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

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

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

v.

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

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

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

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INTRODUCTION

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

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

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

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

STATEMENT

I. The District Court Facially Enjoins Seven Election Provisions

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

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

[1] Citations of the district court record are: "R.[ECF Entry Number]:[Page Number]."

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL STANDARD

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

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

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

ARGUMENT

I. Defendants Are Very Likely To Succeed On Appeal

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

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

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

[4] R.206 is the defendants' post-trial brief. Citations in this brief refer to the page number of the brief on the bottom of the page and not to the ECF page numbers on the top of each page.

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

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

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

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

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

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

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

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

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

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[5] U.S. Census Bureau (USCB), *QuickFacts: Milwaukee city, Wisconsin*, *available at* http://goo.gl/ZRgPJL.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The judgment and permanent injunction should be stayed pending appeal.

Dated: August 12, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2016, I filed the foregoing Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: August 12, 2016

s/Misha Tseytlin
MISHA TSEYTLIN