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

# 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

**RESPONSE TO PETITION FOR INITIAL HEARING EN BANC**

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## INTRODUCTION

The Petition asks this Court to take unprecedented action, on the basis of a claimed emergency that does not exist, in a jurisdictionally improper posture.

Plaintiffs request that this Court bypass its ordinary procedures and grant initial hearing en banc because they believe that immediate action is necessary. Pet. For Initial Hearing En Banc, *Frank v. Walker*, Nos. 16-3052 & 16-3003 (7th Cir. July 29, 2016) Dkt. 14 (hereinafter "Pet.").[1] But there is no reason for such unprecedented haste because the State has already voluntarily accommodated any concerns relating to the November 2016 election. Specifically, Wisconsin has enacted a rule that requires the Division of Motor Vehicles ("DMV") to mail *automatically* a free photo ID to anyone who comes to DMV one time and initiates the free ID process. *See* Wis. EmR1618, § 10. No one must present documents that, for some, have proved challenging to acquire; no one must show a birth certificate, proof of citizenship, and the like. *Id.* § 6. The effort to get a photo ID for the November 2016 election is comparable to "the usual burdens of voting," *Crawford v. Marion County Election Board,* 553 U.S. 181, 198 (2008) (opinion of Stevens, J.): making a trip to the polls, bringing a proof of residency for same-day registration, Wis. Stat. § 6.55(2)(a), (b), and filling out a ballot.

Two courts have confirmed this understanding of Wisconsin's law as it relates to the November 2016 election. Below, Plaintiffs' evidence of alleged shortfalls was

[1] References to documents in the current, consolidated appeal are to "Dkt. XX," and refer to the docket numbers in case no. 16-3052.

based primarily upon trial testimony in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324 (W.D. Wis. 2016), a different case pending on appeal before this Court. *See* Case Nos. 16-3083, 16-3091 (consolidated). Although the Western District in *One Wisconsin* ordered reforms to the photo ID program in the long term, the court recognized that the actions the State has taken to accommodate voters for the November 2016 election are sufficient and thus stayed its own remedial injunction pending appeal. *See* Order, *One Wis. Inst. Inc. v. Thomsen*, No. 15-cv-324 (W.D. Wis., Aug 11, 2016) ECF No. 255:2. This Court made the same point last week in denying Plaintiffs' request to reconsider a stay of the district court's preliminary injunction in the present case: the fact that anyone who applies for a photo ID in Wisconsin will receive at least "a receipt entitling him or her to vote in November means that further temporary relief . . . is unnecessary." Dkt. 36:2.

Accordingly, the remaining questions with regard to Wisconsin's photo ID regime are factual and do not implicate the November 2016 election: Does the photo ID regime that the State has adopted adequately protect voters in the long term, or are the post–November 2016 reforms that the Western District ordered in *One Wisconsin* (or some other adjustments) necessary? These are record-based questions, which should be adjudicated as part of the *One Wisconsin* appeal and/or the upcoming discovery process in the present case. The State respectfully submits that this Court should await resolution of those inquiries before deciding whether to reconsider, en banc, the framework that this Court established in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (*Frank I*), and *Frank v. Walker*, 819 F.3d 384 (7th Cir.

2016) (*Frank II*). Permitting this appeal, as well as the *One Wisconsin* appeal, to go forward "in the ordinary course, after full briefing and argument," Dkt. 36:2, is far preferable to Plaintiffs' unprecedented approach for initial hearing en banc.

Plaintiffs attempt to justify initial en banc review by incorrectly claiming that this Court's precedents are inconsistent with decisions from three courts of appeals. But one of those cases involved an as-applied decision of the sort that *Frank II* permits, and was based on Section 2 of the Voting Rights Act (VRA). *See Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *16, *20–*21, *38–*39 (5th Cir. July 20, 2016) (en banc) (specifically relying upon *Frank II*). Plaintiffs abandoned their VRA claim before their appeal in *Frank II*, and did not ask for relief under that claim in the preliminary injunction motion that resulted in the order on appeal. *See* R.223; 278; 279.[2] Another case did not involve a photo ID law, and turned on "Ohio's particular circumstances." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 532, 559–60 (6th Cir. 2014), *vacated by* No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The other out-of-circuit case that Plaintiffs rely on was based upon a finding of intentional racial discrimination, *see N.C. State Conf. of NAACP v. McCrory*, Nos. 16-1468, 16-1469, 16-1474, 16-1529, 2016 WL 4053033, at *2, *18, *24 (4th Cir. July 29, 2016), which is not at issue in this case.

Finally, even if this Court were interested in reconsidering *Frank I* and *Frank II*, Plaintiffs' cross-appeal is jurisdictionally defective. Although this Court may review an interlocutory order granting or denying an injunction, 28 U.S.C.

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

§ 1292(a)(1), "[o]nly a person injured by the terms of the judgment is entitled to appeal." *Grinnell Mut. Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995). Plaintiffs were the *victors* below: the district court gave them the as-applied preliminary injunction that they sought. Plaintiffs now, remarkably, ask this Court to "*reverse*[ ]" the order that they sought below. Pet. 5 (emphasis added). This is impermissible and would prejudice Defendants' right to develop a record on the facial validity of the current state of their photo ID law.

## STATEMENT

### I. Wisconsin's Photo ID Program

To vote in Wisconsin, voters must present one of ten forms of proof of ID. *See* Wis. Stat. §§ 5.02(6m), 6.79(2)(a), (2)(d), & 6.87(1). While a high percentage of eligible voters already possess an acceptable form of photo ID, some do not. To address this, Wisconsin law directs DMV to issue a free photo ID card to any elector who offers proof of name and date of birth, identity, residency, citizenship, and social security number. R.287:2; *see* Wis. Admin. Code § Trans 102.15(3)–(5).

For the very small number of voters who do not have an eligible photo ID and cannot establish their name, date of birth, or citizenship, Wisconsin promulgated a rule on May 10, 2016, requiring DMV to issue either a permanent photo ID or a temporary photo ID receipt that can be used to vote (if more time for verification is needed before issuing a permanent ID card). R.287:9. To obtain this automatically issued photo ID, the applicant needs only to present proof of residency (which a voter already needs to show to register to vote, Wis. Stat. § 6.34(2)), and proof of identi-

ty (including any "supporting document identifying the person by name and bearing the person's signature, a reproduction of the person's signature, or a photograph of the person." Wis. Admin. Code § Trans 102.15(4)(a)). Applicants will be mailed their ID within six days, R.287:9, or, if the petition is filed during an election week, then "DMV will issue a photo ID receipt by mail on the day" of application. R.287:10. If the applicant receives a temporary ID (as opposed to a permanent ID card, which issues once DMV completes its investigation), that ID will be *automatically* renewed through the November 2016 election and beyond, and renewals will stop only upon a finding of fraud, ineligibility, failure to respond even once to multiple DMV inquiries for half a year, or a request by the applicant to cancel the free ID application. *See* R.287:9–10.

As this Court explained, under Wisconsin's law, "any applicant must receive a photo ID on request, unless the state shows that a given applicant is ineligible to vote, has committed fraud, or does not answer queries for six months." Dkt. 36:2. The Western District made the same point, explaining that "anyone" who petitions the DMV for an acceptable form of photo ID will at the very least "get a receipt that will serve as a valid ID for the November 2016 election." Order, *One Wis. Inst. Inc. v. Thomsen*, No. 15-cv-324 (W.D. Wis., Aug 11, 2016) ECF No. 255:2.

## II. Litigation History

A. On December 13, 2011, Plaintiffs filed this lawsuit challenging Wisconsin's photo ID law under the Fourteenth Amendment and VRA. R.1. On April 29, 2014, the district court decided that the law was unlawful on its face. *See Frank v. Walk-*

*er*, 17 F. Supp. 3d 837, 862–63, 879–880 (E.D. Wis. 2014). This Court reversed in *Frank I*, rejecting Plaintiffs' facial challenge to Wisconsin's law by relying heavily upon *Crawford*. 768 F.3d 744. This Court denied rehearing en banc after a five-to-five vote. *See Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014). The five judges of this Court who wanted to rehear *Frank I* en banc noted their concerns about "a litany of the practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID if they need one in order to be able to vote." *Id.* at 786 (Posner, J., dissenting from denial of rehearing en banc).

After *Frank I,* Plaintiffs sought a preliminary injunction ordering an affidavit exception to remedy alleged as-applied violations under the Fourteenth Amendment, without seeking any relief under the VRA. R.222; R.223:7–8, 17–20. The district court denied Plaintiffs' motion as foreclosed by *Frank I. See Frank v. Walker,* 141 F. Supp. 3d 932, 933–36 (E.D. Wis. 2015).

B. This Court reversed in *Frank II*, 819 F.3d 384, explaining that a "safety net" remedy could be ordered for any voters who cannot get an ID with "reasonable effort." *Id.* at 386–88. In remanding the case, this Court noted that "[t]he state's administrative agencies may have made other adjustments," and that the district court must "permit the parties to explore how the state's system works today before taking up plaintiffs' remaining substantive contentions." *Id.* at 388.

C. On remand, Plaintiffs filed a motion for preliminary injunction, again exclusively under the Fourteenth Amendment and not the VRA. R.278; 279. In their motion, Plaintiffs asked for an order requiring an affidavit option at the polls that

"would allow voters without acceptable identification for voting to cast a regular ballot . . . by affirming that they face a 'reasonable impediment' to obtaining acceptable identification." R.278:1. Plaintiffs added that "[a]ny reason that the voter subjectively deems reasonable should suffice." R.278:1. In support of that motion, Plaintiffs relied primarily upon evidence developed in the Western District of Wisconsin in *One Wisconsin*, *see, e.g.*, R.280-28–280-74, and some brief affidavits, *see* R.280-5–280-7. Defendants, in turn, sought permission to develop for the district court a record showing that, under current law, all eligible voters can obtain a photo ID with reasonable effort. R.285:3; R.275.

The district court granted Plaintiffs' motions and rejected Defendants' requests to develop the record. The district court ordered the State to implement Plaintiffs' proposed affidavit procedure for the November 2016 election. R.294:41–42, 43. The exact "form of the affidavit" was modeled upon the format provided by Plaintiffs. *See* R.294:42–43 (citing Young Decl., Ex. 2, R.280-2). The district court's affidavit allows each voter to "declare under penalty of perjury" that he or she has "been unable to obtain acceptable photo identification with reasonable effort." R.294:43. According to the affidavit, the following circumstances could give rise to an inability to "obtain acceptable photo identification" despite "reasonable effort": "[l]ack of transportation," "[l]ack of birth certificate or other documents needed to obtain photo ID," "[w]ork schedule," "[d]isability or illness," "[f]amily responsibilities," or "[o]ther." R.294:43. If the voter checks "other," the affidavit provides a space to identify the reason for the voter's inability to obtain an acceptable photo ID.

R.294:43. "Any voter who completes and submits" an affidavit must receive a regular ballot, and "[n]o person may challenge the sufficiency of the reason given by the voter for failing to obtain ID." R.294:43.

D. On July 22, 2016, Defendants filed their notice of appeal, commencing case No. 16-3003. R.295. The jurisdictional basis of Defendants' appeal is 28 U.S.C. § 1292(a)(1). R.296:5 (Defendants' Docketing Statement). Plaintiffs then filed this cross-appeal, docketed as Case No. 16-3052, also claiming jurisdiction under 28 U.S.C. § 1292(a)(1), seeking review of the preliminary injunction order. *See* R.307:1. (Plaintiffs' Docketing Statement). On its own motion, this Court consolidated these cases, and set a briefing schedule, with Defendants' opening brief due on Wednesday, August 31, 2016 (that is, nine days from today). Dkt. 15.

On August 1, 2016, Defendants filed a motion to stay the district court's injunction, and on August 10, this Court granted the stay. Dkt. 23. This Court explained that "the district court has not attempted to distinguish genuine difficulties [in obtaining photo ID] of the kind our opinion mentioned, 819 F.3d at 385–86, or any other variety of substantial obstacle to voting, from any given voter's unwillingness to make the effort that the Supreme Court has held that a state can require." Dkt. 23:2. Therefore, this Court found that "there is a substantial likelihood that the injunction will be reversed on appeal." Dkt. 23:2.

Plaintiffs sought rehearing of the decision on the motion to stay, and this Court denied the request. Dkt. 36. This Court noted that the Western District of Wisconsin found that Wisconsin's free ID program "is generally adequate to ensure

that all qualified voters receive photo IDs but expressed concern that temporary documents issued early in the process may not have sufficient duration—though they will all be valid at least through this November's election." Dkt. 36:2. And, concluding that temporary relief was unnecessary, this Court found that "[t]he fact that anyone who applies under the [free ID program] will receive a receipt entitling him or her to vote in November means that further temporary relief, such as the injunction issued by the Eastern District, is unnecessary. The relative merits of the three competing approaches—the state's, the Eastern District's, and the Western District's—safely can be left to decision in the ordinary course, after full briefing and argument." Dkt. 36:2.

## ARGUMENT

### I. Plaintiffs Fail To Justify An Unprecedented Departure From This Court's Normal Procedures

En banc hearings impose a "heavy burden" on an "already overburdened court," and are reserved for "the truly exceptional cases." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam) (citation omitted). *Initial* hearings en banc are rarer still. Indeed, the Petition does not cite a single case in which this Court has granted an initial hearing en banc.

Plaintiffs cannot justify the unprecedented course they seek based upon appeal to the upcoming November 2016 election. Pet. 14. The State will *automatically* mail a free photo ID to anyone who comes to DMV one time and initiates the free ID process. *See* Wis. EmR1618, § 10; Wis. Admin. Code § Trans 102.15(5m); R.287:9–10. This credential will allow every eligible voter to vote in the November 2016 elec-

tion. This effort needed to get this free ID is comparable to the effort that citizens make to vote to begin with. *See Crawford,* 553 U.S. at 198–99 (opinion of Stevens, J.).

A recent order from the Western District in *One Wisconsin* confirms that Plaintiffs' claimed emergency does not exist. Although the Western District found that Wisconsin's ID system needed some long-term reforms, the court stayed its permanent injunction relating to the photo ID law because the court recognized that Wisconsin's law sufficiently accommodated voters for the November 2016 election. Order, *One Wisconsin Institute Inc. v. Thomsen*, No. 15-cv-324 (W.D. Wis., Aug 11, 2016) ECF No. 255:7-9. This Court reached the same conclusion several days later, citing to the Western District's stay decision and explaining that the "fact that anyone who applies [for a photo ID] will receive a receipt entitling him or her to vote in November means that further temporary relief . . . is unnecessary." Dkt. 36:2.

Plaintiffs make three additional arguments to bolster their Petition, but none supports the extraordinary course of initial en banc review.

*First*, Plaintiffs argue that this case "directly impact[s] citizens' ability to exercise their fundamental right to vote." Pet. 6. While cases concerning state voting rules often impact the right to vote, so far as Defendants are aware, no such case has ever received initial en banc treatment in this Court.

*Second*, Plaintiffs argue that initial en banc review is warranted because the "decision in *Frank I* conflicts with decisions issued by the United States Court of Appeals of the Fourth, Fifth, and Sixth Circuits." Pet. 7. Again, Plaintiffs do not ex-

plain why this point favors *initial* en banc hearing rather than possible post-panel en banc rehearing in the ordinary course.

In any event, Plaintiffs' argument that this Court's caselaw is inconsistent with the decisions of the Fourth, Fifth, and Sixth Circuits is incorrect. The Fourth Circuit ordered facial invalidation only because the court found that the law was enacted with racially discriminatory intent under the framework adopted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See McCrory*, 2016 WL 4053033, at *17–*18, *21, *24. No allegation of intentional race discrimination is at issue in the present case. The Fifth Circuit case dealt primarily with an as-applied challenge under the Voting Rights Act. *See Veasey*, 2016 WL 3923868, at *16, *20–*21, *38–*39. Plaintiffs did not rely upon the VRA in seeking the order on appeal, *see supra* p. 6, and this Court's decision in *Frank II* specifically permitted Plaintiffs to pursue as-applied claims, a fact that the Fifth Circuit pointed out. *See Veasey*, 2016 WL 3923868, at *38 ("The remedy must be tailored to rectify only the discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification. *See Frank II*, 819 F.3d at 386."). The Sixth Circuit decision did not address a photo ID law, but rather a different election-related law, and the court emphasized that its decision was based on "Ohio's particular circumstances," such that there was "no reason to think our decision here compels any conclusion about . . . practices in other states." *Husted*, 768 F.3d at 532, 559–60. More generally, none of these cases addressed the

specifics of Wisconsin's law, which provides that any eligible voter will get a free photo ID automatically by making just one trip to the DMV. *See supra* pp. 4–5.

Plaintiffs' assertion that the Fifth Circuit, in particular, rejected this Court's approach is simply wrong. Pet. 7–8. The Fifth Circuit majority explained that "the Seventh Circuit's approach in *Frank* is not inconsistent with our own," noting that "[u]nlike in *Frank*, the district court in this case found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributed SB 14's disparate impact, in part, to the lasting effects of that State-sponsored discrimination." *Veasey,* 2016 WL 3923868, at *20. The court added that "[t]he Seventh Circuit [in *Frank II*] remanded the plaintiffs' constitutional claims to the district court for further consideration of an as-applied challenge factually similar to the one Plaintiffs make in this case." *Id.* at *21. And, as noted above, the Fifth Circuit specifically explained that the court's as-applied remedy was the sort that *Frank II* contemplated. *Id.* at *38.

*Third and finally,* Plaintiffs argue that *Frank I* is inconsistent with *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016). Plaintiffs claim that *Whole Woman's Health* "rejected the proposition that a district court is bound by 'legislative findings.'" Pet. 11. But *Frank I* held that "legislative facts are not sacrosanct." *Frank I,* 773 F.3d at 795. In any event, Plaintiffs provide no support for the argument that *Whole Woman's Health* extends beyond the abortion context, or that the case implicitly overruled decisions such as *Vance v. Bradley*, which held that "those challenging the legislative judgment must convince the court that the legislative

facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." 440 U.S. 93, 111 (1979).

## II. This Court Lacks Jurisdiction Over This Cross-Appeal

This Court has jurisdiction over non-final "[i]nterlocutory orders" "granting . . . or refusing" an "injunction[ ]." 28 U.S.C. § 1292(a)(1). *See* R.296:5; R.307. In their cross-appeal, Plaintiffs invoked § 1292(a)(1) and then challenged the district court's order "entering [the] preliminary injunction." R.307:1. This is "a puzzling step, as [Plaintiffs] won in the district court," *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 672 (7th Cir. 1992), and "[o]nly a person injured by the terms of the judgment is entitled to appeal," *Reinke*, 43 F.3d at 1154.

Plaintiffs' cross-appeal is improper because no statute grants jurisdiction over an interlocutory appeal by a victorious party, on the ground that the district court should have awarded additional injunctive relief not sought below. As relevant to the issues raised on appeal, Plaintiffs' "motion for a preliminary injunction s[ought] an order requiring the defendants to offer voters who . . . cannot obtain [an ID] with reasonable effort the option of receiving a ballot by executing an affidavit to that effect." R.294:2. Convinced that Plaintiffs' approach was "sensible," the district court "grant[ed]" the motion and "order[ed] the defendants to implement [the] affidavit option." R:294:2–3. Now, Plaintiffs ask this Court to "reverse[ ]" the order that they urged the district court to enter, and "to enter an injunction enjoining Act 23 as a violation" of the VRA and Constitution, Pet. 5, even though they did not ask for that facial relief (or relief under the VRA) in their motion below. Plaintiffs' at-

tempt to bootstrap Defendants' *proper* appeal under § 1292(a)(1)—because Defendants were aggrieved by the preliminary injunction—fails because Plaintiffs were not "injured by the terms of the judgment" being appealed. *Reinke*, 43 F.3d at 1154.

This would have been a different case had Plaintiffs asked the district court to enjoin the photo ID law on its face *and* had fully developed that argument and record under Wisconsin's current law, such that the validity of that law was "sufficiently illuminated to enable decision by the court of appeals without further trial court development." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3921.1, at 28 (3d ed. 1998). Plaintiffs here did not ask for facial injunctive relief and instead merely asserted in a conclusory footnote that they were "preserv[ing] their argument that *Frank I* was wrongly decided for purposes of appeal." R.279:6 n.4. As a result of the nature of the relief being sought, as well as the district court's refusal to permit Defendants to develop the record, Defendants' evidentiary submissions below did not seek to vindicate the facial validity of the current state of the photo ID law, and focused upon the alleged burdens on the three categories of voters for whom Plaintiffs were seeking as-applied relief. *See* R.279:5–17.

If, after completion of this interlocutory appeal, Plaintiffs still wish to press a facial invalidity argument, they should present such a request for final relief to the district court, so that Defendants can submit additional evidence on the facial validity of the law. This is critical because Wisconsin law has changed since this Court decided *Frank I*, and in such a way that addresses the specific concerns

raised by the judges who wanted to rehear *Frank I* en banc in 2014. *See Frank*, 773 F.3d 786–87 (Posner, J., dissenting from denial of rehearing en banc). In particular, the State has taken several legally binding steps to eliminate the "practical obstacles" that some Wisconsinites previously "face[d] in obtaining a photo ID." *Id.*

## CONCLUSION

The petition for an initial en banc hearing should be denied.

Dated: August 22, 2016.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 2016, I filed the foregoing Response 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 22, 2016

s/Misha Tseytlin
MISHA TSEYTLIN