No. 16-3091 [Consolidated with 16-3083]

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

ONE WISCONSIN INSTITUTE, INC., ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

MARK L THOMSEN, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

Appeal From The United States District Court
For The Western District Of Wisconsin, No. 3:15-cv-324,
The Honorable James D. Peterson, Presiding

DEFENDANTS-APPELLANTS, CROSS-APPELLEES' REPLY IN SUPPORT OF THE EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL

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INTRODUCTION

The district court's wholesale invalidation of seven of Wisconsin's election laws is indefensible. For forty pages ("[t]he heart of the opinion," R.234:5), the court addresses Plaintiffs' challenge to Wisconsin's prosaic (and, as compared to many of its sister States, voter-friendly) election rules, holding that several violate the First and Fourteenth Amendments. In this discussion, the court ignores the lessons of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and the *Frank* cases, enjoining seven laws *on their face* even though they impose only minor burdens and only on small subsets of voters. In another lengthy section (twenty pages), the court addresses Plaintiffs' allegations of intentional racial discrimination, striking down one law concerning the timing of in-person absentee voting as allegedly motivated by racial animus, even though the statute makes only a minor adjustment in election administration and was not based on racial considerations. Finally, the opinion closes by discussing the Voting Rights Act ("VRA"), finding a violation only because the court had previously found that the law breached the First and Fourteenth Amendments, *and* because the court thought the State is responsible for past actions of Milwaukee that allegedly made the law burdensome to minorities.

Plaintiffs' response largely relegates to a single sentence in a footnote, Resp. 7, n.5, any answer to Defendants' central argument: that the district court's decision to facially invalidate numerous laws based upon less-than-severe burdens on only small subsets of voters violates the basic holdings of *Crawford* and *Frank I*. Indeed, Plaintiffs cannot bring themselves to use the term "facial" even once in their re-

sponse. Unable to defend the "heart" of the district court's decision in light of binding caselaw, Plaintiffs rest their opposition on repetition of the district court's holdings, citations of inapposite out-of-circuit authority, meritless allegations of waiver,[1] and attempts to hide behind the district court's VRA discussion (even though that discussion was, by the district court's own telling, merely derivative of its decision under the First and Fourteenth Amendments).

Proceeding to irreparable harm, Plaintiffs first misstate the standard and then downplay (through sheer speculation) the burdens that the district court's order will impose on the State's election machinery. Plaintiffs also fail adequately to respond to the fact that, absent a stay, Wisconsin will be forced to conduct the next election under an election code that a district court rewrote, in violation of Wisconsinites' right to govern themselves. And Plaintiffs make no attempt to explain how *they* would be concretely injured by a stay. Although they argue that the public would be harmed, that theory turns on the false assumption that once the district court issued its erroneous opinion and a few media outlets reported on it, Wisconsin's voters immediately became accustomed to the new, court-prescribed election rules, notwithstanding that the lawfully enacted regime has been around for years

[1] Plaintiffs claim that certain of Defendants' objections to the court's opinion have been "waived" (meaning presumably "forfeited"). *E.g.*, Resp. 3, 13. Although Defendants disagree with this as a factual matter, *see, e.g.*, R.206:105, 161–62, it is a "well-settled principle" that an appellant "may attack [any] legal theory upon which the district court based its decision." *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 & n.6 (7th Cir. 2015) (citation omitted). In any event, the central—and outcome-determinative—argument was the centerpiece of Defendants' briefing below and thus not even arguably waived: facial invalidation of the laws in question is contrary to *Crawford* and the *Frank* cases. *See, e.g.*, R.206:2.

and is reflected in many official notices and forms (which, absent a stay, would need to be republished and recirculated quickly at considerable public expense).

ARGUMENT

I. Defendants Are Very Likely To Prevail On Appeal

A. The District Court's Facial Invalidation Of Several Laws Under The First And Fourteenth Amendments Is Unlawful

In their Stay Motion, Defendants explained that the district court's facial invalidation of several election laws—"[t]he heart of the opinion," R.234:5—was wrong because, *inter alia*, the court determined only that the laws impose what amount to non-severe burdens and then only on some voters. Mot. 6. This violated *Crawford*'s holding that "[a] facial challenge [to an election regulation] must fail where the statute has a plainly legitimate sweep," and thus a court must "consider only the statute's broad application to all [State] voters." *Crawford*, 553 U.S. at 202–03 (controlling opinion of Stevens, J.) (citations omitted); *see Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("[T]he burden some voters face[ ]" "[can]not prevent the state from applying the law generally.").

Plaintiffs offer no answer to this critical defect in the district court's decision, seemingly believing that facial invalidation is the only option when facing an alleged burden on a small subset of voters. *See* Resp. 12 (claiming that Defendants' argument is tantamount to asserting that laws that do not satisfy *Crawford*'s standard are "immune from constitutional scrutiny"). The closest Plaintiffs come to addressing this dispositive point is a sentence in a footnote, Resp. 7 n.5, where they invoke an inapposite passage from *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983).

Anderson is, of course, consistent with *Crawford*, given that the ballot-access limitation in that case denied *every* voter's right to vote for the candidate. *Id.* at 786 ("Our primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose."). Plaintiffs do not attempt to explain how the decision below is consistent with the passages from *Crawford* and *Frank* quoted above (among others), and their silence is reason enough to conclude that Defendants have an extremely high likelihood of success.

Plaintiffs also fail adequately to defend the decision as to each law:

28-day durational residency provision. The district court facially invalidated Wisconsin's 28-day rule on the ground that it imposes an unjustified "moderate burden on voters" (or a "severe" burden, depending on the page). R.234:74–77. Plaintiffs do not dispute that the Supreme Court has rejected a constitutional challenge to a residency requirement of *50* days. Mot. 1, 8. And they do not dispute that Wisconsin's residency rule is less restrictive than many other States'. Mot. 7. Nor do Plaintiffs take issue with the State's interests. Mot. 7. Finally, Plaintiffs do not address the binding rule that "the burden" some transient voters allegedly face under the rule "[can]not prevent the state from applying the law generally" and so cannot justify an "across-the-board injunction." *Frank II*, 819 F.3d at 386.

Three laws providing for the locations and times for in-person absentee voting. The district court also facially enjoined three provisions that impose certain limitations on the State's no-questions-asked in-person absentee voting regime. R.234:55–63. Notwithstanding that many States do not offer such a voter-friendly system, *see*

Mot. 8, the court struck down these regulations under *Anderson-Burdick* because they are supposedly unduly burdensome as applied to certain subgroups. *See, e.g.*, R.234:58 ("difficulties for voters who lack transportation"). Plaintiffs cannot explain how the "broad application" of these rules puts an impermissible burden on voters generally, *see Crawford*, 553 U.S. at 202–03, or in what sense that "burden" goes beyond the "usual burdens" of election-day in-person voting, *id.* at 198. Plaintiffs also fail to answer the point that there is no general constitutional right to "no-questions-asked in-person absentee voting." Mot. 9 (citing cases).

Law requiring that absentee ballots must be sent by regular mail. The district court facially enjoined the rule requiring that most absentee ballots be sent only by regular mail. R.234:84–86. Like the opinion below, Plaintiffs offer no explanation of how this banal administrative rule's "burden" on voters "who are traveling [around election day]" (R.234:84) merits across-the-board invalidation under *Crawford* and *Frank*. And, again, Plaintiffs do not refute the argument that "there is no general constitutional right to unrestricted absentee voting to begin with." Mot. 9.

Two laws relating to voting by college students. One of Wisconsin's laws requires that any dorm list used for voter-registration purposes confirm citizenship, and another provides that student IDs presented for voting must be unexpired. R.234:67, 111, 113. Plaintiffs are unable to resuscitate the decision's invalidation of these rules as "irrational," which held that the former does not go far enough while the latter is duplicative. R.234.69, 113–14. Plaintiffs fail to grasp that rationality review is untroubled by laws that "select one phase of one field and apply a remedy

there, neglecting the others," *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955), or laws that impose "belt-and-suspenders" protections, *McNeilus Truck & Mfg., Inc. v. Montgomery*, 226 F.3d 429, 440 (6th Cir. 2000).

B. The District Court's Invalidation Of Act 146 Misapplied Intentional-Discrimination Principles

The district court struck down Act 146, concerning the timing of in-person absentee voting, because it supposedly targeted Milwaukee and other "large municipalities." R.234:45. But, as Defendants explained, statements to that effect from *two* legislators and one non-legislative official do not add up to a legislative "purpose," *see* R.234:42–45. Nor does passage of a law merely expected to have a disparate racial impact amount to an invidious act of purposeful race discrimination. Mot. 12. Similar "large municipality" theories of race discrimination have met with defeat in this Court and elsewhere. Mot. 11 (citing cases, which Plaintiffs cryptically regard as distinguishable because they involved perceived "crises," Resp. 10 n.9).

Plaintiffs have little to say in response. Curiously, their first move is to quote remarks from Senator Mary Lazich regarding the supposed purpose of *a completely different law*, Act 23, *see* Resp. 8, which comments the district court's discriminatory-intent analysis did not cite, given their obvious irrelevance to Act *146*. Plaintiffs then proceed to restate several of the district court's conclusions, including the far-from-dispositive detail that Act 146 "had a disparate impact." Resp. 9. Then, in a footnote, Plaintiffs attempt to bolster their apparent position that racially disparate effects caused by laws that Republicans support for allegedly partisan reasons *must be* racially motivated, citing a Fourth Circuit opinion finding an "inextricable link

between race and politics in North Carolina." Resp. 9 n.7 (citation omitted). Among other problems with this argument, Wisconsin is not North Carolina. *See* R.234:106 ("Wisconsin has a relatively scant history of state-sanctioned discrimination.").

C. The District Court's VRA Discussion Is Derivative Of Its Constitutional Discussion And Contrary To Binding Caselaw

Plaintiffs puzzlingly lead their likelihood-of-success section with the VRA, Resp. 3–6, even though this part of the decision was derivative of the *Anderson-Burdick* discussion at "[t]he heart of the opinion," R.234:5. *See, e.g.*, R.234:103 (finding VRA burden "[f]or substantially the same reasons" offered in the *Anderson-Burdick* discussion). The district court found a VRA violation when it concluded that the law at issue was unlawful under *Anderson-Burdick*, *and* that*, in addition*, Milwaukee supposedly had contributed to the burden. R.234:103, 108. So if this Court agrees with Defendants' arguments as to the laws' facial validity under *Anderson-Burdick*, the remaining arguments on the VRA make no difference. That is why the Stay Motion gave the VRA issue only brief treatment.[2]

[2] Plaintiffs correctly point out that the district court's adverse decision under the VRA related to in-person absentee voting, not the residency rule. Resp. 4; *compare* Mot. 4 (accurately explaining that this part of the decision related to in-person absentee voting), *with* Mot. 12–13 (incorrectly stating that the VRA-violation holding related to residency). Yet the district court's opinion itself sows considerable confusion as to its precise holdings. *See* R.234:1–6 (summarizing the entire opinion and noting only *constitutional* violations related to in-person absentee voting, but not mentioning any violations of the VRA); 234:13 ("Analysis" section, stating, for the first time, that "one of the challenged provisions violates the [VRA]," without identifying the "one" provision); 234:110 (after discussing voting locations and voting hours, stating that "[t]hese provisions are invalid under the [VRA]"); 234:118–19 ("Order" section, *not* declaring *any* Wisconsin law illegal under the VRA). What the district court's statements about the VRA reveal is that that aspect of its decision is derivative of the constitutional analysis at "[t]he heart of the opinion." R.234:5.

In any event, the district court premised its VRA holding on the conclusion that Milwaukee's prior actions created "historical conditions of discrimination" for some minority voters in that city, and that the State's voting reforms disparately impacted those voters. R.234:107–08. The district court was forced to admit that its conclusion was inconsistent with this Court's allegedly "rigid" distinction in *Frank I*, since the State did not "technically" cause those alleged "conditions." *Id.* Plaintiffs continue to resist *Frank I*'s holding that States are legally responsible only for their own discrimination. 768 F.3d at 753; *see* Resp. 5. The VRA does not facially invalidate state-wide laws of general applicability on the basis that, due to the action of one city, the laws will have a disparate impact on minority voters in that one city. *See Frank I*, 768 F.3d at 753. And Plaintiffs' suggestion that *Frank I* meant simply to distinguish *government* discrimination from *private* discrimination is wrong, Resp. 5, as the case that *Frank I* relies upon shows, *see Milliken v. Bradley*, 418 U.S. 717, 745 (1974). *Accord Milliken v. Bradley*, 433 U.S. 267, 282 (1977).[3]

[3] While Plaintiffs use broad-brushed phrases to paint a picture of government-sanctioned intentional discrimination ("discrimination by Wisconsin's municipalities," Resp. 5), the district court's opinion merely noted "white flight" (that the City tried to *discourage* with an "open housing law," R.234:108), "employment" issues (without documenting any government involvement, R.234:109), and Milwaukee's K–12 school district's history of segregation in the 1970s. Although Milwaukee's school system participated in "segregative acts" in the 1970s and earlier, *Brennan v. Armstrong*, 433 U.S. 672, 672 (1977), neither the district court nor Plaintiffs explain exactly how K–12 discrimination in one Wisconsin city in the 1970s causes state-wide regulations of in-person absentee voting hours or locations in 2016 to deny the right to vote. This Court has already rejected this theory of VRA liability. *See Frank I*, 768 F.3d at 753 (rejecting the district court's ruling that "the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing").

II. Absent A Stay, The Injunction Will Irreparably Harm The State And Public

Without immediate relief from this Court, the people of Wisconsin will not be permitted to govern themselves by holding the November 2016 election under their own election code, which is more voter-friendly than that in many other States. Mot. 3–4. The State will also need to expend substantial resources to comply quickly with the injunction, and those resources can never be recovered. Mot. 13–16. Plaintiffs' lead response is that Defendants improperly rest their argument on the premise that they are "likely to prevail on the merits." Resp. 14. But that is just what the standard demands: the court must consider whether Defendants will be harmed "if the stay is . . . denied *in error*." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (emphasis added). And Defendants have shown that they will be. "[T]he state's election machinery [is] already in progress," *Reynolds v. Sims,* 377 U.S. 533, 585 (1964), and keeping it in working order is no small undertaking. Yet Plaintiffs (who do not run elections) speculate that making eleventh-hour adjustments to voter-registration forms already in circulation, ballot application forms, and absentee ballots themselves will involve "simply" the expenditure of "routine and unremarkable cost[s]." Resp. 17; Resp. 16 ("simply . . . normal (and nominal) costs").

Equally remarkably, Plaintiffs assert that the risk of "voter confusion," *Purcell v. Gonzalez,* 549 U.S. 1, 4–5 (2006), favors *them*. Resp. 19–20. The injunction-revised laws have been on the books for years. Yet Plaintiffs suggest that, after the district court issued a 119-page opinion on a recent Friday evening and a few newspapers wrote about it, Wisconsin's voters adjusted—virtually overnight—to the new

judicially imposed electoral system. Resp. 14–15 & n.10. And, apparently, those same voters disregard the many official State forms and websites that presently reflect the rules as enacted by the Legislature, *see* Mot. 14–16. This is not credible.

As for the possible risk that granting a stay will concretely harm Plaintiffs, they offer this *ipse dixit*: "keeping [the enjoined] provisions in effect will result in irreparable harm" to them. Resp. 19. In truth, none of the individual Plaintiffs have shown that they will not be able to register within the 28-day window or vote as a result of the in-person absentee schedule, the dorm-list provision, the emailing-and-faxing provision, or the expired-student-ID provision. As for the organizational Plaintiffs, they have not even alleged that, during the lifespan of this appeal, they will "devot[e] resources away from other tasks and toward researching, or educating voters about, the challenged provisions"—the sole alleged basis for their standing to bring this lawsuit. R.234:17. Even if they did so allege, whatever costs they might incur now would pale in comparison to the vastly more burdensome obligations that Defendants will be forced to bear without a stay.

CONCLUSION

The judgment and permanent injunction should be stayed pending appeal.

Dated: August 19, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2016, I filed the foregoing Reply with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: August 19, 2016

s/Misha Tseytlin
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