Nos. 14-2058 & 14-2059

IN THE 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 (LULAC) 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,
CASE NOS. 11-CV-1128 & 12-CV-285,
THE HONORABLE LYNN S. ADELMAN, PRESIDING

DEFENDANTS-APPELLANTS' EXPEDITED MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL

The purpose of this expedited motion is to see that Wisconsin's voter photo identification requirement goes into effect for the November 2014 election.

The voter ID requirement created by 2011 Wisconsin Act 23 ("Act 23") has been in litigation since fall 2011. Voters were required to show ID at the polls during the February 2012 primary election, but Act 23 was enjoined in March 2012 in state court. Recently, the Wisconsin Supreme Court resolved two cases challenging the law under the Wisconsin Constitution in the State's favor, thereby lifting all state court injunctions against Act 23. *See League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ___ Wis. 2d ___, ___ N.W.2d ___, and *Milwaukee Branch of the NAACP v. Walker*, 2014 WI 98, ___ Wis. 2d ___, ___, N.W.2d ___ (*hereinafter* "*NAACP*"). The decisions are attached.

The Wisconsin Supreme Court created an exception procedure for voters who will need to obtain a free photo ID card from the Wisconsin DMV but who cannot obtain the ID without paying a fee to a government agency for a birth certificate or other document. *NAACP*, 2014 WI 98, ¶¶ 69-71. This exception procedure will likely decrease the burden that voters might experience in complying with Act 23.

The district court permanently enjoined Act 23 on April 29, 2014, and entered final judgments in Plaintiffs'[1] favor. (*Frank* Dist. Ct. Dkt. #196; *LULAC* Dist. Ct. Dkt. #128) (attached). It concluded that Act 23 is facially unconstitutional under the Fourteenth Amendment and violates Section 2 of the Voting Rights Act of 1965. (*Frank* Dist. Ct. Dkt. #195, *hereinafter*, the "Decision") (attached).

[1]Plaintiffs-appellees in these consolidated appeals will be referred to collectively as Plaintiffs and as the *Frank* Plaintiffs and the *LULAC* Plaintiffs where appropriate. Defendants-appellants will be referred to collectively as Defendants.

On May 12, 2014, Defendants timely filed notices of appeal. (*Frank* Dist. Ct. Dkt. #199; *LULAC* Dist. Ct. Dkt. #131.) This Court has jurisdiction over the *Frank* and *LULAC* appeals pursuant to 28 U.S.C. § 1291. (*Frank* Dist. Ct. Dkt. #200; *LULAC* Dist. Ct. Dkt. #132.) This Court, of its own motion, consolidated the appeals for briefing and disposition. (No. 14-2058, 7th Cir. Dkt. #3.)

The district court committed reversible errors:

- The district court's interpretation and application of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), was erroneous. The district court facially invalidated Act 23 as unconstitutional when the trial evidence showed that more than 90% of Wisconsin voters already have a qualifying ID.
- The district court's novel and incorrect interpretation of Section 2 of the Voting Rights Act was inconsistent with the plain language and meaning of the law. The district court's approach erroneously required the invalidation of a facially race-neutral law due to pre-existing racial discrimination and diminished economic prospects for minorities, both of which have absolutely nothing to do with obtaining or showing photo ID to vote.
- The district court's permanent injunction was impermissibly broad and constituted an abuse of discretion. Instead of enjoining only the enforcement of Act 23, the district court purported to make itself the "voter photo ID czar." The district court required that *any* amended version of Act 23 that the Wisconsin Legislature might enact must be pre-cleared by the district court prior to its enforcement.

On May 12, 2014, Defendants filed motions with the district court requesting that it stay its permanent injunction pending appeal. (*Frank* Dist. Ct. Dkt. #201; *LULAC* Dist. Ct. Dkt. #133) (attached). The motions have been fully briefed since June 6, 2014. On August 1, 2014, Defendants' undersigned counsel sent letters to the district court requesting that it dispose of the pending motions. (*Frank* Dist. Ct. Dkt. #210; *LULAC* Dist. Ct. Dkt. #140) (attached). The district court has failed to afford the relief requested. Fed. R. App. P. 8(a)(2)(A)(ii).

This Court should stay the district court's permanent injunction pending appeal to permit Act 23 to go into effect for the November 2014 election.

LEGAL STANDARD

Federal Rule of Appellate Procedure 8(a)(2) permits a motion for relief pending appeal. The motion must "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2)(A)(ii).

> The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). . . . To determine whether to grant a stay, we consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007); *Sofinet v. INS,* 188 F.3d 703, 706 (7th Cir. 1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300. As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707.

In re A & F Enters., Inc. II, 742 F.3d 763, 766 (7th Cir. 2014).

Defendants are likely to prevail on appeal because of numerous reversible errors by the district court. The Wisconsin Supreme Court's recent decisions upholding Act 23 also bolster its validity. The balance of harms tips in Defendants' favor because the district court's impermissibly broad permanent injunction causes irreparable harm to the State. It prevents Defendants and local election officials from enforcing a voting regulation designed to preserve and protect the right to vote of all eligible Wisconsin voters.

BACKGROUND FACTS

These consolidated appeals are fully briefed in this Court. Defendants' briefs on appeal are being filed as attachments to this motion, as are the three volumes of Defendants' consolidated separate appendix. Pages in Defendants' appendix will be cited herein as "A. ___." The briefs and appendix describe and illustrate the relevant trial evidence and the district court's findings. Key facts follow.

The district court found that roughly 91% of Wisconsin registered voters possess qualifying ID to vote under Act 23. (Decision at 23.) The district court found that approximately 300,000 Wisconsin registered voters lack qualifying ID. (*Id.*)

The district court made no factual finding as to how many of the approximately 300,000 people who lack ID would be unable to obtain ID or even how many would face an unreasonable—as opposed to an incidental—burden in obtaining one. Instead, the district court found only that "Act 23 will deter a substantial number of eligible voters from casting a ballot." (Decision at 37.)

The district court found that 97.6% of whites, 95.5% of blacks, and 94.1% of Latinos in Milwaukee County who lack qualifying ID have the necessary documentation to obtain ID from the Wisconsin DMV. (Decision at 62 ("only 2.4% of white eligible voters lack both a qualifying ID and one or more of the underlying documents needed to obtain an ID, while 4.5% of Black and 5.9% of Latino eligible voters lack both an ID and one underlying document.").) The district court made no factual finding regarding the total number of Wisconsin registered voters who lack both a form of qualifying ID and the primary documents necessary to get one.

Scores of Wisconsinites have taken advantage of the Wisconsin Department of Transportation Division of Motor Vehicles' free state ID card program for voting. There were more than 217,000 free ID cards issued by the DMV for voting as of October 31, 2013, (A. 637), with more than 74,000 going to voters in Milwaukee County. (A. 296.) Of the free state ID cards issued in Milwaukee County, 22.0% went to whites, 64.4% went to blacks, and 11.3% went to Hispanics. (*Id.*)

In *NAACP*, the Wisconsin Supreme Court addressed concerns regarding some voters who lack a birth certificate or other document necessary to obtain a free ID card from DMV. *See NAACP*, 2014 WI 97, ¶¶ 58-65. The court was concerned that some voters may experience a "severe" burden if they are required to pay a fee to obtain a birth certificate, which would be used at DMV to obtain a free state ID card. *Id.*, ¶ 61. To alleviate its concern, the court made what it called a "saving construction" of the Wisconsin Administrative Code provisions that govern the

documents that must be shown to DMV to obtain a free state ID card under Wis. Stat. § 343.50(5)(a)3. *Id.*, ¶ 66.[2]

Wisconsin Admin. Code § Trans 102.15(3)(a) and (b) were construed by the court to create an exception procedure:

> ¶ 69 In order to harmonize the directive of Wis. Stat. § 343.50(5)(a)3., which says no fees; statutes such as Wis. Stat. § 69.22, which impose payment of fees; and Wis. Admin. Code § Trans 102.15(3)(a), which requires certain documents for which electors may be required to pay fees to government agencies, we construe § Trans 102.15(3)(b). We do so to preserve the constitutionality of § 343.50(5), as follows: One who petitions an administrator pursuant to § Trans 102.15(3)(b) for an exception is constitutionally "unable" to provide those documents and they are constitutionally "unavailable" to the petitioner within our interpretation of § Trans 102.1[5](3)(b), so long as petitioner does not have the documents and would be required to pay a government agency to obtain them.
>
> ¶ 70 Stated otherwise, to invoke an administrator's discretion in the issuance of a DOT photo identification card to vote, an elector: (1) makes a written petition to a DMV administrator as directed by Wis. Admin. Code § Trans 102.15(3)(b) set forth above; (2) asserts he or she is "unable" to provide documents required by § Trans 102.15(3)(a) without paying a fee to a government agency to obtain them; (3) asserts those documents are "unavailable" without the payment of such a fee; and (4) asks for an exception to the provision of § Trans 102.15(3)(a) documents whereby proof of name and date of birth that have been provided are accepted. § Trans 102.15(3)(b) and (c). Upon receipt of a petition for an exception, the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner.

NAACP, 2014 WI 98, ¶¶ 69-70. The *NAACP* court concluded that following the above exception procedure "is not a severe burden on the right to vote." *Id.*, ¶ 71. The court then applied rational basis scrutiny and determined that Act 23 is constitutional in light of the exception procedure. *Id.*, ¶¶ 71-76.

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[2]The Wisconsin Supreme Court is the final arbiter and interpreter of state law, and federal courts must accept a state supreme court's interpretation of its state's laws. *See Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971) ("As the case reaches us we must, of course, accept the construction that the Supreme Court of Wisconsin has put upon the statute.").

The *NAACP* exception procedure will likely eliminate the potential financial burden that many voters who lack a birth certificate could experience when obtaining a free state ID card from the DMV to vote.

ARGUMENT

I. The District Court's Constitutional Analysis Was Erroneous.

A. The District Court Erred In Holding That *Crawford* Is Not Controlling Precedent.

First, the district court erred in its interpretation of *Crawford*. *Crawford* was a 6-3 decision. *Id.* at 184-204 (lead opinion of Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy); *id.* at 204-09 (concurrence by Justice Scalia, joined by Justices Thomas and Alito). The Supreme Court found Indiana's law facially constitutional after applying the *Anderson/Burdick* balancing test. *See id.* Yet, the district court here held that "because a majority of the Court could not agree on how to apply the [*Anderson/Burdick*] test, Crawford is not binding precedent on that matter." (Decision at 9.)

A legal error is enough to establish an abuse of discretion. *See 3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001). *Crawford* controls. The district court committed an error of law by holding that *Crawford* is not binding as to how the Supreme Court applies the *Anderson/Burdick* balancing test to sub-groups of voters. (Decision at 9.)

B. The District Court's Application Of The *Anderson/Burdick* Balancing Test Was Erroneous.

Second, the district court's application of the *Anderson/Burdick* balancing test was erroneous. On balance, the State's legitimate interests outweigh any potential burdens that might be experienced by only a small fraction of the voters who currently lack qualifying ID.

On the "burdens" side of the balance, the district court erred when it made no finding as to how many of the approximately 300,000 voters who lack qualifying ID would be unable to obtain ID or even how many would face an unreasonable—as opposed to an incidental—burden in obtaining one. The district court cryptically found that "a substantial number" of the approximately 300,000 ID-less voters will face an obstacle to obtaining qualifying ID. (*See* Decision at 26, 37, 38.)

The district court's erroneous *Anderson/Burdick* balancing test analysis was plagued by its lack of fact-finding with regard to the magnitude of the supposed burdens that will be created by Act 23. Some quantity, "a substantial number" of the Wisconsin voters who lack qualifying ID, will be "deterred from voting" by Act 23. (Decision at 37.) The district court had before it eight days of trial testimony from dozens of witnesses, hundreds of pages of expert reports, and thousands of pages of exhibits. Neither the district court, nor Plaintiffs' counsel, nor Plaintiffs' experts have been able to identify whether it is 1,000 or 100,000 or even 300,000 voters who will be unconstitutionally burdened by Act 23. That number—even if it were an estimate to the nearest *100,000 voters*—matters in reviewing the correctness of the district court's conclusions because Act 23 has been facially

invalidated as to *all* Wisconsin voters. (Decision at 39.) If 299,999 of the 300,000 voters without ID can obtain an ID tomorrow by incurring only incidental burdens and minimal effort, Act 23 is unquestionably constitutional.

Obtaining a free state ID card from the DMV will not be burdensome for the vast majority of Wisconsinites. The Supreme Court agrees that obtaining ID is not a burden, even when a voter must pay money to obtain a birth certificate. *See Crawford*, 553 U.S. at 198 ("For most voters who need [photo ID] the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents and posing for a photograph surely does not qualify as a substantial burden, or even a significant increase over the usual burdens of voting."); *see also id.*, n. 17 (upholding Indiana's law while finding that "Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate" and that "Some States charge substantially more."); *id.* at 209 (Scalia, J., concurring). In Wisconsin, the cost of obtaining a birth certificate is likely to be a non-issue after *NAACP*.

Even accepting the "burdens" of Act 23 as the district court found them, the district court's *Anderson/Burdick* analysis erred in weighing the "burdens" of complying with Act 23 by only vaguely quantifying their magnitude and scope. It is not possible to discern the magnitude or scope of the alleged burdens created by Act 23 from a reading of the district court's Decision or from the trial evidence that Plaintiffs presented.

Additionally, the district court's balancing test analysis did not factor in its finding that more than 90% of Wisconsin voters already possess qualifying ID.

(Decision at 26, 38.) The voter ID requirement is a restriction only for eligible voters who do *not* have ID. *See Crawford*, 553 U.S. at 198. Act 23 would be no burden whatsoever for the more than 90% of Wisconsin voters who already have an ID. *See id.* (addressing the negligible impact of "life's vagaries" for those who already have ID). In light of *Crawford*, the district court simply went too far by facially invalidating Act 23. *See id.* at 203 ("Finally, we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.").

The anecdotal examples of particularly burdened voters that the district court relied upon were not buttressed by evidence regarding what makes exemplary the experiences of a fraction of a fraction of Wisconsin voters who lack ID. The trial evidence did not indicate a larger, endemic problem. The district court did not find facts whether or to what extent Plaintiffs' unusual examples of particularly burdened voters or the hearsay accounts of community leaders regarding burdened voters were representative of any wider population of voters.

What the Supreme Court found lacking in *Crawford* is also lacking here. There is no finding as to how many people would face a substantial burden. The Supreme Court emphasized quantifying the burden in *Crawford*. *See Crawford*, 553 U.S. at 200 ("it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden on them that is fully justified."); *id.* at 201 ("From this limited evidence we do not know the *magnitude* of the impact [the voter ID law] will have on indigent voters in Indiana."); *id.* at 202, n. 20 (the

lack of public transportation "tells us nothing about *how often* elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV, either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party."). Anecdotes or even the recognition that some voters would face heavier burdens than others was not enough to sustain a facial challenge in *Crawford*. Yet, here the district court made a facial ruling striking down Act 23 on similar facts and equally inconclusive findings. (Decision at 38-39.)

On the "benefits" side of the *Anderson/Burdick* balance, the district court's analysis was incorrectly dismissive of the State's legitimate and important interests in voter ID and did not give them appropriate weight. (Decision at 38-39.) With regard to the State's interest in preventing and deterring voter impersonation fraud, for example, the Supreme Court has never required proof of past voter-impersonation fraud to find that there is a legitimate and important interest in preventing such fraud. *Crawford* did not require such proof, yet it upheld Indiana's law based, in part, upon the state's fraud prevention rationale. *See Crawford*, 553 U.S. at 194 ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."). The district court's Decision inappropriately discounted the State's interests. (Decision at 11 ("because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future, this particular state interest has very little weight.").)

Act 23 is designed to prevent and deter potential voter fraud. It was not necessary for the State to prove that voter impersonation fraud has occurred or is occurring; the State can be proactive and enact measures to decrease the potential for such fraud. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

A recent voter fraud prosecution in Milwaukee County accentuates the State's anti-fraud interest. On June 24, 2014, the *Milwaukee Journal Sentinel* reported that a Shorewood, Wisconsin, man had been charged with 13 counts of voter fraud. The man is alleged to have cast multiple ballots in four elections in 2011 and 2012, including five in the 2012 gubernatorial recall election. "Robert D. Monroe, 50, used addresses in Shorewood, Milwaukee and Indiana, according to the complaint, and cast some votes in the names of his son and his girlfriend's son." Bruce Vielmetti, *Shorewood man charged with 13 counts of voter fraud*, Milwaukee Journal Sentinel (June 24, 2014), *available at http://www.jsonline.com/news/crime/shorewood-man-charged-with-13-counts-of-voter-fraud-b99297733z1-264322221.html* (last visited August 5, 2014). The Wisconsin Supreme Court has cited Monroe's case as an example. *See League*, 2014 WI 97, ¶ 54 n. 12; *NAACP*, 2014 WI 98, ¶ 73 n. 18.

Voter fraud in Wisconsin is not a myth, impossibility, or irrational concern. It is real. The district court was wrong to greatly discount the State's significant interest in preventing and deterring voter fraud, particularly in light of the *Crawford* Court's express recognition of that interest. *Crawford*, 553 U.S. at 195-97.

With regard to the State's interests in promoting public confidence in the integrity of elections and promoting orderly election administration, the Supreme Court has expressly recognized these interests. *See Crawford*, 553 U.S. at 196-98. The district court erroneously discounted the State's additional interests in promoting voter confidence in the integrity of elections and promoting orderly election administration, contrary to *Crawford*. (*See* Decision at 38.)

On balance, the State's interests in fraud prevention and deterrence, promoting voter confidence in the integrity of elections, and promoting orderly election administration outweigh the speculative "burdens" that the district court identified but could not quantify despite extensive trial evidence from which to draw. Furthermore, the district court neglected to give appropriate weight to its own finding that more than 90% of Wisconsin voters already have qualifying ID when applying the *Anderson*/*Burdick* balancing test. The district court should have concluded that Act 23 is facially constitutional. It concluded the opposite, and its judgment is likely to be reversed on appeal.

II. The District Court Erred When It Concluded That Act 23 Violates Section 2 Of The Voting Rights Act.

The district court erred when it concluded that Act 23 violates Section 2 of the Voting Rights Act. There were two main errors: (1) the district court applied a novel and incorrect Section 2 test; and (2) the trial evidence did not demonstrate a Section 2 violation based upon the "totality of circumstances." 42 U.S.C. § 1973(b). The district court's judgments are likely to be reversed.

The district court's erroneous Section 2 analysis boils down to this:

- Minorities have experienced and experience racial discrimination.
- Because minorities have experienced and experience racial discrimination, they are more likely than whites to be poor.
- Because minorities are more likely than whites to be poor, they are less likely than whites to possess or need to possess a driver license or other qualifying ID.
- Because minorities are less likely than whites to possess or need to possess qualifying ID, they are more likely than whites to be excluded from voting by Act 23.

(Decision at 68; *see also id.* at 64-67.)

The district court's piecemeal logic illustrates its attenuated and speculative approach to finding a Section 2 violation. Act 23 is not the cause of prohibited discrimination in the district court's analysis. Instead, in the analysis Act 23 is several steps removed from being a *potential* cause of minority voting rights being denied or abridged. Each successive step in the district court's analysis relies upon a correlation or likelihood—not direct causation—to make an inferential leap to the ultimate conclusion: prohibited discrimination. This rationale is inconsistent with the plain language and meaning of Section 2, which focuses on "results," not likelihoods or correlation. 42 U.S.C. § 1973(a).

The radical nature of the district court's analysis is demonstrated by its lack of a limiting principle. For example, assume that a plaintiff could prove that minority voters are less likely to own automobiles than white voters. Further assume that

this is because minorities are more likely to be poor and that the higher rate of poverty among minorities is the result of historical or current societal discrimination. Under the district court's analysis, all existing voting practices that require in-person voting may constitute a violation of Section 2 because in-person voting is more difficult without an automobile. This cannot be the law because a mere correlation between not having an automobile and experiencing difficulty in traveling to the polls to vote does not prove that one circumstance *caused* the other. Under Section 2, "proof of a causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (*en banc*) (citations and internal quotation marks omitted) (*hereinafter* "*Gonzalez*"), *aff'd on unrelated grounds*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

The "creates a barrier" test that the district court devised and then applied was erroneous. (Decision at 52 ("I conclude that Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not.").) Under Plaintiffs' and the district court's concept of Section 2, any new voting procedure that necessitates a voter's expenditure of money would be suspect because minorities have historically been discriminated against, resulting in disproportionate rates of minority poverty and lower rates of ID possession. (*See* Decision at 64-65.)

Income and wealth are not protected classes under the Voting Rights Act. Race is. *See* 42 U.S.C. § 1973(a) ("on account of race"). Income and wealth disparities that are created or exacerbated by societal discrimination cannot be used as proxies to substitute for proof that Act 23—a facially race-neutral law—results in racial discrimination. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). The district court's approach requires invalidation of a race-neutral law because of a supposed racially disparate impact that does not flow from the law itself, but from the way in which past and present societal discrimination has affected the economic status of minorities.

Section 2 must be read to require that a plaintiff prove not only that a disproportionate number of minorities currently lack a qualifying ID, but that the burdens of obtaining a qualifying ID are substantially more difficult for minority voters and so substantial that they would keep a large and disproportionate number of minorities from voting. This is the essence of the "causation" that must be proven to establish a Section 2 violation. *See Gonzalez*, 677 F.3d at 405 (the "voting qualification" itself must be the cause of a racially disparate impact on voting rights). Such a test is consistent with the plain language of Section 2 and the mandatory "results in" inquiry. 42 U.S.C. § 1973(a). Unlike the district court's erroneous "creates a barrier" test, Decision at 52, Defendants' test would focus on whether the enforcement of a new voting law will result in prohibited racial discrimination based upon the totality of circumstances, not on speculation about

likelihoods. (*See* Decision at 52, 68.) The district court's judgments are likely to be reversed.

III. The District Court's Permanent Injunction Was Impermissibly And Unnecessarily Broad.

Act 23 is constitutional and is consistent with the Voting Rights Act. However, assuming Act 23 is illegal, the proper legal remedy would be for the district court to permanently enjoin Defendants from enforcing *Act 23*. The proper legal remedy is not to enjoin in perpetuity *any* voter photo identification requirement and to also require the State to come before the district court to get permission to enforce a different voter photo ID requirement than Act 23. (*See* Decision at 69.) This is what the district court did—it effectively named itself the "voter photo ID czar." The district court's permanent injunction was an abuse of discretion that is likely to be reversed on appeal.

In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the Supreme Court cautioned federal courts about the breadth of injunctions holding a state statute unconstitutional. The Supreme Court stated that federal courts should "limit the solution to the problem," *id.* at 328, and reminded federal courts that their "constitutional mandate and institutional competence are limited." *Id*. at 329.

The rule in this Circuit is that district courts must tailor injunctive relief "to the scope of the violation found." *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604-605 (7th Cir. 2007) (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 817 (7th Cir. 2005), *rev'd on other grounds*, 547 U.S. 9, 23 (2006)). Injunctions

must comply with "the traditional equitable principle that injunctions should prohibit no more than the violation established in the litigation or similar conduct reasonably related to the violation." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841 (7th Cir. 2013); *see also Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995).

The district court did not limit its "solution" to the problem that it perceived in Act 23. Instead of enjoining only Defendants' enforcement of Act 23, the district court enjoined much more. And it required an unprecedented pre-approval procedure by which the State must get judicial permission prior to enforcing *any* future voter photo ID law. (Decision at 69.) The district court effectively pre-judged future voter photo ID laws and signaled to the Wisconsin Legislature that amending Act 23 would be a lost cause before this district judge.[3] (*Id.* ("given the evidence presented at trial showing that Blacks and Latinos are more likely than whites to lack an ID, it is difficult to see how an amendment to the photo ID requirement could remove its disproportionate racial impact and discriminatory result.").) As a practical matter, under the district court's permanent injunction Wisconsin can never have *any* voter photo ID requirement when minority voters "are more likely than whites to lack an ID." (*Id.*)

No case provides authority for a federal district judge to exercise equitable power to require pre-approval of a future law before it can be enforced by the executive

[3]After the district court's Decision, Wisconsin legislators believed it would be "futile" to amend Act 23 knowing the district judge's predilection against *any* voter photo ID requirement. *See* Dee J. Hall, *Legislature cannot fix voter ID law before November election, leader says*, Wisconsin State Journal (May 1, 2014), *available at http://host.madison.com/wsj/news/local/govt-and-politics/little-chance-to-fix-voter-id-law-given-decision-scott/article_307d1616-042b-58b4-a82f-2a6488c209ff.html* (last visited August 5, 2014).

branch of a State's government. Doing so raises federalism concerns regarding the balance between state legislative and executive power and the federal judicial power. *See Clark*, 60 F.3d at 603-04; *Consumer Party v. Davis*, 778 F.2d 140, 146 (3d Cir. 1985). The fact that the district court might give expedited consideration to a new voter ID law before an upcoming election does not remedy that it has no veto over the Wisconsin Legislature. (Decision at 69.)

The district court abused its discretion in fashioning a remedy. Assuming for the sake of argument that Act 23 flunks under the Constitution or the Voting Rights Act, the district court's permanent injunction was overbroad and not tailored to the specific illegality found as to Act 23—the *only* law that was challenged. The district court's judgments are likely to be reversed on appeal.

IV. The Balance Of Harms Tips In Defendants' Favor Because The District Court's Impermissibly Broad Permanent Injunction Purports To Enjoin Forever A Voting Regulation That Is Designed To Preserve The Right To Vote Of All Eligible Wisconsin Voters.

The balance of harms tips in Defendants' favor because the district court's impermissibly broad injunction purports to permanently enjoin a voting regulation that is designed to preserve the right to vote of all eligible Wisconsin voters. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Aid for Women v. Foulston*, 441 F.3d 1101,

1119 (10th Cir. 2006) (same); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same).

CONCLUSION

As argued herein, the Court should grant this expedited motion and enter an order staying the district court's permanent injunction pending appeal.

Dated this 5th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 5, 2014, I electronically filed the foregoing expedited motion and all accompanying attachments with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

Charles G. Curtis
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Dated this 5th day of August, 2014.

/s/ Clayton P. Kawski

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