UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., *et al.*, Plaintiffs, v. MARK L. THOMSEN, *et al.*, Defendants.	Case No. 3:15-cv-324

PLAINTIFFS' OPPOSITION TO WISCONSIN'S MOTION TO STAY INJUNCTION AND RULING PENDING APPEAL

INTRODUCTION

The State claims this Court's decision and injunction require a "*massive*," "*severe*," and "*vast overhaul* of Wisconsin's election procedures" that will be "burdensome, expensive, and confusing." Defs.' Mot. to Stay Injunction and Ruling Pending Appeal ("Mot.") 1-3, 12 (emphases added). The State also contends "[t]his 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," and instead should simply leave the restrictions that this Court has found illegal and, in one case, intentionally racially discriminatory in place through the 2016 general election, until "the appeals process [has] give[n] final guidance" (presumably from the Supreme Court sometime in 2017 or beyond). *Id.* at 12-13. The State's motion is, of course, a caricature of what this Court really did.

This Court in fact rejected many of Plaintiffs' claims and, where it found illegalities in specific challenged provisions, it acted with surgical precision to invalidate only "the specific

provisions that the court has identified as constitutionally infirm." ECF No. 234, Findings of Fact and Conclusions of Law ("Op.") 93. The Court rejected "broader relief" as an inappropriate "rewrite of the state's election laws," which it found "would be an unwarranted intervention by a federal court into an area reserved to the state legislature." *Id.* And much of the Court's narrow injunctive relief simply restores *discretion* to municipalities—such as the discretion to offer more in-person absentee voting opportunities if municipalities *choose* to do so—and does not require the State to "overhaul" anything.

The State's motion should be denied for many reasons. Most fundamentally, this Court correctly enjoined the statutory provisions at issue in the Motion, and the State has little if any likelihood of success on any of its claims. Under the "'sliding scale' approach" that governs here, this Court therefore does not even need to consider "the balance of harms" or other relevant factors. *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014).

The State also focuses substantially on its own administrative convenience, the supposed burdens *it* must "endure," and its desire to maintain the status quo unless and until all appeals have been exhausted. Mot. 13. The State's Motion nowhere acknowledges the fundamental right to vote, or that courts repeatedly have found that the balance of the equities and the public interest are "best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) (citation omitted).[1]

[1] *See also U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [injunctive relief, which] eliminates a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process."); *Fish v. Kobach*, No. 16-2105, 2016 WL 2866195, *3 (D. Kan. May 17, 2016) (potential administrative problems

It also is striking that, in asserting that a stay is necessary to protect "the public" and "the public interest," the State simply ignores that its proposed stay would fully leave in place *for a presidential election* laws that impose a staggeringly disproportionate impact on black and Latino voters, including one law that the Court has found to be intentionally racially discriminatory. *See* Op. 6, 22, 45, 110; *see also N.C. St. Conf. of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, at *22 (4th Cir. July 29, 2016) ("The Supreme Court has established that official actions motivated by discriminatory intent 'ha[ve] no legitimacy at all under our Constitution or under the [Voting Rights Act].'") (quoting *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)); *id.* at *6 ("If discriminatorily motivated, [facially neutral] laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race."). The State likewise stands silent in response to this Court's forceful demonstration of how voter suppression laws like those in issue here have destroyed the confidence of voters in minority communities, "engender[ed] acute resentment," and "undermine[d] belief in electoral fairness." Op. 20; *see also id.* at 4 (State has "undermine[d] rather than enhance[d] confidence in elections"). In short, both the merits and the equities weigh heavily against injunctive relief.

STANDARD OF DECISION

Rather than being the norm, "[a] request for a stay is a request for extraordinary relief." *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995); *see also Graphic Comm'ns Union v. Chicago Tribune Co.*, 779 F.2d 13, 15-16 (7th Cir.1985) (cases warranting a stay pending appeal "will be extraordinarily rare"). "A stay 'is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted). Instead, it is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing

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with voting rights injunction "pale in comparison to the number of qualified citizens who have been disenfranchised by this law").

that the circumstances justify an exercise of that discretion." *Id.* at 433-34 (internal quotation marks and citations omitted).

"The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F*, 742 F.3d at 766 (citation omitted). "To determine whether to grant a stay, [a court must 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." *Id.* "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." *Id.* This standard applies with equal force to injunctions against state laws. *See Cavel Intern., Inc. v. Madigan*, 500 F. 3d 544, 546 (7th Cir. 2007) (enjoining state statute pending appeal was especially appropriate where "[t]he object of the statute is totally obscure" and the harms it allegedly prevents are "remote from the vital interests of most Illinois residents," so that "a brief delay in its enforcement . . . will not create a perceptible harm").

ARGUMENT

The State has failed to meet the standards for a stay of this Court's decision and injunction. Its arguments regarding the likelihood of reversal on appeal are almost uniformly addressed to disputes with the Court's factual findings, yet it makes no effort to show how those findings might constitute clear error. Many of its arguments are simply repeated from previous briefs and have already been carefully considered and rejected by this Court. The State's Motion also fails to address the countervailing harms that will result if the Court's decision is stayed pending appeal, including the denial and abridgement of voting rights in the 2016 general election (falling with grossly disproportionate force on voters of color).

I. Plaintiffs Are Likely to Succeed on the Merits

A. One-Location for In-Person Absentee Voting

This Court correctly held that Wis. Stat. § 6.855, which limits municipalities to one location for in-person absentee voting, unduly burdens the right to vote under *Anderson-Burdick* and violates Section 2 of the Voting Rights Act. Op. 55-63, 109-10. The State makes no effort to refute the Court's analysis or otherwise show why this ruling might be reversed on appeal. Instead, the State disputes the Court's factual findings and reiterates the argument it made in its summary judgment and post-trial filings that "Plaintiffs' core challenge is that the Legislature should have changed [the one-location rule] in 2013." Mot. 4.

This Court made numerous detailed findings about the burdens the one-location rule imposes on Wisconsin's voters, particularly those in Wisconsin's larger cities. *See* Op. 55-63 (finding, *inter alia*, "that the in-person absentee laws impose burdens for certain voters," that those laws "had profound effects in larger municipalities like Madison and Milwaukee," that "the one-location rule [contributes] to longer lines at clerk's offices, which in turn requires voters to be prepared to devote more time to voting," and that "[h]aving only one location creates difficulties for voters who lack access to transportation"). The State makes no attempt to demonstrate how any of these findings is clearly erroneous. *See generally United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 676 (7th Cir. 2014) (factual findings reviewed for clear error).

Instead, the State merely asserts "there are good administrative reasons to keep the one-location rule in effect." Mot. 4. But this Court already has rejected these proffered justifications for the law. *See, e.g.*, Op. 61-62 ("In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496. The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location. There is simply no evidence that a one-location rule prevents

voter confusion, or that any confusion would be as widespread or burdensome as the types of difficulties that voters face when having only one location at which to vote in-person absentee.") (citation omitted). And, as the Court pointed out, its decision does not *require* but simply *permits* a municipality to open multiple locations if it determines that doing so would best serve the needs of its voters. "Thus, any burdens on clerks that the state was purporting to address [would be] voluntarily undertaken, which undermines the state's interest in alleviating those burdens." Op. 61. In sum, the Court's decision on the one-location rule is likely to be upheld on appeal.

B. Reductions in the Days and Hours for In-Person Absentee Voting

As with the one-location rule, the State's argument for a stay of this Court's injunction with respect to the reductions in the days and times for in-person absentee voting rests solely on assertions that the Court has already rejected. *See* Mot. 4 ("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."). The State does not address this Court's analysis of those provisions under *Anderson-Burdick*, nor does it even acknowledge this Court's determination that the elimination of weekend and evening in-person absentee voting hours was enacted with discriminatory purpose in violation of the Fifteenth Amendment. Op. 42-45. Nor does the State mention the Court's ruling that the reductions in in-person absentee voting hours also violate Section 2 of the Voting Rights Act, *id.* at 109-10, or the many other recent decisions striking down reductions in early voting.[2] The State plainly has not shown

[2] *See, e.g.*, *McCrory*, 2016 WL 4053033, at *19-20 (holding that North Carolina had acted with racially discriminatory intent in reducing the total early voting period from "seventeen to ten days"); *Ohio Org. Collaborative v. Husted*, No. 2:15-1802, 2016 WL 3248030, at *16 (S.D. Ohio May 24, 2016) (invalidating Ohio's elimination of first five days of early voting period); *Ohio St. Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545-60 (6th Cir. 2014), *vacated on other*

that it is likely to succeed on the merits of its appeal seeking to reinstate its reductions to the in-person absentee voting period.

C. Registration Restrictions

The State also fails to articulate any likelihood that the Seventh Circuit will reverse this Court's injunction with respect to "dorm lists" or the 28-day durational residency requirement. Again, it has simply recycled its earlier arguments and failed to even attempt to show any error with Court's factual findings or legal analysis.

Regarding the requirement that "dorm lists" be accompanied by a proof of citizenship provided by a college or university, the State's only contentions are that (1) the Seventh Circuit in *Frank I* mentioned in passing that "[r]egistering to vote is easy in Wisconsin," and (2) students seeking to rely on "dorm lists" have other means of registering. Mot. 5. As explained in prior briefing, however, the quoted language from *Frank I* is dicta that was mentioned in the unrelated context of trying to evaluate the burdens imposed by Wisconsin's voter ID law based on the percentage of eligible voters who failed to register and the percentage who did not have a qualifying voter ID. *Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014). In any case, the question whether it is easy to register to vote in Wisconsin is distinct from the question whether the elimination of a method of registration imposes burdens on the right to vote that outweigh the State's interests in eliminating that registration method.

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grounds, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Obama for Am.*, 697 F.3d at 429 (invalidating Ohio's elimination of the final three days of early voting for nonmilitary voters on *Anderson-Burdick* grounds)*; cf. Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012) (holding, in preclearance case under Section 5 of the Voting Rights Act, that reducing early voting period from discretionary range of 12-14 days to 8 days constituted a "materially increased burden on African-American voters' effective exercise of the electoral franchise," which "would impose a sufficiently material burden to cause some reasonable minority voters not to vote").

In addition, the Court has already addressed and rejected the State's contention that requiring a certification of citizenship with dorm lists is of no consequence because students can simply use other documents beyond dorm lists:

> That is a weak justification for two reasons. First, none of the state's other methods for proving residence require voters to "confirm" their U.S. citizenship beyond signing a citizenship certification on the registration form. Students sign this certification too. Defendants do not explain how this certification procedure, which apparently satisfies the state's interest in confirming citizenship for the overwhelming majority of non-students who register to vote, is insufficient in the context of student voters. Second, even if the state is particularly worried about non-citizen students voting—and at trial, the state presented no evidence of such a problem—the challenged provision does not allay that concern. Non-citizen students could easily skirt the requirement of demonstrating citizenship by using one of the other methods for proving residence.

Op. 69. Thus, the State failed to offer "even a minimally rational justification for the law." *Id*. The State addresses none of these points in its motion and thus has not established a likelihood of success on the merits on appeal.

Nor does the State address the Court's bases for striking down the 28-day residential requirement. As the Court found, for those who move close to an election, "the burden is significant. A voter who does not satisfy the durational residency requirement cannot vote unless he or she: (1) travels back to his or her former municipality; or (2) votes absentee by mail." Op. 75. Moreover, "Wisconsin has a significant population of African American and Latino voters, who are more likely to be transient than white voters are. Thus, the court can infer that the durational residency requirement will impose considerable burdens on a class of voters within the state that will have difficulty complying with the requirement." *Id*. at 76 (citation omitted); *see also id*. at 76-77 (explaining why these problems are not sufficiently alleviated by voting by mail or allowing voters to travel to their previous voting location and why "the durational residency requirement presents unique registration problems"). Nor does the State address—much less demonstrate reversible error with respect to—the Court's findings that the

State's "purported interests in the 28-day durational residency requirement do not justify the severe burdens that the provision imposes[.]" *Id.* at 77; *see also id*. at 77-79 (finding that the State had failed to show that the 28-day requirement prevented any demonstrated problem of "colonization or party raiding" or that the rule aided voters by allowing them "more time to gather documents and plan for voting"). The State's challenge to the Court's ruling on this issue is therefore likely to fail as well.

D. Restrictions on Emailing/Faxing Absentee Ballots

Here again, the State's only argument for reversal of this Court's decision relies on the same evidence already considered and rejected by the Court. Mot. 6. "From a practical perspective, the court simply does not credit the assertion that in the year 2016, printing a paper ballot and instructions, putting them into an envelope, and physically sending the envelope overseas is less burdensome on municipal clerks than compiling a PDF and sending an email. This is especially so because clerks are already sending ballots electronically to military and overseas electors." Op. 86. Moreover, this Court appropriately did not credit the State's alleged privacy and security concerns, explaining that "Defendants also overstate their concerns about privacy, security, and errors . . . . There is no reason to think that it is a widespread problem." *Id*. The State does not explain how these findings constitute clear error.

At the same time, the State ignores the very real harm to voters who are traveling in locations inaccessible by mail if this ruling is stayed. As this Court found, "[n]ow, without the option for electronic ballots, absentee voters must rely on mail service. This is particularly problematic for students or researchers who are abroad in remote areas, but it also affects domestic travelers, especially for elections in which ballots are not finalized until close to election day." Op. 85. "In at least some cases, voters who cannot receive ballots by fax or email

are simply unable to vote." *Id.* "Although voters are able to request their ballots by fax or email, that does them little good if the mailed ballot itself does not ever arrive, or if it arrives too late for a voter to return it in time to be counted." *Id.* The State has not even attempted to engage with these findings, and its effort to stay this portion of the Court's decision must therefore be denied.

E. Expired Student IDs

This Court found that the prohibition on using expired student IDs to vote lacks a rational basis because "[t]he 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." Op. 113. "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. But as it stands, defendants have not explained why any requirement beyond proof of current enrollment is necessary to protect against fraudulent voting with a college or university ID." *Id.* The Court observed that the State failed to articulate any basis for this law in its post-trial briefing that it had not already put forth in its summary judgment filings: "[a]ccording to defendants, the state reasonably has presumed that anyone with an expired ID is probably no longer enrolled at the issuing college or university. Thus, it makes no sense to allow a voter to use an expired college or university ID because that voter will not be able to also provide proof of enrollment. This is a circular argument. Worse, it is the exact argument that defendants presented at summary judgment." *Id.* at 114.

Notwithstanding this holding, the only argument the State advances with respect to this decision is an *ipse dixit* that "it is plainly rational to require a person using a student ID to be a

current student." Mot. 6. And it invokes the same circular reasoning this Court previously rejected: "[t]he 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." *Id.* (emphasis added). As this Court has explained, however, "Wis. Stat. § 5.02(6m)(f) adequately addresses that concern by requiring a voter to present proof of enrollment with the student ID. Adding the requirement that a voter's college or university ID be unexpired does not provide any additional protection against fraudulent voting." Op. 114. Here again, the State has failed to demonstrate any likelihood that this decision will be reversed on appeal.

F. The Voter ID Law and ID Petition Process

The State does not even acknowledge, much less dispute, this Court's findings that the IDPP—supposedly the well-functioning "safety net" required for Wisconsin's ID law to pass constitutional muster—has been a "disaster" and a "wretched failure," has imposed "severe burdens" in a grossly disproportionate manner on voters of color, is "manifestly unconstitutional," and "needs to be reformed or replaced." Op. 4, 29, 40, 89, 111. Plaintiffs respectfully submit that, given these and similar findings, Wisconsin's voter ID law should be enjoined across the board and that this Court's modest relief falls far short of what is needed to remedy the State's constitutional violations. *See also* Op. 3-4 ("If it were within my purview, I would reevaluate *Frank* and *Crawford* …. To put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease."). And it is surprising that the State complains here about this Court's IDPP decision, because it is simultaneously touting that very same decision in the *Frank* appeal proceedings as a *vindication* and *validation* of the State's May 10, 2016 Emergency Rule, and as supposedly demonstrating that Judge Adelman's affidavit remedy goes too far. *See* Defendants-Appellees-Cross-Appellees' Emergency Motion to Stay the Preliminary

Injunction Pending Appeal, at 5-6, *Frank v. Walker*, No. 16-3003, Doc. 16-1 (7th Cir. Aug. 1, 2016).

What does the State have to complain about regarding the relatively mild reforms this Court has ordered for the "wretched failure" and voting rights "disaster" inflicted over the past two years by the IDPP? The State raises only two quibbles. *First*, it argues that "this Court's modification of the IDPP rests on a *fundamental misreading of black-letter law*." Mot. 7 (emphasis added). The "black-letter law" that the Court supposedly misread is the May 10 Emergency Rule, which the State insists gives authority to the DMV to keep reissuing Temporary Receipts indefinitely, not just for 180 days. *Id.* at 7-8. And because voters may keep receiving these paper Temporary Receipts through the U.S. mail every 60 days indefinitely, the State adds, "the IDPP does not create an undue burden on voting." *Id.* at 8.

The language of the Emergency Rule and its implementing documents is about as "clear" as a puddle of mud. The Court will recall that much time was spent during trial trying to understand the Rule and the confusing, ever-changing DMV guidance documents explaining what the Rule means and how it will be implemented.

DMV witnesses testified at trial that they did not know what the Emergency Rule would require or allow after November 13, 2016 (*i.e.*, 180 days from the May 13 issuance of the first batch of Temporary Receipts). In the memorable words of Ms. Schilz, the knowledgeable and candid Supervisor of CAFU: "Stay tuned." 5/19/2016 PM Tr. at 36. And the DMV's Administrator emphasized in her testimony that any renewals beyond 180 days would be granted *only* "if people come forward with new leads or new information to allow us to continue to investigate with information that wasn't provided previously." 5/23/2016 Tr. at 133

(Boardman); *see id.* at 133-34 (renewals beyond 180 days are contingent on receiving "new information" so as to "create incentives" to "pull together the information").

Thus, this Court was entirely correct in in emphasizing the continuing uncertainties of what will happen to voters stuck in the IDPP after 180 days. But this was just one of many factors leading the Court to hold the IDPP unconstitutional, even as amended by the May 10 Emergency Rule. The Court emphasized that, "even under the emergency rule," the IDPP "is still far more arduous" a process than "envisioned in *Crawford* and *Frank*." Op. 28. "Being investigated by CAFU, even under the newest iteration of Wisconsin's emergency rule, still makes it unnecessarily difficult to obtain an ID." *Id.* The IDPP creates an undue burden on voting regardless of whether Temporary Receipts continue to be sent after 180 days in the process.

The State's second objection to this Court's IDPP remedy is that the "credential" issued to those who enter the IDPP may not simply be a paper Temporary Receipt that must be renewed every 60 days; the credential must instead have "a term equivalent to that of a driver license or Wisconsin ID," and must remain valid for voting until it either expires or is "revoked for good cause." Op. 117. "Good cause is shown if the petitioner is not a qualified elector; the failure to provide additional information or communication to the DMV is not good cause." *Id.* Thus, an IDPP petitioner who receives a voting "credential" must be able to use that credential unless and until it expires or the State determines the petitioner is not a "qualified elector."

The State speculates without any foundation that this Court's remedy of the IDPP process might promote voter fraud. If petitioners receive an ID card that is "valid for several years" and some are later determined to be "ineligible to vote or receive an ID," "those improperly-issued IDs will be in circulation during the general election, and for years thereafter," and "DMV would

be effectively powerless to stop such ineligible persons from using an improperly-issued ID on election day." Mot. 8. That is a fanciful concern for many reasons. Wisconsin driver's licenses and IDs are also subject to revocation for cause, yet no one argues that such credentials should not be issued because they might be abused upon revocation or expiration. Since government officials routinely verify whether a driver's license remains valid, the State ought to be able to figure out a way for election officials to verify the continued validity of a special voter ID if they have any questions or concerns.

Moreover, the record in this case establishes that the risk of an IDPP petitioner's attempting to commit fraud is virtually nonexistent. Only a single IDPP petitioner has ever been found ineligible to vote, and CAFU subsequently determined that the petitioner had believed in good faith that she had been naturalized. *See* PX341,"Denial Chart," Petitioner No. 14; PX359 (IDPP file for petitioner in question). The State has been unable to point to a single other IDPP petitioner who was not a U.S. citizen fully eligible to vote. *See* 5/19/2016 PM Tr. at 91-92 (Schilz); PX438 at 73–74 (Schilz Dep. Tr.); *see also* Op. 26. Thus the possibility that any IDPP petitioners will have their voter IDs revoked is extremely remote, and the State's objections to this Court's IDPP remedy should be rejected.

II. The Balance of the Equities Weighs Decisively Against a Stay

The State's motion should also be denied because the balance of the equities weighs decisively against a stay. The State has failed to articulate a single cognizable harm to its interests, and it makes no mention of the harm that will result on the other side—significant burdens on the right of Wisconsinites to vote.

A. The State Will Not Suffer Any Irreparable Harm Absent a Stay

The State has not demonstrated any irreparable harm that it will suffer absent a stay. As an initial matter, the State has not argued that these changes will be difficult to implement in time

for the November 2016 election or even mentioned the *Purcell* doctrine. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006). Nor could it. Many of the changes required by this Court's decision—such as whether to open additional in-person absentee voting locations, expand the days and hours for in-person absentee voting, or provide absentee ballots via fax or email—remain at the discretion of municipal clerks. It is up to those clerks to decide whether they will exercise the discretion now available to them. There is simply no material harm to the State in requiring it to *permit* local election officials to determine how to proceed in light of this Court's ruling. Conversely, granting a stay would, at best, force the State's election administrators to scramble to implement these changes shortly before the presidential election.

With respect to the registration restrictions enjoined by this Court, the State poses the question: "What do election administrators do with a registration that occurred under the rules of the injunction after the injunction and ruling are reversed?" Mot. 5-6. A reversal is unlikely for all of the reasons discussed above. But even if that happened, the hypothetical suggests phantom problems that are easily answered. Anyone who moves between 10 and 28 days before the November election will be able to vote in their new location under the Court's order, and by the time of the next election they will have satisfied the durational-residency requirement regardless of whether the injunction is upheld. Similarly, someone who registers using a dorm list between now and November will, like "any voter [who] registers in Wisconsin," be required to "sign a statement certifying that he or she is a U.S. citizen." Op. 68. Given the State's failure to articulate any reason why the certification signed by students using dorm lists is any less reliable than the same certification all other voters sign (including students registering with one of the other proofs of residence), it has failed to show any harm in allowing students to register with dorm lists without additional proof of citizenship.

Regarding the prohibition on faxing or emailing absentee ballots, the State simply contends that "if there is a reversal after ballots are sent, or returned, there will be confusion over how—or whether—to count wrongly-returned ballots." Mot. 6. This is specious. The question here is how municipal clerks may *transmit* absentee ballots to voters. It has nothing to do with the manner in which voters return those ballots, and there are no conceivable grounds on which the State could refuse to accept an otherwise valid absentee ballot that had been faxed or emailed to a voter. There is no harm to the State here.

With expired student IDs, the State speculates that "absent a stay, universities may not make arrangements to issue compliant IDs[.]" Mot. 7. This argument is hard to follow. Given that new students matriculate to universities in the fall, it is not at all clear why the Court's ruling with respect to expired IDs would cause universities to stop issuing compliant IDs. In any event, the State has cited no evidence of any such possibility.

B. Plaintiffs and Wisconsin Voters Will Be Irreparably Harmed by a Stay

In contrast to the State's failure to show meaningful harm, Plaintiffs and Wisconsin voters generally will suffer substantial harm if an injunction pending appeal is granted. "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am.*, 697 F.3d at 436. Further, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Id.* For the reasons explained in this Court's opinion and above, the provisions that the Court has invalidated unconstitutionally burden the right to vote, in some cases violate the Voting Rights Act, and in some cases will prevent eligible voters from voting—which means that keeping those provisions in effect will result in irreparable harm to Plaintiffs and the public. Further, given that "[v]oters disenfranchised by a law enacted with discriminatory intent suffer irreparable harm far greater than any potential harm to the State," Stay Order, *McCrory*, No. 16-

1468, slip op. at 7 (4th Cir. Aug. 4, 2016), the balance of the equities plainly weighs against the issuance of an injunction that keeps in effect the State's prohibition on weekend and evening in-person absentee voting.

As for the relief that this Court ordered with respect to the IDPP in particular, the record is replete with evidence of qualified electors who have been unable to get an ID through that process, and "[e]ven petitioners who succeed in navigating the IDPP do so only after enduring severe burdens." Op. 89. Kicking the problem down the road does not alleviate the severe burdens that [IDPP] petitioners must endure, nor does it prevent any future petitioners from suffering the same severe burdens." *Id*. at 90. The public interest in immediate reforms to this "wretched disaster" of a program, Op. 4, prior to the first general election in which voters will be required to show ID in order to vote is patent and obvious.

Concerns about voter confusion also weigh against the issuance of a stay. While the State argues to the contrary, *e.g.*, Mot. 4-5, its arguments are premised on the assumption that the State is likely to succeed on appeal. As explained above, however, it is not. Thus, it will be much less confusing for the public for this Court's order—which received substantial public attention[3]—simply to remain in effect, rather than to be stayed, with the significant possibility that it will be put back into effect by the Seventh Circuit. In addition, any concerns raised by the State about confusion relating to the IDPP are entitled to particularly little weight given the

[3] *E.g.*, Patrick Marley & Jason Stein, *Judge Strikes Down Wisconsin Voter ID, Early Voting Laws*, MILWAUKEE J. SENTINEL, Aug. 1, 2016, http://www.jsonline.com/story/news/politics/2016/07/30/judge-strikes-down-wisconsin-voter-id-early-voting-laws/87803408/; Ed Treleven, *Federal Judge Throws out Limits on Absentee Voting, Other Voting Restrictions*, WIS. ST. J., July 30, 2016, http://host.madison.com/wsj/news/local/govt-and-politics/federal-judge-throws-out-limits-on-absentee-voting-other-voting/article_4411da2e-dfb3-5bfb-b524-9a390c45bb2f.html; Laurel White, *Judge Finds Parts of Wisconsin Voter ID Law Unconstitutional*, WIS. PUB. RADIO, July 29, 2016, http://www.wpr.org/print/judge-finds-parts-wisconsin-voter-id-law-unconstitutional.

State's eagerness to change that program repeatedly through "Emergency Rules" during the course of litigation.

Finally, granting a stay would manufacture a *Purcell* problem that does not currently exist and could irreparably harm the State's voters. The State and municipal clerks need to start planning soon to implement the Court's order for the November 2016 election. If the Court stays its injunction, there is little doubt that the State will argue after the appeal that the decision has come too close to the election to be implemented, potentially preventing Plaintiffs and other Wisconsin voters from having their voting rights vindicated prior to the presidential election. For this reason, as well as those set forth above, the balance of the equities weighs against issuance of a preliminary injunction.

III. There Is No Trend of Appellate Reversals or Modifications That Counsels In Favor of a Stay Here

While the foregoing discussion more than justifies a denial of the Motion, a few points about the "trend" in recent election law cases, Mot. 9-13, bear mentioning. Most obviously, those are different cases with different facts from this case, and they do not change the standard for issuance of a stay pending appeal. Moreover, the reasoning of some of those cases strongly supports the conclusion that this Court should denying the Motion.

For example, in *McCrory*, where North Carolina moved for a stay pending appeal, the Fourth Circuit swiftly refused to stay its decision, explaining that "staying the mandate now would only undermine the integrity and efficiency of the upcoming election." Stay Order, *McCrory*, No. 16-1468, slip op. at 7 (4th Cir. Aug. 4, 2016). The Fourth Circuit's words apply with equal force here: "Voters disenfranchised by a law enacted with discriminatory intent suffer irreparable harm far greater than any potential harm to the State. For the Supreme Court has long recognized that '[t]he right to vote freely for the candidate of one's choice is the essence

of a democratic society, and any restrictions on that right strike at the heart of representative government.'" *Id*. at 8 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

The State also cites to the *Veasey* litigation over the Texas voter ID law, but that case likewise argues against a stay here. Although the Supreme Court upheld an interim stay in that case, it also made clear that "in light of the scheduled elections in November," the plaintiffs could seek to rescind the stay if the appellate court did not act quickly enough. *Veasey v. Abbott*, 136 S. Ct. 1823 (2016) (inviting plaintiffs to file an application to vacate or modify the Fifth Circuit's stay of an injunction blocking Texas's voter ID law if the Court of Appeals had not acted "on or before July 20").

In addition, the Supreme Court has recently declined to stay decisions ordering major electoral changes to prevent violations of federal rights, even where elections were imminent or already underway. *See McCrory v. Harris*, 136 S. Ct. 1001 (2016) (mem.) (denying stay pending appeal of decision that North Carolina's congressional districts are unconstitutional gerrymanders even though absentee balloting had already begun); *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (mem.) (denying stay pending appeal of decision that Virginia's congressional districts are unconstitutional gerrymanders even though election cycle had already begun). Thus, recent election laws decisions *bolster* the conclusion that the Motion should be denied.

CONCLUSION

For all of the reasons set forth above, in this Court's decision, and in Plaintiffs' earlier briefing, the State's Motion to Stay Injunction and Ruling Pending Appeal should be denied in its entirety.

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Respectfully submitted,

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