

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

RUTHELLE FRANK, ET AL.,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS,

v.

SCOTT WALKER, ET AL.,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES.

Appeal From The United States District Court
For The Eastern District Of Wisconsin, No. 2:11-cv-1128,
The Honorable Lynn Adelman, Presiding

**DEFENDANTS-APPELLANTS-CROSS-APPELLEES' EMERGENCY
MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL**

BRAD D. SCHIMEL
Wisconsin Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

DANIEL P. LENNINGTON
Deputy Solicitor General

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

Attorneys for Defendants-Appellants-Cross-Appellees

TABLE OF CONTENTS

INTRODUCTION 2

 I. Wisconsin Adopts Both A Photo ID Law And A Comprehensive Program For Granting Free Photo IDs To Every Eligible Voter 3

 II. The District Court Undermines Wisconsin’s Photo ID Law By Requiring The State To Permit Voters To Violate The Law For Any Reason They Deem Subjectively Appropriate 6

LEGAL STANDARD..... 9

ARGUMENT 9

 I. Defendants Are Extremely Likely To Succeed On Appeal..... 9

 A. Plaintiffs Have No Likelihood Of Success On The Merits 9

 B. Plaintiffs Cannot Establish Irreparable Harm 15

 C. The Preliminary Injunction Harms The State And The Public 16

 II. A Stay Is Warranted Because The State And The Public Will Suffer Irreparable Harm, Whereas Plaintiffs Will Suffer No Harm 19

CONCLUSION..... 20

INTRODUCTION

The district court’s preliminary injunction—requiring the State to permit a subjective affidavit exception to its photo ID law—disrupts a regime that already provides that every eligible voter who puts forward a “reasonable effort” will receive a free photo ID. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (“*Frank II*”). The requirement that the State create and implement a subjective affidavit exception should be stayed because it encourages violations of the law and wastes public resources without any benefit. Notably, given that the district court required the State to publicize the affidavit procedure in sufficient time before the November 8, 2016, general election, entering a stay as soon as possible after the completion of the August 9, 2016, primary election is necessary to avoid voter confusion.

Under Wisconsin law, every eligible voter will receive a free photo ID with reasonable effort. The overwhelming majority can get a free photo ID by “making a trip to the [D]MV, gathering the required documents, and posing for a photograph.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). To assist the few voters who do not have “required documents,” Wisconsin, in 2014, created the ID Petition Process (IDPP). Under the IDPP, as promulgated in 2014, the Wisconsin Division of Motor Vehicles (“DMV”) investigated and then issued a free photo ID when it determined that the applicant was an eligible voter. For a very small number of individuals, the 2014 IDPP accommodation proved problematic in some respects. The State comprehensively addressed these concerns earlier this year, such that it is now legally mandatory that every IDPP applicant

receive a free photo ID upon application and can be denied an ID only after a determination of fraud, ineligibility, failure to respond to DMV inquiries for half a year, or voluntary withdrawal from the IDPP. This is how Wisconsin’s law “works today,” *Frank II*, 819 F.3d at 388, and it protects the rights of all voters.

An immediate stay of the district court’s unlawful preliminary injunction is necessary to avoid subjecting the State and the public to substantial, irreparable harm. The district court provided that the affidavit must permit voting without photo ID due to, *inter alia*, “lack of transportation” or “lack of birth certificate,” even though these do not satisfy the “reasonable effort” standard, given the accommodations in Wisconsin’s current law. Worse still, the affidavit permits voters to list *any* other reason for not having a photo ID, and the district court mandated that no reason given—including “*Crawford* and *Frank* were wrongly decided” or “the DMV is haunted”—be called into question. The district court’s requirement that the State expend substantial resources to implement and publicize a procedure that encourages violations of the law demands a stay.

STATEMENT

I. Wisconsin Adopts Both A Photo ID Law And A Comprehensive Program For Granting Free Photo IDs To Every Eligible Voter

In 2011, the Wisconsin Legislature enacted a photo ID law. 2011 Wis. Act 23. Under Wisconsin’s photo ID law, an eligible voter must present one of ten forms of proof of ID to vote. Wis. Stat. §§ 5.02(6m), 6.79(2)(a), (2)(d), and 6.87(1). Pursuant to a free ID program, DMV will issue a free photo ID card if an elector offers proof of: (1) name and date of birth; (2) identity; (3) residency; (4) U.S. citizenship or other

lawful status; and (5) a social security number. R.287:2; *see* Wis. Admin. Code § Trans 102.15.¹ DMV has issued over 420,000 free photo ID cards. R.287:3.

After the free ID program began, the State learned that a small number of voters did not have documents that establish their U.S. citizenship, name, and/or date of birth. To help these people, in September 2014, DMV created the IDPP. R.287:3. Under the IDPP, individuals filled out a form and presented documents to prove identity (any document with a signature or photograph), *see* Wis. Admin. Code § Trans 102.15(4), and residency (such as a utility bill or paycheck), *see* Wis. Admin. Code § Trans 102.15(4m). R.287:3–4. From its inception until May 12, 2016, out of a total of 1,389 petitions, DMV successfully resolved 1,132 petitions by issuing a free state ID, R.287:7, and of the remaining petitions, 138 were either cancelled by the customer or suspended based on a lack of response from the applicant. R.294:22. Only 52 petitions were ultimately denied. R.294:22.² While the IDPP—in its original form—successfully helped most applicants, the process did not prove adequate for a very small number of voters.

¹ Citations to the district court record are: “R.[ECF Entry Number]:[Page Number].”

² For the majority of IDPP applicants, DMV issued a free ID within five days, after simply searching certain official databases. R.287:4, 10. For more complicated cases, the Compliance, Audit, and Fraud Unit took over, whose “primary goal is to issue state IDs to whoever is eligible.” R.287:5. The investigators “engage[d] in numerous and varied efforts in helping petitioners obtain IDs,” including “poring over ancient documents and forms, searching various databases, examining . . . documents petitioners might provide, [] following up with the petitioners on each possible lead,” “talk[ing] to family members, hospitals, school districts,” and “tak[ing] whatever lead they can find in hopes that DMV can resolve the process and move forward with issuing an ID.” R.287:6.

On May 10, 2016, DMV adopted a rule that comprehensively addresses the issues that arose under the IDPP. R.287:9. Under this current law, any petitioner is automatically mailed, within six business days, either a permanent photo ID (if eligibility can be determined quickly) or a temporary photo ID (if more time for investigation is needed). Wis. EmR1618, § 10(a); R.287:9. If the petition is filed during an election week, then “DMV will issue a photo ID receipt by mail on the day that a person makes an application.” R.287:10. If the petitioner gets a temporary photo ID, this ID will be renewed automatically for a minimum of 180 days. R.287:9–10.

Importantly, the applicant will *always* get a renewing temporary photo ID—unless (1) DMV determines (as it usually does) “that it is more likely than not that the name, date of birth or U.S. citizenship provided by the applicant is correct,” Wis. EmR1618, § 8, in which case the petitioner obtains a *permanent* photo ID; or, (2) as happens rarely, DMV denies the petition because the petitioner has “committed a fraud,” is not eligible to vote, has not responded to DMV inquiries for 180 straight days, or has requested cancellation of the IDPP. Wis. EmR1618, § 8; R.287:9–10.

On Friday, July 29, 2016, the Western District of Wisconsin in *One Wisconsin Institute, Inc. v. Judge Gerald C. Nichol*, Case No. 15-C-0324 (W.D. Wis. 2015), determined that the IDPP was unlawful, after relying upon some of the same pre-2016 examples that the district court in the present case cited. *One Wisconsin*, Dkt. 234:89–91. Importantly, however, the Western District then crafted a remedy that is so strikingly similar to the changes that the State enacted into current law in May 2016 that this remedy (inadvertently) confirms that the State has already vol-

untarily addressed the issues that arose under the IDPP. Under the Western District's remedy, any IDPP applicant will receive a permanent photo ID, which the applicant can lose only upon a finding of ineligibility. *Id.* at 117–18. Under current law, every IDPP applicant will receive either a temporary ID that will timely renew or a permanent ID upon a finding of eligibility. *See supra* p. 5. Under either system, IDPP petitioners will have a photo ID upon application, except in rare circumstances in which denial would be reasonable. The only other difference between the Western District's remedy and current law is that, beyond permitting denials upon a finding of ineligibility, current law also permits the DMV to decline to renew a photo ID if the applicant has committed fraud, has not responded a single time in 180 days, or has voluntarily asked to end the IDPP. These are measured, narrow caveats, which balance the voters' rights with the need to effectively investigate the applicants' eligibility, free from applicant fraud and total non-cooperation.

II. The District Court Undermines Wisconsin's Photo ID Law By Requiring The State To Permit Voters To Violate The Law For Any Reason They Deem Subjectively Appropriate

On December 13, 2011, Plaintiffs filed this lawsuit challenging Wisconsin's photo ID law. R.1. On April 29, 2014, the district court decided that the photo ID law, on its face, violated (as relevant to this appeal) the Fourteenth Amendment. *See Frank v. Walker*, 17 F. Supp. 3d 837, 862–63 (E.D. Wis. 2014).

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"), this Court reversed, relying upon *Crawford*. *Frank I* explained that *Crawford* "concluded that both the prevention of voter impersonation on election day and the preservation of

public confidence in the integrity of elections justify a photo ID requirement.” *Id.* at 745. *Crawford* decided that the burdens encountered in obtaining a photo ID are not significantly more demanding than the usual burdens of voting, adding that “[t]hese observations hold for Wisconsin as well as for Indiana.” *Id.* at 746. After *Frank I*, Plaintiffs sought to bring an as-applied claim, R.222; R.223:17–18, but the district court denied this request. *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2015).

In *Frank II*, this Court reversed again, explaining that granting as-applied relief to those who cannot obtain photo ID with “reasonable effort” is “compatible with” *Frank I* and *Crawford*. 819 F.3d at 386–87. This Court also laid out three possible categories of voters who could not obtain a photo ID with “reasonable efforts.” *Id.* at 385–86. Any appropriate relief for such voters, *if they are shown to exist*, must not impact “the general application of Act 23 to the millions of persons who have or readily can get qualifying photo ID.” *Id.* Critically, this Court noted that “[t]he state’s administrative agencies may have made other adjustments,” and that the district court must “permit the parties to explore how the state’s system works today before taking up plaintiffs’ remaining substantive contentions.” *Id.* at 388.

After *Frank II*, Plaintiffs filed a motion for preliminary injunction, class certification, and a supplemental pleading. R.278. Plaintiffs relied upon the evidence they developed in the original trial, evidence submitted before the Western District of Wisconsin in *One Wisconsin*, and some short affidavits from individuals they sought to add as Plaintiffs. R.279. The State *repeatedly* sought permission from the

district court to develop a record showing that, under current law, all eligible voters can obtain a photo ID with reasonable effort. R.285:3; R.275.

On July 19, 2016, the district court granted Plaintiffs' motions, denied the State's requests to develop the record, and awarded class-based, preliminary relief for the following class: "all those eligible to vote in Wisconsin who cannot with reasonable effort obtain a qualifying photo ID." R.294:7. The court found that some Plaintiffs had standing despite the fact that the undisputed record evidence showed that each would receive a photo ID with reasonable effort. R.287:11–12.

The district court also found that Plaintiffs had met class certification requirements, while wrongly asserting that "DMV has already denied IDs to more than 50 applicants who sought IDs under the DMV's current rules." R.294:8–10. *In fact, the record contains zero denials under current law.* The district court then engaged in a lengthy explanation of several individuals who had problems obtaining photo ID under the pre-2016 IDPP, relying exclusively on testimony from the *One Wisconsin* trial. R.294:22–30.

The court issued preliminary relief, ordering the State to implement and publicize an affidavit procedure for the November 2016 election. R.294:42–43. This affidavit must allow each voter to "declare under penalty of perjury" that he or she has "been unable to obtain acceptable photo identification with reasonable effort." R.294:43. The voter can then check: "lack of transportation," "lack of birth certificate or other documents needed to obtain photo ID," "work schedule," "disability or illness," "family responsibilities," or "other." R.294:43. If the voter checks "other,"

there is a space to identify any reason. R.294:43. Critically, the district court also ordered that, as part of the affidavit procedure, “[n]o person may challenge the sufficiency of the reason given by the voter.” R.294:43 (emphasis added). The plain import of the court’s order is that anyone who lacks a photo ID can vote without one.

On Friday, July 29, 2016, the district court denied the State’s stay motion, restating many of the reasons given in its preliminary injunction decision and rejecting the State’s arguments to the contrary. R.311.

LEGAL STANDARD

“The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction.” *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). “[W]e 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. 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.* (citations omitted).

ARGUMENT

I. Defendants Are Extremely Likely To Succeed On Appeal

A. Plaintiffs Have No Likelihood Of Success On The Merits

The district court granted preliminary relief for the following class: “all those eligible to vote in Wisconsin who cannot with reasonable effort obtain a qualifying photo ID.” R.294:7. To show likelihood of success, Plaintiffs would have to “demon-

strate [their] compliance” with the requirements of Federal Rule of Civil Procedure 23 and related standing principles. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). As relevant to the present motion, Plaintiffs must show that they are “member[s] of the class which [they] seek[] to represent at the time the class action is certified by the district court.” *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). And Plaintiffs must “demonstrat[e]”—beyond “mere speculation”—that enough Wisconsinites fall within the defined class to satisfy Rule 23(a)’s numerosity requirement. *See Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990) (citation omitted). Plaintiffs cannot make either of these showings.³

1. Plaintiffs fall outside the class, which is fatal to their case. The only Plaintiffs who do not have a photo ID—Leroy Switlick, James Green, Melvin Robertson, and Ruthelle Frank—could obtain one with reasonable effort. R.297:11–12.⁴ The undisputed record evidence establishes that Plaintiffs would receive a free photo ID by gathering a couple of documents, going to a DMV location, filling out a form, and posing for a photo. *Id.*⁵ Plaintiffs would then have a photo ID at every election going forward—either a temporary ID during the pendency of the IDPP investigation, if needed, or a permanent ID after DMV concluded that the applicant’s name, date of birth and U.S. citizenship are, “more likely than not,” correct. Wis. EmR1618,

³ Given page limitations applicable to this stay motion, the State will not attempt to comprehensively cover all of the legal defects with Plaintiffs’ class-based claim in this filing.

⁴ The remaining Plaintiffs already have a photo ID, so they are clearly not part of the class. *See* R.181 (Trial Tr. vol. 3, 695–96, Nov. 6, 2013); R.294:5.

⁵ Or, if they are incapacitated such that they are unable to go to DMV, they can vote without a photo ID under Wis. Stat. § 6.86(2)(a), as Frank did earlier this year. R.294:5–6.

§ 8. Plaintiffs could only ever lose their free photo ID due to fraud, ineligibility, extreme non-cooperation, or voluntary withdrawal from the IDPP. R.287:9–10.

The district court claimed that some of these Plaintiffs had sought photo IDs from the DMV under prior law, and should not have to do so now. R.294:6, 30–31. But the question is whether Plaintiffs are part of the class “at the time the class action is certified,” *Sosna*, 419 U.S. at 403, meaning that the *only* relevant issue is whether, *under current law*, Plaintiffs would obtain a photo ID by expending reasonable efforts *now*. The undisputed record evidence shows that they would. R.287:11–12. For Switlick, in particular, Plaintiffs’ counsel instructed DMV to no longer work with him, presumably understanding that reasonable efforts would lead his client to get a free photo ID. R.285:13. And for Frank—who was able to vote in a recent election because she qualified for the disability exception, R.286:9—the district court found that she still suffered an injury because she cannot vote in person if she wishes to. R.294:6. But, of course, if Frank became well enough to vote in person, she could then also go to a DMV location, bring a couple of documents that she already has, fill out a form, and get her free photo ID. R.287:11.

Plaintiffs argued below that Green and Switlick fall within the class because they “lack acceptable proof of identity” necessary for the IDPP, R.279:26, but the district court properly did not rely upon this unsupported claim. Switlick and Green assert only that they have no social security card, R.280-7, or identification with a photograph, R.280-6:1, not that they lack the many other acceptable proofs of identity, including any “supporting document identifying the person by name and bear-

ing the person’s signature, a reproduction of the person’s signature, or a photograph of the person.” Wis. Admin. Code §§ Trans 102.15(4), (5)(a). And, of course, there is no support in the record for Plaintiffs’ premise: that obtaining one of the many acceptable proofs of identity requires more than “reasonable effort” from anyone, including Switlick and Green.

2. Plaintiffs’ class-based claim also fails because Plaintiffs will be unable to “demonstrat[e],” beyond “mere speculation,” that a sufficient number of eligible voters cannot obtain photo ID with reasonable efforts to satisfy Rule 23(a)’s numerosity requirement. *See Roe*, 909 F.2d at 1100 n.4 (citation omitted).

a. Most of the district court’s support for its conclusion that the class was sufficiently numerous was based upon dated anecdotes. The district court recited difficulties that a few applicants had under the pre-2016 IDPP, as compared to 1,132 pre-2016 IDPP grants (not to mention the 420,000 free IDs for voters who did not even need to invoke the IDPP). R.287:3, 7. The State already addressed the potential issues that these examples highlight under its current law.

For example, the district court recited some instances of applicants who lacked birth certificates and had their applications ultimately denied, R.294:23–24, or were required to stay in touch with DMV multiple times in a short period of time, R.294:27. Under current law, however, someone lacking a birth certificate will receive a free photo ID within six days, and can only ever be denied renewal upon a finding of fraud, ineligibility, failure to respond for 180 days, or request to withdraw. R.287:9–10. Current law thus comprehensively addresses the situation of “el-

eligible voters who need a document that no longer exists (such as a birth certificate issued by an agency whose records have been lost in a fire),” and ensures that such voters will have ID with reasonable efforts. *Frank II*, 819 F.3d at 386.

The district court also noted that two voters ran into trouble trying to address name mismatches. R.294:24–25. Under current law, however, someone with a name mismatch can fill out a simple form at the start of the IDPP. Wis. EmR1618, §§ 1–3; R.287:8–9. In any event, a name mismatch is not one of the permissible bases for denying a free photo ID. R.287:9–10. Accordingly, current law fully addresses the situation of “name mismatches or other errors in birth certificates or other necessary documents.” *Frank II*, 819 F.3d at 386.

The district court also cited two examples of DMV personnel not informing applicants about the IDPP or common law name-change processes in 2015. R.294:26.⁶ While DMV works hard to eliminate all mistakes by its personnel, a couple of inadvertent errors can occur under any system, including the district court’s mandatory affidavit procedure. The mere possibility of human error falls far short of establishing that Plaintiffs are likely to satisfy the numerosity requirement.

b. When the district court moved beyond inapposite anecdotes, it turned to “mere speculation,” *Roe*, 909 F.2d at 1100 n.4, unsupported by record evidence.

First, the district court asserted that “because there are likely thousands of eligible voters in Wisconsin who lack qualifying ID . . . it is virtually self-evident”

⁶ The photo ID application itself specifically notes the availability of the IDPP for various reasons including “name change.” *See generally* DMV, Wisconsin ID Card Application, <http://wisconsin.gov/Documents/formdocs/mv3004.pdf>.

that many people will have problems under current law. R.294:22. This is baseless speculation and, regardless, is false in light of current law’s comprehensive nature.

Second, the district court observed that current law does not relieve “an applicant from having to produce a document that proves his or her identity.” R.294:27–28. But Plaintiffs failed to identify a single individual who lacks any proof of identity—such as a marriage certificate, paystub with a social security number, or any “*supporting document identifying the person by name and bearing the person’s signature, or a reproduction of the person’s signature,*” Wis. Admin. Code § Trans 102.15(4) (emphasis added)—and could not easily obtain one “on request.” *Frank II*, 819 F.3d at 386. There are thus no “eligible voters who need a credential from some other agency (such as the Social Security Administration) that will not issue the credential unless Wisconsin’s Department of Motor Vehicles first issues a photo ID, which the DMV won’t do until the other credential has been obtained,” *id.*, including because a social security card is not required.

Third, the district court claimed that current law creates problems for those “who because of health reasons cannot travel easily, those without reasonable access to transportation to the DMV, and those who cannot afford to miss work for the time required to make a trip to the DMV.” R.294:29. Those with health problems that prevent them from traveling to the DMV without unreasonable efforts are already exempt. Wis. Stat. §§ 6.86(2)(a); 6.87(4)(b)2. As for the district court’s remaining concerns—work and family responsibilities, etc.—“making a trip to the [D]MV, gathering the required documents, and posing for a photograph” is a reasonable ef-

fort for the State to ask its able-bodied citizens to make. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). The district court’s reliance on these concerns is simply an attempt to invoke the same burdens it noted in its original decision in this case, which this Court found legally insufficient. *See Frank I*, 768 F.3d at 748.

Fourth, the district court showed concern about those “without qualifying ID on election day [who] might be unable to obtain ID in time to have their ballots counted without going to unreasonable lengths.” R.294:29–30. The record shows that DMV will issue same-day, free photo IDs during election week, R.287:10, making it easy for voters who did not obtain a valid photo ID in the months leading up to the election to cast provisional ballots on election day and then present photo IDs by 4 p.m. on that Friday. Wis. Stat. §§ 6.79(3)(b), 6.97(3)(b).

Finally, the district court claimed that current law is not adequate because applicants “will eventually be denied an ID card because the DMV will be unable to verify their qualifications.” R.294:31–32. That is entirely unsupported. Under current law, voters will stop receiving free photo IDs only because of fraud, ineligibility, extreme non-cooperation, or voluntary withdrawal. *See supra* p. 5.

B. Plaintiffs Cannot Establish Irreparable Harm

Plaintiffs must show that, absent preliminary relief, they will suffer irreparable harm. *See East St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 708 (7th Cir. 2005). Here, the district court found that, without relief, some Plaintiffs would be “unable to vote.” R.294:13. That is simply wrong. Plaintiffs could obtain a photo ID by gathering up a couple of documents, going to a

DMV location, and filling out a form. *See supra* pp. 4–5. This would *automatically* lead to every Plaintiff having a photo ID for the November 2016 election. Wis. EmR1618, §10. And even accepting the district court’s premise that it likely could not resolve the *Frank II* remand before Wisconsin’s following election on *February 21, 2017*, R.294:14, every Plaintiff that undertook reasonable efforts would have a free photo ID then as well. The *only* situation under which any IDPP petitioner would not have a photo ID at *any* election would be if the petitioner engaged in fraud, was ineligible to vote, did not respond to inquiries from DMV for 180 days, or voluntarily withdrew from the IDPP. *See supra* p. 5.

C. The Preliminary Injunction Harms The State And The Public

A photo ID law serves the public interests of “the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections.” *Frank I*, 768 F.3d at 745. The preliminary injunction here severely undermines these interests and harms the State and its citizens by encouraging violations of the law and forcing the State to waste public resources.

First, the injunction encourages citizens to violate the photo ID law. Under Wisconsin law, citizens must show a photo ID in order to vote at the polls. Wis. Stat. §§ 6.79(2)(a), and 6.87(1). Under the district court’s affidavit, the voter must first “declare under penalty of perjury that [they are] the individual identified below, and that [they] have been unable to obtain acceptable photo identification with reasonable effort.” R.294:43. If the affidavit stopped there, it would carve out an exception to the photo ID law no broader than the one that the Fourteenth Amendment would

mandate. *Frank II*, 819 F.3d at 386–87. But, of course, such an affidavit could not lawfully be used by *anyone*, because all eligible Wisconsin voters can obtain photo ID with reasonable efforts, *see supra* pp. 12–13.

The rest of the affidavit encourages breaches of the law by those who can get free photo ID with reasonable efforts, in violation of this Court’s holding that relief should not impact those who “readily can get qualifying photo ID.” *Frank II*, 819 F.3d at 386–87. The affidavit provides: “[t]his is due to the following reason(s): ___ Lack of transportation ___ Lack of birth certificate or other documents needed to obtain photo ID ___ Work schedule ___ Disability or illness ___ Family responsibilities ___ Other (please identify).” R.294:43. No matter what the voter selects—and no matter how legally deficient the “reason” is—“no person may challenge the sufficiency of the reason.” R.294:43. But the “[l]ack of birth certificate” is an invalid reason for claiming inability to obtain a photo ID with reasonable efforts, given current law. *See supra* pp. 12–13. And “work” responsibilities fall short of the reasonable efforts standard. *See supra* p. 14. Worse still, the unaccountable “Other” option conveys a clear message to voters who, objectively, can get a photo ID with reasonable efforts and thus are not part of the class: if you feel that you should not have to seek a photo ID, that’s enough. A system under which everyone may “disregard [a legal] requirement[]” if he feels that “he has not been fairly dealt with,” invites every man to “become a law unto himself.” *Somlo v. C. A. B.*, 367 F.2d 791, 793 (7th Cir. 1966).

Comparing the district court’s affidavit process to the affidavit that the Indiana Legislature enacted in *Crawford* is instructive. *Cf. Frank II*, 819 F.3d at 387.

Indiana permitted voting without a photo ID by “appear[ing] before the circuit court clerk or the county election board not later than noon ten (10) days following the election,” and, as relevant here, declaring that the voter is “indigent and unable to obtain a proof of identification without the payment of a fee.” Ind. Code Ann. § 3-11.7-5-2.5. Under Wisconsin law, every eligible voter is *already* entitled to a free ID *and* can obtain that ID by making a trip to any DMV at any time. This actually requires *less* effort than Indiana’s affidavit option, given that in Indiana, the voter has 10 days to travel to the circuit court clerk or the county election board. *Frank I*, 768 F.3d at 746. Wisconsin law thus already provides greater accommodation than does Indiana’s, rendering any affidavit unnecessary.

Second, the injunction harms the State and the public by wasting public resources and causing voter confusion. The district court ordered the Wisconsin Elections Commission to “revise [its] publicity materials” and “train election officials” to use the affidavit. R.294:38. This will be costly and time-consuming. The Elections Commission has already developed publicity material under *current* Wisconsin law, which would need to be redone, and training election officials around the State necessarily costs time and money. R.286:7–8. Indeed, the district court explained that this aspect of its order will “require the election-administration defendants to exercise significant effort.” R.294:38. Since, as explained above, Plaintiffs are extremely unlikely to prevail on the merits, all of this effort will be wasted. Even worse, because Wisconsin’s current law is likely to survive review by the time of final judg-

ment, advertising and employing the district court's affidavit option for just one or two elections will needlessly cause voter confusion.

II. A Stay Is Warranted Because The State And The Public Will Suffer Irreparable Harm, Whereas Plaintiffs Will Suffer No Harm

The remaining stay factors cut strongly in the State's favor, for many of the same reasons that the district court improperly granted the preliminary injunction.

The State will suffer irreparable harm absent a stay. The State will be required to implement the affidavit procedure and suffer the concomitant advertising and training expenses for the November 2016 election. Because these concededly "significant effort[s]," R.294:38, can never be recovered through "money damages," this will subject the State to irreparable harm. *Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir.1994). In addition, refusal to stay will mean that for (at least) the November 2016 election, the will of the Wisconsin people will be thwarted, as those without photo ID cast ballots based upon any reason they subjectively deem sufficient. Such interference with a State's ability to "effectuat[e]" its laws is "a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted).

The harm to the public from failure to stay will be significant. The affidavit that the district court mandated encourages those without a photo ID to violate the law, even when they plainly fall outside of the class. *See supra* pp. 6–9. A stay would allow for the orderly resolution of this dispute, permitting the State to carry out the policy of the legislature. *See Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interfer-

ence with a public program has the cost of diminishing the scope of democratic governance.”). And there will be no compensatory public benefit because Wisconsin law already allows anyone who makes reasonable efforts to get a photo ID.

The potential for voter confusion absent a stay is a particularly compelling reason for a stay. The Supreme Court has warned against court orders that “result in voter confusion.” *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). If Wisconsin informs citizens that there will be an affidavit option, this may well cause substantial confusion for future elections if the courts ultimately uphold Wisconsin’s law. After all, Wisconsin voters today understand that they need a photo ID to vote at the polls. If they are told this is no longer required, it will cause confusion when the affidavit is properly taken off the table at final judgment.

Finally, as explained above, a stay would cause no harm to Plaintiffs because every eligible voter in Wisconsin can obtain photo ID with reasonable efforts.

CONCLUSION

The preliminary injunction should be stayed.

Dated: August 1, 2016.

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

s/ Misha Tseytlin
MISHA TSEYTLIN
Solicitor General
Counsel of Record

DANIEL P. LENNINGTON
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2016, I filed the foregoing Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: August 1, 2016

s/Misha Tseytlin
MISHA TSEYTLIN