Nos. 14-2058 & 14-2059

In the
United States Court of Appeals
For the Seventh Circuit

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF WISCONSIN, et al.,

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Wisconsin, Nos. 2:11-CV-01128-LA & 2:12-CV-00185-LA. The Honorable **Lynn S. Adelman**, Judge Presiding.

FRANK PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' EXPEDITED MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL

On May 12, 2014, Defendants-Appellants moved the district court for a stay of its injunction. (E.D. Wis. ECF No. 201.[1]) That motion was fully briefed on June 6, 2014. (E.D. Wis. ECF Nos. 206, 207.) Without waiting for the district court to rule,

[1] References to district court ECF numbers will correspond to the docket of *Frank v. Walker*, No. 2:11-cv-1128.

Defendants filed an "Expedited Motion to Stay Permanent Injunction Pending Appeal" with this Court on August 5, 2014. (7th Cir. ECF No. 47 ("Defs.' Mot.").) The district court subsequently denied Defendants' motion to stay on August 13, 2014, in a thorough and well-reasoned opinion, which made clear that Defendants do not meet *any* of the requirements for a stay pending appeal. (E.D. Wis. ECF No. 212 ("Stay Denial") (attached).) Oral argument in this case has been scheduled for September 12, less than four weeks from now. (7th Cir. ECF No. 51-1.) For the reasons set forth in more detail below, Defendants' motion before this Court should also be denied.

LEGAL STANDARD

"A request for a stay is a request for extraordinary relief." *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). "'A stay is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, it is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34 (internal quotation marks and citations omitted).

In exercising its discretion over a motion under Rule 8 of the Federal Rules of Appellate Procedure, the Court of Appeals considers "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies.'" *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (summarizing factors as "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").

These four factors are assessed on a "sliding scale," such that a stronger showing on the merits may justify a lesser showing on the balance of harms and vice versa. *A & F*, 742 F.3d at 766. In all circumstances, however, a stay applicant must make "a *strong* showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 434 (emphasis added). "[M]ore than a mere possibility of relief is required" and "simply showing some possibility of irreparable injury fails to satisfy the second factor." *Id.* at 434-35 (internal quotation marks and citation omitted).

ARGUMENT

Defendants have failed to satisfy their burden on any of the stay factors. Accordingly, their motion for a stay pending appeal should be denied.

I. DEFENDANTS HAVE NOT MADE A "STRONG" SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS

As set forth in *Frank* Plaintiffs-Appellees' Brief opposing Defendants' appeal (7th Cir. ECF No. 35), the Defendants do not have a meaningful likelihood of obtaining a reversal of the district court's thorough, fact-intensive decision. Rather than reiterate the arguments regarding the merits of the appeal, Plaintiffs incorporate by reference the arguments raised in their brief. Below, we address

additional arguments in Defendant's stay motion that were not raised in Defendants' opening appeal brief.

A. The Wisconsin Supreme Court's Decision in *NAACP v. Walker* Does Not Weigh in Favor of a Stay

Defendants' latest argument, that the Wisconsin Supreme Court's decision in *Milwaukee Branch of NAACP v. Walker*, No. 2012AP1652, 2014 WL 3744073, ___ N.W.2d ___ (Wis. July 31, 2014) (7th Cir. ECF No. 47-15) (hereinafter "*NAACP*"), weighs in favor of stay, is entirely baseless. As the district court correctly determined, *NAACP* does not alleviate the burdens—financial or otherwise—imposed by Act 23, and will not enable voters who lack required underlying documents to obtain ID. (*See* Stay Denial at 5-8.)

NAACP found that Act 23 imposes a "severe burden on the constitutional right to vote" because voters must pay a government fee for underlying documents such as birth certificates, which are necessary to obtain ID. ¶ 62. But rather than invalidate Act 23, *NAACP* adopted a "saving construction," ¶ 63, of the Wisconsin Administrative Code, holding that voters who lack documents needed to obtain ID, and who must pay a government fee for those documents, may *petition* for ID, in accordance with the following four steps: "(1) make[] a written petition to a DMV administrator as directed by Wis. Admin. Code § Trans 102.15(3)(b) . . . ; (2) assert[] he or she is 'unable' to provide documents required by § Trans 102.15(3)(a) without paying a fee to a government agency to obtain them; (3) assert[] those documents are 'unavailable' without the payment of such a fee; and (4) ask[] for an exception to the provision of § Trans 102.15(3)(a) documents whereby proof of name and date of

birth that have been provided are accepted. § Trans 102.15(3)(b) and (c)." *NAACP* ¶ 70.

Under Wis. Admin. Code § Trans 102.15(3)(b), a "written petition to the administrator of the division of motor vehicles for an exception" must include, *inter alia*, "[a]n explanation of the circumstances by which the person is unable to provide any of the documents" and "[w]hatever documentation is available which states the person's name and date of birth." §§ Trans 102.15(3)(b)2, 3. The DMV administrator may then "delegate" discretion to "subordinates" to "accept or reject such extraordinary proof of name and date of birth." § Trans 102.15(3)(c).

As the district court found in denying Defendants' motion to stay, "from the mere fact that a person may *petition* for an exception to the birth certificate requirement . . . it does not follow that the person will actually *obtain* a free ID card without producing a birth certificate." (Stay Denial at 8.) In fact, the trial record indicates that, even after *NAACP*, voters will continue to encounter numerous obstacles to obtaining ID, including the very government fees that *NAACP* purports to address. Indeed, prior to *NAACP*, DMV already implemented similar exceptions procedures for two categories of voters. But the district court found, based on record at trial, that DMV implements these procedures in a secretive and arbitrary manner, which prevents voters who need such exceptions from actually obtaining ID. (A.191-92 n.17;[2] Stay Denial at 7-8.)

[2] This response cites to the district court's April 29, 2014 Decision and Order located in pages A.160 to A.249 of Defendants' Consolidated Separate Appendix.

First, DMV already had discretion under § Trans 102.15(3)—the same provision invoked by *NAACP*—to accept petitions from and issue IDs to voters who have no birth certificates on file in the states where they were born (*e.g.*, because they were born outside of a hospital and their births were not recorded). (A.191-92 n.17.) *Second*, DMV also maintained similar discretion to grant exceptions for voters with errors or inaccuracies in their birth certificates or other underlying documents. (A.194.) Although Defendants asserted at trial that these exceptions alleviated the burdens of obtaining ID for many voters without accurate underlying documents, the district court rejected that assertion. Based on extensive facts adduced at trial, the district court found that "DMV does not . . . publicize" its exceptions procedures "because it wants to minimize exceptions." (A.191-92 n.17.) Consequently, the fact that exceptions are available "is not made known to applicants, and thus those who might benefit from the exception procedure are unlikely to learn of it." (A.194 (citation omitted)).

Moreover, the obscure exceptions procedures are generally not known to or are even ignored by the DMV staff itself, and any discretion is applied in an inconsistent and arbitrary manner. (*See* A.191-92 n.17 ("[t]eam leaders and supervisors have the discretion to decide on a case-by-case basis whether a person's alternative documentation is 'strong' enough. Tr. 1872;[3] Wis. Adm. Code § Trans. 102.15(3)(c). As a result, whether a voter is able to obtain a state ID card will depend on which DMV service center the voter visits and which supervisor is on

[3] Record references to the trial transcript, found in docket entry numbers 178 to 186, will be denoted as "Tr."

duty.")). Thus, the district court found that voters "are more likely to give up trying to get an ID than to be granted an exception," and that DMV's "exceptions" procedures therefore fail to enable voters without underlying documents or with errors in such documents to obtain ID. (A.194; A.191-92 n. 17.)

Defendants provide no evidence that *NAACP*'s new exception for voters who have to pay government fees for underlying documents will be implemented any differently from the existing ineffectual exceptions. Indeed, Defendants do not even argue that *NAACP* has fully eliminated the financial burdens associated with requiring voters to pay for birth certificates. (*See* Defs.' Mot. at 8 (arguing that *NAACP* "will *likely* eliminate the potential financial burden") (emphasis added)). *NAACP* itself does not even begin to address DMV's systemic failures to ensure that any exceptions are actually available or known to voters, for example, by directing DMV to be more transparent with voters than it has been in the past. (*See* Stay Denial at 8 ("Nothing in the supreme court's decision requires the DMV to do a better job of informing the public that the . . . procedure exists.")). Moreover, under *NAACP*, even if a voter learns of the exception procedure and follows all of the steps to petition for an exception set forth in § Trans 102.15(3)(b), that voter is still not guaranteed to receive an ID. Although *NAACP* instructed the DMV, without further explanation, to exercise its "discretion" under Wis. Admin. Code § Trans 102.15(3)(b) "in a constitutionally sufficient manner," *NAACP* ¶ 70, it did not give any explanation to DMV on how it was to do so, or even order DMV to treat voters consistently. *Cf. Louisiana v. United States*, 380 U.S. 145, 153 (1965) (voting rights

"cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints.").

Nor has the DMV begun to adopt rules to implement *NAACP*, much less to train workers on any new policies or procedures to do so.[4] If anything, reported statements by Wisconsin's Assembly Speaker in the wake of the *NAACP* ruling suggest that Defendants will affirmatively try to minimize the use of this exception.[5] Given the lack of implementation guidance from *NAACP* and Defendants' failure to undertake any steps to implement *NAACP* before bringing

[4] *See, e.g.*, Scott Bauer, "Wisconsin Supreme Court's voter ID ruling creates confusion, possibility of fraud," *Star Tribune*, Aug. 1, 2014, *available at* http://strib.mn/1n5UBQZ ("The court said the state can't require applicants for state-issued IDs to present government documents that cost money to obtain, such as a copy of a birth certificate. The court left it to the Division of Motor Vehicles to come up with a solution. 'We don't know how that's going to work,' Assembly Speaker Robin Vos said Thursday shortly after the ruling."); Mary Spicuzza, "Voter ID ruling stirs confusion, raises fraud concerns," *Wisconsin State Journal*, Aug. 1, 2014, *available at* http://bit.ly/1sS9Rby (the ruling "left lawyers and state officials scrambling to figure out how to put it into effect. . . . [Assembly Speaker] Vos said . . . that he is waiting for officials from the state Department of Justice and Department of Transportation to give lawmakers guidance before considering legislation to address the situation. It was unclear Friday how the change would work" and neither the Wisconsin Department of Transportation or Department of Justice had determined how the exception would be implemented); Marti Mikkelson, "Court Ruling Leaves Voter ID Procedure in the Hands of the Wisconsin DMV," *Milwaukee Public Radio*, Aug. 4, 2014, *available at* http://bit.ly/1o9OM4C (noting that decision "left it up to the Wisconsin Division of Motor Vehicles to decide how to accommodate people who can't obtain a free birth certificate. That's where confusion and perhaps long lines, enter the picture").

[5] *See, e.g.*, Bauer, *supra* n.4 (Assembly speaker Vos stating that issuing ID without requiring birth certificates creates potential for fraud); Spicuzza, *supra* n.4 ("Vos said Friday he feared the court's change could open up the potential for more fraud, such as identity theft, by making it easier to obtain a state ID.").

this hastily filed motion, there is nothing to suggest that this new exception will be implemented in a way that provides meaningful, and non-arbitrary, access to voters, or that voters will be any more likely to actually obtain ID using this exception than they are using existing the exceptions that already exist.

Moreover, even if *NAACP* completely alleviated the financial burdens of government fees for underlying documents—which it clearly does not—the decision does not even purport to ameliorate the many other burdens that Act 23 imposes on voters who lack ID. (*See generally* A.188-95 & nn.17-20 (finding that barriers to obtaining ID include transportation and logistical burdens; lack of information; lack of primary documents other than birth certificates; difficulty obtaining documents for reasons other than cost (such as the non-existence of secondary documents needed to obtain primary documents needed to obtain ID[6]); existence of erroneous documents requiring often costly correction; and delays in obtaining ID)). As the district court correctly observed in denying Defendants' motion for a stay, "even if I assumed that the supreme court[] . . . eliminate[d] the burden of having to pay a fee to obtain a birth certificate or similar document, I could not conclude that the burdens Act 23 places on the right to vote have been lessened to such a degree that the state's interests are now sufficient to justify them." (Stay Denial at 8.)

Thus, for the reasons discussed above, Defendants have not made any showing, much less a "strong" one, that *NAACP* will eliminate the burdens on

[6] Social security cards, for example, do not cost money and therefore are not covered by the *NAACP*-created exception, but they can be difficult to obtain. (*See, e.g.*, A.187-88; A.190.)

voters imposed by Act 23. Defendants thus utterly fail to demonstrate likelihood of success on the merits.

B. Defendants' Motion Improperly Attempts to Circumvent the District Court's Procedure for Expedited Review of a Change in Law

The existing trial record clearly establishes that there is no basis to conclude that *NAACP* will alleviate the burdens imposed by Act 23. But even if there remain material factual questions concerning the effect or implementation of the *NAACP* decision, the existence of such questions would not demonstrate that Defendants have a likelihood of success on the merits. Indeed, resolution of such questions should be left to the district court, whose injunction *specifically* provides a mechanism for expedited review by the district court in the event of any factual questions arising from a material change in law. (A.228.) *Cf. Patterson v. Warner*, 415 U.S. 303, 307 (1974) (it is "desirable that the District Court, in the first instance, evaluate the effect of [an] intervening [state court] decision."). As this Court has explained, where there is a "lack of clarity" because "[t]he record fails to reveal exactly what the [Defendants'] present practice is," the Court should "not engage in guesswork," but should rather permit the district court to make "precise factual findings" concerning the Defendants' "stated policy *and* the actual practices employed by [their] office[s]." *Rembert v. Sheahan*, 62 F.3d 937, 941-42 (7th Cir. 1995); *see also H-D Michigan, Inc. v. Top Quality Serv., Inc.*, 496 F.3d 755, 757 n.1

(7th Cir. 2007) (determining the effect of subsequent developments "is one best resolved in the first instance by the district court").[7]

Defendants have not attempted to avail themselves of the mechanism for relief the district court provided. *See* Fed. R. Civ. P. 62(c). They should not be permitted to bypass that process. Their motion for stay should be denied for that independent reason.

II. THE REMAINING FACTORS WEIGH AGAINST A STAY

The remaining factors further demonstrate that a stay is inappropriate, particularly this close to an election. The district court's balancing of these factors is amply supported by the record. *See A & F*, 742 F.3d at 766 ("aspects of a stay decision" other than likelihood of success "are reviewed deferentially").

First, "[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 op.). Defendants ignore the irreparable harm that a stay of the district court's ruling would have on Plaintiffs

[7] Other Circuits have similarly held that, where circumstances may have changed, any additional factfinding is best performed by the district courts in the first instance. *See, e.g.*, *United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009) (remanding for further evidentiary proceedings where effect of change in law is "by no means absolutely clear," and there is no assurance that "the alleged violations ever ceased" (internal quotation marks omitted)); *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1352 (11th Cir. 2011) (affirming judgment but remanding as to scope of injunction where effect of a change in law "was raised for the first time on appeal, [and] we have no factual record before us"); *KNC Invs., LLC v. Lane's End Stallions, Inc.*, 504 F. App'x 467, 468 (6th Cir. 2012) (where "perhaps the new facts relate to the merits of the dispute," but "the relevant information does not appear in the current record," then "the district court is best suited to find any relevant facts").

and other voters. As the district court correctly found, "some of the named individual plaintiffs," who continue to lack and are unable to obtain ID, not to mention "a large number of individuals who are not parties to this case," "would be prevented or deterred from voting because of Act 23." (Stay Denial at 18-19; *see also* A.197 (if a voter ID requirement were to go into effect, "a substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting.").) This clearly amounts to irreparable harm. Restrictions on the right to vote "strike at the heart of representative government" and therefore 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 432, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes an irreparable injury"). *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) (loss of fundamental rights, "for even minimal periods of time, unquestionably constitutes irreparable injury.").

Second, any purported harm to Defendants from denying their motion will be minimal. Act 23 took effect in only a single, low-turnout election in early 2012, after which it was enjoined by the state courts and subsequently by the district court. Thus, throughout Wisconsin's history, save that single election, no voter ID law has ever been in effect. Defendants cannot credibly claim that they will be irreparably harmed by a denial of a stay, which simply requires them to hold the impending November election under the same rules that have been in place for decades without any demonstrable harm to the state. Indeed, leaving the injunction in place would preserve the "last peaceable, uncontested status of the parties which

preceded the actions giving rise to the issue in controversy." *Praefke Auto Elec. & Battery Co., Inc. v. Tecumseh Prods. Co.*, 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000) (citing *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958)).

Third, Defendants cannot adequately support their argument that a stay is necessary to prevent voter fraud. Defendants failed to show at trial that in-person voter impersonation had occurred or was likely to occur in Wisconsin. (A.174-76.) Their argument on this motion rests entirely on new "facts" from recent news stories that are neither part of the trial record nor the subject of a motion under Federal Rule of Evidence 201 for judicial notice in the court below and thus should have no bearing on this case. And even if this "evidence" could be considered, it does not help Defendants' cause. The case Defendants cite refers to a recent prosecution of a single voter for registering at multiple addresses, double voting, and absentee fraud. (*See* Defs.' Mot. at 13.) As the district court found, however, the evidence at trial established that Act 23 could not prevent forms of fraud other than in-person impersonation. (A.179-80.) As is clear from the record, a voter who registers or votes multiple times is by definition using his own name, and may use photo ID to do so. (*See, e.g.*, Tr. 1038-40; A.401 (Defs.' Trial Ex. 1028 at 2).) With respect to alleged absentee fraud in the name of family members, as in the example Defendants cite, there is no evidence that Act 23 would prevent such behavior. *Cf. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (pointless to have photo ID requirement for absentee ballots), *aff'd*, 553 U.S. 181 (2008). Indeed, Dr.

Lorraine Minnite, an expert on voter fraud whose testimony the district court credited, testified at trial that she is "skeptical" that voter ID would prevent absentee fraud because a perpetrator could simply make a photocopy of and submit the family member's ID. (Tr. 1042; *see also* A.172 n.7.) Moreover, if the family member had previously voted absentee from a particular address, ID does not need to be resubmitted. Wis. Stat. § 6.87(4)(b)3.

Thus, the district court did not err in concluding that "almost certainly no in-person voter-impersonation fraud will have occurred during the time that [this] appeal [is] pending, and the public's confidence in the integrity of the electoral process will not have declined." (Stay Denial at 18.) The fact that this voter was caught and is being prosecuted despite Act 23 having been enjoined during the time the violations occurred makes clear that Act 23 is in fact unnecessary to detect voter fraud, and that the extraordinary remedy of a stay is unwarranted.

Fourth, granting Defendants' motion so close to the November elections would result in extraordinary confusion amongst voters and elections officials, almost certainly leading to inconsistent and arbitrary implementation of Act 23. *See Louisiana*, 380 U.S. at 153. There are fewer than three months before the November general election—which is an insufficient amount of time to implement Act 23—but any changes to identification procedures would have to be implemented even sooner. State law allows issuance of absentee ballots as early as Aug. 27, 2014 and *requires* issuance by September 18, 2014. Wis. Stat. § 7.15(1)(cm); Government Accountability Board, "Calendar of Election and Campaign Events," Nov. 2013 –

Dec. 2014, http://1.usa.gov/1vd672p. If a stay were granted, all 1,852 municipal clerks and tens of thousands of poll workers would have to be immediately and quickly retrained on Act 23, a process that is neither easy nor straightforward. (*See, e.g.,* Tr. 888, 911-13, 1149-54.) In addition, Defendants would also have to notify and educate millions of Wisconsin voters about Act 23 itself and its exceptions—while the *NAACP* exception itself has not yet been implemented. And many voters would have to obtain and present photo ID within a matter of weeks in order to obtain absentee ballots. Given that Act 23 originally provided for a *nine-month* lead time for public education and to allow voters to get ID, from the law's enactment until it went into effect for the low-turnout February 21, 2012 primary (*see* Wis. 2011 Act 23, Sec. 144(2); Tr. 908), it is inconceivable that Act 23 could be implemented properly in time for this fall's elections.

Fifth, the public's interest in preventing the potential disenfranchisement of eligible voters clearly outweighs the ephemeral interests that the law purports to serve, particularly given that "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." (A.197.) *Accord U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388 (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 denying the stay of the preliminary injunction."). Such disfranchisement would clearly be contrary to the extraordinary public 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." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (internal quotation marks omitted).

Finally, oral argument in this case has been scheduled for September 12, less than four weeks from now. (7th Cir. ECF No. 51-1.) There is no reason that a stay pending final resolution of this appeal is necessary given the proximity of the oral argument date.

Defendants' only argument that they will suffer irreparable harm absent a stay is a citation to two in-chambers decisions by individual Supreme Court Justices, for the sweeping proposition that a state suffers "a form of irreparable injury" any time one of its statutes is enjoined. (Defs.' Mot. at 20 (quoting *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)))). The argument that any injunction against enforcement of a state statute constitutes irreparable injury would, if accepted, justify the extraordinary relief of a stay pending appeal in every case 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,[8] and the decisions in *King* and the other cases cited by Defendants are no exception.[9]

[8] Indeed, *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006), and *Coalition for Economic Equity v. Wilson*, 122 F.3d 718 (9th Cir. 1997), cited by Defendants at pp. 20-21, did not even involve stays pending appeal. *Foulston* vacated a preliminary injunction and remanded to the district court. Moreover, it referred to *New Motor Vehicle Board* in a discussion of the merits of the claim, which involved

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay pending appeal should be denied.

Dated this 19th day of August, 2014.

Respectfully submitted,

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a balancing of the government's interests in preventing child abuse against certain professionals' privacy interest in not reporting abuse, 441 F.3d at 1119, not in its discussion of the balance of harms. *Wilson* provides even less support for Defendants: there the court *denied* a motion for a stay of the court of appeals' mandate pending a petition for a writ of certiorari.

[9] In *King*, in contrast, the State provided evidence of 58 criminal prosecutions for serious, violent offenses that the DNA collection and analysis authorized by the enjoined statute enabled. 133 S. Ct. at 3. No similar threat to public safety could result from the State's inability to enforce the ID requirement pending appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2014, the *Frank* Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Expedited Motion to Stay Permanent Injunction Pending Appeal was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated,
Plaintiffs,

v. **Case No. 11-CV-01128**

SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al.,
Defendants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, et al.,
Plaintiffs,

v. **Case No. 12-CV-00185**

JUDGE DAVID G. DEININGER, et al.,
Defendants.

DECISION AND ORDER

In this decision and order, I address the defendants' motion for a stay pending appeal of my order of April 29, 2014, in which I permanently enjoined the defendants from conditioning a person's access to a ballot on that person's presenting a form of photo identification. See Fed. R. Civ. P. 62(c) & Fed. R. App. P. 8(a)(1). The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. In re A & F Enterprises, Inc. II, 742 F.3d 763, 766 (7th Cir. 2014). Stays, like preliminary injunctions, are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on the merits. The goal is to minimize the costs of error. Id. To determine whether to grant a stay, I must consider the moving party's

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. Id. As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. Id.

A. Likelihood of Success on the Merits

On appeal, the defendants argue that I misinterpreted the law applicable to the plaintiffs' claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act. In general, the law applicable to such claims is unsettled, and thus I acknowledge that the defendants have some likelihood of success on the merits. However, having considered the specific arguments that the defendants raise in their motion for a stay, I conclude that their likelihood of success on the merits is low. I discuss these arguments below, as well as the defendants' argument that the scope of the injunction is too broad.

1. Fourteenth Amendment

In their motion for a stay pending appeal, the defendants initially argued that my disposition of the plaintiffs' Fourteenth Amendment claim is likely to be reversed because I made three errors: (1) deciding the claim when my disposition of the plaintiffs' claim under the Voting Rights Act made it unnecessary to do so, Mot. to Stay at 7; (2) enjoining the law as to all voters when I found that the law placed an unjustified burden on only a subgroup of voters, id. at 8; and (3) giving insufficient weight to the state's interest in preventing or deterring voter-impersonation fraud, id. at 9–10. In a recent letter, the defendants raise a fourth argument: that the decision of the Wisconsin Supreme Court in Milwaukee Branch

of the NAACP v. Walker, 2014 WI 98, __ Wis. 2d __, indicates that "Act 23 is lawful." Letter of Aug. 1, 2014, at 1. I address each argument in turn.

First, in my original order, I acknowledged that, given my resolution of the plaintiffs' claim under the Voting Rights Act, I could have declined to resolve the Fourteenth Amendment claim. Dec. & Order at 2–3. But as I explained, the two claims overlap substantially, in that many of the factual findings I made at the conclusion of a nearly two-week trial were relevant to both claims, and therefore it would have been inefficient to resolve the claim under the Voting Rights Act but not the claim under the Fourteenth Amendment. Id. The defendants do not fully develop their argument that this approach constituted reversible error; instead, they merely assert in conclusory fashion that the decision to address the Fourteenth Amendment claim was error. Mot. to Stay at 7. Thus, I see no reason to think that the defendants are likely to succeed on this argument on appeal.

The defendants' second argument is that I should not have enjoined the photo-ID requirement in its entirety because I found that many Wisconsin voters already have a qualifying ID and thus will not experience unjustified burdens. The defendants suggest that I should have fashioned some other remedy that was limited to the voters who will experience the unjustified burdens that I identified. Mot. to Stay at 8. But as I explained in my original order, there is no practicable way to remove the unjustified burdens on the voters who do not currently possess an ID without enjoining the photo ID requirement as to all voters. Dec. & Order at 38–39. Indeed, the defendants did not, in their post-trial brief, identify any practicable remedy short of enjoining Act 23 in its entirety, and they do

not, in their motion for a stay pending appeal, identify any such remedy. Thus, I conclude that the defendants are not likely to succeed on this argument.

The defendants' third argument is that my "application of the Anderson/Burdick balancing test was incorrect"[1] because I "gave insufficient weight to the legitimate and important state interests that the Supreme Court recognized in Crawford."[2] Mot. to Stay at 9. Specifically, the defendants contend that I gave insufficient weight to the state's interest in preventing and deterring voter-impersonation fraud. They argue that Crawford establishes that a state has a "legitimate and important interest" in preventing and deterring voter-impersonation fraud even in the absence of evidence that such fraud has occurred. Mot. to Stay at 9. I agree that Crawford generally establishes that a state has a legitimate and important interest in preventing or deterring voter-impersonation fraud, even in the absence of evidence that such fraud has occurred. But Crawford does not hold that a court may not consider the evidence (or lack thereof) that such fraud has occurred when deciding how much weight to assign to that particular interest under the Anderson/Burdick balancing test. If the evidence shows that voter-impersonation fraud is prevalent, then the state's interest in preventing and deterring such fraud may be "sufficiently weighty to justify" the burdens placed on the rights of individual voters. Crawford, 553 U.S. at 191 (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)). But if the evidence shows that voter-impersonation fraud is rare or nonexistent, then the state's interest is assigned less weight. In the present case, the evidence showed that virtually no voter-impersonation fraud occurs

[1]Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

[2]Crawford v. Marion County Elec. Bd., 553 U.S. 181 (2008).

in Wisconsin and that it is unlikely to become a problem in the foreseeable future. For these reasons, I determined that the state's interest in preventing or deterring voter-impersonation fraud was insufficiently weighty to justify the burdens Act 23 placed on a substantial number of voters. The defendants have not shown that this application of the Anderson/Burdick balancing test was erroneous.

The defendants remaining argument concerning the Fourteenth Amendment claim is that the Wisconsin Supreme Court's decision in Milwaukee Branch of the NAACP v. Walker, establishes that Act 23 is lawful. In their letter to me, the defendants do not expand on this argument, but in their appellate filings, they argue that the state supreme court's construction of an administrative regulation "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." Consol. Reply Br. of Defendants-Appellants at 5. To explain the defendants' argument, I must first briefly discuss the relevant part of NAACP v. Walker.

The Wisconsin Supreme Court began its discussion of the administrative regulation at issue here by noting that, at the state trial-court level, the plaintiffs provided evidence that they were required to make payments to government agencies to obtain certain primary documents, such as birth certificates, that the division of motor vehicles ("DMV") requires them to produce in order to obtain free state ID cards for voting. NAACP, 2014 WI 98, ¶¶ 50 & 52, __ Wis. 2d __. The court then determined that the DMV's requiring a person to produce a document that he or she cannot obtain without making a payment to a government agency resulted in a severe burden on the right to vote. Id. ¶¶ 60–62. In an effort to eliminate this severe burden, the court construed a regulation of the Wisconsin Department of Transportation that granted the administrator of the DMV discretion to issue

state ID cards to persons who could not produce a birth certificate or other specifically identified document as proof of name and date of birth. Id. ¶¶ 66–71. That regulation states that if a person is "unable" to provide a birth certificate or other specifically identified document, and such documents are "unavailable" to the person, the person may make a written petition to the administrator of the DMV for an exception to the requirement to produce a birth certificate or similar document. Wis. Admin. Code § Trans 102.15(3)(b) & (c).[3] Under the Wisconsin Supreme Court's construction of this regulation, a person is "unable" to provide a birth certificate or similar document, and such documents are "unavailable" to the person, "so long as [the person] does not have the documents and would be required to pay a government agency to obtain them." NAACP, 2014 WI 98, ¶ 69.

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[3]The full text of § Trans 102.15(3)(b) & (c) provides as follows:

> (b) If a person is unable to provide documentation under [§ Trans 102.15(3)(a)], and the documents are unavailable to the person, the person may make a written petition to the administrator of the division of motor vehicles for an exception to the requirements of par. (a). The application shall include supporting documentation required by sub. (4) and:
>
> 1. A certification of the person's name, date of birth and current residence street address on the department's form;
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> 2. An explanation of the circumstances by which the person is unable to provide any of the documents described in par. (a); and
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> 3. Whatever documentation is available which states the person's name and date of birth.
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> (c) The administrator may delegate to the administrator's subordinates the authority to accept or reject such extraordinary proof of name and date of birth.

Under the Wisconsin Supreme Court's construction of this regulation, then, a person is entitled to petition for an exception to the birth-certificate requirement if the person cannot obtain a birth certificate without paying a fee to a government agency. But this does not mean that the person will be able to obtain a free state ID for voting without producing a birth certificate. This is so because, under the regulation at issue, a person must still provide "[w]hatever documentation is available which states the person's name and date of birth," Wis. Admin. Code § Trans 102.15(3)(b)3., and then the administrator, in his or her discretion, may accept or reject "such extraordinary proof of name and date of birth," id. § Trans 102.15(3)(c). There is no guidance in the regulation that indicates what kind of documentation might constitute "extraordinary proof of name and date of birth" or what factors the administrator should consider when exercising his or her discretion to determine whether the documentation the person has produced constitutes extraordinary proof. In NAACP, the Wisconsin Supreme Court did not provide any guidance to the administrator concerning the meaning of "extraordinary proof" or set forth any standard that might guide the exercise of the administrator's discretion. Instead, the court offered this cryptic instruction: "the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner." 2014 WI 98, ¶ 70.

Another problem is that it is not clear how members of the public who need to obtain a free state ID will learn that the DMV now has discretion to issue IDs to persons who cannot obtain birth certificates without paying fees to government agencies. At the trial in this case, the plaintiffs demonstrated that the DMV does not publicize its exception procedure, which involves using Form MV3002, because the DMV wants to minimize exceptions. Dec. & Order at 32–33 n. 17. In light of this evidence, I concluded that a

person who might need an exception is more likely to give up trying to get an ID than to be granted an exception. Id. at 32–36 & n.17. Nothing in the supreme court's decision requires the DMV to do a better job of informing the public that the MV3002 procedure exists.

Thus, from the mere fact that a person may petition for an exception to the birth-certificate requirement if the person cannot obtain a birth certificate without paying a fee to a government agency, it does not follow that the person will actually obtain a free ID card without producing a birth certificate, and so the defendants have not shown that the Wisconsin Supreme Court's construction of § Trans 102.15(3)(b) and (c) "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." Consol. Reply Br. of Defendants-Appellants at 5. In any event, having to pay a fee to obtain a birth certificate is only one of many burdens that a person who needs to obtain an ID for voting purposes might experience. See Dec. & Order at 29–36. So even if I assumed that the supreme court's construction of § Trans 102.15(3)(b) and (c) eliminates the burden of having to pay a fee to obtain a birth certificate or similar document, I could not conclude that the burdens Act 23 places on the right to vote have been lessened to such a degree that the state's interests are now sufficient to justify them. Accordingly, the state supreme court's decision does not significantly increase the defendants' likelihood of success on the Fourteenth Amendment claim.

2. Section 2 of the Voting Rights Act

The defendants argue that my disposition of the plaintiffs' Section 2 claim is likely to be reversed for two reasons: (1) I incorrectly determined that the LULAC plaintiffs have

"statutory standing," and (2) my interpretation of how Section 2 applies in a "vote denial" case was erroneous. I have already addressed the statutory-standing argument twice and will not discuss it further, except to note that even if the defendants prevail on this argument on appeal, they will not succeed in reversing my disposition of the Section 2 claim, as the Frank plaintiffs unquestionably have statutory standing.[4]

With respect to my interpretation of Section 2, the defendants argue that I am likely to be reversed because my interpretation "would potentially invalidate other laws not reasonably subject to challenge, such as voter registration laws." Mot. to Stay at 11. The defendants argue that my interpretation has the potential to invalidate voting practices that are unquestionably legitimate (or, in their words, "not reasonably subject to challenge") if they have disproportionate impacts on the poor, as a greater percentage of minorities than whites are poor, and this is due to the history of discrimination against minorities. The suggestion is that my interpretation will lead to an absurd result by invalidating laws that Congress, in passing Section 2, could not have intended to invalidate. But what unquestionably legitimate voting practice is likely to have a disproportionate impact on the poor? In their motion to stay, the defendants point to voter registration, but they do not explain how voter registration is likely to have a disproportionate impact on the poor. In their appellate filings, the defendants point to "all existing voting practices that require in-person voting" by giving the following example:

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[4]The defendants suggest that if it is determined on appeal that the LULAC plaintiffs lack statutory standing, then any evidence presented by the LULAC plaintiffs will need to be "subtracted" from the evidence at trial. Mot. to Stay at 16. However, at trial, the defendants stipulated that any evidence offered by the LULAC plaintiffs would also be considered evidence offered by the Frank plaintiffs, and vice versa. Tr. at 7.

> [A]ssume that a plaintiff could prove that minority voters are less likely to own automobiles than white voters. Further assume that this is because minorities are more likely to be poor and that the higher rate of poverty among minorities is the result of historical or current societal discrimination. Under the district court's analysis, all existing voting practices that require in-person voting may constitute a violation of Section 2 because in-person voting is more difficult without an automobile.

Consol. Reply Br. at 18. Here, however, the final premise of the defendants argument—that in-person voting is more difficult without an automobile—is likely false. Based on the evidence presented at trial, I can conclude that lower-income minorities, especially those who do not own automobiles, are likely to live in urban areas, where it is easier to walk to a polling place than to drive. So it is very difficult to envision a plaintiff using disparities in rates of automobile ownership as a basis for challenging an existing voting practice that requires a person's presence at the polls.

In any event, even if it could be shown that an unquestionably legitimate voting practice would have a disproportionate impact on the poor, and therefore on minorities, that practice would not necessarily be invalidated under my interpretation of Section 2. As I noted in my original decision, if the voting practice was clearly necessary to protect an important state interest—an interest that is not "tenuous"—that voting practice could be sustained even if it has a disproportionate impact on minorities. Dec. & Order at 67–68. Any voting practice that could be described as "unquestionably legitimate" or "not reasonably subject to challenge" will almost certainly be clearly necessary to protect an important state interest. Consequently, I conclude that there is no merit to the defendants' argument that my interpretation of Section 2 will lead to results that Congress did not intend.

The defendants also argue that it was error for me to cite Justice Scalia's dissenting opinion in Chisom v. Roemer, 501 U.S. 380 (1991), in the course of interpreting Section 2. The defendants make the obvious point that a dissent has no precedential value. But I did not cite Justice Scalia's dissent for its precedential value. I cited it because it illuminates the plain meaning of Section 2: it shows that I am not the only jurist to have read the text of Section 2 and come to the conclusion that it means that a state may not adopt a voting practice that makes it more difficult for minorities to vote than whites. The defendants also note that Justice Scalia's dissent was part of a "vote dilution" case, not a vote-denial case. But even though that is true, it does not alter the fact that the example Justice Scalia gave—a county's making it more difficult for Blacks to register to vote than whites—involved vote denial rather than vote dilution. Indeed, Justice Scalia himself described his example as involving a "nondilution § 2 violation[]." Chisom, 501 U.S. at 408 (emphasis in original). So the dissent is instructive on the meaning of Section 2 as applied to a vote-denial claim.

The defendants also argue that I should have upheld Act 23 under Section 2 because Act 23 does not cause any of the racial disparities I identified, such as the disparity in poverty rates for whites and minorities and the resulting disparity in ID-possession rates. But although Act 23 does not cause these disparities, it clearly interacts with them in a way that makes it harder for minorities to vote. And it is this interaction with the effects of discrimination that produces a discriminatory result.[5] Thornburg v. Gingles,

[5]Some of the classic practices used to prevent minorities from voting—literacy tests and poll taxes—did not, by themselves, cause the underlying disparities that allowed the practices to effectively suppress minority voting. Literacy tests did not cause illiteracy; they exploited the fact that, because of the effects of discrimination, Blacks were less likely to

478 U.S. 30, 47 (1986) ("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 black and white voters to elect their preferred representatives." (Emphasis added)).[6] The Ninth Circuit has specifically rejected the idea that a voting practice that produces a disproportionate racial impact may survive scrutiny under Section 2 so long as the voting practice, by itself, is not responsible for any underlying racial disparities. See Farrakhan v. Washington, 338 F.3d 1009, 1016–20 (9th Cir. 2003). As the court stated, "demanding 'by itself' causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by [other] circuits in Section 2 cases, as they also require a broad, functionally-focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact 'is better explained by other factors independent of race.'" Id. at 1018 (quoting Smith v. Salt River Agric. Improvement & Power Dist., 109 F.3d 586, 591 (9th Cir. 1997)). The court continued:

> Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those

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be able to read than whites. Likewise, poll taxes did not cause poverty; they exploited the fact that, because of the effects of discrimination, Blacks were more likely to be poor than whites.

[6]Although Thornburg was a vote-dilution case, not a vote-denial case, the Court did not limit the language I have quoted to vote-dilution cases. Rather, the Court made clear that Section 2 applies to vote-denial cases as well as vote-dilution cases, id. at 478 U.S. at 45 n.10, and the quoted language identifies "the essence of a Section 2 claim," not the essence of a vote-dilution claim.

> factors involve race discrimination. Therefore, under Salt River and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances.

Id. at 1019 (emphasis added).[7] In other words, the question in a Section 2 case is whether the challenged practice magnifies or exacerbates an existing racial disparity caused by discrimination in other areas, thereby importing the effects of that discrimination into the electoral process. In the present case, the evidence showed that discrimination in areas such as employment, housing, and education caused higher poverty rates for minorities than for whites, with the result that a greater percentage of the minority population lacks a photo ID and will have more difficulty obtaining an ID. Act 23 thus imports the effects of discrimination in these areas into the electoral process and produces a discriminatory result.

The defendants also contend that my interpretation of Section 2 is incorrect because my interpretation "focuses not on causation but on mere likelihood." Mot. to Stay at 12. This is in reference to the following language in my opinion: "Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not." Dec. & Order at 52. The defendants argue that my interpretation focuses on whether a voting practice "could potentially create more difficulty for minorities to vote than non-minorities," rather

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[7] In Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010), the en banc court found that the voting practice at issue in the Farrakhan case I cited in the text—a felon disenfranchisement law—did not violate Section 2. However, the court did not disturb the holding that a Section 2 analysis requires consideration of factors external to the challenged voting mechanism itself. See 623 F.3d at 995 (Thomas, J., concurring).

than on whether it actually creates more difficulty for minorities to vote than non-minorities. Mot. to Stay at 13 (emphasis in original). This is wrong. Under my interpretation, a voting practice violates Section 2 only when it actually creates more difficulty for minorities to vote. And I found that Act 23 actually creates more difficulty for minorities to vote than non-minorities, in that Act 23 will prevent or deter a greater percentage of minorities from voting than whites. Dec. & Order at 61–63. The phrase "more likely than whites" (and related phrases) refers to the fact that although not every minority will be deterred or prevented from voting, a greater percentage of minorities will be deterred or prevented from voting than whites. Perhaps what the defendants mean to argue is that a voting practice does not violate Section 2 unless it prevents or deters every member of a racial group from voting. But there is no support for this narrow view of Section 2. The text states that a violation of Section 2 occurs when the political process is not "equally open to participation" by members of a minority group 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). If a voting practice will prevent or deter a greater percentage of minorities from voting than whites, the political process is not "equally open to participation" by minorities, in that they will not have the same opportunity as whites to participate in the political process and to elect representatives of their choice.

Finally, the defendants argue that because my conclusion that Act 23 violates Section 2 depends on the premise that a greater percentage of minorities than whites are poor, I have turned income or wealth into a protected class. That is incorrect. I concluded that Act 23 produces a discriminatory result because it interacts with the effects of racial discrimination, including higher poverty rates for minorities than for whites. If the reason

a greater percentage of minorities than whites in Wisconsin are poor were unrelated to racial discrimination, then showing that minorities are more likely than whites to be poor would not have been sufficient to show that Act 23 produces a discriminatory result. Thus, the root cause of Act 23's disproportionate impact is discrimination on account of race, not income or wealth.

3. Scope of Injunction

The defendants' final argument is that I issued a permanent injunction that is impermissibly broad, in that I enjoined the defendants from enforcing any requirement to produce a photo ID to gain access to a ballot, not simply the photo-ID requirement embodied in Act 23. Importantly, however, I stated that if the State of Wisconsin enacted a new photo-ID law, the defendants could file a motion for relief from the permanent injunction, and that I would schedule expedited proceedings on any such motion, if necessary. Dec. & Order at 69. The defendants contend that I would have no jurisdiction to hear such a motion while an appeal from the order granting the original injunction was pending, because ordinarily a district court loses jurisdiction over a case between the time a notice of appeal is filed and the time the mandate issues. However, Federal Rule of Civil Procedure 62(c) states that while an appeal from an order granting an injunction is pending, the district court may modify the injunction. Moreover, to the extent there were any doubt over whether I would have jurisdiction to consider a motion to modify the injunction, the procedure outlined in Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1 would apply. These rules provide that if a timely motion is made in the district court for relief that the district court lacks authority to grant because an appeal is pending, the district court may inform the court of appeals that it would grant the

motion (or that the motion raises a substantial issue), and then the court of appeals may remand the case to the district court for a ruling on the motion. Thus, if the State of Wisconsin enacts a new photo-ID law, the defendants are not precluded from seeking relief from the present injunction.

With respect to the question of whether I erred in enjoining the defendants from enforcing any photo-ID requirement, not just Act 23, I first note that even if this were error, it would not be grounds for staying my order pending appeal. If the court of appeals concludes that the injunction is impermissibly broad, the court will not reverse my order in its entirety. Rather, the court will vacate the injunction and remand with instructions to enter an injunction limited to Act 23. See PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (stating that court of appeals will "restrict the breadth" of an overbroad injunction). Thus, the argument that the injunction is too broad does not support the defendants' motion for a stay pending appeal. At best, it is an argument that supports modifying the injunction pending appeal, which the defendants have not asked me to do.

In any event, the defendants have not shown that I erred in enjoining them from enforcing any photo-ID requirement, not just Act 23. An injunction "must . . . be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion." Russian Media Group. LLC v. Cable America, Inc., 598 F.3d 302, 307 (7th Cir. 2010). To make an injunction effective, a district court may enjoin "similar conduct reasonably related to" the violation established in the litigation. EEOC v. AutoZone, Inc., 707 F.3d 824, 841 (7th Cir. 2013). In the present case, I concluded that to render the injunction effective, it was necessary to enjoin similar conduct reasonably related to the enforcement of Act 23. While the present case was under consideration, the

Wisconsin Assembly adopted an amendment to Act 23, and the state's governor announced that he would call a special session of the legislature to modify Act 23 in the event that the courts did not uphold it. Now, it is possible that the state could make changes to Act 23 that result in its surviving scrutiny under the Voting Rights Act and the Fourteenth Amendment. However, given the evidence presented during the trial, it seemed doubtful that the kind of changes being discussed at the time would have had that result. Thus, to prevent the defendants from circumventing the injunction by enforcing a new photo-ID requirement that continued to place unjustified burdens on a substantial number of voters and that produced a discriminatory result, I enjoined the defendants from enforcing any photo-ID requirement, not just Act 23 as it then existed, until such time as it could be determined whether the new law removed the unjustified burdens and discriminatory result. In my discretion, I determined that an injunction of this breadth was necessary to render the relief afforded to the plaintiffs effective.

The defendants contend that, although a district court has authority to enjoin a defendant from engaging in conduct that is similar to the conduct found to be unlawful in the litigation, I abused my discretion by imposing a remedy that could be likened to the preclearance requirement of Section 5 of the Voting Rights Act, which the Supreme Court addressed in Shelby County v. Holder, __ U.S. __, 133 S. Ct. 2612 (2013). But the preclearance requirement of Section 5 prevents a covered jurisdiction from enforcing any changes to state election law until they have been precleared by the federal government. Id. at 2624. The injunction I issued allows the State of Wisconsin to enforce any changes to its election law that it wants, so long as the law at issue does not require a person to present a photo ID as a condition to receiving a ballot. Nothing in Shelby County suggests

that once a specific voting practice has been shown to be unlawful under Section 2, a court may not enjoin a state from adopting a similar voting practice without first seeking relief from the injunction. Thus, the defendants' reliance on Shelby County is misplaced.

B. Irreparable Harm and the Public Interest

The other factors that I must consider when deciding whether to stay an injunction pending appeal are 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. The irreparable harm that will result to the defendants if the stay is denied in error is tied to the interests the defendants put forward to justify Act 23 in the first place: preventing in-person voter-impersonation fraud and promoting public confidence in the integrity of the electoral process. But as I found in deciding this case on the merits, there is virtually no in-person voter-impersonation fraud in Wisconsin, and there is no evidence that laws such as Act 23 promote public confidence in the integrity of the electoral process. Thus, if a stay pending appeal is denied in error, the defendants would suffer very little irreparable harm—almost certainly no in-person voter-impersonation fraud will have occurred during the time that the appeal was pending, and the public's confidence in the integrity of the electoral process will not have declined.

On the other side of the balance, the irreparable harm that the plaintiffs would suffer if a stay were granted in error would be significant. To begin with, some of the named individual plaintiffs, including Shirley Brown and Eddie Lee Holloway, Jr., would be unable to vote during any election that occurred while the stay was in effect, as they lack a photo ID and have been unable to obtain a photo ID. Similarly, many members and individuals represented by the organizational plaintiffs in the LULAC case would be prevented or

deterred from voting because of Act 23. Finally, under the public-interest factor, I take into account the fact that a large number of individuals who are not parties to this case and who might not be represented by any of the LULAC organizations would also be prevented or deterred from voting if Act 23 were reinstated pending appeal.

In short, in balancing the potential for irreparable harm to each party, I reiterate my finding that "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." Dec. & Order at 38. Thus, the balance of the harms weighs against a stay pending appeal.

C. Sliding Scale

Having found that the defendants' likelihood of success on appeal is low, that the defendants would suffer very little irreparable harm if a stay pending appeal were denied in error, and that the plaintiffs and members of the public would suffer significant irreparable harm if a stay pending appeal were granted in error, I conclude that, under the sliding-scale approach, I should not stay the permanent injunction pending appeal.

CONCLUSION

For the reasons stated, **IT IS ORDERED** that the defendants' motion for a stay pending appeal is **DENIED**.

Dated at Milwaukee, Wisconsin, this 13th day of August 2014.

s/ Lynn Adelman

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LYNN ADELMAN
District Judge