No. 14-803

IN THE

Supreme Court of the United States

RUTHELLE FRANK, *et al*.,

Petitioners,

v.

SCOTT WALKER, *et al*.,

Respondents.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Does a nondiscriminatory law requiring all voters to present photo identification prior to voting violate the Equal Protection Clause of the Fourteenth Amendment?

Does that same, universally applicable law operate to deny or abridge the right to vote "on account of race or color," in violation of Section 2 of the Voting Rights Act?

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INTRODUCTION

Life in the 21st Century is marked by innumerable administrative burdens. As the world becomes more anonymous and complex, we rely increasingly on an intricate web of administrative procedures and requirements to facilitate every facet of life—from traveling, to purchasing a house, to voting in elections. Accordingly, the need for identification has become paramount. "Photo identification cards . . . are needed to board a plane, enter federal buildings, and cash a check." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008). Act 23 reflects the judgment that if identification is required to protect public safety and prevent theft, it should also be required to safeguard one of our most fundamental rights: the right to vote.

STATEMENT OF THE CASE

I. Act 23

The Wisconsin state legislature passed Act 23 in May of 2011. R. at 25a. The statute requires individuals to present photo identification to vote in Wisconsin elections and lists nine forms of ID that will qualify under the provision: a Wisconsin driver's license, a Wisconsin state ID card, an ID card issued by the U.S. uniformed service, a U.S. Passport, a naturalization certification, an unexpired receipt from filing an application for a Wisconsin driver's license, an unexpired receipt from filing an application for state ID, an unexpired ID issued from a federally recognized Indian tribe, or an ID issued by an accredited Wisconsin college or university that contains the date of issuance, an expiration date, and the

signature of the card's owner. R. at 28a–29a. Citizens who will be at least 18 years of age by the next election may obtain, renew, or reinstate a Wisconsin ID card for free if they ask that the card be provided without charge for voting purposes. Wis. Stat. § 343.50(5)(a); R. at 31a.

Although the Act generally requires voters to provide identification whether they are voting in person or absentee, the Act exempts various categories of individuals from the photo identification requirement. *See* Wis. Stat. § 6.79(2)(a); Wis. Stat. § 6.86(1)(ar); R. at 30a. Specifically, the requirement does not apply to an absentee voter who has presented qualifying ID on a prior occasion and whose name and address have remained the same; absentee voters in the military or abroad; voters with confidential listings; voters who have had their licenses revoked but who can present a copy of the citation that led to revocation; absentee voters who are elderly or disabled and confined to their homes or to care facilities; and individuals with religious objections to being photographed. R. at 30a.

Voters who do not fall within one of the statutory exemptions and who fail to present qualifying identification are still permitted to cast a provisional ballot. Wis. Stat. § 6.97(1)–(2). That ballot will be counted in the election if the voter returns, with appropriate identification, to the polling place or the office of the municipal clerk or board of election commissioners before 4pm on the Friday following the election. Wis. Stat. § 6.97(3)(b)–(c); R. at 30a.

Following its passage, Act 23 remained in effect through the February 2012 election but was subsequently enjoined in March 2012 by two Wisconsin circuit

courts. R. at 26a n.1. The cases made their way to the Wisconsin Supreme Court, and in July 2014, the court resolved a conflict between Act 23 and its implementing regulations and upheld the voter identification requirement under the Wisconsin Constitution. R. at 26a n.1; *see also Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262, 265 (Wis. 2014).

II. Legal Background

This case arose out of two separate lawsuits—one filed on behalf of eligible voters in Wisconsin and the other on behalf of the League of United Latin American Citizens (LULAC) of Wisconsin. R. at 26a. Both suits challenged the validity of Act 23 under the U.S. Constitution and Section 2 of the Voting Rights Act. *Id.*

The U.S. District Court for the District of Wisconsin reviewed both cases together without formally consolidating them. R. at 26a. On April 29, 2014, the District Court issued an order permanently enjoining enforcement of Act 23 on grounds that it violates both the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act. R. at 103a–104a. Following the District Court's order, the Wisconsin Supreme Court decided *Milwaukee Branch of NAACP v. Walker*. *See Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (2014). In that case, the court construed Wis. Code § Trans 102.15(3)(b) to require the Department of Transportation to excuse an individual's failure to provide supporting documentation for "Proof of Name and Date of Birth" if an individual "does not have the documents and would be required to pay a government agency to obtain them." *Id.* at 279. With this construction, the court resolved an apparent

conflict between the regulations and Act 23's directive that the state provide DOT identification documents free of charge for voting purposes. *See id.* at 278; Wis. Stat. § 343.50(5)(a); R. at 31a. Approximately two weeks after the Wisconsin Supreme Court's decision, the District Court denied Defendant's motion for a stay. R. at 211a. A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit reversed, holding that Defendants were likely to succeed on the merits in light of the Wisconsin Supreme Court's decision in *Milwaukee Branch of NAACP*. R. at 189a–190a. A divided Court of Appeals denied Plaintiffs' motion for reconsideration, and on October 6, 2014, the U.S. Court of Appeals for the Seventh Circuit issued a final judgment reversing the District Court's grant of a permanent injunction. R. at 24a, 187a. The Seventh Circuit held that "the district court's findings [did] not justify an outcome different from *Crawford*." R. at 2a. On October 15, 2014, the Seventh Circuit stayed its judgment pending further review. R. at 128a.

III. The Record

A. Wisconsin's Interests

Assistant District Attorney Bruce Landgraf testified at trial that in each major election, there are approximately 10–12 instances of apparent voter impersonation. R. at 36a. Landgraf reported that after weeding out the cases with "innocent explanations," 1–2 cases remain unexplained. R. at 37a. Lorraine Minnite, a professor at Rutgers, further testified to finding one case of voter fraud in the 2004, 2008, 2010, and 2012 Wisconsin elections. R. at 38a. That case involved a man who cast an absentee ballot on behalf of his deceased wife. *Id.* Wisconsin

created task forces in 2004 and 2008 to identify, investigate, and prosecute voter fraud occurring in Milwaukee County. R. at 39a–40a. However, a former Milwaukee police officer, Michael Sandvick, testified that certain types of voter fraud may be more difficult to detect. R. at 40a.

At trial, Plaintiffs presented further regarding the effects of voter ID laws on public confidence in the electoral process. Relying on a study published in the Harvard Law Review, Barry Burden, a professor of political science at the University of Wisconsin, testified that empirical evidence suggests that photo ID requirements do not increase voters' confidence in the electoral process. R. at 44a. Both Burden and Minnite argued that voter ID laws can, in fact, undermine voter confidence by creating the "false perception that voter-impersonation fraud is widespread." R. at 44a–46a.

Based on the evidence presented, the District Court concluded that Act 23 was an unreasonable response to the "potential problem" of voter impersonation. R. at 43a. The court further determined that the Act does not further Wisconsin's interest in preventing other types of voter fraud or promoting public confidence in the electoral process. R. at 47a–48a. The court found, however, that the Act "weakly" serves the state's interest in promoting orderly election administration. R. at 48a.

B. Effect on Voters

Based on the testimony of Plaintiffs' expert, Leland Beatty, the District Court determined that approximately 300,000 registered voters in Wisconsin lacked

qualifying identification at the time of trial. R. at 50a. According to a telephonic survey conducted by Matthew Barretto, 63,085 of those individuals resided in Milwaukee County. R. at 50a–51a.

Research conducted by Matthew Barreto further suggests that between 20,494 and 40,511 of the 63,085 voters in Milwaukee who do not have proper identification earn less than $20,000 a year, and 80.5% of eligible voters without ID had not received any education beyond the high-school level. R. at 52a. Plaintiffs presented testimony from eight individuals who intended to vote but lacked qualifying identification. R. at 51a–52a. Seven of the witnesses were low-income, but only three testified to being unable to afford the supporting documents necessary to obtain a qualifying ID. *See id.*

The record also contains detailed information regarding the process of obtaining qualifying identification. If a Wisconsin resident has a state ID card or driver's license that expired within the last eight years, she may renew it using her social security number. R. at 54a. To get a state ID card for the first time, however, individuals must provide "(1) proof of name and date of birth, (2) proof of U.S. citizenship or legal presence in the United States, (3) proof of identity, and (4) proof of Wisconsin residency." R. at 53a; *see also* Wis. Admin. Code § Trans 102.15. The District Court noted that "most people will need to produce a birth certificate" as proof of name and date of birth. R. at 54a. According to Barreto's study, this may be more difficult for some: approximately 25,354 eligible voters in Milwaukee lacked both qualifying ID and a birth certificate. R. at 54a. However, there were only 1,640

eligible voters who did not have any of the supporting documents necessary to obtain ID. R. at 55a. Those who would like to obtain a copy of their birth certificate may do so by providing the necessary supporting documentation and paying a $20 fee. R. at 54a–55a. Following the Wisconsin Supreme Court's decision in *Milwaukee Branch of NAACP*, these requirements may be waived where an individual lacks supporting documentation and would have to pay a government agency to obtain it. *See Milwaukee Branch of NAACP*, 851 N.W.2d at 279. While certain individuals—voters born outside of Wisconsin, Amish Mennonite voters, and homeless voters—would likely have more difficulty getting the documents necessary to obtain a qualifying ID, the Wisconsin Administrative Code provides for an MV3002 procedure, which allows individuals to prove name and date of birth without a birth certificate. R. at 55a–56a, 60a n.17. Though Debra Crawford testified that she was not initially told about the procedure, she was ultimately successful in helping her mother obtain a state ID card after getting the DMV to waive the birth certificate requirement. R. at 60a–61a n. 17. Additional witnesses testified at trial about the further difficulties individuals might face if there are discrepancies in their documentation. R. at 62a n.18, 62a–63a n.19, 64a n.20. Professor Burden testified that because voting is a "low-benefit" activity, even small burdens—such as weather, illness, and administrative inconveniences—can deter potential voters. R. at 66a-67a. Based on the evidence, the District Court found that Act 23 would deter a "substantial number of eligible voters" from participating in elections. R. at 67a.

The parties presented further evidence as to the impact of Act 23 on members of different racial groups. Leland Beatty testified that black and Latino voters in Wisconsin are less likely to possess qualifying identification than whites. R. at 84a. In reaching this conclusion, Beatty compared the names of registered voters with a list of individuals who had either a Wisconsin driver's license or a state ID card. R. at 120a. Beatty then contracted with a third party—Ethnic Technologies—to determine the likely race of those individuals not matched with one of those two forms of identification, based on the names of the individuals and where they lived. *Id.* Using this methodology, Beatty determined that in 2013, African-American and Latino voters were 1.4 and 2.3 times as likely as white voters to lack a driver's license or state ID. R. at 85a. Barreto's telephonic survey, conducted in January 2012, further indicated that 13.2% of African-American voters and 14.9% of Latino voters in Milwaukee County lacked qualifying ID, as compared with 7.3% of white voters. R. at 86a–87a. The District Court relied on both Barreto and Beatty's findings to make the factual finding that minority voters in Wisconsin are less likely than whites to possess qualifying identification. R. at 89a.

Finally, the record points to the existence of other disparities between racial groups in Wisconsin. According to a survey by Professor Burden, blacks and Latinos are more likely than whites to have been born outside of Wisconsin. R. at 95a. They are also more likely to be low income and to live in urban areas. R. at 97a n.38, 97a n. 39. Professor Levine testified that socioeconomic disparities between whites and minorities in Wisconsin are linked to the effects of residential segregation, housing

discrimination, and discrimination in employment. R. at 98a. Based on this evidence, the District Court concluded that Act 23 has a disproportionate impact on minority voters because of its interaction "with the effects of past and present discrimination." R. at 100a.

SUMMARY OF ARGUMENTS

Act 23 is constitutional under the Equal Protection Clause of the Fourteenth Amendment. Under the standard applied by the District Court, courts would be required to invalidate any voting restriction that imposes even a minor administrative burden on the right to vote, no matter the implications for the integrity of the electoral process. Fortunately, however, this is not the law. As this Court has made clear, nondiscriminatory voting restrictions are upheld as long as they do not severely limit the rights of voters.

Had the District Court properly deferred to this Court's decision in *Crawford*, as well as to the considered judgment of the Wisconsin Legislature, it would have concluded that Wisconsin's interests in safeguarding the integrity of the electoral process more than justify Act 23's voter identification requirement.

Prior decisions of this Court further demonstrate that the District Court erred in finding that Act 23 imposes a severe burden on a subset of Wisconsin voters. The proper standard is not whether a voting restriction would unduly burden the rights of certain classes of voters but rather whether it would severely restrict the rights of voters generally. This Act 23 does not do. However, even if we were to consider Act 23's effect on particular voters, this Court's decision in

Crawford mandates the conclusion that the record here is insufficient to establish a severe burden on voting rights. Thus, on balance, Wisconsin's interests in preventing voter fraud, promoting public confidence in the electoral process, and ensuring the orderly administration of elections outweigh the minimal burdens Act 23 imposes on Wisconsin voters. For this reason, the Act is constitutional under the Equal Protection Clause of the Fourteenth Amendment.

Act 23 must also be upheld under Section 2 of the Voting Rights Act. Because Act 23 does not severely burden voting rights, it cannot result in the denial or abridgment of the right to vote. Moreover, the plain language of Section 2 precludes a finding of liability based on a bare statistical showing of disparate impact. Under the proper standard, plaintiffs must at least demonstrate (1) that the challenged restriction was the dispositive force in denying minority voters an equal opportunity to participate in the electoral process and (2) that race was a primary factor behind the law's disproportionate effect. Because Plaintiffs made no such showing here, the District Court's judgment must be reversed.

For these reasons, Respondents respectfully request that this Court affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit and uphold Act 23 under both the Fourteenth Amendment of the U.S. Constitution and Section 2 of the Voting Rights Act.

STANDARD OF REVIEW

Appellate courts review a lower court's findings of fact under a clearly erroneous standard. "[A] finding is 'clearly erroneous' when although there is

evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Relevant here, "[a] district court's conclusion that a challenged electoral practice has a discriminatory effect is a question of fact subject to review for clear error." *Ortiz v. City of Phila. Office of the City Comm'rs Registration Div.*, 28 F.3d 306, 308 (citing *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), for the proposition that determining whether an electoral process is equally open to minority voters requires "an intensely local appraisal of the design and impact" of the challenged electoral practice). In contrast, pure questions of law and mixed questions of law and fact are subject to de novo review.

ARGUMENT

I. Act 23 is Constitutional Because the State's Significant Interests in the Integrity of the Electoral Process Outweigh the Act's Minimal Burdens on Voting Rights.

Act 23 does not violate the Equal Protection Clause of the Fourteenth Amendment because Wisconsin's legitimate interests in preventing voter fraud and promoting confidence in the electoral process justify any minor burdens that the voter identification requirement imposes on voting rights.

A. Because the Burdens Imposed by Act 23 Are Minimal, The Voter ID Requirement is Subject to a Lower Level of Scrutiny.

While the right to vote is fundamental, "[i]t does not follow . . . that the right to vote in any manner . . . [is] absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). This Court has recognized that, "as a practical matter, there must be

substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

There is "[n]o bright line separating permissible election-related regulation from constitutional infringements." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Rather, courts must apply a balancing framework that "weigh[s] the character and magnitude of the asserted injury" against the "interests put forward by the State." *Burdick*, 504 U.S. at 434. "[T]he rigorousness of [this] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Where an election practice imposes only a limited burden on voting rights, "the State need not establish a compelling interest to tip the constitutional scales in its direction." *Id.* at 439.

In *Burdick*, for example, this Court recognized that "when a state election provision imposes only reasonable nondiscriminatory restrictions" on voting rights, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 434. Concluding that Hawaii's ban on write-in voting imposed only a limited burden on the right to vote, the Court in *Burdick* applied a lower level of scrutiny. *See id.* at 439–40. The Court subsequently concluded not only that the write-in ban was a "reasonable way" of furthering the state's "legitimate interest" in preventing divisive election maneuvers, but also that the state's legitimate interests outweighed the write-in ban's minimal restriction on voting rights. *Id.* at 439–40.

Burdick is consistent with this Court's earlier decision in *Harper*, which struck down a $1.50 poll tax as unconstitutional under the Fourteenth Amendment's Equal Protection Clause. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). Although the Court in *Harper* noted that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized," the contested voter qualification in that case was "not germane to one's ability to participate intelligently in the electoral process." *Id.* at 667.

This Court has recognized that a different standard applies to "evenhanded restrictions that protect the integrity and reliability of the electoral process." *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983); *see also Crawford*, 553 U.S. at 189 (Stevens, J.) (noting that "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.").[1] In *Crawford*, a majority of the Supreme Court agreed that for nondiscriminatory restrictions intended to protect the integrity of the electoral process, courts should apply the balancing framework articulated in *Anderson* and *Burdick*. *See Crawford*, 553 U.S. at 190

[1] There is technically no plurality opinion in *Crawford*, as the Justices were evenly split between the opinion written by Justice Stevens, the concurrence, and the dissent. *See generally Crawford*, 553 U.S. 181. However, when considering Justice Stevens and Justice Scalia's opinions together, it is possible to derive a baseline standard that should be applied in Equal Protection cases. Under that standard, a legitimate voting restriction that imposes only a limited burden on voting rights will be upheld under the Equal Protection Clause. *See id.* at 202 (Stevens, J.) (noting that "[a] facial challenge must fail where the statute has a plainly legitimate sweep"); *id.* at 208 (Scalia, J., concurring) (stating that a statute "must prevail unless it imposes a severe and unjustified burden upon the right to vote).

(Stevens, J.); *id.* at 204 (Scalia, J., concurring) ("To evaluate a law respecting the right to vote . . . we use the approach set out in *Burdick v. Takushi* . . . .").

Like the write-in voting ban at issue in *Burdick*, Act 23's photo identification requirement applies, with only a few limited exceptions, to all Wisconsin voters. *See* R. at 30a (describing Act 23's "limited exceptions"). Moreover, the requirement is "germane" to voters' ability to participate in the electoral process: by giving election officials a means of verifying an individual's identity at the polls, the voter ID requirement ensures that only eligible voters cast ballots in Wisconsin elections. *See Harper*, 383 U.S. at 666. Because the Act is nondiscriminatory and designed to protect the integrity of the electoral process, the *Anderson*/*Burdick* balancing analysis applies.

Further, because the burdens imposed by Act 23 are minimal, the state's legitimate interests in preserving the integrity of the electoral process are sufficient to justify the Act's limited restriction on voting rights. *See Burdick*, 504 U.S. at 434 (explaining that only regulations imposing "severe" restrictions on voting rights must be "narrowly drawn" to advance a compelling state interest). The District Court thus erred in concluding (1) that Act 23 imposes more than a minimal burden on Wisconsin voters; and (2) that the State's important regulatory interests are insufficient to justify that burden.

B. Act 23 Furthers Wisconsin's Important Interests in Preventing Voter Fraud, Promoting Public Confidence in the Electoral Process, and Ensuring Orderly Administration of Elections.

This Court has recognized that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Elections are the cornerstone of our participatory democracy. However, "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised" and will be less likely to participate in the democratic process. *Id.*

In determining that the burdens imposed by Act 23 outweigh the state's interests in detecting and preventing voter fraud, promoting confidence in the electoral process, and ensuring orderly administration of elections, the District Court clearly erred in two respects. First, the court failed to give any weight to this Court's recent decision in *Crawford*, in which a majority of the court concluded that a state's interests in preventing voter impersonation and promoting public confidence in elections outweighed the minor burdens imposed by a voter ID requirement. Second, the District Court erred in failing to defer to the Wisconsin legislature's reasoned judgment that a voter ID requirement is necessary to preserve the integrity of the state's electoral process.

1. This Court Recently Held that a State's Interests in Preventing Voter Fraud and Promoting Public Confidence in Elections Justify the Burdens Imposed by a Voter ID Requirement.

In holding that Wisconsin's interests in preserving the integrity of the electoral process did not justify the burdens imposed by Act 23, the District Court failed to defer to this Court's recent decision in *Crawford*. There, a majority of the Court recognized that a state has legitimate interests in preventing voter impersonation fraud and promoting public confidence in the electoral process that outweigh the burdens imposed by a voter identification requirement.

Specifically, the Court affirmed that a state need not present actual evidence of voter fraud to justify imposing a voter identification requirement. Although the record in *Crawford* lacked evidence of any known instances of voter fraud in Indiana, three Justices, in an opinion written by Justice Stevens, stated that the "propriety" of preventing election fraud was "perfectly clear" given that the risk of voter fraud was not only real, but could also "affect the outcome of a close election." *Crawford*, 553 U.S. at 194–195 (Stevens, J.). Stevens further stated that "public confidence in the integrity of the electoral process has independent significance," and Indiana's interest in promoting public confidence is "sufficiently strong" to justify its voter identification requirement. *See Crawford*, 553 U.S. at 197, 204 (Stevens, J.).

The three Justices in the concurrence did not analyze the state's interests in depth; however, they concurred in the Court's judgment, stating that Indiana's interests in preventing voter fraud and promoting confidence in the electoral

process were "sufficient to sustain [the] minimal burden" imposed by the voter ID law. *See id.* at 209 (Scalia, J., concurring).

The Court's determination in *Crawford* controls the analysis here. The record in this case contains more evidence regarding instances of known voter impersonation than the record in *Crawford*. *See* R. at 37a–38a. In addition, there is nothing to suggest that a voter identification law will have a different impact on public confidence in Wisconsin than in Indiana. Thus, by disregarding binding precedent, the District Court committed clear error.

2. The District Court Erred in Declining to Defer to the Considered Judgment of the Wisconsin Legislature.

In addition to failing to defer to this Court's decision in *Crawford*, the District Court further erred by declining to give any weight to the considered judgment of the Wisconsin Legislature.

Article I, Section 4 of the U.S. Constitution provides that state legislatures shall prescribe "[t]he times, places and manner of holding elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Act 23's voter identification requirement falls within the Wisconsin legislature's purview to regulate the "manner" in which public officials are elected. Indeed, the passage of the Act reflects the legislature's determination that an ID requirement would help safeguard the integrity of the electoral process by preventing voter impersonation and promoting public confidence in elections. Rather than defer to the Wisconsin Legislature's judgment, however, the District Court overstepped its judicial role in two ways: first, by holding that a legislature may not take prophylactic measures to prevent

voter impersonation fraud, absent evidence of known instances of such fraud occurring in the state; and second, by rejecting the legislature's determination in favor of its own empirical assessment of whether a voter ID law promotes public confidence in the electoral process.

Legislatures are not required to wait for actual problems to arise before implementing measures to safeguard the electoral process. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986) (stating that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable."). In *Storer v. Brown*, for example, this Court upheld a California law denying ballot access to independent candidates with political party affiliations within one year prior to the preceding election. *Storer*, 415 U.S at 736. The Court upheld the provision on grounds that it furthered the state's compelling interest in "the stability of its political system." *Id.* Regarding its decision in *Storer*, this Court later observed that "[t]here is no indication that we held California to the burden of demonstrating empirically the objective effects on political stability that were produced by the 1-year disaffiliation requirement." *See Munro*, 479 U.S. at 195. The Court in *Munro* explained that "[t]o require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidates as a predicate to the imposition of reasonable ballot access restrictions . . . would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.*

Similarly, this Court held in *Vance v. Bradley* that a district court's role as finder of fact does not allow the court to reject a legislative determination as "pure speculation" simply because there is not enough evidence on the record to support it. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979) (quoting *Fireman v. Chicago*, 393 U.S. 129, 138–39 (1968)). *Vance* involved an Equal Protection challenge to a statutory provision that imposed a retirement age of sixty on federal employees covered by the Foreign Service retirement and disability system, but not employees covered by the Civil Service system. *Id.* at 94–95. In urging the Supreme Court to invalidate the statute, the Foreign Service officers made two empirical claims: first, that "overseas conditions often are not in fact more taxing than those in the United States," and second, that "arriving at 60 has an insufficient relationship to reduced physical and mental potential." *Id.* at 109–10. This Court, however, upheld the statute, rejecting the plaintiffs' suggestion that the legislative classification could only be sustained upon a showing of current empirical support. *Id.* at 110.

Courts further take on a legislative function when they strike down laws based on their own empirical assessments. In *Fireman*, a District Court held that Arkansas' full crew laws, which required a minimum number of employees to serve on train crews in certain circumstances, were no longer justified in light of economic and technical developments. *Fireman*, 393 U.S. at 130–31. This Court reversed, stating that the District Court had "indulged in a legislative judgment" by invalidating the laws based on the court's own assessment of whether or not they contributed to operational safety. *Id.* at 136.

Here, the District Court erred in concluding that Act 23 was an unreasonable response to the threat of voter impersonation because the record contained little evidence of known instances of voter impersonation fraud in Wisconsin. As this Court has recognized, the Wisconsin legislature was not required to wait for the state's "political system to sustain some level of damage" before taking action. *See Munro*, 479 U.S. at 195. Moreover, to invalidate measures like Act 23 based on the absence of known instances of voter fraud is akin to "throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2650 (2012) (Ginsburg, J., dissenting).

The District Court further erred in determining that Act 23 does not promote public confidence in the electoral process. As the Seventh Circuit recognized below, "whether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about [particular] litigants." R. at 12a. "On matters of legislative fact, courts accept the findings of legislatures." *Id.*

Thus, whatever the outcome of the court's empirical analysis, the court was not authorized to substitute its determination for that of the Wisconsin legislature. This is true even if there was only limited evidence to support the legislature's judgment. *See Vance*, 440 U.S. at 110 (rejecting plaintiffs' argument that a legislative determination may only be sustained if it is supported by empirical data).

In sum, the District Court clearly erred in determining that the state's interests in preventing voter impersonation fraud and promoting public confidence in the electoral process did not justify Act 23's voter ID requirement. These factual findings should therefore be reversed.

C. Act 23 Imposes Only a Minimal Burden on Voting Rights.

The District Court further erred in holding that Act 23 imposes a severe burden on voting rights. First, the court applied an incorrect standard in assessing the effects of the voter identification requirement. The proper test is not whether a voting restriction imposes a severe burden on a subset of voters, but rather whether the law severely impacts voters generally. Second, the court erred in declining to defer to this Court's analysis in *Crawford*. Given the substantial similarities between Wisconsin and Indiana's voter ID laws and the similarities between the *Crawford* record and the evidence presented here, there is no justification for the District Court's departure from this Court's prior determination. Had the District Court shown proper deference to this Court's decision in *Crawford*, it would have held that the record here does not establish that Act 23 imposes a severe burden on voting rights.

1. The Relevant Inquiry in an Equal Protection Analysis Is Whether a Voting Restriction Imposes an Unreasonable Burden on Voters Generally.

The burden that a universally applicable voting requirement imposes on a subset of voters does not amount to an unconstitutional "burden" under the Equal

Protection Clause. Applying this standard, Act 23 imposes only a minimal burden on Wisconsin voters.

Where a generally applicable law burdens only a subset of voters, this Court has held those burdens insufficient to outweigh a state's legitimate interest in the proper administration of its electoral process. In *Burdick*, for example, this Court upheld a state ban on write-in voting, concluding that the burden imposed by the ban was minimal, as any limitation "on voters' freedom of choice and association is borne only by those who fail to identify the candidate of choice until days before the primary." *Burdick*, 504 U.S. at 436–37. As the Court noted, a different holding would have "sacrifice[d] the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters." *Id.* at 437.

More recently in *Crawford*, a majority of the Court determined that even if the burden of Indiana's voter identification requirement were not "justified as to a few voters, that conclusion is by no means sufficient" to support the plaintiffs' "broad attack on the constitutionality" of the statute. *Crawford*, 553 U.S. at 199–200 (Stevens, J.); *id.* at 204 (Scalia, J., concurring) ("I prefer to decide these cases on the grounds that petitioners' premise [that the voter ID law 'may have imposed a special burden on some voters'] is irrelevant and that the burden at issue is minimal and justified."). The three justices in Justice Stevens' opinion reached that conclusion on the narrow grounds that there was insufficient evidence in the record to allow the Court to determine the magnitude of the burden imposed on certain

classes of voters; however, the three justices in the concurrence argued that the burden imposed on a subset of voters is entirely irrelevant to the Equal Protection analysis. *See Crawford*, 553 U.S. at 205–06 (Scalia, J., concurring) (noting that "weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.").

Read in light of this Court's decision in *Burdick*, *Crawford* supports the conclusion that burdens imposed on a subset of voters are irrelevant to the Equal Protection analysis. This Court's decision in *Anderson* is not to the contrary. In that case, this Court considered the "particular burden" that a March filing deadline imposed "on an identifiable segment of Ohio's independent-minded voters" and concluded that the "extent and nature of [that] burden[]" outweighed the state's minimal interests in the early filing deadline. *Anderson*, 460 U.S. at 792, 806. Unlike the statutes at issue in *Burdick*, *Crawford*, and the present case, however, the March filing deadline in *Anderson* only applied to independent presidential candidates. *See id.* at 787. As this Court recognized, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group." *Id.* at 793.

In contrast to the filing deadline in *Anderson*, Act 23's voter identification requirement is universally applicable. Rather than target a particular class of voters, it mandates that all voters present photo identification in order to cast a ballot. The District Court therefore erred in concluding that Act 23 imposed an

unreasonable burden on a subset of Wisconsin voters. As this Court's decisions have shown, the relevant burden in the Equal Protection analysis is the burden imposed on voters generally. *See, e.g.*, *Burdick*, 504 U.S. at 436–37.

Applying this standard, the voter ID requirement imposes only a minimal burden on Wisconsin voters. At the time of trial, 91% of eligible voters in Wisconsin had qualifying ID. *See* R. at 50a. For those individuals, the only burden imposed by Act 23 is the burden of remembering photo identification on election day. The risks that a voter might lose his photo ID on the way to the polls or not resemble the photo on his ID card due to a recent change in appearance "are neither so serious nor so frequent as to raise any question" about the constitutionality of a voter ID requirement. *Crawford*, 553 U.S. at 197 (Stevens, J.). Even if someone does forget their ID on the day of the election, Wisconsin's provisional voting process gives voters a second chance to ensure their vote is counted. *See* Wis. Stat. § 6.97.

For those needing to renew an ID or obtain one for the first time (as every voter will need to do at some point), the process is no more onerous than the process of opening a bank account, buying a car, or obtaining public benefits. Most people will not blink an eye at the $18 for a state ID card. *See* R. at 31a. Those who do, however, are entitled to state identification free of charge for voting purposes. *See* Wis. Stat. § 343.50(5)(a)3; R. at 31. In most cases, that will be the only hurdle to obtaining qualifying identification: most people in Wisconsin already have the supporting documents to obtain either a driver's license or a state ID card from the DMV. *See* R. at 55a (finding that only 1,640 eligible voters in Milwaukee County

lack both a qualifying ID and the supporting documents necessary to obtain one). For those who lack such documentation, the usual cost of obtaining a birth certificate is $20; as of 2014, however, individuals may ask for an exemption if they cannot afford the fee. *See Milwaukee Branch of NAACP*, 851 N.W.2d at 265.

Finally, the record contains no evidence that voter ID laws have depressed turnout in other states. *See* R. at 14a ("[A] finding that a photo ID law has significantly reduced the turnout in a particular state would imply that the requirement's additional costs outweigh any benefit in improving confidence in electoral integrity. As we have observed, however, the judge did not find that photo ID laws measurably depress turnout in the states that have been using them."). Nor is there any indication that Act 23 adversely impacted voter turnout during the February 2012 election. *See Purcell*, 549 U.S. at 6 (Stevens, J., concurring) (suggesting that actual election results "provide the courts with a better record on which to judge [a voting restriction's] constitutionality.").

Considering the effects of Act 23 on all Wisconsin voters generally, the voter identification requirement only minimally burdens the right to vote. The District Court's opposite conclusion, which was based on an analysis of the burdens imposed on only a subset of Wisconsin voters, is therefore clearly erroneous.

2. Even if a Court Were to Consider Act 23's Effect on a Subset of Voters, *Crawford* Mandates the Conclusion that the Burdens Imposed Do Not Outweigh the State's Interests Here.

Even if this Court were to consider Act 23's effect on a subset of voters, *Crawford* mandates the conclusion that the burdens of a voter identification

requirement are nonetheless minimal. In *Crawford*, this Court held that it could not "quantify the magnitude of the burden on [a] narrow class of voters" or determine what "portion of the burden . . . [was] fully justified" based on the evidence in the record. *Crawford*, 553 U.S. at 200. As a result, the Court considered the statute's effect on voters generally and held that the voter identification requirement "impose[d] only a limited burden" on voting rights. *Id.* at 202–203. The Court further concluded that this limited burden was justified by Indiana's legitimate interest in safeguarding the electoral process. *Id.* at 204.

Act 23 is substantially similar to the voter identification law at issue in *Crawford* (SEA 483). Additionally, the evidence presented in this case, like the record in *Crawford*, is insufficient to support a finding that Act 23 imposes more than a minimal burden on any subset of Wisconsin voters.

a) Act 23 is Substantially Similar to Indiana's Voter ID Requirement.

The three primary differences between Act 23 and SEA 483 do not establish that Act 23 makes it significantly more difficult to vote in Wisconsin than in Indiana.

First, although Act 23 requires photo identification for both in-person and absentee voting while SEA 48 requires ID only for in-person voting, this difference does not "establish[] that the burden of voting in Wisconsin is significantly different from the burden in Indiana." R. at 4a. In fact, by requiring individuals to provide photo identification in order to cast an absentee ballot, Act 23 is better tailored to the state's legitimate interest in preventing voter impersonation fraud. *See* R. at

38a n.7 (acknowledging that Act 23's voter identification requirement might have prevented a man from casting an absentee ballot on behalf of his deceased wife had the law been in effect at the time).

Second, although Wisconsin requires provisional voters to present qualifying ID to have their votes count in the election, while Indiana allows indigent voters and those with religious objections to execute an affidavit, this does not establish that it is significantly harder to vote in Wisconsin. *See* R. at 30a; *Crawford*, 553 U.S. at 186. There is no evidence of the number of voters in either Indiana or Wisconsin who actually take advantage of the provisional voting option (involving either execution of an affidavit or presentation of a photo ID). Nor is there any evidence to indicate that people find one form of provisional voting more onerous than the other.

Finally, although Act 23 and SEA 483 provide different lists of qualifying forms of identification, neither list is longer or easier to satisfy. *See* Wis. Stat. 5.02(6m); *Crawford*, 553 U.S. at 198 n.16. As the Seventh Circuit noted, Wisconsin's list "omits some documents that Indiana accepts . . . and includes some that Indiana omits." R. at 3a–4a. As such, the burden of having to provide qualification identification to vote is the same in each state.

b) The Record in This Case is Substantially Similar to the Record in *Crawford*.

The record in this case is also substantially similar to the record in *Crawford*, mandating the conclusion that there is insufficient evidence to conclude that Act 23 imposes a severe burden on Wisconsin voters. The differences between the record

here and the record in *Crawford* do not alter *Crawford*'s precedential value in an analysis of Act 23's burdens on Wisconsin voters.

Simply estimating the number of individuals without photo identification does not answer the question of whether a voter ID requirement imposes a significant burden on the right to vote. Thus, that the record here contains an estimate of the number of voters in Wisconsin without voter identification does not meaningfully distinguish this case from *Crawford*. *See* R. at 50a.

The record here is further distinguishable from *Crawford* on grounds that Plaintiffs' have presented actual evidence of the number of low-income individuals lacking photo identification. *Compare* R. at 52a (finding that between 20,494 and 40,511 eligible voters in Milwaukee who lack photo ID earn less than $20,000 a year); R. at 52a n.12 (citing testimony regarding the numbers of low-income voters without qualifying ID), *with Crawford*, 553 U.S. at 201 (Stevens, J.) (noting the absence of evidence concerning the particular "difficulties faced by indigent voters and voters with religious objections."). However, the data in this case is insufficient by itself to establish that the burdens faced by low-income voters are significant. First, Plaintiffs were unable to provide a precise estimate of how many voters lacking qualifying ID are low-income. According to Professor Barreto's testimony, anywhere between 20,494 and 40,511 eligible voters in Milwaukee who lack photo identification earn less than $20,000 a year. R. at 52a. It is difficult to rely on such a large range in assessing the burdens imposed by Act 23, especially when only 63,085 voters in Milwaukee County lack qualifying identification overall. R. at 51a.

Moreover, the District Court never acknowledged that $20,000 can mean very different things to different people. For example, while an income of $20,000 would place a family of four well below the federal poverty line (which is currently set at $24,250 for a family of four), an individual making the same amount would be well above the poverty line for individuals, which is currently set at $11,770. *Federal Poverty Level (FPL)*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/federal-poverty-level-FPL/ (last visited Jan. 31, 2016). In its analysis, however, the District Court labeled all individuals making $20,000 or less "low-income" and assumed that they would face similar burdens obtaining proper identification. *See* R. at 53a.

Finally, although the record here provided more detailed information regarding the process individuals would have to go through to obtain proper identification, the record suffers from some of the same critical deficiencies as the record in *Crawford*. Most importantly, the evidence presented does not separate out the individuals who lack qualifying identification by choice from those who have tried and failed to obtain the necessary documents. While the District Court assumes that the testimony of individual plaintiffs fills this gap, the Supreme Court in *Crawford* held that similar testimony was insufficient to establish a significant burden on voting rights. *See Crawford*, 553 U.S. at 201 (Stevens, J.) (noting that depositions of plaintiffs and two case managers at a homeless shelter did not "provide any concrete evidence of the burden imposed on voters who currently lack photo identification."). Out of eight individuals who testified at trial, only three said

that they could not obtain photo identification because of the costs of acquiring the supporting documentation. *See* R. at 51a–52a. But whatever the content of the individual testimony, the experiences of a few individuals give no indication as to the total number of people who are unduly burdened by Act 23's voter identification requirement. *Cf. Crawford*, 553 U.S. at 202 (noting that a "single affidavit gives no indication of how common the problem is.").

Thus, although "[a] photo identification requirement imposes some burdens on voters that other methods of identification do not share," the Court in *Crawford* noted that "[b]urdens of that sort arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question about the constitutionality" of such a requirement. *Crawford*, 553 U.S. at 197–98 (Stevens, J.). In light of *Crawford*, the District Court erred in holding that the burdens Act 23 imposes on a small subset of voters were so significant as to outweigh the state's important interests in the integrity of the electoral process.

D. Wisconsin's Significant Interest in the Integrity of the Electoral Process Outweighs the Minimal Burdens that a Voter ID Requirement Imposes on Wisconsin Voters.

Under an Equal Protection analysis, courts must "weigh the character and magnitude of the asserted injury" against the "interests put forward by the State." *Burdick*, 504 U.S. at 434. Where the burdens of a voting restriction are minimal, "the State need not establish a compelling interest to tip the constitutional scales in its direction." *Id.* at 439. Here, Act 23 imposes only a minimal burden on Wisconsin voters. Therefore, Wisconsin's important interests in preventing voter fraud,

promoting public confidence in the electoral process, and ensuring orderly administration of elections outweigh any burdens imposed by the voter identification requirement.

II. Act 23 Is Valid Under Section 2 of the Voting Rights Act Because It Does Not Operate to Deny or Abridge the Right to Vote on Account of Race or Color.

The Voting Rights Act was enacted to "eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 70. Under Section 2 of the Act, states and political subdivisions may not impose a "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgment of the right . . . to vote on account of race or color." 42 U.S.C. § 10301(a). A Section 2 violation is established if a plaintiff can show, "based on the totality of circumstances, . . . 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)." 42 U.S.C. § 10301(b). In other words, members of that class of citizens "have less opportunity than other members of the electorate to participate" in the electoral process. § 10301(b). In applying Section 2's totality of the circumstances test, courts have looked to nine non-exhaustive factors (the "Senate Factors"), including "the history of voting-related discrimination in the state or political subdivision; the extent to which voting . . . is racially polarized; [and] the extent to which minority group members bear the effects of past discrimination," among others. *Gingles*, 478 U.S. at 44–45. The crux

of "a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

A. The Record Does Not Establish that Act 23 Results in a Denial or Abridgement of Minority Voting Rights.

As discussed above, the record in this case does not establish that Act 23 has imposed a severe burden on voting rights. Absent a significant burden, Act 23 does not result in the "denial or abridgement" of the right to vote.

Although a higher percentage of minority voters currently lack qualifying identification, actual outcomes are important in a Section 2 inquiry. *See Gingles*, 478 U.S. at 76 (holding that the "District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23" and reversing the District Court's finding of a Section 2 violation as to that district); *cf. id.* at 73 ("All that matters under § 2 and under a functional theory of vote dilution is voter behavior."). Here, the evidence demonstrates that African Americans in Wisconsin are voting at the same or higher rates as non-Hispanic whites. In the 2012 election, for example, 78.5% of Wisconsin's eligible black voters cast a ballot compared to 75% of eligible white voters. R. at 19a.

In light of this evidence and the discussion above, the District Court clearly erred in determining that Act 23 has operated to deny or abridge minority voting rights.

B. Act 23 Does Not Deny or Abridge the Right to Vote on Account of Race or Color.

Because a bare statistical showing of disparate impact does not establish a Section 2 violation, there is not enough evidence to establish that Act 23 disproportionately impacts minority voters "on account of race or color."

1. A Bare Statistical Showing of Disproportionate Impact Does Not Establish a Section 2 Violation.

The District Court erred in finding that Act 23 violates Section 2 based on a bare statistical showing of disparate impact. Section 2 prohibits voting practices or procedures that operate to deny or abridge minority voting rights "on account of race or color." 42 U.S.C. § 10301(a). Although "proof of intent is no longer required to prove a § 2 violation," subsection (b) makes clear that the provision should also not be read to impose a requirement of proportional representation. *Chisolm v. Roemer*, 501 U.S. 380, 394 (1991) (noting that "[u]nder the amended statute, proof of intent is no longer required to prove a § 2 violation); 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

Lower courts reviewing vote denial claims have held that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (1997); *see also Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015) ("To satisfy this 'results test,' Plaintiffs must show not only that the challenged law imposes a burden on minorities but that 'a certain electoral law,

practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.") (quoting *Gingles*, 478 U.S. at 47); *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986) ("It is well-settled . . . that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act."). Instead, plaintiffs must demonstrate "a causal connection between the challenged voting practice and the prohibited discriminatory result." *Smith*, 109 F.3d at 595.

In *Smith*, the Ninth Circuit affirmed a district court's finding that a landownership requirement for voting in District elections did not violate Section 2, even though African Americans were significantly less likely to own land in the District than non-Hispanic whites. *See Smith*, 109 F.3d at 596. In upholding the statute, the district court below had relied on the parties' joint stipulation that there was no evidence of past or present discrimination in the District's electoral process. *Id.* at 595–96. Specifically, there was no proof that the landownership requirement had been established or maintained with the intent to discriminate based on race, nor was there any "known history or incident of racial discrimination in District elections." *Id.* at 595–96. The district court further concluded that "even if African-Americans [were] disproportionately affected by" the landownership requirement, "the observed difference in rates of home ownership . . . [was] not substantially explained by race but [was] better explained by other factors." *Id.* at 591.

Similarly, in *Ortiz*, the Third Circuit upheld a Pennsylvania law providing that individuals would be removed from the voter registration polls if they failed to vote for two years. *See Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 318 (3d Cir. 1994). Despite evidence of past discrimination and the statute's disproportionate impact on African-American and Latino voters, the Court of Appeals held that the evidence did not establish "that the purge law [was] the dispositive force in depriving minority voters of equal access to the political process." *Id.*

Smith and *Ortiz* thus demonstrate that a Section 2 plaintiff must prove not only that the voting restriction has a racially disproportionate impact, but also that (1) the provision was "the dispositive force" behind minorities' unequal access to the electoral process and (2) race was the primary factor behind the restriction's disparate impact. *See Ortiz*, 28 F.3d at 313; *Smith*, 109 F.3d at 591 (affirming district court's determination that disparity in rates of land ownership was "not *substantially* explained by race") (emphasis added). Though evidence of past discrimination, introduced via the Senate Factors, may indicate whether race was a substantial factor behind a voting law's disproportionate impact on minority voters, *Ortiz* illustrates that it is not the sole determinant of whether a plaintiff has proven causation under Section 2. *See Ortiz*, 28 F.3d at 313; *see also Gingles*, 478 U.S at 45 (noting that the Senate Factors are "neither comprehensive nor exclusive").

Although the Fourth, Fifth, and Sixth Circuits have recently applied a different standard in vote denial cases, that standard reflects a misguided

application of Section 2's causation requirement. Under that test, a voting practice or procedure violates Section 2 when it " impose[s] a discriminatory burden on members of a protected class . . . , and (2) [t]hat burden [is] in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey*, 796 F.3d at 504; *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated*, 2014 WL 10384647 (2014). Applying this standard, the district court in *Veasey* found (1) that SB 14 disproportionately impacted Hispanic and African-American voters; and (2) that the law interacted with socioeconomic disparities and a "legacy of state-sponsored discrimination" to interfere with minority voters' ability to participate equally in the electoral process. *See id.* at 509, 512–13. The Fifth Circuit subsequently affirmed. *See Veasey*, 796 F.3d at 513.

The test applied in *Veasey*, however, has two significant flaws. First, it renders the phrase "on account of race or color" in Section 2 meaningless by failing to require that race or color be a "substantial factor" behind a law's disproportionate impact on minority voters. *See League of United Latin Amer. Citizens v. Clements*, 850 (noting that while "[t]he scope of the Voting Rights Act is indeed quite broad, . . . its rigorous protections . . . extend only to defeats experienced by voters 'on account of race or color.'"). As it stands, the test does not require courts to isolate the impact of race from the effects of other factors. Nor does it require that race constitute a "substantial factor" behind a law's disproportionate impact on minority voters. *See*

Smith, 109 F.3d at 591. While the second prong of the test might cure this defect where a law's impact is clearly linked to a history of state-sponsored discrimination, the actual language of the second prong fails to specify the types of "social and historical conditions" that would satisfy Section 2's causation requirement. Thus, the test would allow Section 2 plaintiffs to establish liability by tying a law's disproportionate racial impact to socioeconomic disparities. This would effectively collapse the test into one prong, as the racial impact of a law is often inseparable from socioeconomic inequality. *See Gingles*, 478 U.S. at 64 (noting that "members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions.").

Further, the second prong of the *Veasey* test does not limit "social and historical conditions" to those conditions produced by state-sponsored discrimination. The test could thus subject states to liability based on the effects of past private discrimination. This contravenes the principle that parties may only be held liable for their own discriminatory practices. *See generally Milliken v. Bradley*, 418 U.S. 717 (1974) (rejecting interdistrict desegregation plan on grounds that there was no evidence of discrimination in outlying school districts). Moreover, Section 2 only applies to "State[s] or political subdivisions," not private actors. *See* 52 U.S.C. § 10301(a).

As the Seventh Circuit observed below, the standard applied by the Fifth Circuit in *Veasey* and the District Court in this case would require courts to

invalidate a host of voting practices and procedures based on little more than a bare statistical showing of disparate impact. *See* R. at 20a. The plain language of Section 2 mandates a more rigorous causation requirement. Accordingly, the District Court should be reversed.

2. The Record Does Not Establish that Race or Color is the Primary Factor Behind Act 23's Disproportionate Impact.

Under the causation standard articulated in *Smith* and *Ortiz*, the District Court erred in concluding that Act 23 violates Section 2 of the Voting Rights Act.

Rather than apply the standard mandated by the plain language of Section 2, the District Court below held that the provision prohibits any voting practice or procedure "that creates a barrier to voting that is more likely to appear in the path of a" minority voter. R. at 83a. This standard is similar to the one applied in *Veasey* and, as noted above, requires little more than a bare statistical showing of disparate impact before a court may invalidate state laws regulating the electoral process.

Applying the more rigorous standard, the record in this case does not demonstrate that Act 23 imposes any burden on minority voters "on account" of race or color. Although black and Latino voters are less likely to possess qualifying identification than whites, the evidence presented does not make clear *why* these voters lack identification. It is possible, for instance, that black and Latino voters are more likely to voluntarily opt out of the electoral process, perhaps due to greater distrust in the democratic process stemming from past discrimination. *See* R. at 18a. Racial disparities in rates of ID possession may also be explained by

socioeconomic inequalities. Because low-income individuals are less likely to own cars, open bank accounts, or travel by plane, they may not feel the need to obtain identification. *See* R. at 89a. Finally, fewer minority voters may possess drivers' licenses because they are more likely to live in urban areas where there is access to public transportation. *See id.* While all of this is mere speculation, the record leaves us with little else. Because the evidence in this case did not isolate the effects of race from the impact of other factors, such as individual choice, socioeconomic status, or geographic location, the evidence is insufficient to support the District Court's finding that Act 23 operates to deny or abridge minority voting rights because of race or color.

Further, to the extent that courts have relied on a state's history of official, state-sponsored discrimination to determine that race is a substantial factor behind a voting law's disproportionate impact, no such evidence was presented here. The vestigial effects of past discrimination in education and employment, which the District Court relied upon in its opinion, do not alone support the invalidation of a voter identification law passed in 2011. To invalidate laws on that basis would be to hold state governments accountable for the effects of past private discrimination; this, courts have been unwilling to do. *Cf. Milliken*, 418 U.S. 717; *Shelby Cty.*, 133 S. Ct. at 2628–29 (noting that the Fifteenth Amendment was "not designed to punish for the past"). Thus, although the social and historical context may be instructive, it does not determine the outcome of a Section 2 inquiry where there is

no rigorous analysis of the factors underlying a voting restriction's disproportionate impact on minority voters.

In sum, the record here does not establish that race was a substantial factor underlying Act 23's alleged disproportionate impact on minority voters. The District Court therefore erred in holding Act 23 invalid under Section 2.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit and uphold Act 23 under both the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.

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Respectfully Submitted,

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