No. 16-3003 [Consolidated with 16-3052]

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES.

Appeal From The United States District Court
For The Eastern District Of Wisconsin, No. 2:11-cv-1128,
The Honorable Lynn Adelman, Presiding

DEFENDANTS-APPELLANTS-CROSS-APPELLEES' REPLY IN SUPPORT OF THE EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Wisconsin has comprehensively addressed the twin compelling goals of ensuring that voters must show a valid photo ID in order to vote at the polls and providing that all eligible voters receive a free ID within days of a request. That the State's approach resolves the problems that have troubled some other States' voter ID laws was confirmed by the permanent remedy recently issued by the District Court for the Western District of Wisconsin after a full trial. *One Wisconsin*, W.D. Wis. Case No. 15-cv-324, Dkt. 234:115–19. Plaintiffs do not dispute that the Western District's remedy duplicates, in every respect relevant to the November 2016 election, the system that Wisconsin has voluntarily had in place since May 10, 2016. Defs.' Mot. 5–6.[1] It was entirely reasonable for Wisconsinites to conclude that this system is superior, from the point of view of both voter rights and election integrity, to the affidavit regimes that some other States have adopted and some other courts have ordered. Critically, Plaintiffs have not identified *even one* problem that has arisen in the nearly three months that Wisconsin's current system has been operating.

[1] The principal differences between the Western District's remedy and Wisconsin's current law is the Western District's requirement that the free photo ID be permanent (not just renewable), and the Western District's specific instruction that Wisconsin cannot decline a free photo ID if an applicant fails to respond to follow-up questions from DMV for 180 days in a row. Defs.' Mot. 5–6. Given that these differences would not impact voters' rights for half a year, they are not relevant to the present stay motion. These differences do have immediate impacts on the State—namely, that permanent photo IDs would need to be issued in less than three weeks—and are thus subject to a separate appeal and likely upcoming stay motion. *See* No. 16-3091.

Plaintiffs nevertheless urge this Court to leave in place the district court's subjective affidavit regime, which—in their own words—permits voters to whom the affidavit procedure is "clearly inapplicable" to evade the photo ID law. Pls.' Opp. 16–17. The preliminary injunction was issued at the behest of those who have no right to represent the class, on the basis of anecdotes that have no applicability to current law. With no public benefit, the injunction undermines the careful system that the State has put into place and should be stayed immediately.

ARGUMENT

I. Plaintiffs Effectively Defaulted On The State's Argument That They Cannot Lawfully Represent The Class

In their lead merits argument, Defendants explained—with careful arguments and citations to undisputed record evidence—that Plaintiffs have no right or standing to bring this class-based claim because they are not "member[s] of the class which [they] seek[ ] to represent at the time the class action is certified by the district court." *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); Defs.' Mot. 9–12.

In their Response, Plaintiffs effectively defaulted. While Plaintiffs asserted in a footnote, *see* Pls.' Opp. 13–14 n.5, that this argument is "discussed above," an examination of their Response uncovers only a couple of stray references to the named Plaintiffs, none of which address Defendants' arguments or record citations. Plaintiffs mention Plaintiff Ruthelle Frank (Pls.' Opp. 9), but do not dispute Defendants' argument that she recently voted without photo ID under the statutory-hardship exception and do not claim that she is ever likely to need photo ID in order to vote. Defs.' Mot. 11. Plaintiffs also have no answer for the undisputed record evidence that if

Frank became well enough to make a trip to the DMV (and was thus healthy enough to travel to the polls), she would receive a free photo ID under current law. *See* R.287:9. Plaintiffs mention Plaintiffs Leroy Switlick and James Green while asserting without any support that they "*need a* Social Security card as proof of identity." Pls.' Opp. 10–11 (emphasis added). But no one "need[s]" a social security card under current law. *See infra* p. 5. And Plaintiffs have no response to Defendants' argument, Defs.' Mot. 11–12, that Switlick and Green never claimed that they lack any of the many acceptable proofs of identity, let alone that they could not readily obtain such commonly available proof. Finally, Plaintiffs briefly mention Plaintiff Melvin Robertson, Pls.' Opp. 13, but do not dispute Defendants' argument that he would get a free photo ID by making a single trip to the DMV. *See* R.287:9.

II. Plaintiffs' Merits And Irreparable-Harms Arguments Rely Upon Speculation Unsupported By A Single Citation Of Current Law

If Plaintiffs had somehow succeeded in showing that they can lawfully represent the class, then they would still need to "demonstrat[e]"—beyond "mere speculation"—that enough Wisconsinites fall within the defined class to satisfy Rule 23(a)'s numerosity requirement, *see Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990) (citation omitted), and that they would suffer irreparable harm without preliminary relief, *East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 708 (7th Cir. 2005). In their Response, Plaintiffs ignore their burden to show numerosity, mistakenly asserting that to get class-based relief, they need to show only that "some voters" will experience problems. Pls.' Opp. 6. Plaintiffs also seek to establish likelihood of success on the merits and irreparable harm by pointing

to allegedly "voluminous evidence" below, Pls.' Opp. 2, while chiding Defendants for not adequately addressing that evidence or the district court's factual findings, Pls.' Opp. 6–8. The problem with Plaintiffs' arguments is that all of their evidence—and thus the district court's findings derived therefrom—look only at prior law. Current law was specifically designed to address the very concerns Plaintiffs' stale evidence raises. Defs.' Mot. 5–6.[2] Plaintiffs' failure to cite even one example of a problematic denial of a request for a free photo ID after current law was put in place on May 10, 2016, almost three months ago, is a powerful indication that the State has addressed any shortfalls with its new procedures.

Although Plaintiffs cannot find a single current example to support their concerns, they speculate that there are four types of voters who could, perhaps, have problems. These arguments fail and, in any event, do not establish the "numerous[ ]" burdened voters necessary for Plaintiffs to be able to obtain class-based relief.

First, Plaintiffs claim that those with "name mismatches or other errors" in their underlying documents could experience problems, asserting that it is "hardly clear" how these situations are handled under current law. Pls.' Opp. 8–10. But two features of current law each, independently, address these concerns. At the threshold, the May 10, 2016, rule codified the common law name-change process, such that it is

[2] While the district court was correct that "the emergency rules did not create a brand new procedure," the court was plainly wrong to suggest that it simply restated prior practice. R.311:2. Instead, what the May 10, 2016, rule did was require the issuance of photo ID throughout the verification process, codified "best practices," and "limit[ed] the DMV administrator's discretion by establishing and requiring a consistent application of standards and criteria throughout the petition process." Wis. EmR1618 Preamble.

entirely "clear" that the process is available. Wis. EmR1618, §§ 1–3; R.287:8–9. In any event, the rule makes "clear" that no applicant for a free ID can lawfully be denied a free photo ID except upon a finding of fraud, ineligibility, failure to respond for half a year, or voluntary withdrawal from the process. Wis. EmR1618, § 8; *see also* R.287:9–10. A name mismatch or other error is simply not a lawful basis for denying a free ID application. That is why Plaintiffs have been unable to locate a single example of a voter running into trouble as a result of such errors under current law.

Second, Plaintiffs claim that some voters may have trouble obtaining "proof of residence" or "proof of identity." Pls.' Opp. 10–11. There is no record support for this argument. Plaintiffs do not cite a single example of a voter having difficulty obtaining proof of residency, under either current or prior law. And as for proof of identity, Plaintiffs stubbornly insist that because the district court previously found that a social security card is the most commonly used form of such proof, a social security card is necessary. Pls.' Opp. 10–11. Under current law, an applicant is issued a free photo ID "without a social security number." Wis. EmR1618, § 4. For the few voters who do not have a social security card, any one of the seven other forms of proof of identity *or* any "supporting document identifying the person by name and bearing the person's signature, or a reproduction of the person's signature" will do. Wis. Admin. Code § Trans 102.15(4). Plaintiffs do not cite a single example of any voter—under either current or even prior law—who was denied a free photo ID based on failure-to-establish-identity grounds after presenting any document "identifying the person by name and bearing the person's signature, or a reproduction of the person's signature."

Wis. Admin. Code § Trans 102.15(4). And they do not argue that any voter cannot readily obtain even one of these many forms of proof.

Third, Plaintiffs worry that some voters who obtain a free photo ID under current law may ultimately not be "permitted to keep it," asserting that the process may simply "end[ ] permanently and the voter will stop getting temporary IDs." Pls.' Opp. 4, 12. Again, this is incorrect. Under current law, applicants can only ever be denied a free photo ID if DMV finds they are not eligible, committed fraud, did not respond for 180 days,[3] or voluntarily withdrew from the process. Wis. EmR1618, § 8; R.287:9–10. The process will not simply "end[ ]." Rather, once DMV is satisfied that all available information has been gathered, it will issue a free photo ID upon a determination "that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct," Wis. EmR1618, § 8. And, in any event, given that this appeal is on a preliminary injunction, any concerns about what might occur at some distant point in the future could not justify *preliminary* relief.

Finally, Plaintiffs repeatedly claim, Pls.' Opp. 3, 7, 13, that Defendants conceded below that "making [a] trip [to the DMV] is an undue burden on some voters," such that they need an affidavit procedure. Pls.' Opp. 3, 7, 13 (citing R.285:19). This is not true. What Defendants actually said below was that, for those voters for whom making a trip to the DMV is an undue burden because of their health, those voters (like Plaintiff Frank) are statutorily exempt from the photo ID law. R.285:19–20.

[3] Plaintiffs complain about Defendants' use of the short-hand phrase "extreme non-cooperation." Pls.' Opp. 12. This simply means not responding a single time to multiple DMV inquiries for 180 days. Wis. EmR1618, § 8.

While Plaintiffs cite the district court's speculation that Wisconsin's statutory provision for disability may not cover all voters for whom making a trip to the DMV is more than a reasonable effort due to health problems, Pls.' Opp. 13, they cannot cite a single example of a voter who found the disability exemption insufficient. If someone is healthy enough to make a trip to the polls to use the district court's affidavit procedure, then he or she is healthy enough to make a trip to the DMV to get a free ID. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.) ("[T]he inconvenience of making a trip to the [D]MV . . . surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."). If the voter is too ill to make either journey without difficulty, then the law fully accommodates him.

III. Allowing The District Court's Subjective Affidavit Procedure Will Encourage Violations Of The Law And Waste Public Resources

In their Stay Motion, Defendants established that, absent a stay, the State will suffer irreparable harm because it will need to expend substantial public resources to promote the district court's subjective affidavit procedure, which is contrary to the sovereign choice made by Wisconsin voters. Defs.' Mot. 16–20. Defendants also explained that the subjective affidavit would mislead voters who could readily obtain a photo ID with reasonable effort into violating the law. Defs.' Mot. 16–20. Plaintiffs do not dispute that the preliminary injunction will subject the State and its citizens to irreparable financial harm. Instead, they make four meritless arguments.

First, Plaintiffs argue that Defendants should not be heard to complain that the district court fundamentally revised the photo ID law, because other States have

a similar regime as a result of either voluntary choice or judicial decree. Pls.' Opp. 1–2, 16–19. But Plaintiffs have not pointed to any other State that has implemented a comprehensive program like Wisconsin's, which ensures that *every* eligible voter will promptly receive a free ID on request. *See* Wis. Admin. Code § Trans 102.15; Wis. EmR1618. Wisconsin has reasonably decided that its system is preferable to a subjective affidavit regime because, unlike that sort of affidavit system, Wisconsin's approach fully achieves the goals of requiring that every voter present a photo ID at the polls and ensuring that any voter who makes reasonable efforts is promptly given a free photo ID. Tellingly, Plaintiffs do not dispute Defendants' point that Wisconsin's current regime is considerably more voter-friendly than Indiana's indigency affidavit at issue in *Crawford*. Defs.' Mot. 17–18.

Second, Plaintiffs argue that the options listed on the district court's subjective affidavit—such as "lack of transportation," "work schedule," and "family responsibilities"—will not encourage those who can get a photo ID with reasonable efforts to violate the photo ID law. Pls.' Opp. 15–16. But "making a trip to the [D]MV, gathering [a couple of] documents, and posing for a photograph" do not qualify as unreasonable efforts for able-bodied citizens, including because such efforts do not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). To an ordinary citizen, the message sent by the listing of these options on the affidavit form is clear: if you would rather not go to the DMV to get a free ID because you think your work schedule or family responsibilities are problematic, then you are exempt from the photo ID law.

Third, Plaintiffs take an incoherent approach to the district court's unaccountable "Other" option. They first appear to agree with Defendants that it would be problematic to permit individuals to whom the affidavit is "clearly inapplicable" to write in their own reasons for evading the photo ID law. Pls.' Opp. 16–17. But, in the very next paragraph, they concede that the district court prohibited all challenges, including challenges to those "clearly inapplicable" reasons. Pls.' Opp. 17.[4]

Finally, Plaintiffs argue that the possibility of voter confusion militates against a stay, pointing to the Fourth Circuit's recent decision to deny a stay relating to North Carolina's photo ID law. Pls.' Opp. 19. The critical difference is that Wisconsin, unlike North Carolina, has emphatically *not* "already notified its voters that it will not ask them to show ID." *See* Order Denying Mot. to Recall Mandate, *N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, Dkt. 156:7 (4th Cir. Aug. 4, 2016). To the contrary, Wisconsin has refrained from informing voters about the district court's subjective affidavit regime because that regime is not available for the primary election, which will be held tomorrow, Tuesday, August 9, 2016. Defendants respectfully request that this Court issue a stay of the preliminary injunction immediately so that no voter confusion can ensue. Every eligible, able-bodied voter in Wisconsin can get a photo

[4] Having no serious defense for the district court's order, Plaintiffs claim that Defendants did not raise this concern below. Pls.' Opp. 16 n.6. This is simply untrue. Three days after the district court issued its subjective affidavit remedy—which is entirely different from the Indiana-style indigency affidavit that this Court, in *Frank II*, noted Plaintiffs were seeking, Defs.' Mot. 17–18—Defendants argued in their stay motion before the district court: "The affidavit procedure created by the Court thus creates a loophole in the ID requirement even for reasons already held insufficient. For example, under the Court's ruling, an affidavit marked 'other' and stating that the voter 'did not want to stand in line at the office that issues drivers' licenses' would be acceptable. This is overbroad under binding precedent." R.297:6.

ID by making a single trip to a DMV location and filling out a form. These voters know that they have three months to make that minimal effort, which effort represents no increase "over the usual burdens of voting." *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.).

CONCLUSION

The preliminary injunction should be stayed immediately.

Dated: August 8, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2016, I filed the foregoing Reply 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 8, 2016

s/Misha Tseytlin
MISHA TSEYTLIN