No. 14A352

In the
Supreme Court of the United States

RUTHELLE FRANK, et al.,
Applicants,
v.
SCOTT WALKER, et al.,
Respondents.

-and-

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, et al.,
Applicants,
v.
DAVID G. DEININGER, et al.,
Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE SEVENTH CIRCUIT STAY

**Directed to the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Seventh Circuit**

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On October 6, 2014, the Seventh Circuit issued its judgment reversing the district court's permanent injunction of Wisconsin's Act 23. Today plaintiffs sought a stay from the Seventh Circuit pending the timely filing and disposition of a petition for rehearing *en banc* and a petition for a writ of certiorari. If the Seventh Circuit denies plaintiffs' motion or has not acted by tomorrow, plaintiffs will file an emergency application asking this Court to stay the Seventh Circuit's judgment. Plaintiffs' application to vacate the September 12 stay order is not rendered moot by the Seventh Circuit's disposition on the merits because the stay order does not expressly expire upon the entry of judgment. If the court of appeals or this Court stays the October 6 judgment, the September 12 stay could remain in effect.

* * * * *

The State's response to plaintiffs' vacatur application acknowledges that 9% of Wisconsin registered voters—300,000 people—still do not have a qualifying photo ID needed to vote under Act 23 in the upcoming election. Opp. 25. The State further acknowledges that 25% of registered voters do not know that they need a qualifying photo ID to vote in the upcoming election. *Id.* at 3–4. And the State does not contest that it lacks sufficient funds for public information and outreach to educate voters or assist them in getting photo IDs between now and Election Day. In these circumstances, it is shameful for the State to enforce Act 23 on November 4.

That is not even the worst of it. Absent relief from this Court, the State will not count thousands of absentee ballots that were sent to voters before September

12 unless those voters come forward with a photo ID that was not previously required. Opp. 30. This bait-and-switch is not only unconscionable, it is unconstitutional. Numerous Wisconsin voters already have cast ballots in accordance with "the instructions of the officials charged with running the election." *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978). A State violates a citizen's right to vote—and their due process right to have the vote counted—by invalidating the ballot based on a subsequent change in voting requirements. *See, e.g.*, *id.*

The State's three responses regarding the after-the-fact disenfranchisement of absentee voters are woefully inadequate. First, the State says that the State's Government Accountability Board instructed local election officials to send a letter and follow up with a phone call informing absentee voters of the new photo ID requirement. Strikingly, the State does not say whether any of these communications have actually occurred. Second, the State asserts that since September 12, Milwaukee election officials have sent correct instructions for absentee voters to complete and return ballots that will be counted. That is cold comfort to voters outside Milwaukee and the thousands of voters who previously received instructions that did not mention that a photo ID must be included for the ballot to count. Third, the State argues that while absentee ballots may already have been "cast" by voters, those ballots have not undergone the "process of 'casting,'" which occurs only when an election official deposits the ballot into the proper ballot box on Election Day. Only a lawyer could appreciate such sophistry.

As far as the voter is concerned, the voting process is complete when the ballot is marked and returned to election officials.

The State asserts that its new Emergency Rule "is working, and voters are getting their IDs." Opp. 27. As support, the State says only that DMV reports receiving "an average of 15-18 applications each day for voters who don't have a birth certificate." *Id.* (quoting news article). But the State notably does not say whether any of these applicants have actually received an ID, which for voters born outside Wisconsin can take up to eight weeks under the State's new process. Dee J. Hall, *Absentee ballots already cast will need photo ID, elections official says*, News Republic (Sept. 16, 2014), http://tinyurl.com/pkfj353. In any event, 18 applications is nowhere near the 9,000 IDs the State would need to issue each day to close the gap by November 4. And the State's assertion that 292,000 IDs have been issued since 2011 does not change the district court's factual finding that an *additional* 300,000 registered voters in Wisconsin lack a qualifying photo ID under Act 23. *Id.*

The State also touts "extensive public promotion throughout Wisconsin that the voter ID requirement *will* be enforced in November." Opp. 4. But the State does not identify any outreach it has done beyond a press conference. Nor has the State allocated any funds to inform voters. As of this filing, the "Voter ID Update" page of the State's website advises readers that Act 23 remains enjoined. *See* "Voter ID Update," http://bringit.wi.gov/news (last accessed Oct. 7, 2014, 8:39 PM). Press accounts of this ongoing litigation are obviously inadequate to inform voters of the last-minute rule change, when one in four voters does not know that qualifying ID will be required to vote on Election Day.

Other than delayed enforcement of the law, the State identifies no harm from postponing enforcement of Act 23 until after the upcoming election. Opp. 24. The State does not argue that any in-person voter fraud has occurred in Wisconsin or likely would occur on November 4. The State just quips that "it does not have to be robbed before it can lock its doors." *Id.* That is an ironic and revealing turn of phrase. The State, purporting to act on an unfounded fear, astoundingly has no shame in calling its citizens robbers and in locking the doors to hundreds of thousands of registered voters on Election Day.

The State has it exactly backwards that vacating the Seventh Circuit's stay "would create a substantial risk of voter confusion." Opp. 4. The Seventh Circuit's stay—not plaintiffs' application to vacate—radically alters the status quo and would guarantee confusion at the polls. This Court should correct the Seventh Circuit's erroneous stay. That is the only course that protects registered voters from disenfranchisement caused by last-minute changes to the requirements for voting.

The State argues that this Court is unlikely to grant certiorari in this case because "there is no circuit split." Opp. 22. But this Court granted plenary review in *Crawford* on the basis that voter ID laws present recurring questions of national importance, not because of a circuit split. The State ignores the likelihood of certiorari on the separate question of whether the government may change requirements for registered voters to cast a valid ballot in close proximity to an election—here, after the election already is underway with absentee voting. On this question, the Seventh Circuit's stay conflicts with this Court's decisions, including *Purcell*, as well as decisions of other federal and state courts.

Contrary to the State's accusation, plaintiffs did not "wait[] too long to pursue equitable relief in this Court." Opp. 4. On September 17, three business days after the Seventh Circuit entered the stay, plaintiffs sought panel rehearing and rehearing *en banc*. On October 2, two days after the panel and five dissenting judges of the Seventh Circuit issued opinions on the rehearing requests, plaintiffs filed their emergency application asking this Court to vacate the stay. Plaintiffs are filing this reply within six hours after receiving the State's opposition. And tomorrow plaintiffs will file a separate application to stay barely 36 hours after the Seventh Circuit entered judgment. Plaintiffs acted with alacrity.

At bottom, the State remains placid that "the voter ID law will have little impact on the vast majority of voters." Opp. 35. The State chastises plaintiffs for focusing on "a small fraction of the electorate." *Id.* at 6. But the franchise does not belong only to the majority. It belongs to all voters—every fraction, big and small. This Court should not condone or allow the State to disenfranchise any voter, much less disproportionately Black and Latino voters. Applicants respectfully ask the Court to vacate the Seventh Circuit's stay of the district court's permanent injunction.

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Respectfully submitted,

/s/ Lisa S. Blatt

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