Elections: Injunction Against Wisconsin Voter ID Law is Stayed

Ruthelle Frank v. Scott Walker, Nos. 14-2058, 2059 (7th Cir. Sept. 30, 2014).

Against a spirited dissent, the Eighth Circuit has upheld a late-breaking challenge to Wisconsin's voter ID law, staying a lower court injunction and allowing the ID requirement to apply to the November 2014 elections—including votes via absentee ballot.

In April 2014 a federal District Court enjoined the implementation of Wisconsin's voter ID law, which requires a photo ID for voting, including via absentee ballot. The State asked the Seventh Circuit to stay the federal injunction so the ID law could be implemented in the fall 2014 election. A Seventh Circuit panel granted the stay. Plaintiffs moved for reconsideration.

HELD: The panel granted the reconsideration and upheld its stay. Subsequently, a request for rehearing en banc was denied by a divided court.

DISCUSSION: In a per curiam decision the Seventh Circuit panel affirmed the stay. Based on the Supreme Court's upholding a similar Indiana voter ID law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the panel determined Wisconsin was likely to succeed. It further noted that there is an important public interest in implementing laws enacted through the democratic process until a final determination is made, and pointed out that the voter ID law was democratically-enacted by the Wisconsin legislature.

Plaintiffs argued that the court was imposing a "radical, last-minute change" on the State, and that the State would be unable to absorb the consequences of the change in the 53 days before the November election. The Seventh Circuit disagreed, pointing out that election officials themselves that asked for the stay, that the State had implemented the law three years prior and used it in a primary before it was enjoined by the District Court, and that the court did not "impose" anything on the State, but simply stated in its order that the "State of Wisconsin may, if it wishes (and if it is appropriate under rules of state law), enforce the photo ID requirement in this November's elections." As a result, if seven weeks was too short a time, the court said, the State could simply choose not to implement the law.

Finally, the court rejected the plaintiff's argument that "equitable considerations" counseled in favor of leaving the injunction in place given that many voters, in September 2014, lacked the ID necessary to vote in November 2014. The court noted the District Court had not made a determination as to the ultimate number of voters that had tried but had been unable to obtain the necessary ID to vote. It also noted that Wisconsin had passed legislation making birth certificates—key documentation for obtaining a photo ID—free to indigent applicants. While around 9% (slightly under 300,000 voters) of the State's roughly 3 million voting population lacked the ID, the Seventh Circuit stated that such a statistic "appears to reflect how many persons have not taken the necessary time [to get the ID], rather than a number of persons who have been disfranchised."

DISSENT: Chief Judge Wood and Circuit Judges Posner, Rovner, Williams, and Hamilton would have voted to hear the matter en banc. The judges noted that the stay invalidates all the absentee ballots that have already been mailed in and any mailed in between its publication and the election because the voters, having followed the directions on the absentee ballot, did not

present the ID now necessary. Moreover, they argued the stay injured 10% of the State's registered voters who lack the ID needed to vote. They put this in context by highlighting that in 2010 the Wisconsin governor's race was decided by 124,638 votes, while the senate race was decided by 105,041 votes. The fact that more than 90% of Wisconsin's registered voters already had voter IDs was unavailing: "the right to vote is not the province of just the majority. It is not just held by those who have cars and so already have driver's licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age. It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state's registered voters; for the State to take this position is shocking." Moreover, the dissenters highlighted that it is impossible for those registered voters to obtain the necessary documents to vote because to do so would require the State to issue 6,000 licenses a day in the 26 business days between the date of the decision and Election Day; most DMV's in Wisconsin are only open two days a week.

It was also noteworthy to the dissenters that continuing the injunction would not irreparably harm Wisconsin. The state had had hundreds of elections without voter IDs and it had failed to provide any evidence at all of the harms the law aimed to prevent. It did not point to one instance of voter impersonation at polls in the state. Thus, waiting until the 2016 election cycle to implement whatever law is ultimately deemed valid in the courts would not harm the state or its voters.

According to the dissent, the court's application of *Crawford* in this instance was "dead wrong." The *Crawford* holding was based on a "complete and utter lack of evidence" that the Indiana voter ID law burdened potential voters. There, the petitioners failed to name a single resident who would be unable to vote as a result of the new law. Furthermore, the petitioner's expert report was rejected, the record failed to provide the number of registered voters without ID in Indiana, depositions did not provide concrete evidence of the burden the law would impose on Indiana voters, and that the record did not speak to the burdens the law would impose on indigent voters or voters with religious objections to being photographed.

In contrast, the challengers in Wisconsin had created a "record-heavy" case with detailed evidence on the burdens the law placed on voters and had prepared witnesses and presented qualified experts. The dissent thus concluded the lower court's injunction against the implementation of the state's voter ID law should have remained in place until after the 2014 election.

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