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

CONSOLIDATED REPLY BRIEF OF DEFENDANTS-APPELLANTS

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CONSOLIDATED REPLY BRIEF OF DEFENDANTS-APPELLANTS

INTRODUCTION

This Court should reverse the district court's judgments because 2011 Wisconsin Act 23 ("Act 23") is constitutional and does not violate Section 2 of the Voting Rights Act. The district court made numerous reversible errors, and recent developments in the law support reversal.

On July 31, 2014, the Wisconsin Supreme Court upheld Act 23 in two cases brought under the Wisconsin Constitution. The court created an exception procedure for voters who will need to obtain a free state 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. This exception procedure will likely decrease the burden that many voters might experience in complying with Act 23.

As to the district court's constitutional analysis, the court misapplied U.S. Supreme Court precedent. The district court found that more than 90% of Wisconsin voters have qualifying ID to vote under Act 23. Nonetheless, the court struck the law down as facially unconstitutional. The district court did not determine how many voters who lack ID will be unconstitutionally burdened by having to obtain ID. Consistent with *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the district court should have concluded that the benefits of a voter photo ID requirement outweigh its potential burdens.

The district court applied a novel and incorrect test in its Voting Rights Act analysis. The district court's test and analysis focused on a correlation between race and ID possession rates and the mere likelihood of a racially discriminatory impact on voting. The trial evidence did not demonstrate that Act 23 will cause a prohibited discriminatory result based upon the totality of circumstances.

The district court erred when it concluded that four organization plaintiffs had statutory standing under 42 U.S.C. § 1973a(a) as "aggrieved person[s]." Individual voters can sue under the Voting Rights Act. Organizations cannot.

Finally, the district court's permanent injunction was an abuse of discretion. The district court (1) enjoined *any* voter ID law (not just Act 23), and (2) required that if a new voter ID law is enacted that the State must first get the district court's permission to enforce it. The district court's remedy was not tailored to the violations it found, and it had no authority to require the State to seek pre-clearance of any future voter ID requirement. The district court's judgments should be reversed.

ARGUMENT

I. The Wisconsin Supreme Court Upheld Act 23 And Construed The Regulatory Procedure For Obtaining A Free State Photo ID Card From The DMV To Assist Voters.

On July 31, 2014, the Wisconsin Supreme Court entered its decisions in *League of Women Voters of Wisconsin Education 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 ___. The court upheld Act 23 in challenges brought under the Wisconsin Constitution.

In *NAACP*, the 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 supreme 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 ID card. *Id.*, ¶ 61. To alleviate its concern, the supreme court made what it called a "saving construction" of the Wisconsin Administrative Code provisions regarding the documents that must be shown to DMV to obtain a free ID card under Wis. Stat. § 343.50(5)(a)3. *Id.*, ¶ 66.

Wisconsin Admin. Code § Trans 102.15(3)(a) and (b) were construed by the supreme 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.

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

II. The District Court Committed Reversible Errors Of Law; Therefore, Plaintiffs' Focus On The "Clearly Erroneous" Standard Of Review For Factual Findings Is Misplaced.

Plaintiffs misunderstand Defendants' arguments when they rely almost exclusively on the "clearly erroneous" standard of review that applies to factual findings. (*Frank* Br. at 23-24; *LULAC* Br. at 12-14.) Defendants are arguing that the district court applied the law incorrectly.

Issues of law are reviewed *de novo*, and the clearly erroneous standard "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation and internal quotation marks omitted). The district court committed errors of law and then applied its incorrect view of the law to the facts, which calls for reversal even under a clearly erroneous standard of review. *See id.*

III. 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). A solid majority of 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. On appeal, Plaintiffs have directed this Court to no district court findings and no trial evidence that quantify just how many voters will be unconstitutionally burdened by Act 23. 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.

The *Frank* Plaintiffs assert that getting a free state ID card from the DMV "can be extremely burdensome." (*Frank* Br. at 5.)[1] As a general matter, the Supreme Court disagrees, 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 BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent 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

[1]The *Frank* Plaintiffs' appeal brief misleadingly characterizes a draft GAB diagram as illustrating "the relationship between Act 23 and DMV's documentation requirements." (*Frank* Br. at 7.)

This diagram, JSA-164 in Plaintiffs' appendix, was confirmed by trial testimony to be a draft that was not presented to the public. (T:1709:3 through T:1710:19 (discussing *Frank* Trial Ex. 412).) Instead, the chart at pages JSA-162 and JSA-163 was disseminated to the public. (*See* Case No. 14-2058, 7th Cir. Dkt. #39-2:JSA-162, JSA-163.)

cost of obtaining a birth certificate is likely to be a non-issue after *NAACP*. *See* Argument § I, above.

Nonetheless, the *Frank* Plaintiffs emphasize that the trial evidence showed various inconveniences experienced by particular voters or groups of voters. (*See Frank* Br. at 6-18.) Many of these inconveniences specifically relate to birth certificates and payments for documents. (*See id.*) Even accepting these "burdens" 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 that it found that more than 90% of Wisconsin voters possess qualifying ID. (Decision at 26, 38.) The *Frank* Plaintiffs make Defendants' point for them when they concede that "the ID requirement is an actual restriction only for eligible voters *who do not have ID*." (Frank Br. at 40 (citing *Crawford*, 553 U.S. at 198; emphasis the *Frank* Plaintiffs').). If that statement is true, how could the district court hold that Act 23 is unconstitutional as to all eligible Wisconsin voters? Act 23 would prove no burden whatsoever for the more than 90% of Wisconsin voters who already have an ID, as the *Frank* Plaintiffs

seem to agree. *See Crawford*, 553 U.S. at 198 (addressing the negligible impact of "life's vagaries" for those who already have ID). The *Frank* Plaintiffs describe the district court's "careful fashioning of a remedy," but that description is the opposite of what occurred. (*Frank* Br. at 39.) Assuming that Act 23 unconstitutionally burdens *some* voters, a "careful" remedy was not to invalidate the law.

The *Frank* Plaintiffs rely upon *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), to explain the district court's wholesale invalidation of Act 23 under the *Anderson/Burdick* test, but that case is inapposite. (*Frank* Br. at 32, 38, 39.) *Lee* was focused on an independent candidate's right to ballot access and candidates' and voters' rights to freedom of association and to vote under the First and Fourteenth Amendments. *See Lee*, 463 F.3d at 764-66, 768-69. The *Lee* court applied the *Anderson/Burdick* test, but it did so in a different context. The laws challenged in *Lee* required independent candidates to file nomination petitions very early and to get signatures from 10% of the voters in the last election. *Id.* at 764-65. They also disqualified any voter who signed an independent candidate's nomination papers from voting in the primary election. *See id.*

Unlike the district court here, this Court concluded in *Lee* that the challenged laws fell on the "severe" end of the *Anderson/Burdick* sliding scale. *Lee*, 463 F.3d at 768. It required that Illinois show that its laws were

"narrowly drawn" to advance a "compelling" state interest, and concluded that the laws were not narrowly drawn to advance the State's interests. *Id.* at 769-72. The district court's constitutional analysis here did not determine that Act 23 creates "severe" burdens on voters, nor did it require that Act 23 be "narrowly drawn" to advance a "compelling" state interest. (*See* Decision at 8-10, 38.) *Lee* is therefore inapposite as to how the *Anderson*/*Burdick* analysis should be applied in this case.

The *Frank* Plaintiffs quibble about whether the district court construed their constitutional claim as a "facial" or an "as-applied" challenge. (*Frank* Br. at 39-40.) That is not the point. The point is that the district court held that Act 23 is unconstitutional as to *every* Wisconsin voter. (Decision at 38-39.) It was an error to do so because there was no legal basis for the district court to conclude that the more than 90% of Wisconsin registered voters who already possess qualifying ID would be unconstitutionally burdened by Act 23. *Crawford* points in the opposite direction. *See Crawford*, 553 U.S. at 198. It does not matter whether the *Frank* Plaintiffs made a "facial" or an "as-applied" challenge; the district court went too far in light of *Crawford*. *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.").

Both sets of Plaintiffs included in their appeal brief a recounting of the trial evidence presented and the district court's findings regarding the difficulties in obtaining ID that could be experienced by an undetermined, but small, group of Wisconsin voters. (*See Frank* Br. at 6-18; *LULAC* Br. at 2-12.) However, these anecdotal examples were not buttressed by testimony regarding what makes exemplary the experiences of a fraction of a fraction of Wisconsin voters who lacked 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 SEA 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 here 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.) Defendants have already explained the State's anti-fraud interest in their opening appeal brief. Defendants explained how the trial evidence and *Crawford*, along with additional decisions from the Supreme Court and other courts, support and confirm the significant weight of this important interest. (Case No. 14-2058, 7th Cir. Dkt. 25:38-44.) Those points will not be repeated, but a recent voter fraud prosecution in Milwaukee County accentuates them.

On June 24, 2014,[2] the *Milwaukee Journal Sentinel* reported that a Shorewood, Wisconsin, man has been charged with 13 counts of voter fraud. The man is alleged to have cast multiple ballots in four elections in 2011 and

[2]One day after Defendants' opening appeal brief was due.

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 4, 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, Defendants stand by the arguments in their opening appeal brief and will add only one point.

The district court heard testimony from Defendants' expert witness regarding survey data, including surveys conducted by the Pew Charitable Trust, which show "well over more than majority support for voter ID laws

across the U.S. from people that have been surveyed." (T:1467:3-16.)[3] The public favors voter ID laws. 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 should be reversed.

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

[3]The district court sustained an objection to a 2011 Election Law Journal article, Defendants' Trial Exhibit 1102, which showed that 75% of Wisconsinites polled favor requiring voters to show photo ID. (T:1464:16 through T:1467:22.); R. Michael Alvarez, et al., *Voter Opinions about Election Reform: Do They Support Making Voting More Convenient?*, Election Law Journal, Vol. 10, No. 2, June 2011, at 79.

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 should 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.

Plaintiffs emphasize that Section 2 includes the words "denial" *and* "abridgement" and that "abridge" has a specific meaning. (*See LULAC* Br. at 28 (misquoting 42 U.S.C. § 1973(a) as "deny or abridge"); *Frank* Br. at 43.) Fair enough—abridge can mean to reduce, diminish, or shorten. Nonetheless, "abridgement" must still be proven to be "on account of race." 42 U.S.C. § 1973(a). Act 23 applies equally to whites and minorities. There is nothing inherent about acquiring or possessing an ID that applies differently to minorities; DMV's free ID program does not take race into account. Any "abridgement" of the right to vote under Act 23 would be "on account of" a voter lacking qualifying ID, not "on account of" race.

The *LULAC* Plaintiffs suggest that Defendants misconstrue the burden of proof in a Section 2 case. (*LULAC* Br. at 26.) Not so. Defendants do not dispute that it was Plaintiffs' burden to prove by a preponderance of the evidence that Act 23 will result in prohibited discrimination. (*See id.*) However, the standard of proof was not merely that Plaintiffs were required to prove by a preponderance of evidence that Act 23 is *likely* to result in prohibited discrimination. This erroneous formulation of the burden of proof is what the district court ultimately applied. (*See* Decision at 68 (summarizing the district court's findings of fact and conclusions of law by using the phrases "more likely to burden," "more likely than whites," "more

likely to have to incur," and "disproportionately likely").) Section 2 is concerned with results, not likelihoods. 42 U.S.C. § 1973(a).

Plaintiffs point to racial disparities in the possession rates of qualifying ID or "primary" documents used to obtain ID as the chief evidence of the difficulties that minorities will face in complying with Act 23. (*See Frank* Br. at 5-10, 16-17; *LULAC* Br. at 2-11, 35-36.) But in relying upon the survey conducted by the *Frank* Plaintiffs' expert witness, the district court found as a fact that 97.6% of whites, 95.5% of blacks, and 94.1% of Latinos in Milwaukee County who lack qualifying ID *already* have the necessary documentation to obtain ID. (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.").) While the district court found that possession rates for primary documents are greater for whites than minorities, the district court also found that the percentage of minority voters in Milwaukee County who do not already have all of the documents that they need to obtain an ID from the DMV is quite small. Based upon the district court's findings, the vast majority of minority voters who currently lack qualifying ID have the documents necessary to obtain ID.

Finally, the *LULAC* Plaintiffs address the "Senate Factors" that the district court expressly declined to apply in its Decision. (*See LULAC* Br. at

38-39; Decision at 50 ("Thus, I cannot resolve the present issue by applying the legal standards developed for vote-dilution cases.").) While a Section 2 case must consider the "totality of circumstances," 42 U.S.C. § 1973(b), the *LULAC* Plaintiffs' effort to import the Senate Factors into the analysis is inappropriate given that the district court made no factual findings regarding the Senate Factors and expressly declined to apply them. With no citation to any district court factual findings, the *LULAC* Plaintiffs allege a "history of official discrimination in Wisconsin," "a significant lack of responsiveness on the part of Wisconsin elected officials to the particularized needs of Blacks and Latinos," and that voting in Wisconsin is "racially polarized." (*LULAC* Br. at 39.) These factors were not addressed by the district court, and they should not be considered by this Court on review of the district court's Decision. The district court's judgments should be reversed.

V. The District Court Erroneously Concluded That The *LULAC* Plaintiffs Had Statutory Standing.

The district court erroneously concluded that the *LULAC* Plaintiffs had statutory standing to pursue their Voting Rights Act claim. (Decision at 46-48.) This is not an Article III jurisdiction issue and is a purely legal question: whether organizations can be "aggrieved person[s]" under 42 U.S.C. § 1973a(a)? The answer is "no" because organizations cannot vote.

The plain language of the Voting Rights Act, read in context, protects an *individual's* right to vote, free from racial discrimination.

The *LULAC* Plaintiffs cite *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), but that case does not interpret the language "aggrieved person," let alone consider those words in the context of the Voting Rights Act. (*LULAC* Br. at 17.) *Korte* involved whether the contraception coverage mandate in the Patient Protection and Affordable Care Act violated a for-profit corporation's rights under the Religious Freedom Restoration Act ("RFRA"). *Korte*, 735 F.3d at 658-659. This Court held that for-profit corporations can be considered "persons" as that word is used in RFRA. *Id.* at 674. Intrinsic to that holding was the idea that, "No one doubts that organizational associations can engage in religious practice." *Id.*; *see also Burwell v. Hobby Lobby Stores, Inc.*, --- S.Ct. ----, 2014 WL 2921709 (June 30, 2014).

The Voting Rights Act is about voting. Only people vote. *Korte* is not on point because voting, unlike religious practice, is accomplished only by individuals. Corporations and associations cannot come together to "vote as a group." That is why using the general definition of "person" in 1 U.S.C. § 1 to include organizations like the *LULAC* Plaintiffs is like "forcing a square peg into a round hole." *Korte*, 735 F.3d at 674 (citation and internal quotation marks omitted). "Aggrieved person" means an individual voter in the Voting

Rights Act context, as numerous courts have held and as Defendants cited in their opening appeal brief. (Case No. 14-2058, 7th Cir. Dkt. #25:56; *id.*, n. 8.)

Finally, the Voting Rights Act contemplates that two classes of people can "institute a proceeding" to pursue a Voting Rights Act claim: (1) individual voters (*i.e.*, "aggrieved persons"), or (2) the United States Attorney General. 42 U.S.C. § 1973a(a); *see also* 42 U.S.C. § 1973a(b) ("a proceeding instituted by the Attorney General or an aggrieved person"). By designating the Attorney General—and not an organization or an association—as having the right to prosecute Voting Rights Act claims on behalf of voters, Congress expressly limited the scope of Voting Rights Act plaintiffs.

The district court erred as a matter of law when it concluded that four organizations had statutory standing to pursue Voting Rights Act claims. There were no individual voter plaintiffs in the *LULAC* case when it went to trial and was decided. The district court erred in concluding that the *LULAC* Plaintiffs had statutory standing, and its judgment in *LULAC* should be reversed.

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

As argued above, 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.

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.[4] (*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

[4]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 4, 2014).

have *any* voter photo ID requirement when minority voters "are more likely than whites to lack an ID." (*Id.*)

The *LULAC* Plaintiffs argue that the district court's injunction was warranted because of "repeated threats of amendment" to Act 23 that were raised by defense counsel at trial, by the Wisconsin Legislature via a bill amending Act 23 that passed the Wisconsin Assembly during trial, and by Governor Walker after the district court's Decision. (*LULAC* Br. at 44-45.) With the exception of Governor Walker, who is a defendant in *Frank*, none of these so-called "threats" came from any party in these cases who has the power to enact a law or to enforce a new voter photo ID requirement. In other words, no Defendants have threatened to enact a voter photo ID law that is not in existence, so it made no practical sense for the district court to enjoin Defendants from enforcing laws other than Act 23.

Plaintiffs do not cite any controlling case in which a federal district judge exercised equitable power to require pre-approval of a future law before it can be enforced by the executive 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.

The *LULAC* Plaintiffs also raise mootness, which is a red herring. (*See* *LULAC* Br. at 47-48.) Defendants do not argue that this case is moot, and whether an amended voter ID law would moot these appeals is not before this Court.

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 should be reversed.

VII. Response To The United States' Amicus Curiae Brief

The amicus curiae brief filed by the United States should not persuade this Court. (*See* Case No. 14-2058, 7th Cir. Dkt. #43, *hereinafter* "U.S. Br.".) The brief largely restates the district court's Decision and adds little.

First, the United States' brief does not address that the district court facially invalidated Act 23 as unconstitutional. Instead, the brief emphasizes that the *Frank* Plaintiffs made an as applied challenge. (*See* U.S. Br. at 11, 12, 15, 17.) This focus side-steps the most objectionable part of the district court's constitutional analysis at pages 38 and 39 of the Decision. It made no difference whether Plaintiffs' "challenge" was as-applied or facial. The

United States' brief virtually ignores the fact that the district court's remedy was overbroad by any measure under *Crawford*. *See Crawford*, 553 U.S. at 203.

Second, the United States' brief does not address that the district court made no factual findings regarding the magnitude of the allegedly unconstitutional burden that would be created by Act 23. Similar to the district court's Decision, the United States' brief uses vague "wiggle words" such as "many" and a "substantial number" to imprecisely define the magnitude of the alleged unconstitutional burden. (U.S. Br. at 2 ("a substantial number of eligible voters"); 11 ("many eligible voters"); 15 ("a substantial number of eligible voters"); 17 ("many eligible voters").) These words are essentially meaningless and provide no way to measure how many voters will be burdened, or in what ways they will be burdened. The Supreme Court in *Crawford* emphasized that identifying the magnitude of the burden and quantifying the burden are important in the *Anderson/Burdick* balancing test analysis. *See Crawford*, 553 U.S. at 200.

Third, as to Section 2 the United States argues for an application of the Senate Factors, but the district court expressly declined to apply the Senate Factors. (U.S. Br. at 21-24.) As noted above, *see* Argument § IV of this brief, the district court correctly concluded that the Senate Factors are not particularly useful in a Section 2 vote denial case. It would be inappropriate

for this Court to *sua sponte* apply the Senate Factors when the district court did not apply them.

Fourth, even if the so-called "more relevant" Senate Factors are to be considered, *see* U.S. Br. at 23, the district court made no factual findings with regard to Senate Factors One, Two, or Eight. Apparently, there was not sufficient evidence in the trial record for the district court to make such factual findings. It is therefore perplexing for the United States to assert in its brief that the district court "relied on the most relevant Senate Factors," U.S. Br. at 24, when the district court made no factual findings at all with regard to Senate Factors One, Two, or Eight.

Fifth, with regard to Senate Factor Nine regarding whether Act 23 is "tenuous," *see* U.S. Br. at 23-24, the Supreme Court's decision in *Crawford* categorically rebuts the contention that a voter photo ID requirement is tenuous. The Supreme Court has recognized the value in such laws, and this Court is bound by the Supreme Court's decisions. *See Crawford*, 553 U.S. at 191-97 (recognizing the numerous State interests in a voter ID requirement).

Finally, Plaintiffs and the United States misconstrue Defendants' Voting Rights Act argument as calling for a test by which minority voting must effectively be impossible under Act 23 for Act 23 to violate Section 2. (*LULAC* Br. at 26-30; *Frank* Br. at 43-44; *see* U.S. Br. at 19-20.) Instead of creating an "impossibility standard," 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.)

CONCLUSION

For the reasons argued in this brief and in Defendants' opening appeal brief, this Court should reverse the district court's judgments in *Frank* and *LULAC*.

Dated this 4th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 4, 2014, I electronically filed the foregoing Consolidated Reply Brief of Defendants-Appellants 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:

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