UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., CITIZEN ACTION OF WISCONSIN EDUCATION FUND, INC., RENEE M. GAGNER, ANITA A. JOHNSON, CODY R. NELSON, JENNIFER S. TASSE, SCOTT T. TRINDL and MICHAEL R. WILDER, Plaintiffs, v. JUDGE GERALD C. NICHOL, JUDGE ELSA LAMELAS, JUDGE THOMAS BARLAND, JUDGE HAROLD V. FROEHLICH, JUDGE TIMOTHY VOCKE, JUDGE JOHN FRANKE, KEVIN J. KENNEDY and MICHAEL HAAS, Defendants.	Case No. 3:15-cv-324

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The Amended Complaint alleges that, since 2011, the State of Wisconsin has enacted a number of provisions that "were intended to burden, abridge, and deny, and that have had and will have the effect of burdening, abridging, and denying, the voting rights of Wisconsinites generally and of African-American, Latino, young, and/or Democratic voters in Wisconsin in particular." *See* ECF No. 19 ("Am. Compl."), first intro. para. Plaintiffs challenge these provisions on the grounds that they violate Section 2 of the Voting Rights Act ("VRA") (Count I); unduly burden the right to vote in violation of the First and Fourteenth Amendments (Count II); treat voters disparately without a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment (Count III); were intended disproportionately to suppress the vote of Democratic voters without a compelling reason in violation of the First and Fourteenth Amendments (Count

IV); were intended disproportionately to suppress the vote of African Americans and/or Latinos in violation of the Fourteenth and Fifteenth Amendments (Count V); and/or were intended disproportionately to suppress the vote of young voters in violation of the Twenty-Sixth Amendment (Count VI). *See id.* second into. para. & ¶¶ 154-81.

In their Motion to Dismiss and Brief in Support of Motion to Dismiss ("Br."), ECF Nos. 21-22, Defendants argue that a subset of these claims should be dismissed for failure to state a claim on which relief can be granted. In particular, Defendants argue for dismissal of Plaintiffs' rational-basis and partisan-fencing claims (Counts III and IV), and they argue that Plaintiffs' VRA and undue-burden challenges to Wisconsin's voter ID law should be dismissed. *See* Br. at 1.[1]

As set forth below, Defendants' challenges to two of the three rational-basis claims raise factual questions that cannot be resolved at this stage and are unpersuasive in any case. Defendants' challenge to Plaintiffs' partisan-fencing claim fails as well, as Defendants' position is inconsistent with the case law and would lead to absurd results. Plaintiffs do not object, however, to Defendants' request that the Court dismiss Plaintiffs' challenges to the voter ID law under the VRA (Count I) and as an undue burden on the right to vote (Count II). *See* Am. Compl. at 48 n.5 ("[P]laintiffs assert claims that the voter ID law violates Section 2 of the [VRA] and unduly burdens the right to vote in order to preserve them for appeal."). Plaintiffs also do not object to the dismissal without prejudice of their rational-basis challenge to the provision that permits military voters but not overseas voters to vote a straight ticket on the federal write-in absentee ballot form for non-national offices.

[1] Plaintiffs also allege that the voter ID law was intended to suppress the vote of African-American and Latino voters in violation of the Fourteenth and Fifteenth Amendments, and of young voters in violation of the Twenty-Sixth Amendment. *See* Am. Compl. ¶¶ 153, 177, 181. Defendants have not moved to dismiss those claims.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipses omitted). In the context of a motion to dismiss under Rule 12(b)(6), the Court must "take all well-pleaded allegations of the complaint as true and view them in the light most favorable to the plaintiff," while considering whether the complaint states a "plausible" claim for relief. *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 934 (7th Cir. 2012) (internal brackets and quotation marks omitted). So long as the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," a motion to dismiss should be denied. *Id.*

ARGUMENT

I. THE AMENDED COMPLAINT ADEQUATELY ALLEGES THAT ASPECTS OF WISCONSIN'S RESIDENCY RULES AND VOTER ID LAW TREAT VOTERS DISPARATELY WITHOUT A RATIONAL BASIS

Defendants' challenges to two of Plaintiffs' rational-basis claims are without merit. In order to survive scrutiny under the Equal Protection Clause, any law that distinguishes between groups must at least be rationally related to a legitimate state interest. *See Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Here, the Amended Complaint plainly alleges that Wisconsin law treats groups of voters disparately, without a rational basis, by (1) permitting voters who move *to* Wisconsin, but not those who move *within* Wisconsin, within 28 days of an election to vote for president and vice president at their new ward or election district and (2) permitting voters who possess a qualifying voter ID, but not voters who possess technical college, out-of-state, and/or certain expired IDs but not a qualifying voter ID, to cast a ballot that will be counted.

A. Disparate Treatment of Voters Who Move to Wisconsin and Voters Who Move Within Wisconsin

The Amended Complaint adequately alleges that Wisconsin law, without a rational basis, treats voters who move within Wisconsin within 28 days of an election less favorably than voters who move to Wisconsin within 28 days of an election. Specifically, the Amended Complaint alleges that "there is no rational basis for permitting the class of voters who moved to Wisconsin from out of state within 28 days of an election to vote for president and vice president at their new ward or election district but not permitting the class of voters who moved within Wisconsin within 28 days of an election to vote for president and vice president at their new ward or election district." Am. Compl. ¶ 124; *accord id.* ¶ 169; *see also id.* ¶¶ 52, 119. This statement clearly alleges that, with respect to voting for president and vice president, individuals who have resided in Wisconsin for 28 days or more before an election are being treated *worse* than individuals who recently moved to the state and that this distinction is not rationally related to a legitimate state interest. The Amended Complaint thus states a claim that this distinction violates the Equal Protection Clause.

Defendants' response that "Wisconsin actually treats those that move within the State more favorably than those that move from outside the State by allowing them to vote for all offices," Br. at 19, is a non sequitur. The challenge at issue is to the State's disparate treatment of voters *with respect to the manner in which they can vote for president and vice president*. And the fact that a group of individuals is provided with favorable treatment in one context plainly cannot justify treating that group with disfavor in another context without reason.

Defendants' assertion that the "alleged 'disadvantage' is not really a disadvantage" because of the availability of absentee voting, Br. at 20, fails as well. The question whether voters are disadvantaged by circumstances that make casting an in-person ballot highly burdensome is a

question of fact that is not appropriate for resolution at this stage in the case. In any event, the assertion is inaccurate: Limiting the options available to individuals—in any context—places those individuals at a disadvantage relative to those with more options.

B. Disparate Treatment of Voters Who Possess Certain Non-Qualifying IDs

The Amended Complaint also adequately alleges that the voter ID law's disparate treatment of voters who possess qualifying voter IDs and voters who possess technical college, out-of-state, and/or certain expired IDs but not qualifying voter IDs violates the Equal Protection Clause. The Amended Complaint makes clear that "the voter ID law does not permit technical college, out-of-state, or many expired IDs to be used for voting" and "therefore distinguishes between voters who possess such IDs but not qualifying voter IDs and voters who possess qualifying voter IDs." Am. Compl. ¶ 168; *see also id.* ¶¶ 143-44. Further, the Amended Complaint alleges that the "exclusion from the list of qualifying voter IDs of technical college IDs, many expired IDs, and out-of-state driver's licenses does not serve any state interest and is not rational," *id.* ¶ 152; *accord id.* ¶ 168, and adds that "[t]he purpose of the voter ID requirement is to confirm identity, not residency," and that "there is no reason to believe that technical college IDs, expired IDs, and out-of-state driver's licenses are any less capable of confirming identity than the documents that can be used as voter ID," *id.* ¶ 152.

Defendants respond not by asserting that any of these allegations are insufficient to state a claim but instead by introducing factual disputes. In particular, Defendants attempt to supply rational bases for the voter ID law's exclusion of technical college, out-of-state, and many expired IDs from the list of qualifying voter IDs. *See* Br. at 23. As set forth in the preceding paragraph, however, the Amended Complaint asserts that there are no rational bases for the exclusion of these forms of ID, *see* Am. Compl. ¶¶ 152, 168; and, at this stage, those facts must be taken as true and

viewed in the light most favorable to Plaintiffs. *See Indep. Trust Corp.*, 665 F.3d at 934.[2]

Defendants also contend that a case or controversy no longer exists with respect to technical college IDs in light of the Government Accountability Board's adoption of an emergency rule that permits technical college IDs to be used for voting, *see* Br. at 21-22, but that argument is flawed. As Defendants themselves acknowledge, the emergency rule went into effect on May 15, 2015, and is effective for only 150 days. *See id.* at 22; *see also* Wis. Stat. § 227.24(1)(c). And while Defendants assert that "[t]he rule will be made permanent after it has gone through the required process for administrative rulemaking," Br. at 22, they tellingly do not assert that the rule *has* been made permanent, *cf. id.* ("The permitted rule was *submitted* to the Legislative Council Rules Clearinghouse . . . .") (emphasis added). Unless and until the rule is made permanent, dismissal of this aspect of the case as moot would be premature.

Finally, the Court should reject Defendants' invitation, in light of ongoing litigation in *Frank v. Walker*, No. 11-CV-1128 (E.D. Wis.), to stay the rational-basis challenge to the voter ID law's disparate treatment of voters who possess qualifying voter IDs and voters who possess

[2] Defendants' assertions fail on the merits in any case. While Defendants assert that the State Legislature "could reasonably have concluded that it would be easier to procure a false form of identification if that identification is expired," Br. at 23, they fail to explain why this would be the case. Defendants also claim that "Wisconsin poll workers are much less likely to know whether an ID card from out-of-state was actually issued by a state government than they will be for IDs issued by Wisconsin, with which they will be familiar." *Id.* But that assertion does not hold up given that the list of approved IDs includes ID cards issued by a federally recognized Indian tribe in the state and university or college IDs, *see id.* at 2—most of which many poll workers surely are not familiar with. Likewise, Defendants' assertion that the State Legislature had an interest in "limiting the number of ID forms to a discrete number," *id.* at 23, ignores that there are numerous varieties of some of the types of IDs that can be used for voting, such as college IDs, *see also id.* at 24 n.4 ("These nine categories encompass more than nine specific forms of ID because there are several different Indian tribes and branches of the armed forces with different ID cards."); that permitting expired IDs to be used for voting would not add additional *types* of IDs to the list; and that permitting technical college IDs to be used for voting would not require a significant change to the categories of acceptable IDs given that other college IDs can be used to vote.

technical college and/or out-of-state IDs but not qualifying voter IDs.[3] "[W]hen considering a request for a stay, courts should be mindful of the Supreme Court's admonition, stated repeatedly by the Court of Appeals for the Seventh Circuit, that federal courts have a virtually unflagging obligation absent exceptional circumstances to exercise jurisdiction when a case is properly before it." *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (internal quotation marks omitted). In deciding whether to stay an action, courts often consider the following factors: "(1) whether the litigation is at any 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. *Id.* (internal citation omitted). The party requesting a stay "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Here, the second, third, and fourth factors identified in *Grice* weigh against a stay: The issuance of a stay will reduce the likelihood that the rational-basis challenges will be resolved prior to the 2016 general election, and the issuance of a stay would have a negligible impact on the complexity of and litigation burdens associated with this case, given that a number of other challenges (including arguments that the voter ID law was passed with the intent to discriminate against minority and young voters) will remain to be litigated irrespective of the results of the Motion to Dismiss. Moreover, as there are rulings pending from the *Frank* court, *see* Br. at 25, a stay of portions of this case would be premature at this point.

[3] Defendants' brief asserts that the plaintiffs in *Frank* have argued that Act 23 "violates equal protection . . . as applied to technical college students in not accepting technical college identification and that the State should accept out-of-state drivers' licenses." Br. at 25. The brief does not mention any challenge to expired IDs. *See id.*

II. THE AMENDED COMPLAINT ADEQUATELY ALLEGES A PARTISAN-FENCING CLAIM

Defendants' argument for dismissal of Plaintiffs' partisan-fencing claims (Count IV of the Amended Complaint) should also be rejected. In *Carrington v. Rash*, 380 U.S. 89, 93 (1965), the Supreme Court held that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The Court reasoned that a right as fundamental as the right to vote "cannot constitutionally be obliterated because of a fear of the political views of a particular group." *Id.*

Here, the Amended Complaint alleges that the challenged provisions were intended to fence out Democratic voters. Specifically, the Amended Complaint explains that "the challenged provisions disproportionately burden the right to vote of individuals who are likely to vote for Democratic candidates" and that "the State Legislature, in not modifying the rule limiting early voting to one location per municipality and in enacting the other challenged provisions, acted with the intent disproportionately to suppress the vote of Democratic voters without a compelling reason." Am. Compl. ¶ 172. And the Amended Complaint is replete with allegations that support this conclusion. *See, e.g.*, *id.* ¶¶ 42-50, 54-71, 74-77, 79-81, 84-88, 94, 96-102, 104-33, 143-47, 150-51, 153.

Defendants' argument that this is not sufficient to establish a fencing claim—that such a claim requires that a group be forbidden or completely denied from voting, *see* Br. at 26-28—cannot be squared with the case law. While there unquestionably are cases in which the Supreme Court has struck down laws that completely excluded classes of individuals from voting, *see id.* at 27-28, Justice Kennedy had made clear that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views" and that a State may not "burden[] or penalize[] citizens

because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (discussing "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"). Likewise, the Supreme Court wrote in *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983), that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." In short, the case law bars not only the exclusion from the right to vote but also disfavored treatment and the imposition of burdens on groups based on the way in which members of that group vote.[4]

Indeed, a contrary conclusion would be indefensible. Under Defendants' complete-denial standard, states would be permitted to pass legislation that required Democrats (and only Democrats) to vote between 2 a.m. and 4 a.m. or that required Republicans (and only Republicans) to travel by foot to their polling location, so long as such voters were not completely denied the right to vote. *Accord Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents."). That plainly cannot be the law. On the contrary, the statements in the Amended Complaint alleging that the challenged provisions

[4] *Levy v. Scranton*, 780 F. Supp. 897 (N.D.N.Y. 1991), does not support a contrary conclusion. While one of the facts that the *Levy* court discussed was that the bill at issue was not "like the statute discussed in *Carrington* that, by its very terms, disenfranchised a particular group of individuals living within the state's borders," *id.* at 902, the *Levy* court also looked to the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), for determining whether a law was motivated by discriminatory intent and "carefully reviewed both the Assembly and Senate debates on the [pertinent bill] as well as the other criteria relevant to a determination of discriminatory intent," even though the bill was "neutral on its face." 780 F. Supp. at 901-02.

were enacted with the intent to discriminate against voters who are likely to vote for Democrats are sufficient to state a partisan-fencing claim.

III. UNOPPOSED REQUESTS FOR DISMISSAL

As set forth above, Plaintiffs do not oppose certain aspects of Defendants' Motion to Dismiss. While Plaintiffs' position is that the Amended Complaint adequately alleges that the voter ID law violates Section 2 of the VRA and unduly burdens the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment, and they expressly reserve the right to make these arguments on appeal and to argue on appeal that *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. (2015), should be overruled, Plaintiffs acknowledge that this Court is bound as to these claims by the Seventh Circuit's holding in *Frank*.[5] Plaintiffs also do not oppose the dismissal without prejudice of their rational-basis challenge to the provision that permits military voters but not overseas voters to vote a straight ticket on the federal write-in absentee ballot form for non-national offices.

CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss should be denied except as set forth in Section III above.

[5] Of note, while the Seventh Circuit expressed some skepticism, it "accept[ed] the district court's finding" that "300,000 registered voters lack acceptable photo ID." *Frank*, 768 F.3d at 748.

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Respectfully submitted,

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*Application for admission forthcoming