Nos. 16-3083, 16-3091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants,
Cross-Appellees.

On Appeal From The United States District Court
For The Western District of Wisconsin, Case No. 3:15-cv-324
The Honorable Judge James D. Peterson, Presiding

PLAINTIFF-APPELLEES, CROSS-APPELLANTS' OPPOSITION TO DEFENDANT-APPELLANTS, CROSS-APPELLEES' EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL

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INTRODUCTION

"[B]efore 2011, Wisconsin had an exemplary election system." Dist. Ct. Findings of Fact & Conclusions of Law ("Op.") 33. Yet from 2011 to 2014, the State enacted a series of laws that "transformed" that system. Op. 2, 8. This case challenges a number of those laws.

Following nearly two weeks of trial, the submission of hundreds of pages of briefing, and oral argument, and based on a voluminous documentary record, the court below found that "none" of the challenged provisions "make[s] voting easier for anyone." Op. 2. The justifications offered for many of the provisions "were meager" and "the challenged laws were passed by a process that allowed limited public input and little actual debate." Op. 34, 37. The court found that "[v]oting in Wisconsin is sharply polarized by race," Op. 33, and the evidence shows that the challenged provisions have imposed (or are likely to impose) disparate burdens on minority and young voters—in some cases by extreme margins. *E.g.*, Op. 38, 40-42, 47, 102-03.

Prior to the passage of one of the bills at issue, 2011 Wis. Act 23, the Chair of the Senate Committee on Transportation and Elections "told the senate Republican caucus that they should support the bill because of what it 'could mean for the neighborhoods of Milwaukee and the college campuses across this state.'" Op. 47. The court found that another one of the challenged provisions, 2013 Wis. Act 146, which eliminated weekend and evening in-person absentee voting, was passed "to achieve a partisan objective, but the means of achieving that objective was to suppress the reliably Democratic vote of Milwaukee's African Americans." Op. 6. Milwaukee, one of the most segregated cities in America, has a majority-minority

population and accounts for approximately two-thirds of the minority population in Wisconsin. Op. 22, 108-09. The court further found that "the conclusion is nearly inescapable: the election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interests." Op. 36-37.

Despite these findings, the district court declined to invalidate the challenged provisions wholesale.[1] Instead, it analyzed the provisions seriatim, upholding some and invalidating others. Op. 18-119. The State then moved to stay the court's injunction, asserting that it required "a vast overhaul of state election procedures." ECF No. 251. The district court found that the State's "description of the court's injunction is, to put it mildly, an exaggeration" and that the State had failed to show that it was likely to succeed on appeal, and the court accordingly denied the motion to stay in substantial part. ECF No. 255 at 1-2, 12 ("Stay Denial").

The State now asks this Court to grant the extraordinary relief of a stay pending appeal. But the State does not even attempt to explain how the district court erred in finding that the restrictions on in-person absentee voting at issue in this case violate the Voting Rights Act ("VRA"). At the same time, the State makes arguments here that it did not make in requesting a stay from the district court—and in some cases did not ever make in the district court. In any event, the State's arguments are likely to fail on the merits, the balance of equities tilts strongly against a stay of the district court's injunction, and the State's motion for a stay pending appeal ("Motion" or "Mot.") accordingly should be denied.

[1] As Plaintiffs will explain in their merits briefing, it should have.

I. The District Court's Relevant Rulings Will Likely Be Upheld

A. In-Person Absentee Voting Restrictions

The district court invalidated two reductions to the window for in-person absentee voting (except with respect to the day before Election Day) and a law barring municipalities from having more than one location for in-person absentee voting. The court found these provisions unduly burdensome and in violation of the VRA, and it held that one of these provisions (the elimination of weekend and evening in-person absentee voting) intentionally discriminated on the basis of race. Op. 42-45, 55-63, 109-10. These holdings will likely be upheld.

First, the Motion makes no argument whatsoever that the district court erred in holding that the in-person absentee voting restrictions violate Section 2 of the VRA. *See* Mot. 12-13 (discussing only the change in the residency requirement—which the court held did *not* violate the VRA, Op. 110). The State's "complete lack of development" of its objections to the court's Section 2 ruling on the challenged in-person absentee voting restrictions constitutes a waiver of those objections here. *Crespo v. Colvin*, 824 F.3d 667, 674 (7th Cir. 2016); *United Cent. Bank v. Davenport,* 815 F.3d 315, 318 (7th Cir. 2016) ("undeveloped argument is waived"). This dooms the State's request for a stay pending appeal with respect to these provisions.[2]

[2] The State also failed to raise any VRA objections to the invalidation of these restrictions in its district court motion to stay and its reply brief. *See* ECF Nos. 241, 251. This as well is fatal to its request for a stay pending appeal as to these restrictions. The whole purpose of requiring an appellee to move for a stay in the district court is to give the district court "an opportunity to properly exercise its jurisdiction" to reconsider any potential errors and exercise *its* discretion to balance the relevant stay factors in the first instance. *Rakovich v. Wade*, 834 F.2d 673, 675 (7th Cir. 1987); *see also Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981) ("the district court should have the opportunity to rule on the reasons and evidence

Second, the trial court's finding that the in-person absentee voting restrictions violate the VRA is sound. Consistent with *Frank I*'s direction, the court analyzed "whether plaintiffs have proven that: (1) the challenged provisions impose disparate burdens on African Americans and Latinos; and (2) under the totality of the circumstances, these burdens are linked to the state's historical conditions of discrimination." Op. 94. It then found both elements were met with respect to the in-person absentee voting restrictions. Op. 103, 108-10; *see also* Op. 42-45, 56-58.

The State's arguments about the court's application of the VRA—which, again, were directed at the increase in the residency requirement rather than the in-person absentee voting restrictions—do not call these findings into question. The State's suggestion that a discriminatory *purpose* is required for a Section 2 violation, Mot. 13, is plainly wrong. "Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 44 n.8 (1986); *accord Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *16 (5th Cir. July 20, 2016) (en banc); *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 550 (6th Cir. 2014) ("*NAACP*"), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

The State's argument that social and historical conditions resulting from discrimination by Wisconsin's political subdivisions—including Milwaukee and nearby communities—are irrelevant to the Section 2 inquiry is also without merit.

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presented in support of a stay, unless it clearly appears that further arguments in support of the stay would be pointless in the district court").

While *Frank I* states that "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination," it explains that Section 2(a) of the VRA "does not require states to overcome societal effects of *private* discrimination that affect the income or wealth of potential voters." 768 F.3d 744, 753 (7th Cir. 2014) (emphasis added). Moreover, discrimination by Wisconsin's municipalities is not legally distinguishable from discrimination by the State. "Political subdivisions of States … never have been considered as sovereign entities" but instead "have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *see also City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). Wisconsin law is consistent with this understanding.[3] And courts routinely consider discrimination by political subdivisions in voting-rights challenges to state practices or policies.[4]

In addition, Congress and the Supreme Court have made clear that the VRA should be interpreted as broadly as possible and that courts applying it should conduct a searching analysis that looks to the totality of the circumstances. 52 U.S.C. § 10301(b); *Chisom v. Roemer*, 501 U.S. 380, 403 (1991); *LWV*, 769 F.3d at

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[3] *See, e.g.*, *Madison Teachers, Inc. v. Walker*, 358 Wis. 2d 1, 62 (2014) ("Cities … have no inherent right of self-government beyond the powers expressly granted to them"); *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533 (1982) ("Cities . . . are not recognized as independent sovereigns."); *Zawerschnik v. Joint Cty. Sch. Comm. of Milwaukee & Waukesha Ctys.*, 271 Wis. 416, 429 (1955) ("[m]unicipal corporations are … created as convenient agencies for exercising such of the governmental powers of the state").

[4] *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1012-13 (1994); *League of United Latin Am. Citizens (LULAC) v. Clement*s, 986 F.2d 728, 778, 781 (5th Cir. 1993); *Major v. Treen*, 574 F. Supp. 325, 328-29, 341 (E.D. La. 1983).

241. The claim that discrimination by political subdivisions is not relevant is at odds with these principles. *See also Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) ("The district court apparently believed that it was required to consider only the existence and effects of discrimination committed *by the City of Watsonville itself*. This conclusion is incorrect."). In short, the district court correctly found that the in-person absentee voting restrictions violate the VRA.

Third, the State has failed to show any error in the district court's finding that the in-person absentee restrictions fail the *Anderson-Burdick* test. Under that test, courts weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (internal quotation marks omitted). This is a "flexible standard," *id.*, under which most laws are subject to "ad hoc balancing," and "a regulation which imposes only moderate burdens could well fail … when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elecs.*, 65 F.3d 1215, 1221 & n.6 (4th Cir. 1995). "However slight [a] burden [on voting] may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181,191 (2008) (citation and quotation omitted). And, the question is not

the extent to which the law burdens voters generally but rather the extent to which it burdens those impacted by it. *Id.* at 186, 191, 198, 201; *NAACP*, 768 F.3d at 543-44 (assessing burdens on "African American, lower-income, and homeless voters").[5]

Here, the district court found that the in-person absentee voting rules impose material burdens. Op. 55-63 (laws "had profound effects in larger municipalities like Madison and Milwaukee"; "the one-location rule [contributes] to longer lines at clerk's offices"; "[h]aving only one location creates difficulties for voters who lack access to transportation"; "eliminating weekend voting and reducing the number of days on which a clerk's office can accept in-person absentee ballots is problematic for a person whose job or class scheduling is less flexible"; and "limiting hours leads to longer lines at clerk's offices"). The Motion does not challenge these findings.

Nor do the State's justifications for these restrictions hold up. "[T]he laws that the [reductions in in-person absentee voting] replaced did not *require* municipal clerks to offer in-person absentee voting during the now-eliminated days and times," meaning that "any burdens on clerks that the state was purporting to address were voluntarily undertaken." Op. 60-61. Moreover, the State simply misstates the law in claiming that these restrictions "mandate uniform rules for in-

[5] The State contends that "an election regulation must unduly burden the right to vote *not* of discrete pockets of electors but of voters *generally*," Mot. 6, but *Anderson* itself disproves this. 460 U.S. 780, 784 (1983) (invalidating law that affected the approximately 6% of the electorate who supported Anderson). It also incorrectly suggests that *Anderson-Burdick* is a binary test that subjects election laws to either strict scrutiny or rational-basis review. Mot. 6. To the contrary, burdens on the fundamental right to vote must be justified by more than mere rational basis. *Crawford*, 553 U.S. at 191 (controlling op.); *McLaughlin*, 65 F.3d at 1221 & n.6. In addition, it contends that the "usual burdens of voting set the objective benchmark of an election regulation's severity." Mot. 6. No case has ever held this, and this "benchmark" argument has been waived because the State never previously raised it. *See Poullard v. McDonald*, 2016 WL 3924375, at *6 (7th Cir. Jul. 21, 2016).

person absentee voting hours." Mot. 8. As the district court explained, the State's asserted interest "in establishing uniform times for in-person absentee voting does not make sense because clerks can currently set whatever hours and days they want for in-person absentee voting …. [T]he challenged provisions do not actually create any consistency in when individual clerk's offices offer in-person absentee voting." Op. 61. The State points to no clear error in these findings; and it does not mention the other decisions that have invalidated restrictions on early voting.[6] The court thus correctly found the in-person absentee voting rules unduly burdensome.

Fourth, the court's finding that 2013 Wis. Act 146, the law barring weekend and evening in-person absentee voting, was enacted with racially discriminatory intent is unlikely to be reversed. "In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence." *Veasey*, 2016 WL 3923868, at *10. Yet shortly before the passage of Act 23—which contained the voter ID bill, a steep reduction in the in-person absentee voting period, and other restrictions on voting—"the Republican leadership insisted that Republicans get in line to support the bill because it was important to future Republican electoral success," and Senator Mary Lazich, the Chair of the Senate Committee on Transportation and Elections, "told the senate Republican caucus that they should support the bill because of what it 'could mean for the *neighborhoods of Milwaukee* and the *college campuses* across this state.'" Op. 35, 47 (emphases added). And Act 23 was just the first of several voting restrictions

[6] *See, e.g.*, *Ohio Org. Collaborative v. Husted*, No. 2:15-1802, 2016 WL 3248030, at *16 (S.D. Ohio May 24, 2016); *NAACP*, 768 F.3d at 545-60; *Obama for Am. v. Husted,* 697 F.3d 423, 429 (6th Cir. 2012); *cf. Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012).

that were enacted over a four-year period in order to achieve partisan advantage by suppressing the votes of minority and young voters. *See* Pls.' Pet. for Initial En Banc Rev., Doc. 6 at 2-3, 12-15, Case Nos. 16-3083, 16-3091 (7th Cir. Aug. 5, 2016).[7]

Act 146 was one of these restrictions. The evidence at trial demonstrated that the elimination of evening and weekend in-person absentee voting had a disparate impact on minority voters. Op. 42. As noted, the law did little to serve its stated purpose of achieving uniformity in in-person absentee voting hours because "[e]ach municipality c[ould] set its own hours for in-person absentee voting." Op. 43. The bill was opposed by the municipal clerks. Op. 43. And statements by Senators Glenn Grothman and Scott Fitzgerald made clear that the purpose of the bill was "specifically to curtail voting in Milwaukee, and, secondarily, in Madison." Op. 42-44; *see also* Op. 44 ("The acknowledged impetus for this law was the sight of long lines of Milwaukee citizens voting after hours."). For these and other reasons, the court was amply justified in holding that "[t]he legislature's immediate goal [with Act 146] was to achieve a partisan objective, but the means of achieving that objective was to suppress the reliably Democratic vote of Milwaukee's African Americans," which constitutes intentional race discrimination. Op. 6.

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[7] Based on the evidence of intentional race, age, and partisan discrimination alone, the State is unlikely to succeed on appeal with respect to any of the provisions at issue. *Compare* Op. 36-37 ("[T]he conclusion is nearly inescapable: the election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interests."), *with N.C. State Conf. of NAACP v. McCrory*, 2016 WL 4053033, at *1 (4th Cir. July 29, 2016) (district court erred in not finding discriminatory intent in part because it ignored "the inextricable link between race and politics in North Carolina"), *and id.* at *11 n.6 ("state legislators also cannot impermissibly dilute or deny the votes of opponent political parties").

Although the State asserts that "the district court rested its finding of discrimination on statements from *two* legislators … and one election official," Mot. 11, it does not mention that those two legislators—Senators Grothman and Fitzgerald—were the author of Act 146 and the Senate Majority Leader or that the "election official" was the Director of the Government Accountability Board. Op. 43-44; PX033 at 2. The State also ignores that one of its own witnesses asserted at trial that "access needed to be taken away in order to level the playing field." 5/24 PM Tr. at 36 (Novack); *cf. McCrory*, 2016 WL 4053033, at *11 (referring to similar rationale as being "as close to a smoking gun as we are likely to see in modern times"). And, a number of other factors—such as the court's finding that "this law was specifically targeted to curtail voting in Milwaukee *without any other legitimate purpose*," Op. 6 (emphasis added)[8]—supported the court's finding of discriminatory intent.

The State's assertions that the elimination of weekend and evening in-person absentee voting "also affect[ed] Milwaukee's *non*-black and *non*-Hispanic voters" and that the State's intent, at worst, was to secure partisan advantage, Mot. 11-12, miss the point.[9] The intentional abridgement or denial of the voting rights of minorities is unconstitutional irrespective of whether there was a partisan motivation for, or whether white voters were also impacted by, such voter-

[8] This language alone rebuts the State's semantic argument that the court should have found the State's justifications "pretextual" rather than "meager." Mot. 12.

[9] The cases the State cites in contending that "large municipality" theories of intentional discrimination have been rejected are readily distinguishable, *see* Mot. 11, as those cases involved interventions in situations that were perceived to be crises. *Hearne v. Bd. of Educ.*, 185 F.3d 770, 772 (7th Cir. 1999); *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 372 (7th Cir. 1999).

suppression tactics. *See Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984); *McCrory*, 2016 WL 4053033, at *17. And "state legislators also cannot impermissibly dilute or deny the votes of opponent political parties." *McCrory*, 2016 WL 4053033, at *11 n.6; *id.* at *8; *see also Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring); *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). In sum, Act 146 is not likely to be reinstated.

B. 28-Day Residency Requirement

The district court enjoined under *Anderson-Burdick* the increase of the durational residency requirement from 10 to 28 days based on detailed factual findings that this law "imposes a moderate burden on voters in Wisconsin" generally and that, for "voters who cannot comply with it," the "burden is significant." Op. 74-75; *see also* Op. 76-77. The court found that "Defendants' purported interests in the 28-day durational residency requirement do not justify the severe burdens that the provision imposes." Op. 77; *see also* Op. 78-79.

In response, the State argues that its "rule is friendlier" than those in other states and does not impact a "significant number of voters." Mot. 7. But other states' practices are irrelevant as to why *Wisconsin* deemed it necessary to burden its voters in this way. *NAACP*, 768 F.3d at 546 ("how Ohio's early-voting system compares to that of other states is not relevant under the *Anderson-Burdick* balancing test"). And a law's burdens must be judged in terms of the voters impacted by the law—i.e., transient voters—not those unaffected by it. *See Anderson*, 460 U.S. at 784; *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016

WL 3166251, at *36 (S.D. Ohio June 7, 2016) ("Although the *Crawford* Court rejected the plaintiffs' argument that the law should be enjoined on the basis of the burden to that smaller group of voters, it did so because the record in that case did not contain evidence of the specific burdens imposed on those vulnerable groups.").

C. Prohibition on Faxing/Emailing Absentee Ballots

The State has also failed to show that the injunction of the prohibition on faxing or emailing absentee ballots will likely be reversed. The court found that this prohibition burdened voters who were away from their polling locations and in some cases resulted in the outright denial of the right to vote. Op. 85. Because "the state's justifications for flatly prohibiting clerks from sending ballots by fax or email do not outweigh the moderate burdens that the challenged provision places on voters who are affected by it," the court found the law unduly burdensome. Op. 87.

The State contends that since this law imposes "a burden on only an exceedingly small group of voters," it is immune from constitutional scrutiny. Mot. 9. As explained, that is incorrect. *See, e.g.*, *Anderson*, 460 U.S. at 784. The State also complains that the district court discounted its unpersuasive evidence that *allowing* clerks to fax or email ballots complicated their jobs. But "[i]f the challenges of sending and receiving electronic ballots are as severe as defendants make them out to be, then the state can make the practice optional instead of mandatory." Op. 87; *see also* Stay Denial at 5. Finally, the State argues that *no* constitutional protections apply to its restrictions on absentee ballots. Mot. 9. That is not the case. *See* Op. 59 (writing that "this case is not about Wisconsin's outright refusal to allow in-person absentee voting" and distinguishing it from cases cited by the State).

D. Requiring Proof of Citizenship for "Dorm List" Registrations

Prior to Act 23, Wisconsin allowed colleges to provide "dorm lists" to clerks, and college students could use their college IDs to register with those lists. Act 23 changed this by requiring that colleges certify that the students on their dorm lists are U.S. citizens. Wis. Stat. § 6.34(3)(a)7.b. But because the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, bars the disclosure of citizenship information without consent, most colleges have stopped providing dorm lists and "Act 23 has taken away a method through which students can register to vote." Op. 68. Further, the justifications for this restriction are "weak," as no other method of registration requires third-party certification of citizenship and the certification could easily be circumvented by using a different form of qualifying ID. Op. 69.

The State contends that it need "not entirely eliminate the problem—reform may take one step at a time." Mot. 10 (quotation omitted). This argument was not raised below and is therefore waived. *See* n.2 *supra*. Regardless, this law plainly is not part of any broader effort to require third-party certification of citizenship.

E. Expired Student IDs

The district court held that the prohibition on using expired student IDs to vote lacks a rational basis because "[t]he three requirements in Wis. Stat. § 5.02(6m)(f) are redundant: (1) the ID card itself must be unexpired; (2) the card must have an expiration date that is no more than two years after its date of issuance; and (3) the voter must present proof of current enrollment." Op. 113. "If each of these requirements provided some additional level of protection against former students using their IDs to vote, then those requirements might be rational.

But as it stands, defendants have not explained why any requirement beyond proof of current enrollment is necessary to protect against fraudulent voting with a college or university ID." *Id*. The State responds to this with a single sentence that addresses none of the district court's bases for invalidating this law. Mot. 10. On this issue, like those discussed above, the State is unlikely to succeed on the merits.

II. The Balance of the Equities Weighs Decisively Against a Stay

The Motion also should be denied because the balance of the equities tilts strongly in favor of following the usual practice against staying injunctions pending appeal. The alleged burdens of the injunction on the State are either nonexistent or greatly exaggerated, while the burdens on the right of Wisconsinites to vote and the further erosion of public confidence in the fairness of our electoral process resulting from a stay would cause irreparable injury to voters and the public interest.

A. The State Will Not Suffer Any Irreparable Harm Absent a Stay

The State nowhere argues that it is *unable* to comply with the district court's injunction, or that it has insufficient time between now and the general election to do so. Rather, its principal claimed "injury" is that it is likely to prevail on the merits, so that any changes implemented now will have to be undone in the future. But that assumption is wrong for all the reasons summarized above. Thus, it will be much less burdensome and confusing for the district court's order—which has received substantial public attention[10]—simply to remain in effect. And none of the State's other balance-of-equities arguments survive close analysis.

[10] *E.g.*, Patrick Marley & Jason Stein, *Judge Strikes Down Wisconsin Voter ID, Early Voting Laws*, MILWAUKEE J. SENTINEL, Aug. 1, 2016, http://www.jsonline.com/story/news/politics/

Restoration of municipal discretion. Many of the changes required by the district court's injunction—such as whether to expand the days, hours, or locations for in-person absentee voting or provide absentee ballots via fax or email—simply restore the discretion of municipal clerks to offer these services *if they so choose*. There is no material harm to the State in requiring it to *permit* local election officials to determine how to proceed in light of the court's ruling. The State complains that local officials will feel "pressure" to offer expanded service, Mot. 15, but does not explain how such constituent "pressure" is a cognizable "injury," "irreparable" or otherwise. Local officials can simply say no. Likewise, the State's warning that allowing election clerks to email and fax absentee ballots will "drain clerk-office resources," *id.* at 16, is specious. Sending a few absentee ballots by email and fax rather than regular mail is a trifling burden at most, and—again—the injunction simply restores the *discretion* to incur that burden if officials wish.

Voter confusion. The State argues that allowing local officials to expand in-person absentee voting opportunities will "threaten widespread voter confusion" because the times and number of locations for such voting will vary from one community to the next, thus requiring voters "to figure out their municipalities' new schedules." Mot. 15. The State adds that this "problem" will be "especially" difficult "for residents of smaller municipalities in the Milwaukee and Madison media

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2016/07/30/judge-strikes-down-wisconsin-voter-id-early-voting-laws/87803408/; Ed Treleven, *Federal Judge Throws out Limits on Absentee Voting, Other Voting Restrictions*, WIS. ST. J., July 30, 2016, http://host.madison.com/wsj/news/local/govt-and-politics/federal-judge-throws-out-limits-on-absentee-voting-other-voting/article_4411da2e-dfb3-5bfb-b524-9a390c45bb2f.html; Laurel White, *Judge Finds Parts of Wisconsin Voter ID Law Unconstitutional*, WIS. PUB. RADIO, July 29, 2016, http://www.wpr.org/print/judge-finds-parts-wisconsin-voter-id-law-unconstitutional.

networks [*sic*], where news of the big cities' unique voting schedules could crowd out reports of which polling places in their own towns will be open for absentee voting and when." *Id.* at 15-16. As the district court demonstrated in both its merits decision and its stay denial, however, the State's argument that the injunction "creates confusing disparities between municipalities rings hollow because the state already allows enormous disparities between communities." Stay Denial at 10 (arguments about uniformity, "cohesi[on]," and "big city" media markets are not "remotely credible"); *see also* Op. 60-62.

Durational residency requirement. The State makes *no* argument that it will be harmed by the restoration of the 10-day residency requirement, and for good reason. "At trial, defendants adduced no evidence at all of any fraud or impropriety that resulted from the shorter 10-day requirement, and they do not now point out any threat to election integrity if the 28-day requirement is enjoined." Stay Denial at 10. Nor does the State attempt to do so in the present motion. Instead, it tries to manufacture injury from this part of the injunction by arguing that it must know whether to put "10" or "28" on the absentee ballots it will begin to send out at the end of this month, and that it will need to make similar revisions to the statewide voter-registration application. These are simply the normal (and nominal) costs of complying with the district court's injunction, not a cognizable injury resulting from a 10- rather than 28-day residency requirement.[11]

[11] The State also warns that, "if the judgment were not stayed, but this Court were to reverse near election day, the State would need to determine whether registrations completed between 28 days and 10 days before the election are valid." Mot. at 15. A reversal is unlikely for all of the reasons discussed above. But even if that happened, having to

Student voting provisions. In denying the State's motion to stay, the district court emphasized that the State had failed to point to "any burden or harm to anyone" resulting from "the injunction against enforcing the requirement that 'dorm lists' must include citizenship information if they are to be used as proof of residence." Stay Denial at 11. "The court considers it conceded then that this part of the injunction poses no meaningful hardship." *Id.* The State should not be allowed now to conjure up a new "hardship" that it did not present to the district court as a reason for staying the injunction. *See* n. 2 *supra.* And in any event, the State's newly claimed "injury"—that it will have to revise the voter registration form to take account of the change required by this part of the injunction, *see* Mot. at 16—is a modest cost of compliance, not an "injury" resulting from not requiring "dorm lists" to denote the citizenship status of each dorm resident.

The State's argument that it is "injured" by the injunction against the provision requiring student IDs used for voting to be unexpired is similarly flawed. The State has not pursued any of the claims of injury it made in its district court stay motion, all of which the court rejected. *See* Stay Denial at 11. Instead, the State now points to the new alleged injury of having to correct its student ID instructions on "official state election websites" and absentee ballot applications. Mot. 16. Here again, that is simply a routine and unremarkable cost of complying with the district court's injunction.

"determine" the consequences hardly constitutes an irreparable injury. These phantom problems could be avoided by allowing anyone who moves between 10 and 28 days before the November election to vote in their new location under the district court's injunction, and by the time of the next election they will have satisfied the durational-residency requirement regardless of whether the injunction is upheld.

The State's "democratic governance rationale." Unable to point to any real injuries if the injunction remains in effect pending appeal, the State claims that irreparable injury occurs *whenever* a federal court enjoins a state law and that this "democratic-governance rationale is sufficient to justify a stay" until the issues have been "finally determined" on appeal. Mot. 13-14. The State's cited authorities do not support this sweeping claim. Each decision identified actual, concrete harms that would occur if the state law remained enjoined while on appeal. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool" pending appeal); *Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503-04 (7th Cir. 1998). And this Court has emphasized that "an injunction [of a state statute] is appropriate if the usual criteria for a stay pending appeal are satisfied," an inquiry that necessarily requires a consideration of the interests allegedly served by the challenged statute and their comparative importance. *Cavel Intern., Inc. v. Madigan*, 500 F. 3d 544, 546 (7th Cir. 2007); *see also Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004).

B. Plaintiffs, Wisconsin Voters, and the Public Interest Will Be Irreparably Harmed by a Stay

In contrast to the State's lack of harm, Plaintiffs and Wisconsin voters generally will suffer substantial harm if the injunction is stayed pending appeal.

Burdens on Wisconsin voters. The State flatly misstates the district court's factual findings in claiming that "even the district court concluded that most of these provisions impose only meager burdens." Mot. at 2. To the contrary, the

district court determined that *all* of the enjoined provisions "impede Wisconsin citizens from voting" and "abridg[e]" their constitutional rights, and that *some* of the burdens are "severe" and "acute." Stay Denial at 5, 8, 10. As the district court emphasized, "abridging voters' constitutional rights" constitutes "irreparable injury." *Id.* at 8 (citations omitted). "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Further, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Id.* For the reasons detailed in the district court's injunction decision and its stay decision, the enjoined provisions unconstitutionally burden the right to vote, in some cases violate the Voting Rights Act, and in some cases will prevent eligible voters from voting—which means that keeping those provisions in effect will result in irreparable harm to Plaintiffs and the public. Further, given that "[v]oters disenfranchised by a law enacted with discriminatory intent suffer irreparable harm far greater than any potential harm to the State," Stay Order, *McCrory*, No. 16-1468, slip op. at 7 (4th Cir. Aug. 4, 2016), the balance of the equities plainly weighs against a stay that keeps in effect the State's prohibition on weekend and evening in-person absentee voting.

Purcell. Granting a stay also would manufacture a *Purcell* problem that does not currently exist and could lead to further irreparable injury to the State's voters. *See Purcell v. Gonzalez,* 549 U.S. 1 (2006). As the State acknowledges in its stay motion, state and municipal officials need to start planning soon to implement

the district court's order for the upcoming November election. If this Court stays the district court's injunction but then later concludes the district court is right, there is little doubt the State will then argue that the decision has come too close to the election to be implemented, potentially preventing Plaintiffs and other Wisconsin voters from having their voting rights vindicated prior to the presidential election. This further tilts the balance of equities against staying the district court's July 29 permanent injunction pending appeal.

Public confidence. The district court determined that Wisconsin enacted the restrictions on the hours for in-person absentee voting "motivated in part by the intent to discriminate against voters on the basis of race," in violation of the Fifteenth Amendment, and that the in-person absentee provisions also violate the Voting Rights Act. Op. 42-45, 109-10. Allowing the State to enforce these racially discriminatory restrictions in the November general election would only further undermine rather than enhance public confidence in the fairness of our electoral system and only exacerbate the "acute resentment in minority communities" discussed in the district court's injunction decision. Op. at 20 (*re* perception of voter ID laws in minority communities); *see also* Op. 4. That would inflict even further irreparable injury and would further undermine the public interest.

CONCLUSION

For the reasons set forth above, the Motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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