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

ONE WISCONSIN INSTITUTE, INC,
et al.,

Plaintiffs,

v. Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

MOTION TO STAY INJUNCTION AND RULING PENDING APPEAL

Defendants respectfully move the Court for an order staying the permanent injunction and ruling, entered on July 29, 2016 (Dkt. 234), as well as its judgment, entered on August 1, 2016 (Dkt. 235), while this case is on appeal. The current injunction and ruling require a vast overhaul of Wisconsin's election procedures. But Defendants are likely to prevail on appeal, and election law cases like this are consistently modified on appeal. It would cause major disruption and voter confusion to require Defendants to change election procedures and inform the public of those changes, only to change the procedures back, and re-inform the public, after an appeal. Issuing a stay now will give the appellate courts an opportunity to clarify election requirements before public funds are spent, with sufficient time to ensure that the public is adequately—and correctly—informed of the

applicable requirements. In contrast, denying a stay will require putting resources into an election overhaul that could very well be reversed, and at minimum is going to be in flux through appellate proceedings. This Court should stay the injunction and ruling pending appellate review to prevent harm to Defendants and the public.

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

The stay factors support staying the Court's injunction and ruling. The injunction and ruling will likely be overturned on appeal, and enforcing the injunction and ruling pending appeal will cause great harm to the state and to voters. And recent similar district court decisions in voting rights cases have consistently been modified on appeal. It is imprudent to require the state to begin a massive overhaul of its election procedures today, when it is highly likely that some, if not all, of the current injunction and ruling will not be in effect for upcoming elections.

I. Defendants will likely succeed on appeal on every issue, and the balance of harms and public interest support granting a stay. [1]

A stay is justified because Defendants will likely succeed on appeal and because the balance of harms support granting a stay.

The Court's first ruling was that the statute establishing one location for in-person absentee voting is unconstitutional. (Dkt. 234:115.) But the

[1] Defendants' position on the merits of each claim is thoroughly explained, with citations to relevant facts and law, in the hundreds of pages of briefing on summary judgment and post-trial submissions. For the sake of brevity, this stay motion summarizes those positions and errors in the Court's decision, but does not repeat voluminous prior briefing.

one-location rule is nothing new—the constellation of laws challenged by Plaintiffs did not change the number of locations. And there are good administrative reasons to keep the one-location rule in effect. (*See* Dkt. 206:57–59.) Plaintiffs' core challenge is that the Legislature should have changed a long-standing law in 2013, despite the many reasons why the law helps election administration. This Court's ruling that a *non-change* to an existing law is unconstitutional amounts to a judicial creation of election procedures and is unlikely to survive appeal. As a practical matter, failure to stay the injunction and ruling pending appeal creates a risk that municipalities will advertise multiple voting locations, some of which will be unavailable on election day.

The Court's ruling on extended hours for in-person absentee voting raises similar problems. Statewide regulation of in-person absentee timing is necessary for orderly and effective elections. For all the reasons established at trial by the clerks with first-hand knowledge of real-world election logistics, eliminating the sensible timing regulations would be detrimental to election administration. (*See* Dkt. 206:54–57.) As to potential harms to the public, municipalities may advertise extended hours for in-person absentee voting in the absence of a stay. These hours are likely to be inconsistent, create extra works for clerks, and may even be set to start before ballots are ready. That confusion will be even worse if the injunction and ruling are

reversed on appeal, requiring administrators to try to advertise last-minute changes to previously announced election hours.

The Court's registration-related injunction provisions are contrary to binding precedent holding that "[r]egistering to vote is easy in Wisconsin." *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014). Despite this precedent, the Court found the "dorm list" requirement unconstitutional, even though students who are unable to rely on a dorm list have twelve different ways to register, including eleven of the forms available to non-students. Wis. Stat. § 6.34(3)(a)1–6, 8–11. And this Court enjoined a 28-day durational residency requirement even though the U.S. Supreme Court has approved longer durational requirements. *Burns v. Fortson*, 410 U.S. 686, 687 (1973) (per curiam) (50-day requirement); *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam) (50-day requirement); *Dunn v. Blumstein*, 405 U.S. 330, 363 (1972) (Blackmun, J., concurring) (30-day requirement). This Court's injunction and ruling run against binding precedent and will likely be reversed on appeal.

As to potential harms, these registration decisions pose a real risk of creating a quagmire surrounding situations where a person improperly registered before reversal. What do election administrators do with a registration that occurred under the rules of the injunction after the

injunction and ruling are reversed? This problem is avoided entirely by a stay.

This Court enjoined limitations on electronic or faxing ballots despite extensive evidence of the security, accuracy, and efficiency reasons for the limits. (*See* Dkt. 206:91–93.) It dismissed security concerns by concluding, without evidence, that voters who transmit ballots by electronic means are "voluntarily" giving up voting privacy, and that forwarded ballots are detectable. (Dkt. 234:86.) But compromising election security is unnecessary, and clerks have no time or means to know when a ballot is returned by the wrong person. This portion of the injunction and ruling will likely fall on appeal, but if there is a reversal after ballots are sent, or returned, there will be confusion over how—or whether—to count wrongly-returned ballots.

The injunction prohibits the prohibition of expired student IDs on *rational basis* review. (Dkt. 234:112–113.) But it is plainly rational to require a person using a student ID to be a current student, and not someone who graduated and moved away long ago. The Court notes that enrollment papers are used in conjunction with an ID, but enrollment papers do not have a photograph, so poll workers have no way of knowing if the papers correspond to the voter without a corresponding valid photo student ID. (Dkt. 234:114.) Regarding any alleged burden, testimony from students establishes that

compliant IDs are available on campus *on election day*. (Dkt 206:154–55 and record cites therein.) But absent a stay, universities may not make arrangements to issue compliant IDs, resulting in confusion after reversal on appeal.

Finally, this Court's modification of the IDPP rests on a fundamental misreading of black-letter law. (Dkt. 234:117–19.) Under the injunction and ruling, anyone who enters the IDPP must promptly be issued a credential for voting, unless the person is not entitled to one. (*Id.*) That already happens:

> The department shall issue an identification card receipt . . . to any individual who has applied for an identification card without charge for the purposes of voting and who makes a written petition . . . The department shall issue the receipt not later than the sixth working day after the applicant made the petition.

Wis. EmR1618 § 8. But the court went on to order that this identification must have a period of expiration no shorter than a driver license. (Dkt. 234:119.)

This order appears to rest on the false premise that the photo receipts in the current process expire after a limited number of automatic renewals totaling 180 days, and that the law is silent about what happens after that. (Dkt. 234:14, 28.) That is not true. The rule is clear that renewed receipts will continue to be sent, with no limit on the number of automatic renewals: "The department shall issue a new receipt to the applicant not later than 10 days before the expiration date of the prior receipt, and having a date of

issuance that is the same as the expiration date of the prior receipt." Wis. EmR1618 § 10. Renewals only stop after a denial:

> The department shall issue no receipt to an applicant after the denial of a petition under sub. (5m)(b)3., except that if the applicant provides additional information that revives an investigation under sub. (5m)(b)3., the department shall immediately issue, and continue to reissue, a receipt to the applicant as provided in that subdivision.

Wis. EmR1618 § 10. The corresponding denial rule—sub. (5m)(b)3.,—permits denials after an applicant does not give information to DMV for 180 consecutive days, for fraud, or when an applicant is ineligible. Wis. EmR1618 § 8; *see also* Tr. 5-23-16:23 ("[renewals] could be longer if they brought forward new information.") The 180-day timeline relied upon by the court is the absolute minimum that an applicant can have a receipt, not a maximum. The law is not "silent" about what happens after 180 days, and the IDPP does not create an undue burden on voting.

Without a stay, everyone in the IDPP will get an identification card that is valid for several years, including applicants who might be ineligible to vote or receive an ID. Unless the Court orders a stay, those improperly-issued IDs will be in circulation during the general election, and for years thereafter. DMV would be effectively powerless to stop such ineligible persons from using an improperly-issued ID on election day. A stay pending appeal is necessary to prevent this harm, and to protect the election system.

II. The reliable pattern of reversal or modification on appeal in similar election law cases counsels strongly in favor of staying the injunction and ruling pending appellate review.

In virtually every recent major election law case, the district court's decision was modified or reversed on appeal. The result has been a reliably dizzying back-and-forth between election laws being enjoined and reinstated. Because avoiding such back-and-forth is of paramount concern for avoiding voter confusion and conserving public resources, this trend weighs heavily in favor of a stay, under both the likelihood-of-success and public-interest prongs.

This back-and-forth has even already happened between Wisconsin district courts and the Seventh Circuit in the *Frank* litigation, where the district court has twice been reversed on appeal, with another stay likely within days. *See Frank v. Walker*, Nos. 16-3003, 16-3052 (7th Cir. August 1, 2016) (emergency motion to stay preliminary injunction (7th Cir. Dkt. 16)). The district court permanently enjoined Wisconsin's voter ID law, only to have that decision stayed, then ultimately reversed.

See Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).[2] The Seventh Circuit concluded that not only did the district court err in concluding the voter ID law violated the Constitution and the Voting Rights Act, but also that the injunction was overly broad. *See Frank I*, 768 F.3d at 755.

Following remand, the district court changed course, and concluded that *Frank I* barred plaintiffs' additional request for relief. *See Frank v. Walker*, 141 F. Supp. 3d 932, 935–36 (E.D. Wis. 2015). But as this Court is aware, this spring the Seventh Circuit vacated portions of the district court's decision, concluding that further proceedings were warranted. *See Frank v. Walker (Frank II)*, 819 F.3d 384, 388 (7th Cir. 2016).

The recent decision in *North Carolina State Conference of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033 (4th Cir. July 29, 2016), is another example of this pattern of confusing back-and-forth. Following a trial, the district court made voluminous findings of fact. *See id.* at *5–6. The Fourth Circuit, however, rejected those findings and reversed the district court's

[2] Further contributing to the back-and-forth, the Supreme Court vacated the Seventh Circuit's stay, with the effect being to reinstate the district court's injunction until the Supreme Court eventually denied certiorari, after which the voter ID law went back into effect after having been improperly enjoined for almost a year. *See Frank v. Walker*, 135 S. Ct. 7, 7 (2014) (vacating stay pending resolution of petition for writ of certiorari); *Frank v. Walker*, 135 S. Ct. 1551 (2015) (denying petition).

denial of a permanent injunction, concluding that the district court's findings were clearly erroneous in multiple respects. *See id.* at *9–11, 21–22.

And before that reversal, the district court had previously denied a motion for a preliminary injunction, only to have the Fourth Circuit reverse that decision in part, based on the conclusion that the district court abused its discretion in denying the preliminary injunction. *See N. Carolina State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 334 (M.D.N.C.); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 230 (4th Cir. 2014). The Supreme Court then stayed *that* decision, thereby allowing all of the challenged provisions to stand for the upcoming election. *N. Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6, 6 (2014).

Strikingly similar procedural patterns have played out in other states. In a challenge to Texas's voter ID law, the district court enjoined the law, *see Veasey v. Perry*, 71 F. Supp. 3d 627, 633, 707 (S.D. Tex. 2014); the Fifth Circuit stayed the injunction, *see Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014); and the U.S. Supreme Court declined to vacate stay of injunction, allowing the challenged voter ID provision to stand for the

upcoming election. *See Veasey v. Perry*, 135 S. Ct. 9, 9–10 (2014).[3]

And in a challenge to Ohio's limitation on early in-person voting, the district court enjoined a law limiting early voting, *see Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio); the Sixth Circuit denied a stay and affirmed the district court's injunction, *see Ohio State Conference of NAACP v. Husted*, 769 F.3d 385 (6th Cir. 2014) (denying stay pending appeal); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) (affirming injunction); and the Supreme Court stayed the injunction, allowing the challenged law to stand during upcoming election. *See Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42, 189 L. Ed. 2d 894 (2014).

These cases illustrate that there is a reliable pattern of reversal or modification from nearly all initial election law decisions. This Court should avoid this burdensome, expensive, and confusing back-and-forth. This can be easily accomplished by granting a stay that permits the appeals process to give final guidance before imposing the severe overhaul of election procedures required by the injunction and ruling.

---

[3] In another round of back-and-forth, the Fifth Circuit recently affirmed the district court's decision in part, concluding that injunctive relief was proper based on the finding of discriminatory effects of the voter ID law. *See Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *39 (5th Cir. July 20, 2016).

CONCLUSION

Defendants will likely succeed on appeal. Failing to grant a stay will result in harm to the public, who will have to sort through the various rulings, and to the Defendants, who will be required to expend resources complying with an injunction and ruling that will be reversed. This Court should not require Defendants and Wisconsin citizens to endure the dizzying back-and-forth that is so common during appeals in this type of case. For the reasons argued in this motion, the Court should stay its injunction and ruling (Dkt. 234), as well as its judgment (Dkt. 235), pending appeal.

Dated this 3rd day of August, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5457 (Murphy)
(608) 267-8904 (Johnson-Karp)
(608) 266-3094 (Schmelzer)
(608) 267-2223 (Fax)
murphysm@doj.state.wi.us
johnsonkarpg@doj.state.wi.us
schmelzerjj@doj.state.wi.us