

Nos. 16-3083, 16-3091

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs-Appellees,  
Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants,  
Cross-Appellees.

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On Appeal From The United States District Court  
For The Western District of Wisconsin, Case No. 3:15-cv-324  
The Honorable Judge James D. Peterson, Presiding

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**MOTION TO STRIKE DEFENDANTS-APPELLANTS' FEBRUARY 7, 2017  
LETTER AND EXHIBITS FILED PURSUANT TO FED. R. APP. P. 28(j)**

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On February 7, 2017, Defendants-Appellants (the “State”) filed a letter to the Clerk of this Court (“Letter”)—purportedly under Federal Rule of Appellate Procedure 28(j)—that encloses two fact declarations and over 50 pages of new evidence regarding Wisconsin’s ID Petition Process (“IDPP”). *See* Doc. 79. The State’s filing and its enclosures are improper under Rule 28(j) and should be stricken in their entirety.

Rule 28(j) allows a party to file a letter alerting the court if “significant *authorities* come to [the] party’s attention after the party’s brief has been filed.” Fed. R. App. P. 28(j) (emphasis added); *see also* 7th Cir. R. 28(j). It is blackletter law in this Circuit and others that, while Rule 28(j) is properly used to present new *authorities*, it may not be used to submit new *evidence*. *See, e.g., Bowman v. City of Franklin*, 980 F.2d 1104, 1107 n.1 (7th Cir. 1992) (granting motion to strike Rule 28(j) submissions that “constitute additional evidence and not authority,” and thus “are not properly submitted under these rules”); *see also Manley v. Rowley*, No. 15-15320, 2017 WL 460661, at \*2 n.2 (9th Cir. Jan. 30, 2017) (granting motion to strike Rule 28(j) letter that “offers no new authorities, but rather seeks to supplement the record with new evidence”); *DiBella v. Hopkins*, 403 F.3d 102, 118 (2d Cir. 2005) (Rule 28(j) “cannot be used to submit new *evidence* to the appeals court”) (emphasis in original); *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986) (“Rule 28(j) permits a party to bring new authorities to the attention of the court; it is not designed to bring new evidence through the back door.”); 16A Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3974.6

(3d ed. 1999 & Supp. 2016) (“Rule 28(j) letters are designed to present legal authorities; they should not be used for the purpose of attempting to proffer evidence that is not a part of the record from the proceeding below.”). The State’s letter, which cites to no new authorities but rather presents new, unverified evidence to the Court shortly before the oral argument, clearly is improper.

Remarkably, the State claims to be following a “cautious approach” in submitting this new evidence. Letter at 1. It argues that “events occurring after filing of the notices of appeal are not relevant to these appeals,” but alleges that Plaintiffs “have repeatedly sought to introduce new information on appeal about Wisconsin’s photo ID law.” *Id.* The State claims merely to be responding to Plaintiffs’ extra-record submissions “out of an abundance of caution.” *Id.*

This seriously mischaracterizes the parties’ respective submissions. Plaintiffs’ filings related to post-trial developments have consisted solely of (1) several supplemental orders by the District Court denying a stay, finding that the State had violated its injunction and this Court’s August 29, 2016 Amended Order, and directing the State to undertake remedial efforts; (2) excerpts from the October 12-13, 2016 hearing held by the District Court regarding the State’s noncompliance with its injunction and this Court’s August 29 Amended Order; and (3) several of *the State’s own submissions* in response to the District Court’s orders regarding the State’s compliance efforts. *See* Supplemental Appendix [SA] 286-307, 1223-47; Final Appendix [FA] 1-33. Moreover, Plaintiffs properly filed all of these post-trial materials during the briefing process. Plaintiffs never have sought to introduce new

evidence through the “back door” of Rule 28(j), *Trans–Sterling, Inc.*, 804 F.2d at 528, let alone shortly before oral argument.

Even if the new evidence presented by the State were properly before this Court—and it is not—it would still raise significant concerns and objections. Plaintiffs have not had the opportunity to test the State’s new evidence through discovery or cross-examination, and the District Court has not had the opportunity to evaluate the accuracy of the State’s characterizations. That is significant because the State repeatedly has represented to the federal courts over the past two and one-half years that the problems associated with the IDPP have been resolved, but those representations have collapsed each time Plaintiffs have been able to test them. As summarized in Plaintiffs’ Reply Brief in this Court:

[T]hree times over the past 27 months (the September 2014 Emergency Rule, May 2016 Emergency Rule, and the August 2016 representations in its briefing to avoid initial en banc review) the State has represented that it finally had an effective safety net in place, and each time the updated version of the IDPP was subsequently adjudicated to be egregiously inadequate and demonstrated to have abridged and actually denied the voting rights of many citizens.

Doc. 60 at 19; *see also id.* at 10-12, 18-20; Plaintiffs’ Response and Cross-Appeal Brief at 23-27, 36-38; “Voter ID Petition Process Timeline,” SA 327-31. There is no reason to believe the State’s representations this time around will be any more accurate and reliable.

Indeed, even at the surface level, it is clear that much of the new evidence about the IDPP is either misleading or indicative of more systemic problems (or both). For example, Kristina Boardman’s declaration represents that “[a]ll voters

who have entered the IDPP since May 13, 2016 have been issued a free identification document for voting, unless the voter chose to remove themselves from the process after applying.” Decl. of K. Boardman at 9, ¶ 36. But as another part of her declaration makes clear, a large portion of these petitioners—approximately 38 percent—have received only *Temporary Receipts*, not the regular state ID cards they seek.<sup>1</sup> Plaintiffs have detailed the many continuing burdens and uncertainties borne by voters who hold only Temporary Receipts. *See* Plaintiffs’ Reply Brief at 13-15. And the reason why Administrator Boardman can represent that *all* IDPP petitioners have received a “free identification document for voting” is that the Wisconsin Department of Justice has instructed DMV not to deny any IDPP petitions while these appeals are pending. *See id.* at 12 n.4; FA 19.<sup>2</sup>

Administrator Boardman’s declaration also demonstrates a growing IDPP backlog. When the State issued its May 10, 2016 Emergency Rule several days before the start of trial, it mailed Temporary Receipts to all applicants in the “pending,” “suspended,” and “denial” categories, numbering some 159 total applicants as of that time. *See* SA 880. The number of Temporary Receipt holders

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<sup>1</sup> Administrator Boardman represents that, of the 3,039 voters who have received “free identification documents through the IDPP,” 1,887 have received regular state IDs and the remaining 1,152 have been issued “receipts valid for voting while the verification process” proceeds, *i.e.* Temporary Receipts. Decl. of K. Boardman at 9, ¶¶ 34-35.

<sup>2</sup> Similarly, the State’s letter claims that, as of January 31, 2017, 553,048 “free ID cards for voting purposes” had been issued since the voter ID law was enacted in 2011, an increase from the approximately 420,000 cards that had been issued as of April 2016. Letter at 1-2. As the State acknowledges, however, many of these are not new cards, but instead replacement or renewal cards, so these numbers do not reflect the total number of individuals who have obtained free IDs since 2011.

has grown in just nine months to 1,152 applicants, Decl. of K. Boardman at 9, ¶ 35, suggesting that the bureaucratic quagmire and delays detailed by the District Court are growing worse, not better.

The State wants its Temporary Receipts to expire after only 60 days, and to be renewable only if an applicant continues to “exercise reasonable efforts” (as judged by DMV) to locate and submit “new leads or new information.” FA 1, 35. Voters whose Temporary Receipts expire without renewal will be left in the same position they were in prior to obtaining the Temporary Receipts: without a qualifying ID to vote and, thus, disenfranchised. Indeed, only two days *after* the State filed its February 7 Rule 28(j) letter with this Court, it delivered letters to the IDPP Plaintiffs (via counsel) “request[ing] *additional* information so that we can continue to process your petition,” suggesting that they look for various “potentially helpful” documents like “Early school records” and “Family Bible records,” and reminding them of their continuing obligation “to assist us with this process.” *E.g.*, Letter from K. Boardman to J. Randle (attached as Ex. 1) (emphasis added).<sup>3</sup> These letters make clear that, for the many IDPP petitioners dependent on Temporary Receipts, their right to vote remains contingent on bureaucratic grace. The letters also give lie to the State’s representation in its opening brief to this Court that “[t]he *only* step an IDPP applicant [must take is to respond to DMV inquiries once

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<sup>3</sup> Although dated February 2, 2017, the letters were not delivered to counsel for the IDPP Plaintiffs until February 9, 2017. The letters also contain numerous material errors and omissions regarding the IDPP Plaintiffs’ interactions with DMV and the evidence they have submitted, including new evidence submitted during this litigation that DMV has not even acknowledged. Plaintiffs intend to address these numerous material errors and omissions with DMV and the District Court.

every half a year, which helps the investigation move forward.” Defs.’ Reply & Response Brief at 13-14 (emphasis added).

For these reasons, this Court should strike the letter and accompanying exhibits filed by the State on February 7, 2017. The State’s letter plainly is improper under Rule 28(j), and the Court should reject the State’s attempt to supplement the record on the eve of oral argument by making a one-sided presentation of new *evidence*, not *authority*.

DATED: February 14, 2017

Respectfully submitted,

**PERKINS COIE LLP**

By s/ Bruce V. Spiva

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CERTIFICATE OF SERVICE

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I hereby certify that on February 14, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the 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.

*s/ Bruce V. Spiva* \_\_\_\_\_

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# **Exhibit 1**



www.dot.wisconsin.gov

Scott Walker  
Governor

Dave Ross  
Secretary

Division of Motor Vehicles  
4802 Sheboygan Ave.  
P O Box 7911  
Madison, WI 53707-7911

## Wisconsin Department of Transportation

February 2, 2017

JOHNNY RANDLE

MILWAUKEE WI 53210

Dear JOHNNY:

This letter concerns your petition for a free Wisconsin identification card for the purposes of voting, which you submitted on 8/12/2015. As you may recall, staff from the Department of Transportation, Division of Motor Vehicles (DMV) worked with you to process your petition. We are writing now to request additional information so that we can continue to process your petition for an identification card.

So far, DMV compliance staff has done the following:

- An attempt to verify your record of birth was made with the vital records of Tchula, MS
- Made 2 attempts to contact you via US mail
- Made 12 attempts to contact you via phone
- You were sent a receipt for voting along with a letter containing DMV contact information

Since 10/30/2015, Wisconsin DMV has not received any contacts from you relating to your petition. Based on this lack of communication, your petition was denied. We have continued to research your petition, though, and you have continued to receive temporary identification receipts valid for voting purposes. This letter does not affect the validity of that receipt, but it is important that you contact us so that we can continue processing your application for an ID card.

To continue processing your petition, we need a contact from you to discuss what alternative information or documentation may be available to verify your name, date of birth, and U.S. citizenship. As previously discussed with you, potentially helpful documentation includes, but is not limited to, the following:

- Baptismal certificate
- Hospital birth certificate
- Delayed birth certificate
- Census record
- Early school record
- Family Bible record
- Doctor's record of post-natal care
- Other documentation that DMV accepts as proof of name, date of birth or U.S. citizenship



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If you contact us to discuss your petition application, we can continue to investigate the verification of your name, date of birth, or citizenship. As long as you act in good faith and use reasonable efforts to assist us with this process, we will continue to renew your identification card receipt.

Please contact the DMV as soon as possible. The best way to contact us is by telephone at (608)261-5684. You may also contact us by U.S. mail at:

DIVISION OF MOTOR VEHICLES  
ADMINISTRATOR'S OFFICE - CAFU  
PO BOX 7909 RM 255  
MADISON WI 53707 7911

or by email at [DOTDMVComplianceUnit@dot.wi.gov](mailto:DOTDMVComplianceUnit@dot.wi.gov)

We look forward to hearing from you soon so that we can continue to work with you to process your petition for an identification card.

Thank you,

A handwritten signature in black ink that reads "Kristina H. Boardman" with a long, sweeping horizontal line extending to the right.

Kristina H. Boardman  
DMV Administrator

## General Information

<b>Court</b>	US Court of Appeals for the Seventh Circuit; US Court of Appeals for the Seventh Circuit
<b>Federal Nature of Suit</b>	Civil Rights - Voting[3441]
<b>Docket Number</b>	16-03091