

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.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY

*One Wisconsin*¹ and *Frank*² are constitutional challenges to Wisconsin's voter ID law. They are major cases that are likely to result in landmark circuit decisions. The appeals are briefed and argued, and a decision is pending. That decision will be binding precedent on this Court.

This case is a constitutional challenge to portions of Wisconsin's voter ID law. It involves student IDs, and in *One Wisconsin* “[m]uch of plaintiffs' evidence concerns the restrictions that the legislature placed on the use of college IDs.” *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 927

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.

(W.D. Wis. 2016.) The arguments underlying the claims here are virtually identical to *One Wisconsin* plaintiffs' arguments:

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.)

The *One Wisconsin* and *Frank* appeal decisions will provide guidance about how to analyze Wisconsin's voter ID framework, and very well may resolve this case completely. This case has just begun, which is the ideal time to order a stay, before the parties are required to engage in burdensome and duplicative discovery and proceedings. Plaintiffs have identified no prejudice and the evidence they have filed shows the unlikelihood of prejudice. This case should be stayed pending the outcome of *One Wisconsin* and *Frank*.

I. This litigation is at an early stage and a stay will not unduly prejudice the Plaintiffs.

Plaintiffs do not argue that the case is not at an early stage.

(*See* Opp. 18.)³ The timing factor weighs in favor of granting a stay.

³ Plaintiffs' Brief in Opposition to Defendants' Motion to Stay is cited herein as "Opp.".

Regarding prejudice, Plaintiffs point out that elections will be held in 2020 but make no connection to prejudice. To the contrary, their only evidence demonstrates lack of prejudice.

Plaintiffs filed two declarations with their Complaint; one from Cassandra Abarca (Dkt. 2), and one from Jessica Gomez (Dkt. 3). Cassandra Abarca has a U.S. Passport, so she has an ID that is valid for voting in Wisconsin. (Dkt. 2 ¶ 5.) In 2018, she was also able to get a qualifying college ID on election day and was able to vote without her U.S. Passport. (Dkt. 2 ¶ 6.) It took just one trip to the student center to get a second qualifying ID. (Dkt. 2 ¶ 6.) She accordingly has at least two qualifying IDs and will not be prejudiced by a stay.

Jessica Gomez likewise has a U.S. Passport and was also able to get a qualifying college ID on election day, with no advance planning, and use it to vote. (Dkt. 3 ¶¶ 4–9.) She can vote and will not be prejudiced by a stay.

The only person who Plaintiffs even allege currently does not have a qualifying ID is Plaintiff Benjamin R. Quintero (Dkt. 1 ¶ 16). But he attends Milwaukee School of Engineering, which issues voting-compliant IDs, and he could easily get one through his school. *See Voter Registration, Milwaukee School of Engineering*, <https://www.msoe.edu/current-students/voter-registration/> (last visited June 24, 2019) (informing students that they “can also vote using a special MSOE Voter ID,” and providing information about

how to obtain a school voting-complainant ID). Indeed, he makes no claim that he cannot easily get one and will not be able to vote in Wisconsin elections. In addition to his college's qualifying voter ID, he could quickly and easily get a qualifying state ID card, as further discussed in section II *infra*.

Plaintiffs' have not identified any plausible prejudice. The lack of prejudice weighs in favor of granting a stay.

II. A stay will simplify the issues and streamline proceedings.

Plaintiffs focus their response on whether the *One Wisconsin* and *Frank* appeals will streamline this case. (Opp. 3–18.) They miss the big picture. The appeals are both constitutional challenges to Wisconsin's voter ID law. They are both major cases, are being considered together, and are very likely to result in landmark circuit decisions that will be binding precedent on this Court. This case is a constitutional challenge to Wisconsin's voter ID law. The *Frank* and *One Wisconsin* appeals will, at minimum, give binding guidance, and, at most, be dispositive. It makes little sense to begin this new case while that appeal is pending.

Plaintiffs do not squarely dispute that the *One Wisconsin* case could give guidance here, or even that it could be determinative, and even acknowledge that the appeal will have some relevance. (Opp. 12.) Instead, they argue that the Seventh Circuit is unlikely to rule in a way that resolves their claims. (See Opp. 10–11 (speculating on effect of different outcomes of expiration date

issue); Opp. 13 (arguing about how the Seventh Circuit panel will rule based on precedent.)) But this speculation highlights why it makes sense to stay this case and then proceed under the circuit court's decision. The parties cannot accurately predict what the ruling will be.

One area of speculation in which Plaintiffs miss the mark is the ID Petition Process ("IDPP"), Wisconsin DMV's process for issuing free IDs that are valid for voting. (Opp. 13–14.) There several ID cards that are valid for voting. Wis. Stat. § 5.02(6m). A person with *any* of the qualifying IDs has what she needs to vote. For example, if a person has a Wisconsin driver license, U.S. passport, or state ID card, she may vote. Wis. Stat. §§ 5.02(6m)(a)(1)–(2), (4). No person is restricted to using only one type of the several IDs.

One qualifying document is a state ID card. Wis. Stat. § 5.02(6m)(a)(2). State ID cards may be issued through the IDPP, a topic that was exhaustively litigated in *One Wisconsin*. Under the IDPP, anyone, college students included, can quickly and easily get a free ID that is valid for voting. In the appeal, the Seventh Circuit will decide whether the IDPP is a valid option for someone who does not have any other qualifying ID. (*See, e.g.*, OWI 7th Cir. Dkt. 30:23–37, 56–59.)

College students have an *additional* ID option that is not available to anyone else—a qualifying college ID. Wis. Stat. § 5.02(6m)(f). This does not mean that a college student cannot use any of the other IDs. Just the opposite:

a college student with a state ID or U.S. passport can vote with either of those documents. Plaintiffs' premise that the law "single[s] out a group of voters" suggests that college students must have an ID that conforms to 5.02(6m)(f). (Compl. 1.) That is not true; a college student can vote with any of the other documents. Their arguments seem to imply that there is a constitutional right to vote *with a college ID*. That is meritless; the issue is the right to vote, and whether Wisconsin's many ID options cause an improper burden.

Hypothetically supposing that there are college students who do not have a qualifying ID in part because of the signature and date requirements, it would remain the case that those students can get a qualifying state ID, including through the IDPP. The Seventh Circuit's decision on the IDPP, including any reforms, if necessary, will therefore be critical to how this case proceeds. An entirely likely outcome is that the Seventh Circuit will decide that the IDPP is a proper option for anyone without a qualifying ID, including college students. Mr. Quintero would then have another approved means to get an ID to vote in addition to the IDs that his college issues.

On the expired-ID/expiration date issues, Plaintiffs attempt to distinguish their claim from those on appeal, but simultaneously concede that the *One Wisconsin* decision was made "on the assumption that there was an expiration date on the ID card." (Opp. 10 (emphasis omitted).) That demonstrates why this case and the *One Wisconsin* appeal are intertwined—

the ruling on expiration dates is premised on a requirement that Plaintiffs challenge. This is a reason to grant a stay, so this Court knows the status of the interrelated requirements. (See Br. in Support of Defs. Mot. for Stay 12–13.)

Indeed, Plaintiffs introduce a merits argument that issuance and expiration dates are unwarranted because of the separate requirement of proof of enrollment. (Response 9–10.) The issue of redundant college ID requirements is part of the *One Wisconsin* appeal, where arguments include:

[the theory that the] Constitution prohibits “redundan[cy],” . . . conflicts with the traditional understanding of rational-basis review. See *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 440 (6th Cir. 2000) (a “belt-and-suspenders approach to regulation passes muster, because the redundant nature of [a] statute does not preclude its being rationally related to” its ends); see also *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976). Indeed, in the context of preventing fraud, “redundancy” itself is a rational goal. Students can prove their enrollment with something as simple as a “class schedule,” “tuition fee receipt,” or an “enrollment verification letter” downloaded from a self-service website, A.420–21 (instructions on how to print such a letter); Wisconsin Elections Commission, G.A.B. Releases Top Things Voters Need to Know about Photo ID (Feb. 1, 2016); A.428–29. Even a “screenshot” of any of the above will do. A.427, 430. These items are easily manipulated, so it was entirely rational for the Legislature to require the “redundancy” of an unexpired ID, which is simple for any enrolled student to obtain, but harder to fake.

(*One Wisconsin* 7th Cir. 16-3083 Dkt. 24:36–37 (footnote omitted).) The Seventh Circuit’s answer to that question will either clearly guide or entirely dispose of Plaintiffs’ theory here.

Regarding *Frank v. Walker*, the Plaintiffs again rely on their projection that the Eastern District's affidavit exception will be reversed by the Seventh Circuit. (Opp. 6–7.) In the case of reversal, they argue, the *Frank* appeal will not impact their claims. (Opp. 7.) Of course, the opposite is true, too; if the affidavit exception is upheld, then any college student who has difficulty obtaining a valid ID could use the affidavit exception and will not need to have a qualifying college ID. Plaintiffs will then have no valid burden claim. The Plaintiffs' point about the effect of reversal highlights why this case should be stayed—the future of this case depends on the outcome of *Frank*.

Plaintiffs note that the Seventh Circuit appeals have been pending for considerable time. (Opp. 16.) That point, if anything, weighs in favor of a stay. The timing makes it more likely that the decisions would be issued soon. This is not a case where an appeal was just filed and the whole life of the appeal lies ahead; a decision could be issued at any time. It is likely that the appellate decision will be issued before a decision could be reached in this district court case.

Plaintiffs cite two cases to support their argument that a stay is too indeterminate: *Hy Cite Corp. v. Regal Ware, Inc.*, and *Waterstone Mortgage Corp. v. Offit Kurman, LLC*. (Opp. 17.) Both cases are distinguishable and should not determine the outcome of a stay here.

In *Hy Cite*, the defendants asked for a stay pending a decision on two appeals in another circuit, which may or may not have resolved an issue regarding the plaintiff's standing to bring a false patent marking action. *Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-cv-168-wmc, 2010 WL 2079866, *1 (W.D. Wis. May 19, 2010). Even if the other circuit had resolved that issue, it would, at most, only be persuasive authority regarding a novel legal issue. Unlike *Hy Cite*, a decision by the Seventh Circuit in *One Wisconsin* and *Frank* will be binding and applied to the voter ID law directly at issue in this case.

Waterstone is similarly misapplied by Plaintiffs. In that case, a stay was sought only because the issue of damages in a legal malpractice action could not be accurately assessed until the outcome of two other cases was known. *Waterstone Mortgage Corp. v. Offit Kurman, LLC*, No. 17-cv-796-jdp, 2019 WL 367642, *2 (W.D. Wis. Jan. 30, 2019). The district court in *Waterstone* ultimately denied the stay because the two pending cases did not impact the issue of liability. *Id.* However, the court invited the parties to renew their motion for a continuance after the filing of dispositive motions addressing liability. *Id.* Unlike *Waterstone*, a decision in *One Wisconsin* and *Frank* will directly affect this case by, at minimum, giving critical guidance on applicable legal standards and, at most, mooting this entire action.

Additionally, the unknown date of an appellate decision does not make a stay unwarranted. *Burnett v. Ocwen Loan Servicing, LLC*, 2017 WL 5171226,

at *3 (N.D. Ill., Nov. 8, 2017); see also *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (noting that “[a]lthough federal courts have a ‘virtually unflagging obligation’ to exercise the jurisdiction conferred on them by Congress, in exceptional cases, a federal court should stay a suit and await the outcome of parallel proceedings as a matter of ‘wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation.’”). If that were the case, stays would never be granted because rarely, if ever, is the date of an appellate decision known in advance.

This is a case where a stay pending a decision on appeal is proper because “direction from the Seventh Circuit would be invaluable.” *Tonn and Blank Const., LLC v. Sebelius*, 968 F.Supp.2d 990, 995 (N.D. Ind. 2013) (granting stay pending appeals in the Seventh Circuit addressing the issue of the contraception mandate component of the Affordable Care Act). Like *Tonn*, the voter ID law at issue in *One Wisconsin, Frank*, and here is an issue of “extraordinary public moment.” *Id.* And “in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” *Landis v. North American Co.*, 299 U.S. 248, 256 (1936). It is prudent to see what the Seventh Circuit says in

the pending landmark voter ID cases, so that the parties and this Court may have the correct framework at the outset of any new district court challenge.

III. A stay will reduce the burden of litigation on the parties and on the court.

Far from showing why a stay is improper, Plaintiffs' response amplifies the burden-related reasons to stay this case already explained in the Defendants' motion. Plaintiffs reveal that they plan to request "overlapping document production" from the Defendants who "have already produced these same college-ID related documents in the previous actions." (Opp. 16.) This not only shows the duplicative burden on the Defendants, but also that the claims here are so closely related to the prior cases that the Plaintiffs need duplicative discovery.

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 24th day of June, 2019.

Respectfully submitted,

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