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

ONE WISCONSIN INSTITUTE, INC.,
et al.,

Plaintiffs,

v. Case No. 15-CV-324

JUDGE GERALD C. NICHOL, et al.,

Defendants.

DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT IN RESPONSE TO PLAINTIFFS' SECOND AMENDED COMPLAINT

The Plaintiffs' Second Amended Complaint is impossible to reasonably defend under the timeline of this lawsuit. They have added six new individual parties, an unidentified class of plaintiffs, an entirely new category of as-applied relief, and an ambiguous theory of alternative facial relief. In a normal lawsuit, under a normal timeline, it may be possible to sort through the allegations and claims through dispositive motions and contention interrogatories. But here the defendants have a scant **40 days from today** to investigate, research, prepare and file an answer, conduct all discovery including depositions, prepare and file any dispositive motions, prepare pre-trial submissions, prepare witnesses, and be ready for a trial. There is no time to guess about what the plaintiffs are asking for.

The defendants move for an order requiring the plaintiffs to clarify what relief they want, and what facts and legal theories they rely upon. Examples of the requested details are:

(a) The facial relief they are seeking,

(b) The identities of "all other similarly situated petitioners for Voter ID" mentioned in their prayer for relief,

(c) The law they believe requires issuance of ID cards to the four new plaintiffs and "all other similarly situated petitioners for Voter ID". For example, are they asking this Court to interpret the state regulations that govern issuance of IDs?

(d) The ruling they think this Court could make with regard to Act 23 that is not controlled by the conclusion in *Frank v. Walker*.

Knowing these details, and anything else that the plaintiffs intend to rely upon at trial, is critical to preparing a defense. Starting immediately, the defendants must engage in a rigorous and focused investigation and discovery regimen, including briefing if necessary. Each category of the requested details bears directly upon how the defendants must prepare for trial under this extraordinarily accelerated timeline.

I. The Court should order a more definite statement of claims under Rule 12(e).

A more definite statement may be required where a pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." "[I]f the claim is unclear, the court should require a plaintiff to prepare a more definite statement under Rule 12(e)." *Scott v. City of Chicago*,

195 F.3d 950, 952 (7th Cir. 1999.) Here, the Second Amended Complaint (Dkt. 141) is insufficiently clear to permit the defendants to competently prepare a defense before trial. Because there is no time to refine the issues through normally-timed motions to dismiss or summary judgment, a 12(e) order is appropriate.

II. The plaintiffs must identify what facial relief they want, not leave the defendants to guess about what unidentified relief may be "possible."

The plaintiffs request "wherever possible to obtain 'facial' rather than 'as-applied' declaratory and injunctive relief." (Dkt. 141:2.) This is a 180-degree shift from the plaintiff-specific remedy that they request in their prayer for relief, and it is also impossibly ambiguous. The defendants should not need to guess at the "wherever possible" relief the plaintiffs are seeking. The plaintiffs should identify (a) the facial relief they are seeking, (b) the facts they belief justify that relief, and (c) who that relief would apply to.

The plaintiffs' case citations are unhelpful to interpreting their cryptic alternatively-pled relief. They cite *John Doe No. 1 v. Reed* for the proposition that "the label is not what matters." (Dkt. 141:2, *quoting John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)). But *Doe* continues: "The important point is that the plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs." *Id.* And where facial relief is

implicated, a plaintiff "must . . . satisfy our standards for a facial challenge to the extent of that reach." *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472 (2010)). The standards referred to in *Doe* are well established: to get facial relief, a plaintiff "would have to establish 'that no set of circumstances exists under which [the challenged law] would be valid. . . or that the statute lacks any 'plainly legitimate sweep'." *Stevens* 559 U.S. at 472. If plaintiffs here are seeking facial relief, they need to disclose the law they are challenging, and the facts they think meet the requirement.

Supposing the plaintiffs can identify such a law, they need to clarify what they want the remedy to be. Who would the facial relief apply to – all voters, including those with an ID or drivers license? Anyone, from anywhere, who asks for an ID? All state citizens, regardless of eligibility to vote? All Wisconsin voters? Voters who take the opportunity to use the ID petition process? Or maybe the undefined class of "all similarly situated petitioners?" Unless the defendants know what the plaintiffs actually want, it is impossible to prepare for a trial six weeks from now.

III. The plaintiffs must clarify the basis for their as-applied relief, and the scope of the class they identify.

The plaintiffs are seeking individual as-applied relief as to each of the four new plaintiffs. They request that each of them be issued an ID. (Dkt. 141:70.) The plaintiffs acknowledge that the rules for issuing such IDs

are a function of the Wisconsin Supreme Court's decision in *Milwaukee Branch of the NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262, and Wisconsin's administrative code. (Dkt. 141, ¶¶ 164–165.) The regulations are fact intensive, and the decision of whether to issue any particular ID is necessarily the result of that person's individual circumstances. If the plaintiffs are asking this Court to hold four mini-trials – one for each new plaintiff – involving the particular application of state regulations as interpreted by the Wisconsin Supreme Court, the plaintiffs may move to sever those claims or move them to state court. If the plaintiffs have some other theory that might tie those ID applications to this lawsuit, the defendants should be aware of the nature of the challenge.

And the prayer for relief goes further than those individuals, asking for IDs to be issued to "all other similarly situated petitioners for voter ID." (Dkt. 141:70.) This is impossibly ambiguous. As the new allegations make clear, each ID determination is highly fact specific. (Dkt. 141, ¶¶ 18–25, 172–174.) Is the proposed class of "similarly situated petitioners" those who allege that they were born in Mississippi? (¶ 18); those who have not given DMV a copy of their birth certificate? (¶¶ 20–21); those whose primary language is Spanish? (¶ 22); or perhaps those who are "presumably Democratic"? (¶ 175) (internal citations to the Dkt 141, Second Amended Complaint). Each of these would clearly fail as a category of relief, but the

defendants must at least know what the plaintiffs want, and who they purport to speak on behalf of.

IV. The plaintiffs must identify what challenge they are making that is not already bound by *Frank v. Walker,* or will not be decided in ongoing *Frank* litigation.

The Seventh Circuit Court of Appeals has already rejected a facial challenge to Act 23, finding that "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014). The plaintiffs have acknowledged this ruling is binding, and does not leave room to re-litigate that issue: "Plaintiffs acknowledge that this Court is bound as to these claims by the Seventh Circuit's holding in *Frank*." (Dkt. 28:10.) This Court previously dismissed the claims on the basis of this concession. (Dkt. 66:2.) The Second Amended Complaint reaffirms the plaintiffs' understanding that *Frank* bars an Act 23 claim: The Seventh Circuit held in October 2014 that Wisconsin's voter ID law on its face does not violate Section 2 of the Voting Rights Act." (Dkt. 141, ¶ 181.)

But the Second Amended Complaint asks this Court to re-litigate the issue anyway and, like the other claims, is completely vague as to what the plaintiffs actually want the Court to do. The plaintiffs point to the Wisconsin Supreme Court case of *Milwaukee Branch of the NAACP v. Walker*, 2014 WI 98, and the prior Voter ID litigation in the *Frank v. Walker* series of decisions. (Dkt. 141, ¶¶ 164–166.) *Milwaukee Branch* held that "the burdens

of time and inconvenience associated with obtaining Act 23-acceptable photo identification are not severe burdens on the right to vote and do not invalidate the law." *Milwaukee,* 357 Wis. 2d at ¶ 77. It made this conclusion in part based upon DMV's discretion to issue ID cards. *Id.* at ¶ 79.

The plaintiffs then allege that *Frank* left open a possibility that "Act 23's voter ID provision could be challenged again if the State abuse its discretion in implementing the amendment process or made it 'needlessly hard to get a photo ID' in 'hardship' cases." (Dkt. 141, ¶ 166.) But the footnote the plaintiffs rely upon is clear that it is commenting on the state court case, not leaving the door open for simple re-litigating of the issue in federal court:

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

Frank, 768 F.3d at 747 n.1.

Do the plaintiffs want this court to interpret the Wisconsin Supreme Court's view of state regulations from the *Milwaukee Branch* decision? If so, a motion to dismiss may be appropriate because that task is better left to state courts, where such a challenge could be brought by "a separate suit" as contemplated by the Seventh Circuit.

Further, the Seventh Circuit is currently addressing the scope of the 2014 *Frank* decision, including the possibility of class-based relief, in federal court. After *Frank* was decided by the Seventh Circuit, the case was remanded to district court. On remand, the *Frank* plaintiffs sought class certification, a permanent injunction, and judgment on several claims that they argued were not resolved by the district court. The district court rejected the *Frank* plaintiffs' arguments, including the class-based claims, and entered judgment in the State's favor. *See Frank v. Walker*, No. 11-C-1128, 2015 WL 6142997 (E.D. Wis. Oct. 19, 2015); E.D. Wis. Case No. 11-C-1128, Dkt. 253 (Judgment in a Civil Case).

The *Frank* plaintiffs appealed. E.D. Wis. Case No. 11-C-1128, Dkt. 256 (Notice of Appeal). On appeal, the issues include whether "the prior appeal decision, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) . . . preclude . . . [a] claim that the burdens imposed by Act 23 upon a narrow class of voters are not justified under the *Anderson-Burdick* balancing analysis" are now fully briefed in the *Frank* case. The appeal is scheduled for oral argument on April 7, 2016. (7th Cir. Case No. 15-3585, Dkt. 17:27.) Any arguments about the breadth of the 2014 *Frank* Seventh Circuit decision, and the potential for class-based relief, should not be simultaneously litigated here and in the Seventh Circuit.

Or maybe the plaintiffs intend to argue at trial that this Court is not bound to follow *Frank* because they can sufficiently distinguish this case from *Frank*, despite both cases addressing allegations of voter frustration over Act 23. (Dkt. 141, ¶ 181.) That seems futile given that, in *Frank*, "[e]ight people testified that they had been frustrated when trying to get photo IDs." *Frank*, 768 F.3d at 746. If their argument is that the four new plaintiffs compel a different outcome than the eight witnesses in *Frank*, that issue may be ripe for summary judgment to prevent four unnecessary mini-trials of the new plaintiffs.

CONCLUSION

In the timeline of a normal lawsuit, this sort of pleading might be sufficient to start the process of summary judgment, eliminating or refining claims, and focusing the triable issues. But when six new parties and many new allegations enter the case six weeks before trial, more specificity is needed. Defendants ask the Court to order the plaintiffs to provide a more definite statement of their claims, including:

(a) The facial relief they are seeking,

(b) The identities of the "all other similarly situated petitioners for Voter ID" mentioned in their prayer for relief,

(c) The law they believe requires issuance of ID cards to the four new plaintiffs and "all other similarly situated petitioners for Voter ID". For example, are they asking this Court to interpret the state regulations that govern issuance of IDs?

(d) The ruling they think this Court could make with regard to Act 23 that is not controlled by the conclusion in the *Frank v. Walker* litigation, as well as any other claims and theories the plaintiffs may rely upon at trial.

Dated this 6th day of April, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

/s/ S. Michael Murphy
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) 266-7477 (Kawski)
(608) 266-0020 (Keenan)
(608) 266-5457 (Murphy)
(608) 267-2223 (Fax)
collinsws@doj.state.wi.us
kawskicp@doj.state.wi.us
keenanbp@doj.state.wi.us
murphysm@doj.state.wi.us