IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v. Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

Defendants respectfully move the Court for an order staying the preliminary injunction that it entered on July 19, 2016, while this case is on appeal. The affidavit remedy imposed by the injunction is unnecessary, overbroad, and constitutes improper judicial legislation. The remedy, and the analysis used to reach it, is likely to be overturned on appeal. Requiring Defendants to comply with the injunction pending appeal would be expensive and burdensome. It would also be contrary to public policy, and—as this Court noted— risks causing voter confusion. (Dkt. 294:38.) The Court should grant this motion and stay its preliminary injunction pending appeal.

LEGAL STANDARD

Federal Rule of Civil Procedure 62(c) states: "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Federal Rule of Appellate Procedure 8(a)(1) states: "A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of the district court pending appeal[.]"

The Seventh Circuit has stated the standard for granting a stay pending appeal:

> The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir.1997). . . . To determine whether to grant a stay, we 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. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir.2007); *Sofinet v. INS,* 188 F.3d 703, 706 (7th Cir.1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300. 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. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707.

In re A & F Enters., Inc. II, 742 F.3d 763, 766 (7th Cir. 2014).

ARGUMENT

Defendants are likely to prevail on the merits on appeal because of numerous legal errors by the Court. The balance of harms tips in Defendants' favor because the cost, voter confusion, and likely abuse that will result from the Court's order; public policy also favors imposing a stay to maintain election continuity. The Court should stay its injunction pending appeal.

I. Defendants are likely to prevail on appeal because this Court imposed an improper remedy and made legal and factual errors.

The affidavit exception imposed by this Court is an improper, overbroad remedy. And the analysis used to reach that improper result was based on stale facts, old law, a misunderstanding of the nature of potential harms, and misapplication of standing principles to the current and proposed Plaintiffs.

A. Any voter who takes reasonable efforts will have an ID, so there is no harm that needs to be enjoined.

A showing of irreparable harm is a prerequisite to a preliminary injunction. *BBL, Inc. v. City of Angola*, 809 F.3d 317, 323–24 (7th Cir. 2015). And it is settled law that "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph" is not an unreasonable burden on the right to vote. *Crawford*, 553 U.S. at 198. So the plaintiffs' burden was to show that they cannot get an ID by taking these reasonable efforts.

Under current law, anyone who goes to a Wisconsin DMV office and applies for a free state ID gets either an ID card or photo receipt that is valid for voting within six days. (Dkt. 287, Boardman Decl. ¶ 40.) Photo receipts are automatically renewed and valid for a minimum of 180 days, so that anyone who has received a receipt since the inception of the receipt process will possess qualifying ID through the November 2016 election. (Dkt. 287 ¶ 41); Wis. EmR1618, § 10. Renewals extend past 180 days unless there is fraud, cancellation, or when an applicant is ineligible or does not respond to multiple DMV inquiries. (Dkt. 287, Boardman Decl. ¶ 41); Wis. EmR1618, § 10.

So anyone who is eligible to vote, and is taking reasonable efforts to cooperate with DMV, will have a valid voting receipt for as long as it take to issue a permanent ID. And if that process is a severe burden for anyone, he or she is exempt from the voter ID law. *See* Wis. Stat. § 6.86(2)(a) (exception for indefinitely confined persons). This ensures that no person will be unable to vote in November 2016, February 2017, or in any other election because of lack of ID if they take reasonable efforts.

This Court summarily found that harm exists because "[t]hose who cannot with reasonable effort obtain qualifying ID will be unable to vote in any elections that occur between now and when their claims are finally resolved." (Dkt. 294:13.) The problem is that there is no one in that category,

and the record shows no current or Plaintiff in that situation. This Court went even further, certifying a class and finding that Rule 23(a)'s numerosity requirement has been met, even though there is no evidence of who, or how many, may be in that class, if it even exists.[1] "[T]he party supporting a class action has the burden of demonstrating the numerosity requirement of a class action, and mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1)." *Roe v. Town of Highland*, 909 F.2d 1097, 1100 n. 4 (7th Cir.1990) (quotation omitted). The plaintiffs have not met that standard so the class-based injunction was improperly granted.

B. The affidavit remedy ordered by the Court is overbroad and improper judicial legislation.

The Court's order requiring the Governor and members of the Elections Commission to implement an affidavit "safety net" is impermissible and likely to be overturned by the Seventh Circuit. Under the Court's instruction, "*any* reason the voter deems a reasonable impediment must be accepted." (Dkt. 294:37) (emphasis added). And election officials can "only make sure the voter signs his name and either checks a box on the form or writes *something* in the space for identifying other reasonable impediments." (Dkt. 294:37)

[1] The Court found that "the DMV has already denied IDs to more than 50 applicants who sought IDs under DMV's current rules." That is not true. The current rules were approved on May 10, 2016 and became effective on May 13, 2016. Wis. EmR1618; (*see also* Dkt 287, Boardman Decl. ¶ 39.) The record does not reflect 50 denials after that date.

(emphasis added). This order is contrary to the holdings of both *Crawford* and *Frank I*.

Under *Crawford*, inconveniences such as "making a trip to the [D]MV, gathering the required documents, and posing for a photograph" do not qualify as a substantial burden on the right to vote. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). As the Seventh Circuit acknowledged, "[t]hese observations hold for Wisconsin as well." *Frank I*, 768 F.3d at 746. Individuals not willing to "invest the necessary time" to take advantage of processes available to them to obtain a qualifying ID—processes that require them "to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses"—are simply not disenfranchised under the law. *Id.* at 748.

The affidavit procedure created by the Court thus creates a loophole in the ID requirement even for reasons already held insufficient. For example, under the Court's ruling, an affidavit marked "other" and stating that the voter "did not want to stand in line at the office that issues drivers' licenses" would be acceptable. This is overbroad under binding precedent.

The Court's preliminary injunction also requires that "[n]o person may challenge the sufficiency of the reason given by the voter for failing to obtain ID," and that these affiants receive a regular ballot. (Dkt. 294:43.) The lack of any review process essentially abrogates both the voter ID law and the

elector challenge procedures provided under Wisconsin law. *See* Wis. Stat. § 6.92(1) ("each inspector shall challenge for cause any person offering to vote . . . who does not adhere to any voting requirement under this chapter."); Wis. Stat. § 6.925 ("Any elector may challenge for cause any person offering to vote whom the elector knows or suspects is not a qualified elector.") Even in states with a duly enacted affidavit provision, such as North Carolina and South Carolina, affiants vote by a provisional ballot that is subject to challenge. *See* N.C. Gen. Stat. § 163–166.13(c)(2); S.C. Code § 7-13-710(D)(1)(b). But the Court's order here would allow *anything* written on an affidavit to pass as a "reasonable impediment," and it would go unchecked. This results in de facto nullification of multiple state laws.

The State's interests in requiring photo ID to vote include preventing voter-impersonation fraud and promoting voter confidence—these interests are sufficient to require voters to obtain a voter ID consistent with *Crawford* and *Frank I*. This Court's affidavit remedy completely ignores *Crawford* and provides a remedy for anybody, without regard to the State's interests, and without regard to whether the voter actually experienced *any* impediment. As such, it is unlikely to be upheld.

The remedy is also improper judicial legislation. This Court had it right the first time, that "ordering such relief would be the functional equivalent of enjoining the current law and replacing it with a new law drafted by me

rather than the state legislature." *Frank v. Walker*, 17 F. Supp. 3d 837, 863 (E.D. Wis. 2014), *reversed* 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"). The legal principles underlying the Court's prior holding are equally applicable now.

It is a fundamental principle that courts cannot rewrite or add language to a statute to make it constitutional. *See United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454, 479 & n.26 (1995) (recognizing that courts have an "obligation to avoid judicial legislation" and therefore "refus[ing] to rewrite the statute" at issue in the case). *See also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397 (1988) (noting that "the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements"); *White House Vigil for ERA Comm. v. Clark,* 746 F.2d 1518, 1529 (D.C. Cir. 1984) ("[I]t is not the province of the court to 'finetune' the regulations so as to institute the single regulatory option the court personally considers most desirable. Courts possess no particular expertise in the drafting of regulatory measures; their role is to uphold regulations which are constitutional and to strike down those which are not.").

The Court's decision completely ignores this weighty line of precedent. (*See* Dkt. 294:36.) Instead, it readily acknowledges that it must "*create* a safety net" that "is not ideal." (Dkt. 294:36) (emphasis added). Nothing in its

decision addresses the Supreme Court's clear directives to avoid this type of intrusion into the legislative sphere.

C. The Court considered stale facts and old law, contrary to the Seventh Circuit's instructions on remand.

This Court focused on evidence submitted by Plaintiffs about DMV's ID Petition Process (IDPP). (Dkt. 294:22–23). None of the evidence cited involves ID issuances under current law. Instead, the Court made its decision on out-of-date anecdotes, contrary to the Seventh Circuit's instructions to explore how the current process works. *Frank v. Walker,* 819 F.3d 384, 388 (7th Cir. 2016) ("*Frank II*").

For example, the Court relied on an anecdote involving an IDPP application that was denied in June 2015 because of documentation and fee issues. (Dkt. 294:23 (citing Young Decl., Ex. 59).) That entire process took place before the current law was in effect. Under current, applicable law, if no documents can be found, DMV will still issue an ID if it is more likely than not that the applicant is presenting an accurate identity. Wis. EmR1618 § 8. And during the time DMV is assisting in getting a free ID, the applicant has an ID receipt that is valid for voting. Wis. EmR1618 § 10. Further, DMV pays fees when that would advance an investigation. (Dkt. 287 ¶ 16.) The Court's observations about what happened under past law cannot support a finding of an injunction against the current law.

The Court also relied on a situation where an applicant's name was spelled differently on his birth certificate than his social security card. (Dkt. 294:24 (citing Young Decl., Ex. 42).) This again occurred entirely under old law. Now, name mismatches or inconsistencies in identity documents do not result in denial. Wis. EmR1618, §§ 1–3; (Dkt. 287, Boardman Decl. ¶ 37; Dkt. 287-7, Ex. 1019.) DMV has an efficient and free affidavit process that results in ID issuance.

The Court cited another situation where an IDPP petitioner was not informed of DMV's notarization process. (Dkt. 294:26 (citing Young Decl., Ex. 41).) This, too, occurred *before* the DMV notarization process was in place. Likewise, the Court relied on a case of a name spelling discrepancy that occurred *before* the name change affidavit became part of DMV's standard procedures. (Dkt. 294:26 (citing Young Decl., Ex. 42).) And to support the proposition that voters will not be able to get a receipt in time for a provisional ballot to be counted, the Court cited a situation from before the receipt process started—indeed, before receipts were even issued. (Dkt. 294:30 (citing Dkt. 280-15 ¶ 6).)

These, and several other anecdotal examples that the Court relied upon, all have the same problem: they did not "permit the parties to explore how the state's system works today." *Frank II*, 819 F.3d at 388. The Seventh

Circuit is unlikely to affirm the preliminary injunction when this Court did not follow its remand instructions.

D. No Plaintiff has standing because none can show an undue burden on voting.

Standing requires an "invasion of a legally protected interest" that is concrete and particularized, not conjectural or hypothetical. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The legally protected interest at issue in this case is the ability to vote. After *Crawford* and *Frank I*, it is no longer reasonably debatable that the act of showing an ID to get a ballot, or "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph" is an unreasonable burden on the right to vote. *Crawford*, 553 U.S. at 198.

This Court noted that two of the plaintiffs, Brown and Smith, already have an ID. (Dkt. 294:5.) They have no injury because merely having to show the ID that they already have is not redressable under *Crawford* and *Frank I*. But this Court found standing on the conjectural and hypothetical possibility that the law will change to no longer require an ID, which could confer standing on parties who have an ID. (Dkt. 294:5) (finding standing because "the plaintiffs intend to argue on appeal that *Frank I* was wrongly decided and that Act 23 should be enjoined in its entirety.") This would require that the Seventh Circuit to make a complete reversal of its own decision from only

two years ago, and do so in the face of *Crawford*. That is unlikely, and the standing decision should be stayed pending the Seventh Circuit's decision on appeal.

This Court also found that Ruthelle Frank has standing, even though she has voted while the voter ID law was in effect. (Dkt. 294:6.) It made this finding on an observation that Ms. Frank has voted absentee, but would rather vote in person. (*Id.*) There is no evidence to support that finding. The Court relied upon two pages of Ms. Frank's 2012 deposition. (*Id.* (citing Frank Dep. at 12–13, Dkt. 280:4).) That deposition discusses her voting history, but says nothing about a preference to vote in person.

The Court found standing for the remaining Plaintiffs—Robertson, Switlick, and Green—by reasoning that they should not be required to re-apply for an ID after DMV changed its procedure. (Dkt. 294:6.) But the entire point of this case it to examine whether the current DMV procedures are appropriate. The Seventh Circuit instructed this Court to "permit the parties to explore how the state's system works today before taking up plaintiffs' remaining substantive contentions." *Frank II*, 819 F.3d at 388. This Court did the opposite by holding that Plaintiffs do not need to show how the new law affects them before deciding if they have standing.

Finally, there is the matter of Mr. Switlick, who has prevented himself from getting an ID by prohibiting the DMV from contacting him.

(Dkt. 288-6, Murphy Decl. Ex. 1006:221–22 (*One Wisconsin* Tr. 05-23-16 at 221–22).) If Mr. Switlick has any injury, it was self-imposed when he asked DMV not to contact him. Mr. Switlick should not be permitted to manufacture standing by preventing DMV from working with him to get an ID.

II. The affidavit remedy will cause irreparable harm and is contrary to public policy.

The affidavit remedy crafted by the Court will also cause a temporary change in elections administration, which will lead to confusion for both elections administrators and voters. This will cause irreparable harm that is contrary to public policy, necessitating a stay.

The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo when it concerns election administration. In *Purcell v. Gonzalez,* 549 U.S. 1 (2006), the Supreme Court held that, "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or non-issuance of an injunction, considerations specific to election cases and its own institutional procedures." *Id.* at 4. One of these considerations is that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to

remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5.

The Supreme Court has further instructed that, "[i]n awarding or withholding immediate relief, a court is entitled to and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims,* 377 U.S. 533, 585 (1964) (emphasis added). Accordingly, in certain circumstances when "a State's election machinery is already in progress," equitable considerations might justify a court in withholding preliminary relief. *Id.*

Certainly, these considerations factored into halting injunctions in similar cases that would have altered state election laws in the months preceding general elections. *Frank v. Walker,* 135 S. Ct. 7 (2014)*; North Carolina v. League of Women Voters of N.C.,* 135 S. Ct. 6 (2014)*; Husted v. Ohio State Conference of N.A.A.C.P.,* 135 S. Ct. 42 (2014).

Here, the Administrator of the State's Elections Commission has stated that the Court's affidavit remedy will introduce extreme confusion into the elections process. (Dkt. 286 ¶ 7.) There are 1,854 municipal clerks that would be responsible for implementing the affidavit remedy. (Dkt. 286 ¶ 12.) There would be substantial difficulty informing and training these clerks and election inspectors in a timely manner about how to administer the affidavit

remedy in time for the November 2016 election. (Dkt. 286 ¶¶ 11–12.) The municipal clerks are not parties to this action and not within the jurisdiction of the Court—the Elections Commission has limited authority over these municipal officers. (Dkt. 286 ¶¶ 13–14.) Changing the "State's election machinery" through orders which will be carried out by non-party clerks poses too great of risk of inconsistent election administration and voter confusion. *See Sims,* 377 U.S. at 585.

This clear harm to election administration must be balanced against the lack of any harm to voters. Anyone who goes to a Wisconsin DMV office and applies for a free state ID will get either an ID card or photo receipt that is valid for voting. (Dkt. 287, Boardman Decl. ¶ 40.) The receipt and renewals will be valid for a minim of 180 days, and renewals will only ever cease because of fraud, ineligibly, cancellation, or lack of cooperation with DMV. (Dkt. 287 ¶ 41); Wis. EmR1618, § 10. No voter who takes reasonable efforts will be unable to vote because of lack of ID.

Furthermore, the Court's preliminary injunction order also requires the Elections Commission to "revise their publicity materials" and "train election officials" to include the affidavit remedy. (Dkt. 294:38.) But the Commission has already engaged in an advertising campaign targeted at the existing voter ID law. (Dkt. 286 ¶¶ 32–33.) Advertising design work has already been completed and the Commission does not have funds allocated for

modifications to these ads that are already completed. (Dkt. 286 ¶ 34.) There is no funding for the affidavit remedy, and even if the funds could be allocated, the State's competitive bidding process to conduct an information campaign requires between six weeks and two months to complete. (Dkt. 286 ¶¶ 37–39.)

Given this, the Supreme Court's instruction in *Purcell* is applicable. The State's voter ID law has been on the books since 2011, and was in place for the April 2016 elections, where voters turned out in record numbers. (Dkt. 288-8:28.) The affidavit remedy ordered here is in conflict with what voters have been instructed and experienced since its implementation. The fact that it is only a temporary "safety net" that could be altered following an appeal or trial on the merits only exacerbates that likelihood of inevitable voter confusion about both this remedy and the voter ID law in general. Allowing the preliminary injunction to go forward would "result in voter confusion and consequent incentive to remain away from the polls," which will increase "[a]s an election draws closer." *Purcell*, 549 U.S. at 4–5. The Court acknowledges this in its decision: "[v]oter confusion is of course a risk." (Dkt. 294:38.) Where an effective remedy is already in place to provide voters an ID to vote (*see* section I(C), *supra*), this is not a risk that should be taken.

The State will be also be irreparably harmed if the stay is not issued. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). If the Court's affidavit remedy is ultimately reversed, the State cannot run the election over again.

A stay of the Court's injunction pending appeal would allow for the orderly resolution of this dispute and allow the State to carry out the statutory policy of the Legislature, which "is in itself a declaration of public interest and policy which should be persuasive." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance."). This is especially true for the voter ID law, which is already in place and which the State has used successfully in its February and April 2016 elections.

CONCLUSION

For the reasons argued in this motion, the Court should stay its preliminary injunction pending appeal.

Dated this 22nd day of July, 2016.

Respectfully submitted,

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