

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

COMMON CAUSE, COMMON CAUSE
WISCONSIN, BENJAMIN R.
QUINTERO,

Plaintiffs,

v.

Case No. 19-CV-323

MARK L. THOMSEN, *et al.*,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY

This is a new voter ID lawsuit, filed while two major voter ID cases are pending in the Seventh Circuit: *One Wisconsin*¹ and *Frank*.² The issues, arguments, evidence, and defendants here overlap substantially with those cases. The Seventh Circuit decisions may completely resolve this case and, at a minimum, will provide guidance about how to analyze the claims here and Wisconsin's voter ID framework in general. To avoid duplicative discovery, motion practice, and briefing, and also to account for the fact that Plaintiffs'

¹ *One Wisconsin Institute, Inc. et al. v. Nichols et al.* Western District of Wisconsin case number 15-CV-324; Seventh Circuit case numbers 16-3083 and 16-3091.

² *Frank v. Walker*, Eastern District of Wisconsin case number 11-CV-1128; Seventh Circuit case numbers 16-3003 and 16-3052.

claims could be mooted or resolved by the Seventh Circuit's decision, this case should be stayed pending resolution of *One Wisconsin* and *Frank*.

BACKGROUND

The *One Wisconsin* and *Frank* cases are the culmination of 8 years of district court Voter ID litigation. They are on appeal, and all briefing and arguments are complete. The only thing that remains is the Seventh Circuit's decision.

I. *One Wisconsin* involved college ID requirements and free state IDs.

One Wisconsin involved multiple voting laws, but a primary focus was Wisconsin's voter ID law. (See OWI³ Dkt. 141:50–60 ¶¶ 153–177; 185:1.) As this Court noted, “[t]he most significant new law is 2011 Wisconsin Act 23, which requires voters to present one of several specified types of photo ID.” (OWI Dkt. 185:1.) It was brought by nine plaintiffs including three who were in college or use a college ID for voting. (OWI Dkt. 141:5, 7–8 ¶¶ 7, 11, 12.) The defendants include the Commissioners of the Wisconsin Elections Commission in their official capacity, who are Defendants in this case.

The case went to trial, and “[o]ver nine extended days, the court heard the testimony of 45 live witnesses, including six experts, with additional

³ References to the *One Wisconsin* district court docket, case number 15-CV-324, are in the format (OWI Dkt. [docket number]:[page or paragraph number]).

witnesses presented by deposition.” *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016.) College IDs were an important part of the case and trial.

Several witnesses testified about using college IDs for voting. For example, Plaintiff Renee Gagner was a recent college graduate from Beloit College who testified about the photo ID law’s effect on college students. (OWI Dkt. 200:27–28, 45.) Plaintiff Jennifer Tasse also testified about college students using IDs, the signature requirement and the availability of qualifying student ID cards, including her own ID card. (OWI Dkt. 211:20, 43–47, 49.) Carmen Gosey was a UW-Madison student who also testified about student IDs, including how to get a voting compliant ID at UW-Madison. (OWI Dkt. 210:21; 215:174–75; 215:168–69.) Plaintiffs’ expert, Allan Lichtman, testified about use of student IDs. (Dkt. 214:275–78.) Diane Lowe, an election specialist at Government Accountability Board, was questioned about the effect of the photo ID law on college students. (Dkt. 217:63, 123.) And Analiese Eicher, an employee of One Wisconsin Institute, testified about a Wisconsin Senate committee hearing relating to the voter ID law, and student IDs specifically. (Dkt. 217:161–63.)

Post-trial briefing in *One Wisconsin* addressed plaintiffs’ claims concerning college IDs for voting. Indeed, the *One Wisconsin* plaintiffs argued that: “The voter ID law effectively targets college students . . . by making

student IDs unnecessarily difficult to use for voting: Unlike a driver's license or a passport, it must be unexpired; it must contain a signature of the student—even though there is no signature matching done at the polls; it must contain a date of *issuance*; and the expiration date must not be later than two years after the date of issuance,” which are the same arguments that Common Cause is making now. (OWI Dkt. 207:227.)

In the *One Wisconsin* decision, this Court acknowledged that “[m]uch of plaintiffs' evidence concerns the restrictions that the legislature placed on the use of college IDs.” *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 927. The Court even ruled on one component of the college ID requirements, concluding that requiring a college ID to be unexpired is impermissible. *Id.* at 962. That decision was premised on compliance with the other college ID requirements: “To be clear, the court is not concluding that voters have carte blanche to use expired college or university IDs at the polls; they must still comply with the other requirements of Wis. Stat. § 5.02(6m)(f).” *Id.* The court observed that the requirements have overlapping effect and therefore are not cumulatively enforceable:

The 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. 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.

Id. at 961–62.

The court upheld the college ID requirements against an age discrimination challenge because the rule gives college students an *additional* means of voting, above and beyond everyone else:

College students may use any of the means of identification or proof of residence that are available to all citizens generally. The legislature also extended to students the additional ability to use their college IDs, albeit under certain restrictive conditions. As a practical matter, these restrictions meant that the standard student IDs that many University of Wisconsin campuses issue were not valid for voting. But some universities have provided workarounds in the form of special university-issued voting IDs. This seems like an unwarranted rigmarole, but the end result is that college students have more ID options than other citizens do.

Id. at 927.

That conclusion is critically intertwined with Wisconsin’s program for giving anyone, including college students, free voting compliant photo ID cards. *See id.* at 912–13. (“As part of Act 23, Wisconsin enacted a statute allowing citizens to receive free IDs to vote”). The *One Wisconsin* decision extensively analyzed the free state ID card program, known as the “ID Petition Process,” or “IDPP.” *See id.* at 913–918, 922, 949. And the court ultimately ordered the state to “reform the IDPP so that qualified electors will receive a credential valid for voting without undue burden, consistent with this opinion”. *Id.* at 965. That requirement was stayed pending appeal. *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-jdp, 2016 WL 4250508 at *1 (W.D. Wis. Aug. 11, 2016).

That decision is on appeal to the Seventh Circuit. The appeal is fully briefed and was argued in February 2017. Issues on appeal include the validity of the requirement that college IDs be unexpired; the process for distributing free state IDs, including the IDPP; and whether the entire voter ID law should be invalidated. (See e.g., OWI 7th Cir. Dkt.⁴ 30:23–37, 48–49, 56–59.)

II. *Frank* is a long-litigated voter ID case that is also on appeal and is being considered alongside *One Wisconsin*.

Frank was filed in 2011 and sought a declaration that the photo ID law is unconstitutional (Frank Dkt.⁵ 1; see Frank Dkt. 31:76–78.) Like *One Wisconsin*, the defendants include the same Wisconsin Elections Commissioners as are Defendants in this case. *Frank*'s eight-year history includes an eight-day trial and several decisions and orders from the Seventh Circuit. (Frank Dkt. 179–186, 215, 216, 220, 221, 263, 313, 318.) Most recently, the district court issued an injunction permitting anyone to avoid the photo ID requirement by filling out an affidavit certifying that he or she could not obtain

⁴ The *One Wisconsin* appeal involves two consolidated appeals, Nos. 16-3083 and 16-3091. References to appellate documents in *One Wisconsin* are in the format (OWI 7th Cir. Dkt. [docket number]:[page or paragraph number]).

The same format is used for the two consolidated appeals in *Frank v. Walker* (Nos. 16-3052 and 16-3003): (Frank 7th Cir. Dkt. [docket number]:[page or paragraph number]).

⁵ References to the *Frank v. Walker* district court case, Eastern District of Wisconsin case number 11-CV-1128, are in the format (Frank Dkt. [Docket number]:[page or paragraph number]).

a qualifying ID with reasonable effort. (Frank Dkt. 313:2.) The defendants appealed that decision and requested a stay pending appeal, which the Seventh Circuit granted. (Frank Dkt. 295, 313.) It then heard arguments on the same day in *Frank* and *One Wisconsin* and appears to be considering the cases together. (*Compare* OWI 7th Cir. Dkt. 85, *with* Frank 7th Cir. Dkt. 79.)

III. Common Cause’s 2019 challenge regarding Wisconsin’s voter ID law and college IDs.

This lawsuit includes only two claims, both of which are voter ID challenges: “COUNT ONE (College or University ID Issuance Date and expiration date requirements violate first and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983)” (Compl. 20); “COUNT TWO College or University ID Signature Requirement Violates First and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983)” (Compl. 22). The Complaint requests an order enjoining those requirements. (*See* Compl. ¶ 2, p. 23–24.)

ARGUMENT

Courts may stay proceedings in the interest of judicial economy and sensible disposition of cases. Currently pending are two fully briefed and argued appeals involving overlapping claims, the resolution of which may resolve, or at least significantly clarify, the claims here. In light of the substantial factual and legal overlap between the cases; the fact that, in some

measure, resolution of those cases will very likely determine the outcome of this case; and the related likelihood that any proceedings in this case now could be wasteful, this case should be stayed pending resolution of *One Wisconsin* and *Frank*.

I. District courts possess inherent discretion to stay proceedings to dispose of cases efficiently and sensibly.

Courts have inherent power to stay proceedings and control disposition of cases, giving due regard to economy of time and effort for the court, the parties, and counsel. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Emerson v. Sentry Life Ins. Co.*, No. 18-CV-254-JDP, 2018 WL 4380988, at *2 (W.D. Wis. Sept. 14, 2018). Deciding whether to stay a case involves a balancing of factors, including “(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.” *Grice Eng’g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (internal citations omitted); *Emerson*, 2018 WL 4380988, at *2.

This Court recently acknowledged that a pending appeal in a different case with related claims warrants granting a stay. *See Kilty v. Weyehaeuser Co.*, No. 16-CV-515-WMC, 2016 WL 6585597, at *1 (W.D. Wis. Nov. 7, 2016).

In *Kilty*, an asbestos lawsuit was filed while related claims against the same defendants were pending in the Seventh Circuit. *Id.* This Court stayed the district court litigation, including discovery, noting that any resolution of the appeal could materially alter the district court's analysis, either making the case ripe for summary judgment or guiding the trial court's inquiry. *Id.*

Other courts routinely grant stays under these circumstances. For example, while awaiting appellate guidance on whether discrimination on the basis of sexual orientation is actionable under Title VII, a court found that “the prudent course at present is to stay this matter pending the issuance of a decision [from the court of appeals]—a decision that should clarify whether [the claims] can be sustained.” *Matawka v. Bd. of Educ. of J. Sterling Morton High Sch. Dist. 201*, 189 F. Supp. 3d 809, 811 (N.D. Ill. 2016).

And in the context of the contraceptive mandate in the Patient Protection and Affordable Care Act, the district court stayed a case pending the Seventh Circuit's resolution of cases with related issues, reasoning that “the interests of judicial economy and the other factors . . . weigh in favor of temporarily staying the proceedings until the Seventh Circuit has had an opportunity to decide.” *Tonn & Blank Const., LLC v. Sebelius*, 968 F. Supp. 2d 990, 995 (N.D. Ind. 2013).

A stay pending an appellate decision is particularly appropriate where that decision “has the potential to reduce all costs attendant to th[e] lawsuit

[because it] will demarcate—and likely narrow—the playing field for this court and for the parties.” *Woodman’s Food Mkt., Inc. v. Clorox Co.*, No. 14-CV-734-SLC, 2015 WL 4858396, at *3 (W.D. Wis. Aug. 13, 2015).

II. This case should be stayed because the Seventh Circuit’s decisions in *One Wisconsin* and *Frank* will necessarily demarcate the playing field for Plaintiffs’ claims here.

All of the factors weigh in favor of staying this case pending the outcome of the Seventh Circuit’s decisions in *One Wisconsin* and *Frank*. First, this litigation has barely begun. Second, Plaintiffs cannot complain of prejudice by waiting for guidance from the Seventh Circuit: they are challenging a law that was passed eight years ago and did not pursue their claims while that law was litigated through two trials and multiple appeals. Third, a stay will streamline the issues and may even resolve this case completely: the issues on appeal will likely provide guidance on how to analyze any alleged burdens related to requirements for college IDs; and a decision regarding Wisconsin’s IDPP will provide guidance about *everyone’s* access to free IDs in Wisconsin. Fourth, given the overlap of issues and the likelihood that the Seventh Circuit’s decisions will provide guidance on Plaintiffs’ claims here, a stay now will reduce (and perhaps eliminate) the litigation burden and costs for the parties and this Court. In light of all this, this case should be stayed.

A. This litigation is at an early stage and Plaintiffs cannot reasonably complain of prejudice.

This case commenced recently; the answer was just filed along with this motion. There has been no discovery, briefing, or court decisions. This is the ideal time to stay the case to prevent inefficient litigation for the parties and the Court.

Likewise, Plaintiffs would suffer no prejudice from a stay. The laws at issue were passed in 2011. (Compl. ¶ 19.) Plaintiffs have waited eight years to raise their complaints, having sat by during trials on these very issues. They were plainly aware of the litigation: Common Cause filed an amicus brief in the *One Wisconsin* appeal. (OWI 7th Cir. Dkt. 53.) Having sat out of the two major trials on voter ID in Wisconsin, which presented issues interrelated to those they now raise, Plaintiffs have no reasonable claim of prejudice from waiting until those appeals are resolved.

B. A stay will simplify or resolve the issues and may eliminate the need for a trial.

The issues on appeal will streamline, and may resolve, this case. Plaintiffs seek to enjoin laws requiring a college ID to have an issuance date, expiration date, and signature, arguing that these are “unnecessary and unjustified step in the voting process.” (Compl. ¶ 6, p. 20–24.) Their argument is nearly identical to the college ID claims in *One Wisconsin*:

The voter ID law effectively targets college students as well by making student IDs unnecessarily difficult to use for voting: Unlike a driver's license or a passport, it must be unexpired; it must contain a signature of the student—even though there is no signature matching done at the polls; it must contain a date of *issuance*; and the expiration date must not be later than two years after the date of issuance.

(OWI Dkt. 207:227.)

Plaintiffs note that their precise claims were not at issue in *One Wisconsin*. (Compl. ¶¶ 27–29.) But college ID issues were the topic of evidence and briefing, and it is highly likely that the appellate decision will either resolve or clearly steer resolution Plaintiffs' claims here.

For example, an issue on appeal in *One Wisconsin* is the availability of free IDs for voting through Wisconsin's ID Petition Process. (*See, e.g.*, OWI 7th Cir. Dkt. 30:23–37, 48–49, 56–59.) Those free IDs are available to anyone, including college students. If the Seventh Circuit were to uphold Wisconsin's current program for free IDs, any college student who does not have a qualifying ID would be able to use the Seventh Circuit-approved process to get a free state ID to vote. Alternatively, a decision from the Seventh Circuit could affirm this Court's order to "reform the IDPP so that qualified electors will receive a credential valid for voting without undue burden, consistent with this opinion." *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 965. Any reforms under that order could also resolve the claims here; i.e., reforms in accordance with this Court's order would also result in a court-approved process for obtaining free IDs.

Other issues on appeal also could have significant impacts, including the issue of whether a requirement that college IDs be unexpired is valid. If the Seventh Circuit were to reinstate the requirement that college IDs be unexpired, it would make no sense to rule that the IDs do not need to have an expiration date. Further, an issue on appeal in *Frank* is the availability of an affidavit exception that would allow anyone without a qualifying ID to vote by simply certifying that they could not obtain an ID with reasonable effort.

All of these topics would impact any arguments about putative burdens related to college IDs. Thus, even if the pending appeals do not resolve the issues in this case completely or directly, it is difficult to imagine that those decisions will not give important guidance applicable to Plaintiffs' claims here. Given that multiple issues on appeal could "demarcate—and [perhaps] narrow—the playing field for this court and for the parties," *Woodman's Food Mkt., Inc.*, 2015 WL 4858396, at *3, a stay is appropriate to streamline any further proceedings in this case.⁶

⁶ The *One Wisconsin* and *Frank* appeals have multiple issues and may include determinations to be made on remand. If the decisions do not end this case completely, then consolidating the issues, at least for trial, may be appropriate. See Fed. R. Civ. P. 42(a).

C. A stay will reduce the burden of litigation and avoid duplicative litigation.

As this Court is aware, the *One Wisconsin* case involved a trial “[o]ver nine extended days, [where] the court heard the testimony of 45 live witnesses, including six experts, with additional witnesses presented by deposition” and where this Court noted that “[m]uch of plaintiffs’ evidence concerns the restrictions that the legislature placed on the use of college IDs.” *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d, 902, 927. In light of the substantial overlap between the college ID claims at issue there and Plaintiffs’ claims here, it makes little sense to start the evidentiary process over now while the Seventh Circuit is considering those claims.

Additionally, the Defendants in this case are parties to both *One Wisconsin* and *Frank*. All three cases are directed at the Wisconsin Elections Commissioners in their official capacities. The Commissioners, their predecessors, and their attorneys have already expended extensive time and resources defending two federal cases through discovery, long trials and multiple appeals over the last eight years. It would be unduly burdensome to proceed with a third voter ID case. Indeed, allowing this case to proceed now risks wasting resources because the parties and the Court could expend significant effort litigating the issues under current precedent, just to have the landscape altered by the decisions in *One Wisconsin* and *Frank*.

A stay will simplify any issues to be resolved and prevent inefficient and unduly burdensome litigation. This Court should stay this case until *One Wisconsin* and *Frank* are resolved.

CONCLUSION

For the reasons discussed, this Court should stay proceedings in this case pending resolution of the appeals in *One Wisconsin* and *Frank*.

Dated this 3rd day of June, 2019.

Respectfully submitted,

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