

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

RUTHELLE FRANK, et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as
Governor of the State of Wisconsin, et al.,

Defendants.

Civil Action No. 2:11-cv-01128 (LA)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND LEAVE TO FILE SUPPLEMENTAL
PLEADING**

Plaintiffs submit this memorandum of law in support of their motion for a temporary restraining order, which seeks emergency individualized relief for new proposed Plaintiff Andrew Voegele, who will be disenfranchised in the November 2016 general election unless this Court allows his provisional ballot to be counted.

Andrew Voegele is an eligible Wisconsin voter who moved to Prescott, Wisconsin from Minnesota in August 2016 and did not learn about Wisconsin's voter ID law until he arrived at the polls today. Because he does not have an acceptable photo ID for voting, he was compelled to cast a provisional ballot, which will not be counted unless he presents acceptable photo ID by Friday. *See* Ex. 1 (Voegele Declaration).¹ He has a Minnesota driver's license, which he does not want to surrender in exchange for a Wisconsin ID, because he regularly commutes to a suburb of

¹ "Ex." Refers to the Exhibits that are attached to the Declaration of Sean J. Young, which has been filed in conjunction with this brief.

Minneapolis for work as a school teacher and he may wish to return to Minneapolis someday in the future. He also does not want to spend \$34 for a Wisconsin driver's license just to vote.

In other words, Voegele will be disenfranchised simply because Wisconsin stubbornly refuses to issue eligible Wisconsin voters a free ID for voting unless they surrender their out-of-state driver's license, *see* Wis. Stat. § 343.50(1)(b); Wis. Admin. Code § Trans 102.14(2), even though driving has nothing to do with voting. Thus, and for the reasons below, this Court should grant Plaintiffs' motion for a temporary restraining order directing Defendants to count the single provisional ballot that has been cast by Voegele—a *de minimis* burden on Defendants—and grant Plaintiffs' motion for leave to file a supplemental pleading, which adds Voegele as a new Plaintiff. *See* Ex. 2 (proposed supplemental complaint).

“Pursuant to Federal Rule of Civil Procedure 65, the standard for granting a temporary restraining order is similar to that for granting a preliminary injunction.” *H-D Mich., LLC v. Hellenic Duty Free Shops S.A.*, No. 2:11-cv-742, 2011 WL 3903278, at *1 (E.D. Wis. Sept. 6, 2011). Plaintiffs seeking a preliminary injunction must demonstrate that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Plaintiffs are likely to succeed on the merits of their claim because the State has imposed upon Voegele an undue burden on his right to vote. As the Seventh Circuit recently affirmed, “[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 . . . the state may not frustrate this right for any eligible person by making it unreasonably difficult to obtain a qualifying photo ID.” *Frank v. Walker*, ---

F.3d ----, 2016 WL 4524468, at *1 (7th Cir. Aug. 29, 2016) (citations and quotation marks omitted). As discussed above, Voegele arrived at the polling place today and was prohibited from casting a regular ballot because he lacks acceptable forms of photo ID and was forced to cast a provisional ballot. He reasonably does not want to surrender his Minnesota driver's license because he commutes daily to Minnesota from Wisconsin, he may wish to return to Minnesota someday, and a Wisconsin driver's license costs \$34.

Plaintiffs merely ask that the provisional ballots of this one individual be counted by Friday. Without this Court's intervention, the new proposed Plaintiff will lose the right to vote in this election, suffering irreparable harm. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). The balance of equities also tips in Plaintiffs' favor: "[w]hile states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Id.* (citations and quotation marks omitted). Counting this single provisional ballot is a negligible burden on elections officials. And the public interest "favors permitting as many qualified voters to vote as possible." *Id.* at 437.

This Court should also grant Plaintiffs motion to file a supplemental complaint (attached as Exhibit 2) to add these new proposed Plaintiff, pursuant to Fed. R. Civ. P. 15(d). For the reasons this Court provided in granting Plaintiffs' previous motion to file a supplemental complaint, *Frank v. Walker*, --- F. Supp. 3d ----, 2016 WL 3948068, at *2 (E.D. Wis. July 19, 2016), this Court should do the same here. "[Not allowing [the new Plaintiffs] to become parties in this case would only increase the risk of duplicative litigation." *Id.* Supplemental pleadings can may add new Plaintiffs if they were affected by recent events. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226-27 (1964).

As this Court is aware, there is a pending appeal of this Court's decision to grant a preliminary injunction that would create an affidavit option at the polls for voters unable to obtain ID with reasonable effort, and that decision has been stayed. The appeal does not preclude this Court from proceeding in this case by entering individualized relief on behalf of new parties. *See Aljabri v. Holder*, 745 F.3d 816, 820 (7th Cir. 2014) ("In [the interlocutory appellate review] situation, the district court retains jurisdiction over the case during the pendency of the appeal . . . [which] allows the district court to proceed with other aspects of the case"); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976) ("An appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case. The Supreme Court [has] explained that following the appeal of an interlocutory order the case is to proceed in the lower court as though no such appeal has been taken." (citation and quotation marks omitted)); *Ex parte Nat'l Enameling Co.*, 201 U.S. 156, 162 (1907) ("The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken").

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary restraining order and leave to file a supplemental pleading. In addition, the Court should enter a temporary restraining order as set forth in the proposed order attached to this motion.

Dated this 8th day of November 2016,

Respectfully submitted,

/s/ Sean J. Young

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