

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

**DEFENDANTS-APPELLANTS-CROSS-APPELLEES' REPLY IN SUPPORT
OF THEIR EMERGENCY MOTION TO STRIKE PLAINTIFFS-APPELLEES-
CROSS-APPELLANTS' BRIEF AND SHORT APPENDIX**

In their opposition, Plaintiffs do not even attempt to argue that their Brief and Short Appendix comply with Federal Rule of Appellate Procedure 10(a) and Federal Rule of Appellate Procedure 30(a)(1) because, among other legal defects, those documents seek to introduce *new declarations* for the first time on appeal. Plaintiffs make four arguments to defend their refusal to comply with this Court's rules, all of which are entirely meritless.

First, Plaintiffs repeat their false assertion—made for the first time in their letter to this Court on September 1, 2016—that Defendants have “reli[ed] on a new DMV policy announced for the first time on August 22, 2016.” Opp. 2. This is absolutely false. As Defendants explained in their responsive letter—filed the same day that Plaintiffs first leveled this erroneous charge—Defendants, the Western District of Wisconsin, this Court sitting *en banc*, and even Plaintiffs' own lead

counsel have all explained that there are certain requirements to “initiate the IDPP,” including submitting proof of identity and residency. *See* No. 16-3003, Dkt. 46. And while the DMV has since exercised its administrative discretion to allow initiation of the IDPP without these proofs, *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324, Doc. 271:33; Doc. 273 ¶ 109 and Ex. N, Defendants did *not* rely upon this exercise of discretion in their briefings in this appeal and do not intend to do so. To be absolutely clear and to put Plaintiffs’ minds at ease, Defendants are seeking vacatur of the preliminary injunction on the assumption that an applicant must submit proof of identity and residency to initiate the IDPP. Opening Br. 3, 22–24.

Plaintiffs’ reliance on a new declaration by Molly McGrath is particularly inappropriate. The allegations in that declaration are presently being litigated before the Western District of Wisconsin in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324. On October 7, 2016, Defendants submitted a 40-page report to the Western District, with 51 pages in declarations (and dozens more in exhibits), focused largely upon these same allegations. *See id.* Docs. 271–281. Specifically, that filing discusses the extensive training that DMV has engaged in to make sure its staff provide accurate information, and explains that DMV personnel at 31 different DMV locations gave accurate explanations about the IDPP to undercover state troopers posing as customers. *See id.* Docs. 275–277. A hearing on

these factual issues is scheduled before the Western District tomorrow, Wednesday, October 12, 2016.*

Second, Plaintiffs claim that they should be permitted to submit extra-record evidence to “respond to Defendants’ reliance on an August 2016 change to the proof of identity requirement.” Opp. 4. But Defendants relied *exclusively* upon the plain text of the administrative rule, the same rule that was before the district court. That rule provides that proof of identity includes, *inter alia*, any “supporting document identifying the person by name and bearing the person’s signature, a reproduction of the person’s signature, or a photograph of the person.” Wis. Admin. Code § Trans 102.15(4). That text unambiguously covers many different documents, including Medicare and other public assistance cards. Opening Br. 21–24. It is this binding rule—not *DMV’s website*—that Defendants relied upon to make this argument. *Id.* Defendants’ brief citation to DMV’s judicially noticeable public website—in a single footnote in their Opening Brief—was made *only* to inform this Court of the background point that DMV will not accept an identity document if it “has reason to suspect its authenticity.” Opening Br. 26 n.12.

* In an amicus brief filed on Friday, October 7, 2016, amici curiae League of Women Voters of Wisconsin, the City of Madison, and Milwaukee Mayor Tom Barrett detailed the same allegations that McGrath made in Plaintiffs’ improperly submitted declaration. No. 16-3003, Dkt. 51. This morning, this Court entered an instant order granting amici’s motion to file that brief. No. 16-3003, Dkt. 52. While Defendants do not intend to formally seek reconsideration of that order, if this Court were to grant the present Motion to Strike Plaintiffs’ Brief and Short Appendix—including McGrath’s declaration—Defendants would properly understand such an order to indicate that they need not engage in collateral litigation over her factual allegations before this Court in this appeal and will, instead, confine those arguments to the Western District proceedings.

Third, Plaintiffs argue that some documents in the Short Appendix “are the proper subject of judicial notice,” Opp. 6, a point that Defendants made in their Motion to Strike. Strike Motion 2 n.*. Defendants have no problem with Plaintiffs relying upon judicially noticeable materials like current government websites, but those materials—by rule—do not belong in the Short Appendix. *Id.*

Finally, Plaintiffs argue that this Court should “prohibit Defendants from relying on an August 30, 2016 change to DMV’s mailing policy.” Opp. 6. Defendants only mentioned this policy in a footnote in the fact section of their Opening Brief and then cited a judicially noticeable governmental website in support. Opening Br. 7 n.5. Defendants did not base any arguments on this footnote. It also bears noting that DMV changed the policy not, as Plaintiffs claim, in response to anything the district court held, Opp. 7, but immediately after some members of the Wisconsin Elections Commission voiced concerns about the speed of regular mail close to election day. *See* Patrick Marley, Milwaukee Journal-Sentinel, “Some Could Have Trouble Getting ID Near Election,” <http://on.jsonl.in/2bOUkUg> (Aug. 31, 2016) (“Wisconsin election officials raised concerns Tuesday [Aug. 30] that some voters won’t be able to get IDs in time to vote in the Nov. 8 presidential election” (emphasis added)); Wis. Dep’t of Trans., “People Who Need An ID To Vote Are Encouraged To Get It Now,” <http://wisconsindot.gov/Pages/about-wisdot/newsroom/news-rel/699-co-dmv.aspx> (Aug. 30, 2016) (“For those who apply during an election week, DMV will issue a photo ID receipt by overnight mail on the day that a person makes an application.”).

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

Dated: October 11, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2016, I filed the foregoing Reply with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 11, 2016

s/Misha Tseytlin
MISHA TSEYTLIN