

Nos. 14-2058 & 14-2059

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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RUTHELLE FRANK, et al.,

*Plaintiffs-Appellees,*

v.

SCOTT WALKER, et al.,

*Defendants-Appellants.*

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LEAGUE OF UNITED LATIN AMERICAN  
CITIZENS OF WISCONSIN, et al.,

*Plaintiffs-Appellees,*

v.

DAVID G. DEININGER, et al.,

*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Eastern District of Wisconsin, Nos. 11-cv-1128 & 12-cv-185  
The Honorable Lynn S. Adelman, Presiding

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**EMERGENCY MOTION TO EXTEND THE STAY OF, OR RECALL AND  
STAY, THE MANDATE THROUGH THE CONCLUSION OF THE  
APRIL 7, 2015 ELECTIONS**

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Plaintiffs-Appellees (“Plaintiffs”) respectfully file this emergency motion, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to extend this Court’s stay of the mandate temporarily to prevent a sudden change in voting requirements while voting is underway for the April 7, 2015 Spring General Election.<sup>1</sup> By the present terms of this Court’s stay order, the stay “will expire automatically . . . if a petition [for a writ of certiorari] is filed and denied.” (ECF No. 79.) Today, the United States Supreme Court denied Plaintiffs’ petition for certiorari. The resulting imminent expiration of the stay threatens to impose a new voter photo ID requirement in the fast-approaching election.<sup>2</sup> In fact, the election is already *here*: absentee ballots have *already* been sent out without any indication

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<sup>1</sup> See Wis. Gov’t Accountability Bd., *Spring 2015 Election*, <http://gab.wi.gov/elections-voting/2015/spring>; Wis. Stat. § 5.02(21) (spring elections are held on the first Tuesday in April). Offices on this year’s ballot include Justice of the Supreme Court of Wisconsin, Court of Appeals Judges for two districts, and Circuit Court Judges for numerous counties. See Wis. Gov’t Accountability Bd., *Candidates on Ballot by Election, 2015 Spring Election – 4/7/2015*, [http://gab.wi.gov/sites/default/files/page/amended\\_candidates\\_on\\_ballot\\_4\\_7\\_2015\\_spring\\_elect\\_19905.pdf](http://gab.wi.gov/sites/default/files/page/amended_candidates_on_ballot_4_7_2015_spring_elect_19905.pdf). The ballot will also contain a Constitutional Amendment on Election of the Chief Justice. See Wis. Gov’t Accountability Bd., *Spring 2015 Election*, <http://gab.wi.gov/elections-voting/2015/spring>. In addition, there are numerous non-partisan local offices on the ballot, such as the Mayor of Madison, see Pete Zervakis, *Soglin, Resnick advance in Madison mayoral race*, WKOW (Feb. 18, 2015, updated Mar. 5, 2015), <http://www.wkow.com/story/28134031/2015/02/18/soglin-resnick-advance-in-madison-mayoral-race>, and the Milwaukee School Board, see Official Website of the City of Milwaukee, *2015 Spring Election Local Certified Candidates in Ballot Order*, <http://city.milwaukee.gov/ImageLibrary/User/dwalton/2015SpringCandidates4.pdf>.

<sup>2</sup> See Jennifer Fetterly, *Attorney general says lawsuits are coming*, WAUNAKEE TRIBUNE, Mar. 12, 2015, [http://www.hngnews.com/waunakee\\_tribune/news/article\\_47ecac3e-c8d2-11e4-9bbc-7f9b568a5814.html](http://www.hngnews.com/waunakee_tribune/news/article_47ecac3e-c8d2-11e4-9bbc-7f9b568a5814.html) (Wisconsin Attorney General stating that if Supreme Court denies certiorari, “the U.S. 7th Circuit Court of Appeals decision stands, and Wisconsin’s voter ID law will actually go in effect”).

that photo ID must be submitted, and early in-person voting—without any photo ID requirement—started *this morning*.<sup>3</sup> The State’s website, meanwhile, continues to advise voters to this day that they do not need to show photo ID for this election, and, even if it is immediately updated, many voters will not have effective notice.<sup>4</sup>

Plaintiffs have not succeeded on the merits of this appeal. But in the *immediate* short term, implementing Act 23’s photo requirement while voting is ongoing will result in fundamentally unfair treatment of voters and widespread confusion for the April 2015 elections. After this election, the State will have more time to implement Act 23’s photo ID requirement for future elections (barring any future successful challenge to the law). Accordingly, and particularly in light of the Supreme Court’s suspension of Act 23’s photo ID requirement under similar eleventh-hour circumstances last October, *see Frank v. Walker*, 135 S. Ct. 7 (2014), Plaintiffs respectfully request a short extension of the stay of the mandate (or if the mandate has already issued, a recall and stay the mandate) through the conclusion of the April 7, 2015 elections.

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<sup>3</sup> See Official Website of the City of Milwaukee, *Upcoming Election Dates*, <http://city.milwaukee.gov/UpcomingElectionDate857.htm#.VQUGFPPF-Ww>; Wis. Gov’t Accountability Bd., *Absentee Voting*, <http://gab.wi.gov/elections-voting/voters/absentee>; Wis. Stat. § 7.15(cm) (municipal clerks must send all mail-in ballots by the 21st day before the election if the request is made before that day); Wis. Stat. § 6.86(1)(b) (applications for in-person early voting may be made beginning on the 3rd Monday preceding the election, *i.e.*, March 23, 2015).

<sup>4</sup> Wis. Gov’t Accountability Bd., <http://www.gab.wi.gov> (last visited Mar. 23, 2015) (“Voters currently do not need to show a photo ID to receive a ballot.”).

## BACKGROUND

Wisconsin's Act 23 requires voters to show one of only a few forms of specified photo ID to cast a ballot. Since its enactment in May 2011, Act 23 has never been enforced in any federal election, except for a single low-turnout primary in February 2012. In April 2014, the district court issued a permanent injunction enjoining the law, *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), which a panel of the Seventh Circuit stayed on September 12, *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014). On September 26, the Seventh Circuit denied rehearing en banc of the stay order "by an equally divided court." *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014). Pointing out that "thousands of absentee ballots . . . were mailed to voters before the panel's order," *id.* at 499 (Williams, J., dissenting), Judge Williams, writing for the five dissenting circuit judges, concluded that the panel "should not have altered the status quo in Wisconsin so soon before [the November] elections. And that is true whatever one's view of the merits of the case," *id.* at 498. The Supreme Court agreed, and on October 9, it vacated the Seventh Circuit's stay of the district court's injunction, halting the implementation of Act 23 on the eve of the November 2014 elections. *Frank v. Walker*, 135 S. Ct. 7 (2014).

On October 6, while the parties were briefing the stay issue in the Supreme Court, the Seventh Circuit panel reversed the district court's decision on the merits. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). Judge Posner's *sua sponte* call for rehearing en banc was likewise denied by an equally divided vote. *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014). The Seventh Circuit panel then, after the Supreme

Court vacated the panel's initial stay of the district court's injunction, granted Plaintiffs' motion to stay the mandate pending the filing and resolution of a petition for a writ of certiorari. (ECF No. 79.) On January 7, 2015, Plaintiffs filed a petition for certiorari (ECF No. 82), which the Supreme Court denied today, March 23, 2015. As of the time of the filing of this emergency motion, the Supreme Court's order denying certiorari has not yet been received and filed in this Court.

## ARGUMENT

### I. THE COURT SHOULD EXTEND THE STAY OF THE MANDATE THROUGH THE CONCLUSION OF THE APRIL 2015 ELECTIONS.

Under Federal Rule of Appellate Procedure 41(b), this Court has the broad authority to extend the time for issuing a mandate in circumstances unrelated to a pending petition for a writ of certiorari.<sup>5</sup> *See, e.g., Shepard v. Madigan*, 734 F.3d

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<sup>5</sup> When a mandate is stayed for the purpose of filing a petition for certiorari, Rule 41(d)(2)(D) provides that the mandate must issue "immediately when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D). Here, however, as of the time this motion was filed, the Supreme Court's order denying certiorari has not yet been "filed" in this Court and the mandate procedure in Rule 41(d)(2)(D) is thus not yet in effect. *See, e.g., Alphin v. Henson*, 552 F.2d 1033, 1034 (4th Cir. 1977) (per curiam) (holding immediate issuance of mandate following the denial of certiorari not triggered until the denial is filed in the court of appeals). We therefore seek, on an emergency basis, to extend the stay for reasons independent of certiorari review, pursuant to this Court's broad authority under Rule 41(b). *See, e.g., id.* (granting "further stay" of mandate beyond denial of certiorari to resolve motion for second petition for rehearing); *cf. Stokley v. Ryan*, 705 F.3d 401, 403 (9th Cir. 2012) (stating the "court has the authority to issue a stay in 'exceptional circumstances'" following the denial of certiorari); *Coe v. Bell*, 210 F.3d 371 (6th Cir. 1999) (unpublished opinion) (same). If the mandate issues before this Court reviews this application, Plaintiffs respectfully request a temporary recall of the mandate for the same extraordinary reasons described. *See infra*.

748, 749 (7th Cir. 2013) (noting that the court had extended its *sua sponte* stay for the State to enact a new law at State's request for more time); *Alphin v. Henson*, 552 F.2d 1033, 1034 (4th Cir. 1977) (before order denying certiorari was filed in the court of appeals, court granted "further stay" of mandate "until the [motion for leave to file second petition for rehearing] could be decided"); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 897–98 (5th Cir. 1995) (continuing to withhold mandate after denial of certiorari, because court "retain[s] discretionary control over [the] mandate" where "stay is in effect (for a reason independent of the petition for certiorari)"). The extraordinary circumstances present here easily justify such an extension.

First and foremost, the imposition of Act 23's photo ID requirement will result in unfair treatment and after-the-fact invalidation of ballots since voting has already commenced. The State has been sending, and continues to send, mail-in absentee ballots to voters—*none* of which include photo ID instructions—and some presumably have since been returned. These are the precise circumstances under which the Supreme Court suspended operation of Wisconsin's voter ID law last October, *see Frank*, 135 S. Ct. at 7 (Alito, J., dissenting), and reason enough to extend the stay temporarily until the April 7, 2015 election has concluded, *see Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (denying relief in part because "[a]bsentee ballots have already been mailed to voters who will be overseas on election day"); *Frank*, 135 S. Ct. at 7 (Alito, J., dissenting) (in acknowledging that the Court had "a colorable basis" to block implementation of Act 23, finding it

“particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted”). Indeed, the circumstances here are even worse than they were last year, because voters are now, as of *this morning*, casting ballots *in-person* without being instructed to show photo ID. All of these already-cast ballots will likely be rendered void.<sup>6</sup> This after-the-fact disqualification of ballots, valid when cast, would be both unconscionable and unconstitutional. *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1075–76, 1078 (1st Cir. 1987) (concluding invalidation of ballots cast in accordance with “the instructions of the officials charged with running the election” based on a subsequent change in voting requirements constituted denial of due process).

Second, the State cannot practically implement the photo ID requirement midstream while voting is already underway, with only two weeks left to go.<sup>7</sup> The State would have to immediately retrain each of its 1,852 municipal clerks,<sup>8</sup> who in

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<sup>6</sup> *See, e.g.,* Memorandum from Michael Haas, Elections Div. Adm’r, on Voter Photo ID and Absentee Ballots for 2014 General Election, to Wis. Cnty. Clerks, Wis. Municipal Clerks, City of Milwaukee Election Comm’n, Milwaukee Cnty. Election Comm’n (Sep’t 16, 2014), <http://tinyurl.com/qy5asum>.

<sup>7</sup> Indeed, Neil Albrecht, the City of Milwaukee’s election commissioner, has described the immediate implementation of Act 23 as “somewhat problematic to the Spring Election,” and hopes this Court will continue to block the law until after the April 2015 elections. Ann-Elise Henzl, *Wisconsin’s Battle Over Voter Photo ID Law Could Soon Reach an End*, MILWAUKEE PUBLIC RADIO, Mar. 11, 2015, <http://wuwv.com/post/wisconsins-battle-over-voter-photo-id-law-could-soon-reach-end>.

<sup>8</sup> *See, e.g.,* Jason Stein & Larry Sandler, *1850 municipal clerks another complication*, J. SENTINEL, Apr. 6, 2011, <http://www.jsonline.com/news/statepolitics/119373789.html>.



turn will have to immediately retrain tens of thousands of poll workers, on implementing the photo ID requirement, all while voting is ongoing. Because Act 23's requirements are complex,<sup>9</sup> "the potential for chaos" in counting on effective last-minute retraining "is obvious," *South Carolina v. United States*, 898 F. Supp. 2d 30, 49 (D.D.C. 2012), and "poses a risk of interference with the rights of other . . . citizens, for example, absentee voters," *Williams v. Rhodes*, 393 U.S. 23, 35 (1968). The State and each of the 1,852 municipal clerks would also have to immediately inform all voters of the need to have a qualifying photo ID to vote or validate a previously-cast ballot in the time remaining in the voting period. This is a nearly impossible task since the State has long advised voters that they do *not* need a photo ID to obtain a ballot, and when Wisconsin's own legislature decided in 2011 that *at least eight months*—not the mere two weeks left here—would be necessary for an adequate "public informational campaign," outreach to voters, and actually "provid[ing] assistance" to voters needing it, 2011 Wis. Act. 23 §§ 95, 144(1)–(2). *See South Carolina*, 898 F. Supp. 2d at 49 (concluding that a legislature's provision of a lengthy period for voter education and poll-worker training before new voter ID

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<sup>9</sup> For example, clerks and poll workers must learn exactly what forms of ID are acceptable (*e.g.*, only some specialized college IDs, not regular student IDs) and what IDs are not (*e.g.*, Veterans' Administration ID), which IDs are valid despite varying permissible expiration dates, and whether and to what extent the name, photograph, signature, or address on the ID has to match voter registration data. Given that the annual turnover rate for municipal clerks is about 20-25%, Tr. 889–90, and that the law has not been enforced since February 2012, a substantial number of clerks—likely a majority—will never have been trained on Act 23.

requirements take effect “strongly suggest[s] that those steps cannot be adequately completed” in a truncated time, especially just weeks before an election).

Third, two weeks is insufficient time for voters who do not have a qualifying photo ID, and who had no reason to believe they needed one for this election, to obtain the necessary ID. The Wisconsin DMV has only 92 offices statewide, *Frank*, 17 F. Supp. 3d at 857, many of which are open two days a week only.<sup>10</sup> As a practical matter, this limited capacity makes it highly unlikely that the hundreds of thousands of registered voters without the requisite photo ID will learn of the new requirement and be able to get to an open DMV office in the next two weeks, even if the DMV could actually process all the applications. The prospect for obtaining a photo ID in time is especially bleak for voters who do not have the requisite supporting documentation, since there is no guarantee that the State can process their applications in time.<sup>11</sup> In fact, the verification process could take *eight weeks* for voters born in other states.<sup>12</sup>

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<sup>10</sup> Todd D. Milewski, *Clock is ticking to get a Wisconsin voter ID before November election, faster in some areas*, THE CAP TIMES, Sept. 15, 2014, [http://host.madison.com/news/local/writers/todd-milewski/clock-is-ticking-to-get-a-wisconsin-voter-id-before/article\\_d1346760-3cf1-11e4-9560-df1946b2278e.html](http://host.madison.com/news/local/writers/todd-milewski/clock-is-ticking-to-get-a-wisconsin-voter-id-before/article_d1346760-3cf1-11e4-9560-df1946b2278e.html).

<sup>11</sup> See Wis. Dep’t of Transp., *Document verification petition process for a Wisconsin Identification Card for voting purposes*, <http://www.dot.state.wi.us/drivers/drivers/apply/petition-process.htm> (“The DMV will attempt to process applications in less than seven business days, but completion time may be longer depending upon the responsiveness of the entities being contacted for verification.”).

<sup>12</sup> See Dee J. Hall, *Absentee ballots already cast will need photo ID, elections official says*, WIS. STATE J., Sept. 17, 2014, <http://host.madison.com/news/local/govt-and->

For much these same reasons, it is unsurprising that the Supreme Court prevented Act 23's photo ID requirement from taking effect mere weeks before the November 2014 elections. *See Walker*, 135 S. Ct. at 7; *see also id.* (Alito, J., dissenting) (suggesting Court's order vacating stay was based on "the proximity of the upcoming general election" and because "absentee ballots have been sent out without any notation that proof of photo identification must be submitted"); *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Just as it stayed the mandate immediately following the Supreme Court's suspension of the photo ID requirement for the November 2014 elections, this Court should prevent the implementation of a midstream voting change by extending the stay of the mandate for the short time left until the April 2015 elections are complete. In doing so, the Court will ensure the orderly administration of the elections and permit the voices of all registered Wisconsin voters to be heard on election day.

## **II. THE COURT SHOULD RECALL THE MANDATE IF IT HAS ALREADY ISSUED.**

In the event that the stay has already expired and the mandate has or is presently being issued, the Court should recall and stay the mandate through the conclusion of the April 7, 2015 elections for the same "extraordinary circumstances" described above, *see United States v. Reyes-Sanchez*, 509 F.3d 837, 838–39 (7th Cir. 2007) (acknowledging court of appeals' authority to recall its mandate "in

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extraordinary circumstances when inaction would lead to an injustice” (citing *Calderon v. Thompson*, 523 U.S. 538, 549–53 (1998)). These are the very sorts of “grave, unforeseen contingencies” against which a court’s power to recall is held. *Calderon*, 523 U.S. at 550.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to extend the stay of the mandate in this matter, or, if the mandate has already issued, to recall and stay the mandate, through the conclusion of the April 7, 2015 Spring General Election.

Dated: March 23, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2015, I electronically filed the foregoing Emergency Motion to Extend the Stay of, or Recall and Stay, the Mandate Through the Conclusion of the April 7, 2015 Elections with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 23rd day of March, 2015.

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