Nos. 16-3003, 16-3052

In the United States Court of Appeals for the Seventh Circuit

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees/ Cross-Appellants,

v.

SCOTT WALKER, in his official capacity as Governor of State of Wisconsin, 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**, Judge Presiding.

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INTRODUCTION AND SUMMARY

Defendants' response brief only confirms that this Court should overrule *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), vacate the decision below, and remand with instructions to enjoin the enforcement of Wisconsin's voter ID law.

As a preliminary matter, Defendants argue that this Court lacks jurisdiction over Plaintiffs' cross-appeal because the district court did not "refuse" injunctive relief that Plaintiffs asked for. The district court plainly did. Plaintiffs argued that *Frank I* should be overruled and Wisconsin's voter ID law enjoined in its entirety, A.019 n.4, but the district court did not do so, SA.36 n.12, for the obvious reason that the district court has no power to overrule circuit precedent. Because the district court did not, and could not, grant the facial relief Plaintiffs sought, this Court has jurisdiction over Plaintiffs' cross-appeal which seeks such relief.

On the merits, Defendants attempt to distinguish *Frank I* from the voting rights decisions in the Fourth, Fifth, and Sixth Circuits by pointing out immaterial differences, but they do not dispute that *all* of them have rejected *Frank I*'s atextual "equal-treatment" standard under the Voting Rights Act. *Frank I*, 768 F.3d at 754. *See* P.Br. at 52-53.[1] Nor do they meaningfully dispute that the Fifth Circuit's analysis of the factual record in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en

[1] In this brief, "Dkt." refers to the docket entries in the district court proceedings. "ECF No." refers to the docket entries in the appellate proceedings. "P.Br." refers to Plaintiffs' opening brief, ECF No. 47. "D.Reply" refers to Defendants' reply brief, ECF No. 58-1. For docket entries, where the pagination of the pdf does not match the pagination in the document, this brief refers to the pagination of the document.

banc), is diametrically opposed to *Frank I*'s analysis of a nearly-identical factual record in this case.

Next, Defendants seek to distinguish *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), by pointing out that it is an abortion case, but they ignore the Supreme Court's guidance that "[t]he abortion right is similar" to the way in which the right to vote is treated under the Constitution. *Planned Parenthood v. Casey*, 505 U.S. 833, 873-74 (1992). *Whole Woman's Health* confirms that courts should not blindly accept the myth of widespread in-person voter impersonation fraud which has been parroted by Wisconsin politicians, when there is no evidence that that kind of fraud—the only kind that voter ID would prevent or deter—is an actual problem.

As a last resort, Defendants rely on a 2005 report by the Commission on Federal Election Reform because it provides support for voter ID laws generally. Leaving aside the obvious fact that this decade-old report does not forever immunize Wisconsin's voter ID law from federal constitutional and statutory liability, Defendants ignore the fact that they have repeatedly refused to comply with the Commission's recommendations—such as creating mobile DMV offices that are actually accessible to lower-income voters who cannot easily take time off work during the day. In any event, the decade-old report's reliance on the outdated myth of widespread voter impersonation fraud should not be the dead hand that controls this Court's constitutional jurisprudence in perpetuity. So long as there is no evidence that in-person voter impersonation fraud is an actual problem, Wisconsin's

strict voter ID law remains unjustified no matter how many times Defendants tinker with the cumbersome machinery of DMV's ID-issuance procedures.

Wisconsin's voter ID law is both discriminatory and pointless. It is well past time for this Court to strike it down.

ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE DISTRICT COURT DID NOT, AND COULD NOT, ENJOIN WISCONSIN'S VOTER ID LAW

Defendants initially argue that this Court lacks jurisdiction over Plaintiffs' cross-appeal because "Plaintiffs did not request—and thus the district court did not 'refus[e]'—any facial injunctive relief." D.Reply at 26 (quoting 28 U.S.C. § 1292(a)(1)). This is flatly wrong. In asking for a reasonable impediment affidavit option, Plaintiffs' opening brief expressly stated:

> To be clear, Plaintiffs do not suggest that this 'reasonable impediment' affidavit cures all of the legal defects of Wisconsin's voter ID law. Plaintiffs maintain that the law should be invalidated in its entirety because it is unconstitutional and violates Section 2 of the Voting Rights Act, as this Court initially found. Dkt. #195. Plaintiffs preserve their argument that *Frank I* was wrongly decided for purposes of appeal.

A.019 n.4.[2] The district court repeatedly acknowledged Plaintiffs' request for facial invalidation; acknowledged that its entry of a reasonable impediment affidavit option would not satisfy that request; and acknowledged that it was without power to grant facial relief. *See* SA.05 (acknowledging that reasonable impediment

[2] Indeed, Plaintiffs have made their position clear at every stage of litigation following *Frank I* that the decision should be overturned. *See, e.g.*, Dkt. 223 at 17 n.6; Dkt. 237 at 14 n.12; Pls.-Appellants' Br., *Frank v. Walker*, No. 15-3582 (Dec. 28, 2015), ECF No. 15 at 26-27 & n.9.

affidavit would "not be effectual relief for" Plaintiffs Shirley Brown and DeWayne Smith, who "intend to argue on appeal that *Frank I* was wrongly decided and that Act 23 should be enjoined in its entirety"); SA.36 n.12 ("In describing the affidavit option as a 'safety net,' I do not mean to imply that it is preferable to an injunction invalidating Act 23 in its entirety. I continue to believe, for the reasons expressed in my original opinion that enjoining the photo ID requirement in its entirety is the proper remedy.").

"Only a person injured by the terms of [an injunction] is entitled to appeal." *Grinnell Mut. Reinsurance Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995). Here, Plaintiffs are injured by the district court's preliminary injunction because it did not enjoin Wisconsin's voter ID law—indeed, it *could not* do so because the district court could not overturn circuit precedent. Thus, this Court has jurisdiction over Plaintiffs' cross-appeal, which asks this Court to overrule *Frank I*, vacate the injunction below, and remand with instructions to enjoin Wisconsin's voter ID law.

II. *FRANK I* CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS AND THE SUPREME COURT

As explained in Plaintiffs' opening brief, *Frank I* should be overruled because it is now an outlier among the circuits, and because its reasoning has been undermined by the Supreme Court in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). P.Br. at 52-57. Nothing in Defendants' reply brief alters this conclusion.

A. The Fourth, Fifth, and Sixth Circuits Have Adopted a Section 2 Legal Standard that Conflicts with *Frank I*

As a preliminary matter, Defendants do not dispute that the Fourth, Fifth, and Sixth Circuits have all embraced the same legal standard for vote denial claims[3] under Section 2 of the Voting Rights Act—one that directly conflicts with the legal standard that *Frank I* adopted. Whereas *Frank I* held that Section 2 merely imposes an "equal-treatment" requirement, 768 F.3d at 754, suggesting that only facially discriminatory voting restrictions are prohibited, the three other Circuits have embraced a two-part test that requires: 1) a showing of disparate impact; and 2) that the impact is caused by or linked to social and historical conditions that have contributed to discrimination against a protected class. For example, the Fifth Circuit expressly stated that it was "adopt[ing] the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims," pointedly leaving out the Seventh Circuit when describing which side it was taking. *See Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)). Indeed, Defendants do not dispute that a majority of Fifth Circuit judges, including the

[3] "Vote denial" claims refer to claims that challenge restrictions that make it harder to vote. Other Section 2 cases deal with "vote dilution" claims, which refer to claims that challenge structural devices, such as at-large elections and redistricting plans, which can be used to dilute the effect of minority votes.

dissenters, expressly recognized the obvious dissonance between *Frank I* and the *Veasey* majority opinion. P.Br. at 53.

Defendants attempt to reconcile *Frank I* with these other Circuits, but none of their arguments are availing.

First, Defendants argue that there is no conflict with the Fourth Circuit because it invalidated North Carolina's voter ID law due to racially discriminatory intent. D.Reply at 27 (citing *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)). This is a straw man. Plaintiffs' argument is not that *Frank I* conflicts with the Fourth Circuit's most recent decision from July 2016—which was decided on discriminatory *intent* grounds[4]—but that it directly conflicts with the Fourth Circuit's 2014 preliminary injunction decision, where the court found a likely violation of Section 2, *see League of Women Voters of N.C.*, 769 F.3d at 240, employing the two-part framework for Section 2 vote denial liability that *Frank I* declined to adopt.

Second, Defendants say that the Sixth Circuit decision is distinguishable because it did not rule on a voter ID law, D.Reply at 27-28, but it is the legal standard it embraced—the two-part Section 2 standard—not its application to a particular kind of election law, that conflicts with *Frank I*. *See Ohio NAACP*,

[4] The Fourth Circuit's recent decision did, however, contain language concerning the proper legal standard under Section 2 that does conflict with *Frank I*. *Contrast N.C. NAACP*, 831 F.3d at 232 ("The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past. No law implicated here—neither the Fourteenth Amendment nor § 2—requires such an onerous showing."); *with Frank I*, 768 F.3d at 747 (district court should have measured voter ID's impact on turnout).

768 F.3d at 554. And the more recent Sixth Circuit decision cited by Defendants, *Ne. Ohio Coalition for the Homeless v. Husted*, --- F.3d ---, 2016 WL 4761326 (6th Cir. Sept. 13, 2016), only proves Plaintiffs' point: it officially embraced the two-part test set forth in the vacated *Ohio NAACP* decision and recognized that "[t]wo circuits have since adopted the [*Ohio NAACP*] test," *id.* at *8 (citing *League of Women Voters of N.C.* and *Veasey*), conspicuously leaving out the Seventh Circuit in its description.

Third, Defendants attempt to distinguish the Fifth Circuit's voter ID decision in *Veasey* on various immaterial grounds. But the bottom line is that *Veasey* adopted a Section 2 legal standard different from *Frank I*; *applied* that standard to a set of facts nearly identical to the facts in this case; and then concluded, contrary to *Frank I*, that such facts established a violation of Section 2 of the Voting Rights Act. Defendants do not even attempt to refute Plaintiffs' point-by-point recitation of all the critical aspects in which *Veasey* applied the law differently than *Frank I* to a similar set of facts. *See* P.Br. at 55-56 (listing differences, such as *Veasey*'s conclusion that disparate rates of ID possession helped demonstrate discriminatory abridgment of the right to vote, while *Frank I* dismissed similar ID possession figures as irrelevant).

Instead, Defendants argue that unlike *Veasey*, "[t]his appeal does not involve the [Voting Rights Act]," D.Reply at 28, but this is wrong. As noted above, Plaintiffs expressly stated below that "the law should be invalidated in its entirety because it is unconstitutional and *violates Section 2 of the Voting Rights Act*, as this Court

initially found." A.019 n.4 (citing Dkt. 195) (emphasis added). This argument was expressly preserved for purposes of appeal, and Plaintiffs now ask this Court to overturn *Frank I* in part because, under the Section 2 legal standard adopted by other Circuits, the factual record in this case—a record nearly identical to the one in *Veasey*—compels affirmance of the district court's original finding that Wisconsin's voter ID law violated the Voting Rights Act.

Defendants further argue that unlike in *Veasey*, "the district court in this case did not find historical and contemporary examples of *state-sponsored* discrimination." D.Reply at 28. But no court other than this Court in *Frank I*—not even *Veasey* itself—held that a showing of state-sponsored discrimination is *required* to prove a Section 2 violation, which is unsurprising because the whole purpose of Section 2's "effects" test was to eliminate intent as an element of liability. *See Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991) ("In 1982, Congress amended § 2 of the Voting Rights Act to make clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden *even though the absence of proof of discriminatory intent protects them from constitutional challenge*.") (second emphasis added); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing *discriminatory effect alone . . .* ") (emphasis added); *see generally Ohio NAACP*, 768 F.3d at 552-60 (finding likely Section 2 violation without assessing whether socioeconomic disparities were caused by state-sponsored discrimination); *League of Women Voters of N.C.*, 769 F.3d at 245-47 (same).

Moreover, as Plaintiffs stated in their opening brief, *see* P.Br. at 54, and as Defendants do not dispute, Defendants never argued in the court below that state-sponsored discrimination was necessary to establish a violation of Section 2 of the Voting Rights Act. In fact, Plaintiffs produced evidence of state-sponsored discrimination at trial, which could have formed an ample basis for a finding of state-sponsored intentional discrimination in Wisconsin. *See, e.g.,* Dkt. 194 at 40-43. But because no court has ever held, and Defendants did not argue below, that state-sponsored discrimination is a prerequisite to Section 2 liability, it was not necessary for the district court to make a specific finding of whether Wisconsin's undisputed, extreme racial disparities in housing, income, employment, education, and incarceration, were attributable to private- or state-sponsored discrimination.[5]

Lastly, Defendants argue that *Frank I*'s discussion of "legislative facts" is consistent with the Supreme Court's description of legislative facts in *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073 (2012). D.Reply at 28-29. This is a red herring. The question is whether a State's purported interest in preventing in-person voter impersonation fraud is a "legislative fact" to which courts must categorically defer, regardless of how little evidence there is of such fraud. *Frank I* answered yes, holding that the mere assertion of voter impersonation fraud must be accepted by courts when assessing challenges to voter ID laws, whether or not there was any evidence to support it. *See Frank I*, 768 F.3d at 750. *Veasey,* in contrast,

[5] To the extent that this Court affirms that such a finding of state-sponsored discrimination is necessary for Section 2 liability, the district court should be permitted in the first instance to make the factual determination as to whether such state-sponsored discrimination is in fact present here.

answered no, holding that "the articulation of a legitimate interest [in preventing voter fraud] is not a magic incantation a state can utter to avoid [liability.] *Even under the least searching standard of review* we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted." *Veasey*, 830 F.3d at 262 (emphasis added). There is a Circuit conflict on this issue, and it warrants this Court's correction.[6]

B. *Frank I* Has Been Undermined by *Whole Woman's Health*

As discussed in Plaintiffs' opening brief, *Frank I* has also been undermined by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which upheld the district court's reliance on record evidence to evaluate the extent to which a State's interests are actually furthered by a law that burdens important constitutional rights, rather than relying on purportedly unassailable legislative facts. Defendants argue that "the law regarding legislative facts remains the same as it was when *Crawford* and *Frank I* were decided." D.Reply at 29. But, as noted above, the issue is whether a State's purported interest in mythical widespread voter fraud is a "legislative fact" that must be accorded strong weight regardless of what the evidence says. *Frank I* said yes. But under the reasoning of *Whole Woman's Health*,

[6] Deepening this split, the Ninth Circuit Court of Appeals, sitting *en banc*, recently dismissed Arizona's purported interest in preventing voter fraud in a case challenging the criminalization of third-party collection and delivery of early voting ballots. Declining to give much weight to Arizona's purported interests, the Court found that Arizona "could not identify a single example of voter fraud in Arizona caused by ballot collection, nor is there one to be found anywhere in the voluminous record before us." *Feldman v. Ariz. Sec'y of State*, --- F.3d ---, 2016 WL 6635921, at *3 n.1 (9th Cir. Nov. 4, 2016) (en banc). The Supreme Court, without noted dissent, subsequently stayed this decision, presumably because it was entered too close to the November 8 election. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Ariz. Sec'y of State v. Feldman*, --- S. Ct. ----, 2016 WL 6569841 (Nov. 5, 2016).

the answer is no: though Defendants try to justify this voter ID law by invoking unsubstantiated fears about voter fraud, the "Court retains an independent constitutional duty to review [a legislature's] factual findings where constitutional rights are at stake." *Whole Woman's Health*, 136 S. Ct. at 2310 (citation omitted). And where, as here, "the relevant statute does not [even] set forth any legislative findings," *id.*,[7] there is even less judicial deference, if any, to the purported interests given by a State in its legal briefs.

In a final gambit, Defendants argue that *Whole Woman's Health* is inapplicable because it is an abortion case. But that is not the point: the right to vote, like the right to an abortion, is constitutionally protected, and when "constitutional rights are at stake," the Court's "independent constitutional duty" is to "review [a legislature's] factual findings." *Whole Woman's Health*, 136 S. Ct. at 2310 (citation omitted). Furthermore, Defendants ignore the fact that in the seminal abortion case of *Planned Parenthood v. Casey*, 505 U.S. 833, 873-74 (1992), the Supreme Court, citing its voting rights decision in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), articulated the "undue burden" standard after expressly stating that the "[t]he abortion right is similar" to the right to vote in the way it is treated under the Constitution. Thus, *Whole Woman's Health* confirms that courts should not blindly accept unsubstantiated governmental interests when important constitutional rights—such as the right to abortion or the right to vote—are at

[7] *See* 2011 Wisconsin Act 23, docs.legis.wisconsin.gov/2011/related/acts/23.pdf.

stake. Here, there is simply no evidence to support Defendants' myth of widespread voter impersonation fraud, and the Court need not defer to it.

C. Defendants' Remaining Arguments Are Unavailing

Defendants argue that *Frank I* should not be overruled because, they claim, Wisconsin's voter ID law allegedly "follow[s] the recommendations of the bipartisan 'Commission on Federal Election Reform' chaired by former President Jimmy Carter and former Secretary of State James A. Baker III," D.Reply at 30, which was issued more than a decade ago in 2005. But that report urged implementation of voter ID in a way that "increases, not impedes, [voter] participation," Rep. of the Commission on Fed. Election Reform, *Building Confidence in U.S. Elections* (Sep. 2005), http://tinyurl.com/zs7hye6 at iii, 34, something that is not the case here. Further, Wisconsin's voter ID law does not actually follow the report's recommendation that states, among other things, "play an affirmative role in reaching out to non-drivers by providing *more offices*, *including mobile ones*, to register voters and provide photo IDs free of charge." *Id.* at iv (emphasis added). In any event, for the reasons discussed above, this Court should not cling to the decade-old report's reliance on the outdated and unsubstantiated myth of widespread voter impersonation fraud.[8]

[8] *Cf. also Feldman*, 2016 WL 6635921, at *3 n.1 (declining to defer to Carter-Baker report because it "was issued before the Supreme Court invalidated the § 5 preclearance requirement; since that time, the voting rights landscape has changed considerably, requiring courts to exercise more vigilance as the primary bulwarks against voter suppression").

Defendants defend DMV's bureaucratic gauntlet by pointing out that the DMV requires five different proofs (name and date of birth, identity, residency, citizenship, and a social security number) before they will issue ID, which helps the DMV "determine[]" whether the applicant "is an eligible elector (in which case an ID card is issued)." D.Reply at 31. But it is not the job of the DMV, a bureaucracy designed to regulate driving, to be the gatekeeper for our democracy by determining who is and is not eligible to vote. Contrary to Defendants' brief, DMV's website explicitly asserts that "DMV does not have information regarding voter eligibility, poll locations, voter registration information or other election information. Please contact your local election officials or county clerk for election information. The Wisconsin Elections Commission is another useful source of information."[9] And the fact that some non-DMV forms of photo identification are allowed (e.g., a United States passport), proves that DMV does not determine voter eligibility.

Nor *should* the DMV be the gatekeeper of our democracy, given its haphazard and constantly changing ID-issuance procedures. Though Defendants deride as "risible" Plaintiffs' comparison of Wisconsin's voter ID law to a literacy test, D.Reply at 30, going through the cumbersome process for obtaining an ID has not been a laughing matter for vulnerable, lower-income voters over the last five years. Like literacy tests, the process for obtaining ID has been incredibly confusing and inconsistently applied. It has involved: demands for multiple kinds of

[9] *See* Wis. DMV Official Gov't Site, *Wis. ID card for voting purposes – petition process*, *available at*: http://wisconsindot.gov/Pages/dmv/license-drvs/how-to-apply/petition-process.aspx (last visited Nov. 8, 2016).

documentation (as Defendants appear to concede, with the concession that five proofs are necessary to obtain ID), multiple layers of emergency rules, secret *ad hoc* exceptions that are triggered when an applicant gets the attention of a legislator (or the media), *ad hoc* interpretations that deviate from those rules, unguided administrative discretion over which secondary documents enable a voter to obtain permanent ID, conflicting descriptions of the ID process in Defendants' own briefs, changing websites, P.Br. at 5-16, and now Defendants' recent use of "transitional administrative discretion" (whatever that means) to bend the rules, D.Reply at 23. Even the DMV has been unable to consistently implement or even understand its own procedures. P.Br. at 21-22. Forcing voters to understand the DMV's complicated and constantly-changing rules before they can exercise the fundamental right to vote is unconstitutional, especially when those rules serve no real purpose. *See Louisiana v. United States*, 380 U.S. 145, 153 (1965) (inconsistent application of literacy test renders it unconstitutional).

At the end of the day, the State does not have to make it *impossible* for someone to vote in order to violate the Constitution or the Voting Rights Act, which prohibits both the "denial" and the "abridgement" of the right to vote, including laws that result "in [racial minorities] hav[ing] *less opportunity* than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(a)-(b) (emphasis added). The State could offer reading lessons to the illiterate so they can pass a literacy test, or no-interest loans to a low-income people so they can afford a poll tax. But neither would make these voting restrictions any more legitimate. The

hoops that Plaintiffs and the unnamed members of the class have had to jump through under Defendants' constantly-changing ID-issuance regime over the last five years are unjustified, *see* P.Br. at 37-44, and they continue to be unjustified even as Defendants employ "transitional administrative discretion" at the eleventh hour in the hopes of salvaging Wisconsin's voter ID law. So long as there is no evidence that in-person voter impersonation fraud is an actual problem, Defendants' tinkering with DMV's ID-issuance procedures amount to "nothing more than rearranging deck chairs on the Titanic." *Veluchamy v. F.D.I.C.*, 706 F.3d 810, 813-14 (7th Cir. 2013). Stripped of any justifiable purpose, Wisconsin's voter ID law is nothing more than raw voter suppression, and should be enjoined in its entirety.

For the above reasons, this Court should overrule *Frank I*, vacate the decision below, and remand with instructions to enjoin Wisconsin's voter ID law. Such an injunction would still permit Defendants to seek modification should they believe that developments have made it no longer appropriate. *See* Fed. R. Civ. P. 60(b). Though given Wisconsin's utterly weak basis for requiring voters to provide photo identification at the polls, it is doubtful that Defendants would succeed.

III. WHETHER THE DISTRICT COURT REASONABLY EXERCISED ITS DISCRETION IS NOT DEPENDENT ON LATER DEVELOPMENTS

Federal Rule of Appellate Procedure 28.1(c)(4) provides that Plaintiffs-Appellees' reply brief "must be limited to issues presented by the cross-appeal." However, pursuant to this Court's October 12, 2016 Order denying Defendants' motion to strike, Plaintiffs provide the following statement addressing "which events following the close of the record in the district court [i.e., on July 19, 2016] is

subject to judicial notice, and what role (if any) events not so subject may properly play in the decision of the appeal." ECF No. 56.

The central issue in Defendants' appeal is whether the district court reasonably exercised its discretion in granting a preliminary injunction based on the record that was before it. In analyzing this issue, this Court should not consider facts, even those that are the subject of judicial notice, that occurred after July 19, 2016, when the district court issued its decision. *See, e.g.*, *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."). Thus, this Court should not consider the factual assertion that Defendants made for the first time on August 22, that "anyone" who is able to go to the DMV with whatever documents they have will get ID that is valid for voting. ECF No. 38 at 1.[10]

If this Court believes that developments after July 19, 2016 should be considered, it should not accept Defendants' recent use of "transitional administrative discretion" to ignore their own emergency rules, apparently by issuing temporary ID receipts to virtually anyone (or at least virtually anyone whose case is publicized in the media) while this appeal is pending. D.Reply at 23; *see e.g.*, Dkt. 280-57 at 1, 2 (high-level DMV officials expressing intent to "use the

[10] With respect to Plaintiffs' cross-appeal, Plaintiffs have pointed to government websites that help illustrate the pointlessness of Wisconsin's voter ID law. *See* P.Br. at 59 (citing SA.65, SA.77-78). These websites are the proper subject of judicial notice and may be relied upon by this Court when considering Plaintiffs' cross-appeal, though this Court need not do so in order to overrule *Frank I*.

grey areas of the law" to get ID to Ruthelle Frank because she "is the primary plaintiff in the Voter ID lawsuit"). Defendants' brief all but confirms that their recent use of "transitional administrative discretion" is nothing more than a short-term attempt to temporarily evade court injunctions for the November 2016 elections, without providing permanent ID for voters. *Cf. Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 831 (7th Cir. 2014) ("inconsistent and shifting positions" do not give courts "much confidence" that *ad hoc* policies generated during litigation reflect anything permanent).

First, Defendants assert that voters unable to satisfy the DMV's "five proofs" requirement will only get—"at minimum"—a temporary ID receipt which will expire as soon as the DMV's "verification process" ends. D.Reply at 31. But according to the very declaration Defendants cite, the IDPP "verification process" is only designed to verify "name, date of birth, and U.S. citizenship," *not* identity, residence, or social security number (i.e., the other three proofs). A.126. In other words, the DMV is only authorized to track down birth documents. There is thus *no verification process* for a voter who lacks these latter proofs, and so by the terms of the language in Defendants' own brief, temporary ID receipts for these voters will expire *immediately*, or at least never be renewed.

Second, Defendants' use of "transitional administrative discretion" still does not solve the problem of voters who lack birth documentation, and who are unable to provide the DMV with any more information that can help their "verification process," resulting in permanent denial of ID. They cannot meaningfully respond to

DMV's inquiries if they have already provided all the information that they have. *See* P.Br. 18-19.

Third, Defendants' use of "transitional administrative discretion" does not alleviate the significant barriers for voters who cannot reasonably reach the DMV. *See* P.Br. at 19-21. Defendants do not, for instance, suggest that they will create mobile DMV offices open on evenings and weekends, consistent with the recommendations of the bipartisan report by the Commission on Federal Election Reform to which Defendants cling so tightly.[11]

CONCLUSION

For the above reasons, pursuant to Plaintiffs' cross-appeal, this Court should vacate the decision below and remand with instructions to enjoin the enforcement of Wisconsin's voter ID law. Otherwise, the district court's injunction should be affirmed.

[11] Without a shred of evidence, Defendants accuse Plaintiffs' counsel of driving Switlick to the DMV only after hearing about the computer outages. D.Reply at 24. This is false. Plaintiffs' counsel did not learn about the computer outage until after Switlick arrived at the DMV, and it is DMV's own incompetence that resulted in Switlick being unable to obtain ID after *three* trips to the DMV.

Defendants also accuse Plaintiffs' counsel of "instructing Switlick not to cooperate with DMV, lest he be sent the free ID," *id.*, but Plaintiffs did nothing more than remind Defendants of their ethical obligation not to contact their client directly without going through counsel. After reminding Defendants of their ethical obligations, DMV, tellingly, never tried to contact Switlick through his counsel.

Dated: November 14, 2016

Respectfully submitted,

/s/ Sean J. Young

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,026 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: November 14, 2016

s/ Sean J. Young

Sean J. Young

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, the Reply Brief of Plaintiffs-Appellees/Cross-Appellants 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 the participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

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