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.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 2:11-cv-01128-LA
The Honorable Lynn S. Adelman, Presiding

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Just four months ago, this Court observed that "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily," and it recognized that eligible voters who are "unable to get acceptable photo ID with reasonable effort" may be entitled to relief from Wisconsin's strict voter ID requirement. *Frank v. Walker,* 819 F.3d 384, 386-87 (7th Cir. 2016) ("*Frank II*"). This Court further recognized that the "sort of safety net" affidavit that Plaintiffs here sought—and which the district court has now granted as preliminary relief—may be an appropriate remedy for those voters who cannot obtain qualifying ID with reasonable effort. *Id.* at 387.

This same relief—permitting a person without ID to vote by executing a sworn statement affirming her identity and the existence of impediments that made obtaining ID unreasonably difficult—was agreed to by the State of Texas just two days ago as interim relief for the November 2016 election in the wake of an *en banc* decision from the Fifth Circuit Court of Appeals that recently directed the district court to consider such a remedy. *See Veasey v. Abbott*, 2:13-cv-00193, Joint Submission of Agreed Terms (S.D.Tex. Aug. 3, 2016), ECF Nos. 877, 877-1; *Veasey v. Abbott*, --- F.3d ---, 2016 WL 3923868, at *36-*39 (5th Cir. July 20, 2016) (en banc). Courts have also approved of similar affidavit safety nets in North Carolina, South Carolina, and North Dakota. *N.C. State Conf. of NAACP v. McCrory*, --- F. Supp. 3d ----, 2016 WL 1650774, at *120 (M.D.N.C. Apr. 25, 2016), *rev'd on other grounds*, 2016 WL 4053033 (4th Cir. July 29, 2016); *South Carolina v. United States*, 898 F.

Supp. 2d 30, 40-41 (D.D.C. 2012); *Brakebill v. Jaeger*, No. 1:16-cv-008, Order Granting Pls.' Mot. for Prelim. Inj. (D.N.D. Aug. 1, 2016), ECF No. 50. And just yesterday, the Fourth Circuit Court of Appeals denied a stay of an injunction against North Carolina's voter ID law where, like here, voters had already been notified of new procedures ID pursuant to an injunction. *See* Order, *N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, slip op. at 7 (4th Cir. Aug. 4, 2016), ECF No. 156.

In ordering preliminary relief, the district court correctly found, based on voluminous evidence, that "although many individuals who need qualifying ID will be able to obtain one with reasonable effort under [Defendants'] procedures [for obtaining ID], there will still be some who will not." Dkt. 294 at 22.[1] At bottom, Defendants simply disagree with this factual finding, but that is insufficient to establish clear error, a standard that Defendants do not even acknowledge. *D.U. v. Rhoades*, --- F.3d ----, 2016 WL 3126263, at *2 (7th Cir. June 3, 2016). Defendants want this Court to accept, in the face of the district court's contrary findings, that yet another version of the "emergency rule"—adopted *after* Plaintiffs' preliminary injunction motion was filed[2]—will instantly eliminate *all* unreasonable hurdles for

[1] In this brief, "Dkt." refers to the docket entries in the district court proceedings, *Frank v. Walker*, No. 11-cv-1128 (E.D. Wis.). "D.Br." refers to Defendants-Appellants-Cross-Appellees' Emergency Motion to Stay the Preliminary Injunction Pending Appeal, ECF No. 16. "Tr." refers to the trial transcript in this case.

[2] Though Defendants assert that the emergency rule passed on May 10, 2016 will instantly fix everything, what they fail to mention is that they are actually relying significantly on ad-hoc interpretations of the emergency rule as set forth in a last-minute declaration signed by the DMV Administrator Kristina Boardman on June 16, 2016, Dkt. 287, after Plaintiffs

every single voter, *see* D.Br. at 2 ("*every* eligible voter who puts forward a 'reasonable effort' will receive a free photo ID" (emphasis added)), even when they concede that prior "emergency rules" have repeatedly failed in this respect, *see id.* at 4. "We failed for five years but trust us, we'll get it right this time," is not sufficient to invalidate the district court's injunction.

The district court did not clearly err in finding that Defendants' allegedly new and improved ID Petition Process ("IDPP") for voters who lack birth certificates will fail to ensure that *all* voters without ID can obtain it with reasonable effort, for three simple reasons.

First, contrary to Defendants' assertions, not *every* voter can obtain a temporary photo ID under the current IDPP. In order to receive a temporary ID, an applicant has to *successfully initiate* the IDPP process. But some voters are prohibited from even opening an IDPP application, because they lack documentary proof of identity such as a social security card or proof of residence, Dkt. 294 at 27-28, 31, while others are unable to travel to the DMV in the first place (as Defendants conceded in the court below, Dkt. 285 at 19), Dkt. 294 at 29. And the IDPP process still does *not* clearly apply to all voters with birth documents containing name mismatches (who are also not otherwise guaranteed ID, Dkt. 294 at 22). *Compare* Dkt. 280-24 at 15 *with* Dkt. 280-24 at 18; *compare* Dkt. 287 at 8-9 *with* Dkt. 287 at 9-10. Furthermore, many voters who find themselves without qualifying ID on Election Day will simply be unable to obtain a temporary photo ID

filed their motion for a preliminary injunction on June 10, Dkt. 278. *See* D.Br. at 4, 5, 8, 11, 12, 13, 15 (repeatedly relying on declaration instead of the emergency rule's actual text).

by mail in time to cure their provisional ballot by Friday "without going to unreasonable lengths." Dkt. 294 at 29-30.

Second, not every voter who receives a temporary ID upon initiating the IDPP will actually be permitted to keep it. Defendants maintain that IDPP applicants will only be denied ID and have their temporary IDs canceled under limited circumstances such as a determination of ineligibility, D.Br. at 3, but that assertion is plainly belied by the record: the district court found that IDPP applicants have been denied for a variety of reasons, including simply because DMV "could not verify the applicant's qualifications and the applicant could not provide the DMV with further leads." Dkt. 294 at 23; *see also id.* at 23-27. Nothing about the new emergency rule meaningfully resolves that problem.

Third, even if the IDPP process were universally accessible and perfect on paper—and it is neither—DMV's sprawling, cumbersome bureaucracy and track record of arbitrary exercises of discretion and outright failure in implementing every procedure or "temporary rule" in place over the last five years indicates that the agency is simply incapable of ensuring that all eligible voters can obtain ID with reasonable effort. Dkt. 294 at 26-27.

In light of the record, the district court did not clearly err in finding, even in light of Defendants' latest last-minute changes, that at least some voters will be denied the right to vote because they cannot obtain ID with reasonable effort, necessitating preliminary relief. The motion for a stay should be denied.

LEGAL STANDARD

"A request for a stay is a request for extraordinary relief." *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). "'A stay is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, it is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34 (internal quotation marks and citations omitted).

In exercising its discretion over a motion under Rule 8 of the Federal Rules of Appellate Procedure, the Court of Appeals considers "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). The first factor "[r]equires more than a mere possibility of relief" and "simply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35 (internal quotation marks and citation omitted).

In deciding on the merits of a stay—the same posture as in review of a preliminary injunction—this Court reviews "the district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a

preliminary injunction for abuse of discretion." *D.U. v. Rhoades*, --- F.3d ----, 2016 WL 3126263, at *2 (7th Cir. June 3, 2016).

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT SOME VOTERS CANNOT OBTAIN ID WITH REASONABLE EFFORT

Defendants have failed to make a "strong showing" that they are likely to succeed on the merits, because the district court did not clearly err in finding that some voters cannot obtain ID with reasonable effort.

Consistent with this Court's instruction to "explore how the state's system works today," *Frank II*, 819 F.3d at 388, and in light of the preliminary injunction posture made necessary by impending elections, the district court considered the available evidence of how Defendants' ID Petition Process ("IDPP") works, and correctly found that, "although many individuals who need qualifying ID will be able to obtain one with reasonable effort under these procedures, there will still be some who will not." Dkt. 294 at 22. The entirety of Defendants' motion boils down to their repeated mantra that *every* single voter in Wisconsin can obtain ID with reasonable effort, D.Br. at 2, 15-16, 17, 18, 20, which is nothing more than a dispute with this factual finding and is not a demonstration of clear error. *Rhoades*, 2016 WL 3126263, at *2.

Defendants' main argument is that the district court should have completely ignored all evidence of anything occurring prior to May 10, 2016, including DMV's multiple failures to issue ID prior to that date. *See, e.g.*, D.Br. at 5, 12-13. They even go so far as to assert that "*the record contains zero denials under current law,*" *id.* at

8, with "current law" presumably referring to the emergency rules hastily promulgated less than three months ago in May 2016. The district court, however, already addressed this argument, finding that "the emergency rules did not create a brand new procedure for issuing free state ID cards," but instead codified preexisting failed practices. Dkt. 311 at 2-5. Defendants do not even attempt to engage with the district court's findings on this point or explain how they are clearly erroneous.

Nor do Defendants meaningfully dispute many findings of fact that support the district court's conclusion that many Wisconsin voters will not be able to obtain ID with reasonable effort. Defendants do not, for example, dispute the following findings of fact:

- Between September 15, 2014 (when the IDPP procedure went into effect) and May 12, 2016, 190 IDPP petitioners did not receive the ID they need to vote, including 52 "flat denials." Dkt. 294 at 22; D.Br. at 4.

- Several IDPP petitions were denied "because the applicant was unable to provide, and [DMV] was unable to locate, satisfactory information proving name, date of birth, and/or citizenship." Dkt. 294 at 23; D.Br. at 4.

- There are voters "who cannot reasonably make even a single trip to the DMV," Dkt. 294 at 29—in fact, Defendants *conceded* in the court below that "making that trip is an undue burden on some voters." Dkt. 285 at 19.

- "[E]rrors made by DMV staff will result in applicants being unable to obtain ID with reasonable effort," Dkt. 294 at 26; D.Br. at 13, and these errors include failures to communicate various workarounds, forcing voters to make multiple unnecessary trips to the DMV, which is a burden that "involve[s] more than reasonable effort for many voters, especially those with limited time and limited access to transportation." Dkt. 294 at 27.

- Voters—particularly homeless voters—are especially burdened unreasonably by DMV's requirement that they "keep[] in touch with the . . . investigator

over the period of weeks or months that it takes the investigator to verify the applicant's qualifications." Dkt. 294 at 27.

- Some voters who lack qualifying ID on Election Day will be unable to have their ballots counted because, assuming they are even eligible for the IDPP process, they cannot immediately obtain transportation to the DMV to apply for ID, and/or because they may not receive the temporary receipt that DMV may mail them, in time for them to go back to the clerk's office by the Friday after Election Day to have their provisional ballots counted. Dkt. 294 at 29-31; D.Br. at 15.

Perhaps realizing that they cannot establish clear error, Defendants now ask this Court to simply replace the district court's factual findings with their own unsubstantiated assertion that every single voter in the three categories emphasized by Plaintiffs, *Frank II*, 819 F.3d at 385-86, can now obtain ID with reasonable effort. This Court should decline to adopt Defendants' proposed findings of fact, which distort or misstate the record, and hardly establish clear error.

First, Defendants assert that "current law fully addresses the situation of 'name mismatches or other errors in birth certificates or other necessary documents,'" because "someone with a name mismatch can fill out a simple form at the start of the IDPP," and "a name mismatch is not one of the permissible bases for denying a free photo ID." D.Br. at 13. But it is hardly clear what happens after voters fill out the form—the rule is utterly silent on this point and does not even mention common law name change affidavits. Dkt. 280-24 at 15. Indeed, the district court was "unable to locate anything in the record that explains when an ID will be issued after a person submits" this common law name change affidavit. Dkt. 294 at

22.[3] And none of Defendants' citations to the record on appeal clarify this mystery, *see* D.Br. at 13 (citing Dkt. 287 at 8-10), much less establish clear error.

In any event, as the district court found, the process of filling out this name change form is hardly "simple." *See* Dkt. 294 at 21-22, 25. Making matters worse, voters like Ruthelle Frank cannot even truthfully sign the affidavit, *see* Dkt. 287-7, because she cannot swear that the misspelled name on her birth certificate is her "old name," as the affidavit requires, and because she has obviously never used the misspelled name during her lifetime. *See* Dkt. 288-6 at 95-97 (DMV Administrator unsure whether someone in that situation could sign affidavit).[4] And this entire process does not even apply if the name mismatch is with Social Security records. *See* Dkt. 288-6 at 9; *see, e.g.*, Dkt. 195 at 34 n.18 (voter had to rely on daughter to drive her to Social Security office to fix spelling error in Social Security records). Perhaps most importantly, the IDPP process does *not* clearly apply to all voters with birth documents containing name mismatches, so they *do not* all necessarily get the temporary IDs that are mailed to people initiating the IDPP process.

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[3] Perhaps this is because Defendants do not even mention this alleged name change process on their website, *see* http://tinyurl.com/h66pmhm, which instead continues to state—as recently as this morning—that specific documents are required to verify a name change. *See* Exhibit C.

[4] Defendants suggest that Frank, who is in her eighties, Dkt. 280-4 at 5, should keep going to the DMV over and over until she finally gets an ID. D.Br. at 11. What they fail to mention is that Frank's daughter *already* inquired about getting an ID for her mother in November 2015, *after the IDPP was in place*, but was not offered the use of that process at the time of the inquiry. Dkt. 280-57. Such DMV failures to provide accurate information about options is consistent with the district court's finding that such errors "happen frequently." Dkt. 294 at 26.

Compare Dkt. 280-24 at 15 *with* Dkt. 280-24 at 18; *compare* Dkt. 287 at 8-9 *with* Dkt. 287 at 9-10.

Second, the district court found that the emergency rules "do not relieve an applicant from having to produce a document that proves his or her identity," which for most voters is a Social Security card that generally cannot be obtained without photo ID. Dkt. 294 at 27-29. The emergency rules simply do not eliminate the proof of identity requirement, Wis. Admin. Code § Trans. 102.15(4); though the rule amends provisions for voters who lack a social security *number*, Dkt. 280-24 at 16, it leaves untouched subsection (4), which governs proof of identity. Nevertheless, Defendants now appear to assert that *any* voter "will *always* get a renewing temporary photo ID." D.Br. at 5. This is simply wrong: temporary IDs are only issued to voters who actually initiate the IDPP process, and voters without proof of identity (as well as voters without proof of residence) *cannot* do so because the IDPP is reserved for voters lacking proof of *citizenship* or name and date of birth (i.e., a birth certificate). Dkt. 294 at 27-28, 31. Thus, voters without proof of identity simply *do not* receive a temporary ID. Furthermore, as the district court found, "to satisfy this requirement [of providing proof of identity], a person will generally need to produce a social security card," Dkt. 294 at 28, because a Social Security card "is the most commonly available document to use to prove identity," Dkt. 195 at 28, but one cannot obtain a social security card without photo ID, Dkt. 294 at 28. Thus, voters like Plaintiffs Leroy Switlick and James Green, who need a Social Security card as proof of identity, Dkt. 280-6, 280-7, remain caught in a "gastonette," *Frank*

II, 819 F.3d at 386. Indeed, Switlick has already made multiple unsuccessful efforts to get ID; the new rule does nothing to address his Catch-22 situation. Dkt. 294 at 6. This is no trivial matter: approximately 1,640 eligible voters in Milwaukee County alone lack both an ID and a Social Security card needed to obtain ID or to initiate the IDPP process. *See* Dkt. 279 at 25.

Defendants respond by arguing, for the first time in five years of litigation, that the proof of identity requirement can be satisfied by "*any 'supporting document identifying the person by name and bearing the person's signature, or a reproduction of the person's signature*," D.Br. at 14-15 (quoting Wis. Admin. Code § Trans 102.15(4)). That is simply not what the existing rule says (nor does the emergency rule does alter this subsection)—Defendants quote an introductory sentence from Trans 102.15(4), but they omit the list that follows, which specifies a limited number of documents that DMV accepts as satisfying the proof of identity requirement. Moreover, while Defendants would have this Court believe that "any" document with a mere signature will satisfy the proof of identity requirement, they point to nothing in the record that would support such a broad reading of the relevant regulation. That certainly was not the experience of Plaintiff Leroy Switlick, who was told by DMV that he needed a "photo ID" to prove his identity, and who was not issued ID because he lacked a Social Security card. Dkt. 280-6.

Third, with respect to voters who lack birth certificates and must therefore rely on the IDPP process, Defendants dispute the district court's finding that some "will eventually be denied an ID card because the DMV will be unable to verify their

qualifications" during the 180 day review period, D.Br. at 15, because, Defendants claim, "voters will stop receiving free photo IDs only because of fraud, ineligibility, extreme non-cooperation, or voluntary withdrawal." *Id.* It is not clear what Defendants mean by "extreme non-cooperation," a phrase found nowhere in the emergency rule, Dkt. 280-24 at 18-19, but the bottom line is that if the DMV is unable to verify the applicant's birth information, and the applicant has provided all the information that she has, the process ends permanently and the voter will stop getting temporary IDs. *See* Dkt. 294 at 19-20. The district court specifically cited several examples of situations in which this occurred. Dkt. 294 at 23-24, 27.

And even if ancient secondary documentation is found after all of this rigmarole, there is still no guarantee of ID, because the Director of the DMV's Bureau of Field Service ultimately has to conclude, based on unspecified criteria, "that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct." Dkt. 294 at 19 (quoting Dkt. 280-24 at 19). Defendants assert, again for the very first time on appeal and without pointing to anything in the record, that DMV "usually" determines "that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct." D.Br. at 5. Even if that unsupported assertion were true, the fact that voters may "usually" get ID depending on some vague discretionary standard is cold comfort to voters who do not. *See Frank II*, 819 F.3d at 386 ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."). And for those who do not get an ID, there is no

possibility of appeal. The "voting fate" of citizens without birth documents like Plaintiff Melvin Robertson (who could not locate secondary documentation even with help), Dkt. 280-5, is thus left "to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

Lastly, with respect to transportation barriers, Defendants assert that "[t]hose with health problems that prevent them from traveling to the DMV without unreasonable efforts are already exempt" from having to show ID to vote. D.Br. at 14 (citing Wis. Stat. §§ 6.86(2)(a); 6.87(4)(b)(2)). However, the statutes cited refer only to those voters who are "indefinitely confined because of age, physical illness or infirmity." As the district court correctly observed, this exemption "does nothing to help . . . those whose health problems do not result in 'confinement' or rise to the level of disability." Dkt. 294 at 29. And while Defendants criticize the district court's "remaining concerns" about "those without reasonable access to transportation to the DMV and those who cannot afford to miss work for the time required to make a trip to the DMV," Dkt. 294 at 29, as being precluded by *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) ("*Frank I*"), Defendants themselves *conceded* below that "making that trip is an undue burden on some voters." Dkt. 285 at 19.

Defendants' misstatements vitiate most of their arguments and do not establish that all voters in Wisconsin can obtain ID with reasonable effort. Accordingly Defendants fail to establish clear error.[5]

[5] Defendants' motion also contains various perfunctory arguments concerning class certification that barely mention the class certification factors, D.Br. at 9-15, and they certainly do not demonstrate an abuse of discretion in the district court's decision to certify a class. *See Kleen Prods. LLC v. Int'l Paper Co.*, --- F.3d ---, No. 15-2385, slip op. at 4 (7th

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING A "SAFETY NET" AFFIDAVIT REMEDY

Defendants criticize the district court's preliminary remedy, consisting of a safety net affidavit that permits eligible voters who cannot obtain ID with reasonable effort to vote. The district court crafted this relief by carefully balancing the remaining preliminary injunction factors—irreparable harm, the balance of the equities, and the public interest—and Defendants fail to demonstrate how this balancing was an abuse of discretion. *See Rhoades*, 2016 WL 3126263, at *2. This remedy, while imperfect because it fell short of full invalidation, is fully consistent with *Frank II*'s guidance and, as explained below, consistent with the decisions and settlements in other voter ID litigation around the nation.

The bulk of Defendants' arguments concerning the remaining preliminary injunction factors just repeat their claim that every single voter in Wisconsin can obtain ID with reasonable effort. *See, e.g.*, D.Br. at 15-16 (no irreparable harm because every single voter in Wisconsin can get ID easily); 17 (no one would sign a "reasonable efforts" affidavit because every single voter in Wisconsin can get ID with reasonable effort); 18 (affidavit unnecessary because every single voter in Wisconsin can get ID easily); 20 (no public benefit because every single voter in Wisconsin can get ID easily); 20 (no harm to Plaintiffs because every single voter in

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Cir. Aug. 4, 2016). Although Defendants challenge numerosity, that challenge is simply bootstrapped to their erroneous assertion that every single person in Wisconsin can get ID with reasonable effort. D.Br. at 12-15. Defendants then appear to suggest that Ruthelle Frank, Leroy Switlick, James Green, and Melvin Robertson are not suitable class representatives because they can each supposedly obtain an ID with reasonable effort under the current law. *Id.* at 10. But as discussed above, Defendants are wrong as to each one.

Wisconsin can get ID easily). As demonstrated above, this assertion is not only untrue but amounts to nothing more than a disagreement with the district court's factual findings, and thus does not establish clear error. The record amply supports the district court's modest finding that at least some voters will be unable to obtain ID with reasonable effort. Neither did the district court abuse its discretion in concluding, based on unrefuted declarations from the municipal clerks of Wisconsin's largest municipalities, that the remedy could be implemented by November, and that the risk of disenfranchising and irreparably harming vulnerable voters outweighed the minimal burdens imposed on elections officials. Dkt. 294 at 37.

Defendants also criticize the affidavit remedy because it provides a list of reasons that a voter cannot obtain ID with reasonable effort, D.Br. at 17, including specifically "Lack of transportation," "Lack of birth certificate or other documents needed to obtain photo ID," "Work schedule," "Disability or illness," and "Family responsibilities." Dkt. 294 at 43. But there is no real question that the listed impediments *do* make it unreasonably difficult for at least some voters to obtain ID. *See, e.g.*, Dkt. 285 at 19 (conceding transportation is undue burden for some voters); *supra* Part I. (lack of birth certificate or other documents); Dkt. 280-14 (work); Dkt. 280-12, 280-22 (disability); Tr. 846 (family responsibilities). Moreover, voters cannot complete the affidavit and choose one of these reasons unless they swear "under penalty of perjury" that they "have been unable to obtain photo identification with reasonable effort." Dkt. 294 at 43. This listing of impediments is also consistent

with the "reasonable impediment" affidavits adopted in other jurisdictions. *See, e.g.*, *Veasey v. Abbott*, 2:13-cv-00193, Joint Submission of Agreed Terms (S.D.Tex. Aug. 3, 2016), ECF Nos. 877, 877-1; *South Carolina*, 898 F. Supp. 2d at 41; *N.C. NAACP*, 2016 WL 1650774, at *14; *see also* Dkt. 280-2, 280-3.

Defendants next construct a straw man, arguing that the "other" option in the affidavit, which requires a voter to identify other reasons for inability to obtain ID with reasonable effort, will allow voters for whom the affidavit is clearly inapplicable to nonetheless vote by affidavit, such as voters who believe they should not have to obtain ID, D.Br. at 17, voters who believe *Crawford* and *Frank* were wrongly decided, or voters who believe the DMV is haunted, *id.* at 3.[6] But the district court's order cannot be reasonably construed to permit such patently absurd justifications for not having ID. A similar issue was raised in *South Carolina*, where the court made clear that "statements simply denigrating the law—such as, 'I don't want to' or 'I hate this law'—need not be accepted. Nor need nonsensical statements such as, to borrow an absurd example given at trial, 'The moon is made of green cheese, so I didn't get a photo ID.' The ability of county boards to police the outermost boundaries of the expansive reasonable impediment provision in this commonsense way does not affect our evaluation of Act R54. . . . [W]e assess the 'reasonable' voter, not a voter who seeks to flout the law." 898 F. Supp. 2d at 36 n.5;

[6] Defendants also have waived this argument, since they never raised this supposed deficiency after Plaintiff requested this remedy in their motion for a preliminary injunction, Dkt. 279 at 18-19, nor did they raise this argument in their motion for a stay before the district court, which might have given the district court an opportunity to craft an order that more specifically addresses Defendants' fanciful arguments. In any event, any modification is unnecessary.

see also N.C. NAACP, 2016 WL 1650774, at *120 (in North Carolina, "reasonable impediment declaration can only be rejected if it is false, merely denigrating to the photo-ID requirement, or obviously nonsensical").

Defendants also object to the district court's decision to prohibit challenges to the reasonableness of the justification the voter provides. Dkt. 294 at 35; D.Br. at 17. Again, the district court's decision is completely consistent with rulings in other cases and the experience of other jurisdictions, which seek to ensure that the affidavit works practically as a fail-safe, and is not a vehicle for voter harassment. *See, e.g., South Carolina*, 898 F. Supp. 2d at 40 ("the process of filling out the form must not become a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters"); *see also* 52 U.S.C. § 10307(b) (prohibiting voter intimidation). In prohibiting challenges to the reasonableness of the provided justification, the district court sensibly patterned its provision after those adopted in South Carolina and North Carolina. *See South Carolina*, 898 F. Supp. 2d at 36 ("the reasonableness of the listed impediment is to be determined by the individual voter, not by a poll manager or county board."); *N.C. NAACP*, 2016 WL 1650774, at *120 (similar). Texas, too, has since followed suit, agreeing to an interim reasonable impediment affidavit for the November elections, whereby the "reasonableness of [the voter's] impediment or difficulty cannot be questioned." *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D.Tex. Aug. 3, 2016), ECF No. 877-1 at 2. The district court's decision to follow other states' examples in this area can hardly be characterized as an abuse of discretion. *See Nat'l People's Action v. Vill. of Milmette*, 914 F.2d 1008,

1011 (7th Cir. 1990) ("our review is limited to determining whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes" (quoting *Thornton v. Barnes*, 890 F.2d 1380, 1385 (7th Cir. 1989)).

Defendants also assert that implementing the district court's affidavit remedy, which was ordered on July 19, will be logistically difficult and result in voter confusion at this point in the elections calendar. D.Br. at 18. The Supreme Court, however, has made clear that, notwithstanding "time constraints . . . in light of the scheduled elections in November," modifications to voter identification requirements as of that date are permissible. *See Veasey v. Abbott*, 136 S. Ct. 1823 (2016) (inviting plaintiffs to file an application to vacate or modify the Fifth Circuit's stay of an injunction blocking Texas's voter ID law if the Court of Appeals has not acted "on or before July 20"). And here, the district court properly relied on the testimony from the municipal clerks of Wisconsin's two largest municipalities, who confirmed that the affidavit could be implemented in time for November. *See* Dkt. 294 at 37 (citing Dkt. 280-8, 280-9).

Moreover, since that time, state and local elections officials have already started implementing and publicizing the district court's preliminary remedy,[7]

[7] *See* Declarations of Neil Albrecht and Maribeth Witzel-Behl, municipal clerks of Wisconsin's two largest municipalities, dated Aug. 4, 2016, attached as Exhibits A and B; Wisconsin Elections Commission, Memorandum dated July 20, 2016 (instructing clerks on implementation of affidavit remedy), *available at* http://tinyurl.com/hpyeqjd; Laurel White, Wisconsin Public Radio, *Elections Commission Navigates New Voter ID Requirements*, July 20, 2016 (noting that "[t]he state Elections Commission is working to implement polling place changes and new voter education requirements in light of a federal judge's ruling on Wisconsin's voter ID law," and quoting Elections Commission spokesman stating that the

efforts that would be undermined by a stay. In addition, many voters have already contacted local election officials inquiring about the affidavit, suggesting that voters already expect such an option, such that granting a stay would cause rather than reduce the potential for voter confusion. *See* Albrecht Decl. (Exhibit A) ¶¶ 7-8; Witzel-Behl Decl. (Exhibit B) ¶ 7. Indeed, yesterday, the Fourth Circuit denied a stay of an injunction against North Carolina's voter ID law under similar circumstances. *See* Order, *N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, slip op. at 7 (4th Cir. Aug. 4, 2016) (denying a stay and holding that "staying the mandate now would only undermine the integrity and efficiency of the upcoming election," particularly given that "[t]he State has already notified its voters that it will not ask them to show ID" via a press release, as "[v]oters are likely to rely on that announcement."), ECF No. 156.

Furthermore, Defendants' concerns about voter confusion do not trump all other equitable considerations, such as preventing irreparable harm to voters who cannot obtain ID with reasonable effort. Indeed, the Supreme Court recently rejected claims of potential "mass confusion" and denied stays where lower courts ordered relief involving major electoral changes to prevent violations of federal rights, even where elections were imminent or already underway. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016) (mem.) (denying stay pending appeal of redistricting decision even though absentee balloting had already begun); *Wittman v.*

Commission is "experienced in dealing with these sorts of court orders and complying with them, and changing media campaigns to reflect them."), *available at* http://tinyurl.com/hqjo4k5.

Personhuballah, 136 S. Ct. 998 (2016) (mem.) (denying stay pending appeal of redistricting decision even though election cycle had begun).

Lastly, Defendants have never suggested any alternative injunctive language. "[H]aving failed to suggest alternative language either in the district court or in this court, it has waived the objection [to the injunction's breadth]." *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003); *see also United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 739 (7th Cir. 2009) (rejecting argument that injunction was excessively "vague or open-ended" in part because "Apex has no suggestions for rewriting the injunction").

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay pending appeal should be denied.

Dated: August 5, 2016

Respectfully submitted,

/s/ Sean J. Young

KARYN L. ROTKER
State Bar No. 1007719
LAURENCE J. DUPUIS
State Bar No. 1029261
American Civil Liberties Union of Wisconsin Foundation, Inc.
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
krotker@aclu-wi.org
ldupuis@aclu-wi.org

SEAN J. YOUNG (*Counsel of Record*)
DALE E. HO
SOPHIA LIN LAKIN
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
syoung@aclu.org
dale.ho@aclu.org
slakin@aclu.org

NEIL A. STEINER
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036

LAUGHLIN MCDONALD
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, Suite 1440

(212) 698-3822
neil.steiner@dechert.com

CRAIG G. FALLS
Dechert LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3373
craig.falls@dechert.com

ANGELA M. LIU
Dechert LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

Atlanta, GA 30303
(404) 523-2721
lmcdonald@aclu.org

TRISTIA BAUMAN
National Law Center on Homelessness
& Poverty
2000 M Street NW, Suite 210
Washington, DC 20036
(202) 638-2535
tbauman@nlchp.org

Attorneys for Plaintiffs-Appellees-Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, Plaintiffs-Appellees-Cross-Appellants' Response in Opposition to Defendants' Emergency Motion to Stay the Preliminary Injunction Pending Appeal was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 5, 2016

/s/ Sean J. Young

SEAN J. YOUNG (*Counsel of Record*)
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
syoung@aclu.org

Attorney for Plaintiffs-Appellees-Cross-Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.

Plaintiffs-Appellees-Cross-Appellants,

v.

Case No.16-30003
(consolidated with 16-3052)

SCOTT WALKER, et al.,

Defendants-Appellants-Cross-Appellees.

Declaration of Neil Albrecht

Neil Albrecht declares as follows:

1. I am the executive director of the Election Commission of the City of Milwaukee, the largest municipality in Wisconsin. The Election Commission administers elections in the City of Milwaukee.

2. The City of Milwaukee has a population of approximately 600,000 people with approximately 440,000 (73%) of voting age. People of color represent the city's majority racial demographic, with an estimated 40% African American and 17% Hispanic/Latino. Approximately 28% of all City of Milwaukee residents live in poverty, compared to the state's average of 13%. In Milwaukee, poverty disproportionately effects people of color, with an estimated 40% of African American residents and 35% of Hispanic/Latino residents living in poverty.

3. Approximately 330,000 city residents are registered voters. Typical turnout for a presidential election is 85% of registered voters. My office oversees 193 polling places on Election Day, and hires, trains, and assigns approximately 2,500 poll workers to administer the election at the City's polling places.

4. I am aware that the district court issued an order requiring the State of Wisconsin to implement an affidavit exception to the Voter ID law. I also am aware that the order directs the State to put the affidavit procedure into effect at the upcoming November 2016 presidential election.

5. I submitted a declaration in the district court that provided information about the numbers of Milwaukee voters lacking qualifying ID who cast provisional

ballots that ultimately were not counted, because the voters did not present a qualifying ID to the Election Commission by 4 p.m. the Friday of election week. Further, that a far greater percentage of the voters that appeared without required ID declined voting provisionally largely due to the complexity of the process. Finally, I stated that the number of potential voters who did not go to the polls due to the Voter ID requirement, or perceptions related to the Voter ID requirement, is unknown.

6. I also stated in my declaration in the district court that an affidavit procedure for voters unable to obtain a qualifying ID due to a reasonable impediment would be more effective and less time consuming for poll workers to administer than provisional ballots.

7. Since the district court issued the order requiring the affidavit procedure, my office has been contacted by several dozen members of the public, local media, and community leaders seeking information about the affidavit procedure.

8. These numerous contacts from voters, the media, and election workers seeking information about the affidavit procedure have occurred even though the State of Wisconsin has not yet initiated a public information campaign publicizing the affidavit procedure.

9. There has been significant local media coverage of the district court's order requiring the State to implement the affidavit procedure.

10. Based on the contacts to my office and the media coverage, I believe a number of voters who lack a qualifying ID now expect that an affidavit procedure will be available at the polls if they are unable to obtain a qualifying ID before Election Day.

11. My office is preparing to formally implement the affidavit procedure immediately after the August 9 Fall Primary and is awaiting more specific direction from the Wisconsin Elections Commission.

12. As of the date of this declaration, Election Day is less than 100 days away. Early in-person voting begins in less than 90 days. Based upon my personal communication with voters that were unable to vote in the April 2016 Spring Election due to the photo ID requirement, the existence of impediments to securing a photo ID remains a significant issue for City of Milwaukee voters.

13. An order for stay would disrupt the preparations already underway in the City of Milwaukee to implement the affidavit procedure at the November election.

Of utmost importance, these preparations include integrating the affidavit and accompanying procedures into the training curriculum for city's 2,500 election workers. Additionally, new procedures are being established for integrating the affidavit into requests for absentee ballots. Finally, I am aware of numerous community leaders and organizations that are already promoting awareness of the affidavit so as to assure individuals that have been unable to secure the required ID with reasonable effort that they may still vote in November.

14. Further, an order for stay would create confusion and uncertainty among the discrete class of voters whom the district court's injunction is designed to protect and who are in jeopardy of losing their right to vote.

15. The district court's injunction does not affect the vast majority of voters who already possess a qualifying voter ID. Likewise, granting a stay would neither harm nor help those voters. A stay would harm only the most vulnerable voters, i.e., those who have been unable to obtain a qualifying ID through reasonable effort.

16. Granting a stay would not decrease the workload for poll workers on Election Day. An order for stay would require poll workers to process numerous provisional ballots for voters who are unable to show a qualifying ID. The provisional ballot procedure is more time consuming than the affidavit procedure ordered by the district court. I am concerned that processing large numbers of provisional ballots for voters unable to present a qualifying ID will create delays and lines at the polls at the upcoming general election.

17. Additionally, poll workers would likely encounter confused voters at the polls, hoping to execute an affidavit, who would require individualized explanations of the unavailability of the affidavit procedure.

18. Based on my observations during the Spring election in April 2016, I have no doubt that a stay of the district court's preliminary injunction order would adversely impact many otherwise qualified, registered City of Milwaukee voters.

I declare under penalty of perjury, that the foregoing is true and correct.
Executed on this 3rd day of August 2016.

Neil Albrecht

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.

Plaintiffs-Appellees-Cross-Appellants,

v.

Case No.16-30003
(consolidated with 16-3052)

SCOTT WALKER, et al.,

Defendants-Appellants-Cross-Appellees.

Declaration of Maribeth Witzel-Behl

Maribeth Witzel-Behl declares as follows:

1. I am the municipal clerk of the City of Madison, the second-largest municipality in Wisconsin. The clerk's office, for which I am responsible, oversees and administers elections in Madison.

2. The City of Madison has approximately 189,000 registered voters. Typical turnout for a presidential election is 80% of registered voters. My office oversees 87 polling places on Election Day, and hires, trains, and assigns 3,000 poll workers to administer the election at the City's polling places.

3. I am familiar with Judge Adelman's order requiring the State of Wisconsin to provide an affidavit option to voters who are unable to obtain a legally qualifying ID with reasonable effort. I know the order requires the State to make the affidavit option available at the upcoming November 2016 presidential election.

4. I submitted a declaration in the district court stating that during the 2016 Spring election, 123 voters in the City of Madison cast a provisional ballot because they lacked a qualifying ID. Only 41 (one-third) of the ballots could be counted. The remaining voters were not able to present a qualifying ID to the City Clerk's Office by 4 p.m. the Friday of election week. An additional 40 voters who did not have a qualifying ID declined a provisional ballot at the polls for the 2016 Spring Election, and 29 voters who did not have a qualifying ID declined a provisional ballot for the 2016 Spring Primary.

5. I believe the affidavit procedure ordered by Judge Adelman could be efficiently and effectively administered at the November election for voters who have been unable to obtain qualifying ID to vote, despite reasonable efforts.

6. My office is already preparing to implement the affidavit procedure. I have reviewed Judge Adelman's order and the form of affidavit required by the order and discussed the procedure with our City Attorney's Office, my staff, and poll workers. We have already worked with the County Clerk to develop a voter outreach plan that includes the affidavit option. When our poll workers encounter voters who do not have a qualifying ID at the polls on August 9, they will offer a provisional ballot and will offer to put the voter in touch with the Dane County Voter ID Coalition for assistance in obtaining an ID. I would not be at all surprised if the poll workers also explained that an affidavit process will be available in November if the voter is not able to obtain an ID before Election Day.

7. Since Judge Adelman's order was issued on July 19, 2016, our office has received dozens of inquiries from voters seeking information about the affidavit option. I have personally provided information to voters about the affidavit option. I have spoken to the media about the affidavit option on both the radio and television. The Dane County Voter ID Coalition, which assists eligible voters who need to obtain a qualifying ID, has been talking about the availability of an affidavit at the November General Election for voters unable to obtain a qualifying ID before Election Day.

8. Leaving the order in place through the November election would protect the right to vote of voters who have been unable to obtain a qualifying ID, and would have no effect on voters who already have IDs.

9. I believe changing the rules and requirements for Voter ID again, this close to the November election, would be confusing, disruptive, and harmful, particularly for those voters who have been unable to obtain IDs.

10. A stay of Judge Adelman's order would make it more difficult for my office to prepare for the upcoming presidential election, which is already a very busy time. Our office would likely be contacted by confused voters who have heard conflicting information about the availability of the affidavit procedure. We would have to conduct additional voter outreach, including in-person outreach in community centers and similar venues, to try to ensure that voters who lack ID are not misinformed, given the conflicting court orders.

11. Likewise, if a stay is granted, it is likely that a significant number of voters who lack ID will come to the polls expecting to execute an affidavit. Poll workers will

have to advise such voters that the affidavit procedure is not available. Most poll workers would not have the time or ability to explain to voters why the affidavit option that they read about in the newspapers or saw on TV is not available.

12. Given our experience in the Spring election, if the affidavit option is not available, we can expect that hundreds of voters will need to be offered provisional ballots due to the lack of a qualifying ID. Provisional ballots are time consuming for poll workers to process and difficult for many voters to understand. Issuing a provisional ballot is a time-consuming 17-step process for our poll workers. More often than not, they are never counted, due to the voter's inability to provide a qualifying ID in time.

13. Thus, I am very concerned that a stay will cause harm by disenfranchising hundreds of qualified voters and creating delays and longer lines on Election Day.

I declare under penalty of perjury, that the foregoing is true and correct.
Executed on this 3rd day of August 2016.

Maribeth Witzel-Behl

Maribeth Witzel-Behl

Case: 16-3003 Document: 20-4 Filed: 08/05/2016 Pages: 2

State of Wisconsin
Department of Transportation

Acceptable documents for proof of name change

How to apply
Motorcycle
Documentation requirements
Renewal and changes
Lost or stolen
Suspended or revoked
Occupational license
New residents
Driver license/ID cards
Commercial license
Teen drivers
Vehicles

(en español)

If you have legally changed your name, you will need to change your name with the Social Security Administration Office before coming to a DMV customer service center. When you come to a DMV customer service center to change your name on your driver license or identification card, you will be required to show proof of your name change.

The following are acceptable documents to show proof of your name change:

- Certified marriage certificate
- Certified record of divorce
- Certified court order

- Valid unexpired U.S. Passport issued in your current name
- Note to REAL ID driver license and ID card applicants:
  - If you have a valid, unexpired U.S. Passport in your current name, you will not need to bring in additional documentation regarding past name changes.
  - If you don't have a valid, unexpired U.S. Passport in your current name, you will need to provide documents to support each change of your name from birth to the present date.

The interactive driver licensing guide is a helpful tool for those looking for information on driver licensing, commercial driver licensing or Identification (ID card) requirements. The guide will provide you with a checklist of requirements, and allow you to pre-fill any required application(s). Depending on your eligibility you may also be able to use the guide to electronically submit your application and schedule an appointment with the DMV for expedited service.

Driver Information Section
P.O. Box 7983
Madison, WI 53707-7983

Email Wisconsin DMV email service
Phone (608) 264-7447
Fax (608) 267-3812