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June 27, 2016

VIA Fed Ex

The Honorable Lynn Adelman
362 United States District Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: *Ruthelle Frank, et al. v. Scott Walker, et al.*, Case No. 11-cv-1128

Dear Judge Adelman,

We represent Plaintiffs in the above-captioned case, and we write to provide supplemental legal authority in support of Plaintiffs' Motion for a Preliminary Injunction, Leave to File Supplemental Pleading, and Class Certification, Dkt. #278.

Today, the United States Supreme Court issued a decision, *Whole Woman's Health v. Hellerstedt*, No. 15-274, slip op. (U.S. June 27, 2016),[1] which facially invalidated a pair of abortion restrictions enacted by Texas for the purported purpose of protecting women's health, because they imposed an undue burden unjustified by the evidence. This decision provides further support for Plaintiffs' argument that *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), was wrongly decided, which is an argument that Plaintiffs have preserved for purposes of appeal. *See* Dkt. #279 at 6 n.4.

First, the Supreme Court rejected the proposition that a district court cannot rely on expert testimony to challenge the extent to which a State's interests are actually furthered by a law that burdens important constitutional rights. Rather than automatically accepting, as legislative fact, Texas's *ipse dixit* that the abortion restrictions significantly advanced its legitimate interest in protecting women's health, the Supreme Court surveyed the factual record presented before the district court in extensive detail, and agree with the district court's decision that Texas's claim was unsupported by the evidence and that the new laws were unnecessary given preexisting safeguards to protect women's health. *See Whole Woman's Health*, slip op. at 19-39. The Seventh Circuit, on the other hand, automatically gave conclusive weight to

[1] The decision can be accessed at: http://www.supremecourt.gov/opinions/15pdf/15-274_p8k0.pdf. It is also available on Westlaw at 2016 WL 3461560.

Wisconsin's claim that its voter ID law furthered its legitimate interests. *Frank I*, 768 F.3d at 750-51. The Seventh Circuit should have accepted this Court's initial findings that Wisconsin failed to demonstrate that voter ID actually advanced its otherwise legitimate interests in preventing voter fraud given preexisting safeguards against such fraud.

Second, on the burdens side of the equation, the Supreme Court today rejected the kind of demanding standard embraced by *Frank I*, which requires a showing that voter ID imposes substantial obstacles on a significant fraction of *all eligible voters* in order for the law to be invalidated. *See Frank I*, 768 F.3d at 748-49. Specifically, the Supreme Court held that an abortion restriction must be facially invalidated if a "large fraction" of "women for whom the provision is an actual rather than an irrelevant restriction" face a "substantial obstacle." *Whole Woman's Health*, slip op. at 39 (citation and alterations omitted). The plaintiffs did not need to demonstrate that a "large fraction" of "all women," "pregnant women," or even "the class of women seeking abortions" would be substantially burdened. *Id.* (citation and alterations omitted). Similarly, here, the comparison should be whether *many voters without ID*, particularly lower-income voters, face substantial obstacles to obtaining ID, something this Court previously found was in fact the case. *See* Dkt. #195 at 26-37; *see, e.g.*, *Whole Woman's Health*, slip op. at 6 (the laws "erect a particularly high barrier for poor, rural, or disadvantaged women"). Furthermore, the Supreme Court dismissed as irrelevant the principal dissent's argument that the law should be facially upheld because "95% of women of reproductive age" would do just fine. *See Whole Woman's Health*, slip op. at 35-36 (Alito, J., dissenting). Similarly here, *Frank I*'s emphasis that 91% of registered voters have ID, and its belief (not supported by the record) that 95.5% of eligible voters would not face substantial obstacles obtaining ID, *Frank I*, 768 F.3d at 749,[2] is completely irrelevant.

In sum, Act 23's voter ID provisions "vastly increase the obstacles confronting" lower-income Wisconsin voters without ID "without providing any benefit" to the State's interests "capable of withstanding any meaningful scrutiny." *Whole Woman's Health*, slip op. at 37. As a result, "[t]he provisions are unconstitutional on their face . . . ." *Id.*

Third, Plaintiffs draw this Court's attention to the discussion of the scope of relief in *Whole Woman's Health*, slip op. at 15, which held that facial relief may be appropriate in response to an as-applied challenge. Plaintiffs' request for a reasonable impediment affidavit should be granted for all the reasons set forth in our brief, but we simply note that this request is as well-supported as even the *facial* relief entered in *Whole Woman's Health*, given the facts and evidence showing continuing problems with the law after it went into effect.

Lastly, another recent Supreme Court decision, *Fisher v. University of Texas at Austin*, No. 14-981, slip op. (U.S. June 23, 2016),[3] further demonstrates that *Frank I* was wrongly decided with respect to the Voting Rights Act claim. There, the Supreme Court found that the University of Texas's affirmative action program had a "meaningful" impact on increasing racial diversity because Hispanic and African-American enrollment increased by "54 percent and 94

[2] *Frank I* believed that "more than half" of the 9% of eligible voters without photo ID "could get one without hassle," which leaves 4.5% of eligible voters who face significant obstacles under *Frank I*'s framework.

[3] The decision can be accessed at: http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf. It is also available on Westlaw at 2016 WL 3434399.

percent, respectively"—an increase from 11% to 16.9% for Hispanics and from 3.5% to 6.8% for African-Americans. *Id.*, slip op. at 15. In other words, the Supreme Court divided the percentages to measure the relevant racial impact. Yet *Frank I* expressly rejected this method of measuring racial impact in conducting its Section 2 analysis. *See Frank I*, 768 F.3d at 752 n.3 ("we do not divide percentages"). This Court's initial findings, that "African-American voters in Wisconsin were 1.7 times as likely as white voters to lack [ID] and that Latino voters in Wisconsin were 2.6 times as likely as white voters to lack [ID]," Dkt. #195 at 54, together with other evidence, establish that Wisconsin's voter ID law violates Section 2 of the Voting Rights Act.

For the reasons outlined above and in Plaintiffs' brief, Dkt. #279, Plaintiffs respectfully request that a reasonable impediment affidavit be preliminarily implemented while this case is pending, and while any further consideration of these issues by the Seventh Circuit and/or the Supreme Court proceeds.

Respectfully,

/s/ Sean J. Young

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