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

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

Plaintiffs,

v. Case No. 15-CV-324-JDP

ANN S. JACOBS, Chair, Wisconsin Elections Commission, *et al.*,

Defendants.

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JUSTIN LUFT, *et al.*,

Plaintiffs,

v. Case No. 20-cv-768-JDP

TONY EVERS, *et al.*,

Defendants.

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# *One Wisconsin* Plaintiffs' Rebuttal Brief in Support of Motion for Preliminary Injunctive Relief and Brief in Opposition to Defendants' Motion for Summary Judgment

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| Boardman Dep. | Deposition of Kristina Boardman, Sept. 3, 2020, ECF No. 383 |
| CAFU | Compliance, Audit and Fraud Unit of the DMV |
| CLEAR | A personal background report prepared by the National Comprehensive Report Plus Associates |
| CLNC | Common Law Name Change |
| DHS | Wisconsin Department of Health Services |
| DMV | Division of Motor Vehicles, DOT |
| FR | Facial Recognition Verification |
| IDPP | ID Petition Process |
| Schilz Dep. | Deposition of Susan Schilz, Sept. 3, 2020, ECF No. 384 |
| SSA | Social Security Administration |
| WDOJ | Wisconsin Department of Justice |
| WDOT | Wisconsin Department of Transportation |

**Statement on Evidentiary Hearing**

The *One Wisconsin* plaintiffs believe there should be an evidentiary hearing followed by oral argument to the Court. We ask to cross-examine Ms. Boardman and Ms. Schilz. The Court may recall that they both testified at length during the May 2016 trial, and they may be able to help clarify any questions about CAFU and the IDPP process. In addition, the State's brief makes numerous assertions of fact about various aspects of the IDPP that are at odds with the Boardman and Schilz depositions. The testimony of these witnesses would help clarify these and other issues.

**Statement on Protective Order Issues and Sealing Status**

*One Wisconsin* plaintiffs' counsel intended all along to file our opening and rebuttal briefs on the public docket. We sought to prepare a fact-heavy brief full of the sorts of individual stories and details this Court requested, without revealing anyone's identity or violating privacy rights. We followed the same drafting and redaction protocols that we negotiated with the WDOJ in 2016 (with input from the Court). We believe those drafting and redaction protocols worked well and struck the right balance.

Our decision *temporarily* to file under seal was made by Mr. Curtis on Friday evening after several email exchanges he had with Mr. Murphy on Thursday and Friday regarding compliance with the protective order (ECF No. 67) and privacy laws. To Mr. Curtis, some of Mr. Murphy's redaction suggestions, although more *strict* than those we followed in this case four years ago, seemed reasonable, and we incorporated them into our brief. Other suggested redaction protocols were nonstarters and seemed to conflict with how the 2015-16 trial was briefed, tried, and argued to this Court. With Mr. Murphy continuing to express "concern," Mr. Curtis decided Friday evening to file the brief under seal *temporarily* pending resolution of the protective-order situation. Since Mr. Murphy and his team would be dissecting the brief between Saturday and Tuesday, Mr.

Curtis asked them to let us know if they found anything that should be redacted, with any disputes to be presented to this Court on Friday. This also gave us time to proof the text and footnotes once again for any material that should be redacted.

Mr. Murphy rejected this suggestion, but Mr. Curtis decided to keep the brief under seal until Tuesday in case the WDOJ wanted to share any privacy concerns it might have about the *One Wisconsin* brief. The purpose here was not to shift responsibility for complying with the protective order to other parties. That responsibility rests solely with *One Wisconsin* plaintiffs' attorneys. But as part of our own due diligence protocols, we thought it appropriate to file *temporarily* under seal and invite any corrections or concerns the WDOJ—which was the proponent of the protective order, after all—might have once the WDOJ team had repeatedly read our brief in the 96 hours between filings. This was purely a due diligence exercise, not an attempt to shift responsibility.

Having heard no objections, and in light of this Court's Monday morning text order, the *One Wisconsin* plaintiffs are filing their *redacted* opening brief tonight on the public record.[1] And this response brief is being filed on the public record as well.

*One Wisconsin* counsel ask to be heard on Friday regarding compliance with the redaction provisions of the Court's September 21 text order. Literally applied, the wording would require the redaction of each IDPP case file that is under seal, each packed with private information about the named petitioner, but each of which could, in theory, be "redacted" page by page, line by line. We do not believe the Court had this in mind. The Court decided in 2016 to keep all IDPP petitioner files under seal. So did the Seventh Circuit and Judge Adelman in the Eastern District.

[1] The brief is technically a "redacted" version because, in our own due-diligence review over the weekend, we found a single word on page 51, footnote 32 that we believe should, out of caution, be redacted to avoid any risk. Thus, the public "redacted" version will have only a single word in it redacted, along with the Filed Under Seal notices on the front cover of the brief.

No judge has required the filing of redacted Case Activity Reports and other documents contained in IDPP petitioner's files. *One Wisconsin* plaintiffs' counsel will seek clarification and guidance from the Court on this issue on Friday, if that is agreeable to the Court.

**Statement on *Amicus* Brief from the Wisconsin Legislature**

The Legislature announced last evening, September 21, that it intends to file an *amicus curiae* brief when the parties exchange their second-round final briefs tonight, September 22. ECF No. 409 at 1-2. The *One Wisconsin* plaintiffs strongly object to the calculated timing of this proposed *amicus* submission. The Legislature has known of the two-stage briefing process the Court adopted, and of the scheduled September 25 hearing/argument, for weeks. Its counsel easily could have filed the Legislature's proposed *amicus* brief when the parties filed their opening briefs on Friday, September 18, so that the parties themselves could review and respond to the Legislature's assertions. Instead, the Legislature seems to have made a tactical move to file at the *close* of briefing when the parties themselves will have no chance to respond and are now busy getting ready for Friday's hearing. The Legislature is asking for a privilege none of the parties themselves enjoy—the ability to submit a brief picking apart the parties' briefs, without any opportunity for the parties themselves to file a response. We ask the Court to deny as untimely any motion by the Legislature to file an *amicus* brief at this late date. A proposed *amicus* brief should not be used as a tactical weapon.

**Introduction and Summary of the Argument**

This Court could not have been more clear: the parties' briefing should be "**structured around the flaws this court previously found in the IDPP,**" and should "**use this Court's previous rulings to provide the framework**, along with any guidance provided by the court of appeals in *Frank* or *Luft*." ECF No. 364 at 2 (emphasis added). The State's brief has ignored that

request—it repeatedly fails even to *acknowledge* many of the Court's concerns, let alone engage with the Court and attempt to explain why the Court was wrong or how circumstances have changed.

The State repeatedly claims that the Temporary Receipt system has cured any constitutional infirmities with the IDPP, even though this Court repeatedly has ruled otherwise. The Court has rightly labeled the Temporary Receipt system a "patch" and a "Band-Aid" on the IDPP pending more fundamental reforms. ECF No. 299 at 2-A-6 (Oct. 13, 2016 Hr'g Tr.); ECF No. 366 at 34 (Aug. 25, 2020 Hr'g Tr.). Yet as discussed below, that "Band-Aid" is now the State's principal defense of the IDPP. The State, in fact, argues that "[t]he constitutional inquiry is whether an eligible voter can get an ID with reasonable effort, and the IDPP 'receipt' meets this requirement." ECF No. 399 at 15. As repeatedly shown below, neither the IDPP as a whole or the Temporary Receipt system meet this standard.

Part I of this brief will respond to the State's many mischaracterizations of what the *various* *Frank* and *Luft* decisions mean and what they held. In some instances, the State's characterizations of the law are exactly the opposite of what Judge Easterbrook said in *Frank II* and *Luft.*

Part II focuses on standards, including those for the summary judgment defendants are seeking. It demonstrates this case is not appropriate for summary judgment because it was just remanded several months ago for the construction of a new IDPP record. There has been expedited, limited discovery, not the sort of full opportunity for discovery to which plaintiffs are entitled before having to defend against summary judgment motions.

Part III is structured in the same way as Part III of our opening brief. It reviews each of the Court's **fifteen** stated concerns and objections to the IDPP's operation. There are fifteen subparts—A through O—and each examines the State's arguments and attempts to highlight where

facts are undisputed or in dispute. In many instances the defendants have not even acknowledged the State's concerns, so some of the fifteen points on our "checklist" can be dealt with quickly.

## I. Relevant legal framework

The State describes a Seventh Circuit jurisprudence that simply does not exist. Most fundamentally, the State claims that, under *Frank* and *Luft,* "[p]laintiffs [sic] burden **cannot be met by showing individual cases of inconvenience**; they must demonstrate that 'Wisconsin makes it needlessly hard to get photo ID.'" ECF No. 399 at 15 (citations omitted, emphasis added). The State urges that, in evaluating the IDPP, this Court must keep in mind that *Luft* and other Seventh Circuit decisions have supposedly recognized that "election laws 'invariably impose some burden upon individual voters,'" and that "**[a]ny election regulation 'is going to exclude either de jure or de facto, some people from voting** … ." *Id.* at 14-15 (emphasis added).

This is deeply misleading, and the quoted Seventh Circuit language is taken badly out of context. The quoted language all involves challenges seeking across-the-board systemic relief, such as the *Anderson-Burdick* claims of general applicability that were before the Seventh Circuit in *Luft.*[2] Remarkably, our Department of Justice does not even *acknowledge* that the Seventh Circuit repeatedly has emphasized that "[t]he right to vote is **personal** and is not defeated by the fact that **99%** of other people can secure the necessary credentials …," and that the State *must* provide a genuine and functional "**safety net**" for *every* voter who needs help. *Frank v. Walker,* 819 F.3d 384, 386-87 (7th Cir. 2016) (*Frank II*) (emphasis added); *see also Frank v. Walker,* 835

[2] The State's reliance on *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004), is badly misplaced. The quoted language is taken out of context for the point the State is arguing. *Griffin* involved a challenge to Illinois absentee voting laws and sought a rule "that would allow people who find it hard for whatever reason to get to the polling place on election day" to be able to vote absentee, a claim the Seventh Circuit rejected. *Id.* at 1130. *Griffin,* in other words, was seeking systemic relief for the 99%, and had nothing to do with the required "safety net" for those left behind.

F.3d 649, 651 (7th Cir. 2016) (*Frank III*); *Luft v. Evers*, 963 F.3d 665, 679-80 (7th Cir. 2020). The key terms "**personal**" (as in the "personal" right to vote),"), "**99%**," and "**safety net**" do not appear *anywhere* in the brief. Instead, most of the brief is focused on the wrong question, including its many examples of IDPP petitioners who enjoyed a good customer experience. No doubt there are many who get through the IDPP with ease. But as *Luft* emphasizes, that is not the relevant question. "The constitutional question under *Frank II* is whether the state ensures that **every eligible voter** can get a qualifying photo ID with reasonable effort." 963 F.3d at 679 (emphasis added).

The State also claims the Seventh Circuit already has *decided* that "the IDPP as a process is adequate to ensure that any eligible voter can get a voting-qualifying ID." ECF No. 399 at 2; *see also id.* at 3, 7. That's not true. Whatever positive things the Seventh Circuit has had to say about the IDPP are based on the glowing descriptions provided by the State's lawyers, not on any determinations that court has made itself. *Luft* stated that the IDPP, "*as the state describes it*," sounded "constitutionally" "adequate," "*if reliably implemented*." 963 F.3d at 679 (emphasis added).

As any reader can see, the Seventh Circuit's favorable comments about the IDPP were based on the State's claims that every petitioner enjoys "a rebuttable presumption of eligibility"; that there is a genuine "more likely than not" standard that governs the process; that an IDPP petitioner's required "administrative steps" are "no more than what *Crawford* … considered reasonable"; and that the new CLNC process "*requires* the officials to accept a name change" when presented with a completed CLNC affidavit. *See* 963 F.3d at 679-80 (emphasis added). As this brief demonstrates, each of these understandings is mistaken. The Seventh Circuit in no way "has approved the IDPP as a process" or endorsed the Temporary Receipt system as a fix for the

IDPP's problems. ECF No. 399 at 7. The Seventh Circuit remanded to this Court to build a record about today's IDPP and how it is *actually* works, with only a single restriction not relevant here. 963 F.3d at 680. The Seventh Circuit in no way has held that "the IDPP *as a process* is adequate." ECF No. 399 at 2 (emphasis added).

## II. Standards of decision

The standards for preliminary injunctive relief are set forth in the *One Wisconsin* and *Luft* plaintiffs' opening September 18 briefs.

Defendants seek a summary judgment of dismissal under Fed. R. Civ. P. 56. Such requested relief, at this stage of the litigation, is not appropriate. The Seventh Circuit vacated the IDPP portion of this Court's July 29, 2016 order because "[t]he district court acted on a record assembled years ago," and remanded for this Court to "assemble[]" a current record of how the IDPP is functioning. *Luft,* 963 F.3d at 680. "Adequacy cannot be evaluated in the abstract." *Id.* The 2016 IDPP factual record took five months of discovery, including many depositions (and often trial testimony as well) of DMV and CAFU personnel, community workers, and affected IDPP petitioners.

Here, discovery has been a rushed and limited affair—what this Court called "a rather expedited review of the petition process." ECF No. 366 at 4.[3] DMV did not even begin its mass-production of IDPP files until August 20, and it has refused to produce data on the racial composition of IDPP petitioners. Only three witnesses have been deposed thus far (Ms. Boardman, Ms. Schilz, and Ms. Wolfe). We understand this need for expedited proceedings given the

[3] The Court emphasized that "[i]t's nowhere near the schedule I would pick under any other reasonable set of circumstances, but we've got the election coming up …. So we've got to do what we can to get the information together[.]" ECF No. 366 at 4.

imminent November 3 election. But this expedited, focused discovery in no way constitutes the "**full opportunity to conduct discovery**" to which *One Wisconsin* plaintiffs are entitled on remand. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986); *see McCann v. Badger Mining Corp.*, 965 F.3d 578, 592 (7th Cir. 2020); Fed. R. Civ. P. 56(d). We've only had, effectively, less than four weeks of discovery, and only three depositions, limited to about three hours each at the strong urging of deponents' counsel because of the press of their other business—something plaintiffs agreed to given the rushed context, never imagining the WDOJ might later claim that this constituted our "full opportunity to conduct discovery." *Liberty Lobby,* 477 U.S. at 257. Any consideration of summary judgment motions should be deferred until plaintiffs have received that "full opportunity."

## III. The IDPP as presently administered continues to violate the First and Fourteenth Amendments in every material respect catalogued by this Court in its 2016 decisions.

Part III of our opening brief identified at least fifteen flaws in the IDPP that troubled this Court in 2016 and demonstrated that all of these flaws are still present in today's IDPP. Subparts A through O will examine what the State's opening brief says about these issues, where it says anything at all, and rebuts the State's arguments. As shown below, the defense brief repeatedly ignores important issues flagged by this Court in its prior decisions, including the racial disparities in the IDPP, the extent of administrative discretion, and the problems faced by those who cannot with "reasonable effort" obtain required secondary documentation.

### A. Continued reliance on multiple and often dysfunctional interactions among many in-state and out-of-state government agencies

This Court explained in 2016 that the IDPP was "complicated" in part because "the process required interaction between various divisions of the DMV, the Wisconsin Department of Health Services, and agencies of other states." *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 914

(W.D. Wis. 2016), *aff'd in part, rev'd in part, and remanded sub nom. Luft v. Evers,* 963 F.3d 665 (7th Cir. 2020). The Court aptly described the IDPP as "a very complicated beast of a system." ECF No. 299 at 2-A-6.

The parties' briefs present a Tale of Two IDPPs. One IDPP is "more efficient and exhaustive [today] than ever before," "flexible," good at "problem solving," "quick," "easy," "faster," and "better" than before, and has *"effectively eliminated errors.*" ECF No. 399 at 2, 6-7, 11, 23, 25 (emphasis added). The other IDPP is the one described in *One Wisconsin* plaintiffs' briefs, based on the IDPP files and guidance manuals themselves.

We have no doubt there are applicants who sail through the IDPP with relative ease.[4] But that is not the issue—the issue is what we do about those who are "stuck," and being asked to engage in much more than mere "reasonable effort" to secure an ID. And for them, the system remains unchanged, as we show below.

One alleged "improvement" is that CAFU has now "found that it is sometimes possible to verify" a person's identity by checking with out-of-state DMVs to see if *they* would have required a birth certificate as part of their own licensing process many years ago. If the answer is "yes," DMV considers the case solved—petitioner will get a regular ID. *See* ECF No. 399 at 23-24. The defense brief also announces that "CAFU has also learned that marriage licenses can sometimes resolve name-change issues." *Id.* at 24. These are not things to brag about. It took DMV ***six years*** to figure out that other states' DMVs might be helpful, and that marriage licenses can "sometimes" resolve name-change issues"? *Id.* What about all of the IDPP petitioners since

[4] However, *One Wisconsin* plaintiffs dispute that the experiences of K.C. and T.R. are "typical and reflect the experience of the majority of IDPP applicants." ECF No. 399 at 17. We have reviewed and catalogued hundreds of IDPP files thus far, many involving petitioners who were "stuck" in the system, gave up, or finally obtained their hard card IDs only through extraordinary effort. The files for many of these people are in the sealed appendices, and their stories are discussed in our opening brief and this brief.

September 2014 who have been denied or simply quit the effort, even though these two "new" discoveries might well have cured their problems? That's what happened to Susie Jones, the 100-year-old woman discussed at the beginning of our opening brief. She landed in the IDPP because her Illinois driver's license was not good enough to prove identity. She lingered in the system from December 2017 until September 2019, and finally was denied for lack of communication. Just a few months later, CAFU "discovered" that an Illinois driver's license can sometimes help confirm identity. As detailed in our opening brief, CAFU will not give people like Mrs. Jones the benefit of this "improvement" unless *they* contact DMV, not the other way around. ECF No. 403 at 4-5. And this "improvement" is not yet applied consistently, has only been tried with a few other state DMVs, and is often not helpful at all.

### B. Continued linkage of criteria for "voting IDs" to standards for drivers' licenses and state photo IDs

Another fundamental problem identified by this Court in 2016 was that "the DMV evaluated IDPP petitions for voting IDs by using the same identification standards that it applied to applications for Wisconsin driver licenses and standard IDs." 198 F. Supp. 3d at 915. But as the Court emphasized, *id.*, the standards fundamentally differ. Thus, the Court emphasized that "the credentials issued under this [injunction] need *not* be valid for any purpose other than voting; **the court is not ordering the state to issue Wisconsin IDs to all those who enter the IDPP**." *Id.* at 964 (emphasis added). Many if not most of the problems with the IDPP "safety net" could be resolved fairly quickly if the State simply provided for a separate voter ID hard card, good only for voting in Wisconsin. If the State chooses to link a voter ID to a driver's license or state ID, however, it cannot tie the issuance of the former to compliance with the far more strict "matching," "verification," and "confirmation" standards applied to the latter.

This Court already has noted that this "mismatch" continues, explaining at the August 25 status conference:

> So my concern is I see a potential mismatch between having [CAFU] doing an exhaustive search for confirmation of … birth documentation when there is utterly no doubt that the person is a qualified elector. And so how does that secondary documentation step square with the stated presumption of entitlement to the ID?

ECF No. 366 at 33. The *One Wisconsin* plaintiffs address the Court's "mismatch" point in Part III-B of our opening brief. *See* ECF No. 403 at 30-32. Defendants opening brief does not even acknowledge, let alone join issue with, these concerns expressed by the Court.

**C. Continued insistence on a "perfect[] match" with Social Security records**

One particular example of an inappropriate standard used by the DMV in 2016 was its insistence that petitioners' birth records "**perfectly match** their names or other aspects of their identities, such as Social Security records." 198 F. Supp. 3d at 915. As we demonstrated in Part III-C of our opening brief, the DMV unfortunately continues to insist on a "perfect match" of names and birthdates between a petitioner's birth records and SSA records. ECF No. 403 at 32-33. And although an SSA match is still required, it also still provides no relief from all the other "matching" and "verification" requirements. Petitioners often have become "stuck" in the IDPP (or even denied) *even after* an SSA verification (*e.g.,* where DHS is "unable" to verify a name or birthdate, or the birth state does not cooperate, or a CLNC affidavit is required to (supposedly) synchronize administrative databases. As Judge Easterbrook emphasized in *Luft*, any voter ID requirement must be "**material to voting eligibility**." 963 F.3d at 680. The SSA "match" requirement has nothing to do with "voting eligibility."

### D. Continued reliance on burdens of proof far more stringent than "more likely than not"

Although DMV witnesses insisted in 2016 that they were applying the "more likely than not" standard of proof, the Court found this testimony "was not credible." 198 F. Supp. 3d at 916 n.8. The Court found that "petitioners were held to a much higher standard than 'more likely than not,'" and that petitions instead "were decided by a standard that was at least as rigorous as 'clear and convincing proof.'" *Id.*

Part III-D of our opening brief demonstrated that nothing has changed. ECF No. 403 at 34-36. Indeed, the Court beat us to the punch in raising this concern; it noted during the August 25 scheduling conference that it was having difficulty understanding how the "secondary documentation step square[s] with the stated presumption of entitlement to the ID?" ECF No. 403 at 31. Strangely, the State does not even acknowledge, let alone resolve, the Court's concern.

The answer to the Court's question is that CAFU's current operations ***cannot*** be squared with the presumption-of-eligibility and more-likely-than-not standards. Consider:

- In the 58-page single-spaced manual that governs the conduct of the IDPP, *Processing ID Petition Process Applications* (*IDPP Procedures*), neither "**presumption of eligibility**" nor "**more likely than not**" appears anywhere in the procedures. *See* Ex. 152 (ECF No. 396-3).[5] Any argument that IDPP petitioners are enjoying a "presumption of eligibility" and a forgiving "more likely than not" standard deserves

[5] CAFU also has a special "Election Mode" of its *IDPP Procedures*, titled *CAFU Election Mode Receipt Process*. *See* Ex. 153 (ECF No. 396-4). As the title suggests, this document focuses exclusively on the Temporary Receipt process when the DMV goes into "Election mode," which "happens the Monday through Friday the week before a Tuesday election and Monday through Thursday the week of a Tuesday election." *Id.* at 1. The terms "presumption of eligibility" and "more likely than not" do not appear anywhere in the "Election Mode" version of the *IDPP Procedures*, either.

no weight it all. If these key principles are not even stated *once* in CAFU's *IDPP Procedures* document, they are not happening at CAFU. *See also* ECF No. 399 at 5-6, 20.

- Even more remarkable, in all the 271,805 pages of 133,221 IDPP documents produced by DMV to date, the phrase "**more likely than not**" appears just twice, once in a draft regulation and once in a letter from Attorney Curtis complaining that DMV was failing to follow that standard. *See* ECF No. 403 at 36; Ex. 7 at 5-6 (Curtis letter).
- Ms. Schilz could not estimate the *average* wait time for the IDPP petition process. She also did not know how long the oldest IDPP petition had been pending. The answer is six years, back to the very beginning of the IDPP. The petitioner, Mr. Haley, first filed his petition on October 13, 2014, right after the IDPP was created. Over the past six years he has provided early school information, information about his family, signed a Census application, and essentially exhausted everything he knows about his life and family. But CAFU is still unable to "verify" his identity. This gentleman has been stuck in the system long enough—six years—and enough is enough. His CAR demonstrates that the IDPP process is anything but "efficient," as claimed by the State. There is repeated evidence of a failure to pursue obvious sources of information. For example, it was not until *this year* that someone in CAFU thought to call Mr. Haley's adult children to see if they could help find family information, which would seem like a rather obvious thing to do. *See* Ex. 103. For additional examples of pending IDPP petitions that have languished for years, *see* Ex. 105 (pending since November 8, 2016; CAFU thinks petitioner should keep looking for a copy of his certificate of baptism); Ex. 104 (petition has been pending since January 4, 2017; CAFU's latest advice to this

U.S. Navy veteran is "to be on the lookout for any early childhood document, obituary for his father, or anything").

It's simply not credible to argue that DMV and CAFU are following the "more likely than not" standard given that it never appears in handbooks, guidance documents, or individual IDPP files, and that some cases have been languishing not just for months, but years (in one instance, nearly six years). Ex. 103.

**E. Continued reliance on administrative discretion**

This Court criticized the discretionary nature of the IDPP: rather than simply "collecting documents and making a trip to the DMV," petitioners had to "***convince*** the DMV to exercise its ***discretion*** to issue them IDs." 198 F. Supp. 3d at 916 (emphasis added). Success often depended on "months of back-and-forth with CAFU" in an effort to persuade it to "determine[], ***in its discretion***, that the petitioner has made a strong enough case to warrant issuing an ID." *Id.* at 949 (emphasis added). Part III-E of *One Wisconsin* plaintiffs' opening brief addresses the Court's concerns about administrative discretion and demonstrates that IDPP petitioners continue to be subject to the enormous discretion of DMV and CAFU in multiple respects. *See* ECF No. 403 at 37-38.

The defendants' brief does not even acknowledge the Court's expressed concerns about "discretion," let alone attempt to persuade the Court it need not worry. The word "discretion" is not even used a single time in the State's brief.

**F. Continued unguided discretion among DMV field supervisors.**

As demonstrated in Part III-F of *One Wisconsin* plaintiffs' opening brief, this Court's concerns about agency discretion apply both in the DMV headquarters building in Madison, as well as in DMV offices throughout the State. *See* ECF No. 403 at 38-40. Ms. Boardman confirmed

in her recent testimony that about 35 DMV supervisors scattered around the State continue to exercise "discretion" to issue free voter IDs in "the **gray areas of the law**" without even requiring applicants to go into the IDPP. ECF No. 214 at 204 (Boardman 2016 Trial Test.); Boardman Dep. at 13-15. Ms. Boardman also confirmed these supervisors continue to "have ***independent authority to use discretion*** in limited circumstances" if they "can piece together that person's identity and the dates and the residency." Boardman Dep. at 14 (emphasis added). She knows of no "procedure manual" for these supervisors, and there are no reporting, record-keeping, supervisory review, or other oversight mechanisms to monitor how these scattered supervisors are exercising their "discretion" in the field so as to ensure the fair, impartial, and uniform treatment of IDPP petitioners in the field as well as in Madison. *Id.*at 15.

This kind of discretion may be acceptable when it comes to getting a driver's license or other government benefits and services, but it is not tolerable when it comes to exercising the individual constitutional right to vote. In the ***voting*** context, this "absence of specific standards" and "uniform rules" is forbidden because there is too great a risk of "arbitrary and disparate treatment" of voters. *Bush v. Gore*, 531 U.S. 98, 106-07 (2000); *see also* ECF No. 403 at 37-38 & n.22 (collecting secondary literature on the exercise of "discretion" in the voting-rights context). As demonstrated in our opening brief, the equal protection principles discussed in the controlling opinion for the Court in *Bush v. Gore* speak directly to the DMV supervisors' discretion in whether to overlook small points and just grant a regular ID or instead route the applicant to the IDPP in Madison. *See* ECF 403 at 39-40. As in *Bush v. Gore,* "[t]his is not a process with sufficient guarantees of equal treatment." 531 U.S. at 107.

**G. Continued problems with missing or nonexistent records.**

This Court's 2016 decision emphasized that "CAFU's Case Activity Reports document many instances in which petitioners are repeatedly sent to family members, hospitals, or schools to hunt for additional documentation, even when there is no doubt that the person is a qualified elector." 198 F. Supp. 3d at 949. Petitioners sent off to look for secondary documentation or asked to assist CAFU's methodical (and often agonizingly slow) search for such archival records, are, to quote the Court, "stuck and stuck hard" in the IDPP. ECF No. 214 at 76 (Court's comments during Boardman 2016 Trial Test.); *see also id.* at 77; ECF No. 255 at 7 (Aug. 11, 2016 denial of stay). The Court repeated its concerns about the "secondary documentation" requirement several times at the August 25 scheduling conference. *See* ECF No. 366 at 32-34; *see esp. id.* at 33 ("And so to me that was a very substantial failure of the ID petition process, and that is that certain people just can't get over that last step of verification despite the fact that there's no serious doubt that they're a citizen and entitled to vote.").

We addressed this concern in detail in our opening brief, offered many individual examples, and demonstrated that nothing has materially changed. ECF No. 403 at 40-44. The State's brief barely acknowledges these recurring problems with secondary documentation, instead emphasizing the *easy* cases at the other end of the spectrum.

**H. Continued reliance on arbitrary and irrational "naming" requirements**

It is surprising the State brags about "Mr. Randle's situation as an example of … problem solving" by CAFU and the DMV, in this instance the CLNC process. ECF No. 399 at 6. As demonstrated in our opening brief, Mr. Randle *refused* to sign what he was being told to sign, and Ms. Boardman "solved" the "problem" by just going ahead and giving Mr. Randle his permanent ID anyway even though he did ***not*** comply with DMV's repeated demands that he fill out a CLNC

affidavit in the way he was being told. ECF No. 403 at 46. Specifically, he had his daughter fill out the "old" and "new" names on the CLNC identically—"Johnny Martin Randle"—and continued to refuse to state under oath that he had "changed" his name, which he hadn't. This refusal to properly fill out his CLNC affidavit had led to his previous denial in January 2016, and CAFU strongly recommended that he be denied again for the same reason.

But Ms. Boardman overruled CAFU in February 2017 and decided she was "**more than comfortable**" in issuing Johnny his long-sought ID, even if he refused to fill out the affidavit as he was being told. Ex. 84 at 9 (ECF No. 395-9) (emphasis added). Ms. Boardman understood that the CLNC affidavit "technically was not filled out correctly," but she "stepped in to—to authorize it moving forward." Boardman Dep. at 24 (emphasis added). She thought "this is one of those **more likely than not** based on the information that we were seeing, and … I felt **very comfortable in moving forward**." Id. at 21, 24 (emphasis added).

This was the right decision, though it came about fourteen months too late. And the determination by Ms. Boardman—the head of the DMV—that a CLNC is *not* necessary proves our point, not the State's. The requirement of an executed CLNC declaration is almost always *pointless*. Moreover, the State's claim that the CLNC affidavit now operates as a lickety-split way to avoid having to go through the IDPP does not square with the DMV witnesses' actual testimony. Ms. Boardman and Ms. Schilz emphasized there is no "right" to submit a CLNC affidavit; petitioners must formally "enter" the IDPP *first* and be assigned an "adjudicator," must go through much if not all of the "matching" and "verification" processes (including their interminable delays), and only then *might* be able to use a CLNC affidavit to convince CAFU to exercise "discretion" to give them permanent IDs. The CLNC affidavit form is "an internal [CAFU] document and it doesn't apply to everyone"; it is *CAFU* that exercises discretion whether a CLNC

affidavit is appropriate, not the voter ID "petitioner." Schilz Dep. at 82; *see IDPP Procedures* at 40-42. Petitioners must first go through what Ms. Schilz called as "**a discovery process**," and it is only *after* an unsuccessful vital records search "that we ***start having that conversation about the common law name change***." Schilz Dep. at 39; Boardman Dep. at 100 (emphasis added). Thus, the CLNC process is not the quick and easy way to avoid the IDPP that this Court and the Seventh Circuit may have been led to believe.

Ms. Boardman's decision to waive the CLNC affidavit requirement for Mr. Randle illustrates other problems with that requirement. It is *entirely* unnecessary. Ms. Boardman recognized that, with all the information DMV had on Mr. Randle, it was not only "more likely than not" that he was who he said he was; he *obviously* was the same gentleman. There was no point to a properly filled out CLNC affidavit. And that will almost always be the case: the CLNC affidavit is only offered to petitioners ***at CAFU's discretion***, when CAFU is *already* comfortable that it has the right person and is simply trying to document its files to "match" other bureaucratic records. *See IDPP Procedures* at 40-42. But that only goes to show that CAFU already believes it is more likely than not that the petitioner is truthful; anything beyond that point is simply unnecessary.

Not to belabor the point, but the CLNC process also raises all of the concerns about agency discretion the Court has identified, discussed in Part III-E-F *supra.* Discretion can be used both to help and to withhold. A voter has no "right" to a CLNC fix. A CLNC affidavit is only offered to petitioners at CAFU's discretion, at a time of CAFU's choosing, once CAFU already is comfortable that it has the right person and is simply trying to paper its files to "match" other bureaucratic records. *See IDPP Procedures* at 40-42.

## I. Continued problems in "matching" voters' birthdates.

This Court repeatedly has expressed its constitutional concerns over the birth date "matching" issues that frequently arise in the IDPP. The Court emphasized during trial, in reference to one such petitioner with a birthdate "match" problem:

> THE COURT: [H]ow on earth can he ever fix this problem, because he's got these records with three different dates? And I suppose he's going to say that's the right one or he's going to say he doesn't know, but I don't see how he can ever resolve this conundrum.
>
> MS. SCHILZ: I agree, Your Honor. That's the saddest part of this whole process because there is a percentage of people who they've went this far in their life and have never been able to prove their identity. I don't know what the answer is to that.

ECF No. 216 at 4-P-57 (Schilz 2016 Trial Test.). The Court again emphasized this as one of the central flaws in the IDPP process in its July 29, 2016 permanent injunction decision. *See* 198 F. Supp. 3d at 915, 922, 949. The Court again brought this up as an issue for analysis during the August 25, 2020 status conference, asking how such an emphasis on "confirmation" of a birthdate or other birth information can possibly "square with the stated presumption of entitlement to the ID?" ECF No. 366 at 33.

The *One Wisconsin* plaintiffs continue to believe that CAFU's present "birthdate" rules cannot possibly hold up under the "more likely than not" standard (which we know is not being applied by CAFU, *see* pp. III-D12-14 *supra*). Our opening brief contains many examples of IDPP petitioners who are "stuck, and stuck hard," ECF No. 214 at 76, in the IDPP over trivial birthdate glitches even though there is no doubt they are qualified Wisconsin electors. *See* ECF No. 403 at 51-55.

The State's response to this judicial concern is to ignore it. The State's brief uses the phrase "birth date" only once, and uses "birthdate" only three times in its brief supposedly addressing the

Court's concerns. *See* ECF No. 399 at 18, 19 & n.11, and 21. Each of these four uses of "birthdate" or "birth date" are references to individual petitioner' birthdates. Nowhere does the State attempt to "square" the "secondary documentation" requirement for minor birthdate issues with the presumption of eligibility.

### J. Continued examples of successful petitioners having to "surmount[] severe burdens."

The Court emphasized in the introduction to its July 2016 decision that the IDPP was such a "disaster" that "even voters who *succeed* in the IDPP manage to get an ID only after surmounting severe burdens." 198 F. Supp. 3d at 903 (emphasis added). Our opening brief offered numerous recent examples demonstrating that this unfortunately continues to be the case.

The State's brief does not acknowledge this concern expressed by the Court. Instead, it swings to the other end of the spectrum and offers some carefully curated examples of when the process has worked *quickly*—within days or weeks. ECF No. 399 at 15-17. No doubt there are more such examples, but these are probably the best DMV could find. We are not surprised that many people can obtain their "hard card" IDs with reasonable effort—sometimes very quickly, but that is not the relevant issue here. The right to vote is *individual* and *personal,* so the "constitutional question" is "whether the state ensures that ***every* eligible voter** can get a qualifying photo ID with reasonable effort," not whether "most" or "nearly all" can. *Luft,*963 F.3d at 679-80. The Court asked us to address situations where IDPP petitioners are "stuck" in the process, not those who sail through. The State's various success stories do not bear on the burdens borne by IDPP petitioners who face much more challenging obstacles that are difficult and sometimes impossible to overcome.

### K. Continued reliance on CLEAR background investigations

This Court found in its July 2016 decision that CAFU "commonly" obtains "CLEAR background reports" from the National Comprehensive Report Plus Associates, which contain "a substantial amount of deeply personal information, including any criminal records, judgments and liens, residence history, home and vehicle ownership history, and a list of possible relatives and associates." 198 F. Supp. 3d at 914 n.5. DMV does not tell IDPP petitioners that it compiles this extensive background information about them. This Court found that "having DMV personnel acquire and review a compilation of personal information imposes a substantial burden on the right to vote." *Id.*

Defendants did not heed the Court. These invasive practices continue unabated. Nor does the State bother to acknowledge the Court's expressed concerns, let alone attempt to persuade the Court on the issue.[6]

### L. Continued staggering racially disproportionate impacts

This Court repeatedly emphasized in its July 2016 decision the "**very pronounced racial differences**" among IDPP petitioners; that those "racial imbalances" are "striking"; and that "the IDPP imposes a discriminatory burden on racial minority groups." 198 F. Supp. 3d at 918, 922, 957. The 2016 racial statistics were shocking. "As of April 2016, **two thirds** of those who entered the process were minorities; African Americans alone represented **55.9 percent** of the IDPP petitioners. … Worse yet, African Americans and Latinos represented **85 percent** (52 out of 61) of all IDPP denials." 198 F. Supp. 3d at 922 (emphasis added).

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[6] The CLEAR reports often demonstrate beyond reasonable doubt that an IDPP petitioner is a solid, honest citizen who is who he says he is. But more often than not, CAFU appears to use these reports simply to search for IDPP petitioners *after* they have fallen out of touch rather than at the outset to readily confirm that petitioners are "more likely than not" who they say they are.

The *One Wisconsin* plaintiffs demonstrated in our opening brief that the racial disparities in 2020 continue to be appalling. Our very quick analysis of 199 "denied" and "suspended" files produced by the DMV shows that, of the 199 denied and suspended files that were analyzed, fully **69.35%** are for Black or Latino IDPP petitioners. The "White" vs. "Non-white" disparity is **26.63% vs. 72.36%**. Ex. 151 at 1 (ECF No. 396-2). This in a State in which Blacks and Latinos make up less than 13% of the population.[7]

It is remarkable that, in response to a federal district court's finding of a "manifest" racial disparity in the operation of the IDPP as of 2016, the DMV witnesses testified they have no clue whether the racial disparities in 2020 are better or worse than, or about the same as, four years ago. They insist the DMV is "not paying attention to" race and "[i]t doesn't matter to us." Schilz Dep. at 23-24; *see also* Boardman Dep. at 19-20. It is also surprising that, after a federal court has expressed concern about the "**manifest"** racial disparities of the IDPP, the WDOT and WDOJ would refuse to produce data about the 2020 IDPP racial disparities on the grounds that these data lack "**evidentiary value**" and would require too much programmer time to tweak.[8]

Perhaps it should not be surprising, if the DMV ignores race and the WDOT and WDOJ refuse to produce racial data, that the defendants' brief would likewise just ignore the subject. Even though the parties were asked to address this Court's articulated concerns, the words "race" and "racial" do not appear anywhere in defendants' September 18 brief. Nor do the words

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[7] Richard Cohen and Charlie Cook, *The Almanac of American Politics 2020*, at 1917 (2019) (6.2% Black, 6.6% Latino).

[8] Specifically, WDOT has acknowledged these data are contained in its database and could probably be assembled, but advised on September 11, 2020 that it "declines to undertake the burden of that project" because (1) WDOT does not believe the "outcome" will have much "likely evidentiary value"; and (2) the project "would require a customized query with several hours of runtime, has risks of over and under inclusion, and … would be difficult and time consuming to test for accuracy." Ex. 154 at 1-2 (ECF No. 396-5).

"Latino," "Hispanic," or "African-American" appear anywhere in that 34-page brief. There is one use of "black" in the brief, but only in the context of arguing that Temporary Receipts should not be printed out on "**black** and white printers," which "would make them very easy to forge" and "would create a substantial risk of fraud." ECF No. 399 at 22. All of this is well and good, but we have never asked for such.

This deafening silence—this failure to acknowledge what seems plain to so many of us—speaks volumes.

### M. The Temporary Receipts continue to be only "Band-Aids" and "patches," not the constitutionally required fundamental reform of the IDPP.

Defendants' principal argument throughout its brief is that the Temporary Receipt system adopted by Emergency Rule in May 2016 and codified in the December 2018 Extraordinary Session resolves all of the Court's concerns. Whenever an IDPP petitioner hits a roadblock, the response is always that he keeps getting Temporary Receipts while the IDPP investigation languishes.

This Court repeatedly has emphasized since July 2016 that the Temporary Receipt system does ***not*** cure the IDPP's constitutional violations, is itself severely flawed, and is only a "patch" and a "Band-Aid." *One Wisconsin*, 198 F. Supp. 3d at 904, 916, 922, 949; ECF No. 255 at 2, 7; ECF No. 293 at 2, 6; ECF No. 299 at 2-A-6. The Court's comments during the August 25 Scheduling Conference showed continuing deep skepticism with the argument that Temporary Receipts are *themselves* the solution to the constitutional flaws identified by this Court. ECF No. 366 at 34.

*One Wisconsin* plaintiffs are not going to repeat all the arguments for why defendants' reliance on the Temporary Receipt system is wrong. This Court already has rejected defendants'

arguments repeatedly. Defendants do not even *once* acknowledge the Court's contrary rulings, let alone try to engage the Court and change its mind.[9]

**N. Continued inadequate public education.**

By agreement among counsel for the *One Wisconsin* and *Luft* plaintiffs, the *Luft* plaintiffs will present the public education arguments on behalf of both plaintiff groups. We hope this will help reduce overlap and unnecessary repetition. The *One Wisconsin* plaintiffs join the public education arguments in the *Luft* brief in full.

**O. The "cure" is still far "worse than the disease."**

The Court at one point in its July 2016 decision labeled Wisconsin's voter ID system as "a cure worse than the disease," meaning that the system "has disenfranchised more citizens than have ever been shown to have committed impersonation fraud." 198 F. Supp. 3d at 903, 913. That remains as true today as it was four years ago.

If the goal of the IDPP was to ferret out fraud, it hasn't found much. DMV purports to have discovered a grand total of 29 instances of suspected "fraud," which constitute just 0.23% of the 12,355 total IDPP petitioners since September 2015. That means that even the DMV has conceded that 99.77% of all IDPP petitioners are never suspected of fraud. *See* Doc. 403 at 66.

Moreover, as discussed at length in our opening brief, the discovery in this case has demonstrated beyond dispute that many of these 29 suspected "frauds" did not involve fraudulent conduct at all. For example, after being presented with the CAR for one of these petitioners, Ms.

[9] For these reasons, there is certainly a material dispute over the State's claim that "the IDPP allows any eligible voter to quickly and easily get a voting credential." ECF No. 399 at 11. Although petitioners are mailed a Temporary Receipt after incurring the transactional costs of traveling to the DMV and presenting various documents, their "voting credential" expires every sixty days, and to maintain it, they must comply with an indefinite series of information requests, sometimes extending for years. Thus, while the IDPP may be "quick and easy" for some petitioners, it is often burdensome and requires the petitioner to exert strenuous effort. *See e.g.* Ex. 103; ECF No. 403 at 55-57.

Boardman scanned it and quickly agreed it was inappropriate to call this a case of fraud. Boardman Dep. 37-41. There are many more such cases among the 29. And we now know through discovery that CAFU's "fraud" determinations do not comply with Wis. Stat. § 343.165(8)(f), which governs voter "fraud" determinations by CAFU in the IDPP—it appears that no one was even aware of the due-process procedures in the statute.

It thus should not be surprising that Ms. Boardman has now clarified that the word "fraud" as used in the IDPP context does *not* mean the case actually involves suspected fraud. Rather, she says the label "fraud" is just a "blanket category" and "**a catchall internal designation of convenience**" that reflects no determination of actual fraud. Boardman Decl. ¶ 40, ECF No. 406. So, when DMV brags that the IDPP has snagged 29 cases of suspected "fraud," it must be remembered that DMV doesn't mean *real* fraud, but "a catchall internal designation of convenience," whatever that means.

Whatever *real* fraud has been detected in the IDPP has been revealed either though initial facial recognition match (*see* ECF No. 403 at 71, Exs. 39, 48, 89, 91, and 79 (ECF No. 393-14, 393-23, 395-14, 395-16, and 395-4)) or the receipt of information from secondary sources such as ICE. There is no evidence that fraud has ever been uncovered through CAFU's extensive and invasive requests for extraordinary proof. In the case of Mr. Haley, for instance (Ex. 103) it is doubtful the man has orchestrated a six-year campaign to secure a permanent voter ID via the construction and maintenance of a fake identity. Instead, he is a man who has had a difficult life and simply wants the "hard" voter ID that he requires and to which he is entitled. The State has taken that right away from him. *See also* Ex. 56 (ECF No. 394-6) ("[t]hrough no fault of the

petitioner, we cannot verify [petitioner's] birth, so we cannot recommend that we issue a voter ID card.").[10]

Defendants broadly allege that the IDPP verification process is needed to "identify" and "cancel" certain applications but carefully avoid describing these applications as "fraudulent." Instead, defendants allege that the extensive verification procedures are necessary to cancel the petitions of (1) "people who are not U.S. citizens" and (2) "people seeking an ID as a second identity." ECF No. 399 at 20. This is false, because these applications are detected through less intrusive portions of the process such as facial recognition and inquiries to ICE.[11]

In support of the first proposition, defendants assert that "DMV cancels applications where it determines that the applicant is not entitled to an ID for voting eligibility. Many such cancellations occur because DMV determines that the applicant is not a U.S. Citizen." *Id.* This is not accurate. DMV cancels applications under a much lower threshold, simply where it is "*unable to determine*" whether the applicant is a U.S. Citizen, and does so even when it has good reason to believe the applicant may be a U.S. Citizen. ECF No. 403 at 69; *see also id.* at n. 43. Despite its claim of making a "determination," DMV cancels these applications without having determined that the applicant is not a U.S. Citizen. *Id.* There is no application of a "more likely than not" standard; CAFU simply gives up the search. Moreover, as Ms. Boardman has acknowledged, the DMV doesn't mean "fraud" when it says "fraud."

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[10] Mr. Haley's experience demonstrates there simply is no "safety net" in operation here. The State fails to acknowledge there are individuals the IDPP has failed, and continues to fail, who simply do not have sufficient documentation to verify every detail of the origin of their difficult lives.

[11] Due to defendants' failure to offer any evidence showing "DMV's diligent processes are necessary to discover [multiple identity or non-citizen] applications," the proposition remains a material fact in dispute, as shown in this subpart of the brief.

Instances of "people seeking an ID as a second identity" are apparently few and far between, yet quickly discovered. *See* ECF No. 403 at 71 (highlighting facial recognition matches). There is little evidence that the extensive verification procedures of the IDPP, beyond facial recognition and checking with ICE, are necessary.

Defendants submit a paltry offering of examples to justify the collective burden the IDPP procedures place on already disadvantaged Wisconsin voters (and in particular various racial and socioeconomic subgroups). Defendants apparently agree, pointing to only three instances where the rigorous IDPP procedures have caught bad actors in action. ECF No. 399 at 20-22. These three examples only demonstrate that the IDPP verification process is an unnecessary burden on its applicants.

The first involves R.B.H., a man who was "insisting on getting an ID and going through the IDPP," but who had presented a fake social security card. ECF No. 399 at 21. Defendants' description belies the facts of the matter. R.B.H. presented a fake SSA card, a copy of his New York state birth certificate, and a utility bill. SSA verified his identity under another SSN, which led one CAFU investigator to ask Ms. Schilz whether he could "reach out to [R.B.H.] and ask why he insists on using this SSN and what is apparently a fake card," to which Ms. Schilz responded *not* to do so because SSA may want to investigate and that might "tip him off." Ex. 58 at 1 (ECF No. 394-8). However, SSA was not interested in investigating, which led Ms. Schilz to inquire whether "[R.B.H]. is collecting other benefits?" *Id*. at 7. It isn't clear whether intentional fraud occurred here, and SSA's response indicates this may be a mistake, and one which R.B.H. may benefit from being aware of. Critically, this mix-up is also not a controlling factor on whether this man—who is apparently R.B.H. under either one SSN or the other—is an eligible voter. It is

therefore neither a clear example of intentional fraud nor an instance where the IDPP process has protected the ballot box from fraudulent votes.

The second instance, that of C.F, is an instance of a supposed double identity that was caught through facial recognition (FR). ECF No. 399 at 21; Ex. 39 (ECF No. 393-14). An individual entered the petition process in September 2015, and his birth record was verified by DHS. The (allegedly) same individual then presented for another DMV product under another name and different birthday in October of 2018. *Id.* Thus, this is another case in which potential fraud was caught through FR, not through the rigorous IDPP verification procedure. It is also not apparent that CAFU's procedures provided much benefit at all in this instance, considering "CAFU [wa]s unable to determine which is the real record even though each individual has provided identity documents," and considering that the birth record for the IDPP petitioner was verified by DHS.

The third and only other instance of fraudulent activity put forth by defendants involves a woman who ICE "would like to locate." Ex. 66 at 1 (ECF No. 394-16). What defendants characterize as an "investigation [which] revealed that [her] home country is Ukraine" evidently amounted to looking at the MV3012, which stated her home country was Ukraine.[12] *Id.*; ECF No. 399 at 21). A quick email to ICE revealed this individual had been removed by an immigration judge and was not an eligible voter. *Id.* This exchange reveals both that the extensive IDPP procedures such as requiring extraordinary proof did *nothing* to solve this case, and an email to

[12] In many cases of Fraud Cancellation, the allegedly fraudulent actors openly state they were born in a foreign country, but many still believe they had been naturalized. Ex. 9 at 1 (Mexico), 37 at 1 (Dominican Republic), 38 at 6 (Mexico), 43 at 1 (Mexico), 45 at 1 (Vietnam), 92 at 22 (Philippines), 96 at 1 (Samoa), 97 at 2 (India) (ECF No. 392-9, 393-12, 393-13, 393-18, 393-20, 395-17, 395-20, 395-21).

ICE upon seeing the applicant was born in a foreign country was all that was needed. More troubling, ICE explicitly confirmed this individual was not a citizen, in contrast to the many instances of "fraud" where ICE could not determine whether a person was a citizen or even found it "very possible" or "probable" that they were. *See* ECF No. 403 at 69 & n. 43. This contrast exposes CAFU's assumptive procedures in Fraud Canceling voters for failing to prove their own citizenship despite lack of evidence to the contrary.

These few instances call into question the reliability and effectiveness of the IDPP procedures as tools to detect and mitigate fraud, and they provide no evidence that they are effective in protecting and mitigating *voter* fraud. Defendants contend that the years-long obstacle course many voters are forced to endure (and that many do not complete) is a "necessary" burden to be able to "discover" applications by people who are not citizens or already have an ID. With only three examples of such, this supposed "cure" remains far worse than the "disease." Even worse, it is clear that the procedures themselves are excessive beyond using facial recognition and emailing ICE when a petitioner indicates they were born in a foreign country.

The 60-day term for paper receipts is hardly a "safeguard" that is necessary to prevent fraudulent voting, and it is inaccurate to suggest that "there is no effective way to revoke an ID in the possession of an applicant." ECF No. 399 at 22. It is disingenuous for the DMV to suggest it is unable to revoke an ID when the Department of Transportation is specifically tasked by law with administering the "Cancellation, Revocation and Suspension of Licenses" (s*ee* Wis. Stat. §§ 343.25-343.40), nearly all of which expire 8 years after the date of issuance. *Id.* § 343.20 (1). Those laws, for example, allow the department to order any person whose operating privilege has been canceled, revoked or suspended to surrender the license to the department, impose a fine on

any person who fails to surrender, and to take possession or direct any traffic officer to take possession of a license required to be surrendered. Wis. Stat. § 343.35 (1)-(3); *see id.* § 343.36.

Because these IDs we are talking about here are for voting purposes only, there is no reason why a list of the very small number of voters whose voter IDs had been revoked could not be distributed to the election officials in the ward in which the voter is registered or domiciled. Moreover, whether a cancelled petitioner has voted in an election should be readily determinable after the election and the individual may be prosecuted. *See* Wis. Stat. § 343.44.

It is similarly disingenuous for defendants to suggest that allowing voters to print out a copy of their paper receipt would create a risk of fraud, but to simultaneously withhold the provision of hard cards to these same individuals. ECF No. 399 at 22. If defendants are concerned that there is a risk of fraud from the use of paper receipts, they should give petitioners who demonstrate that they are more likely than not eligible for a voting ID a hard card that is valid for eight years.

**Conclusion**

The *One Wisconsin* plaintiffs' motion for preliminary injunction should be granted, and defendants' motion for summary judgment should be denied.

Dated this 22nd day of September, 2020.

Respectfully submitted,

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