

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

ONE WISCONSIN INSTITUTE, INC., ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

MARK L. THOMSEN, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

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

**RESPONSE TO MOTION TO STRIKE
DEFENDANTS' FEB. 7 LETTER**

On February 7, 2017, Defendants-Appellants, Cross-Appellees (“Defendants”) filed a letter and supporting exhibits providing the most recent information about Wisconsin’s free ID program. Dkt. 79.¹ On February 14, Plaintiffs-Appellees, Cross-Appellants (“Plaintiffs”) filed a motion to strike the letter and exhibits, on the grounds that Defendants “improper[ly]” provided “new evidence.” Dkt. 80:1. As explained in the February 7 letter, Defendants have consistently argued that “events occurring after filing of the notices of appeal are not relevant to these appeals.” Dkt. 79:1 (citing *Berwick Grain Co., Inc. v. Ill. Dep’t of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997)). Plaintiffs, however, have “repeatedly sought to introduce new information on appeal

¹ Citations to the district court record are: “R.[ECF Entry Number]:[Page Number].” Citations to this Court’s docket are: “Dkt. [ECF Entry Number]:[Page Number].”

about Wisconsin's photo ID law," so Defendants have responded in kind "out of an abundance of caution." Dkt.79:1. Defendants would support striking their February 7 letter and exhibits *if* this Court were also to strike any new information the Plaintiffs have introduced about events occurring since the filing of the notices of appeal. In short, this Court should not consider updated information as presented by only one side.

The issue of plaintiffs who are challenging Wisconsin's voter ID law seeking to introduce information on appeal about events occurring after the filings of the notices of appeal has been a recurring problem. When the plaintiffs in *Frank v. Walker*, Nos. 16-3003 & 16-3052, sought to introduce new evidence in their opening brief and supplemental appendix, Defendants moved to strike those materials. Mot. to Strike, *Frank v. Walker*, Nos. 16-3003 & 16-3052, Dkt. 49 (Oct. 3, 2016) (citing *Berwick*, 116 F.3d at 234). This Court denied that motion, instructing the parties to address what was and was not properly before this Court in the briefs. Order Denying Mot. to Strike, *Frank v. Walker*, Nos. 16-3003 & 16-3052, Dkt. 56 (Oct. 12, 2016). Defendants thereafter argued in their brief that new information was not properly before this Court. Defs. Reply and Resp. Br. 21–23, *Frank v. Walker*, Nos. 16-3003 & 16-3052, Dkt. 58 (Oct. 31, 2016). But, out of an abundance of caution, Defendants cited new information as well, given the possibility that this Court may reject Defendants' position on the propriety of considering this new information. *Id.* at 23–25; Defs. 28(j) letter, *Frank v. Walker*, Nos. 16-3003 & 16-3052, Dkt. 78 (Feb. 7, 2017).

Events in the present case played out in a similar manner. In their appendix to their opening brief, Plaintiffs included multiple post-appeal orders from the District Court and excerpts of certain post-appeal hearings, for the purpose of arguing that “numerous” problems with the IDPP process came to light in October 2016—well after the filing of the notices of appeal. Pls. Opening Br. 27, 36; SA286–307, 1223–47.² Defendants responded that these allegations “[we]re not properly before this Court,” but in any event, had been addressed “quickly and voluntarily.” Defs. Reply and Response Br. 15–16 (citing declaration of Kristina Boardman Regarding IDPP Compliance, RA13–30). Defendants did not move to strike because this Court denied Defendants’ request to strike similar materials filed by the plaintiffs in *Frank*. Then, in an appendix to their reply brief, Plaintiffs again included materials filed in the District Court post-appeal, FA1–33, including one of Defendants’ status updates to the District Court. FA26–33. Defendants’ February 7 letter simply provided Defendants’ latest status update, as filed in the District Court. R.320, 321.

Plaintiffs argue that their submissions of post-appeal information are somehow different from Defendants’ submissions because some (but not all) of their new information consists of supplemental orders by the District Court and excerpts of hearings before the District Court, and because Plaintiffs filed these materials “during the briefing process.” Dkt. 80:2–3. Neither distinction makes a legal

² SA refers to Plaintiffs’ Supplemental Appendix filed with their Response and Cross Appeal Brief. Dkt. 31 (Oct. 19, 2016). RA refers to Defendants’ Supplemental Appendix filed with their Reply and Response Brief. Dkt. 60 (Nov. 23, 2016). FA refers to Plaintiffs’ Final Appendix filed with their Reply Brief. Dkt. 65 (Dec. 7, 2016).

difference. *See Berwick*, 116 F.3d at 234. The only relevance of the orders and hearings Plaintiffs submitted is the underlying facts about events occurring post-appeal, as shown by Plaintiffs' citations to these materials. Pls. Opening Br. 27 (discussing "[r]ecent investigative reports"), 36 (discussing events in October). Thus the nature of the filing (order vs. declaration) is irrelevant; and, of course, Plaintiffs also introduced Defendants' status updates filed before the district court, which is the same category of document attached to Defendants' disputed 28(j) letter. Nor does it matter whether the information was attached to a brief or a 28(j) letter.³ Plaintiffs argue that the timing of Defendants' letter prevents them from having the "opportunity" to respond. Dkt. 80:3. But the same objection would apply if this Court were to strike the February 7 letter but consider the Plaintiffs' allegations of post-appeal problems with the IDPP.

In all, Defendants' position is that all post-appeal information is not properly raised in this appeal. Defendants would therefore gladly support striking their February 7 letter, provided that this Court also declined to consider any post-appeal information raised by Plaintiffs. If, however, this Court decides to consider Plaintiffs' allegations relating to events occurring after the filing of the notices of appeal, then it should consider the *latest* information, which the 28(j) letter provides.

³ Plaintiffs cite various precedents for the proposition that 28(j) letters may not be used to submit new evidence. Dkt.80:1–2. Of course, the same is true of an appendix to an appellate brief, which cannot contain information that is not part of the record on appeal. Fed. R. App. P. 10(a); 30(a)(1); Cir. R. 30(b); *see Berwick*, 116 F.3d at 234. Plaintiffs' opening supplemental appendix and final appendix both violated this rule. SA286–307; 1223–47; FA1–33.

Dated: February 21, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I filed the foregoing 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: February 21, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

General Information

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