

**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.

**DEFENDANTS-APPELLANTS-CROSS-APPELLEES' EMERGENCY
MOTION TO STRIKE PLAINTIFFS-APPELLEES-CROSS-APPELLANTS'
BRIEF AND SHORT APPENDIX**

Defendants move to strike Plaintiffs' Brief and Short Appendix and to require Plaintiffs to re-file these documents consistent with this Court's rules. *See, e.g., Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824, 831 (7th Cir. 1987).

Plaintiffs' Short Appendix contains 49 pages, 32 of which are not part of the record below. SA 60–65, 68–93. Most troublingly, these pages include new declarations that were not subjected to the adversarial process. SA 79–93. Plaintiffs' Brief repeatedly relies upon these materials. *See, e.g.,* Resp. Br. 20 n.8, 21–22, 40 n.16.

Plaintiffs have thus violated Federal Rule of Appellate Procedure 10(a), which confines the record on appeal to: “(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk,” Fed. R. App. P. 10(a), as well as

Federal Rule of Appellate Procedure 30(a)(1), which limits appendices to: “(A) the relevant docket entries in the proceeding below; (B) the relevant portions of the pleadings, charge, findings, or opinion; (C) the judgment, order, or decision in question; and (D) other parts of the record to which the parties wish to direct the court’s attention,” Fed. R. App. P. 30(a)(1); *see also* 7th Cir. R. 30(b). As this Court has explained, “[t]he appellate stage of the litigation process is not the place to introduce new evidentiary materials.” *Berwick Grain Co., Inc. v. Ill. Dep’t of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997); *accord United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010) (“A Court of Appeals is limited to the record built in the district court, so arguments that depend on extra-record information have no prospect of success.”); *Henn*, 819 F.2d at 831 (“The parties may rely on appeal only on materials furnished to the district judge.”).*

Given Plaintiffs’ repeated reliance upon these nonrecord materials, Defendants respectfully ask this Court to strike Plaintiffs’ Brief and Short Appendix and to direct Plaintiffs to re-file corrected versions of those documents by October 10, 2016. *See id.* (ordering similar relief). Expedition is needed because Defendants’ final brief in this appeal is due on October 31, 2016, and Defendants have a right to know whether they must respond to Plaintiffs’ arguments based upon these

* This Court may, of course, take notice of nonrecord information where the legal standard for judicial notice is met. Some of the entries in the Short Appendix, such as the DMV’s current website, SA 62–65, satisfy this standard. *See, e.g., Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003). Nevertheless, those entries were not properly included in an appendix, which is limited to record materials. *See* Fed. R. App. P. 30(a)(1); 7th Cir. R. 30(b).

nonrecord materials (including, if permitted, submitting other nonrecord materials—such as new declarations of their own—as part of the rebuttal).

Dated: October 3, 2016.

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

s/ Misha Tseytlin
MISHA TSEYTLIN
Solicitor General
Counsel of Record

DANIEL P. LENNINGTON
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 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: October 3, 2016

s/Misha Tseytlin
MISHA TSEYTLIN