

Nos. 14-2058 & 14-2059

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

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

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, et al.,

Defendants-Appellants.

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

EMERGENCY PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC OF PANEL ORDER GRANTING MOTION TO STAY

KARYN L. ROTKER (*Counsel of Record*)
LAURENCE J. DUPUIS
American Civil Liberties Union of
Wisconsin Foundation
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
krotker@aclu-wi.org
ldupuis@aclu-wi.org

Charles G. Curtis, Jr.
Arnold & Porter LLP
Suite 620
16 North Carroll Street
Madison, Wisconsin 53703
Phone: (608) 257-1922
charles.curtis@aporter.com

Attorneys for *Frank* Plaintiffs-Appellees

Attorney for *LULAC* Plaintiffs-Appellees

(ADDITIONAL COUNSEL LISTED ON REVERSE SIDE)

NEIL A. STEINER
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3822
neil.steiner@dechert.com

CRAIG G. FALLS
Dechert LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3373
craig.falls@dechert.com

ANGELA M. LIU
Dechert LLP
77 West Wacker Drive, Suite 3200
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

DALE E. HO
SEAN J. YOUNG
American Civil Liberties Union
Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
dale.ho@aclu.org
syoun@aclu.org

JEREMY ROSEN
National Law Center on Homelessness
& Poverty
2000 M Street NW, Suite 210
Washington, DC 20036
(202) 347-3124
jrosen@nlchp.org

Attorneys for *Frank* Plaintiffs-Appellees

JOHN C. ULIN (*Counsel of Record*)
MARCO J. MARTEMUCCI
Arnold & Porter LLP
777 S. Figueroa Street, Suite 4400
Los Angeles, CA 90017
(213) 243-4000
john.uln@aporter.com
marco.martemucci@aporter.com

CARL S. NADLER
ETHAN J. CORSON
Arnold & Porter LLP
555 Twelfth Street NW
Washington, DC 20004
(202) 942-6130
carl.nadler@aporter.com
ethan.corson@aporter.com

NATHAN D. FOSTER
Arnold & Porter LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
(303) 863-1000
nathan.foster@aporter.com

PENDA D. HAIR
KATHERINE CULLITON-GONZÁLEZ
LEIGH M. CHAPMAN
Advancement Project
1220 L Street NW, Suite 850
Washington, DC 20005
(202) 728-9557
phair@advancementproject.org
kcullitongonzalez@advancementproject.org
lchapman@advancementproject.org

DANIEL OSTROW
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022
(212) 715-1000
daniel.ostrow@aporter.com

Attorneys for *LULAC* Plaintiffs-Appellees

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2058

Short Caption: Frank v. Walker

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Ruthelle Frank, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Frank Ybarra,
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National Law Center on Homelessness and Poverty; Dechert LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

not applicable

Attorney's Signature: s/ Karyn L. Rotker Date: May 16, 2014

Attorney's Printed Name: Karyn L. Rotker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: ACLU of Wisconsin Foundation, 207 E. Buffalo St., #325
Milwaukee, WI 53202

Phone Number: 414-272-4032 x221 Fax Number: 414-272-0182

E-Mail Address: krotker@aclu-wi.org

(cont'd from previous page) Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Anthony Judd, and Anthony Sharp

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not applicable

Attorney's Signature: s/ Laurence J. Dupuis Date: May 16, 2014

Attorney's Printed Name: Laurence J. Dupuis

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Address: ACLU of Wisconsin Foundation, 207 E. Buffalo St., #325
Milwaukee, WI 53202

Phone Number: 414-272-4032 x212 Fax Number: 414-272-0182

E-Mail Address: ldupuis@aclu-wi.org

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not applicable

Attorney's Signature: s/ Sean J. Young Date: May 16, 2014

Attorney's Printed Name: Sean J. Young

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: ACLU Voting Rights Project, 125 Broad Street, 18th Floor
New York, NY 10004

Phone Number: 212-284-7359 Fax Number: 212-549-2651

E-Mail Address: syoung@aclu.org; dale.ho@aclu.org; mrugg@aclu.org

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Appellate Court No: 14-2058

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Neil A. Steiner Date: June 5, 2014

Attorney's Printed Name: Neil A. Steiner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 1095 Avenue of the Americas
New York, NY 10036

Phone Number: +1 212 698-3822 Fax Number: +1 212 698 0480

E-Mail Address: neil.steiner@dechert.com

(cont'd from previous page) Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Anthony Judd, and Anthony Sharp

Appellate Court No: 14-2058

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Craig G. Falls Date: June 5, 2014

Attorney's Printed Name: Craig G. Falls

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

Address: 1900 K Street, NW
Washington, DC 20006

Phone Number: +1 202 261 3373 Fax Number: +1 202 261 3034

E-Mail Address: craig.falls@dechert.com

(cont'd from previous page) Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Anthony Judd, and Anthony Sharp

Appellate Court No: 14-2058

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Dale E. Ho Date: June 5, 2014

Attorney's Printed Name: Dale E. Ho

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Address: ACLU Voting Rights Project, 125 Broad Street, 18th Floor
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E-Mail Address: dale.ho@aclu.org; mrugg@aclu.org

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Appellate Court No: 14-2058

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Angela M. Liu Date: June 5, 2014

Attorney's Printed Name: Angela M. Liu

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

Address: 77 West Wacker Drive, Suite 3200
Chicago, Illinois 60601

Phone Number: +1 312 646 5816 Fax Number: +1 312 646 5885

E-Mail Address: angela.liu@dechert.com

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Appellate Court No: 14-2058

Short Caption: Frank v. Walker

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N/A

Attorney's Signature: s/ Jeremy Rosen Date: 6/6/2014

Attorney's Printed Name: Jeremy Rosen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: c/o National Law Center on Homelessness & Poverty
2000 M Street, NW, Suite 210 - Washington, DC. 20036

Phone Number: (202) 347-3124 Fax Number: (202) 638-2737

E-Mail Address: jrosen@nlchp.org

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2059

Short Caption: League of United Latin American Citizens of Wisconsin, et al., v. Deininger, et al

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Arnold & Porter LLP

Advancement Project

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PLEASE SEE ATTACHED LIST

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not applicable

Attorney's Signature: s/ Carl S. Nadler Date: 06/02/2014

Attorney's Printed Name: Carl S. Nadler, Esquire

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: Arnold & Porter LLP

555 Twelfth Street NW, Washington, D.C. 20004-1206

Phone Number: 202-942-6130 Fax Number: 202-942-5999

E-Mail Address: carl.nadler@aporter.com

Circuit Rule 26.1 DISCLOSURE STATEMENT (page 2)

(3) IF the party or amicus is a corporation:

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League of United Latin American Citizens; Greater Milwaukee Synod, Evangelical Lutheran Church of America; Evangelical Lutheran Church of America; and The League of Young Voters Education Fund

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2059

Short Caption: League of United Latin American Citizens of Wisconsin, et al., v. Deininger, et al

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Attorney's Printed Name: Charles G. Curtis, Esquire

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Address: Arnold & Porter LLP 16 North Carroll Street, Suite 620, Madison, Wisconsin 53703

Phone Number: 608-257-1922 Fax Number: 202-942-5999

E-Mail Address: charles.curtis@aporter.com

Circuit Rule 26.1 DISCLOSURE STATEMENT (page 2)

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League of United Latin American Citizens; Greater Milwaukee Synod, Evangelical Lutheran Church of America; Evangelical Lutheran Church of America; and The League of Young Voters Education Fund

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2059

Short Caption: League of United Latin American Citizens of Wisconsin, et al., v. Deininger, et al

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not applicable

Attorney's Signature: s/ Nathan D. Foster Date: 06/02/2014

Attorney's Printed Name: Nathan D. Foster, Esquire

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Arnold & Porter LLP
370 Seventeenth Street, Denver, Colorado 80202-1370

Phone Number: 303-863-2355 Fax Number: 303-832-0428

E-Mail Address: nathan.foster@aporter.com

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not applicable

Attorney's Signature: s/ John C. Ulin Date: 06/02/2014

Attorney's Printed Name: John C. Ulin, Esquire

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No X

Address: Arnold & Porter LLP

777 S. Figueroa Street, Suite 4400, Los Angeles, California 90017

Phone Number: 213-243-4228 Fax Number: 213-243-4199

E-Mail Address: john.ulín@aporter.com

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not applicable

Attorney's Signature: s/ James Eichner Date: 7/9/2014

Attorney's Printed Name: James Eichner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Advancement Project, 1220 L St., NW, Suite 850, Washington, DC 20005

Phone Number: 202-728-9557 Fax Number: 202-728-9558

E-Mail Address: jeichner@advancementproject.org

Circuit Rule 26.1 DISCLOSURE STATEMENT (page 2)

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Attorney's Signature: Penda D. Hair Date: 7/15/2014

Attorney's Printed Name: Penda D. Hair

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No X

Address: Advancement Project, 1220 L St., NW, Suite 850, Washington, DC 20005

Phone Number: 202-728-9557 Fax Number: 202-728-9558

E-Mail Address: phair@advancementproject.org

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2059

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not applicable

Attorney's Signature: s/ Leigh Chapman Date: 7/16/2014

Attorney's Printed Name: Leigh Chapman

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No X

Address: Advancement Project, 1220 L St., NW, Suite 850, Washington, DC 20005

Phone Number: 202-728-9557 Fax Number: 202-728-9558

E-Mail Address: lchapman@advancementproject.org

Circuit Rule 26.1 DISCLOSURE STATEMENT (page 2)

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Attorney's Signature: s/ Katherine Culliton-Gonzalez Date: 7/9/2014

Attorney's Printed Name: Katherine Culliton-Gonzalez

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Address: Advancement Project, 1220 L St., NW, Suite 850, Washington, DC 20005

Phone Number: 202-728-9557 Fax Number: 202-728-9558

E-Mail Address: kcullitongonzalez@advancementproject.org

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Attorney's Signature: Penda D. Hair Date: 7/15/2014

Attorney's Printed Name: Penda D. Hair

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Appellate Court No: 14-2059 (w/14-2058)

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Attorney's Signature: s/ Ethan J. Corson Date: 07/22/2014

Attorney's Printed Name: Ethan J. Corson, Esquire

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No X

Address: Arnold & Porter LLP 555 Twelfth Street, N.W., Washington, D.C. 20004

Phone Number: 202-942-6584 Fax Number: 202-942-5999

E-Mail Address: ethan.corson@aporter.com

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Attorney's Signature: s/ Marco J. Martemucci

Date: 07/22/2014

Attorney's Printed Name: Marco J. Martemucci, Esquire

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Address: Arnold & Porter LLP

777 S. Figueroa Street, Suite 4400, Los Angeles, California 90017

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Attorney's Signature: s/ Daniel Ostrow Date: 07/22/2014

Attorney's Printed Name: Daniel Ostrow, Esquire

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No X

Address: Arnold & Porter LLP 399 Park Avenue, New York, New York 10022

Phone Number: 212-715-1000 Fax Number: 212-715-1399

E-Mail Address: daniel.ostrow@aporter.com

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| <i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) | 3, 7 |
| <i>South Carolina v. United States</i> , 898 F.Supp.2d 30 (D.D.C. 2012) | 6, 7, 10 |
| <i>U.S. Student Ass'n v. Land</i> , 546 F.3d 373 (6th Cir. 2008) | 10 |
| <i>Westermann v. Nelson</i> , 409 U.S. 1236 (1972) | 8 |
| <i>Williams v. Rhodes</i> , 393 U.S. 23 (1968) | 7, 9 |
| STATUTES | |
| Fed. R. App. P. 2 | 1, 4 |
| Fed. R. App. P. 35(a) | 4 |
| Fed. R. App. P. 35(a)(2) | 4 |
| Fed. R. App. P. 35(b) | 1 |
| Fed. R. App. P. 35(b)(1)(B) | 1 |
| Fed. R. App. P. 40 | 1 |
| Wis. Stat. § 5.02(6m)(a)-(f) | 8 |
| OTHER AUTHORITIES | |
| Wright, Miller & Cooper, <u>Federal Practice & Procedure: Jurisdiction 3d</u> (1999) | 4 |

STATEMENT REQUIRED BY FED R. APP. P. 35(b)(1)

Pursuant to Fed. R. App. P. 2, 35(b), 40 Plaintiffs-Appellees file this Emergency Petition for Rehearing En Banc, which should be granted for two reasons:

First, the panel decision involves a question of exceptional importance under Fed. R. App. P. 35(b)(1)(B) because it imposes a radical, last-minute change to procedures for conducting an election that is already underway. The risk of disenfranchisement from imposing such a last-minute disruption far outweighs the non-existent harm to the state of maintaining the status quo and not requiring photo ID for one more election. Supreme Court precedent and other Circuits uniformly caution against such eleventh-hour changes to the election laws, even where those courts have approved such changes for future elections. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Second, the panel's extraordinary decision to grant a stay pending appeal – which altered rather than maintained the status quo – ignored the four-factor test for such relief set forth by the United States Supreme Court in *Nken v. Holder*, 556 U.S. 418, 434 (2009), and the Court's admonition against last-minute reversals of lower court election law rulings in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Specifically, the panel decision failed to consider that issuance of the stay and the consequent slapdash implementation of a complex law – which was designed to have a rollout period of 8 months before a primary and 16 months before a general election – “will substantially injure” the rights of voters without ID, and that “the

public interest lies” strongly against fundamentally changing the rules of an election on the eve of the election, particularly where absentee voting is *already underway*. In addition, the panel decision failed to consider seriously one of the “most critical” factors. Defendants will not be “irreparably injured absent a stay,” *Nken*, 556 U.S. at 434, if the election proceeds without a photo ID requirement, as has been the case in all but one election in Wisconsin’s history.

STATEMENT OF THE CASE

Wisconsin adopted Act 23 in the spring of 2011 to require voters to present one of a limited number of forms of photo ID to vote in-person or, with very limited exceptions, by absentee ballot. Act 23 was in effect for only one low-turnout primary in February 2012, after which it was enjoined by state and federal courts. In light of the injunctions, Wisconsin suspended the photo ID requirement itself and all implementation of the Act, including training of the 1852 municipal clerks who run Wisconsin elections and tens of thousands of poll workers, and all public information and educational outreach to voters for two and a half years.

In this case, the district court found that approximately 300,000 voters do not have the most common form of ID that would now be needed to vote on November 4 (exactly 7 weeks from today), which is an unexpired driver’s license or state-issued photo ID. *See Frank v. Walker*, No. 11–CV–01128, 12–CV–00185, 2014 WL 1775432, at *11 (E.D. Wis. Apr. 29, 2014). It is not only unreasonable, but also mathematically, logically, and physically impossible that by November 4, hundreds of thousands of voters will learn about the need for ID, especially given the total

suspension of public information about the law for two and one-half years, collect multiple required documents, get to a DMV office, and obtain the ID suddenly required by staying the District Court's injunction last Friday afternoon. Doing so would require Wisconsin to issue some 6,000 photo IDs *per day* between now and the election.

Nevertheless, on September 12, 2014, a panel of this Court granted Defendants' motion for a stay of the district court's injunction forbidding implementation of the photo ID requirement. By granting a stay on the eve of this year's elections, with thousands of absentee ballots already in the mail, the panel decision forces a radical change in election procedures with no time for preparation, training, or outreach. Such a radical change is improper when a state's "election machinery is already in progress." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Moreover, the panel's decision referenced submissions by Defendants tendered several hours *after* oral argument, *see* ECF 61, concerning the state's new policies (apparently adopted a day earlier) responding to the Wisconsin State Supreme Court's decision in *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 62-63 (July 31, 2014) (*NAACP*). That case, recognizing the "severe burdens" imposed by Act 23, required the Wisconsin Department of Motor Vehicles (DMV) to make free IDs available to those who would otherwise have to pay for documents like birth certificates to get ID. 2014 WI 98, ¶ 70. After six weeks, with no official action, counsel for Defendants announced for the first time during oral argument on September 12, 2014, that DMV had issued new emergency rules that purport to

address the identified deficiencies. Before and during argument, Plaintiffs had no opportunity to view these rules, much less question or dispute them. Defendants filed them after oral argument concluded. ECF 61. Soon thereafter, and without affording Plaintiffs any opportunity to respond, the panel issued the stay, reasoning that *NAACP* and the state's new policies "reduce[] the likelihood of irreparable injury" to plaintiffs and "change the balance of equities." ECF 64 at 2.

The panel's decision to allow immediate implementation of Act 23 this close to an election will sow chaos at the polls and undermine election integrity and public confidence in the November 4 election. The decision raises questions of voting rights and election administration that are of exceptional public importance. Fed. R. App. P. 35(a)(2). The risk of disenfranchisement and electoral chaos from granting a stay far outweighs the abstract harm to the state in delaying photo ID for one more election. Plaintiffs therefore request that this Court reconsider the panel's decision or review the panel's decision en banc on an expedited basis and vacate the stay order, which will simply preserve the status quo while the panel reviews the merits of the appeal.¹ See Fed. R. App. P. 35(a) (providing for en banc review of an appeal "or other proceeding"); *Flower Cab Co. v. Petite*, 685 F.2d 192, 195 (7th Cir. 1982) (Court of Appeals has power to grant rehearing or rehearing en

¹ Plaintiffs request that consideration of this petition be expedited pursuant Fed. R. App. P. 2. Time is of the essence to avoid a rush to implement Act 23 without adequate training or preparation, which is already causing confusion among voters, elections officials, clerks and poll workers that will inevitably interfere with election administration and lead to the unnecessary and unlawful disenfranchisement of many voters. See 16A Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 3d § 3948, at 25 (1999); 1967 Advisory Committee Note to Fed. R. App. P. 2; *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

banc of a stay granted by a panel of the Court).

ARGUMENT

As the Supreme Court explained in *Nken*, courts must consider four factors when deciding whether a stay is warranted:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

556 U.S. at 434 (citations omitted). “The first two factors of the traditional standard are the most critical.” *Id.* The “party requesting a stay bears the burden of showing that the circumstances justify” a stay. *Id.* Here, by failing to balance the dramatic harm to the public and to voters who currently lack ID in changing the rules of an election at the eleventh-hour against the lack of any irreparable harm to the state in waiting to implement photo ID for one election, the panel’s decision fails to heed the proper standard articulated in *Nken*, and should be overturned.

I. FUNDAMENTALLY CHANGING THE RULES JUST BEFORE AN ELECTION WILL SUBSTANTIALLY HARM THIRD PARTIES AND THE PUBLIC INTEREST WITH NO APPRECIABLE BENEFIT TO THE STATE

In issuing the stay, the panel made no finding as to the effect of its decision on other parties and the public interest. This omission is particularly glaring because this factor points decisively against a stay.

A. No court has permitted a voter ID law to go into effect this close to an election based on last-minute changes to the law.

Last-minute orders changing election procedures – particularly from an

appellate court reversing a district court – are strongly disfavored, because “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell*, 549 U.S. at 4-5. No court has permitted a voter ID law to take effect based on purported ameliorative changes adopted this close to an election. For example, in *South Carolina v. United States*, 898 F.Supp.2d 30, 46 (D.D.C. 2012), the state’s photo ID law was changed during litigation to include an ameliorative provision “designed to relieve any potentially problematic aspects” of the law, which the three-judge court found cured the law’s burdens and discriminatory impact. Nevertheless, the court ruled that the ID law could not be implemented until after the upcoming November 2012 election due to concerns that a rush to implementation “cannot be completed in the short time before the 2012 elections” and would result in “chaos.”

In the course of just a few short weeks, the law by its terms would require: that more than 100,000 South Carolina voters be informed of and educated about the law’s new requirements; that several thousand poll workers and poll managers be educated and trained about the intricacies and nuances of the law. . . . and that county election boards become knowledgeable of the law. . . . New forms need to be created, and notices posted and mailed, among other things. . . .

[T]hose steps cannot be completed in the short time before the 2012 elections. . . . The statute’s own requirements that education and training begin nearly a *year* before the first elections under Act R54 strongly suggest that those steps cannot be adequately completed in just four weeks. . . .

[T]he Court also considers it important that South Carolina voters without R54-listed photo IDs would have very little time before the 2012 elections to choose the option of obtaining one of the free qualifying photo IDs.

Id. at 49-50. *See also Applewhite v. Com.*, 617 Pa. 563, 568, 54 A.3d 1,4 (September

18, 2012), and *Applewhite*, 2012 WL 4497211 at *2 (Cmmw Ct. Oct. 2, 2012) (decision on remand); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006).

Courts considering other last-minute changes to election rules have routinely delayed implementation of proposed changes, even if the party seeking the change was likely to prevail. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968) (denying relief, despite unconstitutionality of statute, because “the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens” and “relief cannot be granted without serious disruption of election process”) (decided Oct. 15); *Reynolds v. Sims*, 377 U.S. at 585 (“where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief”) (remedial order on July 25); *Moore v. Brown*, 448 U.S. 1335, 1340 (1980) (Powell, J., Circuit Justice) (on Sept. 5, declining to stay preliminary injunction affecting November election even though district court may have erred).² The wisdom of refraining from imposing a dramatic change on the eve

² *See also Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139 (1st Cir. 2012) (on Sept. 18, denying relief where, “on the eve of a major election, plaintiff seeks to disrupt long-standing election procedures, which large portions of the electorate have used”); *id.* at 139, n. 9 (“even where plaintiff has demonstrated a likelihood of success, issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own.”); *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (on Oct. 16, ruling that, even though campaign finance law might well be unconstitutional, “given the imminent nature of the election, we find it important not to disturb long-established expectations that might have unintended consequences . . .”); *cf., Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (even if candidate had a good case on merits, “any remedial order would throw the state’s preparations for the election

of an election applies with special force here.

B. Absentee voters and the public interest will be harmed by the stay.

Before the stay was issued, nearly 12,000 absentee voters' ballots were mailed *without* photo ID instructions,³ and hundreds of absentee votes are estimated to have *already been cast*.⁴ Those voters did not know that the rules of the game would change, *i.e.*, that their ballots will now not be counted without a follow-up submission of a photocopy of accepted photo ID, Wis. Stat. § 5.02(6m)(a)–(f); they may well be disfranchised. Changing the rules in the middle of the absentee voting process runs contrary to the public interest in smooth and effective administration of the voting laws, and constitutes a basis for denying a stay. *See, e.g., Nader*, 385 F.3d at 736 (denying relief in part because “[a]bsentee ballots have already been mailed to voters who will be overseas on election day”); *Westermann v. Nelson*, 409 U.S. 1236 (1972) (Douglas, Circuit Justice) (“election machinery is already under

into turmoil”).

³ See Patrick Marley and Jason Stein, *Appeals panel reinstates Wisconsin's voter ID law*, J. SENTINEL (Sept. 12, 2014), <http://www.jsonline.com/news/appeals-panel-questions-why-voter-id-shouldnt-be-in-place-nov-4-b99350157z1-274904111.html>, The record was clear before the stay that this was likely to be the case. See ECF 53 (Plaintiffs-Appellees' Opposition to Defendants-Appellants' Expedited Motion to Stay Permanent Injunction Pending Appeal and ECF 56-2 at 3 (Declaration of Kevin J. Kennedy).

⁴ See Dee J. Hall, *Absentee ballots already cast will need photo ID, elections official says*, NEWS REPUBLIC (Sept. 16, 2014), http://www.wiscnews.com/baraboonewsrepublic/news/state-and-regional/article_3de3068c-18f3-5887-bb10-3648b28d6eab.html; Patrick Marley, *Voters who returned absentee ballots must send ID copies*, J. SENTINEL (Sept. 16, 2014), <http://www.jsonline.com/news/statepolitics/ballot-fight-is-brewing-as-state-scrambled-on-voter-id-b99352576z1-275311521.html>.

way, printing the ballots. Absentee ballots have indeed already been sent”); *Fishman v. Schaeffer*, 429 U.S. 1325, 1330 (1976) (Marshall, Circuit Justice) (denying “extraordinary relief” where absentee ballots were being printed and distributed).⁵ Even Defendants’ trial witness municipal clerk Diane Hermann-Brown admitted the stay “complicates the election for clerks because it comes as voters are already requesting and in some cases receiving absentee ballots.”⁶

C. Voters without ID will be substantially harmed by a stay, given their lack of information and inability to rapidly obtain ID.

On the eve of an election, “the Court of Appeals was required to weigh . . . considerations specific to election cases,” and to “give deference to the discretion of the District Court.” *Purcell*, 549 US at 4. Failure to do so constitutes error. *Id.* Yet the panel failed to consider the “substantial harm” to 300,000 registered voters that the district court found lack ID,⁷ many of whom do not use ID in their daily lives or who have a form of ID, like Veterans’ Administration ID, that is not acceptable for voting.⁸ *Frank* 2014 WL 1775432, at 2. These voters have no reason to know they

⁵ See also *Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000) (inappropriate to change party-identification procedures after absentee ballots already printed and mailed); *Perry v. Judd*, 471 Fed. Appx. 219, 2012 WL 120076, at *8 (4th Cir. Jan. 17, 2012) (change in rules after absentee ballots already printed would be improper); cf., *Williams*, 393 U.S. at 35 (last minute ballot change could interfere with rights of absentee voters).

⁶ Jason Stein and Patrick Marley, *Absentee ballot mailings halted in push to restart voter ID law*, J. SENTINEL, <http://www.jsonline.com/news/statepolitics/clerks-elections-officials-scramble-to-reinstate-voter-id-law-b99351689z1-275146501.html>

⁷ Many voters who have obtained ID since 2011 were not new voters without ID, but voters renewing ID or replacing lost or stolen ID cards. *Frank v. Walker*, 11-CV-01128, 2014 WL 1775432 at 38 (E.D. Wis. Apr. 29, 2014).

⁸ The stay will also impose substantial harm on student voters. Regular student ID

would even need ID to vote less than two months from now, because the Government Accountability Board (GAB), which administers elections, suspended all public information and outreach about the law in March 2012. *NAACP*, 2014 WI 98 at ¶¶ 15-16. *Cf. South Carolina*, 898 F. Supp. 2d at 49-50 (insufficient time for voters to learn requirements and obtain ID); *U.S. Student Ass'n v. Land*, 546 F.3d 373, 387-8 (6th Cir. 2008) (voter confusion that would result from stay constitutes harm to others and to public interest). But Act 23 will offer no fail-safe affidavit option for voters without ID, rendering this law materially different from Indiana's. *Contrast, Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 185-6 (2008).

Although Act 23 required public information and voter assistance, *id.* at §§ 95, 144(1), GAB had no intention of even developing a new plan for public information and outreach until 2015, much less a plan that can be implemented to reach voters in less than two months to ensure that these voters understand Act 23, how to get ID, and the new procedures for obtaining it.⁹ Defendants' emergency rules will not even be published until September 17.¹⁰ Other than press releases,

cards are not acceptable for voting in Wisconsin and colleges' plans to produce alternative voting IDs that expired no more than two years after issuance were reportedly put on hold after the injunctions. Jason Stein and Patrick Marley, *Absentee ballot mailings halted in push to restart voter ID law*, J. SENTINEL, <http://www.jsonline.com/news/statepolitics/clerks-elections-officials-scramble-to-reinstate-voter-id-law-b99351689z1-275146501.html>

⁹ *See*,

http://gab.wi.gov/sites/default/files/event/74/09_04_14_gab_complete_open_session_a_genda_material_20954.pdf (at 76; p. 79 of PDF) (stating that GAB will be in a better position to develop plan for effective use of state funds to meet voter ID law objectives after Jan. 1, 2015).

¹⁰ ECF 61-1, third link at p. 3 (Letter to Legislative Reference Bureau.)

there has been no apparent public information or outreach, and the state “has no money available” for further public outreach.¹¹ Furthermore, it does not appear that DMV staff have been fully and uniformly trained to implement the new procedures.¹² DMV has only 92 offices statewide, (*Frank*, 2014 WL 1775432 at 15); and in 48 counties representing over a quarter of the state’s population, those offices are open only two days a week for a total of ten hours.¹³ DMV is simply incapable of processing a substantial number of applications from the 300,000 registered voters without ID.

Nor are the new rules a panacea. All voters still have to obtain and produce proof of identity and residency and travel to DMV.¹⁴ Voters who do not have birth certificates in their possession must complete a petition form with information relevant to the date and circumstances of birth. This initiates a two-step verification procedure. First, the DMV shall provide the birth information to the department of health services and attempt to obtain verification of the

¹¹ See Marley, *supra* note 4.

¹² A “DMV hotline worker told us they're still getting up to speed with the new procedure and that it just came down yesterday, so clearly, the agency is still working through this.” “New voter ID law rules cause confusion,” *CBS58 News* (Sept. 13, 2014, updated Sept. 14, 2014), viewed 9/14/14 at <http://www.cbs58.com/news/local-news/New-voter-ID-law.html>)

¹³ Todd Milewski, *Clock is ticking to get a Wisconsin voter ID before November election, faster in some areas*, THE CAP TIMES, 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

¹⁴ See, e.g., Ann-Elise Henzl, *Agencies, Advocates Await Word on How to Help Wisconsin Voters Obtain Photo IDs*, MILWAUKEE PUBLIC RADIO, <http://wuwm.com/post/agencies-advocates-await-word-how-help-wisconsin-voters-obtain-photo-ids>.

information. ECF 61-2 at 8 (Sec. 11 (creating Wis. Adm. Code Trans. 102.15(5m)(2)1.) DMV warns Wisconsin-born voters that the process may take seven business days to complete. Attachment A. In addition, efforts to implement matching procedures involving different database formats routinely experience severe and unexpected problems and delays.¹⁵ If that does not verify required information, then DMV must notify the applicant that the applicant needs to provide other documents, and a DMV administrator or his delegate then has discretion to accept alternatives such as hospital records, baptismal certificates, or other such records. *Id.* at 8-9 (creating Wis. Adm. Code Trans. 102.15(5m)(2)2.) ECF 61-2 at 8 (Sec. 11 (creating Wis. Adm. Code Trans. 102.15(5m)(2)1.)

Moreover, DMV currently has an agreement to verify birth information only with *Wisconsin's* vital records office.¹⁶ Even though Election Day is now only seven weeks away, GAB has indicated that the verification process could take *eight weeks* for voters born in other states.¹⁷ Indeed, no formal verification system has been set up for these voters. The state represented at oral argument that this process is ongoing, but the state has reportedly done no more than notify other states of its rules.¹⁸ DMV itself is telling voters that “for voters born in another

¹⁵ See, e.g., Coverage in jeopardy for 40% of HealthCare.gov enrollees, <http://www.consumerreports.org/cro/news/2014/06/40-percent-of-healthcare-gov-accounts-in-jeopardy/index.htm> (describing database matching problems in implementation of HealthCare.gov).

¹⁶ (WI Dept. of Trans. <http://www.dot.state.wi.us/news/releases/031-nr20140910.html>)

¹⁷ See Hall, *supra* note 4.

¹⁸ Ann-Elise Henzl, *Voter ID: No Birth Certificate Needed to Apply for Wisconsin ID*

state or country, the length of the process will depend upon how long it takes the other government agency to respond to Wisconsin's request for information."

Attachment A.

Thus, thousands of Wisconsin voters – especially those born elsewhere – are unlikely to benefit from the new procedures in time to vote. Almost 47% of eligible Milwaukee voters without ID were born outside Wisconsin. (A.187.) This population is disproportionately comprised of Blacks and Latinos, who are more likely than whites to lack both ID and a document needed to get ID, such as birth certificates, *Frank* 2014 WL 1775432 at 29-30.¹⁹ The fate of voters whose birth records are not verified through this matching process will rest in the hands of front-line DMV employees, who will be charged with deciding when and whether alternative documents are acceptable, a situation that has led to arbitrary and disparate treatment in the past and has not gotten ID to voters. *See Frank*, 2014 WL 1775432 at 16 n. 18 and n. 20. ECF 61-2 at 8-9 (Wis. Adm. Code Trans. 102.15(5m)(2)2). *Cf. Louisiana v. United States*, 380 U.S. 145, 153 (1965).

D. A fundamental change in election procedures just before an election will sow confusion among voters and elections officials.

The panel's decision to allow Act 23 to go into effect at this late date virtually

at DMV Office, <http://wuwvm.com/post/voter-id-no-birth-certificate-needed-apply-wisconsin-id-dmv-office>.

¹⁹ See also, *Frank* 11-CV-01128, 2014 WL 1775432 at 30 n. 37 ("Many Latino voters who were born in Puerto Rico will have trouble obtaining their birth certificates because the Puerto Rican government annulled all birth certificates of individuals born there prior to 2010. . . . 16.7% of eligible Latino[voters] in Milwaukee County were born in Puerto Rico and 38.4% of those born in Puerto Rico ha[ve] yet to obtain a new birth certificate.")

guarantees substantial chaos in election administration and resulting voter confusion and disenfranchisement in the November elections. This will be contrary to the public interest, and will *undermine* voter confidence.

The necessary steps to implement Act 23 – which originally contemplated an eight-month implementation period – cannot be completed in time for this fall’s election cycle.²⁰ *See* Fr. Ex. 635 at 74 (deposition testimony of former GAB Elections Division head Robinson) (“This is a new sweeping law with a lot of nuances, and for poll workers who do not do this as a matter of their daily jobs . . . the facts that should be known, the basic facts, in fact, are many times not known.”). The GAB will have to figure out how to retrain the 1,852 municipal clerks who run elections in Wisconsin, roughly *one-fifth* of all the clerks in charge of elections in the nation,²¹ as well as ensuring immediate retraining of tens of thousands of poll workers. This process is neither easy nor straightforward, *see, e.g.*, Doc. 53-1 at 15, as Act 23 is extremely complex. 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,

²⁰ Act 23’s photo ID provisions were scheduled to have a “soft implementation” beginning on July 1, 2011, and to not take mandatory effect until the February 2012 low turnout primary. *Id.*, § 144 (2); <http://docs.legis.wisconsin.gov/2011/related/acts/23> ; Tr. 908.

²¹ *See, e.g.*, Jason Stein and Larry Sandler, *1850 municipal clerks another complication*, J. SENTINEL, <http://www.jsonline.com/news/statepolitics/119373789.html> These clerks also have a 20-25% annual turnover rate, Tr. 889-90, and thus many were never trained on voter ID.

photograph, signature, or address on the ID has to match voter registration data.²²

II. ALLOWING THE SAME ELECTION PROCEDURES TO REMAIN IN PLACE FOR ONE MORE ELECTION DOES NOT RESULT IN IRREPARABLE HARM TO THE STATE

When weighed against such a substantial risk of election official confusion and disenfranchisement, the error of the panel's decision is all the more important because of its failure to consider "whether the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434. Other circuits have rejected stay motions when the government has not sustained its burden on this factor. *See, e.g., Ohio State Conf. NAACP v. Husted*, 2014 WL 4494938, (6th Cir. Sept. 12, 2014) (denying stay where "Defendants did not carry their burden to demonstrate that they will suffer more than a mere 'possibility' of irreparable harm.") *Id.*

CONCLUSION

It is not too late to avert this impending disaster. GAB Executive Director Kevin Kennedy has stated publicly that his agency would cease efforts to implement this law "if ordered to stop by a court order."²³ For the reasons set forth herein, this Court should so order. Plaintiffs request that this Court reconsider or reconsider en banc its Sept. 12, 2014 ruling and vacate the stay that was issued.

²² For example, a common problem while voter ID was in effect was poll workers *incorrectly* requiring that the photo ID have the voting address. Tr. 1699-1700.

²³ *See* Marley, *supra* note 4.

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Respectfully submitted,

CHARLES G. CURTIS, JR.
Arnold & Porter LLP
Suite 620
16 North Carroll Street
Madison, Wisconsin 53703
(608) 257-1922
charles.curtis@aporter.com

s/ John C. Ulin
JOHN C. ULIN (*Counsel of Record*)
MARCO J. MARTEMUCCI
Arnold & Porter LLP
44th Floor
777 South Figueroa Street
Los Angeles, California 90017
(213) 243-4000
john.ulिन@aporter.com
marco.martemucci@aporter.com

CARL S. NADLER
ETHAN J. CORSON
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-6130
carl.nadler@aporter.com
ethan.corson@aporter.co

PENDA D. HAIR
KATHERINE CULLITON-GONZÁLEZ
LEIGH M. CHAPMAN
Advancement Project
Suite 850
1220 L Street, N.W.
Washington, D.C. 20005
(202) 728-9557
phair@advancementproject.org
kcullitongonzalez@advancementproject.org
lchapman@advancementproject.org

s/ Karyn L. Rotker
KARYN L. ROTKER (*Counsel of Record*)
LAURENCE J. DUPUIS
American Civil Liberties Union of
Wisconsin Foundation
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
krotker@aclu-wi.org
ldupuis@aclu-wi.org

DALE E. HO
SEAN J. YOUNG
American Civil Liberties Union
Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2693
dale.ho@aclu.org
syoung@aclu.org

NEIL A. STEINER
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3822
neil.steiner@dechert.com

CRAIG G. FALLS
Dechert LLP
1900 K Street NW
Washington, DC 20006
(202) 261-3373
craig.falls@dechert.com

ANGELA M. LIU
Dechert LLP
77 West Wacker Drive, Suite 3200
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

NATHAN D. FOSTER
Arnold & Porter LLP
370 17th Street, Suite 4400
Denver, Colorado 80202
(303) 863-1000
nathan.foster@aporter.com

DANIEL OSTROW
Arnold & Porter LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000
daniel.ostrow@aporter.com

Attorneys for *LULAC* Plaintiffs-Appellees

JEREMY ROSEN
National Law Center on
Homelessness & Poverty
2000 M Street NW, Suite 210
Washington, DC 20036
(202) 347-3124
jrosen@nlchp.org

Attorneys for *Frank* Plaintiffs-
Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2014, I electronically filed the foregoing Emergency Petition for Rehearing and Suggestion for Rehearing En Banc of Panel Order Granting Motion to Stay 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 16th day of September, 2014.

s/ Karyn L. Rotker

KARYN L. ROTKER (*Counsel of Record*)

American Civil Liberties Union of
Wisconsin Foundation

207 East Buffalo Street, Suite 325

Milwaukee, WI 53202

(414) 272-4032

krotker@aclu-wi.org

ldupuis@aclu-wi.org

Attorney for *Frank* Plaintiffs-Appellees

s/ John C. Ulin

JOHN C. ULIN (*Counsel of Record*)

Arnold & Porter LLP

777 S. Figueroa Street, Suite 4400

Los Angeles, CA 90017

(213) 243-4000

john.ulín@aporter.com

marco.martemucci@aporter.com

Attorney for *LULAC* Plaintiffs-Appellees

Nos. 14-2058 & 14-2059

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

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

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, et al.,

Defendants-Appellants.

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

DECLARATION OF Jeremy N. Rosen

I, Jeremy N. Rosen, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am one of the attorneys for the Plaintiffs in the above-captioned action. I submit this Declaration in support of Plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc.

2. I make this Declaration based on my own personal knowledge and based upon the sources described, true and correct copies of which are attached hereto.
3. Attached as Attachment A is a true and correct copy of an information sheet that, upon information and belief, on Sept. 15, 2014, the Wisconsin Division of Motor Vehicles began providing to voters who apply for ID cards using the new petition process.
4. Attached as Attachment B is a true and correct copy of a signed Declaration of Maribeth Witzel-Behl.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 16th day of September, 2014.

s/ Jeremy N. Rosen

Jeremy N. Rosen

Florida Bar # 0145718

One of the Attorneys for Plaintiffs

National Law Center on Homelessness & Poverty

2000 M Street, NW – Suite 210

Washington, DC. 20036

Telephone: (202) 347-3124

Fax: (202) 628-2737

E-mail: jrosen@nlchp.org

EXHIBIT A

ID CARD PETITION PROCESS INFORMATION

You have applied for a Wisconsin Identification (ID) card for voting using the Petition Process.

If you were born in Wisconsin, the entire process – from applying at the DMV service center to receiving your card in the mail – will typically take seven business days. If you were born in another state or country, the length of the process will depend upon how long it takes the other government agency to respond to Wisconsin's request for information.

Once your information has been verified, you can expect the following:

- You will receive a letter/e-mail from the Wisconsin DMV that the process has been successfully completed. Included with this correspondence will be an ID card receipt that includes your photo. This photo receipt is valid identification for voting in Wisconsin.
- Your ID card will be mailed to you at the address you provided on your application. The card will arrive approximately 3-5 business days after you receive your letter and photo receipt.

If any of the contact information you provided on your application or petition changes before you hear from the Wisconsin DMV, please contact us at 608-266-1069. Having accurate and up-to-date contact information for you will help us get you your ID card quickly.

Please be advised that ID cards issued via this petition process cannot be "upgraded" to a REAL ID or Driver's License without showing complete documentation.

Thank you.



EXHIBIT B

Before the United States Court of Appeals
for the Seventh Circuit

Ruthelle Frank, et al

Plaintiffs-Appellees,

V

Scott Walker, in his official capacity
as Governor of the State of Wisconsin

Defendant-Appellee.

Declaration of Maribeth Witzel-Behl

Maribeth Witzel-Behl declares as follows:

1. I am the Municipal Clerk of the City of Madison, the second-largest municipality in Wisconsin. The Clerk's Office, for which I am responsible, oversees and supervises the conduct of elections, including the provision of absentee ballot to registered voters who request them, in Madison.
2. The City of Madison has approximately 172,000 registered voters. Typical turnout for a midterm election is nearly 80% of registered voters. My office oversees 86 polling places on Election Day, and hires, trains, and assigns 2,600 to 3,000 poll workers to administer the election at the City's polling places.
3. I am aware that until Friday, September 12, 2014, the Voter ID law had been enjoined the order of the United States District Court for the Eastern District of Wisconsin, but as a result of an order by the United States Court of Appeals for the 7th Circuit, the Voter ID Law is now in effect for the November 4, 2014 election in Wisconsin.
4. The implementation of the Voter ID law at this late date, approximately seven weeks before the election, likely will cause significant confusion for voters and poll workers and cause disruption and delays at the polls, due to the short time available to train poll workers and to provide public information and education to voters. Even in the very low-turnout 2012 primary, the only election at which the Voter ID has ever been in effect, many voters were turned away at the polls because they lacked ID. Those problems will be exponentially magnified at a general election, when turnout is much higher.

5. As of Friday, September 12, 2014, the Clerk's Office had labeled and stuffed approximately 3,000 envelopes for absentee ballots (for military/overseas, permanent absentees and requests to-date) to prepare them for mailing no later than Thursday, September 18, 2014. The envelopes contained instructional letters that do not include information on Voter ID. We had instructional materials collated for another 4,500 absentee ballots. We do not have replacement instructions available that include Voter ID information. We are awaiting direction from the Wisconsin Government Accountability Board regarding instructions for absentee voters. Such instructions were not available as of the date and time I signed this affidavit.
6. As of Friday, September 12, 2014, I had finalized the training schedule for poll workers who will work at Madison's 86 polling places. After learning of the Court's order putting the Voter ID law into effect for the November 4 election, I have determined that all poll workers will need to attend two training sessions, one devoted exclusively to Voter ID. I am trying to book locations for an additional 60 training sessions that will need to take place within the next seven weeks for 3,000 poll workers. As of the date and time I signed this affidavit, I have not received training materials for poll workers from the Wisconsin Government Accountability Board.
7. The City of Madison includes a large campus, the University of Wisconsin-Madison, which has 40,000 students. The City has six polling places on the UW-Madison campus. My office works closely with the UW-Madison on election access for students. Through my contacts with UW-Madison officials, I am aware that the UW-Madison developed a separate "voter ID" to be issued on request to students, because the standard student ID does not comply with the requirements of the Voter ID law. To my knowledge, the UW-Madison has not publicized the availability of the special student Voter ID to students since the Voter ID law has been enjoined. Further, the Voter ID law includes special requirements for students who use a university-issued ID card to vote, including a requirement that the student voter presents proof of enrollment. The poll workers for the on-campus polling places as well as other polling places in neighborhoods where students reside will require training on these special requirements.
8. Our website and many of our documents must be updated and reprinted with new information relating to the Voter ID law. This will include updating instructional and reference documents that will go to the polls on Election Day.

9. We will need to print many more provisional ballots for this election for voters who appear at the polls without a qualifying ID. Provisional ballot processing will have to be included in training and instructional materials.
10. I will need to request an additional \$96,000 from the mayor and City Council to cover the trainings and poll worker payroll costs related to voter ID. These costs are substantially higher than otherwise would be required to implement a change in election law due to the very short time remaining before the November election. Additional funding will be needed for voter outreach and for reprinting materials to be used at the polls. Those costs have yet to be determined, but will be substantial.
11. I declare under penalty of perjury, that the foregoing is true and correct.
Executed on this 15th day of September, 2014.

Maribeth Witzel-Behl

Maribeth Witzel-Behl

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2014, I electronically filed the foregoing Declaration of Jeremy N. Rosen 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 16th day of September, 2014.

s/ Karyn L. Rotker

KARYN L. ROTKER (*Counsel of Record*)
American Civil Liberties Union of
Wisconsin Foundation
207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
krotker@aclu-wi.org
ldupuis@aclu-wi.org

Attorney for *Frank* Plaintiffs-Appellees

s/ John C. Ulin

JOHN C. ULIN (*Counsel of Record*)
Arnold & Porter LLP
777 S. Figueroa Street, Suite 4400
Los Angeles, CA 90017
(213) 243-4000
john.ulín@aporter.com
marco.martemucci@aporter.com

Attorney for *LULAC* Plaintiffs-Appellees