UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al., Defendants.	Civil Action No. 2:11-cv-01128 (LA)

FRANK PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY

On May 12, 2014, Defendants in this case sought a stay of this Court's injunction. For the reasons set forth below, Defendants' request should be denied.

I. Defendants are Not Entitled to a Stay Pending Appeal

a. Standard for a Stay

"A request for a stay is a request for extraordinary relief." *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). This Court has therefore acknowledged that, "[b]ecause the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied." *In re Application of Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1117 (E.D. Wis. 2004) (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 11 Federal Practice & Procedure § 2904, at 503-05 (2d ed. 1995) (footnotes omitted)).

Under Federal Rule of Civil Procedure 62(c), a court's decision as to whether to issue a stay pending appeal is discretionary and the movant is required to demonstrate a "likelihood of

success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014).

As discussed below, Defendants have failed to satisfy their burden on *any* of these requirements; indeed, they have not even addressed the issues of irreparable harm and the public interest. Accordingly, their motion for a stay pending appeal should be denied.

b. Defendants Have Not Addressed Two of the Requirements for a Stay: Whether a Stay Will Injure the Non-Moving Parties and Whether a Stay is in the Public Interest

Defendants have not even attempted to address two of the required showings necessary to obtain a stay: that a stay would not substantially injure the non-moving parties (*i.e.*, Plaintiffs), and that the public interest lies in favor of a stay. They have therefore failed to satisfy their heavy burden of establishing that the extraordinary relief of a stay pending appeal is appropriate. Defendants' motion should be denied on that basis alone.

Defendants' omissions may stem from the recognition that any effort to make these required showings would be futile. A stay of this Court's ruling would irreparably harm Plaintiffs and other voters. Undisputed evidence at trial demonstrated that, if a stay were granted and a voter ID law were permitted to go into effect, Plaintiffs and trial witnesses such as Shirley Brown, Eddie Lee Holloway, Jr., Ruthelle Frank, Alice Weddle, Rose Thompson, Sim Newcomb, Rickey Davis and Melvin Robertson would be precluded from voting. Furthermore, this Court found that "a substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting" if a stay is granted. Decision and Order, Doc. 195 ("*Frank* Decision"), at 37.

This clearly amounts to irreparable harm. As the Supreme Court recently recognized,

"[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality opinion). Because the right to vote is a precondition of participation in our democracy, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Restrictions on the right to vote therefore "strike at the heart of representative government" and warrant the closest attention from courts. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes an irreparable injury" (citing *Williams v. Salerno*, 792 F.2d 323, 326 (2nd Cir. 1986)). Deprivation of a fundamental right, even for brief periods of time, constitutes irreparable injury. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Ezell v. City of Chicago*, 651 F.3d 684, 699-700 (7th Cir. 2011) (violation of Second Amendment rights caused irreparable harm because of the "intangible nature of the benefits" of those rights and the fear persons would be deterred from exercising those rights, "even if imperceptibly" (quoting *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 548 (6th Cir. 2010))).

Nor would a stay serve the public interest. In accordance with the guarantees of the Constitution and the Voting Rights Act (VRA), the public has an extraordinary interest in preventing denial or abridgement of the right to vote. "[T]he Voting Rights Act protects the public interest in the due observance of all constitutional guarantees and the individual's right to vote." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (internal quotation marks omitted); *cf. United States v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest

public interest in the due observance of all the constitutional guarantees"); *Jones v. McGuffage*, 921 F. Supp. 2d 888, 901 (N.D. Ill. 2013) ("[T]he public interest would not be harmed by an injunction that increases ballot access"). The public's interest in preventing the disenfranchisement of eligible voters clearly outweighs the ephemeral interests that Act 23 purports to serve, particularly given that "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." *Frank* Decision at 38; *accord, U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief]").[1] Thus, the public interest weighs heavily against a stay.

c. Defendants Will Not Suffer Irreparable Injury from Preservation of the Status Quo

In contrast to the substantial harm that would be suffered by Plaintiffs, other voters, and the general public, Defendants have utterly failed to demonstrate that they will suffer irreparable injury if the injunction remains in place. Defendants assert that a stay is necessary because this Court's order prevents them from enforcing a voting regulation "designed to preserve the right to vote of all eligible Wisconsin voters," and that any injunction of a state statute constitutes irreparable injury. Defs.' Notice of Mot. & Mot. to Stay Permanent Inj. Pending Appeal, Doc. 201 ("Mot. to Stay"), at 18. Neither of these arguments is availing.

Defendants' argument that any injunction of a state statute constitutes irreparable injury would, if accepted, justify the extraordinary relief of a stay pending an appeal in every case

[1] In contrast, the purported benefits from implementation of the enjoined provisions would not be served in this case, given the essential non-existence of the types of fraud that voter ID would prevent, and the fact that the voter ID law does not further the State's other purported interests. *See infra* Sec. I.d.

where a district court strikes down a state statute as unconstitutional or in violation of federal law. No court has endorsed such a broad proposition. More specifically, enjoining Act 23 does not constitute irreparable injury. As set forth *infra* Sec. I.d., the Court found that the law substantially infringed upon the right to vote of many eligible Wisconsin voters. Given their duty to administer elections, Defendants cannot be irreparably injured by the inability to enforce a statute that disfranchises eligible voters. Moreover, given that there has been no voter ID law in effect throughout Wisconsin's history (save a single, low-turnout election in early 2012), and given that a state court injunction also prevents current enforcement, *Frank* Decision at 1 n. 1, leaving this Court's injunction in place pending appeal would do no more than require the State to continue to hold elections under the same rules that have been in place for decades. These rules have not been shown to harm the Defendants at all, much less irreparably. In addition, lifting the injunction poses a significant risk of confusion and misapplication of the law among elections officials, voters and poll workers. *See generally* Frank Pls.' Am. Post-Trial Br., Doc. 194, at 23-27, 85-87.

d. Defendants Do Not Have a Significant Probability of Success on the Merits

Even if Defendants had established the presence of the factors discussed above—and they have not—a stay should be denied because they have failed to demonstrate a significant probability of success on the merits.

i. The Court Correctly Determined that the Voter ID Law Violates Equal Protection

This Court correctly determined that it must apply the *Anderson-Burdick* balancing test in deciding whether the burdens imposed on eligible voters were excessive in relation to the State's

purported interests.[2] *Frank* Decision at 7-11. As this Court recognized, the balancing test is applicable in the photo ID context. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing judgment) (applying *Anderson-Burdick*); 204 (Scalia, J., joined by Alito & Thomas, JJ., concurring in judgment) (applying *Burdick*); 210-211 (Souter, J., joined by Ginsburg, J., dissenting) (applying *Anderson-Burdick*). Defendants do not dispute that the Court was correct to apply the *Anderson-Burdick* test, but rather object to the manner in which it was employed. Mot. to Stay at 2, 9-10.

Defendants erroneously suggest that *Crawford* categorically precludes constitutional challenges to voter ID laws so long as in-person voter impersonation is theoretically possible. Mot. to Stay at 9-10. The controlling plurality opinion in *Crawford*, however, never suggested anything of the sort. As that opinion confirms, there is no "litmus test for measuring the severity of a burden that a state law imposes on . . . an individual voter, or a discrete class of voters. However slight that burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S at 191 (internal quotation marks omitted). Thus, the State's purported interests—ones that the Court determined were minimal in this case—must be balanced against the law's application to voters who, the Court found, are concretely and specifically burdened by the need to obtain photo ID. Here, the

[2] *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) ("[T]he Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (quoting *Anderson*, 460 U.S. at 789)).

burdens on voters outweigh the State's interests. *Frank* Decision at 38; *see also Crawford*, 553 U.S. at 198 (plurality opinion).[3]

Relying on credible evidence and the testimony of multiple witnesses, the Court found that 300,000 Wisconsin voters lack Act 23 compliant ID; that a substantial number of these voters have low incomes and limited education; and that many thousands of voters without ID also lack one or more of the documents that are required to obtain ID. *Frank* Decision at 23-27, 80-84 (App'x B). Defendants do not dispute these facts.[4] Mot. to Stay at 8-9. The Court also found that for a substantial number of voters without ID, getting to DMV during the limited hours it is open is a burden, and that obtaining documents needed to obtain ID imposes additional, and at times insurmountable, burdens. *Frank* Decision at 27-36. The combined effects of these burdens go far beyond "merely inconvenient." *Id*. at 37-38 ("in light of the evidence presented at trial, it is also clear that for many voters, especially those who are low income, the burdens associated with obtaining an ID will be anything but minor"). Rather than disputing any of these findings of fact, Defendants suggest that a voting restriction that burdens *more than 300,000* Wisconsin voters should not warrant scrutiny under the U.S. Constitution, a suggestion that finds no support in the case law.

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[3] As the lead opinion in *Crawford* made clear, even if burdens are not severe, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." 553 U.S. at 190. Even if the State has a legitimate interest, a law imposing significant burdens on the right to vote is not "necessary" if that interest could be addressed in a less restrictive way. *Anderson*, 460 U.S. at 789. To the extent that burdens on some voters are less than severe, *Frank* Decision at 37, they remain excessive in relation to the purported state interests and therefore do not satisfy the "hard judgment" standard, *Crawford*, 553 U.S. at 190.

[4] Although Defendants now argue that evidence from Mr. Beatty, upon which, *inter alia*, the finding of 300,000 voters without ID is based, should be excluded because the LULAC Plaintiffs purportedly lacked standing, Mot. to Stay at 15, they neglect to mention the stipulation that all the evidence admitted in either case would come in for both cases. *See* Trial Tr. vol. 1 at 7 (Dkt. 179); Trial Tr. vol. 6 at 1708 (Dkt. 184).

Instead, the Court correctly followed *Anderson* and *Burdick* by balancing these burdens against the justifications proffered by Defendants and found that those justifications were unsupported by the factual record. The Court found that Wisconsin's election laws are aggressively enforced; that despite that level of enforcement there have been no in-person voter impersonation prosecutions and essentially no evidence of voter impersonation fraud; and that engaging in voter impersonation would be both difficult and highly risky. *Frank* Decision at 11-17. In addition, the Court found no evidence of a relationship between photo ID and voter confidence, and that both photo ID and unsubstantiated claims of voter fraud were as likely to undermine as to increase that confidence. *Id.* at 17-20. Act 23 also "only weakly" serves the state's purported interest in orderly election administration, *id.* at 21-22, and, in any event, "administrative convenience" cannot justify a practice that impinges upon a fundamental right, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975). That the State disagrees with the Court's factual findings concerning voter fraud and with the manner in which the Court balanced them against the documented burdens, Mot. to Stay at 9-10, does not justify the relief Defendants seek.

ii. The Court Correctly Determined that the Voter ID Law Violates Section 2 of the Voting Rights Act

The Court also correctly determined that the photo ID law violates Section 2 of the Voting Rights Act. *Frank* Decision at 68. Section 2 prohibits any State from imposing or applying a "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

> A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives

of their choice.

42 U.S.C. § 1973(b). The "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Defendants argue that the Court's Section 2 analysis failed to focus on racially disparate "results or causation." Mot. to Stay at 12. Defendants are simply incorrect on both counts. With respect to disparate results, the Court correctly recognized—and Defendants do not dispute—that Blacks and Latinos are less likely to have photo ID than whites, are less likely to have the documents needed to obtain photo ID, and are more likely to have been born out of state, compounding the difficulty of acquiring requisite documents and thus of obtaining ID. *Frank* Decision at 52-59, 62-63. It is also undisputed that Wisconsin's poor and less educated voters—who will face multiple and heightened burdens as a result of a photo ID requirement—are disproportionately Black and Latino. *Id.* at 65-67.

Defendants are also wrong to suggest that the Court did not focus on causation. To the contrary, the Court explicitly found that the disproportionate impact of the photo ID requirement on Black and Latino voters "is not merely a product of chance," but rather that:

> Act 23 has a disproportionate impact on Black and Latino voters because it is more likely to burden those voters with the costs of obtaining a photo ID that they would not otherwise obtain. This burden is significant not only because it is likely to deter Blacks and Latinos from voting even if they could obtain IDs without much difficulty, but also because Blacks and Latinos are more likely than whites to have difficulty obtaining IDs. This disproportionate impact is a "discriminatory result" because the reason Black and Latino voters are more likely to have to incur the costs of obtaining IDs is that they are disproportionately likely to live in poverty, and the reason Black and Latino voters are disproportionately likely to live in poverty is connected to the history of discrimination against Blacks and Latinos in Wisconsin and elsewhere.

Frank Decision at 64, 68. Where, as here, a voting restriction interacts with discriminatory conditions to cause it to be more difficult for Blacks and Latinos to exercise the right to vote than it is for whites, voting is no longer "equally open to participation" by minorities.

II. The Relief Granted in this Case is Proper

a. The District Court Has Jurisdiction to Enforce the Permanent Injunction

Defendants' argument that a stay is appropriate because the Court supposedly lacks jurisdiction to enforce the judgment also fails. *See* Mot. to Stay at 5-6. Defendants' argument that the District Court lacks jurisdiction to enforce an injunction during a pending appeal is clearly wrong. *See* Fed. R. Civ. P. 62(a) ("[U]nless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken: (1) a[] . . . final judgment in an action for an injunction"); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000) (a "notice of appeal does not stay enforcement of a district court's order. A judge may—and should—enforce an un-stayed injunction while an appeal proceeds." (internal citations omitted)).[5]

Defendants' suggestion that the Court's order is overbroad because the Defendants are required to move for relief from the injunction, potentially while an appeal is pending, fares no better. Mot. to Stay at 4-6. All injunctions require enjoined parties to move for relief from the injunction if they believe that changed circumstances warrant such relief. *See* Fed. R. Civ. P.

[5] Defendants' cases, Mot. to Stay at 6, are inapposite because they do not hold that a district court lacks jurisdiction to enforce its own judgment pending the filing of a notice of appeal. *See, e.g., Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 57 (1982) (holding notice of appeal was defective and a nullity because it was filed while motion to alter or amend judgment was still pending); *Wis. Mut. Ins. Co. v. United States*, 441 F.3d 502, 505 (7th Cir. 2006) ("Because the initial notices of appeal were premature, the district court acted within its jurisdiction by patching up the judgment to allow appellate review"); *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (district court lacked jurisdiction because the Seventh Circuit had issued an order remanding for an evidentiary hearing, but the district court held evidentiary hearing before mandate was to issue).

60(b)(5). That the Court's order *accommodates* Defendants by providing for a procedure in which such a motion for relief may be heard on an expedited basis does not make the injunction overbroad, and is in fact consistent with ordinary practice. *See Chicago Downs Ass'n, Inc. v. Chase*, 944 F.2d 366, 370 (7th Cir. 1991) (explaining that district court is able to entertain a Rule 60(b) motion during the pendency of an appeal); *MacDonald v. City of Chicago*, No. 97 C 5266, 1999 WL 102775, at *3 (N.D. Ill. Feb. 22, 1999) (explaining that it is within district court's purview to consider whether an amended law addresses the court's concerns with the enjoined law, even when a notice of appeal has been filed), *rev'd on other grounds*, 243 F.3d 1021 (7th Cir. 2001); *see also* Fed. R. App. P. 12.1 (outlining process that must be taken if a party, during the pendency of an appeal, files a motion under any rule that permits the modification of a final judgment).

b. The Relief Granted on the Constitutional Claims is Proper

Defendants do not appear to challenge issuance of an injunction against voter ID on the basis of the VRA violations. They nevertheless argue that, with respect to the Constitutional claims, invalidating the statute is overbroad and that the Court could and should have "grappled with the 'subgroups' issue by addressing the *Frank* Plaintiffs' class certification motion." Mot. to Stay at 8. Defendants' argument is ironic to say the least, as Defendants have repeatedly asserted that class treatment in this case was unnecessary. *See, e.g.*, Defs.' Post-Trial Br., Doc. 176, at 104 ("class certification is an unnecessary exercise in this case"); Defs.' Br. in Opp'n to Pls.' Mot. for Class Certification, Doc. 83, at 8 ("there are no individualized claims which would *not* be adequately addressed in this case even without this being a class action").

As the Court held, the nature of the statute and the difficulties in crafting an injunction that provides the requisite clarity renders partial invalidation impractical in this case. *Frank*

Decision at 38-39; *see R.I. Med. Soc'y v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001) (striking statute in its entirety where statute was not susceptible to severability and there was no way to impose a limiting construction on statute without rewriting statute); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 202 (6th Cir. 1997) (striking entire statute where court "essentially would have to rewrite the Act in order to create a provision which could stand by itself"). Allowing some voters to vote without ID or by a mechanism such as by affidavit would require the Court to "write words into the statute . . . or to foresee which of many different possible ways the legislature might respond to the constitutional objections." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). *See Rita v. United States*, 551 U.S. 338, 383 n.7 (2007) (Scalia, J., concurring) ("Courts have no power to add provisions that might be desirable now that certain provisions have been excised"); *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 332-33 (7th Cir. 1985) ("Rewriting is work for the legislature"), *aff'd*, 475 U.S. 1001 (1986).

CONCLUSION

For the reasons set forth herein, Plaintiffs request that this Court deny Defendants' request for a stay.

Dated this 2nd day of June, 2014.

Respectfully submitted,

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