IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., CITIZEN ACTION OF WISCONSIN EDUCATION FUND, INC., RENEE M. GAGNER, ANITA JOHNSON, CODY R. NELSON, JENNIFER S. TASSE, SCOTT T. TRINDL, and MICHAEL R. WILDER,

Plaintiffs,

v. Case No. 15-C-324

JUDGE GERALD C. NICHOL, JUDGE ELSA LAMELAS, JUDGE THOMAS BARLAND, JUDGE HAROLD V. FROEHLICH, JUDGE TIMOTHY VOCKE, JUDGE JOHN FRANKE, KEVIN J. KENNEDY, and MICHAEL HAAS, all in their official capacities,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT, DKT. 131

STATEMENT OF THE ISSUE

A court should deny a motion when amendment is futile, unduly prejudices a defendant, or because of undue delay. Here, Plaintiffs lack standing for the new claims in their motion and their amended complaint fails to state a claim against the named Defendants. Such an amendment

would unduly prejudice Defendants because Plaintiffs filed their motion after the close of dispositive motions and expert disclosures—shortly before the close of discovery and start of a multi-week trial. Should the Court deny Plaintiffs' motion?

STATEMENT OF THE CASE

Plaintiffs have moved to amend their complaint to include as-applied claims in Counts I and II alleging that the voter ID laws violate Section 2 of the Voting Rights Act and the Constitution. (Dkt. 131.) Plaintiffs filed this motion after previously not opposing dismissal of facial voter ID claims in Counts I and II of their amended complaint. (Dkt. 28:10.) Plaintiffs now move to resurrect and convert these facial claims to as-applied voter ID claims.

Plaintiffs originally filed a complaint against eight defendants. (Dkt. 1:1.) Plaintiffs later amended the complaint with the eight defendants remaining unchanged. (Dkt. 19:1.) All eight defendants are members or staff of the Wisconsin Government Accountability Board. (Dkt. 1:10 (complaint); 19:10 (amended complaint).)

Plaintiffs' amended complaint made facial voter ID claims in Counts I and II. Although Plaintiffs did not initially identify the claims as facial, they later confirmed the facial nature of the claims. (Dkt. 132:10; 136:10 (citing *Frank v. Walker*, 768 F.3d 744, 747 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015)).)

Plaintiffs now seek to "reinstate" dismissed facial voter ID claims by converting them to as-applied claims in Counts I and II. (Dkt. 131:2.) Plaintiffs do not submit a second amended complaint: "Plaintiffs do not believe it is necessary to file another amended pleading" (Dkt. 132:6; 136:6), but they "of course stand ready to submit a new pleading if the Court believes that is appropriate." (Dkt. 132:32; 136:32.) Plaintiffs acknowledge that their current motion seeks to convert their amended complaints' facial claims to as-applied claims. (Dkt. 132:10; 136:10 (citing *Frank*, 768 F.3d at 747).)

The motion seeks to transform facial claims already resolved by binding precedent into fact-intensive, as-applied claims. Now, at this late date, Plaintiffs allege that "several dozen DMV officials exercise standardless discretion whether to grant 'hardship' exemptions without requiring voters to go through the formal ID petition process." (Dkt. 132:2; 136:2.) They also "seek to make other as-applied challenges to the actual effects and results of the implementation and enforcement" provisions of Wis. Admin. Code Trans § 102.15. (Dkt. 132:32; 136:32; *see* Dkt. 132:8; 136:8; *see also* Dkt. 132-1.) These claims stand in stark contrast to Plaintiffs' original facial claims, which they made only to "expressly reserve the right to make these arguments on appeal and to argue on appeal that *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. [1551] (2015), should be overruled." (Dkt. 28:10.)

The proposed amendment would thus fundamentally change the dismissed facial voter ID claims into factually intensive, as-applied claims. The motion comes forty-four days after the deadline for filing dispositive motions and disclosing experts, and only forty-seven days before the cutoff for discovery. (Dkt. 65 (amending deadlines in Dkt. 29); Dkt. 29:3 (discovery deadline).) Even worse, Plaintiffs propose this fundamental change to the claims just eighty-two days prior to trial. (Dkt. 29:5 (trial date).)

SUMMARY OF ARGUMENT

Whether viewed as a "reinstatement" or an amendment, the motion to include as-applied claims should be denied because of its futility and on undue delay and prejudice grounds.

The motion is futile because Plaintiffs' are unable to name any Plaintiffs who have standing to raise the proposed as-applied claims. Moreover, the amended complaint does not name a proper Defendant—none of the as-applied claims pertain to any of the named Government Accountability Board officials.

Further, the late date of the proposed amendment, coupled with the fundamental change in the nature of the claims, renders Plaintiffs' proposal untimely and unduly prejudicial.

APPLICABLE LEGAL STANDARDS

The Federal Rules of Civil Procedure provide that Plaintiffs cannot amend their complaint without leave of the court. Fed. R. Civ. P. 15(a)(2). Although Plaintiffs described their motion as a reinstatement of claims (Dkt. 131), Plaintiffs concede they require leave of the court as a motion to amend under Federal Rules of Civil Procedure 15(a)(2). (Dkt. 132:24–25; 136:24–25.)

Leave to amend should be granted when justice requires, but certainly not in every case. *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2002) (citing Fed. R. Civ. P. 15(a)). Reasons to deny leave to amend include "undue delay, bad faith or dilatory motive on part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment [or] futility of amendment." *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 07-CV-449-bbc, 2008 WL 2766289, at *1 (W.D. Wis. Mar. 25, 2008) (quoting *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007)).

The moving party generally has the burden in a motion to amend and must show no undue delay and prejudice. *King v. Cooke*, 26 F.3d 720, 724 (7th Cir. 1994) (prejudice); *Carlson v. Northrop Grumman Corp.*, No. 13-C-2635, 2014 WL 5334038, at *3 (N.D. Ill. Oct. 20, 2014) (undue delay). The nonmoving party has the burden when futility is the basis to deny

a motion to amend. *City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975, 980 (E.D. Wis. 2002).

The Court may deny Plaintiffs' motion to amend when it "finds undue delay by the moving party, undue prejudice to the party opposing amendment, or that the amendment would be futile." *Aida Eng'g, Inc. v. Red Stag, Inc.*, 629 F. Supp. 1121, 1127 (E.D. Wis. 1986).

ARGUMENT

I. The Court should deny Plaintiffs' motion because it is futile.

Plaintiffs' motion to convert facial claims to as-applied claims is futile for two reasons: (1) Plaintiffs lack standing; and (2) Plaintiffs fail to state a claim against Defendants.

Here, Plaintiffs do not submit a second amended complaint with their motion. (Dkt. 132:6, 136:6.) Instead, they rely on the parties identified and injuries alleged in their amended complaint. (Dkt. 19:2–11 (parties and injuries).)

Most troublesome is that the current named Plaintiffs have no standing to assert the new as-applied claims. To support their amendment, the Plaintiffs must identify harm personal to themselves. *Tisza v. Commc'ns Workers of Am.*, 953 F.2d 298, 300 (7th Cir. 1992). Plaintiffs must do more than allege *some* violation of a rule—they must identify a personal loss traceable to a violation of the rule. *Id.* Here, Plaintiffs never allege they

personally suffer harm from the Department of Transportation's ID petition process. (*Compare* Dkt. 19 (amended complaint), *with* Dkt. 131 (motion), *and* Dkt. 132; 136 (briefs).) Plaintiffs confuse an alleged violation of a right with an injury. *See Tisza*, 953 F.2d at 300.

Plaintiffs' motion also fails to state a claim against Defendants named in the amended complaint. The current operative complaint names only eight Defendants, all of whom are members or staff of the Government Accountability Board. (Dkt. 19:10.) But Plaintiffs' new as-applied claims allege that "several dozen [Department of Transportation, Division of Motor Vehicles (DMV)] officials exercise standardless discretion whether to grant 'hardship' exemptions without requiring voters to go through the formal ID petition process." (Dkt. 132:2; 136:2.) Plaintiffs' motion does not allege Defendants at the Government Accountability Board abused their discretion; they do not allege Defendants named in the amended complaint implemented or enforced the Department of Transportation's ID petition process.

The proposed amendment should therefore be rejected. Plaintiffs fail to include officials from the Department of Transportation in their amended complaint.[1] Thus, the as-applied claims fail as a matter of law because the

[1] If Plaintiffs were to later name Department of Transportation officials in a second amended complaint, considerations of lack of timeliness and undue prejudice would be paramount and also grounds for denial.

current named Defendants are in no way responsible for the alleged violations. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Ind.*, 786 F.3d 510, 524 (7th Cir. 2015) (futility and failure to state claim).

Allowing Plaintiffs' claims to proceed without a plaintiff who has standing and without a claim against the named Defendants would be futile. The Court should therefore deny Plaintiffs' motion.

II. The Court should also deny Plaintiffs' untimely motion because of undue prejudice to Defendants.

"The major consideration in a motion to amend is whether the amendment will prejudice defendants' rights." *Wetmore v. Fields*, 458 F. Supp. 1131, 1134 (W.D. Wis. 1978). Thus, a "court does not abuse its discretion by denying a motion to amend if granting leave to amend would unduly prejudice a party not afforded an adequate chance to respond to the newly-raised issues," *Samuels v. Wilder*, 871 F.2d 1346, 1351 (7th Cir. 1989), or require a defendant "to conduct additional discovery and file further summary judgment briefs during a period in which they should be preparing for trial." *Hackensmith v. Port City S.S. Holding Co.*, 938 F. Supp. 2d 824, 830 (E.D. Wis. 2013).

Here, Plaintiffs' untimely motion prejudices Defendants and should be denied. Plaintiffs could have pursued as-applied voter ID claims in their

complaint. As Plaintiffs explain, such an as-applied claim was "expressly recognized in the *Frank* panel decision." (Dkt. 132:6; 136:6 (citing *Frank*, 768 F.3d 744).) Plaintiffs acknowledge understanding from case law that the ID petition process involves discretion on the part of the Department of Transportation. (Dkt. 132:7–8; 136:7–8 (citing *Milwaukee Branch NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262).) Understanding the legal issues, Plaintiffs could have raised as-applied claims when they originally amended their complaint. The Court should deny Plaintiffs' motion as untimely because the claims could have been addressed in their initial filing. *See Jones v. Psimos*, 882 F.2d 1277, 1285 (7th Cir. 1989).

Even if timely, Plaintiffs' motion to convert facial claims to as-applied claims still prejudices Defendants for three reasons: (1) they filed it after the deadline for filing dispositive motions and disclosing experts; (2) they filed it shortly before the cutoff for discovery; and (3) they filed it shortly before the start of the two-week trial.

First, the motion unduly prejudices Defendants because Plaintiffs filed it after the deadline for filing dispositive motions and disclosing experts. Plaintiffs moving to amend the complaint after the deadline for disclosing experts is significant given this Court's intent "to put the parties more or less on equal footing." (Dkt. 122:2.) Indeed, when the Court granted Plaintiffs' motion to submit reply expert reports, it cautioned that "Plaintiffs are not

entitled to introduce new theories or data in these limited rebuttal reports." (Dkt. 122:2.)

Plaintiffs now ignore the Court's directive—using Allan Lichtman's rebuttal report with its "voluminous appendix" to introduce new data and a new legal theory. (Dkt. 132:3 n.1; 136:3 n.1.) Any attempt to maintain "equal footing" would be lost if this Court were to grant amendment of the complaint after the expert deadline.

Further prejudice is shown also by the passage of the dispositive-motion deadline. Here, that lost opportunity is critical because of the problems with Plaintiffs' amended claims—Defendants identify fundamental flaws where Plaintiffs lack standing and fail to state a claim against the named Defendants.

Second, any amendment would unduly prejudice Defendants because Plaintiffs filed their motion only forty-seven days before the cutoff for discovery. An extension of discovery would not cure the undue prejudice to Defendants if the May 16 trial date remains. (Dkt. 29:3 (discovery deadline).)

Plaintiffs already challenge fourteen laws under a combination of six legal theories. (Dkt. 79-1:2 (table illustrating challenged laws and legal theories).) They now seek to add new, fact-intensive, as-applied claims, which would propagate a new legal theory into an already complex case—all in the closing days of discovery. Such an amendment would unduly prejudice

Defendants because there is insufficient time for discovery given the complexity of the claims already at issue coupled with the fact-intensive nature of the proposed as-applied claims. Denial of Plaintiffs motion to amend is appropriate. *See, e.g., Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 793 (7th Cir. 1999) (not abuse of discretion to deny amendment on eve of summary judgment proceedings); *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1184 (7th Cir. 1986) (not abuse of discretion to deny amendment before close of discovery).

Third, the motion unduly prejudices Defendants because Plaintiffs filed it shortly before the start of trial—only eighty-two days before a two-week long trial begins. (Dkt. 29:5.) Notably, Plaintiffs' current arguments make it difficult to determine the precise impact on the trial. Although they vaguely acknowledge that they "seek to make *other* as-applied challenges to the actual effects and results of the implementation and enforcement of those [voter ID] provisions," they do not articulate just what those "*other* as-applied challenges" would be. (Dkt. 132:32; 136:32 (emphasis added).) What *is* clear from Plaintiffs' motion, however, is that the fact-intensive nature of the as-applied claims will impact the scope and duration of the trial. An amendment at this late stage would thus require Defendants to divert their limited remaining time for trial preparation toward familiarizing themselves

with new, vague, as-applied claims—claims which were, ostensibly, already excluded from the case once before. *See Hackensmith*, 938 F. Supp. 2d at 830.

Here, "Plaintiffs emphatically seek no delay in the May 16, 2016 trial date." (Dkt. 131:2.) Whether or not this is true is of no moment because with this motion Plaintiffs seek to use the firm trial date to prevent Defendants from having an adequate chance to respond to the new as-applied claims. Assuming Defendants would have extended deadlines for discovery, expert reports, and dispositive motions regarding the new claims, they would have to pursue such options during a period when they should be preparing for trial on the original claims. Under those circumstances, there is no question that Plaintiffs' motion unduly prejudices Defendants. *See Samuels*, 871 F.2d at 1351; *Hackensmith*, 938 F. Supp. 2d at 830.

Given the significant prejudice posed by allowing these new claims at this late date, the Court should deny Plaintiffs' motion. *See, e.g., Jones*, 882 F.2d at 1285 (not abuse of discretion to deny when unnecessarily prolong the litigation).

* * * * *

This Court should deny Plaintiffs' motion. Here, the current operative complaint already challenges fourteen laws under a combination of six legal theories. (Dkt. 79-1:2.) Now, Plaintiffs would add fact-intensive, as-applied voter ID claims to the mix—after the close of expert disclosures, after the deadline for dispositive motions, shortly before the close of discovery, and close to the start of an already lengthy trial. Although "defendants cannot dictate the breadth of the plaintiffs' case," they "can reasonably object to a change in breadth which prevents indefinitely a decision on the merits." *McPhail v. Bangor Punta Corp.*, 58 F.R.D. 638, 642 (E.D. Wis. 1973).

If this Court were to entertain and grant Plaintiffs' motion, Defendants request time to serve a responsive pleading, present defenses, and file motions as well as for a hearing before trial and the opportunity to seek an adjournment of the trial date.

CONCLUSION

Defendants ask the Court to deny Plaintiffs' motion.

Dated this 16th day of March, 2016.

Respectfully submitted,

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