*No. 14-803*

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IN THE

# Supreme Court of the United States

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RUTHELLE FRANK, *et al.*,

*Petitioners,*

v.

SCOTT WALKER, *et al.*,

*Respondents.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Does a law that requires voters to obtain photo identification to be allowed to vote violate the Equal Protection Clause?

2. Does a voter photo identification law that is disproportionately likely to affect black and Latino registered voters violate the Voting Rights Act?

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## STATEMENT OF THE CASE

### I. The Wisconsin Legislature Enacts Act 23.

In May of 2011 the Wisconsin Legislature passed 2011 Wisconsin Act 23, which created a new requirement that citizens present one from a limited list[1] of acceptable government issued photo identifications to be allowed to vote. R. at 25 (citing Wis. Stat. §§ 5-6) . The list of acceptable photo IDs does not include Veteran's ID cards or the IDs Wisconsin's two-year technical colleges issue. R. at 29.

Act 23 applies both to absentee and in-person voting. R. at 30-31. An absentee voter must mail in a copy of a qualifying ID at the time they request to vote absentee. R. at 30 (citing Wis. Stat. § 6.87(1)). In-person voters must show their qualifying ID to the poll worker when they get their ballot. R. at 29 (Wis. Stat. § 6.79(2)(a)) . A small subset of individuals may vote without showing a photo ID—such as persons serving in the military. R. at 29 ( citing Wis. Stat. § 6.87(1)). A registered voter without a qualifying ID may cast a provisional ballot. R. at 29. But for it to be counted, the individual must appear at the municipal clerk's office with acceptable ID by 4:00 pm on the Friday after the election. R. at 29 (citing Wis. Stat. §§ 6.79(3)(b), 6.97(3)(b)).

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[1] These are (1) a Wisconsin driver's license, (2) a Wisconsin state ID card, (3) an ID card issued by a United States uniformed service, or (4) a United States passport (5) a naturalization certificate issued within the last two years, (6) a current temporary license, (7) a current temporary ID card, (8) a current ID card issued by a federally recognized Indian tribe in Wisconsin or (9) a current ID card issued by an accredited Wisconsin university or college. R. at 28. (Citing Wis. Stat. § 6.02(1)).

## II. The District Court Rules That Act 23 is Unconstitutional and Violates Section 2 of the Voting Rights Act.

In the wake of the enactment, two sets of plaintiffs sued challenging the law. R. at 26. In the *Frank* case individual eligible voters argued that Act 23 burdened their right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the law disproportionately burdened blacks and Latinos in violation of Section 2 of the Voting Rights Act. *Id.* In *LULAC* community groups argued the law violated Section 2. *Id.* The district court handled the cases together. *Id.*

### A. The Trial Court Finds That Act 23 Is Unconstitutional.

The trial court first assessed the constitutional claim, weighing the state interests offered by the defendants against the burdens Act 23 imposed on registered voters without ID. R. at 28. Defendants offered four state interests in the law: (1) that the Act would help detect and prevent in-person voter fraud; (2) that the Act would boost public confidence in elections; (3) that the Act would prevent other types of voter fraud; and (4) that it would promote the orderly administration of elections and accurate record keeping. R. at 36.

Plaintiffs' expert Lorraine Minnite, a Rutgers University professor who specializes in the study of the incidence of voter fraud in contemporary American elections, testified that in Wisconsin there was no evidence of in-person voter fraud. R. at 38-39. Indeed, after thorough historical research into the 2004, 2008, 2010, and 2012 elections in Wisconsin, Professor Minnite found no evidence of in-person voter fraud. R. at 38. In the single instance of any type of voter impersonation fraud

she uncovered, a man filled out and sent in his recently deceased wife's absentee ballot. *Id.* The trial court observed that Act 23 is not well equipped to address this type of fraud, as the man could have evaded its provisions by mailing in a copy of his wife's ID along with her ballot. R. at 38 n.7.

Bruce Landgraf, an Assistant District Attorney in Milwaukee County, testified that in each major statewide election his office investigates ten to twelve cases where a voter arrives at the polls and is told that they have already cast a ballot. R. at 37. Landgraf testified that his office had not found that any of those instances were due to voter fraud. R. at 37. His office's investigations typically turned up innocent explanations, such as a poll worker mismarking who had voted. R. at 37. In a few instances the District Attorney's office was unable to determine the precise cause of the confusion. R. at 37.

Wisconsin has been vigilant in watching for persons committing voter fraud. R. at 39-39. In 2004, 2008, 2010, and 2012 governmental law enforcement agencies set up task force units to detect voter fraud in Milwaukee County. R. at 39-40. While they brought charges against groups for conspiring to corrupt the process, they found no evidence that in-person voter fraud was attempted. *Id.* Defendants argued that voter impersonation fraud might be difficult to detect, but offered no evidence on that point. R. at 40. Under Wisconsin law, voter impersonation fraud is a felony punishable by a fine of up to $10,000 and three years imprisonment. R. at 42.

The trial court found that there are serious practical impediments to committing voter-impersonation fraud. R. at 42-43. For example, a would-be fraud must know the voter's name and address, and that the voter has not yet voted. *Id.* Based on this evidence the court found that "Act 23 cannot be deemed a reasonable response" to the remote possibility of in-person voter fraud. R. at 43.

Barry Burden, a professor of political science at the University of Wisconsin-Madison, testified that available evidence indicates that voter Photo ID laws do not improve public confidence in the democratic process. *Id.* Professor Burden described a study published in the Harvard Law Review that looked at the relationship between voter ID laws and voter trust in the electoral process. R. at 44 (citing Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737 (2008)). The authors of the study found that the there was "zero relationship" between voter ID laws and public confidence in the process. R. at 44 (citing Ansolabehere & Persily, *supra* at 1756).

Professor Burden, Professor Minnite, and Kevin Kennedy, the director of the state run Government Accountability Board, all testified that allegations of voter fraud unnecessarily undermined public confidence in the electoral process. R. at 44-46. From this testimony the trial court concluded that Act 23 might actually undermine public confidence in the electoral process by heightening unfounded concerns about voter fraud. R. at 46. The trial court therefore held that Act 23 did

not further the state's interest in building confidence in the electoral process. R. at 47.

The defendants also proposed that Act 23 would prevent other types of voter fraud, such as attempts to vote by non-citizens and felons. *Id.* The trial court stated that it could not see how this was true, as qualifying IDs are available to those populations. *Id.* The defendants also proposed that Act 23 would weed out persons who no longer maintained residency in the state, but remain on the voter rolls and attempt to vote both in their state of residency and in Wisconsin. *Id.* The trial court held that defendants had not explained how having to produce a qualifying ID would prevent that type of voter fraud, and therefore found that the law did not serve an interest in deterring other types of voter fraud. R. at 47-48.

Defendants proposed that Act 23 would promote the orderly administration of elections and help with accurate record keeping, but the trial court stated the defendants had not explained how this would work. R. at 48. The trial court accordingly found there was no evidence that Act 23 would promote these goals. *Id.*

The court next assessed the burdens that Act 23 imposes. R. at 48. Based on the expert testimony of Leland Beatty, a statistical consultant with extensive experience in politics, the court determined that there are 300,000 registered voters who lack a qualifying photo ID. R. at 50. This means that 9% of the Wisconsin electorate does not have qualifying ID. *Id.* The district court observed that in 2010 the Wisconsin Governor's race was decided by 124,638 votes, and the race for United States Senate in Wisconsin was decided by 105,041 votes. *Id.*

The court also heard testimony from Matthew Barreto, a professor at the University of Washington and an expert on voting behavior and statistical analysis. R. at 50-51. His telephone survey found that 63,085 eligible voters in Milwaukee County alone lacked a qualifying ID. R. at 51. His survey also showed that somewhere between one third and two thirds of these voters made less than $20,000 a year, and that 80.5% of them have no education past high school. R at 52.

The court then turned to the requirements to obtain a state ID card, which is the most easily obtained type of qualifying ID. R. at 53. In order to obtain a qualifying ID a person must submit (1) proof of name and date of birth, (2) proof of United States citizenship or legal presence in the United States, (3) proof of identity, and (4) proof of Wisconsin residency. *Id.* While a State ID card from the DMV typically costs $18.00, if an applicant affirmatively asks that the fee be waived so that they can get a qualifying ID, the DMV is required to waive the charge. R. at 31. To meet the documentation requirements, the trial court found that voters were often required to produce birth certificates. R. at 54.

The trial court heard testimony from several persons who had not obtained Photo IDs because they did not have birth certificates, and two testified that they could not obtain accurate birth certificates and so could not obtain ID. R. at 51-52. For some persons born at home there is no birth certificate on file. R. at 60 n.17. Professor Barreto found that 25,354 eligible voters in Milwaukee County lacked both a qualifying ID and a birth certificate. R. at 54.

In addition to a birth certificate, individuals seeking a state ID must produce a document as proof of identity. R. at 55. Professor Barreto found that there are around 1,640 eligible voters in Milwaukee County who need to get qualifying ID to vote and do not have documents they need to prove identity. *Id.* Sim Newcomb, who uses his Veteran's ID card to bank, testified that he could not obtain a state ID card because he could not satisfy the DMV's proof of identity requirements. *Id.*

People who lack proof of identity will likely need to obtain social security cards, as they are the most commonly available proof of identity. R. at 55. In order to obtain a social security card an individual must visit the Social Security Office and show "convincing documentary evidence of identity." R. at 56 (citing 20 C.F.R. § 422.10(c)). Convincing evidence "may consist of a driver's license, identity card, school record, medical record, marriage record, passport, Department of Homeland Security document, or other similar document serving to identify the individual." R. at 56 (citing 20 C.F.R. § 422.10(c)).

A voter might need to make a trip to an additional government agency to obtain one the documents required by the Social Security Office. R. at 56. For example, Dewayne Smith had to go to a hospital and have his sister show her photo ID in order to obtain his medical records, so he could then go to the social security office and apply for a social security card. *Id.*

Voters must also show proof of residence in order to get a State ID card. *Id.* Homeless voters can only prove residence by obtaining a letter from a social service agency. *Id.* Homeless voters also do not have physical addresses where the DMV can

send the ID card once it is ready, and the DMV does not allow individuals to pick up ID cards in person. *Id.*

The trial court next examined the practical burdens voters faced in obtaining qualifying ID. R. at 57. To get ID, an eligible voter would first need to determine the process to request an ID from the DMV, the required supporting documents, and any relevant petitions for exceptions or fee waivers they might need. *Id.* The judge noted that he had been able to determine the requirements because he had access to the administrative codes, and had presided over a two-week trial where testimony had been given on the subject, but that voters with only high school educations might find it more difficult to gain access to information about how to obtain ID. *Id.*

The district court next turned to the problem of even getting to a DMV. There are 92 DMV service centers in the state. *Id.* All but two close before 5:00pm and there is only one center open on weekends. *Id.* The trial court stated that these circumstances meant it was likely a person would have to take time off work in order to go to a DMV. R. at 57-58. And one person testified that he was unable to take time off work in order to obtain ID. R. at 58.

The court also considered the trouble that eligible voters might face in securing transportation. *Id.* Because many of the people who now need qualifying ID are low income it can be challenging just to secure transit to a DMV. *Id.* For example, Carl Ellis walked to and from the DMV, which took an hour and a half, because he does not have a car and could not afford to pay bus fare. *Id.* The

Accountability Board received many complaints from voters who were struggling to get to the DMV, including in areas where the public transit system was "pretty good." *Id.* And the court found that not all of the DMV's service centers are accessible by public transit. *Id.* And Kenneth Lumpkin stated that the DMV in Racine County is 3–5 miles away from the inner city where the majority of the city's population lives, and cabs do not serve the inner city. *Id.* The trial court noted that persons who are missing an underlying document will also need to travel to another government services provider, and may face similar challenges to getting there. *Id.*

The trial court heard testimony from Professor Burden that small increases in the costs of voting deter people from voting, as the personal benefits of casting an individual vote are marginal. R. at 66-67. Professor Burden explained that with a "low-cost, low-benefit" activity, very slight changes can have "large effects on participation." R. at 67. The trial court therefore concluded that because the burdens, as described above, were "anything but minor," Act 23 would "deter a substantial number of eligible voters from casting a ballot." *Id.*

Because the trial court found that Act 23 would deter voting, and because the court found no countervailing state interest that could justify the burdens, the court found that the Act violated the Equal Protection Clause. R. at 68.

### B. The Trial Court Finds That Act 23 Violates Section 2 of the Voting Rights Act.

The trial court then turned to the claim that the law burdened black and Latino voters in violation of section 2 of the Voting Rights Act. R. at 79. The Court determined that Section 2 bars a "voting practice that creates a barrier to voting

that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not." R. at 83.

As defendants conceded, black and Latino voters in Wisconsin and elsewhere are less likely than white voters to possess Photo IDs. R. at 89-90. Beatty testified at trial that he found that in 2013 registered black voters in Wisconsin were 140% more likely to lack ID than registered white voters, and registered Latino voters were 230% more likely to lack ID than registered white voters. R. at 85. In 2012 the disparities were 170% and 260% respectively. R. at 85. Professor Barreto similarly found that in Milwaukee County 7.3% of eligible white voters lacked qualifying ID, while 13.2% of eligible black voters and 14.9% of Latino eligible voters lacked ID. R. at 86.

The trial court further found that blacks and Latinos without qualifying IDs face additional hurdles to get the IDs compared to whites without qualifying IDs. R. at 94. Blacks who do not have qualifying ID are 188% more likely than whites to lack the underlying documents required to obtain an ID. *Id.* While Latinos who do not have qualifying ID are 246% more likely than whites to lack the underlying documents. *Id.* Based on this evidence the trial court held that Act 23 disproportionately burdened blacks and Latinos. *Id.*

The trial court further found that the disproportionate impact of the photo ID requirement was a result of past and present discrimination. R. at 97. The court found that blacks and Latinos in Wisconsin are disproportionately likely to live in poverty. *Id.* Persons who live in poverty are less likely to be able to afford a car, or

to be able to afford to participate in the types of activities that require photo ID, such as air travel. R. at 97. Low-income individuals are therefore less likely to obtain ID because they derive fewer benefits from an ID, and face greater hardships in going through the process to get an ID. *Id.*

The Court next examined how discrimination had led to poverty in the African American and Latino communities. R. at 98. The court found that Milwaukee was in the top ten most segregated large cities in the US for both black/white segregation, where it ranks number one, and white/Latino segregation. R. at 98. Segregation is responsible for limiting educational access and employment opportunities for blacks and Latinos. *Id.* Marc Levine, a Professor of History, Urban Studies and Economic Development at the University of Wisconsin-Milwaukee, testified that Milwaukee's segregation could be traced to its history of housing discrimination. *Id.*

Further, the trial court heard testimony about a study performed in Milwaukee in the early 2000s that found that white job applicants with identical resumes to black job applicants were twice as likely to be called back after an interview. R. at 98-99; *see also* Devah Pager, *The Mark of a Criminal Record*, 23, Focus, 44, 46 (2004) (study stating the same). The study also found that even whites with criminal records were more likely to receive callbacks than blacks without criminal records. R. at 99. Professor Levine testified that the study shows that "discrimination was alive and well in the Milwaukee labor market." *Id.*

Professor Levine stated that the data showed that Milwaukee particularly, but Wisconsin in general had the "most entrenched racial and ethnic socioeconomic disparities of virtually any region in the county." *Id.* Professor Levine said that these disparities were "without question the effects of the historical legacy of discrimination as well as contemporary practices of discrimination." *Id.* The court cited similar testimony from Professor Burden in concluding that the disparities were the result of discrimination, past and present. R. at 100. The Court therefore found that the Act Violated Section 2.

### III. The Wisconsin Supreme Court Modifies State Administrative Rules to Save Act 23 From a Constitutional Challenge.

After the trial court had issued its ruling, the Wisconsin Supreme Court ruled on a constitutional challenge to Act 23. *Milwaukee Branch Of the NAACP v. Walker*, 357 Wis.2d 469 (2014). The Wisconsin Supreme Court determined that requiring a birth certificate, which costs $20, to obtain a qualifying ID was unconstitutional. *Id.* at 499. And the court held that Wisconsin could not require a person to purchase any documents from the government in order to be eligible to vote. *Id.* at 500.

To avoid invalidate Act 23 on constitutional ground, the court read Wisconsin Administrative Law to require the DMV to exercise its discretion to grant ID without a person providing a birth certificate "in a constitutionally sufficient manner." *Id.* at 504 (interpreting Wis. Admin. Code § Trans 102.15(3)(a)). For a person to obtain an ID without a birth certificate they must file a petition with the DMV stating they cannot obtain the document without paying for it, and request

the requirement be waived. *See Milwaukee Branch Of the NAACP*, 357 Wis.2d at 504.

**IV. The Seventh Circuit Reverses.**

Defendants appealed the trial court decision to the Seventh Circuit. R. at 2. The panel reversed, holding that the facts of *Crawford v. Marion County Election Board*, where this Court upheld an Indiana law requiring voter ID, were so similar to the facts here that Act 23 could not be found unconstitutional. R. at 2 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)). And the panel stated that after *Crawford* it was a legislative fact that strict photo ID laws promote electoral confidence, as this Court ruled there that the Indiana law served the State's interest in promoting confidence in the process. R. at 12. (citing *Crawford,* 553 U.S. at 197 (opinion of Stevens, J.)).

The panel also rejected the trial court's reading of Section 2. R. at 18. They found instead that even if a law had a disparate impact, there was no Section 2 violation as long as minorities and whites could obtain ID on the same terms and therefore had the same "opportunity" to participate in the political process. R. at 18-19 (citing 52 U.S.C.A. § 10301). Further, they held that only state-enforced discrimination could be considered in assessing legacies of discrimination. R. at 18. In distinguishing this case from redistricting cases, where this court has said that there is no requirement to show a state discriminated intentionally in the past, the panel stated that when the state drew the district lines it was wholly responsible for

the consequences of the line drawing. R. at 22. The Seventh Circuit held Act 23 did not violate section 2 of the Voting Rights Act. R. at 23.

### V. The Seventh Circuit Splits Evenly in a Vote to Rehear the Case En Banc.

Plaintiffs requested en banc review. R. at 130. Five judges voted not to rehear the case, while five voted in favor of rehearing it. R. at 130. The proposal to rehear the case therefore failed. R. at 130.

Judge Posner, joined by four of his colleagues, dissented from the decision not to rehear the case. R. at 130. He disagreed with the panel's conclusion that *Crawford* was controlling, stating that in *Crawford* there were evidentiary deficiencies, many fewer people were burdened, and that here there was evidence to rebut the state's proposed interests in the law. R. at 131, 146, 149-48, 151-53. Judge Posner rejected the notion that it was a legislative fact that strict voter ID laws promote voter confidence, stating that "[i]n so saying, the panel conjures up a fact-free cocoon in which to lodge the federal judiciary." R. at 154.

The judge concluded by stating that data strongly suggested Republican governments enact Voter ID laws in an attempt to shut poor minority voters out of the election process because those voters are more likely to vote for Democrats. R at 146-148 (citing Keith G. Bentele and Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 Perspectives on Politics 1088 (2013)). He noted that strict voter ID laws have typically been found to depress voter turnout by 2%, mainly by deterring low-income people of color from voting. R.

at 151. (citing Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. Times, July 15, 2012).

In a separate dissent from the decision to lift the stay imposed by the district court, Judge Williams stated that in Wisconsin most DMVs are only open two days a week. R. at 180.

Plaintiffs petitioned this Court for review, and this Court granted a writ of certiorari. The legal contentions are reviewed de novo. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). And the district court's findings of fact are reviewed for clear error. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

## SUMMARY OF ARGUMENTS

The Seventh Circuit erred in upholding Act 23 for two independent reasons: first, Act 23 is unconstitutional, and second, it violates the Voting Rights Act.

This Court has stated that to assess the constitutionality of election laws the Court balances a law's burdens on voters against proposed state interests in the law. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Act 23 fails this balancing test. Almost 10% of the Wisconsin electorate must now engage in an elaborate process of document collection and waiver petitions with the DMV to procure IDs and secure their fundamental right to vote. To justify even a slight burden on the right to vote defendants must show that there is a relevant state interest "sufficiently weighty to justify the limitation." *See Norman v. Reed*, 502 U.S. 279, 288–289 (1992).

Here, far from being able to offer a weighty interest, the defendants cannot show that the law serves any state interest. Defendants propose that the law may prevent in-person voter fraud, but the evidence shows that in-person voter fraud simply does not occur in Wisconsin. R. at 36-43. Similarly, there is evidence that there is no positive relationship between strict voter ID laws and voters' confidence in the electoral process. R. at 43. While defendants have suggested that Act 23 might prevent other types of voter fraud or help ensure orderly administration of elections, they have not explained how the Act might advance either of these interests. R. at 47-48. It is not enough that it is "theoretically imaginable" that Act 23 could serve some of these interest. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968). The Constitution and this Court require more than that before a state can burden the fundamental right to vote.

The defendants seek to argue that *Crawford* dictates that this Court must find Act 23 constitutional. While both here and in *Crawford* the court consider constitutional challenges to voter ID laws, that is where the similarities between the two cases begin and end. The *Crawford* evidentiary record was lacking in key respects—for example there was no evidence about the number of registered voters without photo ID. *Crawford,* 553 U.S. at 202. And under the challenged law in *Crawford* there were ways to opt out of the voter ID law, such as by registering to vote absentee. *Id.* at 201. Further, on the record presented to the Court in *Crawford* the defendant's arguments that the law would boost voter confidence in the process and that it would address administrative deficiencies in the Indiana voter roles

were credible. *Id.* at 194-97. On the record here none of the defendants' stated interests are more than imaginable. Therefore, in light of the heavy burdens that Act 23 imposes on voters, Act 23 violates the Equal Protection Clause and should be invalidated.

Further, Act 23 violates Section 2 of the Voting Rights Act. Section 2 provides that no one should have "less opportunity…to participate in the political process" because of "race or color." 52 U.S.C.A. § 10301. This court has found there is no requirement to show discriminatory intent in Section 2 cases. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). In assessing whether voting laws comply with the Voting Rights Act, Federal Circuit Courts have first looked to see if the law disproportionately imposes burdens on voters of certain races. *See*, *Veasey v. Abbott*, , 504 F.3d 487 (5th Cir. 2015). Courts then look to see if these burdens can be traced back to historical legacies of discrimination. *See id.*

Here the burdens of Act 23 are disproportionately likely to fall on blacks and Latinos. Black registered voters are 140% more likely than whites to lack qualifying ID, and Latinos are 230% more likely than whites to lack qualifying ID. R. at 85. These disparities can be directly traced back to poverty within the African American and Latino communities. *See* R. at 97. People in poverty have less need of an ID, because they are less likely to be able to pay to participate in many of the activities that require ID, and are less able to afford to take on the burdens of getting IDs. *Id.* Poverty within the African American and Latino communities of Wisconsin stems from housing and employment discrimination against those

groups. R. at 97-99. As a result of an ongoing pattern of discrimination against minorities in Wisconsin, Act 23 imposes weightier burdens on minority voters. Therefore Act 23 violates Section 2 of the Voting Rights Act, and should be struck down.

## ARGUMENT

### I. ACT 23 UNCONSTITUTIONALLY IMPOSES SIGNIFICANT BURDENS ON VOTERS WITHOUT SERVING A STATE INTERST.

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). It is through the vote that citizens choose the State Governments, as well as the elected representatives entrusted with the powers of the First and Second branches of the Federal Government, and thereby embody their political will. Other basic rights "are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

"[I]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right [under the Equal Protection Clause] to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972). While there must be significant regulation of elections to ensure they are well ordered, even slight burdens on the right to vote "must be justified by relevant and legitimate state interest 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 190 (opinion of Stevens, J. announcing the decision of the Court) (citing *Norman*, 502 U.S., 288–289). There is no simple

"litmus test" that neatly divides valid and invalid restrictions. *Crawford*, 553 U.S. at 190 (opinion of Stevens, J.). Instead a court must make a "hard judgment," about a restriction's constitutionality. *Id.*

To assist in that "hard judgment," this Court has created a balancing test to assess laws that burden the right to vote. Under the balancing test a court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. Then a court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* This test was articulated in *Anderson*, subsequently affirmed in *Burdick*, and reaffirmed by six Justices in Crawford. *See Burdick*, 504 U.S. at 445-46 (quoting Anderson, 460 U.S. at 789)*; Crawford*, 553 U.S. at 189–91 (opinion of Stevens, J.); *id.* at 210 (opinion of Souter, J. dissenting); *id.* at 237 (opinion of Breyer, J. dissenting). Act 23 does not survive this balancing test.

### A. Act 23 Substantially Burdens Voters by Requiring Them to Navigate Complex Government Processes and Sacrifice Their Time and Money to Secure Their Fundamental Right to Vote.

This Court assesses the burdens created by a law by weighing the "'character and magnitude' of the injury to the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). To understand the burdens a law imposes on a voter, the court must consider the burdens from the vantage point of those burdened by the law, rather than the vantage point of the average voter or average lawyer. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 782 ("The question

presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational *rights of Anderson's supporters*.") (emphasis added).

*Crawford* did not overrule this standard. In that case this Court also addressed a law that imposed a photo ID requirement. *See Crawford,* 553 U.S. at 189. There was no majority or plurality opinion. Justice Stevens, joined by two of his colleagues, found the factual record inadequate to sustain the plaintiffs' challenge. *Id.* at 202 (opinion of Stevens, J.). But his opinion strongly suggested that the court "measure[es] the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters" in assessing constitutionality. *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.). And Justices Souter, Ginsberg, and Breyer all agreed that burdens borne by forty thousand voters were sufficient to invalidate a voter ID law. *See id.* at 237 (opinion of Souter, J.); *id.* at 241 (opinion of Breyer, J.).

In concurrence Justice Scalia stated that a law's burdens had to be evaluated on the basis of its "reasonably foreseeable effects on voters generally," and not the basis of the burdens it imposed on any subgroup of voters. *Id.* at 206 (opinion of Scalia, J.). Justice Scalia stated that, rather than looking at the hardships a subset of individuals might face in satisfying a law's requirements, courts should instead look to the "likely impact" of the regulation. *Id.* (internal citation omitted).

Such a test would gut Equal Protection jurisprudence in regards to election law, as the core of an equal protection claim is that a law burdens some subgroup of

voters more than "voters generally." In order for a law to disproportionately burden some voters, without being blatantly discriminatory on its face, the law must operate on special circumstances present in those voters' lives to deter or bar them from voting. To allow only laws that burden voters generally to be challenged would allow states to impose harsh burdens on small groups of unpopular or vulnerable citizens unchecked.

But, even if the "effects on voters generally" test were applied here, the law affects such a broad swath of registered voters that the burdens it imposes do have effects on voters generally. The trial court found that there are 300,000 registered voters who lack a qualifying photo ID—9% of all registered voters in Wisconsin. R. at 50. Act 23 implicates Wisconsin's entire electoral process. The winning candidate in Wisconsin United States Senate race in 2010 secured 51.9% of the vote. *See id.* A law which effects 9% of the registered voting population can easily sway the outcome of elections, affecting statewide and national politics, and satisfying the "likely impact" inquiry. By contrast in *Crawford* there were only around 43,000 people without photo ID—less than 1% of the voting age population in Indiana. *See id.* at 189 (Opinion of Stevens, J.).

But ultimately the test this Court has historically applied directs the Court to evaluate burdens by looking specifically at the hardship imposed on the plaintiffs and those like them, rather than on voters generally. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. Here, Act 23's burdens fall mainly on registered voters who do not have a photo ID. Many of the voters without qualifying ID are in

vulnerable populations: at least a third and up to two-thirds of them are low income, most have no education past high school, some are veterans, some are disabled, and some homeless. *See* R. at 52. The fact that these voters have not already obtained an ID, which can often be useful in everyday life, suggests that there are likely barriers to them easily obtaining identification.

### 1. The Process for Obtaining Qualifying ID is Complex, Confusing, and a Substantial Burden.

Obtaining a qualifying ID can often be an arduous process. To get a qualifying ID a person must submit: (1) proof of name and date of birth, (2) proof of United States citizenship, (3) proof of identity, and (4) proof of Wisconsin residency. R. at 53.Each of these requirements deters voters from getting a qualifying ID, and has the potential to disenfranchise voters.

Individuals seeking a Photo ID must produce documents as proof of identity. R. at 53. Professor Barreto found that there are more than a thousand eligible voters in Milwaukee County alone without the documents they need to prove identity. R. at 55. This requirement has prevented people from obtaining qualifying IDs and therefore from voting. *Id.*

Social security cards are the most commonly available type of proof of identity. *Id.* But in order to get a social security card, an applicant must produce documents to prove their identity. R. at 56 (citing 20 C.F.R. § 422.10(c)). Many of the documents one could show to obtain a social security card are the types of qualifying IDs burdened voters do not have—passports, state ID, and driver's

licenses are all given of examples of acceptable ID. *See* R. at 56 (citing 20 C.F.R. § 422.10(c)).

The situation is not a total Catch-22, however, as there are other documents that a person can present in order to obtain a social security card. These include school records, medical records, or marriage records. *See* R. at 56 (citing 20 C.F.R. § 422.10(c)). But to obtain these documents a voter may need to make a trip to a school, hospital or county clerk's office. *See* R. at 56. Administrators at those institutions may be loath to release such personal documents to individuals who cannot show ID to prove that they are the subjects of the records. Indeed, Dewayne Smith testified that he was only able to obtain his own medical records from a hospital after his sister showed her ID to help demonstrate he was who he said he was. R. at 56.

Further, voters hoping to obtain qualifying ID must also offer proof of residence. *Id.* For homeless voters this can pose a real challenge as the only way for them to prove residence in Wisconsin is to get a letter from a social services agency. *Id.* A voter who does not have any type of relationship with a social service agency will be unable to obtain such a letter and will be barred from voting. *See id.* Additionally voters cannot pick up their voter IDs at the DMV. *Id.* Instead the DMV requires them to provide an address where the ID can be sent, and homeless voters may have no mailing addresses. *Id.*

Voters additionally used to be required to obtain their birth certificate in order to prove their name, date of birth, and United States citizenship. R. at 54. At

trial eight witnesses testified they could not obtain ID because they did not have their birth certificates, some testified that they were unable to pay to have errors on their birth certificates corrected. R. at 51-52. And others found that there was no birth certificate on file for them. R. at 60 n.17. Although after the Wisconsin Supreme Court ruling voters no longer need to produce birth certificates to obtain ID, they must submit a special petition to the DMV to obtain an ID without a birth certificate. *See Walker*, 357 Wis.2d at 504. Many may still engage in the process of attempting to obtain a birth certificate because they are unaware of the petition process.

The process to obtain a Photo ID is complex, and at times Kafkaesque. The trial judge observed that he had been able to ascertain the requirements to obtain an ID because he had access to Wisconsin Statutes and Administrative Code, and had presided over a two-week trial. R. at 57. Navigating these procedures may be more burdensome for persons with low income and only high school education. It will require them not only to figure out what documents the DMV requires, but also to determine what documents they need to get in order to request the documents that the DMV demands.

But even once an eligible voter figures out all of the documents they need, they face the considerable challenge of physically getting to all of the places they have to go to obtain the necessary documents and applications.

### 2. Voters Seeking to Obtain Qualifying ID Face Logistical Burdens That Will Deter Them From Voting.

Getting to an open DMV in Wisconsin is not a simple task. Most DMVs there are only open two days a week. R. at 180. All but two close before 5:00pm, and only one is open on weekends—making it highly likely that the only times a person could go to the DMV would be during their work week. R. at 57.

On top of these time restrictions, registered voters seeking to obtain ID must also secure transit to the DMV. R. at 58. Since these voters lack driver's licenses, they are forced to pay for public transit. *See id.* Voters have been unable to get to DMVs because there are none in their county, because they cannot afford to take time off of work, because public transit cannot connect them with a DMV, and because cabs refuse to pick them up from their homes. *Id.* These logistical burdens are substantial for the low-income voters who must shoulder them.

The burdened voters must now obtain all of this documentation, and state ID cards specifically for the purpose of voting—those who already obtained IDs for other reasons now can vote as an added benefit. Because there are only marginal individual benefits to voting, these types of barriers can be sufficient to prevent people from voting. R. at 66-67.

With these disenfranchised citizens in mind, and considering the burdens of considerable time and effort even voters who are able to obtain qualifying ID will have to expend, it now falls to the defendants to show that the state has weighty interests in the law that justify these serious burdens.

### B. Defendants Have Failed to Show How Act 23 Advances Any of Their Proposed State Interests.

While the state is within its rights to make attempts to ensure a fair election process, this court has said that states cannot burden the right to vote solely to attempt to address dangers that are only "theoretically imaginable." *Williams*, 393 U.S. at 33. Defendants proposed four arguments for why they believe the voter ID law might serve a weighty state interest. These are that the Act will help detect and prevent in-person voter fraud, prevent other types of voter fraud, boost public confidence in elections, and promote the orderly administration of elections and accurate record keeping. R. at 36. Act 23 fails to serve any of these goals.

#### 1. Act 23 Will Not Prevent Any In-Person Voter Fraud in Wisconsin.

There is no evidence that in-person voter fraud occurs in Wisconsin. R. at 36. Assistant District Attorney Bruce Landgraf testified that his office, despite investigations into voting abnormalities, has never confirmed a case of in-person voter fraud. R. at 37. And, after an analysis of the 2004, 2008, 2010, and 2012 elections, Professor Minnite found no instances of in-person voter fraud. R. at 38-39. And Wisconsin has initiated numerous task forces to monitor elections for voter fraud, which have not found evidence showing anyone attempted to perpetrate in-person voter fraud. *Id.*

Further, the criminal law in Wisconsin is already an ample deterrent to any individuals tempted to commit voter fraud. Under Wisconsin law, voter impersonation fraud is a felony punishable by a fine of up to $10,000 and three

years imprisonment. R. at 42. The monetary fine alone, not to mention the liberty costs and collateral consequences of a felony conviction, dwarfs any benefit a person or a candidate might derive from a single additional vote.

Further it is difficult to perpetrate in-person voter fraud. A person committing voter fraud needs to know the name of a registered voter, as well as the voter's polling place and the voter's address. R. at 42-43. Additionally a fraudulent voter must know that the person they are impersonating has not voted—and if they wish to escape detection, that the voter will not vote—and also know that no one at the polling place will know that the impersonator is not the voter. *Id.*

Defendants are claiming to try to solve a problem that does not exist in Wisconsin, and it is not enough that that problem is "theoretically imaginable." *See Williams*, 393 U.S. at 33. Therefore this proposed interest cannot justify Act 23's burdens.

#### 2. Defendants Cannot Explain How Act 23 Will Detect or Deter Other Types of Voter Fraud.

At trial the defendants sought to argue that a Photo ID requirement could prevent other types of voter fraud. R. at 47. The defendants gave such examples as voting by a convicted felon, voting by a non-citizen, or double voting by people who no longer live in Wisconsin. R. at 47. But felons and non-citizens are entitled to driver's licenses and state ID cards. *See* R. at 47. And persons who no longer live in Wisconsin are presumably registered to vote absentee, and already fulfilled the ID requirement when they registered. *See* R. at 30. There is no evidence that Act 23 will deter any type of voter fraud.

### 3. Stricter Voter ID Laws Do Not Improve Public Confidence in the Electoral Process.

There is "zero relationship" between strict voter ID laws and confidence in the democratic process. R. at 44 (citing Ansolabehere & Persily, *supra* at 1756). Instead experts in the field have stated that unfounded allegations of voter fraud unnecessarily undermine public confidence in the electoral process. R. at 44-46. And the trial court stated that voter ID laws can also undermine public confidence in the electoral process by heightening concerns about non-existent voter fraud. R. at 46.

As noted by Judge Posner there is literature to suggest that these types of voter ID laws are political moves by Republican politicians to disenfranchise low-income voters of color, who are likely to vote for Democrats. R. at 146-148. The perception that voter ID laws are a calculated political move to prevent people of color from voting may also damage public confidence in the process.

At best Act 23 has no impact on voter confidence in the electoral process. At worst it sends a message to the voters of Wisconsin that their elected leaders are manipulating the voting laws to try and advantage their own political party. Act 23 will not boost the citizenry's confidence in the process.

### 4. Defendants Cannot Explained How Act 23 Promotes Orderly Election Administration or Accurate Record Keeping.

Defendants argued at trial that Act 23 advanced the state's interest in orderly elections and accurate record keeping. R. at 48. However, defendants failed to explain how this might work in practice, and the trial court could not imagine how the Act would advance that interest. R. at 48.

Ultimately, while defendants have referenced several noble aims, they have entirely failed to show that Act 23 will advance any of their stated goals. Because Act 23 imposes serious burdens on hundreds of thousands of registered voters, and the state has failed to show a "sufficiently weighty" countervailing state interest, this Court should not allow Act 23 to stand. *See Norman*, 502 U.S., 288–289.

### C. Unlike in *Crawford*, Here There Is a Strong Factual Record That Justifies Overturning Act 23.

Defendants seek to rely on *Crawford* to argue that the Act should be upheld. While *Crawford* also addressed a law that required voter ID, there is a wide gulf between that case and the circumstances here: *Crawford's* evidentiary record was lacking, Act 23 is significantly more burdensome than the Indiana law, and the plaintiffs in *Crawford* did not refute the proposed state interests.

First, there were serious evidentiary deficiencies in the *Crawford* record. There was no evidence about the number of registered voters who were disenfranchised by the law. *See Crawford*, 553 U.S. at 200 (opinion of Stevens, J.). There was no testimony from anyone who was disenfranchised by the law. *See Crawford*, 553 U.S. at 201 (opinion of Stevens, J.). The record said virtually nothing about the burdens on the indigent, and there was limited testimony from individuals about the struggles they faced to obtain ID. *Id.* at 201-202.

Further, while Justice Stevens stated that for most voters taking a trip to the DMV was likely not a substantial burden, he also stated that there was inadequate evidence presented at trial on whom the law impacted and how the law affected them. *Id.* at 198-202. ("In sum, *on the basis of the record that has been made in this*

*litigation*, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.") (emphasis added). He also acknowledged that low-income voters might face substantial burdens because of the law. *See id.* at 199.

Here plaintiffs have presented a record that states how many registered voters are affected, explains the burdens imposed by the law, describes the law's impact on the indigent, and includes testimony from tens of plaintiffs describing the challenges they face because of Act 23, as well as testimony from several voters disenfranchised by the law. *See* R. at 50-67. This record demonstrates Act 23, unlike the Indiana law, places substantial burdens on voters.

Further, there are meaningful distinctions between the requirements and contexts of the Indiana law and Act 23. Critically, there is no way to opt out of the requirements of Act 23. In *Crawford* voters retained the option to cast absentee ballots without presenting a photo ID. *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.) (stating that although "it may not be a completely acceptable alternative" voters who struggle to obtain ID "are able to vote absentee without presenting photo identification."). Here even those voting absentee must show qualifying ID. R. at 30.

Additionally, in *Crawford* if a person was indigent and could not obtain the supporting documents they needed without paying a fee, the "severity of that burden" was "mitigated" because they were excused from the process of obtaining ID. *See Crawford*, 553 U.S. at 186 (opinion of Stevens, J.). Instead they could execute an affidavit within ten days of the election attesting to their situation, and

have their ballot counted. *Id.* This process spared low-income voters from going down an administrative rabbit hole. Further, indigent voters did not need to be affirmatively aware of the regulation requiring ID to obtain an exception. Instead, they could show up at the polls on voting day and learn of the exception from a poll worker on the spot. *See id.*

Here voters who show up at the polls without ID functionally have three days to obtain ID and take it to the county clerk's office. R. at 30. Considering how complex the process to obtain an ID is—and also taking into account that it will likely take the DMV more than three days to process a request for an ID, print the ID, and mail it—this provision is unlikely to allow anyone to be able to vote who was otherwise disenfranchised by Act 23. *See* R. at 30.

Further, DMVs were open longer hours in Indiana than they are in Wisconsin. R.at 180. In Wisconsin most DMVs are open for around 16 hours a week during workdays. *See* R. at 180.

Finally, in *Crawford* the evidentiary record regarding the state's interest in the law was markedly different, and there it did justify a finding that the law served a state interest. In *Crawford* there was evidence that Indiana's voter roles were inflated by as much as 41.4%, which Justice Stevens found suggested there might be issues with voter fraud in the state, and therefore provided a reason for the state to move to prevent voter fraud. *See Crawford*, 553 U.S. at 192; 196-98 (opinion of Stevens, J.). Here there is no evidence of issues with the voter roles, or of any other type of administrative problem that Act 23 might address. *See* R. at 130.

The Seventh Circuit ruled that after *Crawford* it was a legislative fact that voter ID laws increase voter confidence. R. at 12. But such a determination asks courts to ignore actual facts because a previous case on the subject presented an inferior record. In *Crawford* the plaintiffs did not dispute the proposition that stricter voter ID laws would boost confidence in the process. *See Crawford*, 553 U.S. at 197 (opinion of Stevens, J.). By contrast, plaintiffs here provided conclusive evidence to demonstrate that Act 23 will not boost voter confidence in the election—and may very well harm voter confidence. *See* R. at 44-46. This Court should not ignore the full factual record here because not all of the evidence on the subject of voter ID laws was presented to it in *Crawford*.

This case is not *Crawford*, and because the burdens here outweigh the state interests, this court should strike down Act 23 as unconstitutional.

## II. ACT 23 VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT BY LIMITING THE OPPORTUNITIES OF BLACK AND LATINO VOTERS TO PARTICIPATE IN THE POLITICAL PROCESS.

Section 2 of the Voting Rights Act prohibits any "practice… imposed or applied by any State … which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C.A. § 10301. Section 2 claims can "be proved by showing discriminatory effect alone." *Thornburg v. Gingles,* 478 U.S. at 35; *see also Chisom v. Roemer*, 501 U.S. 380, 404 (1991) ("Thus, Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone.");*Veasey v. Abbott*, 796 F.3d at 504 (holding that a

disparate impact standard should be applied in assessing a Section 2 challenge to a voter ID law); 52 U.S.C. § 10301(b).

Therefore, if a law creates a barrier that is more likely to affect black or Latino people's ability to vote than white people's, the law runs afoul of Section 2 because minorities now have "less opportunity" to participate in the political process. *See* 52 U.S.C. § 10301(b). Justice Scalia provided a hypothetical to this effect in his dissent to the Courts decision in a redistricting case. *See Chisom*, 501 U.S. at 407–08 (opinion of Scalia, J. dissenting). There he explained that "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity to participate in the political process than whites, and Section 2 would therefore be violated." *Id.* (internal citations omitted).

The Seventh Circuit suggested that a law with a disparate impact would not necessarily violate Section 2 unless blacks and Latinos could not receive an ID under the same terms as whites. R. at 18. Under that test, the hypothetical posed by Justice Scalia about the DMV open only three hours a day would not necessarily violate Section 2, as blacks and Latinos could obtain ID on the same terms as whites. *Chisom*, 501 U.S. at 407–08 (opinion of Scalia, J. dissenting). The Seventh Circuit's reading of the Voting Rights Act puts the onus on citizens to prevent a law from suppressing the minority vote by overcome a law's disparate burdens, rather than requiring states to pass laws that do not disproportionately burden certain

racial groups. This Court has not and should not apply the test adopted by the Seventh Circuit.

Section 2 challenges can be divided into vote dilution and vote denial claims. In a vote dilution challenge plaintiffs typically argue that the way voting district lines are drawn disadvantages minority voters. *See*, *e.g.*, *Gingles,* 478 U.S. 30. In vote denial claims plaintiffs instead raise claims that the laws surrounding voting and elections operate to deter minorities from voting. *See*, *e.g.*, *Abbott*, 796 F.3d 487. This is a vote denial claim.

The vast majority of vote denial claims the federal courts have adjudicated are claims that felon disenfranchisement laws run afoul of Section 2. *See*, *e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). There, however, courts did not reach a full Section 2 analysis because felon disenfranchisement laws have a "long history," and the legislative history of the Voting Rights Act did not indicate that Congress had any intention of voiding those laws. *See*, *Farrakhan*, 623 F.3d at 993. There is no such long history of strict photo ID laws.

The Fourth, Fifth, and Sixth Circuits have adopted a two-element test for Section 2 challenges to a law in the vote denial context. First, the challenged law "must impose a discriminatory burden on members of a protected class" such that "members of the protected class 'have less opportunity than other members of the

electorate to participate in the political process and to elect representatives of their choice.'" *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014)(quoting 52 U.S.C. §10301); *see also League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 1735, 191 L. Ed. 2d 702 (2015); *Abbott*, 796 F.3d. at 504. Second, the burden must in part be linked to "social and historical" legacies of discrimination against members of the protected class. *See* 52 U.S.C. §10301; *see also League of Women Voters of N.C.,* 769 F.3d at 240; *Husted*, 768 F.3d at 554; *Abbott*, 796 F.3d. at 504.

### A. Act 23 Disproportionately Burdens Black and Latino Voters, Limiting Their Ability to Participate in the Political Process.

A district court is able to determine "whether minorities are disproportionately affected by a change in the law, based on statistical analyses." *Abbott*, 796 F.3d at 508 *(Citing Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 410-11 (5th Cir. 1991)). Here the evidence shows that Act 23 disproportionately burdens black and Latino voters.

The district court examined the statistical evidence offered by Professor Beatty, and found that in 2013 registered black voters were 140% more likely to lack qualifying ID than registered whites, and registered Latino voters where 230% more likely to lack ID than whites. R. at 85. In his analysis of Milwaukee County, Professor Barreto found that while only 7.3% of eligible white voters lacked a

qualifying ID, 13.2% of eligible black voters lacked ID and 14.9% of eligible Latino voters lacked ID. R. at 86.

Additionally, looking at the subset of registered voters without qualifying ID, blacks are 188% more likely than whites to also lack underlying documents needed to obtain an ID, while Latinos are 246% more likely than whites to lack the underlying documents. R. at 94. This means that not only are black and Latino voters more likely to have to shoulder burdens in order to obtain qualifying IDs, but they are also likely to have to go through a more arduous process to procure a qualifying ID than whites who need ID. *See id.*

These numbers are comparable to those that the Fifth Circuit found demonstrated that a Photo ID law disparately impacted black and Latino voters in Texas. *See Abbott*, 796 F.3d at 506 (finding there that "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack [qualifying] ID."). And in that case only 4.5% of the electorate was affected. *Id.* at 505. Therefore Act 23 affects a much higher percentage of the black and Latino electorate than were impacted by the law in *Abbott. See id.*

The statistical evidence of disparate impact demonstrates that Act 23 limits minority opportunity to participate in the political process.

### B. Act 23 Disproportionately Burdens Blacks and Latinos Because of a Legacy of Discrimination Against Those Groups.

Once a disparate burden is established, there are several factors this Court traditionally looks to in order to help assess whether "on the totality of the

circumstances" the law violates Section 2. *See Gingles*, 478 U.S. at 43-46 (quoting 52 U.S.C. § 10301). None of the factors is dispositive or required, and courts must make an "intensely local" assessment of the situation in the light of "past and present reality." *Id.* at 78 (quoting *White v. Regester*, 412 U.S. 755, 769–70 (1973)).

The factors include the tenuousness of the connection between proposed policy objectives and the law, and "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 45. Here, the disparities can be tied directly back to a historical legacy of discrimination against blacks and Latinos in Wisconsin.

Black and Latino people are more likely to live in poverty, which, as described, makes it more likely that they will lack an ID, while simultaneously making it harder for them to obtain an ID. R. at 97. Blacks and Latinos are more likely to be low income because of the legacy of race-based discrimination. Many of the racial socioeconomic disparities can be attributed to housing segregation. R. at 98. Housing segregation limits minorities' access to education and negatively impacts minority employment opportunities. *Id.* Milwaukee is one of the most racially segregated cities in the United States. *Id.* This segregation is a result of Milwaukee's history of housing discrimination and segregation. *Id.*

On top of that, a recent study of the Milwaukee labor market found that African Americans seeking employment face a wall of discrimination in the hiring process. *Id.* The study found that white applicants were twice as likely as equally

qualified black applicants to receive a callback interview. *Id.* Shockingly, the study found that white applicants with criminal records were still more likely to be called back than black applicants without criminal convictions. *Id.* Professor Levine described Wisconsin as having the "most entrenched racial and ethnic socioeconomic disparities of virtually any region in the county." R. at 99. And both he and Professor Burden stated that these disparities were the result of discrimination against Latinos and blacks. *See* R. at 99-100.

The Seventh Circuit held that only state enforced discrimination could be considered in assessing historical discrimination. R. at 18. This Court should not require a showing of state discrimination as "Congress intended to give the Voting Rights Act "the broadest possible scope." *See League of Women Voters of N. Carolina*, 769 F.3d at 240 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). And in the redistricting cases this court has addressed there is no requirement to show that the state is the source of past discrimination. *See Gingles*, 478 U.S. at 44-46.

The Seventh Circuit differentiated redistricting cases on the grounds that the state was responsible for drawing district lines, and that therefore the state alone was responsible for the disparate impact caused by the design of electoral districts. R. at 22. But here the state is responsible for determining the criteria of acceptable photo ID, and it notably excluded certain groups such as veterans and students at two-year colleges from the populations sure to have ID. *See* R. at 29. Further the process for obtaining qualifying ID is state determined and enforced.

Ultimately a state act of voter suppression remains a state act of voter suppression regardless of the type of law it is packaged within. Both redistricting laws and photo ID laws are state actions. And a legacy of state enforced discrimination is not required for either a voter ID law or a redistricting law to run afoul of Section 2.

Finally, as described above, there is a very tenuous connection between the proposed state interest in the law and the law's practical impact. This fact also counsels in favor of striking down the Act under Section 2. *See Gingles*, 478 U.S. at 45

Act 23 interacts with Wisconsin's history of discrimination, as well as with on-going discrimination people of color face in Wisconsin, to disproportionately bar Latinos and blacks from voting. This is a violation of Section 2 of the Voting Rights Act, and the Court should strike down Act 23.

## CONCLUSION

When the Voting Rights Act was passed in 1965 it carried with it the promise that no state would be able to prevent or discourage citizens from voting on account of their race. Act 23 threatens that promise. Because the law disproportionately deters blacks and Latinos from voting, and because the disproportionate burdens stem from an ongoing practice of discrimination against those groups, Act 23 violates the Voting Rights Act. Additionally, Act 23 is unconstitutional because it imposes serious burdens and the defendants cannot demonstrate that it serves any

state interest. Accordingly, this court should reverse the decision of the Seventh Circuit and strike down Act 23.

Dated: February 10, 2016

Respectfully submitted

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APPENDIX

SECTION 2 OF THE VOTING RIGHTS ACT

**(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

**(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.