

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, ANN S.)
JACOBS, BEVERLY GILL, JULIE)
M. GLANCEY, JODI JENSEN, and)
DEAN KNUDSON, in their official)
capacities as Commissioners of the)
Wisconsin Elections Commission,)
MEAGAN WOLFE, in her official)
capacity as the Interim Administrator)
of the Wisconsin Elections Commission,)

Defendants.)

_____)

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO STAY**

INTRODUCTION

Defendants have moved to stay this case pending the resolution of two appeals in cases that challenged different aspects of the same law. While both appeals concern Wisconsin's voter identification requirement, in whole

or in part, neither involves the legal issues and claims raised by Plaintiffs in this case. The constitutionality of the three challenged requirements for college and university ID cards to be used as voter ID—the issuance date, expiration date, and signature requirements—has never been tested. And the two pending appeals are entirely irrelevant to Plaintiffs’ challenges to two of these three requirements—the issuance date and signature requirements.

In contrast to *Frank v. Walker* and *One Wisconsin Institute v. Thomsen*, Plaintiffs have brought a tightly focused and targeted lawsuit aimed only at three requirements listed in a single subsection of a single statute. This is an action that will require *significantly* less discovery and briefing than *Frank* and *One Wisconsin Institute* did and, in Plaintiffs’ view, can and should be efficiently resolved on cross-motions for summary judgment. Those appeals have been pending for 840 days, as of this filing, and are of course potentially years away from a final resolution before the Seventh Circuit sitting en banc or the United States Supreme Court. Even if there is some overlapping evidence between those cases and this case, the existence of other cases that have challenged different aspects of the Wisconsin voter ID law is not grounds to enter a stay and allow these unconstitutional requirements to

remain in force in election after election. Respectfully, Plaintiffs request that Defendants' Motion be denied.

I. The *Grice* factors do not support granting Defendants' motion for a stay.

"Courts often consider the following factors when deciding whether to stay an action: (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). Because factor (3) should be dispositive here, Plaintiffs will discuss that factor first.

A. Factor (3): whether a stay will simplify the issues in question and streamline the trial

When a party seeks to stay the proceedings in one case until the final resolution of a different case, this Court has analyzed the relationship between the cases' legal issues under the third factor: "whether a stay will simplify the issues in question and streamline the trial." *See, e.g., Emerson v. Sentry Life Ins. Co.*, No. 18-cv-379-jdp, 2018 WL 4380988, at *3 (W.D. Wis. Sept. 14, 2018) (noting that plaintiff's claims "stand to be resolved" in

separate class action that embraces plaintiff as class member). District courts in this Circuit have found that a stay will simplify issues when the resolution of the pending case will resolve the same claims in the case at bar. *See, e.g., Tonn and Blank Const., LLC v. Sebelius*, 968 F. Supp. 2d 990, 993 (N.D. Ind. 2013) (granting motion to stay because “the plaintiffs in *Korte* and *Grote* have explicitly requested the Seventh Circuit to address the very same substantive claims raised by T & B in the underlying case against the very same government defendants”); *Grice Eng’g*, 691 F. Supp. 2d at 920–21 (denying stay where it was “far from clear” that a separate case would “resolve or simplify the issues”).

1. *Frank v. Walker*

Defendants do not make any effort to argue that the *legal issues and claims* raised in *Frank v. Walker*¹ overlap with and/or would be dispositive of the legal issues and claims raised in Plaintiffs’ challenge. That is because they do not and would not. Originally filed in 2011,² *Frank v. Walker* is on its

¹ *Frank v. Walker* was filed in the U.S. District Court for the Eastern District of Wisconsin and assigned case number 11-cv-1128. The Seventh Circuit case numbers are 16-3003 and 16-3052.

² In full disclosure, Plaintiffs’ counsel Jon Sherman served as plaintiffs’ counsel with the American Civil Liberties Union in *Frank v. Walker* from the

third trip to the U.S. Court of Appeals for the Seventh Circuit and has zero bearing on the instant case. *Frank v. Walker* challenged the voter ID law as a whole and as applied to certain classes of voters, and also particular aspects of the ID law.³ However, no live claim in the case has any bearing on the resolution of this action. All claims seeking to strike the law down on its face and/or to strike the law down as a violation of the First and Fourteenth Amendments and Voting Rights Act as to large classes of eligible Wisconsin voters who lack a valid, qualifying voter ID were rejected by the Seventh Circuit, and the Supreme Court denied the plaintiffs' petition for a writ of certiorari.⁴ Therefore, at this point, there is no chance that *Frank v. Walker* will result in the invalidation of Wisconsin's voter ID law on its face or even as to a large class of voters without a valid, qualifying ID.

The current and third appeal is solely focused on the scope of an affidavit the district court fashioned to accommodate eligible voters who have had difficulty obtaining a valid photo ID to comply with the voter ID

time the case was filed until he left his employment to take another job in 2012. Mr. Sherman has no involvement with that case.

³ *Frank v. Walker*, No. 11-cv-1128, Dkt. 31, First Amended Complaint.

⁴ *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

requirement.⁵ While, at most, it may change the number of people who can utilize the affidavit, any ruling on that question has no bearing on the legal issue of whether the challenged requirements for college and university IDs to be used as voter ID are constitutional.

Nevertheless, Defendants suggest that the district court's affidavit "that would allow anyone without a qualifying ID to vote by simply certifying that they could not obtain an ID with reasonable effort" may be affirmed on appeal, potentially giving ID-less voters an alternative. Dkt. 21:13.⁶ But the Seventh Circuit's decision to stay the lower court's preliminary injunction, during the lengthy pendency of the interlocutory appeal, would seem to indicate otherwise. In issuing the stay order, the Court noted that the district court's ruling was "likely to be reversed on appeal." *Frank v. Walker*, No. 16-3003, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016). The Court explained why it believed the affidavit was too lax and not in keeping with its prior decision:

⁵ *Frank v. Walker*, 196 F. Supp. 3d 893 (E.D. Wis. 2016); *Frank v. Walker*, No. 16-3003, Defendants-Appellants-Cross-Appellees' Brief.

⁶ All docket entries appear in the format: Dkt. [docket entry number]:[page number]. This docket entry of course refers to this case, but for other cases, Plaintiffs specify the case name, case number, and court.

Because the district court has not attempted to distinguish genuine difficulties of the kind our opinion mentioned, or any other variety of substantial obstacle to voting, from any given voter's unwillingness to make the effort that the Supreme Court has held that a state can require, there is a substantial likelihood that the injunction will be reversed on appeal.

Id. (internal citation omitted). As that order makes plain, a decision in the *Frank v. Walker* appeal, whenever it may arrive, will have no impact here.

2. *One Wisconsin Institute, Inc. v. Thomsen*

The other case, *One Wisconsin Institute, Inc. v. Thomsen*,⁷ presents no legal or factual issue or any claim that has any bearing on Plaintiffs' challenges to the issuance date and signature requirements for college and university IDs.⁸ Therefore, any Seventh Circuit ruling in that case will have zero relevance to the instant challenges to the issuance date and signature requirements for college and university ID cards. The Seventh Circuit's decision may have some relevance only to Plaintiffs' challenge to the expiration date requirement, but it will not be dispositive.

⁷ *One Wisconsin Institute, Inc. v. Thomsen* was filed in the U.S. District Court for the Western District of Wisconsin and assigned case number 15-cv-324. The Seventh Circuit case numbers are 16-3083 and 16-3091.

⁸ Plaintiffs did group their challenges to the issuance and expiration dates into a single claim, Count One, but for purposes of this response to the stay motion, it makes sense to disaggregate the challenge into the distinct issuance date and expiration date requirements.

Defendants begin by recounting some of the witness testimony in the case that touched on college and university IDs, but it is the legal issues and claims that must be compared in analyzing this stay factor. Dkt. 21:3; *In re Groupon Derivative Litig.*, 882 F. Supp. 2d 1043, 1048–49 (N.D. Ill. 2012). To that end, the plaintiffs in *One Wisconsin Institute, Inc. v. Thomsen* successfully challenged the requirement that student IDs be unexpired, 198 F. Supp. 3d 896, 960–62 (E.D. Wis. 2016),⁹ but did not challenge the separate and different requirement that an expiration date appear on the college and university ID card presented as voter ID. This Court itself listed the requirements that “(1) the ID card itself must be unexpired” and “(2) the card must have an expiration date that is no more than two years after its date of issuance” as separate and distinct. *Id.* at 961. In contrast to *Frank v. Walker*, it is notable that the Seventh Circuit panel rejected the motion to stay this Court’s judgment in that case.¹⁰

⁹ In *One Wisconsin Institute*, the plaintiffs’ Second Amended Complaint actually challenged the Wisconsin voter ID law’s exclusion of “many expired IDs”; it did not focus on expired college and university ID cards. Dkt. 141 ¶ 195. After trial, this Court narrowly granted relief only as to expired college and university ID cards.

¹⁰ Dkt. 20, Order, *One Wis. Inst., Inc. v. Thomsen*, No. 16-3091 (7th Cir. Aug. 22, 2016).

Defendants assert that the *One Wisconsin Institute* ruling “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.* at 962. But its ruling was not “premiered” on the continuing existence of the other requirements for college and university IDs. As this Court explained in text that Defendants ignore, the other requirements of the voter ID law were simply not challenged. The next two sentences following the one Defendants quote are:

Plaintiffs have not directed their rational basis challenge to the requirement that a voter with a college or university ID also present proof of enrollment at the issuing institution. *Nor have plaintiffs challenged the rational basis for permitting only IDs that expire no more than two years after issuance.*

Id. (emphasis added). Defendants also ignore footnote 24, in which this Court suggested that the expiration date requirement serves no purpose but noted that requirement was beyond the scope of the plaintiffs’ challenge and so would remain in effect:

Without the requirement that a voter present an unexpired college or university ID, it seems unnecessary to regulate the ID’s expiration date. But that is outside the scope of plaintiffs’ challenge, and so the court will leave it to the state to determine whether this provision is still necessary.

Id. at 962 n.24. That expiration date requirement is now challenged in this case.

The question in this case is whether requiring an expiration date at all serves an important or even legitimate government interest in light of the separate, unchallenged requirements that college and university students show or submit proof of current enrollment along with their college or university IDs and that all voter registration applicants show documentary proof of residence. The question in *One Wisconsin Institute* was whether the government had an important or even legitimate state interest in requiring that college or university ID cards be unexpired, *on the assumption that there was an expiration date on the ID card*. After all, as Plaintiffs have alleged and will prove, Dkt. 1:11, some forms of valid, accepted voter ID in Wisconsin, like certain military IDs or tribal IDs, are valid indefinitely or bear no expiration date whatsoever.

Accordingly, if the Seventh Circuit were to affirm the district court's ruling, finding that the state has no legitimate, important interest in requiring that college and university IDs be unexpired, that would be consistent with the arguments made in this case, but it would not command

an automatic victory for Plaintiffs in this action. Perhaps the state has some as-yet-unidentified, alternative interest which supports the expiration date requirement, and that would need to be adjudicated in this case. Indeed, because the plaintiffs in *One Wisconsin Institute* did not actually seek to strike down the expiration date requirement itself, that necessitated this part of Plaintiffs' Count One. Dkt. 1, Complaint ¶¶ 27-29 (citing *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 961-62, 962 n.24 (W.D. Wis. 2016)).

On the other hand, if the Seventh Circuit were to reverse, ruling that the state *does* have a legitimate interest in requiring that college and university IDs be unexpired, that would also not be dispositive of Plaintiffs' challenge to the separate expiration date requirement. No court will have ever ruled on whether Wisconsin has a legitimate or important regulatory interest in requiring an expiration date on college and university ID cards, where the sole, legitimate purpose of the ID law is to confirm identity using a name and a photo. The voter ID law arbitrarily requires that college and university ID cards bear an expiration date but permits the use of military IDs and tribal IDs that do not bear an expiration date and are valid for a lifetime. Wis. Stat. § 5.02(6m); Dkt. 1 ¶ 21. The purpose of a strict photographic voter ID law is to verify the voter looks like the photograph on

an ID. Dkt. 1 ¶ 31; Wis. Stat. § 6.79(2)(a). If the voter's face "reasonably resembles" the photo on the ID, *id.*, the expiration date serves no purpose. *Id.* And if the voter's face does *not* "reasonably resemble[]" the photo, then an expiration date cannot make up the difference and verify the voter's identity. An additional, more specific basis for the irrationality of the expiration date requirement for college and university IDs is the fact that students are separately required to present proof of current enrollment along with their ID, Wis. Stat. § 5.02(6m)(f), a requirement that Plaintiffs do not challenge. Therefore, notwithstanding any outcome in *One Wisconsin Institute*, expiration dates are irrelevant to the voter ID's legitimate purpose of verifying voters' identity and therefore cannot survive *Anderson/Burdick* scrutiny.

That piece of the Seventh Circuit's anticipated decision has *some* relevance to the instant action, but Plaintiffs maintain that the Circuit's decision on that different legal question should not and will not be dispositive as to their challenge to the expiration date requirement in this action. Plaintiffs are entitled to an opportunity to prove that Wisconsin does not have a legitimate, let alone important, regulatory interest in requiring an expiration date on college IDs.

Defendants also point to the broader challenges to the voter ID law in *One Wisconsin Institute*, but the same Seventh Circuit panel that rejected these constitutional and Voting Rights Act challenges in *Frank v. Walker* will rule in *One Wisconsin Institute*. That panel will not facially invalidate the same law it upheld against virtually identical constitutional and Voting Rights Act challenges in the other case. The Seventh Circuit sitting en banc or the U.S. Supreme Court might reverse the panel decision, but that may be years in the future. Given all the time that has elapsed since these cases were tried, there might also be a remand for further district court proceedings before any final resolution.

Defendants also posit that the *One Wisconsin Institute v. Thomsen* challenges to and analysis of Wisconsin DMV's ID Petition Process ("IDPP") and the DMV rules and procedures for issuing state IDs for voting purposes will have relevance to and an impact on this challenge. Respectfully, that is incorrect. Plaintiffs' challenge has nothing to do with the IDPP or Wisconsin DMV's rules and procedures for issuing state IDs for voting purposes. Plaintiffs have made no allegations as to the Wisconsin DMV process for obtaining a voter ID or the IDPP, and do not intend to seek any discovery related to that agency or its role in the voter identification requirement.

The constitutional question in this case is solely whether the state has a legitimate, let alone important, government interest in requiring that college and university photo ID cards contain unnecessary elements or information that Wisconsin state and local election officials and poll workers do not need and do not use. These requirements for college and university ID cards are at issue, not the rules and procedures college students with non-compliant college IDs must navigate in obtaining forms of compliant voter ID such as a compliant college ID, a U.S. passport, or a free Wisconsin state ID card. Wis. Stat. § 5.02(6m). Defendants cannot dodge the constitutional inquiry into the basis for these requirements that are imposed solely on college and university ID cards, by diverting attention to regulatory frameworks for other forms of photo identification. For this reason, this Court's prior consideration in *One Wisconsin Institute* of the IDPP and the associated burdens and complexities of the Wisconsin DMV process for obtaining a compliant voter ID is irrelevant.

Furthermore, the instant case is far more straightforward and much more limited in scope than the sprawling challenge in *One Wisconsin Institute*. As this Court knows, the challenge in *One Wisconsin Institute* involved many different constitutional and Voting Rights Act claims,

challenging numerous parts of the Wisconsin Election Code, not just three elements of a single subsection of a single statute. In its 119-page opinion issued nearly three years ago, this Court considered voluminous evidence and rendered decisions on: facial challenges to the voter ID law; intentional race and age discrimination claims levied against at least eight different election laws and/or regulations; a partisan fencing claim; *Anderson/Burdick* undue burden claims against eleven different changes to Wisconsin's election laws and/or regulations and the cumulative effect of those election laws;¹¹ Voting Rights Act claims against eight different changes to Wisconsin election laws; and Fourteenth Amendment disparate treatment claims. *One Wis. Inst.*, 198 F. Supp. 3d at 905, 910-62; see also *One Wis. Inst.*, Dkt. 141, Second Amended Complaint ¶¶ 178-210. Wisconsin's voter ID law is just one of the many provisions challenged in these various claims. *One Wis. Inst.*, 198 F. Supp. 3d at 910-62.

This case has just two claims (arguably three, if Count One is disaggregated into the issuance date and expiration date requirements), which invoke the same First and Fourteenth Amendment *Anderson/Burdick*

¹¹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

test. Given that this action solely focuses on just three voter ID law requirements for college and university IDs, the scope of discovery and briefing will be much more limited than in *Frank* and *One Wisconsin Institute*. Any overlapping document production requests will likely be easier for Defendants since they have already produced these same college ID-related documents in the previous actions. Additionally, discovery is so interrelated for all three challenged requirements that there would be no practicable way to issue a partial stay of just the expiration date requirement challenge.

As of this filing, 840 days—and two general elections, including a presidential election and a gubernatorial election—have passed since oral argument was heard in *One Wisconsin Institute* on February 24, 2017. Even once the Seventh Circuit rules, that case—with its many claims against many different election laws—may still not be final, as lengthy en banc and/or Supreme Court proceedings may follow. Defendants themselves acknowledge that either or both cases could be remanded for further district court proceedings. Dkt. 21:13 n.6.¹² In weighing this stay factor, this Court has considered the procedural posture of the pending case and how soon it

¹² *Frank v. Walker* is of course in the Eastern District of Wisconsin and therefore cannot be consolidated with this case.

is likely to be resolved. For example, in *Hy Cite Corp. v. Regal Ware, Inc.*, the defendants moved to stay proceedings in a patent infringement case pending the resolution of another district court case and two cases on appeal at the Federal Circuit. No. 10-cv-168-wmc, 2010 WL 2079866, at *1 (W.D. Wis. May 19, 2010). This Court denied the stay, in part, because it was unlikely the two cases on appeal would be resolved any time soon. *Id.* at *2. The Court reached this conclusion, noting that the Federal Circuit's decision might not be the final resolution:

If the issue in *Stauffer* . . . is novel as defendants assert, then it may be appealed beyond the Federal Circuit to the Supreme Court, leaving a final decision on the constitutional issue in *Stauffer* years in the future. There is also always the off chance that the Federal Circuit runs into some procedural hurdle in *Stauffer* that prevents it from reaching the merits, leaving the plaintiff Hy Cite Corporation with arguable rights sitting in limbo for an indefinite period of time.

Id. Additionally, in *Waterstone Mortgage Corp. v. Offit Kurman, LLC*, the defendants sought to stay the current action until the resolution of two district court cases, arguing it would simplify the question of damages. No. 17-cv-796-jdp, 2019 WL 367642, at *2 (W.D. Wis. Jan. 30, 2019). In denying the motion to stay, this Court acknowledged that one of the cases was unlikely to be resolved any time soon due to the "potential for lengthy arbitration proceedings and appeals." *Id.*

Finally, nothing about the long-anticipated decision in *One Wisconsin Institute* will clarify the *Anderson/Burdick* standard for evaluating whether the government has proffered an important, or even legitimate, regulatory interest to justify laws governing the exercise of the right to vote. The Supreme Court has already set forth that test in cases like *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Crawford v. Marion County Election Board*, 553 U.S. 181, 190–91 (2008), and the Seventh Circuit is of course bound by those decisions and cannot modify the test. Plaintiffs respectfully submit that this Court should not detain the adjudication of the legal questions raised in this case, simply because one case on appeal might have some relevance to one of the three challenged requirements for college and university ID cards. That case will not be dispositive of any of the claims in this case, including the expiration date requirement challenge, and the scope of discovery and briefing will be far more limited in this much more focused and targeted action.

B. Factors (1) and (2): whether the litigation is at an early stage, and whether a stay will unduly prejudice or tactically disadvantage the non-moving party

Litigation is of course at an early stage in this case, but Defendants too readily dismiss the prejudice and harm to Plaintiffs that a stay would cause.

There are upcoming elections in 2020, as soon as the April 27, 2020 presidential primary election, and every election cycle with these unconstitutional requirements remaining in force prejudices Plaintiffs. Since lengthy en banc and/or Supreme Court proceedings may follow the Seventh Circuit's panel decisions in these pending appeals of large, complex cases with many different claims, if this case were stayed, Plaintiffs' claims would hang in limbo potentially for years. *See Grice Eng'g, Inc.*, 691 F. Supp. 2d at 921 (“[P]laintiff would be prejudiced by a stay because it is uncertain when the appeal will be resolved.”).

It is unclear what Defendants mean when they say Plaintiffs “sat out” two cases against Wisconsin’s voter ID law. Dkt. 21:11. Those litigants do not speak for Plaintiffs, who have asserted different legal claims. The timing of cases depends on a variety of factors and strategic considerations. Simply because Common Cause and Common Cause Wisconsin did not seek to intervene in prior cases or file a lawsuit earlier than 2019 does not preclude them from seeking to enjoin unconstitutional requirements now, well in advance of the 2020 elections. Mr. Quintero is 20 years old and only a sophomore at Milwaukee School of Engineering; he was not even old

enough to vote in 2016 so cannot be faulted for failing to file a federal voting rights lawsuit. Dkt. 1:8-9.

C. Factor (4): whether a stay will reduce the burden of litigation on the parties and on the court

The discussion of this factor is duplicative of the analysis of factor (3), since the only way in which issuing a stay can reduce the burden of litigation is if the parties' dispute is addressed in another pending case. As Plaintiffs have argued above, no other case, including *One Wisconsin Institute*, has raised the claims in this case; no other case has challenged these three requirements for college and university ID cards under the Wisconsin voter ID law; the current and third *Frank v. Walker* appeal has no relevance to Plaintiffs' challenges to any of these three requirements; and the *One Wisconsin Institute* appeal's only possible relevance is to the expiration date requirement, though any ruling will not be dispositive of the instant challenge to that requirement.

CONCLUSION

Accordingly, in light of the foregoing, Plaintiffs respectfully request that Defendants' motion to stay be denied. In the alternative, if the Court is inclined to grant the Motion, Plaintiffs request that their challenges to the

issuance date and signature requirements for college and university IDs be allowed to proceed.

DATED: June 14, 2019

Respectfully submitted,

/s/ Jon Sherman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Brief in Opposition to Defendant's Motion to Stay was served upon the following parties via the CM/ECF system on June 14, 2019:

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