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.

JUDGE 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-185,
THE HONORABLE LYNN S. ADELMAN, PRESIDING

BRIEF OF PLAINTIFFS-APPELLEES IN NO. 14-2059 (THE "*LULAC* PLAINTIFFS") IN OPPOSITION TO DEFENDANTS-APPELLANTS' EXPEDITED MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL

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In twin July 31, 2014 opinions, the Wisconsin Supreme Court held that Wisconsin's implementation of its voter ID law (2011 Act 23, or "Act 23") imposed an illegal burden on the right to vote.[1] Defendants have not yet implemented any changes to try to remedy the "severe burden" identified by the Wisconsin Supreme Court. *See NAACP,* 2014 WI 98, ¶ 7. Nor have they tried to address the many other burdens that the District Court identified as abridging the right to vote in violation of the Voting Rights Act.

Instead, Defendants filed their "Expedited Motion to Stay Permanent Injunction Pending Appeal." ("Mot.", Doc. 48-1). Defendants' declared purpose "is to see that Wisconsin's voter photo identification requirement goes into effect for the November 2014 election"—an election only 77 days from the date of this filing. Mot. 2. Instead of working to make it easier for people to vote, that is, Defendants have focused solely on securing a legal ruling that would permit them to rush the enforcement of a statue that imposes discriminatory burdens on voters of color.[2]

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[1] *Milwaukee Branch of the NAACP v. Walker*, 2014 WI 98, ¶ 7, 2014 WL 3744073 (Jul. 31, 2014) [hereinafter *NAACP*]; *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*, 2014 WI 97, 2014 WL 3744174 (Jul. 31, 2014).

[2] This is only the latest of Defendants' efforts to rush Act 23 into effect. The state courts denied Defendants' requests for stays of injunctions against Act 23 no less than five times. *See* Order Denying Mot. For Stay of Temp. Injunction, *Milwaukee Branch of the NAACP, et al. v. Walker, et al.* ("*NAACP*"), No. 11 CV 5492 (Wis. Cir. Ct. March 15, 2012); Dec. and Order Denying Def. Mot. to Stay, *League of Women Voters of Wisconsin Educ. Network v. Walker, et al.* ("*League*"), No. 11 CV 4669 (Wis. Cir. Ct. March 20, 2012); Op. and Order, *NAACP*, No. 12 AP 557 (Wis. Ct. App. Apr. 25, 2012) (same); Order, *League*, No. 2012 AP 584 (Wis. Ct. App. Apr. 26, 2012) (same); Order, *League*, No. 2012 AP 584 (Wis. Sep. 27, 2012) (dismissing motion to stay); Order, *NAACP*, No. 2012 AP 1652 (Wis. Sep. 27, 2012) (same). Copies of documents from these cases, including the cited orders, are available under the respective case names at http://moritzlaw.osu.edu/electionlaw/litigation/.

SUMMARY OF THE ARGUMENT

For a variety of reasons, Defendants cannot justify the extraordinary equitable remedy they request. *First,* the Wisconsin Supreme Court decisions confirm that Act 23, as interpreted and implemented by the State over the past three years, has imposed a "severe burden" on the right to vote. *NAACP,* 2014 WI 98, ¶¶ 7 & n. 5, 60. To try to prevent Act 23 from continuing to operate as a "de facto poll tax," *id.* ¶¶ 50, 54-55, 57, the Wisconsin Supreme Court ruled that Department of Motor Vehicles supervisors (who have discretion "to excuse the failure to provide" birth certificates and other vital records required to secure a voter ID) must treat those vital records as "constitutionally 'unavailable'" if a voter petitions for an exception and a fee would be required for the voter to obtain them. *Id.*, ¶¶67, 69-70.

The State has failed to announce any plan to implement this "saving construction." Any such implementation will rest on DMV officials' discretion in implementing an administrative petition process requiring "extraordinary proof" that documents needed to obtain an ID cannot be obtained. *See NAACP* ¶67 (quoting Wis. Admin. Code § Trans. 102.15(3)(b)-(c)). The District Court found this process to be both burdensome and administered in a secretive, arbitrary and politicized manner.[3] It is accordingly unlikely to cure even the specific monetary burden identified by the Wisconsin Supreme Court, and it certainly will not remedy

[3] *See* Decision and Order, 32-33 n.17, 34-37 & n.20 ("Dec.", Doc. No. 127 in 12-cv-185); *see also* Decision and Order, 7-8 ("Stay Dec.," Doc. No. 142 in 12-cv-185) (attached to the *Frank* Plaintiff's Stay Opposition, Dkt No. 53).

the broad range of problems that cause Act 23 to violate Section 2 of the Voting Rights Act, of which having to pay money for birth certificates was "only one of many." Stay Dec. 8.

Second, the District Court applied the correct standard in finding that Act 23 violates Section 2 of the Voting Rights Act, finding based on the totality of the circumstances that voters of color had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Dec. 51-52 (quoting 42 U.S.C. § 1973(b)); Stay Dec. 14.

Third, the District Court's injunction was not just appropriate, but necessary to ensure that the many ways Wisconsin's voter ID law discriminates against voters of color are remedied.

Fourth, defendants' *sole* argument for why the injunction must now be lifted with only 11 weeks to go before the general election is that there is a *per se* rule that a State is deemed to suffer "irreparable injury" any time one of its statutes is enjoined. Mot. 20. That is not the law, in this Circuit or elsewhere.

Finally, the *LULAC* plaintiffs, their members, and their constituents, on the other hand, would suffer a variety of irreparable harms (including racial discrimination and denial of an equal opportunity to vote) if Act 23—which has been enjoined since early 2012—is now allowed to be hastily implemented and enforced on the eve of the 2014 general election (especially when the proposed specifics for doing so have not yet been revealed).

ARGUMENT

Defendants' motion for a stay pending appeal seeks an "extraordinary remedy." *Classic Components Supply, Inc. v. Mitsubishi Electronics America, Inc.*, 841 F.2d 163, 165 (7th Cir. 1988). In considering the District Court's denial of such a stay, this Court reviews the lower court's "finding of fact for clear error, its balancing of the factors under the abuse of discretion standard and its legal conclusions de novo." *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).

I. Defendants Have Not Shown a Significant Probability of Success on the Merits

A. The New Wisconsin Supreme Court Decisions Do Not Justify a Stay

Defendants are wrong that the Wisconsin Supreme Court's new decisions undermine the District Court's permanent injunction. To the contrary, they confirm that Act 23, as construed and enforced by the State over the past three years, has imposed a "*severe burden*" on the right to vote. *NAACP,* 2014 WI 98, ¶¶ 7 & n. 5, 60, 63 (Jul. 31, 2014) (emphasis added); *see also id.* ¶¶ 4-7, 50-65, 78-80. Specifically, the Wisconsin Supreme Court held that the Wisconsin Constitution prohibits requiring voters to pay a fee to a government agency for any official documents that must be obtained in order to receive a voter ID. The Court repeatedly referred to such a practice as a "de facto poll tax." *Id.* ¶¶ 50, 54-55, 57.[4]

[4] Beginning in 2011, Defendants imposed *precisely* this "severe" and illegal burden in its implementation of Act 23. Kristina Boardman, the Wisconsin Division of Motor Vehicles Deputy Administrator, testified that the law did not excuse voters from having to pay for records necessary to obtain the required state ID, even where the voter literally "has to make a choice between paying for his child's dinner and getting a birth certificate needed to vote." Tr. 1119-20. *See also* Dec. 31 ("A person

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The Wisconsin Supreme Court adopted a "saving construction," not of Act 23, but of Wis. Admin. Code Trans. § 102.15(3)(b). The Court held that DMV agents should henceforth exercise "discretion" during the "extraordinary proof" petition process found in § 102.15(3)(b) so that voters can seek to be excused from the requirement of presenting birth certificates or other documents that require a fee. 2014 WI 98, ¶¶ 66-70.

This "saving construction" will require substantial changes in how the State administers § 102.15(3)(b), including revisions to agency regulations and policies, retraining of State personnel and poll workers, and publicizing the new policies to prospective voters. But Defendants have not yet announced changes or plans for responding to and implementing the July 31 State Court decisions. Thus, neither the parties nor the courts can yet know whether the State can successfully eliminate the "severe burden" and "de facto poll tax" of Act 23.

Nor do the State Court's decisions require any changes to resolve the numerous problems the District Court found with Defendants' administration of § 102.15(3)(b)'s secretive and highly politicized "extraordinary proof" petition process. *See, e.g.,* Dec. 32-33 n.17, 34-37 & n.20; Stay Dec. 7-8. Indeed, the State Court's "saving construction" vests even *more* "discretion" in DMV supervisors to decide who gets the ID needed to vote, thereby exacerbating one of the core

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who needs to obtain a missing underlying document is also likely to have to pay a fee for the document.").

problems with this law that led the District Court to conclude that it denies and abridges the rights of voters of color in violation of Section 2.[5]

Moreover, if and when the State reveals the details of how it proposes to comply with the State Court decisions, whether and to what extent—if any—those changes justify modification to the District Court's injunction, will present factual issues for the District Court in the first instance, before any review by this Court.

> [T]he fundamentally different roles of appellate and trial courts mandate consideration of the new evidence by the district court under Fed. R. Civ. P. 62(c) before Rule 8 proceedings in this court. The district court is the proper forum for presentation, testing and confrontation of the new evidence. Only upon completion of the district court's factfinding role, should [the Court of Appeals] consider any relief pending appeal.

Chem. Weapons Working Group v. Dep't of the Army, 101 F.3d 1360, 1362 (10th Cir. 1996). "The district court must determine" what has changed and what has not; "[t]his done, the district court must next assess whether the new practice has completely cured the injury of which the [plaintiffs] originally complained." *Rembert v. Sheahan*, 62 F.3d 937, 942 (7th Cir. 1995).

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[5] As the District Court emphasized in its decision denying the motion to stay, "[t]here is no guidance in [§102.15(3)(b)-(c)] that indicates what kind of documentation might constitute 'extraordinary proof of name and date of birth' or what factors the administrator should consider when exercising his or her discretion to determine whether the documentation the person has produced constitutes extraordinary proof. In *NAACP*, the Wisconsin Supreme Court did not provide any guidance to the administrator concerning the meaning of 'extraordinary proof' or set forth any standard that might guide the exercise of the administrator's discretion." Stay Dec. 7; *see also League*, 2014 WI 97, ¶¶103-106 (Abrahamson, C.J., dissenting) (noting the many questions left unanswered by the *NAACP* "saving construction" and that "leave discretion in the hands of the [DMV]".).

Finally, as the District Court emphasized in denying a stay, even if the State resolved all the questions and concerns about how it will implement the Wisconsin Supreme Court's "saving construction," "having to pay a fee to obtain a birth certificate is only one of many burdens that a person who needs to obtain an ID for voting purposes might experience." Stay Dec. 8. As detailed in the District Court's April 29th decision, those additional burdens include:

- Having to figure out the complicated and confusing requirements for obtaining a State ID card. Dec. 29.
- That the State does not publicize DMV's discretion to make exceptions or the "extraordinary proof" petition process "because it wants to minimize exceptions," *id.* 32 n.17, "and thus those who might benefit from the exception procedure are unlikely to learn of it," and ""are more likely to give up than to be granted an exception." *Id.* 35.
- "Many older voters of color face the additional problem of never having had an official birth certificate in the first place" and therefore would have trouble securing the necessary documents even if they were able to pay for them. *Id.* 63 n. 36.
- Even if the voter can obtain all required documents without paying a fee, he or she will still have to spend the time and incur transportation costs in order to obtain those documents by traveling to one or more government offices. *Id.* 27-29.
- Even after a voter acquires all the necessary documents, the time, expenses and inconvenience of getting to the DMV, which has offices that are often far away and inconvenient hours, can impose extreme hardships particularly on those without transportation or who have trouble getting time off work. *Id.* 30-31.
- "Latino voters who speak primarily Spanish will face additional difficulties as they try to navigate a process that was designed to accommodate those who speak English." *Id.* 63.

The District Court determined that, even if it assumed that "the burden of having to pay a fee to obtain a birth certificate or similar document" will be eliminated, "*I could not conclude that the burdens Act 23 places on the right to vote have been lessened to such a degree that the state's interests are now sufficient to*

justify them." Stay Dec. 8 (emphasis added).[6] Defendants' motion offers nothing suggesting that this crucial fact-finding constitutes "clear error." *See Hinrichs*, 440 F.3d at 396. Thus while the Court can only guess what changes Wisconsin *may* implement, the District Court's findings and existing record already demonstrate that the State Court decision fails to cure the many burdens imposed by Act 23.

B. The District Court Applied the Right Test in Finding that Act 23 Violates Section 2 of the Voting Rights Act and Correctly Applied that Test.

Defendants argue that "the district court applied a novel and incorrect Section 2 test" and "the trial evidence did not demonstrate a Section 2 violation." Mot. 14. LULAC plaintiffs have addressed these arguments in detail in the merits brief in this appeal. Therefore, we will only briefly summarize that response here and respectfully refer this Court to that briefing for a more detailed discussion of these points. *See* Consolidated Brief of the Plaintiffs-Appellees in No. 14-2059 at 19-42 ("Merits Br.", Doc. No. 43).

There was nothing "novel" or "incorrect" about the Court's Section 2 analysis. Applying the statutory language, the District Court correctly held that a Section 2 violation is established if the totality of the circumstances show that the challenged voting practice results in a political process that is not "equally open to participation" because "members [of a protected group] . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Dec. 51-52 (quoting 42 U.S.C. § 1973(b)).

[6] *See also League*, 2014 WI 97, ¶¶99-101 & nn. 21-25, 107 (Abrahamson, C.J., dissenting)(listing additional fees not addressed by *NAACP*'s "saving construction").

In determining whether Act 23's voter ID requirement results in a political system that is not "equally open" to Wisconsin's voters of color, the District Court analyzed the "totality of circumstances" to find that the voter ID requirement "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." Dec. 52. The presence of such a barrier, the District Court reasoned, "prevents the political process from being 'equally open' to all and results in members of the minority group having 'less opportunity' to participate in the political process and to elect representatives of their choice." *Id.*; *see also* Stay Mem. 8-12.[7] The Court also found that Act 23 interacts with societal and historical factors to result in denial and abridgement of the right to vote on account of race, in violation of Section 2, 42 U.S.C. § 1973(a). Dec. 68.

Defendants are also incorrect that the District Court applied the wrong test for liability because it relied on correlation or likelihood, not direct causation. Mot. 15. The District Court did not find it merely "likely" that the voter ID requirement results in a political process that is not equally open to participation by Wisconsin's Black and Latino voters. The Court found that Act 23 *actually* "has a disproportionate impact on Black and Latino voters" and *actually* "results in the

[7] Defendants seize on the "creates a barrier" language to argue that the District Court is rewriting the statute. But the Court used this phrase not to create new law but to explain how obstacles or barriers in the registration and voting processes can cause the political process not to be equally open, resulting in less opportunity for voters of color. Act 23, like the poll taxes and literacy tests used to disenfranchise voters of color before the passage of the Voting Rights Act, is such a barrier.

denial or abridgment of the right of Black and Latino citizens to vote on account of race or color." Dec. 68; *see also id.* 52, 64; Stay Dec. 14 ("Under my interpretation a voting practice violates Section 2 only when it *actually* creates more difficulty for minorities to vote") (emphasis in original); *id.* 18-19 (finding that "some of the individual plaintiffs . . . would be unable to vote" absent the injunction and that many individuals "would be prevented or deterred from voting because of Act 23").

C. The Scope of the District Court's Permanent Injunction was Appropriate

Defendants are also wrong that the District Court permanent injunction was "impermissibly broad." Even if Defendants were correct, of course, the proper remedy would be to remand with instructions to narrow the injunction, not to grant a stay. Stay Dec. 16.

In any event, the scope of the injunction was an entirely appropriate response to the many problems the District Court identified with Wisconsin's voter ID law, and fell well within the Court's "wide discretion to fashion a complete remedy." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 840 (7th Cir. 2013) (applying abuse of discretion standard to review of injunctive relief); *Judge v. Quinn*, 624 F.3d 352, 358 (7th Cir. 2010) (same). The District Court was not required to limit its injunction to address only enforcement of Act 23 in its current form and not the underlying practice of requiring official photographic identification. Injunctive relief "should undo the results of past discrimination *as well as prevent future inequality of treatment." U.S. v. State of La.*, 225 F. Supp. 353, 393 (E.D. La. 1963)

(emphasis added); *see also Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (Voting Rights Act should be broadly applied given its "broad remedial purpose").

Accordingly, federal courts in voting rights cases routinely enjoin government officials not just from enforcing a particular statute, but also from engaging generally in the practice found to violate federal law. *See, e.g., Northeast Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 589, 599 (6th Cir. 2012) (affirming injunction against general practice of rejecting provisional ballots cast in the wrong precinct); *United States Student Ass'n Found. v. Land,* 546 F.3d 373, 379 (6th Cir. 2008) (refusing to stay injunction against general practice of "cancelling or rejecting a voter's registration based upon the return of the voter's original voter identification card as undeliverable"); *U.S. v. State of Tex.,* 252 F. Supp. 234, 255 (W.D. Tex. 1966) (enjoining general practice of "requiring the payment of a poll tax as a prerequisite to voting").

II. The Other Relevant Factors Weigh Strongly In Favor of Keeping the District Court's Permanent Injunction In Place Pending Appeal.

Under the "'sliding scale' approach," because defendants have little or no likelihood of success on the merits of their claims, this Court need not even consider "the balance of harms." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). But the considerations that enter into that balancing — "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," *id.* — all tilt decisively against any stay.

A. Defendants Face No Risk of Irreparable Injury

Defendants have cited nothing demonstrating clear error in the District Court's finding that "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."[8] There is simply no reason to believe that in-person voting fraud, non-existent in the past, will somehow become sufficiently prevalent to have an irreparable impact on the upcoming November elections.

Nor do Defendants demonstrate clear error in the District Court's finding that, far from "promoting confidence in the integrity of the electoral process," the enactment and attempted implementation of Act 23 have badly damaged Wisconsin democracy and undermined public confidence in the electoral process in many respects. Dec. 17-22. Because they failed to show any benefit from

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[8] Dec. 11. Defendants' only support for their contention that "[v]oter fraud in Wisconsin is not a myth, impossibility, or irrational concern" is a newspaper article from June 2014 about a voter fraud prosecution. As initial matter, this article is not part of the record that can be considered by this Court. Moreover, it is inadmissible hearsay, and none of the facts asserted have been tested or addressed by District Court fact-finding. For these reasons, it is also not a proper subject for judicial notice. Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.")

Moreover, the article, even if accurate, does not describe any instances of in-person voter impersonation fraud, the type of fraud Act 23 was allegedly designed to protect against. Instead, it describes alleged instances of fraud that Act 23's voter ID requirement would not have prevented and two alleged instances of fraud involving absentee ballots that may or may not have been prevented by Act 23. Therefore, this one alleged incident, even if it were properly before this Court and proved to have occurred, still does not call into question the District Court's determination that "virtually no voter impersonation fraud occurs."

implementing Act 23, they cannot claim to suffer harm from the District Court's injunction against enforcement of that statute.

Unable to point to any evidence of *actual* irreparable harm, defendants claim irreparable injury occurs *whenever* a federal court enjoins a state law. *See* Mot. 20-21. But their authorities do not support this sweeping claim. Each case cited identified actual, concrete harms that would occur if the state law remained enjoined while on appeal. *See, e.g., Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool" pending appeal); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox. Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (absent a stay, California would be unable to regulate aspects of motor vehicle manufacturer-dealer relationships, including unfair practices).

This Court has emphasized that "an injunction [of a state statute] is appropriate if the usual criteria for a stay pending appeal are satisfied," thereby requiring a consideration of the interests allegedly served by the challenged statute and their comparative importance. *Cavel Intern., Inc. v. Madigan*, 500 F. 3d 544, 546 (7th Cir. 2007) (enjoining state statute pending appeal was especially appropriate where "[t]he object of the statute is totally obscure" and the harms it allegedly prevents are "remote from the vital interests of most Illinois residents," so that "a brief delay in its enforcement . . . will not create perceptible harm"); *see also Joelner v. Village of Washington Park, Ill.,* 378 F.3d 613, 620 (7th Cir. 2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute[.]").

The State of Wisconsin conducted fair and orderly elections for more than 150 years without requiring voters to present an official photo ID to obtain and cast a ballot.[9] Thus, leaving the District Court's permanent injunction in place preserves the true status quo pending appeal, and letting Act 23 go into effect would wreak havoc on that status quo. *See, e.g., LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 406 (7th Cir. 1983) ("it is the last uncontested status preceding the controversy which is to be maintained by the court"); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1332 (7th Cir. 1980) ("status quo" for purposes of challenged law was "the regulatory situation which existed *prior* to the effective date of the challenged [law]") (emphasis added).

B. A Stay Would Irreparably Injure Plaintiffs, Their Members, and Other Wisconsin Voters.

On the other hand, the *LULAC* plaintiffs, their members, and the eligible voters they represent would face irreparable harm if Act 23 were allowed to go back into effect while the appeal proceeds. *First,* promises made to ameliorate voting rights violations made in the face of litigation are an insufficient basis to nullify an injunction. *Puerto Rican Organization For Political Action ("PROPA") v. Kusper*, 350 F. Supp. 606, 611 (N.D. Ill., 1972), *aff'd* 490 F.2d 575 (7th Cir. 1973) ("absent an injunction," the government "would be free to decide at any time before

[9] The sole exception was the February 2012 primary election, the only one in which Act 23's voter ID requirement was in force. The record amply demonstrates that Act 23 suppressed the Black and Latino vote even in that very low-turnout primary election, causing confusion, frustration, and actual vote denial among voters of color. *See infra* note 11 and accompanying text.

or during the election not to carry out all or any part of the contemplated program").

This Court cannot simply assume that Defendants will implement the changes ordered by the Wisconsin Supreme Court decisions successfully. In *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010), the Supreme Court held that the "First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 1591. In *Free Speech Coalition, Inc. v. Attorney Gen. of the U.S.*, 677 F.3d 519, 539 n.15 (3d Cir. 2012), the Third Circuit rejected promises by the government to ameliorate damage through exercise of regulatory discretion, reasoning that "[a]fter all, there is no guarantee that the government's current interpretation of the Statutes will remain unchanged." *Id.*

As another federal court put it with regard to Voting Rights Act violations, "[t]he fact that [a] defendant[] ha[s] resolved to take some steps in the direction of giving [impacted] citizens an effective vote is an inadequate assurance for such a fundamental right in a free society." *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974) (emphasis added). These principles are especially applicable here, because the Wisconsin Supreme Court "did not provide any guidance" for the application of discretion by the DMV but only "offered [the] cryptic instruction: 'the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner.'" Stay Mem. 7, *quoting NAACP*, 2014 WI 98, ¶70.

Second, Act 23's abridgement of the constitutionally protected right to vote is, by definition, an irreparable injury that warrants injunctive relief. *See Northeast Ohio Coal. for the Homeless*, 696 F.3d at 599 (finding irreparable harm where state action would "unjustifiably burden [] voters' fundamental right to vote"); The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "regarded as a fundamental political right, because preservative of all rights").

The District Court found, and defendants have not disputed, that Act 23, as implemented, imposed "substantial barrier[s]" and "practical obstacles" that would "deter a substantial number of eligible voters from casting a ballot." Dec. 22, 29, 38. Although some of these voters could obtain their IDs if they persevered long enough and jumped through enough bureaucratic hoops, others would be "unable" from a practical standpoint to surmount these obstacles and would find it "impossible" to obtain the necessary proofs. *Id.* 24-25, 60 & n.34. Moreover, these irreparable harms fell disproportionately on voters of color, who in turn would face "additional hurdles" in trying to overcome these barriers and obstacles. *Id.* 61. The enforcement of Act 23 also "undermine[d] the public's confidence in the electoral process" in these and a number of additional respects. *See* Dec. 18-20. Defendants' motion is silent on all of these injuries to plaintiffs and the public interest.

These irreparable harms would be greatly magnified by any attempt to implement and enforce Act 23 in time for the November general election, which is 77 days away as of the date this brief is filed. The Supreme Court has condemned making such precipitate changes to voting requirements shortly before a federal election. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)("Court 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"); *Reynolds*, 377 U.S. at 585 (court "should consider the proximity of a forthcoming election and the mechanical complexities of state election laws, and should act upon and rely upon general equitable principles").

In enacting Act 23, the Wisconsin Legislature itself recognized that a substantial transition period would be necessary to "conduct a public informational campaign," to allow voters time to obtain the necessary IDs (and the documents needed to obtain those IDs), and to train poll workers and DMV personnel . *See* Act 23 § 144(1). Pursuant to this determination, the State conducted a nine-month "soft implementation" of Act 23 before it became mandatory in February 2012. *See* Tr. 1733-35 (Susan Ertmer, Winnebago County Clerk, explains that the "soft implementation" made Act 23's ID requirements optional during all of 2011 so "the general public will be made aware of the changes coming and they will have time to figure out how to get an ID if they don't have one"); Act 23 § 144(2).

The trial record demonstrates that this transition and implementation effort in 2011-12, even with nine months to do it, were woefully inadequate. There was

considerable confusion about what the law required, in part due to inadequate outreach to communities of color, and failure to adequately publicize and explain the new requirements.[10] Between the lack of the public education efforts and the barriers to obtaining the documents required to vote, voters of color were disenfranchised in 2012.[11]

C. The Balance of Equities Weighs Heavily Against a Stay.

The District Court correctly described the balance of harms: "It is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." Op. 38; Stay Dec. 19 (reiterating same finding); *see also id.* 18 ("if a stay . . . is denied in error . . . almost certainly no in-person voter-impersonation fraud will have occurred during the time that the appeal was pending, and the public's confidence in the integrity of the electoral process will not

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[10] *See, e.g.,* Tr. 172 (Cabrera) (voters in the Latino community did not know about the opportunity to obtain free state ID cards); *id.* at 190 (Garza) (Act 23 was enacted "with very little publicity focused on the Latino or other non-English speaking community languages -- or non-English speaking communities. That created confusion"); *id.* at 429-30 (Lumpkin) (voters in February 2012 expressed to him that they were confused about what Act 23 required); *id.* at 501 (Montgomery Baker) (she witnessed confusion about the law and people's eligibility to vote among young African-Americans).

[11] *See, e.g.,* Tr. at 376-77 (Pastor Michelle Townsend de Lopez: recounting "frustrations . . . of individuals who were not able to vote either because they didn't have . . . the proper documentation"); *id.* at 416-17 (Anita Johnson); *id.* at 433, 436 (Kenneth Lumpkin's Racine newspaper "monitored the number of people that was being turned around" at the polls in Feb. 2012, "and it was substantial;" "we already see a pattern of people that would normally go out and vote that we have interviewed that they just feel it's too difficult now"); *id.* at 2063 (Maribeth Witzel-Behl, City of Madison clerk: 42 voters were unable to cast a regular ballot in the Feb. 2012 election because they lacked Act 23 ID; 28 left the polling place without voting provisionally, and only 5 of the 16 provisional ballots were ultimately counted).

have declined."); *id.* 19 (finding that "a large number of individuals," including non-parties, "would also be prevented or deterred from voting if Act 23 were reinstated pending appeal.").

The competing claims of injury are not remotely comparable: baseless claims of in-person voter impersonation fraud cannot outweigh the certain denial and suppression of voting by people of color that Act 23 will cause. As the Sixth Circuit concluded in analogous circumstances:

> Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [injunctive relief, which] eliminates a risk of individual disfranchisement without creating any new substantial threats to the integrity of the election process.

Land, 546 F.3d at 388-89; *see also* Stay Dec. 19 (public interest weighs against a stay given the large number of voters who would "be prevented or deterred from voting if Act 23 were reinstated pending appeal").

Defendants ask this Court to lift the injunction on Act 23, notwithstanding the constitutional and statutory violations found by the District Court, because in their view it is somehow critical for the State to rush the implementation of voter identification in November 2014. That argument is highly "suspect" because the incumbent party is seeking to impose new voting restrictions that defendants concede would fall disproportionately on voters of color, who tend to favor the opposition party. *See LULAC v. Perry*, 548 U.S. 399, 441 (2006). The Supreme Court has condemned this kind of "troubling blend of politics and race" and held that it "cannot be sustained" under Section 2. *Id.* at 442; *see also id.* at 440 ("In

essence the State took away the Latinos' opportunity because Latinos were about to exercise it.").

CONCLUSION

The Court should deny Defendants' motion to stay the District Court's April 29, 2014 permanent injunction pending appeal.

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CERTIFICATE OF SERVICE

I certify that on August 19, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will accomplish electronic notice and service on all counsel of record who are registered CM/ECF users.

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