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September 21, 2012

BY ECF

Hon. Lynn S. Adelman, U.S. District Judge
U.S. District Court for Eastern District of Wisconsin
517 E Wisconsin Ave, Rm 364
Milwaukee, WI 53202-4511

Re: *Frank v. Walker*, 2011-CV-1128

Dear Judge Adelman:

Plaintiffs in *Frank v. Walker* write to advise the Court of the possible consequences of recent developments in the state court litigation, which has thus far enjoined implementation of the voter photo ID requirement of 2011 Wisconsin Act 23, on proceedings in this case.

On August 13, 2012, this Court removed a September trial date from its calendar based upon the representations of the parties that injunctions in *Milwaukee Branch, NAACP v. Walker* and *League of Women Voters of Wisconsin v. Walker* were extremely unlikely to be stayed or reversed prior to the November 6, 2012 general elections. The two panels of the state Court of Appeals had denied motions to stay the injunctions pending appeal and were proceeding with decision processes that were unlikely to conclude for both cases prior to the November elections. However, on August 21, 2012, the Attorney General filed with the Wisconsin Supreme Court petitions to bypass the Courts of Appeals, motions to consolidate the *League* and *NAACP* cases, and motions to stay the injunctions to allow the photo ID requirement to go into effect for the November elections. Counsel for defendants in this case, who also represent the defendants in the state court litigation, did not disclose any plans they may have had to seek to dissolve the state court injunctions during the August 13, 2012 status conference before this Court.

The plaintiffs in the state court litigation have responded to the defendants' filings in the Supreme Court. At this time, the Supreme Court has not ruled on any

of the defendants' requests. However, the injunctions in both state cases could now be lifted by the action of a single court, rather than the actions of two independent panels of the Court of Appeals, increasing the possibility that this Court will need to act before the November 6, 2012 elections. Should the Supreme Court stay or otherwise dissolve the injunctions now, implementation of the ID requirement prior to November would inevitably lead to disenfranchisement of eligible voters and to a rushed and likely chaotic attempt to prepare election officials, as Defendant Kevin Kennedy, the Executive Director of the Government Accountability Board, has stated according to media reports. Marley, "Elections Chief Does Not Want Supreme Court to Act on Voter ID this Fall," *Milwaukee Journal-Sentinel* (Sept. 12, 2012); *see also Milwaukee Branch, NAACP v. Walker*, Order Denying Motion for Stay at 1-2 (Sept. 14, 2012) ("[T]he inescapable reality is that the need for stability, predictability and adequate preparation for the electoral process strongly weighs against this court granting a stay and thus changing the voting process at this late hour.") (attached).

Frank Plaintiffs are concerned about the possibility that the state court injunctions may be lifted with very little time for this Court to act. Plaintiffs believe that this Court may decide the currently pending motions for a preliminary injunction and for class certification on the existing record although, should the Court believe that additional evidence may be helpful – particularly evidence on the impossibility of fair and orderly implementation in the short time remaining before November 6, which would be relevant to Plaintiffs' claims 7 and 8 – Plaintiffs are also prepared to request a brief factual hearing at which they would call Defendant Kennedy as a witness.

We also note that oral argument is now scheduled for October 10, 2012. We are concerned that if the Wisconsin Supreme Court lifts the injunctions more than a day or two before then, an earlier date for argument (and testimony, if any) might be required.

Accordingly, Plaintiffs request that this Court schedule a status conference to determine whether and when a factual hearing should be scheduled.

Sincerely,

/s Laurence J. Dupuis
Laurence J. Dupuis, Bar No. 1029261
One of Plaintiffs' Attorneys

cc: Assistant Attorneys General Thomas Bellavia, Carrie Benedon, Clayton Kawski and Maria Lazar (by ECF)
Charles Curtis, Carl Nadler, John Ulin (by email)
Penda D. Hair, Kumiki Gibson, Denise D. Lieberman, James Eichner (by email)

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Milwaukee Branch of the NAACP, et al.,

PLAINTIFFS,

vs. Case No. 11 CV 5492

Scott Walker, et al.,

DEFENDANTS

ORDER DENYING MOTION FOR STAY OF PERMANENT INJUNCTION

The defendants have filed, on August 21, 2012, a motion to stay a permanent injunction rendered as part of a an Order for Judgment and Judgment Granting Declaratory and Injunctive Relief, July 17, 2012, together with legal argument in support of the motion. The motion has been fully briefed and, for the reasons set forth below, the court hereby denies the motion to stay.

The court should stay the permanent injunction if the defendants demonstrate: (1) a showing that the defendants are likely to succeed on the merits in an appeal; (2) a showing that, in the absence of a stay, the defendants will sustain irreparable injury; (3) a showing that a stay will cause no substantial harm to the plaintiffs; and (4) a showing that a stay will do no harm to the public interest, In re Marriage of Leggett, 134 Wis. 2d 385, 396 787 (Ct. App. 1986); Scullion v. Wisconsin Power & Light Co., 237 Wis. 2d 498, 502, 614 N.W.2d 565 (2000).

I. The defendant has not demonstrated that irreparable harm will be caused in the absence of a stay.

Both parties point to the fast approaching general election as a basis to grant or to deny a stay of the injunctive judgment. The judgment now in issue was rendered July 17, 2012. It had immediate application to the general election to be conducted sixteen weeks thereafter, on November 6, 2012. The problem, at this point, of attempting to re-configure the voter qualifications is a very serious concern which this court cannot ignore. Apart from the arguments that have been made for and against Wisconsin Act 23, the inescapable reality is

that the need for stability, predictability and adequate preparation for the electoral process strongly weighs against this court granting a stay and thus changing the voting process at this late hour.

The defendant looks to an order of Chief Justice Rehnquist, acting as Circuit Justice, for authority that enjoining of a state law is, of itself, an instance of irreparable harm, New Motor Vehicle Board of California v. Fox, 434 U. S. 1345 (1977). The court concludes this to be a somewhat over-expansive interpretation of that order. Certainly, enjoining a state law is a very serious matter which should be undertaken with great care and caution but potential harm is essentially delay and while delay may indeed, in specific instances, be very serious, it need not be automatically considered irreparable, Whalen v. Roe, 423 U.S. 1313, 1317 (1975). Here, the difficulty that will ensue should the voter requirements be changed so near the general election is likely significant, and leads this court to conclude that the defendants have not shown irreparable harm should a stay be denied.

II. The defendants have not shown that a stay will cause no harm to the plaintiffs

This case implicates the competing interests which are extremely important in a democracy, access to vote and the need to protect the integrity of the election process. These are both critically important concerns. At trial, the plaintiffs offered credible, compelling evidence that Wisconsin Act 23, while intended to protect the integrity of the process, had the effect of impeding, that is, making more difficult and inconvenient, the voting access for more than 300,000 citizens of Wisconsin. These are people who are already qualified and registered to vote but who do not possess the limited types of identification that are to be absolutely required. By contrast, no evidence whatsoever was offered at trial to suggest that there exists any problem of voter misrepresentation that would be addressed by this requirement. Indeed, evidence was offered that there have been repeated government investigations to uncover such fraud without reported result. It is, upon this record, not possible for the court to conclude that the defendants have shown that a stay will cause no harm to the current voters who lack the required voter identification.

III. The defendants have not shown, on balance, that a stay will not harm the public interest

Each side asserts that it seeks to promote the public interest and it certainly must be acknowledged that there is indeed a public interest, here represented by the Attorney General, in defending the constitutionality of any properly enacted statute, which is what Wisconsin Act 23 is. The question now before the court, however, is not the constitutionality of Act 23 but rather it is the determination of whether or not the judgment rendered July 17, 2012 should be stayed pending appeal. As to that narrow question, the potential negative impact upon citizens who are currently lawful voters together with the difficulty that is likely to ensue from any change now to the voter requirements, undercuts significantly any public interest that may exist in defending the regularity of a statutory enactment.

IV. The defendants have not shown a substantial probability of success on appeal

The party seeking a stay of judgment pending appeal must make a showing of more than simply the possibility of success on appeal, State v. Gudenschwager, 191 Wis. 2d 431, 441 (1995), and where the equities do not clearly weigh in favor of a stay, the showing of a probability of success must be more substantial, Ruiz v. Estelle, 650 F.2d 555, 565-566 (5th Cir. 1981). The parties agree that of the four factors, likelihood of success on appeal should properly be viewed in light of, or in balance against the other three factors, the equities of the case. Here, as stated above, the equities of the case do not appear to favor the granting of a stay and, therefore, it is incumbent upon the defendants to make a substantial showing of likelihood of success on appeal.

Wisconsin Act 23 is entitled to and has been afforded a strong presumption of constitutionality. The Wisconsin Supreme Court, however, when asked to review questions of voter qualification, has stated that such regulation "must be reasonable", State ex rel. Frederick v. Zimmerman, 254 Wis. 2d 600, 614 (1949). That is the basis for this court's review of Wisconsin Act 23 and the judgment now in issue, after consideration of the argument and evidence offered by each party.

The defendants suggest that this court, in the July 17, 2012 judgment, is in error for failing to follow the guidance offered in the U.S. Supreme Court decision of Crawford v. Marion County Election Board, 553 U.S. 181 (2008). The Supreme Court, in that decision, determined that a particular voter identification law, enacted by the state of Indiana, had not been shown to be in violation of the U. S. Constitution. In that case, the U.S. Supreme Court had before it a voter ID law that was substantially less restrictive than Wisconsin Act 23. The U. S. Supreme Court had before it a trial court record of fact that reportedly was substantially less complete and less credible than the record that was presented to this court. The U. S. Supreme Court had no reason to consider the guidance of the Wisconsin Supreme Court regarding the voting guarantee set forth in Article III, Section 1 of the Wisconsin Constitution. Certainly, the Crawford decision must be and was considered carefully by this court but, upon that consideration, this court concluded that the Crawford decision did not control the proper result in this matter.

The court concludes that the defendants have not made a substantial showing of likelihood of success on appeal.

Conclusion

The defendants have not made a sufficient showing to justify the granting of a stay pending appeal pursuant to sec. 806.08, Wis. Stats. The motion to stay the Judgment rendered July 17, 2012, is hereby denied.

By the court this 14th day of September, 2012.

Judge David Flanagan

cc: Attorney Richard Saks
Assistant Attorney General Thomas C Bellavia

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