Defendants are entitled to judgment as a matter of law on Plaintiffs' three remaining constitutional claims in Counts 4, 5, and 6. As argued in Argument sections V through VII of this brief, Plaintiffs' "partisan fencing" claim in Count 4, their intentional racial discrimination claim in Count 5, and their Twenty-sixth Amendment age-discrimination claim in Count 6 each fail.

The Supreme Court has upheld longer durational residency requirements for voting than Wisconsin's. *See Burns*, 410 U.S. at 687; *Marston*, 410 U.S. at 680–81; *Dunn*, 405 U.S. at 363 (Blackmun, J., concurring). And the Voting Rights Act itself includes a longer requirement of 30 days. Accordingly, this Court should grant summary judgment to Defendants on all Plaintiffs' pending challenges to Wisconsin's 28-day durational residency requirement.

* * *

Plaintiffs raise an unusual number of separate legal claims in this case. As the argument and facts show, Plaintiffs do not prevail on any of them.

Plaintiffs' claims under Section 2 the Voting Rights Act all fail because their concept of Section 2 is inconsistent with the plain language of the Voting Rights Act and controlling precedent, particularly the Seventh Circuit's recent decision in *Frank*. Under *Frank*, Plaintiffs cannot prevail on their Section 2 claims because none of the challenged election laws creates a prohibited discriminatory result for minority voters.

Plaintiffs' various federal constitutional claims also fail. The challenged laws are constitutional. They are part of a Wisconsin election system that is fundamentally fair, easy-to-navigate, and open to all. For the reasons argued here, the Court should dismiss Plaintiffs' pending claims and enter judgment in Defendants' favor.

CONCLUSION

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

Dated this 11th day of January, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

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

WINN S. COLLINS
Assistant Attorney General
State Bar #1037828

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

Attorneys for Defendants

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