

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 (LULAC) 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,
CASE NOS. 11-CV-1128 & 12-CV-285,
THE HONORABLE LYNN S. ADELMAN, PRESIDING

DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS-
APPELLEES' EMERGENCY PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC OF PANEL ORDER GRANTING MOTION TO STAY

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a 6-3 majority of the U.S. Supreme Court upheld Indiana’s voter photo identification law in spite of a constitutional challenge. Obviously, this Court is bound by that decision. Here, a unanimous panel of this Court determined on September 12 that Wisconsin’s voter ID law is “materially identical to Indiana’s photo ID statute, which the Supreme Court held valid in *Crawford*[.]” (No. 14-2058, 7th Cir. Dkt. #64:2, *hereinafter* the “Order”). The Court permitted Wisconsin to enforce its voter ID law for the upcoming November 2014 elections. (*Id.*)

There is no good reason to revisit that decision. Wisconsin election officials are already implementing the voter ID law. Plaintiffs are asking this Court to pinball state and local election officials between enforcing and not enforcing the law with an election on the horizon. Voters would get the pinball treatment, too. There has been extensive media coverage and public promotion that voter ID can be enforced and that it *will* be enforced in November.

Plaintiffs’ petition is heavy on rhetoric and “sky is falling” speculation but light on the pertinent facts. The district court found that more than 90% of Wisconsin registered voters already have qualifying ID, and that estimate was based upon testimony offered by Plaintiffs and heard at trial in November 2013, almost 10 months ago. (No. 14-2058, 7th Cir. Dkt. #47-2:23).

Voters continue to obtain free IDs from the State for purposes of voting.¹ With regard to the small percentage of voters who still lack ID, this Court correctly held that “[a]fter the district court’s decision, the Supreme Court of Wisconsin revised the procedures to make it easier for persons who have difficulty affording any fees to obtain the birth certificates or other documentation needed under the law, or to have the need for documentation waived. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98 (July 31, 2014).” (Order at 2). Plaintiffs focus on a very small number of voters who they speculate will have problems obtaining qualifying ID, but this focus on a fraction of the electorate is not a justification to revisit the panel’s Order.

The petition should be denied because Plaintiffs have not identified sufficient reasons for this Court to take the step of reconsidering en banc a stay order of a unanimous panel of its circuit judges. Plaintiffs have cited no case in which this Court has ever taken that extraordinary step. This Court

¹Wisconsin has been providing free state photo ID cards for purposes of voting since 2011. The free ID card program was never enjoined. As of May 16, 2012, 79,170 free IDs were issued for purposes of voting. (No. 14-2058, 7th Cir. Dkt. #47-11:A.362-63 (Defendants’ Trial Ex. 1003 at 18-19).) By October 31, 2013, 217,061 free ID cards were issued for purposes of voting. (No. 14-2058, 7th Cir. Dkt. #47-12:A. 637 (Trial Tr. at 1814)). Of the free IDs issued in Milwaukee County, 22.0% went to whites, 64.4% went to blacks, and 11.3% went to Hispanics. (No. 14-2058, 7th Cir. Dkt. #47-11:A. 296 (Defendants’ Trial Ex. 1001 at 19)).

To date, the State has issued about 292,000 free IDs for voting. See Anthony Beckett, *Wisconsin DMV service centers ready to fill photo ID requests*, Wisconsin Radio Network (Sept. 15, 2014), available at <http://www.wrn.com/2014/09/wisconsin-dmv-service-centers-ready-to-fill-photo-id-requests/>. All hyperlinks in this response were last visited on September 23, 2014.

rightly concluded that Wisconsin has shown that its voter ID law should be permitted to go into effect for the November elections. Leaving an injunction in place as to lawfully enacted legislation works an active harm to the State and its citizens. The petition should be denied.

LEGAL STANDARD

Federal Rule of Appellate Procedure 35(a) states, in relevant part:

. . . An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

“[R]ehearings en banc are designed to address issues that affect the integrity of the circuit's law (intra-circuit conflicts) and the development of the law (questions of exceptional importance).” Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 160 (2014) (citing *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (per curiam)). “Hearings and rehearings en banc are very rare.” *Id.* (citing *Roberts v. Sears, Roebuck & Co.*, 723 F.3d 1324, 1328 (7th Cir. 1983) (en banc) (separate opinion of Posner, J.)). “It should go without saying that mere disagreement with a decision by a panel of the court is not sufficient ground for rehearing en banc.” *Mitchell v. JCG Indus. Inc.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing en banc).

ARGUMENT

I. The Court's September 12 Order Does Not Meet The Standard For A Rehearing Or A Rehearing En Banc Under Federal Rule Of Appellate Procedure 35.

The Court's September 12 Order does not meet the standard for a rehearing or a rehearing en banc under Federal Rule of Appellate Procedure 35. Plaintiffs are seeking review of a stay order. This Court has not issued its opinion or judgment.

First, the Order does not create intra-circuit (or inter-circuit) conflict. Fed. R. App. P. 35(a)(1). It is not necessary to review the Order "to secure or maintain uniformity of the court's decisions." *Id.*

Second, while this case arguably "involves a question of exceptional importance," Fed. R. App. P. 35(a)(2), the Order does not answer any pertinent legal question in a way that develops the law or departs from existing law. The Order expressly relies upon *Crawford*, a binding precedent that is directly on point. (Order at 2). Likewise, the Order applies a standard balancing analysis to determine whether the equities now favor a stay of the district court's permanent injunction. It states:

After the district court's decision, the Supreme Court of Wisconsin revised the procedures to make it easier for persons who have difficulty affording any fees to obtain the birth certificates or other documentation needed under the law, or to have the need for documentation waived. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98 (July 31, 2014). This reduces the likelihood of irreparable injury, and it also changes the balance of equities and thus the propriety of federal injunctive relief. The panel has concluded that the state's probability of success on the merits of this appeal is sufficiently great that

the state should be allowed to implement its law, pending further order of this court.

(*Id.*). Plaintiffs disagree with the panel’s balancing analysis in the Order, which is an insufficient reason for this Court to grant the petition. Requiring photo ID at the polls is a common sense election reform that has already been upheld by the U.S. Supreme Court, even on a similar time frame as here.

In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the U.S. Supreme Court vacated an injunction granted on appeal by the Ninth Circuit, which halted Arizona’s enforcement of its voter ID law. The Ninth Circuit’s injunction pending appeal was entered on October 5, 2006. *Id.* at 3. The Supreme Court’s decision in *Purcell* was issued on October 20, 2006. *Id.* at 1. There were elections weeks later on November 7, 2006. This Court’s Order is consistent with *Purcell*.

By issuing the Order on September 12, this Court did not create an intra- or inter-circuit split, it did not contradict a U.S. Supreme Court opinion, and it did not develop new law. The Court’s opinion on the merits regarding the important legal questions will issue “in due course.” (Order at 2). En banc rehearing makes no sense when these important legal issues have not even been addressed by the Court in an opinion. Review of the Order does not meet the criteria for rehearing or rehearing en banc in Federal Rule of Appellate Procedure 35.

II. State And Local Election Officials Are Already Enforcing The Voter ID Law And Have Been Since Shortly After September 12.

State and local election officials are already enforcing the voter ID law and have been since shortly after September 12. Granting Plaintiffs' petition and vacating the Order would create confusion because it would pinball election officials and voters between the law being not in effect, then in effect, then not in effect. State election officials have advised local election officials and the public that the law is in effect as of September 12.

On September 12, this Court entered the Order around 4 p.m. Around 5:15 p.m., the Wisconsin Government Accountability Board's ("GAB's") Elections Division Administrator, Michael Haas, sent a communication to the Wisconsin county clerks, the Wisconsin municipal clerks, the City of Milwaukee Election Commission, and the Milwaukee County Election Commission indicating that the voter ID law is to be enforced.²

The same evening, GAB's director and general counsel, Kevin Kennedy, stated publicly that GAB "is taking every step to fully implement the voter photo ID law for the November general election. We are now focused on

²See <http://gab.wi.gov/elections-voting/photo-id> and http://gab.wi.gov/sites/default/files/memo/20/clerk_communication_photo_id_rei_nstatement_9_12_14_14932.pdf.

communicating with local election officials and voters, and will have more information about the details next week.”³

Plaintiffs raise issues regarding absentee ballots. (Petition at 8-9). “The statutory deadline for clerks to begin mailing absentee ballots to voters who have filed a request for an absentee ballot [was] September 18, 2014.” (No. 14-2058, 7th Cir. Dkt. #56-2, Declaration of Kevin J. Kennedy, ¶ 6); Wis. Stat. § 7.15(1)(cm). September 17, 2014, was the deadline for county clerks to deliver ballots to municipalities. Wis. Stat. § 7.10(3). On September 17, GAB instructed local election officials that all absentee ballots must be mailed to voters with instructions indicating that photo ID is required to vote absentee.⁴

As Plaintiffs point out, some absentee ballots were mailed prior to September 12 and may have been returned to local election officials without enclosing a photocopy of a qualifying ID. GAB has ably addressed these issues. On September 16, GAB held a press conference and followed up with written communications sent to all local election officials to instruct them as

³Patrick Marley and Jason Stein, *Appeals panel reinstates Wisconsin’s voter ID law*, Milwaukee Journal Sentinel (Sept. 12, 2014), *available at* <http://www.jsonline.com/news/appeals-panel-questions-why-voter-id-shouldnt-be-in-place-nov-4-b99350157z1-274904111.html>.

⁴Updates to Absentee Forms for Voter Photo ID Implementation, *available at* <http://gab.wi.gov/node/3379>.

to how these ballots are to be treated and how voters are to be informed of their obligation to provide photo ID.⁵

GAB instructed local election officials that all absentee ballots—including those previously mailed—must be accompanied by qualifying photo ID if they are to be counted.⁶ GAB provided local election officials with draft communications that are to be sent to every voter who has requested an absentee ballot, thereby informing those voters to provide a copy of their photo ID to local election officials.⁷ GAB also instructed local election officials to follow up their written communications to absentee voters with a telephone call.⁸

On September 17, GAB sent a communication to all local election officials regarding updated absentee ballot forms that must be used.⁹ The updated forms reference that voters are required to show photo ID.

On September 18, the City of Milwaukee sent out absentee ballots to those who requested them with letters alerting people that they will need to

⁵Voter Photo ID and Absentee Ballots for 2014 General Election, *available at* <http://gab.wi.gov/node/3377>; *see also* http://gab.wi.gov/sites/default/files/memo/20/photo_id_guidance_2014_1_absentee_ballots_9_16_14_53121.pdf.

⁶http://gab.wi.gov/sites/default/files/memo/20/photo_id_guidance_2014_1_absentee_ballots_9_16_14_53121.pdf.

⁷http://gab.wi.gov/sites/default/files/memo/20/missing_photo_id_letter_9_16_14_docx_48267.docx.

⁸http://gab.wi.gov/sites/default/files/memo/20/photo_id_guidance_2014_1_absentee_ballots_9_16_14_53121.pdf.

⁹http://gab.wi.gov/sites/default/files/memo/20/updates_to_absentee_forms_for_voter_photo_id_imple_87945.pdf.

provide a copy of a qualifying photo ID.¹⁰ It would be extremely confusing for these voters to be informed now that the letter that they just received from the City of Milwaukee is inaccurate.

Aside from absentee ballot issues, Plaintiffs highlight the general issue of the Order creating a late-developing change in election procedure. (See Petition at 13-14). It is not unreasonable to adapt to such change at this time.¹¹ See, e.g., *Purcell*, 549 U.S. at 5-6.

Election officials, poll workers, and voters are asked to adapt to electoral changes regularly—for virtually every election cycle. For example, in Wisconsin there have been fairly recent election administration changes requiring voters to sign the poll book, see 2011 Wis. Act 23, § 45, and to permit voters to show certain residency documents electronically on their smart phones for purposes of voter registration.¹² Requiring a voter to show

¹⁰John Cuoco, *City sending out absentee ballots and Voter ID letters Thursday*, CBS 58.com (Sept. 17, 2014), available at <http://www.cbs58.com/news/local-news/City-sending-out-absentee-ballots-and-Voter-ID-letters-Thursday-275537261.html>.

¹¹Plaintiffs filed a declaration from the City of Madison's municipal clerk in support of their petition, but the declaration does not state that Madison has started training its poll workers for the November elections. The City's website suggests that the clerk's office is looking for poll worker volunteers and does not list any dates or times for training sessions. See <http://www.cityofmadison.com/election/pollWorkers/apply.cfm>.

¹²Proof of Residence for Voter Registration, available at http://gab.wi.gov/sites/default/files/publication/154/proof_of_residence_pdf_151_05.pdf

photo ID is no different than these basic procedural changes to the election process.

Poll workers will be appropriately trained in the photo ID requirement and equipped to handle it on Election Day. In fact, local election officials are making diligent efforts to help voters obtain qualifying ID, train poll workers on the photo ID requirement, and otherwise fully implement the Court's Order.¹³ Inevitably, there will be administrative issues that arise, but questions necessarily arise in election administration when the act of voting is accomplished through voter registration, set polling places and times, paper ballots, vote counting machines, human interactions, et cetera.

To argue that voter ID is a "new" procedure that will be a "disaster" to implement now ignores that it was already in place for Wisconsin's February 2012 primary election. (Petition at 15). The State is not starting from

¹³See Dee J. Hall, *Madison events will recruit poll workers, help with voter ID requirement*, Wisconsin State Journal (Sept. 19, 2014), available at http://host.madison.com/wsj/news/local/govt-and-politics/madison-events-will-recruit-poll-workers-help-with-voter-id/article_b838d8e3-9847-55dd-bc5f-7b7a7257f046.html.

Claims of electoral "chaos" are highly exaggerated, if not downright false. "Municipal clerks in Appleton, Neenah and Kaukauna don't anticipate incurring additional costs with the reinstatement of the voter ID law for the Nov. 4 election[.]" Duke Behnke, *Clerks: Cost of voter ID law will be minimal*, Appleton Post-Crescent (Sept. 23, 2014), available at <http://www.postcrescent.com/story/news/politics/elections/2014/09/22/16083667/>. Neenah's city clerk said, "I read in the paper [the clerks in Milwaukee and Madison] all were going to hire new people to get through this, and I'm like 'For what?' . . . It's not going to cost me any more for poll workers, but it will take more time going through the line." *Id.*

scratch, and GAB already had training and promotional materials prepared because it has previously used them. (See, e.g., No. 14-2058, 7th Cir. Dkts. #47-11, 47-12:A.412-438, A.465-570 (Defendants' Trial Exs. 1053, 1054, 1056, 1058, 1059, 1060, 1065, 1066).) Even with less than two months until the November election, it is not credible to argue that implementing the voter ID law now "virtually guarantees substantial chaos." (Petition at 13-14). People adjust, and this law was already in effect once.

What about voters who still need to obtain qualifying ID? As an initial matter, the voter ID law will have little impact on the vast majority of voters. The district court found that more than 90% of Wisconsin's registered voters already have a qualifying ID. (No. 14-2058, 7th Cir. Dkt. #47-2 at 23).¹⁴ These voters can easily produce their photo ID to vote. Anyone who forgets his or her ID can vote provisionally and return to the polling place on Election Day to show the ID and have the vote counted. Wis. Stat. § 6.97(3)(b). Alternatively, the voter can return to show the ID to the municipal clerk or board of election commissioners prior to 4 p.m. on the Friday after the election and have the vote counted. *Id.*

¹⁴Some absentee voters, such as active military voters, permanent overseas voters, and confidential voters, are exempt from the voter ID law. Wis. Stat. § 6.86(1)(ac). Indefinitely confined absentee voters are also exempt. See Wis. Stat. § 6.86(2)(a); Wis. Stat. § 6.87(4)(b)2.

With regard to those voters who do not currently have qualifying ID, this Court's Order correctly found that the State's recent procedures for issuing free ID cards decrease the burden on affected voters to such an extent that the law may be enforced. (Order at 2). For voters who do not have an ID but possess the required underlying documentation to obtain one from the DMV, they will receive a receipt from the DMV with their photo on it the same day they visit the DMV to obtain ID. A DMV state ID card receipt is a qualifying ID under the voter ID law. Wis. Stat. § 5.02(6m)(d). For those voters who were born in Wisconsin but cannot afford to pay for a birth certificate, the DMV will attempt to verify their birth certificates with the Wisconsin Department of Health Services, and the voter will receive his or her qualifying ID in the mail after the verification process is completed.¹⁵

Plaintiffs' petition is based in part upon speculation that an unspecified number of voters will not be able to get to a DMV service center during business hours and that the DMV will have insurmountable issues confirming the documentation of voters born in states other than Wisconsin. (See Petition at 12). With regard to DMV's hours, "[f]or most voters who need [photo ID] the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph

¹⁵See Wisconsin DMV, *Document verification petition process for a Wisconsin Identification Card for voting purposes, available at <http://www.dot.wisconsin.gov/drivers/drivers/apply/petition-process.htm>.*

surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Crawford*, 553 U.S. at 198; *see also id.* at 209 (Scalia, J., concurring). In any event, the Wisconsin Department of Transportation’s Division of Motor Vehicles has expanded service hours to Saturdays at two Milwaukee locations.¹⁶ With regard to voters with out-of-state birth certificates, the en banc Court should not grant Plaintiffs’ petition based upon speculation that an unspecified number of voters will be unable to obtain an ID from the DMV because they do not have any of the alternatives to a birth certificate that DMV’s new petition procedure can consider, (*see* No. 14-2058, 7th Cir. Dkt. #61-2:8-9 (listing supporting documentation that DMV can consider)), or that the DMV will be unable to verify birth certificate information with other states.¹⁷

Lastly, Plaintiffs cannot rely upon speculation that voters will not know that they need a photo ID to vote. As discussed above, GAB has been making diligent efforts to inform the public and local election officials about the voter ID requirement for the November 2014 elections. There has been widespread

¹⁶WisDOT, *Saturday hours now at select DMVs* (Sept. 16, 2014), available at <http://www.dot.wisconsin.gov/news/releases/053-nr.htm>.

¹⁷In addition to obtaining free ID for voting from the DMV, students at University of Wisconsin System colleges and universities will have the opportunity to obtain photo ID cards that comply with the voter ID law. *See* Student Voting Guide, University of Wisconsin System, *What voting documents can I get from my UW school?*, available at <http://www.uwsa.edu/voting/uw-documents/>.

and extensive media coverage of the fact that the voter ID law is in effect. Plaintiffs' petition cites a small sample of some of the hundreds of stories in print and online media in Wisconsin and nationwide that reported this Court's Order and that voters will be required to show photo ID at the polls in November. (See Petition at n.3, n.4, n.6, n.12, n.13, n.14). Other recent articles have been cited in this response. Voters who pay attention to the news or discuss the news with informed voters are now aware that Wisconsin's voter ID law is in effect and that voters will be required to show photo ID at the polls in November. GAB and local election officials are diligently working to make sure that every voter who arrives at the polls on Election Day in November is aware of the photo ID requirement.

Granting Plaintiffs' petition and vacating this Court's September 12 Order would "sow chaos" for election officials, Petition at 4, who are already implementing and enforcing the voter ID law. It would also unnecessarily confuse voters. The petition should be denied.

CONCLUSION

Plaintiffs' petition should be denied.

Dated this 23rd day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 23, 2014, I electronically filed the foregoing response with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

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