Appeal Nos. 14-2058 and14-2059
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 OF WISCONSIN, et al.,	)
Plaintiffs-Appellees,	)
v.	)
DAVID G. DEININGER, et al.,	)
Defendants-Appellants.	)

Appeal from the Judgments of the United States District
Court for the Eastern District of Wisconsin
Honorable Lynn Adelman, Judge, Case Nos. 11-cv-01128 and No. 2:12-cv-00185

BRIEF OF AMICUS CURIAE SUPPORTING THE APPELLANTS AND SUPPORTING REVERSAL OF THE DECISION OF THE DISTRICT COURT

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Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The *Amici* are Margaret Farrow, Deborah Haywood, George Mitchell, Michael Sandvick, Aaron Rodriguez, and Robert Spindell. All are qualified electors of the State of Wisconsin, vote regularly, and possess the type of identification required by 2011 Wisconsin Act 23 ("Act 23"). Each is involved in various ways in politics and public policy in the State of Wisconsin as more fully set forth in the Motion for leave to file this brief.

Amici support Act 23's photo identification requirements for voting. They believe that a photo ID requirement protects their votes from being stolen by fraudulent voters and enhances public confidence in the electoral process. This concern is particularly salient in a state like Wisconsin that permits same day registration using easily fabricated proofs of residence. *See* Wis. Stat. §§ 6.34, 6.55.

Amici believe that Act 23 is constitutional and does not violate the Voting Rights Act. But if Act 23 is invalidated, *Amici* would urge the Wisconsin Legislature to adopt a different photo ID requirement tailored to remedy any legal deficiencies. For that reason, it is critical that the proper legal standards be identified so that legislators will know what is required of

them. It is also critical that any injunction not exceed the jurisdiction of the District Court or the bounds of its discretion.

The District Court badly misstates the proper legal standard for assessing election regulations under both the United States Constitution and Section 2 of the Voting Rights Act. While the Defendants-Appellants also criticize these aspects of the District Court's decision, *Amici* argue for different – and more fully developed – standards. The State correctly points out that the District Court erroneously relied upon probabilities and what *might* happen as a result of Act 23. The State argues that it was the burden of the Plaintiffs to prove – and the District Court to decide – whether Act 23 would cause discrimination on the basis of race. (Def.-App. Br. at 27-29.) As the State aptly puts it, Section 2 focuses on results and not on likelihoods. (*Id*. at 28.)

Amici agree, but further urge this Court to clarify the legal standard for a vote denial claim under Section 2 of the Voting Rights Act, *i.e.*, to set forth precisely what it means to say that an election regulation has "caused" a discriminatory "result" on "account of" race. The District Court held that any burden having even a non-quantifiable effect would suffice, even if that burden were a result of income, and not race, because societal discrimination has resulted in greater poverty among minorities. But this is error.

This Court should hold that to violate Section 2's requirement that the right to vote be abridged "on account of race," an election regulation must result in a denial of the right to vote on the basis of race and not simply create burdens that may be more difficult for low income persons to surmount – even if low income is correlated with race – and that correlation may be a product of societal discrimination unrelated to the regulation or the electoral system itself. In the context of Photo ID, to meet Section 2's requirement that a challenged practice must cause a discriminatory "result," a plaintiff must prove not only that a disproportionate number of minorities currently lack the required forms of ID, but also that the burdens of obtaining an approved form of ID are: (1) substantially more difficult for minority voters than white voters, and (2) so substantial that they would keep a large and disproportionate number of minorities from actually voting.

With respect to the constitutional claim, this Court should hold that only a substantial burden on the right to vote can trigger the more exacting balance tests called for in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Any other approach would be

inconsistent with Article I, section 4's commitment of the principal responsibility for election administration to the states.

Moreover, both concurring opinions in *Crawford v. Marion County* 553 U.S.181 (2008), make clear that, at least in a facial challenge, courts cannot limit a balancing analysis to some subset of the population – however small – said to be uniquely burdened by the law while ignoring the fact that an overwhelming majority is unaffected. If exacting scrutiny is not premised on a burden that exceeds a triggering threshold and can be assessed by that burden's impact only on a small subgroup, then virtually every election regulation will be vulnerable to constitutional challenge.

Finally, the District Court exceeded its jurisdiction and abused its discretion by entering an injunction that prevents the State of Wisconsin from enforcing **any** photo identification requirement, as opposed to enjoining the specific photo identification requirement contained in Act 23.

No party or party's counsel authored this brief in whole or in part, and no party, party's counsel or other person other than the *Amici* and their counsel contributed money to fund preparing or submitting this brief.

I. THE DISTRICT COURT APPLIED AN IMPROPER STANDARD TO BOTH THE SECTION 2 AND CONSTITUTIONAL CLAIMS

A. Constitutional Framework

As the Supreme Court recently observed, our constitutional framework allows "the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 133 S.Ct. 2612, 2623 (2013), citing *Gregory v. Ashcroft*, 501 U.S. 452, 461-462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Thus, states have "broad power to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). Federal courts must tread lightly because it is "for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Crawford v. Marion County Elections Bd.*, 553 U.S. 181, 208, 128 S.Ct. 1610, 170 L.Ed.2d 574 (Scalia, J.). Aggressively "detailed supervision of the election process would flout the Constitution's express commitment of the task to the states." *Id*.

This element of our constitutional structure informs both constitutional scrutiny of state law and interpretation of the Voting Rights Act. In *Shelby County*, the Court recognized the "extraordinary" and "unfamiliar" burdens placed upon subject states by the preclearance requirements of Section 5. While these burdens could be justified by the "unique" and "pervasive" impact of *official*

discrimination in the administration of elections in the affected jurisdictions, respect for state sovereignty and our federal system required current and substantial justification that Congress, in continuing to use a 40-year-old coverage formula, lacked. *Shelby County*, 133 S.Ct. at 2624-2625, 2631.

Although the Court's decision did not affect Section 2, it has important implications for its interpretation. *Cf. Shelby County*, 133 S. Ct. at 2630 ("The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary.") While, to be sure, preclearance is not involved here (but see p. 26, *infra*), the level of scrutiny Section 2 imposes on state electoral practices implicates the same federalism concerns. It is only substantial burdens with substantial impacts – impacts that can actually be measured – that warrant federal interference with the states' election practices.

Almost all election regulations will impose some form of burden on the right to vote. For example, requiring in-person voting at limited locations during limited hours or specifying a process – times and places – to obtain an absentee ballot will require voters to make some effort and even expend some resources. Voters will have to learn what to do. They will have to find a way to get to the right place at the appointed time.

It will always be more difficult for some voters to comply with those requirements than others. While the state – and parties and candidates – will do much to make voting easier, it will always be marginally harder for persons with fewer resources and more pressing economic demands – persons without a car or less ability to take time off – than others. Indeed, there may be a few "eggshell" voters whose unfortunate circumstances make compliance with even the most minimal of procedures very difficult. But such disparate burdens do not enable federal courts to fine tune state voting regulations. *Crawford*, *supra*, 553 U.S. at 197 ("Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of [photo ID.]"); *id*. at 208 (Scalia, J.) ("[W]e have never held that legislators must calibrate all election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.").

B. The District Court's Analysis of the Causation Element of a Claim under Section 2 of the Voting Rights Act Was Erroneous.

1. Whatever impact the photo ID requirement may have on voters, it is not "on account of" race.

The District Court agreed that, standing alone, proof that a voting practice has a disparate impact on minorities is insufficient to establish a violation of Section 2; a plaintiff must also prove that a voting practice *caused* a discriminatory result. (Dec. at 64.)

Here is the District Court's reasoning, summarized: While the overwhelming majority of both white and minority voters have a photo ID, those who do not have them are more likely to be minorities than those who have them. Thus, even though most voters of every race and ethnic group have photo ID,[1] a larger percentage of minorities than whites will now have to obtain one in order to vote.

This is the "disparate impact," but it alone cannot make out a Section 2 claim. The District Court did not find that the State made it harder for minorities to obtain photo ID[2] or that the disparities in possession of ID are a product of past discrimination in the provision of qualifying IDs such as driver's licenses. Indeed, the only evidence introduced concerning the reason that minorities are somewhat less likely to possess photo ID is that poor people are less likely to do so. This cannot close the Section 2 gap. Income and wealth are not protected classes under the Voting Rights Act.

The District Court thought it could elide the distinction by finding that minorities are more likely to be poor than non-minorities due to general discrimination. The District Court concluded that past societal discrimination has resulted in minorities being more likely to live in poverty. Poverty causes people

[1] While there was no precise estimate of the number of minority voters who lacked all forms of qualifying ID, there was evidence that, in 2013, 91.7% of whites, 88.5% of blacks and 80.8% of Hispanics had a driver's license – one form of acceptable ID. The record showed that somewhere between 91% and 95% of voters had one form of qualifying ID. (Def.-App. Br. at 7-11.)

[2] Indeed, the evidence showed that the state's provision of free IDs already significantly reduced the numbers of persons without ID and the racial disparity in the possession rate of IDs. (Def.-App. Br. 8-9, 13-14.)

to have less need for photo ID: *e.g.*, if you do not have a car, you may not need a driver's license. Because poor people are more likely to be minorities, minorities will possess photo ID at lower levels than whites. (Dec. at 64-65.) Because obtaining a photo ID in general could require greater or lesser effort and use of resources, it may be harder for poor people – who, again, are more likely to be minorities – to obtain one.

The District Court's analysis is a breathtaking reworking of Section 2. As noted above, low income persons are not a protected class under the Voting Rights Act. The District Court cites no authority for the proposition that they can be made into one by arguing that they are more likely to be minorities and that this is the result of general discrimination unrelated to the electoral system.

The District Court's approach is, at best, in uncomfortable tension with the Supreme Court's longstanding refusal to allow findings of general societal discrimination to justify the invalidation of a race-neutral law or imposition of a race conscious remedy. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499(1989) ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . . ."); *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.").

While these cases involved the constitutionality of race-conscious remedies, the District Court's approach also entails a form of race-consciousness. It requires invalidation of a neutral law because of a 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 certain groups.

Indeed, courts that have considered the matter in the context of Section 2 have rejected the District Court's move. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) *cert. granted*, 133 S.Ct. 476, 184 L.Ed.2d 296 (2012) *aff'd on unrelated grounds sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013), involved, among other things, the very issue under consideration here. Assessing the plaintiffs' claim that Hispanic voters were less likely to possess photo ID than whites, the en banc Ninth Circuit explained that:

> A bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry. Said otherwise, a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged *voting qualification* causes that disparity, will be rejected.

Gonzalez, 677 F.3d at 405 (internal punctuation and quotation marks omitted, emphasis added). In fact, the *dissent* advanced the view of the District Court here,

arguing that historic discrimination against Latinos caused the neutral requirement that photo ID be presented at the polling place to have a discriminatory result that violated Section 2. *Id.* at 443-44 (Pregerson, J., concurring in part and dissenting in part).

General discrimination does not turn a disparate impact into actionable discrimination. In *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), plaintiffs challenged a Tennessee statute that disenfranchised felons. The Sixth Circuit found no Section 2 violation despite the fact that a significantly higher number of black Tennesseans were convicted of felonies than whites, and therefore the felon disenfranchisement law placed a heavier burden on minorities. *Id.* at 1260-61. Significantly, it rejected that challenge even though the court also noted that there was a history of racial discrimination in Tennessee, the effects of which continued through the date of the decision. The Sixth Circuit held that "such evidence of past discrimination 'cannot, in the manner of original sin, condemn action that is not in itself unlawful.'" *Id.* at 1261 (quoting *City of Mobile v. Bolden,* 446 U.S. 55, 74, 100 S.Ct. 1490, 1503, 64 L.Ed.2d 47 (1980)).

In *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3d Cir. 1994), Philadelphia decided to purge its voter rolls of inactive voters. The plaintiffs showed that the purge disproportionately affected minorities. The Third Circuit conceded that the purge removed African-Americans and Latinos from the voter registration rolls at a

higher rate than whites and that there was a history of racially polarized voting, disparities in education, employment and health, racial appeals in elections and in some instances a failure by the City to address the needs of minority citizens. All of this may have caused minorities to be less likely to vote in some elections and be more likely to be purged. *Id.* at 312-14.

But the disparate impact connected to that history of discrimination did not turn a neutral law into a violation of Section 2. The plaintiffs were obligated to prove that the purge law was the *cause* of minorities not voting and failed in such proof. *Id.* at 312, 313-14 ("We agree that Section 2 plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result."). Again, it was the dissent that argued for the position advocated by the District Court in this case, but that view did not prevail. *Id.* at 336 (Lewis, J., dissenting).

In *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir.1997), the Ninth Circuit held that there must be a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Id.* at 595. The plaintiffs had challenged a requirement that voters had to own land in the agricultural district in order to vote for board members who established laws "necessary to carry on the [d]istrict's business, construct works for irrigation, drainage, and power, levy taxes on real property within the [d]istrict, sell tax-

exempt bonds, and exercise the power of eminent domain." *Id.* at 589. The plaintiffs claimed that this requirement was a violation of Section 2 because land ownership was disproportionately lower among minorities than whites. The court found that there was no violation, because the plaintiffs failed to prove that the land ownership requirement was the *cause* of minorities being unable to vote in the same proportion as whites. *Id.* at 595-96.

A Section 2 plaintiff must take the world as she finds it. To establish a violation of Section 2, she must prove that the voting requirement in issue is the cause interfering with minorities' right to vote. That requirement cannot be met by showing that some other form of discrimination has resulted in disparate group characteristics – a disproportionate likelihood to have a felony conviction in Tennessee, a greater likelihood not to vote in a given election in Philadelphia, or a lower rate of land ownership in Arizona *or* a higher rate of poverty in Milwaukee. In the present case, the District Court would have had to have found that the State of Wisconsin itself now imposes – or had imposed – more onerous requirements on minority voters' ability to obtain an approved form of ID than are imposed on white voters. That the lingering effects of past discrimination through various cascading causes and effects has indirectly resulted in minority voters being a bit less likely to possess photo ID is insufficient.

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 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.

The only authority the District Court relies on for this extraordinarily broad interpretation of Section 2 is a dissenting statement by Justice Scalia in *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). (Dec. at 52.) Not only was the statement made in dissent, but it was made in the course of discussing an issue that had nothing to do with the issue here. The question in *Chisom* was whether the Voting Rights Act applied to claims of vote dilution in judicial elections. Justice Scalia – who believed it did not – was offering an example of a claim to which Section 2 might properly be applied. But this brief example was not intended as a statement of what proving such a claim would require. A lower court cannot read an offhand remark made in dissent in the course of discussing

something else altogether as authority for a new and expansive theory of Section 2 liability.[3]

2. The District Court did not find that Act 23 causes a discriminatory result.

But the problems with the District Court's analysis run even deeper. As noted above, all election regulations will impose some burden on voters and those burdens will not fall evenly on all voters. Lest Section 2 be a warrant for federal superintendence of state election law, there must be some discernible impact on the ability of minorities to vote and participate in the political process. Putting aside the problem of what can and cannot be considered to have happened "on account of" race, a requirement that disproportionately burdens minorities but prevents no one – or vanishingly few – from voting does not violate Section 2.

Other courts have found that far greater discriminatory burdens did not violate Section 2. In *Wesley*, a felony conviction stripped a person of the ability to vote, as did being purged from the rolls in *Ortiz* or failing to own land in *Salt River*. But, as the United States Supreme Court noted in *Crawford*, a prior lack of photo ID does not translate into a continuing lack

[3] The District Court cites language in *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), for the proposition that societal discrimination can turn a neutral law into an unlawful vote denial. (Dec. at 64.) This is a category error. *Gingles* was a vote *dilution* case in which plaintiffs would be required to show that an inability of minority voters to elect candidates of their choice due to the combination of a challenged practice and racial bloc voting. Were those requirements here, plaintiffs could not have survived summary judgment.

of photo ID[4] or an inability to vote on the part of those who would otherwise do so. *Crawford*, 553 U.S. at 200-03.

According to the numbers credited by the District Court, Wisconsin had 3,395,688 registered voters, of whom 300,000 lacked the necessary ID. (Dec. at 72-73.) While the District Court concluded that minority voters were disproportionately represented in the group of 300,000, the District Court cited no evidence that the State of Wisconsin imposed more onerous requirements to obtain an approved form of ID on the minority voters in the group of 300,000 than it did on the white voters in that group – or that the requirements it did impose would fall more heavily on minorities who lacked IDs than whites.

In addition, the District Court made no finding as to how many of these 300,000 people would be unable to obtain an ID or even how many would face an unreasonable – as opposed to an incidental – burden in obtaining one. Although it heard evidence that some voters might have unusual and extraordinary difficulties in obtaining an ID, the District Court made no finding as to how many such persons there might be.

[4] As demonstrated in the Defendants-Appellants' Brief, over 74,000 Wisconsinites in Milwaukee County *alone* obtained free photo ID's after Act 23 went into effect *but while it was not being enforced.* (Def.-App. Br. at 14.) Nearly 80% of those people were minorities. (*Id.*) This suggests the burdens are not insurmountable or even particularly onerous and that Act 23 has actually had a beneficial effect on minorities.

Indeed, what evidence existed on this point suggested that the numbers who lacked the documents necessary to obtain ID may be passingly small. A phone survey in Milwaukee found that 97.6% of whites, 95.5% of blacks, and 94.1% of Latinos had the necessary documentation. (Dec. at 62.) Even this does not tell us what proportion of this small subgroup of a subgroup would be unable to obtain ID or could not do so without an unacceptable burden – much less how many of them who otherwise would have voted, would now not do so.

What it does tell us is that the number who would be prevented or deterred from voting would not be substantial. The relevant impact is a few percentage points among a small subgroup (those without documentation) of a small subgroup (those without ID). To invalidate an entire state law on this basis cannot possibly be consistent with Section 2, particularly in light of *Shelby County*.

Yet this is what the District Court did. While the District Court concluded that a "substantial" number of voters would be prevented or deterred from voting, it did so without an evidentiary basis. Voting, the court concluded, was a "low-cost, low benefit" activity and even a "very slight, marginal change in the costs" of doing so "like weather or illness [and] day-to-day interruptions" can have "large effects" on participation.

(Dec. at 37.) In other words, virtually any burden at all can have the requisite negative "result" required by Section 2. This is very close – if it is not equivalent – to saying that a discriminatory result can be presumed from the smallest of burdens. Here is what the District Court said:

> Even if the burden of obtaining a qualifying ID proves to be minimal for the vast majority of Blacks and Latinos who need to obtain one in order to vote, that burden will deter a large number of Blacks and Latinos from voting [because] … even small increases in the costs of voting can deter a person from voting since the benefits of voting are slight and can be elusive.

(Dec. at 61.)

Again, this approach renders almost anything subject to Section 2 invalidation if it can be said to create a disproportionate impact – no matter how small – on poor people. Having to take a bus or buy gas to drive to the polls may be a "small factor," but it will matter more to poor people than to non-poor people and, thus, the people most burdened by it will be disproportionately minority. For the District Court, this would at least create a prima facie violation of Section 2, notwithstanding the Supreme Court's admonition in *Crawford* that "life's vagaries" cannot be the basis for invalidating an election regulation.

This leaves Wisconsin with almost nowhere to go. Imagine that the legislature amended Act 23 to provide a free birth certificate to anyone who needed one to obtain ID and instructed registrars to correct any clerical

errors that prevented one from being issued. Under the District Court's analysis, the requirement would still violate Section 2 because it would require "minor costs" that it assumes could have a "large" impact on participation. Assume that the legislature allowed those who could not obtain ID to submit an affidavit explaining why and then vote without one. Would this also be the type of "minor cost" from which a discriminatory result can be presumed?

The District Court's claim that more closely tailored findings are not possible (Dec. at 39), is wrong. There is now substantial experience with photo ID across the country (and substantial research on the effects those laws have had). It is not beyond the ken of men and women – or litigants – to learn whether these requirements have resulted in a discernible impact on minority voting.

To meet Section 2's requirement that a challenged practice must have (*i.e.*, must cause) a discriminatory "result" requires, in the context of Photo ID, proof not only that a disproportionate number of minorities currently lack the required forms of ID, but also that the burdens of obtaining an approved form of ID are: (1) substantially more difficult for minority voters than white voters, and (2) so substantial that they would keep a large and

disproportionate number of minorities from actually voting. A "substantial" burden must be more significant than "life's vagaries."

II. THE DISTRICT COURT FAILED TO FOLLOW THE SUPREME COURT'S HOLDING IN CRAWFORD

As the state points out, the District Court failed to follow *Crawford* when it required the state to provide evidence of the strength of the interests that photo ID is designed to serve, *i.e.*, to prove that the legislature was right in wanting what it wanted. Amici's concerns with the District Court's application of *Crawford* are two-fold. First, as the District Court noted (but did not carefully address), *Crawford* did not produce a majority on how the *Anderson/Burdick* balancing test is to be applied.

For Justice Stevens and the two justices who joined him, the test should be applied to any burden placed on exercise of the franchise, with the level of scrutiny varying based upon the degree of burden placed on the franchise. Justice Scalia and the two justices who joined him would apply exacting scrutiny only to burdens that exceed a certain threshold. Below that threshold, rational basis scrutiny would apply. Justice Scalia saw the Court's prior applications of *Anderson/Burdick* as adopting a two-track approach:

> Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson 's* amorphous "flexible standard" into something resembling an administrable rule. See *Burdick*, supra, at 434, 112 S.Ct. 2059.

> Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Clingman v. Beaver*, 544 U.S. 581, 586–587, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005). "[S]trict scrutiny is appropriate only if the burden is severe." Id., at 592, 125 S.Ct. 2029. Thus, the first step is to decide whether a challenged law severely burdens the right to vote. Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe. See id., at 591, 593–597, 125 S.Ct. 2029. Burdens are severe if they go beyond the merely inconvenient. See *Storer v. Brown*, 415 U.S. 724, 728–729, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (characterizing the law in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as "severe" because it was "so burdensome" as to be "'virtually impossible'" to satisfy).

Crawford, 553 U.S. at 205-206 (Scalia, J.).

One commentator has analogized the difference in the two approaches to a dimmer switch (Justice Stevens) and an on/off switch (Justice Scalia). Justin Levitt, Crawford – *More Rhetorical Bite Than Legal Bite?*, May 2, 2008, http://www.brennancenter.org/blog/archives/crawford_more_ rhetorical_bark_than_legal_bite (last visited June 30, 2014). This may or may not produce differing results, but it does provide clearer guidance to state legislators. *Crawford*, 553 U.S. at 208 (Scalia, J.) ("Judicial review of [legislative] handiwork must apply an objective, uniform standard that will enable them to determine, ex ante, whether the burden they impose is too severe.").

Justice Scalia also made clear that the burden could be assessed only by its impact on the entire electorate and not individual voters. In other

words, in assessing a burden, it could not be measured solely by the impact that it has on the plaintiff or a small subgroup of voters:

> This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.

Id. Justice Stevens' opinion also took a dim view of making a facial attack on a statute by showing its disparate impact on a small subset of voters. *Id.* at 202.

The District Court concluded – erroneously – that Justice Stevens left open the possibility that a law could be invalidated by a burden imposed on a subgroup of voters. (Dec. at 9.) The District Court therefore viewed Justice Stevens as the narrower of the two opinions, so it felt free to go beyond *Crawford* and invalidate Act 23 based on its impact on a subgroup.

First, it is not clear why Justice Stevens' opinion is narrower. We would normally not regard an opinion that hinted at, although did not find, a more intrusive standard of review as the narrower opinion. All six of the Justices in the majority believed that courts must weigh the impact of an

election regulation on the *entire* electorate and apply the *Anderson/Burdick* balancing test. That is the rule of *Crawford*.

Second and more fundamentally, it is quite clear that the approach taken by the District Court is inconsistent with the approach taken by Justice Stevens. Justice Stevens was aware that there was, as here, a small group of voters who may have faced a "heavier burden" in obtaining ID. *Id.* at 199 (referencing the record and taking judicial notice that elderly persons born out of state, the homeless, or persons with "economic and other personal limitations" might face a heavier burden).

But to advance a facial challenge – to strike down an entire state law – that burden was insufficient. Justice Stevens rejected the "not even the slightest burden" interpretation of the Constitution adopted by the District Court. *Id.* 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, or even a significant increase over the usual burdens of voting.").

The *Crawford* plaintiffs had not presented an acceptable estimate of the number of voters who did not have ID. But Justice Stevens did not think that was the key to the case. He noted that, even if the record had revealed the number of voters who lacked photo ID at the time the law was passed or

the case was tried, one still would not know how many voters could not subsequently obtain free photo IDs.

What Justice Stevens found lacking in *Crawford* is also lacking here. There is no finding as to how many people would face a substantial burden. *See Crawford*, 553 U.S. 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 persons would certainly face heavier burdens was not enough to sustain a facial challenge.

For the District Court, it was unnecessary to answer these questions because almost any burden would lead some unspecified number of persons not to vote and that is enough. But one could have said the same in C*rawford*. It is quite clear that the approach taken by the District Court here is inconsistent with the approach taken by Justice Stevens and those who joined him.

III. THE INJUNCTION ISSUED BY THE DISTRICT COURT WAS TOO BROAD AND CONSTITUTED AN ABUSE OF DISCRETION

The rule in this Circuit is that 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, 126 S.Ct. 1264, 164 L.Ed.2d 10 (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).

In this case, the District Court went too far. All of the proof involved the specific photo identification required under Wisconsin Act 23 (how many eligible voters lacked such ID, how difficult it was to get such ID, the lack of a "safety valve," etc.).

But District Court's injunction is not limited to Act 23 and these facts. Rather, the District Court's injunction prevents Wisconsin from enforcing *any* photo ID requirement. (Dec. 70.) Assuming an ongoing jurisdiction over the State, the District Court required that the Wisconsin Legislature must present any proposed photo ID for approval prior to implementation. (Dec. 69.) In other words, it adopts a "preclearance" requirement similar to Section 5.

This is wholly inconsistent with *Shelby County*. 133 S.Ct. at 2623 ("The Federal Government does not have, however, have a general right to review and veto state enactments before they go into effect."). If Congress cannot require preclearance without a finding of current and pervasive discrimination, the District Court cannot either. It cannot presume that Wisconsin will not conform itself to the law.

As the State notes, the breadth of the injunction goes beyond the "case or controversy" before the District Court and exceeded its subject matter jurisdiction. It was also an abuse of discretion by the District Court.

In *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 126 S.Ct. 961, 163 L.Ed.2d 812 (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," 546 U.S. at 328, and reminded federal courts that their "constitutional mandate and institutional competence are limited." *Id*. at 329. The Supreme Court held that the specific injunction in that case (striking down a statute in its entirety, rather than striking down only its unconstitutional applications), was error. *Id.* at 331-32. While the context is different, the Court's caution and instructions are relevant here.

The District Court did not limit its solution to the problem. This is not a case of systemic discrimination – *e.g.*, school segregation – whose effect must be eliminated through an ongoing program of remediation subject to judicial oversight. Once the law was enjoined, the wrong found by the District Court had been remedied. There was no basis for the District Court to assume the role of photo identification czar for the State of Wisconsin.[5]

Suppose for example that the State of Wisconsin passed a new photo identification statute expanding the types of ID that would be accepted at the polls. The District Court has heard no evidence on the impact of such a statute. On what basis could the District Court enjoin such legislation in advance? Yet that is what the injunction does.

What if a new law provided that persons who were unable to obtain an ID may submit an affidavit attesting to that incapacity? Such alternative compliance measures would reduce (although not eliminate entirely) the burden upon voters. The District Court has heard no evidence or arguments as to the legality of such a photo ID law.[6] On what possible basis can it order the state to seek judicial preclearance?

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[5]The District Court also appeared to prejudge the matter by saying that it is difficult for the court to see how any "amendment to the photo ID requirement could remove the disproportionate racial impact and discriminatory result." (Dec. at 69.)

[6] Such a law would closely mirror – even surpass in permissiveness – the Indiana law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181.

This Court has stated that it will reverse a district court's grant of an injunction where the "scope of injunctive relief exceeds the extent of the plaintiff's protectable rights." *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) (internal quotation marks and alterations omitted). The plaintiffs cannot have protectable rights with respect to nonexistent photo identification statutes. The District Court's injunction constituted an abuse of discretion and should be reversed.

CONCLUSION

Amici request that this Court reverse the judgment below and clarify the proper standard for evaluating the legality of photo ID requirements. It cannot be that a neutral law that imposes no burden on an overwhelming majority and a minor burden on most of the rest has no chance of surviving review.

Dated this 30th day of June, 2014.

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Dated this 30th day of June, 2014.

/s/ Richard M. Esenberg
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CERTIFICATE OF SERVICE

I certify that on June 30, 2014, I electronically filed the foregoing Amicus Brief 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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