No. 14A_____

In the

# Supreme Court of the United States

RUTHELLE FRANK, et al.,
*Applicants*,

v.

SCOTT WALKER, et al.,
*Respondents.*

-and-

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, et al.,
*Applicants*,

v.

DAVID G. DEININGER, et al.,
*Respondents.*

## EMERGENCY APPLICATION TO VACATE SEVENTH CIRCUIT STAY OF PERMANENT INJUNCTION

**Directed to the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Seventh Circuit**


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## STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Applicants has a parent corporation, and no publicly held corporation holds 10 percent or more of any Applicant's stock.

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## Emergency Application to Vacate Stay

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit:

Applicants respectfully request an emergency order vacating the September 12, 2014 order of the United States Court of Appeals for the Seventh Circuit that stayed the district court's permanent injunction of Wisconsin's new voter ID law.

Wisconsin's Act 23 is one of the strictest voter ID laws in the country. The law, enacted in May 2011, would require voters to show one of only a few forms of specified photo identification to cast a ballot. The law has been enjoined since March 2012, shortly after it took effect, and has never been enforced in any federal election. On April 29, 2014, after a two-week trial, the district court permanently enjoined the law, holding that it violates Section 2 of the Voting Rights Act and the Fourteenth Amendment. The court reached the "inescapable" conclusion that "Act 23's burdens will deter or prevent a substantial number of the 300,000 plus voters who lack an ID from voting"—disproportionately affecting Black and Latino voters. App. 60, 96. In declining to stay the injunction pending appeal, the district court found it "absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." App. 37 (Aug. 13, 2014 Order).

In a breathtaking move that guarantees chaos at the polls and irreparable disenfranchisement of many thousands of registered Wisconsin voters, a panel of the Seventh Circuit, in a ten-sentence order, stayed the district court's permanent injunction on September 12. App. 1–2. The court explained that the State could now "enforce the photo ID requirement in this November's election." *Id.* Before the

panel's order, Wisconsin had taken virtually no steps to implement Act 23 for the upcoming election. On September 26, the Seventh Circuit denied hearing *en banc* "by an equally divided court." App. 18. Five judges of the Seventh Circuit—Chief Judge Wood and Judges Posner, Rovner, Williams, and Hamilton—voted to "revoke[]" the stay order and declared that the court of appeals "should not accept, as the state is willing to do, the disenfranchisement of up to 10% of Wisconsin's registered voters." App. 15, 16 (Williams, J., dissenting). The dissenting judges decried that "for the state to take this position is shocking." App. 10.

Unless this Court vacates the order below, the panel's stay will sow confusion at the polls and discourage voting in the November 4 general election in Wisconsin. Voting is the foundational element of a free society. Chaos in an election—especially when entirely preventable—is undemocratic. Yet weeks before a major election, the panel's stay order dramatically changed the status quo for voters—*i.e.*, the continuation of Wisconsin's traditional voting practices and suspension of Act 23's stringent new photo ID requirements.

The stay order did not address whether the State in the coming weeks can adequately train polls workers, sufficiently educate voters about the new photo ID requirements, and get qualifying IDs into the hands of those who need them. As the dissenting judges explained below, "It is simply impossible—as a matter of common sense and of logistics—that hundreds of thousands of Wisconsin voters will both learn about the need for photo identification and obtain the requisite identification in the next 36 days." App. 10 (Williams, J., dissenting). Wisconsin's

limited DMV locations—the only places where voters without qualifying ID can obtain one free of charge—simply cannot issue anywhere near the number of IDs that are needed to avoid massive disenfranchisement. And "[o]btaining the necessary identification can take *months* for voters who were born outside Wisconsin and who lack birth certificates. Make no mistake, that is no small number of the registered voters at issue." *Id.* (emphasis added).

Worse still, many voters *already have cast absentee ballots*. After the panel issued the stay order, the State immediately declared that the "thousands of absentee ballots that were mailed to voters before the panel's order" will not be counted unless voters now come forward with photo ID that was not required when they cast their ballots. App. 11 (Williams, J., dissenting). These voters' once-valid votes thus are rendered void by the decision below.

"Changing the rules so soon before the election is contrary not just to the practical realities of an impending election, but it is inconsistent with [this Court's] approach in such cases." *Id.* (Williams, J., dissenting). Eleventh-hour changes to voting requirements "can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that that increases "[a]s an election draws closer." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). The Seventh Circuit's stay guarantees massive confusion among voters and poll workers on election day. Many voters, unsure of what identification is now required to vote, will likely stay home from the polls, while others will be turned away.

On the other side of the ledger, the State made no showing at trial—and the Seventh Circuit panel made no mention in its stay order—of any tangible harm to the State by postponing implementation of the new voter ID law until after the November election. As the five dissenting judges explained, the State will not "be irreparably harmed absent a stay. . . . The state has conducted hundreds of elections without a voter identification requirement. It had been planning for months to do so again." App. 14 (Williams, J., dissenting). The panel's stay order threatens "the disenfranchisement of up to 10% of Wisconsin's registered voters" to "guard[] against a problem"—in-person voter fraud—that the State of Wisconsin "does not have and has never had." App. 15 (Williams, J., dissenting).

Regardless of the outcome of this case on the merits, the electorate should not have to suffer chaos and confusion on the eve of a major election. This Court should vacate the Seventh Circuit's stay until after the Seventh Circuit decides the State's appeal on the merits and any aggrieved party has had an opportunity to seek review from this Court. "[T]he status quo before the panel's order should be restored—the status quo that all Wisconsin had been operating under, and the status quo that if not restored will irreparably harm registered voters in Wisconsin." App. 12 (Williams, J., dissenting).

## Background

1. Wisconsin's Act 23, enacted on May 25, 2011, requires Wisconsin voters to produce one of several specific forms of photo identification in order to cast a ballot. App. 41–42. Voters who do not have a qualifying ID can obtain one at a DMV location, but only if they produce documents, typically including a certified

birth certificate, proving citizenship or legal presence, name and date of birth, identity, and Wisconsin residency. App. 63–66. The ostensible purpose of this measure is to combat in-person voter fraud—that is, when a person appears at the polls and attempts to vote as someone else. App. 48–54. Act 23 is among "the most restrictive voter identification law[s] in the United States." Order for Judgment and Judgment Granting Declaratory and Injunctive Relief, *Milwaukee Branch of the NAACP, et al. v. Walker, et al.*, No. 11 CV 5492 (Wis. Cir. Ct. July 17, 2012), http://tinyurl.com/mwm8y9s (all websites last accessed Oct. 1, 2014).

The Wisconsin legislature deferred enforcement of Act 23 for eight months until the low-turnout local primaries in February 2012. During this eight-month period, the legislature directed State officials to "conduct a public informational campaign," "[e]ngage in outreach to identify and contact groups of electors who may need assistance," and affirmatively "provide assistance" to those people needing it. 2011 Wis. Act 23, §§ 95, 144(1)–(2). Despite these efforts, the enforcement of Act 23 in the February 2012 local primary caused significant confusion, mistakes, and burdens, and some registered voters were outright denied the opportunity to cast a ballot. *See* Trial Tr. 153–54, 172–73, 376–77, 416–17, 433, 436, 2063. A Wisconsin state court enjoined the Act two weeks after the February 2012 primary. Order Granting Motion for Temporary Injunction, *Milwaukee Br. of the NAACP, et al. v. Walker, et al.*, No. 11 CV 5492 (Wis. Cir. Ct. Mar. 6, 2012), http://tinyurl.com/kadaotg. The Act remained enjoined under various state and

federal court orders for the following 30 months.[1] During this 30-month period, the State suspended voter ID training and outreach efforts. *See* Trial Tr. 1922, 1955–57; Patrick Marley, *Elections board requests $460,000 for voter ID campaign*, MILWAUKEE J. SENTINEL (Sept. 30, 2014), http://tinyurl.com/kl8b5k5.

2. Plaintiffs filed suit in the Eastern District of Wisconsin to enjoin enforcement of Act 23 on grounds that it would disproportionately disenfranchise Black and Latino voters in violation of Section 2 of the Voting Rights Act (42 U.S.C. § 1973), and would impose an unjustifiable burden on voters in violation of the Fourteenth Amendment. In November 2013, the district court conducted a two-week bench trial at which the parties presented 43 fact witnesses, six expert witnesses, and introduced thousands of pages of documentary evidence.[2]

In an exhaustive 90-page decision, the district court permanently enjoined Wisconsin's voter ID law under Section 2 of the Voting Rights Act and the Fourteenth Amendment. App. 38–127 (Apr. 29, 2014 Order). The court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID" needed to vote under Act 23. App. 60. The court reached the "inescapable" conclusion that the group of voters that would be disenfranchised by Act 23 is "disproportionately" made up of Blacks and Latinos. App. 96. The court found that while many registered voters might obtain

[1] App. 38–127 (district court injunction); Decision and Order Granting Summary Declaratory Judgment and Permanent Injunction at 6, *League,* No. 11-CV-4669 (Dane Cnty. Cir. Ct., Mar. 12, 2012); Order Granting Motion for Temporary Injunction at 4, *NAACP* , No. 11-CV-5492 (Dane Cnty. Cir. Ct., Mar. 6, 2012).

[2] This consolidated case involves two lawsuits. The *Frank* case was filed on December 13, 2011. The *LULAC* case was filed on February 23, 2012.

acceptable IDs with sufficient (occasionally "tenacious") efforts, many others could not. App. 69 & n.17, 74–75.

The district court acknowledged the State's interest in "[d]etecting and preventing in-person voter-impersonation fraud" and "promoting confidence in the integrity of the electoral process." App. 48, 55. But the court found that, after two years of litigation, "[t]he defendants could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." App. 49. Even taking unresolved reports of voting fraud into account, "[t]he rate of potential voter-impersonation fraud is . . . exceedingly tiny"; "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." App. 48, 50, 53. Thereafter, the court denied the State's motion to stay the injunction pending appeal, concluding "that it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." App. 75.

3. The State appealed to the Seventh Circuit. On appeal, the United States filed an *amicus curiae* brief supporting plaintiffs on both the Section 2 and Fourteenth Amendment claims and expressed the growing national significance of the issues presented in this case. *See* Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellees and Urging Affirmance, *Frank v. Walker*, Nos. 14-2058 & 14-2059 (7th Cir. filed July 30, 2014) (ECF 43).

On September 11, 2014—the day before oral argument in the Seventh Circuit—the State adopted an "Emergency Rule" to modify the procedures to obtain

a voter ID at a DMV location. *See* Wisconsin Department of Transportation, EmR14 (Sept. 11, 2014), http://tinyurl.com/mdrk4aq. Wisconsin adopted this "Emergency Rule" following decisions of the Wisconsin Supreme Court. *See League of Women Voters v. Walker*, 851 N.W.2d 302 (Wis. July 31, 2014); *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. July 31, 2014). The Wisconsin Supreme Court held that Act 23 imposed a "severe burden" on voters that other jurisdictions have characterized as a "de facto poll tax." *NAACP*, 851 N.W.2d 262, ¶¶ 50, 60, 62. The court adopted a "saving construction" of DMV regulations that supposedly would lessen the burden on voters and eliminate fees to obtain a qualifying ID needed to vote. *Id.* ¶ 69–70. Based on that "saving construction," the state high court lifted the state court injunctions against enforcement of Act 23. The State's "Emergency Rule" purports to implement this "saving construction."

At oral argument before the Seventh Circuit on September 12, the State requested an immediate stay of the district court's permanent injunction, arguing that the Emergency Rule would reduce the burden on voters attempting to obtain a qualifying ID. App. 2, 4. Later that day, the panel issued a one-page order "stay[ing] the injunction issued by the district court" and inviting the State to "enforce the photo ID requirement in this November's elections." App. 2. The panel explained that the merits of the appeal "remain under advisement, and an opinion on the merits will issue in due course." *Id.*

4. On September 26, the panel denied plaintiffs' motion for reconsideration, and the Seventh Circuit denied hearing *en banc* "by an equally divided court." App. 18.

On September 30, the panel in a *per curiam* opinion stated that Wisconsin had a "strong prospect of success on appeal" based on this Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and the Wisconsin Supreme Court's decisions lifting the state-court injunctions. App. 4, 8. The panel acknowledged that "[n]one of these decisions is dispositive, because the district judge [in this case] made findings of fact different than those the Supreme Court of the United States and the Supreme Court of Wisconsin had in front of them." App. 4. The panel further stated that there is a "public interest in using laws enacted through the democratic process, until the laws' validity has been finally determined" (even if a law had been found unconstitutional). App. 5.

The panel discounted the notion that the State cannot fairly and responsibly implement the Act 23 in a matter of weeks, and that changing voting rules so close to an election will cause chaos at the polls. The panel reasoned that "the state's election officials themselves asked for the stay," and that voters had "eight months to acquire necessary documents before Act 23's first implementation (in the February 2012 primary); a further two years and nine months will have passed by this fall's election." *Id.* According to the panel, moreover, its stay order "does not 'impose' any change," but rather "lifts a federal prohibition and permits state officials to proceed as state law allows or requires." App. 6.

Concurrently on September 30, Judge Williams issued an opinion dissenting from the denial of hearing *en banc*, which was joined by Chief Judge Wood and Judges Posner, Rovner, and Hamilton. App. 9–14. They concluded that the stay "will substantially injure numerous registered voters in Wisconsin, and the public at large, with no appreciable benefit to the state." App. 9. The dissent explained that changing the rules for an election "only weeks away" would cause widespread disenfranchisement because "[i]t is simply impossible—as a matter of common sense and logistics—that hundreds of thousands of Wisconsin's voters will both learn about the need for photo identification and obtain the requisite identification in the next 36 days." App. 9, 10. The dissent found the State's willingness to "accept the disenfranchisement of 10% of the state's registered voters" to be "shocking" and "brazen." App. 10. Judge Williams concluded that the panel "should not have altered the status quo so soon before [the November] elections. And that is true whatever one's view of the merits of the case." App. 9, 12 (separately finding that the panel's assumptions on the merits were "dead wrong").

Plaintiffs have no other avenue in which to seek the relief sought in this application.

## Reasons to Vacate the Stay

A Circuit Justice may vacate a stay "where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of

accepted standards in deciding to issue a stay." *W. Airlines v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 130 S. Ct. 705, 709–10 (2010). This case meets all of those requirements.

## I. The Stay Order Below Will Cause Chaos at the Polls and Will Disenfranchise Many Thousands of Wisconsin Voters in November

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). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Yet the Seventh Circuit threw Wisconsin's election machinery into disarray by changing the voting rules in a way that will disenfranchise hundreds of thousands of registered Wisconsin voters who lack an ID needed to vote. The Seventh Circuit's stay will deny those voters the opportunity to cast a ballot unless they learn about the requirement and manage to procure a qualifying photo ID between now and the election in 33 days—a Herculean task that common sense, the district court, and five judges of the Seventh Circuit tell us would be "simply impossible." App. 10.

Separate from the legality of Act 23, the State cannot effectively implement its photo ID requirements instantaneously, like the flip of a switch. As Judge Kavanaugh of the D.C. Circuit explained for the three-judge district court in *South Carolina v. United States*, the fact that a legislature has provided a lengthy period for voter education and poll-worker training before new voter ID requirements take

effect "strongly suggest[s] that these steps cannot be adequately completed" in a truncated time, especially just weeks before a major election. 898 F. Supp. 2d 30, 49 (D.D.C. 2012). Here, Wisconsin's legislature decided in 2011 that *at least eight months* would be necessary for an adequate "public information campaign," outreach to voters, and actually "provid[ing] assistance" to voters needing it. 2011 Wis. Act 23 §§ 95, 144(1)–(2). Act 23 "was designed to have a rollout period of 8 months before a primary and 16 months before a general election—not mere weeks." App. 14 (Williams, J., dissenting).

Wisconsin does not have the infrastructure or bandwidth to implement the necessary measures in the next several weeks. The Wisconsin DMV has only 92 offices statewide. App. 67. In 48 counties representing over a quarter of Wisconsin's voting age population, those offices are open only two days a week for a total of ten hours—"and these are weekdays, not weekends." App. 10 (Williams, J., dissenting). Between now and Election Day, DMV offices in 11 Wisconsin cities will be open three or fewer days; two will not be open at all. Voters in each of these cities must travel at least 12 miles to get to the next-closest DMV office; some voters would need to travel as far as 26 miles.[3] This is a potentially insurmountable burden for citizens who, by definition, do not have driver's licenses.

[3] Location and hours and dates of operation of DMV service centers found using State's "Find my closest DMV" tool, http://tinyurl.com/p9u7bjl.

The Wisconsin DMV issues approximately 220 new IDs per day statewide.[4] At that rate, the State will issue around 10,000 new IDs between now and Election Day. Even if the State does so, that would still leave at least 290,000 registered Wisconsin voters without a qualifying ID who would be unable to vote on November 4. In order to issue qualifying IDs to all 300,000 registered voters who do not have one, DMV would need to issue over 9,090 IDs *per day*—seven days per week—between now and Election Day.

After Act 23 was passed, the State earmarked $2 million for training and outreach about the new law, had full-time employees dedicated to implementing the law, and had State officials and others make over 150 presentations to voters and election officials throughout the State about Act 23's requirements. *See* Trial Tr. 1921–22, 1944–46. The State now has *no* funds available for public information or outreach to ensure voters are aware of the "emergency" implementation of Act 23, let alone adequate funds to assist huge numbers of voters in obtaining voter IDs.[5] Numerous officials—including the chief election officials for Wisconsin's two largest cities, Milwaukee and Madison—have acknowledged there is not enough time to educate and assist voters or train poll workers.[6]

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[4] Dee J. Hall & Doug Erickson, *State has no budget for voter ID, agencies say*, WIS. STATE J. (Sept. 21, 2014), http://tinyurl.com/msvtpb8.

[5] Hall & Erickson, *State has no budget, supra* note 4.

[6] Hall & Erickson, *State has no budget, supra* note 4 (Executive Director of the Milwaukee Election Commission stating "there is not proper time to educate all voters . . . and ensure they're also able to cast a ballot on Election Day"); Zoe Sullivan, *Wisconsin Voter ID Ruling Threatens Chaos On Election Day*, THE GUARDIAN (Sept. 23, 2014) (Madison clerk stating "implementation of the voter ID law at this late date . . . likely will cause significant confusion for voters and poll workers and cause disruptions and delays at the polls"), http://tinyurl.com/mgp3rq3.

The irreparable harm to absentee voters is even more acute. State officials mailed nearly 12,000 absentee ballots to registered Wisconsin voters before September 12. The instructions included with those ballots did not include a photo ID requirement, and many voters have already completed and returned those absentee ballots.[7] But amazingly, after the Seventh Circuit stayed the permanent injunction, the State declared that those ballots will not be counted unless the voters who cast them now come forward with photocopies of their qualifying IDs.[8] To be clear: "those thousands of absentee ballots that were mailed to voters before the panel's order . . . do not count when returned in the manner their instructions direct, for they do not comply with the Wisconsin voter identification law." App. 11 (Williams, J., dissenting). This after-the-fact disenfranchisement of thousands of registered Wisconsin voters who sought to exercise the franchise is unconscionable.

The harm that will be suffered by these disenfranchised Wisconsin voters is the epitome of irreparable. A vote not counted is a vote forever lost. As the five dissenting judges recognized, "The scale balancing the harms here . . . is firmly weighted down by the harm to the plaintiffs. Should Wisconsin citizens not have their votes heard, the harm done is irreversible." App. 15.

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[7] Dee J. Hall, *Absentee ballots already cast will need photo ID, elections official says*, BARABOO NEWS REPUBLIC (Sept. 17, 2014), http://tinyurl.com/pkfj353; Patrick Marley, *Voters who returned* absentee *ballots must send ID copies,* MILWAUKEE J. SENTINEL (Sept. 16, 2014), http://tinyurl.com/neabkok.

[8] Memorandum from M. Haas, Elections Division Administrator, on Voter Photo ID and Absentee Ballots for 2014 General Election to Wisconsin County Clerks, Wisconsin Municipal Clerks, City of Milwaukee Election Comm'n, Milwaukee County Election Comm'n (Sept. 16, 2014), http://tinyurl.com/qy5asum.

## II. The Seventh Circuit Was Demonstrably Wrong in Its Application of the Accepted Standards for Issuing a Stay

To issue a stay, courts must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). "The first two factors . . . are the most critical," and the "party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Id.* at 434.

On the first prong, the panel concluded that the State was likely to succeed on the merits primarily "given *Crawford*," though the panel recognized that *Crawford* is not "dispositive" because this case involves a different factual record. App. 4, 8. The dissenting judges rightly found the panel's reliance on *Crawford* "dead wrong." App. 12 (Williams, J., dissenting). This case is materially different from *Crawford* in at least three critical respects. First, this Court's opinion in *Crawford* "made very clear that its decision was specific to the evidence in the record in that case. Or, to be more precise, to the complete and utter lack of evidence." *Id.* By contrast, in this case, "plaintiffs put on detailed evidence of the substantial burdens Wisconsin's voter identification law imposes on numerous voters." *Id.* Thus, "[t]he record that has been made in this litigation is entirely different from that made in *Crawford*. In every way." *Id.*

Second, Wisconsin's Act 23 is not "materially identical" to the Indiana voter ID law upheld in *Crawford*, as the panel claimed. App. 2. Rather, Act 23 imposes

much more stringent requirements than Indiana's law. "[T]he Wisconsin law does not have an affidavit option that allows indigent voters without identification to vote provisionally as the Indiana law at issue in *Crawford* did." App. 14 (Williams, J., dissenting). Also, unlike Wisconsin, Indiana law allows all voters over age 65 and all disabled voters to vote absentee without a photo ID and without any other requirements. Ind. Code § 3-11-10-24(a)(4), (5); *see also Crawford*, 553 U.S. at 201 ("[Although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification.").

Third, this case, unlike *Crawford*, involves a claim under Section 2 of the Voting Rights Act.

On the second *Nken* factor, the State will not suffer tangible harm absent a stay. Act 23 is supposedly designed to prevent in-person voter fraud. But the district court found that, after two years of litigation, the State "could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." App. 49. The court found that "virtually no voter impersonation occurs in Wisconsin," and that "it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future." App. 48–49.

On the third *Nken* factor, the panel did not dispute that burdening or denying the right to vote constitutes irreparable harm to voters, including plaintiffs. The district court and the dissenting judges of the Seventh Circuit rightly concluded that Act 23 will lead to "the disenfranchisement of up to 10% of Wisconsin's registered voters." App. 15 (Williams, J., dissenting). The dissent was right to call

this outcome "shocking" and a "brazen" position for a State to take with respect to its own citizens. App. 10. The panel, by contrast, laid blame on voters "who did not already have a document that Wisconsin accepts (a driver's license, for example)," despite having "more than three years to get one." App. 7. Of course, Act 23 was enjoined during nearly all of that period, when the law operated as a "de facto poll tax." *NAACP*, 851 N.W.2d at 275, ¶ 50 (July 31, 2014).

On the final factor, there is an overwhelming public interest in not disenfranchising large numbers of registered voters. The panel's stay "will substantially injure numerous registered voters in Wisconsin, and the public at large, with no appreciable benefit to the state." App. 9 (Williams, J., dissenting). The panel relied on a generalized "public interest in using laws enacted through the democratic process, until the laws' validity has been finally determined." App. 5. The panel drew a false analogy to the same-sex marriage cases. The stays in the marriage cases *preserve* the status quo pending this Court's review of the issue. By contrast, the order below radically *upends* the status quo of Wisconsin's longstanding election procedures. "The state has conducted hundreds of elections without a voter identification requirement. It had been preparing for months to do the same again." App. 14 (Williams, J., dissenting).

The panel's application of the stay factors also cannot be squared with this Court's frequent admonitions against changing the voting rules on the eve of an election. *Purcell*, 549 U.S. at 4–5 ("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."); *Moore v. Brown*, 448 U.S. 1335, 1340 (1980) (Powell, J., in chambers) (declining on September 5 to stay a preliminary injunction affecting the upcoming November election); *Williams v. Rhodes,* 393 U.S. 23, 34–35 (1968) (denying relief, despite unconstitutionality of ballot-access statute, because ballots had already been printed and "the confusion that would attend . . . a last-minute change poses a risk of interference with the rights of other Ohio citizens" such that "relief cannot be granted without serious disruption of [the] electoral process") (decided October 15); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (court "should consider the proximity of a forthcoming election and the mechanical complexities of state election laws," as well as whether "a State's election machinery is already in progress") (remedial order on July 25).

In stark contrast to the decision below, the Sixth Circuit in *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 388–89 (6th Cir. 2008), properly concluded that the public interest weighs in favor of injunctive relief "[b]ecause the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters." *Id.* at 388–89. The court explained that the injunction "eliminates a risk of individual disfranchisement without creating any new substantial threats to the integrity of the election process." *Id.* at 389. The Seventh Circuit's contrary methodology—which included no "weighing" at all—was "demonstrably wrong." *W. Airlines*, 480 U.S. at 1305.

## III. This Court Should and Likely Will Grant Review

This case presents two issues of paramount national importance that plainly warrant this Court's plenary consideration.

First, Act 23 is one of many voter ID laws of varying degrees of stringency that States have enacted in the wake of *Crawford*. Federal and state courts have taken wildly conflicting views about the scope and meaning of that decision. Several of those conflicting decisions are now or may shortly come before this Court, including cases challenging voter ID laws in North Carolina and Texas.[9] The lower courts' differing readings of *Crawford* and conflicting approaches to voter ID requirements warrant this Court's resolution and guidance on the merits.

The panel's assertion (App. 2) that Act 23 "is materially identical to Indiana's photo ID statute" upheld in *Crawford* is wrong, as explained above. This case presents the opportunity to answer many of the questions necessarily left unresolved in *Crawford*, where the record had not been developed on several key issues. For example, in *Crawford* (1) "the evidence in the record [did] not provide [the Court] with the number of registered voters without photo identification"; (2) the "evidence presented in the District Court [did] not provide any concrete evidence of the burden imposed on voters who currently lack photo identification"; (3) the record did not include evidence of "how difficult it would be for" certain plaintiffs to obtain a birth certificate; (4) there was no evidence of how many free

[9] *League of Women Voters of North Carolina v. North Carolina*, slip op., No. 14-1859 (4th Cir. Oct. 1, 2014); *United States v. Texas*, No. 2:13-cv-263 (S.D. Tex.) (pending decision following September 2014 bench trial on Section 2 and Fourteenth Amendment claims).

photo IDs the state issued after its voter ID law was enacted; and (5) "nothing in the record establishe[d] the distribution of voters who lack photo identification." 553 U.S. at 200–01, 203 n.20 (plurality opinion). The extensive trial record here provides exactly the kind of evidence that this Court called for in *Crawford*.

Second, the Seventh Circuit's decision to issue a stay just weeks before a major election conflicts with this Court's decisions as well as those of other federal and state courts. This Court repeatedly has cautioned that lower courts considering last-minute changes to long-established election rules should delay implementation of proposed changes, even where the party seeking those changes is likely to prevail. *See supra* pp. 3, 17-18 (citing *Purcell* and other voting cases); *see also* App. 11 (Williams, J., dissenting) ("*Purcell* was not the first time [this] Court recognized these realities." (citing additional cases)).

The Seventh Circuit's authorization to implement new "emergency" voter ID procedures weeks before a major general election sharply conflicts with the decisions of other federal and state courts. *See Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139 (1st Cir. 2012) (denying relief because plaintiff's late-filed voter registration challenge came "on the eve of a major election" and sought "to disrupt long-standing election procedures, which large portions of the electorate have used"); *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (ruling on October 26 that, even though campaign finance law might be unconstitutional, "given the imminent nature of the election, we find it important not to disturb long-established expectations").

The fact that Wisconsin's Emergency Rule is supposed to mitigate the harm suffered by Wisconsin voters due to the rushed implementation of Act 23 is irrelevant. The case of South Carolina's voter ID law is instructive. South Carolina amended its law shortly before the 2012 elections to include an "expansive reasonable impediment provision that was intentionally designed to relieve any potentially problematic aspects . . . and allow[] voters with non-photo voter registration cards to vote as they could before." *South Carolina*, 898 F. Supp. 2d at 46. Nevertheless, the three-judge district court ruled that, as of October 2, 2012, the State could not complete "a large number of difficult steps [that] would have to be completed in order for the reasonable impediment provision to be properly implemented on November 6, 2012." *Id.* at 49–50. The court explained that "[i]n the course of just a few short weeks, the law by its terms would require: that more than 100,000 South Carolina voters be informed of and educated about the law's new requirements; that several thousand poll workers and poll managers be educated and trained about the intricacies and nuances of the law . . . and that county election boards become knowledgeable of the law." *Id.* at 50. The court expressed special concern that "South Carolina voters without [qualifying] photo IDs would have very little time before the 2012 elections to choose the option of obtaining one of the free qualifying photo IDs." *Id.*

Other courts similarly have refused to allow States to implement voter ID laws shortly before an election. *Applewhite v. Commonwealth*, 54 A.3d 1, 4 (Pa. 2012) (decided Sept. 18) (remanding to determine whether Pennsylvania could

implement new voter ID requirement in two months remaining before election); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211, at *2 (Pa. Commw. Ct. Oct. 2, 2012) (enjoining law because voters still had extreme difficulty navigating new procedures designed to lessen burdens to obtain a voter ID); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006) (plan to implement voter ID law must "allow[] sufficient time for [state] education efforts" and "undertake[] sufficient steps to inform voters of the [ID] requirement before future elections"). This consistent line of authority reveals just how far the panel strayed from accepted practice.

In proceedings below, the State relied on this Court's decision in *Purcell*, but that case undoubtedly supports plaintiffs' position that voting rules cannot be changed at the eleventh hour. In *Purcell*, the Court vacated a Ninth Circuit decision that had enjoined Arizona's voter ID requirement. But, critically, the Arizona law had been in effect *prior* to the Ninth Circuit's injunction. In other words, the Ninth Circuit's decision to enjoin the voter ID law upset the status quo and threatened to confuse voters and discourage them from voting. This Court's decision in *Purcell* thus restored the long-standing status quo until after the election. 549 U.S. at 3.

The same principle is applicable here. Wisconsin's voter ID law had been enjoined for 30 months when the Seventh Circuit entered the stay order on September 12, 2014. Like the injunction in *Purcell*, the Seventh Circuit's stay radically altered the status quo and fundamentally changed voting procedures

weeks prior to Election Day. This duty to ensure the orderly administration of a general election is entirely separate from the underlying merits of voter ID laws generally. The principle is the same: in this country, we do not change the rules for voters mid-game.

This Court in *Purcell* also stressed that the Ninth Circuit had failed to accord appropriate deference, in its four-sentence injunction, to the district court's factual findings and its "ultimate finding" on the likely merits of the voting rights claims. *Id.* at 5. Similarly, the Seventh Circuit's cursory order staying the permanent injunction shows no acknowledgment (much less deference) to the extensive factual findings throughout the district court's 90-page decision. As this Court held in *Purcell*, despite the proximity of the election, "it was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court," and its failure to do so was "error." *Id.* at 5. The same is true here.[10]

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"[T]he right to vote is not the province of just the majority. It is not held just by those who have cars and so already have driver's licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age." App. 10 (Williams, J., dissenting). If this

[10] The Arizona voter ID law at issue in *Purcell* also gave voters a variety of ways to vote without having to obtain an official state ID. For example, Arizona voters could participate in early voting without having to show an official ID. 549 U.S. at 2. And the Arizona law allowed voters to present *either* an official ID *or* two different forms of non-photo identification bearing the voter's name and address, such as a utility bill, bank statement, or insurance card. *Gonzalez v. Arizona*, 677 F.3d 383, 404 & n.31 (9th Cir. 2012) (en banc), *aff'd on other grounds*, 133 S. Ct. 2247 (2013). Act 23 has no comparable provisions.

Court does not vacate the Seventh Circuit's stay, many of the people who show up to the polls in Wisconsin on Election Day will be deterred or outright turned away and stripped of their fundamental right to vote—all because a federal court decided to change the election rules at the eleventh hour. The legal questions underlying plaintiffs' challenge to Act 23 deserve solemn and fulsome consideration by this Court in due course. In the meantime, this Court should maintain the status quo, avoid the chaos that inevitably will follow from the enforcement of new voter ID requirements still unknown to countless voters and poll workers, and permit the voices of all registered Wisconsin voters to be heard on Election Day.

**Conclusion**

This Court should vacate the Seventh Circuit's September 12, 2014 order staying the District Court's permanent injunction and leave that injunction in force pending the Seventh Circuit's issuance of a decision on the merits and the opportunity to seek review of that decision from this Court.

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