No. 14-___

IN THE

Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,
v.
SCOTT WALKER, *et al.*,
Respondents,
-and-
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, *et al.*,
Petitioners,
v.
THOMAS BARLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a plurality of this Court denied a constitutional challenge to Indiana's voter ID law based on an inadequate evidentiary record. Since *Crawford*, 17 states have enacted increasingly restrictive voter ID laws, many of which impose stricter photo ID requirements than Indiana's law. Wisconsin's Act 23 is one of the strictest voter ID laws in the nation. The law requires all voters to show one of only a few specified forms of photo ID to vote.

After a trial, the district court found that Act 23 substantially burdens the voting rights of hundreds of thousands of registered voters without advancing a legitimate state interest, in violation of the Equal Protection Clause. The court found that these burdens fall disproportionately on African-American and Latino voters, resulting in discrimination in violation of Section 2 of the Voting Rights Act. Nevertheless, a panel of the Seventh Circuit upheld Act 23. The court of appeals denied rehearing en banc by an equally divided vote (5–5).

The questions presented are:

1. Whether a state's voter ID law violates the Equal Protection Clause where, unlike in *Crawford*, the evidentiary record establishes that the law substantially burdens the voting rights of hundreds of thousands of the state's voters, and that the law does not advance a legitimate state interest.

2. Whether a state's voter ID law violates Section 2 of the Voting Rights Act where the law disproportionately burdens and abridges the voting rights of African-American and Latino voters compared to White voters.

RULE 14.1(b) STATEMENT

Petitioners in *Frank v. Walker* are Ruthelle Frank, Carl Ellis, Justin Luft, Dartric Davis, Barbara Oden, Sandra Jashinki, Anthony Sharp, Pamela Dukes, Anthony Judd, Anna Shea, Matthew Dearing, Max Kligman, Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Frank Ybarra, Sam Bulmer, Rickie Lamont Harmon, and Dewayne Smith.

Petitioners in *LULAC of Wisconsin v. Barland* are the League of United Latin American Citizens (LULAC) of Wisconsin, Cross Lutheran Church, Milwaukee Area Labor Council, AFL-CIO, and Wisconsin League of Young Voters Education Fund.

Respondents in *Frank v. Walker* are Scott Walker, Thomas Barland, Harold Froehlich,* Timothy Vocke, John Franke,* Elsa Lamelas,* Gerald Nichol, Kevin J. Kennedy, Michael Haas,* Mark Gottlieb, Patrick Fernan,* Kristina Boardman, Donald Reincke, Tracy Jo Howard, Sandra Brisco, Barney L. Hall, Donald Genin, Jill Louis Geoffroy, and Patricia A. Nelson. Each respondent is sued in his or her official capacity.

Respondents in *LULAC of Wisconsin v. Barland* are Thomas Barland, Harold Froehlich,* Timothy Vocke, John Franke,* Elsa Lamelas,* Gerald Nichol, Kevin J. Kennedy, and Michael Haas.* Each respondent is sued in his or her official capacity.

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* Pursuant to Rule 35.3, asterisks indicate the names of current public officers who succeeded to office and are not reflected in the decision below.

RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of petitioners' stock or interest.

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OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 768 F.3d 744 (7th Cir. 2014). App. 1a. The opinion of the district court is reported at 17 F. Supp. 3d 837 (E.D. Wis. 2014). App. 25a.

JURISDICTION

The Seventh Circuit entered judgment on October 6, 2014. Judge Posner *sua sponte* requested a vote for rehearing en banc, which the court denied by a 5–5 vote on October 10, 2014. App. 130a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, provides:

> (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.

Wisconsin's voter ID law, part of 2011 Wisconsin Act 23, is reproduced in the Appendix at 212a–224a.

STATEMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1435 (2014) (plurality opinion). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

This case raises issues of profound national importance regarding the constitutional and statutory limits on a state's ability to restrict voting rights by requiring photo identification to vote. Millions of

registered voters, disproportionately African Americans and Latinos, lack a qualifying photo ID needed to vote under laws in Wisconsin and other states. These voters face substantial or insurmountable burdens to obtain a qualifying photo ID. No legitimate state interest justifies these extensive burdens on voting rights. The main proffered rationale for requiring photo IDs—to prevent in-person voter impersonation fraud—is illusory and pretextual. Regardless of the merits, this Court's review is necessary to ensure that states do not unjustifiably deny or abridge voting rights, and to end the electoral turmoil caused by pervasive uncertainty about the validity of voter ID laws.

A. Wisconsin's Act 23

Wisconsin enacted its voter ID law, known as Act 23, on May 25, 2011. Act 23 requires voters to produce one of several specified forms of photo identification to vote in person or, in most cases, absentee. Wis. Stat. §§ 6.15(3), 6.79(2), 6.79(3)(b). The only acceptable IDs are a current or recently expired Wisconsin drivers' license or non-driver photo ID, military ID, or U.S. passport; a tribal ID from a federally recognized Indian tribe in Wisconsin; a naturalization certificate issued within the last two years; a student ID from a Wisconsin college or university (only if it contains the student's signature, an issuance date, an expiration date within two years of issuance, and proof of enrollment); or an unexpired receipt from a drivers' license or non-driver ID application. *Id.* § 5.02(6m). Many common forms of photo and non-photo identification are unacceptable under Act 23, such as VA-issued veteran IDs, county IDs, employee IDs, regular student IDs from University of Wisconsin campuses,

utility bills, government benefit checks, and library cards.

Voters without a qualifying photo ID can obtain one at a DMV office, but only if they produce records—typically including a certified birth certificate—proving citizenship, name, date of birth, identity, and Wisconsin residency. Wis. Admin. Code § Trans. 102.15. If a voter lacks a qualifying ID at the polls, the voter may submit a provisional ballot, but it will not be counted unless the voter returns to the municipal clerk with a qualifying ID within three days after the election. Wis. Stat. § 6.97(3)(a), (b).

Act 23 is among the most restrictive voter ID laws in the nation. Like other voter ID laws, Act 23's ostensible purpose is to combat in-person voter impersonation fraud—that is, when a person appears at the polls and attempts to vote as someone else. App. 36a (district court).

The State has enforced Act 23's ID requirements only once, during the low-turnout primaries in February 2012. *Id.* at 26a n.1. Act 23 has been enjoined under state and federal court orders in every election since.

B. Proceedings Below

1. Plaintiffs filed suit in the Eastern District of Wisconsin to enjoin enforcement of Act 23 under the Equal Protection Clause and Section 2 of the Voting Rights Act.[1] In November 2013, the district court conducted a two-week bench trial at which the parties presented 43 fact witnesses, six expert witnesses, and thousands of pages of documentary evidence.

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[1] *Frank* was filed on December 13, 2011. *LULAC* was filed on February 23, 2012.

In a 90-page decision, the district court permanently enjoined Act 23 under both the Equal Protection Clause and Section 2. App. 25a–126a. The court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID" under Act 23. *Id.* at 50a. The court further found that while many registered voters might obtain qualifying IDs with sufficient (sometimes "tenacious") efforts, many others could not. *Id.* at 48a–67a. Many witnesses undertook arduous, and often unsuccessful, efforts to obtain ID for themselves, family members, or neighbors. *Id.* The court reached the "inescapable" conclusion that Act 23 would "disproportionately" burden and disenfranchise African-American and Latino voters in Wisconsin. *Id.* at 67a–68a, 90a. The court also found that "Act 23's disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result." *Id.* at 100a.

The district court acknowledged the State's interest in "[d]etecting and preventing in-person voter-impersonation fraud." *Id.* at 36a. But the court found that, after two years of litigation and investigations by the State, "[t]he defendants could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." *Id.* at 37a. The court held that "it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future." *Id.* at 36a–37a.

The district court also acknowledged the State's interest in "promoting confidence in the integrity of the electoral process." *Id.* at 43a. But the court found

that "photo ID requirements have no effect on confidence or trust in the electoral process" in Wisconsin. *Id.* at 43a–44a. To the contrary, such laws may "undermine the public's confidence in the electoral process as much as they promote it." *Id.* at 44a. The laws "caus[e] members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id.* at 46a. Wisconsin voters testified that "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system," and that "Act 23 is designed to keep certain people from voting" and "to confuse voters." *Id*. And "the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process." *Id.* at 44a (citing unrebutted testimony of plaintiffs' expert and written statements from Wisconsin's top election official to the state legislature).

2. On July 31, 2014, the Wisconsin Supreme Court lifted the state court injunctions against enforcement of Act 23. *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014). The state supreme court concluded that Act 23 imposed a "severe burden" on voters that other jurisdictions have characterized as a "de facto poll tax." *Id.* ¶¶ 50, 60, 62. To avoid striking down the law, the court adopted a "saving construction" of DMV regulations that supposedly would lessen the burden on voters and eliminate some—but not all—costs to obtain a qualifying ID. *Id.* ¶¶ 69–70.

Based on the state supreme court's "saving construction," the State asked the district court to stay its

permanent injunction pending appeal. Ltr. re: Mot. to Stay (E.D. Wis. Dkt. #210). The State argued that the saving construction "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." App. 195a (district court quoting State's brief in Seventh Circuit). The district court denied the State's request for a stay. App. 179a. The court stated that it had considered similar arguments by the State at trial, and in any event "having to pay a fee to obtain a birth certificate is only one of many burdens that a person who needs to obtain an ID for voting purposes might experience." *Id.* at 198a–199a. Even with the saving construction, the court found "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." *Id.* at 211a.

3. On September 11, 2014—the day before oral argument in the Seventh Circuit—the State adopted an "Emergency Rule" purporting to implement the state supreme court's "saving construction" of DMV regulations. *See* Wis. Dep't of Transportation, EmR14, http://tinyurl.com/mdrk4aq. The next day, at oral argument, the State asked the Seventh Circuit to immediately stay the district court's permanent injunction based on the one-day-old Emergency Rule. Later that day, the panel issued a one-page order staying the district court's injunction and inviting the State to "enforce the photo ID requirement in this November's elections." App. 189a.

The Seventh Circuit denied rehearing en banc of the stay order "by an equally divided court." App. 130a. Judge Williams—joined by Chief Judge Wood and Judges Posner, Rovner, and Hamilton—issued a dissenting opinion. App. 178a–185a (Williams, J., dissenting).

The dissent concluded that the panel "should not have altered the status quo so soon before [the November] elections. And that is true whatever one's view of the merits of the case." *Id.* at 178a. The dissent also found the panel's view of the merits to be "dead wrong." *Id.* at 181a.

4. On October 9, 2014, this Court granted plaintiffs' emergency application to vacate the Seventh Circuit's stay. *Frank v. Walker*, 135 S. Ct. 7 (2014). The State thus did not enforce Act 23 in the general election four weeks later.

5. On October 6, 2014, while the parties were briefing the stay issue in this Court, the Seventh Circuit panel reversed the district court's decision on the merits. The panel held that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), "requires us to reject a constitutional challenge to Wisconsin's statute." App. 14a. The panel acknowledged that "Wisconsin's law differs from Indiana's law," and that the evidentiary record in this case differs from the record in *Crawford*. *Id.* at 3a. But the panel concluded that none of those differences warranted a different result. With respect to plaintiffs' Section 2 claim, the panel recognized that the district court found "a disparate outcome"—that is, Act 23 imposes a greater burden on African Americans and Latinos seeking to exercise the franchise. *Id.* at 17a. The panel concluded, however, that this disparate outcome "do[es] not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter." *Id.*

Judge Posner *sua sponte* called a vote for rehearing en banc, which the court again denied by an equally divided vote (5–5). App. 130a. In dissent, Judge Posner, joined by Chief Judge Wood and Judges

Rovner, Williams, and Hamilton, penned a scathing critique of every aspect of the panel's opinion, which he called a "serious mistake." App. 130a (Posner, J., dissenting). The dissent found this case to be "importantly dissimilar" to *Crawford* (which Judge Posner authored on behalf of the Seventh Circuit in 2007). *Id.* at 131a.

The dissent explained that the panel did a "disservice" to this Court by extending *Crawford* to a law more onerous than Indiana's and on a vastly different evidentiary record. *Id.* at 132a. Judge Posner pointed to "compelling evidence that voter-impersonation fraud is essentially nonexistent in Wisconsin," and that the State's justification is "a mere fig leaf for efforts to disenfranchise voters." *Id.* at 140a. The dissent chastised the panel for accepting legislative findings devoid of evidentiary support, a practice that "conjures up a fact-free cocoon in which to lodge the federal judiciary." *Id.* at 154a. Judge Posner concluded that "the case against a law requiring a photo ID . . . as strict as Wisconsin's is compelling. The law should be invalidated; at the very least, with the court split evenly in so important a case and the panel opinion so riven with weaknesses," the panel's decision should not stand without further review. *Id.* at 159a.

The panel thereafter stayed the mandate pending this Court's resolution of this petition. App. 128a.

REASONS FOR GRANTING THE PETITION

The right to vote is the foundational element of American democracy. Increasingly restrictive voter ID laws like Wisconsin's Act 23 unjustifiably burden the voting rights of millions of registered voters, particularly African Americans and Latinos. The

validity of such laws is among the most important issues affecting elections today. Certiorari is warranted on this basis alone.

But there is more. In upholding Wisconsin's Act 23, the decision below "piles error on error." App. 149a (Posner, J., dissenting). The Seventh Circuit wrongly concluded that this Court's decision in *Crawford* forecloses an Equal Protection challenge to Act 23, disregarding material differences between the laws at issue and the records in the two cases. And the court of appeals adopted a counter-textual reading of Section 2 of the Voting Rights Act that cannot be reconciled with this Court's decisions and eviscerates the statute's purpose of eliminating racially discriminatory voting practices. The nation profoundly needs this Court's guidance on these issues.

I. THIS CHALLENGE TO WISCONSIN'S VOTER ID LAW RAISES RECURRING QUESTIONS OF FUNDAMENTAL NATIONAL IMPORTANCE

In 2007, this Court granted review in *Crawford* based on the "importance" of a challenge to Indiana's voter ID law. 553 U.S. at 188 (plurality opinion). The stakes are exponentially higher today. Since *Crawford*, 17 more states have enacted increasingly restrictive voter ID laws, many of which are stricter than Indiana's. This trend will continue, particularly now that federal preclearance is no longer an obstacle (not to mention the decision below upholding Wisconsin's law). Voter ID laws burden or disenfranchise millions of registered voters—disproportionately African Americans and Latinos—across the country. Since *Crawford*, lower courts' uncertainty over the validity of voter ID laws has caused confusion on the

eve of elections. It is now exceedingly clear that the main justification for voter ID laws—to prevent in-person voter fraud—is pretextual. Putting the merits aside, this Court's review is desperately needed.

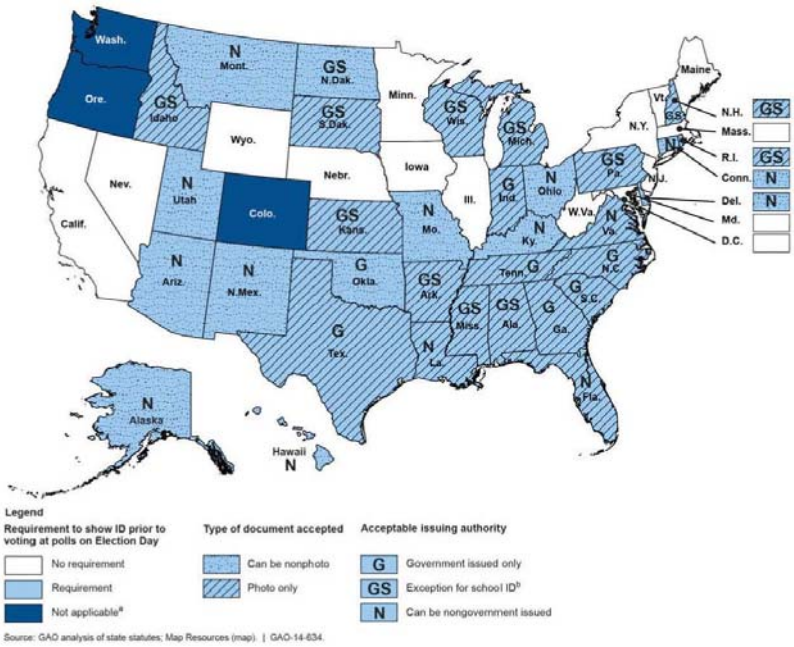
A. Numerous States Have Enacted Increasingly Restrictive Voter ID Laws

When this Court granted certiorari in *Crawford*, only *two* states (Indiana and Georgia) had enacted voter ID laws that required voters to show a photo ID to cast a regular ballot. Those laws had safeguards to protect voters without a qualifying ID. A handful of other states had more permissive laws that allowed voters to show non-photo forms of ID such as utility bills and government benefit checks. This Court nonetheless recognized the "importance" of even a few restrictive voter ID laws and agreed to hear the *Crawford* plaintiffs' challenge to Indiana's law on that basis alone. 553 U.S. at 188 (plurality opinion).

The situation has now intensified. In the six years since *Crawford*, 17 states have tested the limits of *Crawford* by enacting new and increasingly restrictive voter ID laws. In addition to Wisconsin, eight other states have enacted so-called "strict" photo ID requirements without safeguards to ensure that voters lacking a qualifying photo ID can cast a regular ballot: Arkansas, Kansas, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia. State courts in Pennsylvania and Arkansas permanently enjoined those two states' strict laws under the state constitutions. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014). The Missouri Supreme Court struck down that state's less restrictive law under the state constitution.

Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006). In all, 32 states now require voters to show some form of ID at the polls. App. 142a (Posner, J., dissenting).

Map of States that Have Enacted Voter ID Requirements as of June 2014



Other states are poised to enact restrictive voter ID laws. The wave of post-*Crawford* laws began soon after the 2010 elections, which resulted in "political turnover in 8 governorships and at least one house in each of 17 state legislatures." Richard Sobel, *The High Cost of 'Free' Photo Voter Identification Cards* 7 (Charles Hamilton Houston Inst. for Race & Justice, Harvard Law School 2014). The November 2014 elections resulted in similar turnover in four more governorships and at least one house in ten more state legislatures, which may open the door for these states to enact restrictive voter ID laws. Nat'l Conf. of State

Legislatures, *StateVote 2014: Election Results, After-Election Analysis*, http://tinyurl.com/k8lw3wz. In 2014 alone, 14 states proposed to enact new voter ID laws or make existing laws more onerous for voters. *See* Nat'l Conf. of State Legislatures, *Voter ID*, http://tinyurl.com/ohtqwxc. More states can be expected to enact similar laws and seek to apply them in the 2016 presidential election.

Shelby County v. Holder, 133 S. Ct. 2612 (2013), further paved the way for states no longer subject to federal preclearance to implement restrictive voter ID laws. Just hours after this Court issued its decision in *Shelby County*, Texas announced that it would enforce its strict photo ID law effective immediately. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. Times, June 25, 2013. Texas enacted its law in 2011, but the Justice Department refused to preclear it, and a three-judge court rejected the State's request for judicial preclearance. *Texas v. Holder*, 888 F. Supp. 2d 113, 115, 117–18, 138 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013). North Carolina likewise enacted a law imposing strict photo ID requirements and other onerous voting restrictions "[i]mmediately after the *Shelby County* decision." *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6, 6 (2014) (Ginsburg, J., dissenting). Challenges to these states' voter ID laws are ongoing in lower courts. In the meantime, Texas's law took effect for the 2014 election, and North Carolina's law is set to take effect for the 2016 election.

B. Voter ID Laws Burden or Disenfranchise Millions of Voters Who Are Disproportionately African Americans and Latinos

Millions of registered voters across the country do not have a qualifying photo ID needed to vote. In Wisconsin, 9% of registered voters—more than 300,000 people—lack qualifying ID. App. 50a. In Texas, 4.5% of registered voters—more than 600,000 people—lack qualifying ID. *Veasey v. Perry*, No. 13-cv-193, 2014 WL 5090258, at *21 (S.D. Tex. Oct. 9, 2014). In Pennsylvania, "[h]undreds of thousands" of registered voters lacked qualifying ID. *Applewhite*, 2014 WL 184988, at *20. In Missouri, at least 169,000 registered voters lacked qualifying ID. *Weinschenk*, 203 S.W.3d at 206. The North Carolina Board of Elections found that over 600,000 registered voters may lack qualifying ID in that state. N.C. State Bd. of Elections, *2013 SBOE-DMV ID Analysis* 1 (Jan. 7, 2013), http://tinyurl.com/q7zxsdc.

What is more, voter ID laws disproportionately burden the voting rights of African-American and Latino voters, who are more likely than White voters to lack qualifying photo ID. The district court below found that Act 23 "disproportionately impacts Black and Latino voters"; "the conclusion that Blacks and Latinos disproportionately lack IDs is inescapable." App. 90a. African-American and Latino voters are also more likely to lack the underlying documents needed to obtain qualifying ID. *Id.* at 94a. The district court in Texas similarly found: "It is clear from the evidence . . . that [the State's ID law] disproportionately impacts African-American and Hispanic registered voters relative to Anglos in Texas." *Veasey*, 2014 WL 5090258, at *49. And in Pennsylvania, "[r]egistered

minority voters, including African-Americans and Latinos, are almost twice as likely not to have compliant photo ID." *Applewhite*, 2014 WL 184988, at *56.

For many voters who lack a qualifying photo ID, obtaining one is exceedingly difficult or outright impossible. There are "a litany of . . . practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID if they need one to in order to be able to vote." App. 136a (Posner, J., dissenting). The district court described the obstacles facing many voters, such as the need to obtain out-of-state birth certificates, limited DMV office hours that are inaccessible to the working poor and other voters, the bureaucratic hurdle of correcting misspellings on birth certificates, the cost of travel to DMV, and the need to obtain other underlying documents like Social Security cards which *themselves* sometimes require ID. App. 51a–65a. The court also found that African Americans and Latinos face greater obstacles because of the impact of racial discrimination. *Id.* at 97a–100a. Further, a national study found that the expenses to obtain a photo ID from a DMV "typically rang[e] from about $75 to $175." Sobel, *High Cost*, *supra*, at 2. The decision below, however, "does not discuss the cost of obtaining a photo ID. It assumes the cost is negligible. That's an easy assumption for federal judges to make, since we are given photo IDs by court security free of charge. And we have upper-middle-class salaries. Not everyone is so fortunate." App. 149a (Posner, J., dissenting).

C. The Purported Justifications for Voter ID Laws Are Pretexts To Disenfranchise Certain Voters

"The only kind of voter fraud that [a voter ID law] addresses is in-person voter impersonation at polling places." *Crawford*, 553 U.S. at 194 (plurality opinion). In *Crawford*, "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* The plurality nonetheless credited Indiana's "interest in counting only the votes of eligible voters" as a justification for the State's law. *Id.* at 196.

Perhaps in 2008 the jury was still out on how frequently in-person voter impersonation fraud actually occurs. Seven years later, the verdict is in. This type of fraud is "more than a dozen times less likely [to occur] than being struck by lightning." App. 147a (Posner, J., dissenting) (citation and internal quotation marks omitted). It is "[t]he one form of voter fraud known to be too rare to justify limiting voters' ability to vote." *Id.*

In case after case challenging voter ID laws, states have failed to identify *any* nontrivial incidence of in-person voter fraud, despite every incentive to do so. Wisconsin "could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." App. 37a (district court). Pennsylvania *stipulated* that it was "not aware of any incidents of in-person voter fraud in Pennsylvania." *Applewhite*, 2014 WL 184988, at *57. Texas, for its part, identified two incidents of such fraud in the past ten years, "a period of time in which 20 million votes were cast." *Veasey*, 2014 WL 5090258, at *6.

Why, then, do states enact restrictive voter ID laws? The answer involves a "troubling blend of race and politics." *LULAC v. Perry*, 548 U.S. 399, 442 (2006). In Judge Posner's words, voter impersonation fraud is "a mere fig leaf for efforts to disenfranchise voters likely to vote for the political party that does not control the state government." App. 140a (Posner, J., dissenting). In Texas, the district court found that the legislature was "motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate." *Veasey*, 2014 WL 5090258, at *56; *see also Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (Ginsberg, J., dissenting) ("[T]he Texas Legislature and Governor had an evident incentive to 'gain partisan advantage by suppressing' the 'votes of African-Americans and Latinos.'" (quoting district court)).

Wisconsin's use of the voter-fraud pretext to disenfranchise voters of color is unoriginal. The Texas legislature invoked voter fraud to justify laws establishing all-white primaries (1895–1944), literacy restrictions (1905–1970), poll taxes (1902–1966), voter re-registration and purging (1966–1976), and racial gerrymandering (1970–2014). *Veasey*, 2014 WL 5090258, at *2–3 & n.24. Tennessee also invoked voter fraud to justify a one-year durational residency requirement, which this Court invalidated in *Dunn v. Blumstein*, 405 U.S. 330, 345–46 (1972).

The panel below found it irrelevant that in-person voter impersonation fraud "does not happen in Wisconsin," because the panel surmised that Act 23 alternatively "promotes public confidence in the integrity of elections." App. 10a–12a. But the district court found exactly the opposite based on the trial record: Such laws "undermine the public's confidence

in the electoral process as much as they promote it." *Id*. at 44a. The laws "caus[e] members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id.* at 46a. "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system." *Id*. And "the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process." *Id.* at 44a. The State, for its part, introduced "no evidence that such laws promote public confidence in the electoral system." App. 153a (Posner, J., dissenting).

Disregarding these findings, the panel held that *Crawford* established an irrefutable presumption that voter ID laws promote public confidence in elections, no matter the contrary evidence. App. 12a–14a. The panel also stated that the Wisconsin legislature believed Act 23 would promote public confidence in elections—which the panel described as "a proposition about the state of the world." *Id.* at 12a. The panel's blanket disregard of the facts cannot stand, lest the federal judiciary wrap itself in "a fact-free cocoon" and deem legislative assumptions to be irrefutable truths. App. 154a (Posner, J., dissenting). "As there is no evidence that voter-impersonation fraud is a problem, how can the fact that a legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?" *Id.*

D. The Unsettled Status of Voter ID Laws Causes Electoral Confusion

The *Crawford* plurality concluded that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire [Indiana] statute." 553 U.S. at 189. *Crawford* thus does not guide lower courts on the validity of state voter ID laws when, as here, plaintiffs develop a comprehensive record regarding both the burdens on voters and the state's proffered justifications. The lack of guidance has created persistent uncertainty. The Seventh Circuit's 5–5 vote for rehearing en banc in this case exemplifies the division among lower-court judges. Judge Easterbrook's panel decision and Judge Posner's dissent from the denial of rehearing en banc sharply disagree about the fundamental questions of how to apply *Crawford* and Section 2 of the Voting Rights Act to evaluate challenges to voter ID laws.

As a result, challenges to voter ID laws are ping-ponging back and forth between state and federal courts, and—within the federal system—between district courts, courts of appeals, and this Court. This wrangling over voter ID laws has caused confusion in elections and will predictably continue to do so.

The November 2014 general election highlights the problem. In Wisconsin and Texas, voter ID laws were on-again-off-again as courts struggled to determine their validity under *Crawford*'s Equal Protection ruling and Section 2. In this case, Wisconsin's Act 23 was enjoined by state courts (until those injunctions were lifted), enjoined by a federal court (until that injunction was stayed), then enjoined again (when the stay was vacated). Texas's voter ID law was blocked by the Justice Department, then unblocked by *Shelby*

County, then enjoined by a district court, until the Fifth Circuit stayed that injunction.

In the end, this Court had to resolve the temporary fate of the laws in Wisconsin and Texas on an emergency basis in a matter of days. The Court blocked Wisconsin's Act 23 but allowed Texas to enforce its voter ID law. *Frank v. Walker*, 135 S. Ct. 7 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014). The Court's stay decisions provide no further guidance regarding the long-term validity of these two restrictive laws and others like them around the country.

Unless the Court acts now, it can and should expect to be put in the same untenable position of refereeing voter ID disputes in the run-up to the November 2016 general election. The lawsuit challenging North Carolina's voter ID law and other post-*Shelby County* voting restrictions is in the pretrial phase (though the State recently filed a petition for certiorari, No. 14-780, seeking review of a Fourth Circuit decision preliminarily enjoining voting restrictions other than voter ID). The district court's judgment permanently enjoining Texas's strict ID law is on appeal. *Veasey v. Perry*, No. 14-41127 (5th Cir.). And every time a new state enacts a restrictive voter ID law, it raises the specter that this Court may be called upon to decide the law's fate—and the ability of thousands of voters to cast a ballot—on the eve of an election.

The sort of confusion surrounding voter ID for the 2014 general elections in Wisconsin and Texas is disruptive and antidemocratic. The Court should grant review now to avoid a repeat performance of last year's electoral uncertainty.

II. THE DECISION BELOW "PILES ERROR ON ERROR" AND CONFLICTS WITH DECISIONS OF THIS COURT

A. The Seventh Circuit Misinterpreted *Crawford*

The Seventh Circuit concluded that "*Crawford* requires us to reject a constitutional challenge to Wisconsin's statute." App. 14a. The panel was demonstrably wrong.

Wisconsin's ID law is "importantly dissimilar" to Indiana's. App. 131a (Posner, J., dissenting). In rejecting the challenge to Indiana's voter ID law, the *Crawford* plurality specifically relied on mitigating provisions in Indiana's law that are absent in Wisconsin's Act 23. For instance, the *Crawford* plurality found that the "severity of [the] burden" was "mitigated" because indigent voters without ID in Indiana could still vote by affidavit. 553 U.S. at 199. In contrast, "Wisconsin has no [such] provision for indigent voters." App. 134a (Posner, J., dissenting).

The *Crawford* plurality found that "the elderly in Indiana are able to vote absentee without presenting photo identification." 553 U.S. at 201. Not so here. Elderly Wisconsin voters have no such option, and even those who vote by absentee ballot "must submit a photocopy of an acceptable ID." App. 3a.

Crawford also noted that "elderly persons who can attest that they were never issued a birth certificate" can present other documents such as Medicaid/Medicare cards or Social Security benefits statements to obtain ID. 553 U.S. at 199 n.18. Again, not so here. Wisconsinites who were never issued a birth certificate do not have such a straightforward option, but are

subjected to a convoluted procedure that *may* result in the issuance of an ID. App. 60a n.17 (district court).

Moreover, the evidentiary "record that has been made in this litigation is entirely different from that made in *Crawford*. In every way." App. 182a (Williams, J., dissenting). The *Crawford* plurality found that "the evidence in the record [did] not provide [the Court] with the number of registered voters without photo identification." 553 U.S. at 200. But here, the district court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of registered voters, lack a qualifying ID." App. 50a.

In response to this finding, the panel below expressed disbelief that so many registered Wisconsin voters could lack a photo ID "in a world in which photo ID is essential to board an airplane, . . . buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal." App. 7a–8a. That premise is wrong at every turn:

- According to the U.S. Transportation Security Administration, travelers do not need a photo ID to board an airplane.[2]
- According to the State of Wisconsin Department of Revenue, only those who "appear[] to be under the legal drinking age" are required to show ID.[3]

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[2] Transportation Security Admin., *Acceptable IDs*, http://www.tsa.gov/traveler-information/acceptable-ids.

[3] Wis. Dep't of Revenue, *Wisconsin Alcohol Beverage and Tobacco Law for Retailers* 7 (Jan. 2012), http://www.dor.state.wi.us/pubs/pb302.pdf (citing Wis. Stat. 125.07(7)).

- According to the Centers for Disease Control and Prevention, patients do not need a photo ID to pick up a prescription in 35 states, including Wisconsin.[4]
- According to the Department of Treasury, bank customers do not need a photo ID to open a bank account.[5]
- According to the Department of Justice, gun owners do not need a photo ID to buy a gun.[6]
- And as this Court is aware, members of the public do not need a photo ID to enter the Supreme Court Building at One First Street.

Accord App. 149a–150a (Posner, J., dissenting).

In short, the panel's many inaccuracies and speculation portray a hypothesized reality that simply does not exist for thousands of less privileged Wisconsinites and conflicts with the facts established during the two-week trial in the district court. Such are the hazards of untested appellate fact-finding.

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[4] Centers for Disease Control and Prevention, *Law: Requiring Patient Identification Before Dispensing*, http://www.cdc.gov/homeandrecreationalsafety/Poisoning/laws/id_req.html.

[5] U.S. Dep't of Treasury, Office of the Comptroller of the Currency, *Answers About Identification*, http://www.helpwithmybank.gov/get-answers/bank-accounts/identification/faq-bank-accounts-identification-02.html (an "identification number" such as "the individual's Social Security number or employer identification" is sufficient to open a bank account; the bank may verify the information without photo ID).

[6] U.S. Dep't of Justice, Office of the Inspector General, *Review of ATF's Project Gunrunner* at 10 (Nov. 2010), http://www.justice.gov/oig/reports/ATF/e1101.pdf ("Individuals who buy guns from an unlicensed private seller in a 'secondary market venue' (such as gun shows, flea markets, and Internet sites) are exempt from the requirements of federal law to show identification . . . .").

The *Crawford* plaintiffs also failed to produce "any concrete evidence of the burden imposed on voters who currently lack photo identification." 553 U.S. at 201. But here, plaintiffs established "a litany of the practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID." App. 136a (Posner, J., dissenting). Those burdens include the difficulty in obtaining out-of-state birth certificates (especially for African Americans born in the Jim Crow south and Latinos born in Puerto Rico), inaccessible DMV locations with very limited office hours, government bureaucracies that demand photo ID to issue documents needed to obtain photo ID, the need to fix misspellings in birth certificates, lack of accessible information, time and transportation costs, and other hurdles. App. 48a–67a (district court).

The *Crawford* plurality further stressed that the Indiana plaintiffs "had not introduced a single, individual Indiana resident who will be unable to vote as a result of [Indiana's law] . . . or will have his or her right to vote unduly burdened by its requirements." 553 U.S. at 187. But here, "eight persons testified that they want[ed] to vote in the November 4 election but [were] unable to obtain the required identification." App. 135a (Posner, J., dissenting).[7] Numerous other witnesses testified about their repeated, arduous, and often unsuccessful efforts to obtain qualifying photo ID for themselves, family members, neighbors, parishioners, constituents, and other community members. Trial Tr. 153–154, 172–173, 372, 376–377, 397–400,

[7] Since trial, two of those eight witnesses have obtained qualifying ID with the assistance of the ACLU of Wisconsin.

416–417, 431–434, 436, 541–543, 578, 747; App. 51a–53a, 55a, 57a–66a (district court).

The panel below ignored these facts in favor of rose-colored assumptions about the world in which many lower-income voters live. The panel assumed that people without qualifying photo ID must be "unwilling to invest the necessary time," since anyone "willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses" can get ID. App. 8a. The record demonstrates otherwise. Many Wisconsinites are forced to navigate a bureaucratic maze just to obtain a birth certificate. *See* App. 160a–171a (Appendix to Judge Posner's *en banc* dissent, titled "Scrounging for your Birth Certificate in Wisconsin"); App. 60a–61a n.17 (district court describing the "tenacious" efforts by one voter and her family in dealing with multiple states' bureaucracies and making repeated visits to Wisconsin DMV offices). As the *Crawford* plurality warned, "[s]upposition based on extensive Internet research"—or apparently no research at all by the panel below—"is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication." 553 U.S. at 202 n.20.

The panel also misstated the established facts. The decision below states that that six key voter witnesses "did not testify that they had tried to get [a copy of their birth certificate], let alone that they had tried but failed." App. 5a. In fact all six witnesses testified about their failed attempts to get a birth certificate. Trial Tr. 37–38 (testimony of Alice Weddle); *id.* at 46–51 (testimony of Eddie Holloway); *id.* at 214–216 (discussing Shirley Brown); *id.* at 401 (discussing Melvin Robertson); *id.* at 700–705 (testimony of Rose Thompson); App. 60a n.17 (discussing Nancy Wilde);

see also App. 156a–157a (Posner, J., dissenting); *compare Crawford*, 553 U.S. at 201 (witnesses did "not indicate[] how difficult it would be for them to obtain a birth certificate").

The decision below states that "[t]he record also does not reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting." App. 6a. But Wisconsin's own expert, who studied Georgia's voter ID law, conceded that it "[h]ad the effect of suppressing turnout" to the tune of about 20,000 voters in Georgia in 2008, and he agreed "as a matter of [his] professional opinion that the Wisconsin voter ID law . . . is likely to suppress voter turnout in the State of Wisconsin." App. 148a (Posner, J., dissenting); *see also* Trial Tr. 1477. Plaintiffs' expert also opined that Act 23 would suppress voting in Wisconsin based on numerous academic studies finding that "photo voter ID requirements appeared to exert a vote suppression effect along socioeconomic lines." Trial Tr. 1239. Indeed, the non-partisan Government Accountability Office recently released a 206-page report concluding that state voter ID laws suppress voter turnout, disproportionately among minority voters. Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws*, GAO-14-634 (Sept. 2014).

The decision below rests on other flawed assumptions. The panel speculated, without citation, that Act 23 could help prevent voters who "are too young or are not citizens" from voting. App. 11. The State has never made these arguments in defense of Act 23, for good reason. No one has alleged, much less presented evidence, that minors or non-citizens attempt to vote in Wisconsin. In any event, some forms of qualifying ID under Act 23, such as many student IDs, are not

required to show a voter's age. Wis. Stat. § 5.02(6m)(f). And Wisconsin state-issued IDs are available to non-citizens. Wis. Admin. Code § Trans. 102.15(3m).

The panel also opined that Act 23 might help "promote[] accurate recordkeeping (so that people who have moved after the date of registration do not vote in the wrong precinct)." App. 11a. But Act 23 has nothing to do with voting in the correct precinct. Under the law, the address on a voter's ID does not have to match his or her voting address. Trial Tr. 868 (testimony of Executive Director, Wisconsin Government Accountability Board); Wis. Stat. § 6.79(2)(a).

In sum, "*Crawford* dealt with a particular statute and a particular evidentiary record. The statute at issue in this case has different terms and the case challenging it a different record, the terms and the record having been unknown to either [the Seventh Circuit] (affirmed by the Supreme Court in *Crawford*) or the Supreme Court." App. 132a (Posner, J., dissenting). "It is a disservice to a court to apply its precedents to dissimilar circumstances." *Id*.

B. The Seventh Circuit Misinterpreted Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act prohibits a state from imposing a voting practice or procedure that "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. § 10301(a). The statute further provides: "A violation of [Section 2] 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 [protected class] 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." *Id.* § 10301(b). "The essence 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." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

The decision below misconstrues Section 2 to prohibit only voting practices that are both facially and intentionally discriminatory and that explicitly deny minorities a right to vote. Section 2's plain text and this Court's decisions squarely refute that reading.

First, the decision below held that Act 23 does not constitute "a 'denial' of anything by Wisconsin, as Section 2(a) requires." App. 17a. To the contrary, the district court found that Act 23 has denied and will continue to deny the right to vote. App. 101a. More fundamentally, Section 2 does not require a "denial." Rather, Section 2 also prohibits any measure that results in an "abridgement" of minority voting rights. 52 U.S.C. § 10301(a). The prohibition on "abridgement" reaches any "onerous procedural requirements which effectively handicap exercise of the franchise by voters of color," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), as well as any "cumbersome procedure[s]" and "material requirement[s]" that "erect[] a real obstacle to voting," *Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965). Section 2 "covers all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls

are open, . . . and other similar aspects of the voting process that might be manipulated." *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring).

Second, the decision below erroneously held that minorities do not have "less opportunity," 52 U.S.C. § 10301(b), to vote if a law facially treats members of different races equally. App. 21a–22a. The panel stressed that "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 22a. But facially neutral statutes can cause minority voters to have "less opportunity" to vote compared to Whites. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Anderson v. Celebrezze*, 460 U.S. 780, 801 (1983) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for African Americans to register than whites, . . . Section 2 would therefore be violated." *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.); *see also Lane*, 307 U.S. at 275 (states may not impose "onerous" voting measures that, while racially neutral on their face, "effectively handicap exercise of the franchise by [minority voters] although the abstract right to vote may remain unrestricted as to race").

Third, the panel repeatedly suggested that Section 2 requires proof of intentional discrimination. App. 17a, 18a, 22a. To the contrary, "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone." *Gingles*, 478 U.S. at 35; *accord Chisom*, 501 U.S. at 404 ("Congress made clear that a violation of Section 2 c[an] be established by proof of discriminatory

results alone."). The panel also stated, incorrectly, that the district court did not "find that differences in economic circumstances are attributable to discrimination by Wisconsin." App. 17a. The district court found that deep-rooted racial "discrimination in areas such as education, employment, and housing" was "the reason Blacks and Latinos are disproportionately likely to lack an ID," and is the "cornerstone from which other socioeconomic disparities flow." *Id.* at 98a. The court also found various other factors showing how Wisconsin's voter ID law interacts with the effects of past or present discrimination and is not merely a product of chance. *Id.* at 96a–100a. The court concluded that the State's proffered interests "do not justify the discriminatory result." *Id.* at 101a.

C. This Case Is an Ideal Vehicle

The evidentiary record in this case is fully developed. The district court conducted an extensive trial. The parties presented dozens of fact and expert witnesses. The court's 90-page opinion contains comprehensive factual findings that address each of the questions unanswered in *Crawford*. The dueling opinions of Judges Easterbrook and Posner, along with the district court's decision, put the relevant constitutional and statutory issues in stark relief with competing narratives. This case thus presents an ideal vehicle to resolve both questions presented.

* * *

Voter ID laws like Wisconsin's Act 23 unjustifiably burden the voting rights of millions of registered voters who are disproportionately African Americans and Latinos. More states are actively considering increasingly restrictive laws. Unless this Court acts

now, the Court likely will continue to be put in the untenable position of refereeing voter ID disputes on an emergency basis on the eve of elections every two years. Given the stakes for so many voters across the country, and the uncertainty among lower courts exemplified by the 5–5 division on the court of appeals below, this Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14-2058 & 14-2059

RUTHELLE FRANK, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT WALKER, Governor of Wisconsin, *et al.*,

Defendants-Appellants.

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

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, Member, Government Accountability Board, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
Nos. 11-CV-01128 & 12-CV-00185
Lynn Adelman, *Judge.*

ARGUED SEPTEMBER 12, 2014—
DECIDED OCTOBER 6, 2014

Before EASTERBROOK, SYKES, and TINDER, Circuit Judges.

EASTERBROOK, *Circuit Judge*. Since 2005 Indiana has required voters to present photographic identification at the polls. The Supreme Court held that this statute is compatible with the Constitution. *Crawford V. Marion County Election Board*, 553 U.S. 181 (2008). In May 2011 Wisconsin enacted a similar statute, 2011 Wis. Act 23. A district court held that Act 23 is unconstitutional and enjoined its implementation. *Frank V. Walker*, 2014 U.S. Dist. LEXIS 59344 (E.D. Wis. Apr. 29, 2014), stay denied, 2014 U.S. Dist. LEXIS 111811 (E.D. Wis. Aug. 13, 2014). After receiving briefs and argument, we stayed that injunction. Order issued Sept. 12, 2014; reconsideration denied Sept. 26, 2014; opinions issued Sept. 30, 2014. We now reverse the injunction, because the district court's findings do not justify an outcome different from *Crawford*.

The Justices observed that a commission chaired by former President Carter had recommended the use of photo ID to verify a person's entitlement to vote. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 18 (2002). The Court added that the Help America Vote Act of 2002 (HAVA) requires states to verify a person's eligibility to vote, using photo ID, portions of Social Security numbers, or unique state-assigned identifiers. 52 U.S.C. §21083(a)(5)(A), formerly 42 U.S.C. §15483(a)(5)(A). Many people register to vote when they get drivers' licenses (National Voter Registration Act of 1993, 52 U.S.C. §20504, formerly 42 U.S.C. §1973gg–3), which links registration and photo ID from the outset. The Justices concluded that both the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections justify a photo ID requirement, even though persons who do not already have government-issued photo IDs must spend time to acquire necessary documents (such as

birth certificates) and stand in line at a public agency to get one. "For most voters who need them, the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. These observations hold for Wisconsin as well as for Indiana.

Wisconsin's law differs from Indiana's, but not in ways that matter under the analysis in *Crawford*. One difference is that Wisconsin requires photo ID for absentee voting as well as in-person voting; a person casting an absentee ballot must submit a photocopy of an acceptable ID. Another difference is that when a person who appears to vote in person lacks a photo ID but says that he has one, and therefore casts a provisional ballot, the state will count that ballot if the voter produces the photo ID by the next Friday; in Indiana the voter signs an affidavit of eligibility in one of the state's circuit courts (which usually means travel to the county seat) within 10 days. Offices of the Department of Motor Vehicles in Wisconsin (where most people get government-issued photo IDs) are open shorter hours than those in Indiana, but more than three years have passed since Act 23's adoption, which makes it difficult to conclude that people who want photo ID have been unable to find an open office in all that time; no one thinks that people who want drivers' licenses in Wisconsin are unable to get them because of limited office hours. Wisconsin's list of acceptable documents (drivers' licenses, Wisconsin state ID cards, passports, military ID of persons in active service, recent naturalization papers, photo ID issued by a recognized Indian tribe, or signed photo ID issued by a college or university) omits some

documents that Indiana accepts (see 553 U.S. at 198 n.16) and includes some that Indiana omits. There are other differences in detail, but none establishes that the burden of voting in Wisconsin is significantly different from the burden in Indiana.

The district court concluded that *Crawford* is not controlling for three principal reasons. First, the judge estimated that 300,000 registered voters in Wisconsin lack a photo ID that the state will accept for voting. That is approximately 9% of the state's 3,395,688 registered voters. The district judge in *Crawford*, by contrast, estimated that only 43,000 persons eligible to vote lacked an acceptable photo ID. 458 F. Supp. 2d 775, 807 (S.D. Ind. 2006). Second, the judge found that voter-impersonation fraud (a ringer pretending to be a registered voter) happens so rarely in Wisconsin that the desire to reduce its occurrence cannot justify any significant burden on voters. Third, the judge found that white persons who are eligible to vote are more likely than others to have in their possession either an acceptable photo ID or the documents (such as copies of birth certificates) that make it simple to get an acceptable photo ID. The judge found that in Milwaukee County (which the judge took as a proxy for the whole state) 97.6% of white eligible voters have a qualifying photo ID or the documents they need to get one. That figure is 95.5% for black eligible voters and 94.1% for Latino eligible voters. The judge concluded from the first two findings that Act 23 violates the Constitution and from the third that it violates the Voting Rights Act. The judge made many other findings, but these are the most important ones.

Before we address the significance of the findings the judge made, we mention a few things that the judge did *not* find. First, the judge did not find that

substantial numbers of persons eligible to vote have tried to get a photo ID but been unable to do so. Eight people testified that they had been frustrated when trying to get photo IDs. Six of the eight testified that the state would not issue photo IDs because they lack birth certificates, but they did not testify that they had tried to get them, let alone that they had tried but failed. Only two testified that distance or poverty hindered them when trying to obtain birth certificates or correct records to remove an error from a birth certificate.

Nor did the judge find that the situation of these eight differed from the situation of many persons in Indiana. The record in *Crawford* contains evidence about the same kind of of frustration, encountered by persons born out of state, who are elderly and may have forgotten their birthplaces and birthdates (if their parents ever told them), who are uneducated (and thus may not grasp how to get documents from public agencies), or who are poor (and so may have trouble getting to a public agency, or paying fees for copies of documents). The district judge here made extensive findings demonstrating that the poor are less likely to have photo IDs than persons of average income. Yet the district judge in *Crawford* also discussed these problems; so did the Supreme Court, which deemed them an inadequate basis for holding Indiana's law unconstitutional. 553 U.S. at 199–203.

The Court reached that conclusion even though Indiana charged for copies of birth certificates—as did Wisconsin, at the time of trial. Between the trial and the argument of this appeal, however, the Supreme Court of Wisconsin directed state officials to issue photo IDs without requiring applicants to present any document that must be paid for. *Milwaukee Branch of*

NAACP v. Walker, 2014 WI 98 ¶¶ 66–70. Moreover, Wisconsin recently issued regulations requiring officials to get birth certificates (or other qualifying documents) themselves for persons who ask for that accommodation on the basis of hardship. Emergency Rule 14, Wis. Admin. Reg. 704b (August 31, 2014). So at the time of trial it was no harder to get supporting documents in Wisconsin than in Indiana, and today it is easier in Wisconsin than in Indiana.[1]

Second, the judge did not make findings about what happened to voter turnout in Wisconsin during the February 2012 primary, when Act 23 was enforced (before two state judges enjoined it). Did the requirement of photo ID reduce the number of voters below what otherwise would have been expected? Did that effect differ by race or ethnicity? The record does not tell us. This suit, like Crawford, therefore is a challenge to Act 23 as written ("on its face"), rather than to its effects ("as applied").

The record also does not reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting. If as plaintiffs contend a photo ID requirement especially reduces turnout by minority groups, students, and elderly voters, it should be possible to demonstrate that effect. Actual results are more significant than litigants' predictions. But no such evidence has been offered.

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[1] *Milwaukee Branch of NAACP* and the regulations leave much to the discretion of the employees at the Department of Motor Vehicles who decide whether a given person has an adequate claim for assistance or dispensing with the need for a birth certificate. Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated.

The lack of evidence about what has happened in other states (or even in Wisconsin itself in 2012) means that this case is in the same posture as Indiana's: the parties and the district court have tried to make predictions about the effects of requiring photo ID, but the predictions cannot be compared with results.

Plaintiffs want us to treat Crawford as a case in which there was no record, so that the Supreme Court had no facts to go on. That's not what happened. An extensive record was compiled in Crawford, and the district judge issued a lengthy opinion. The judge in Indiana thought, just as the judge in Wisconsin has found, that some voters would be unable, as a practical matter, to get photo IDs—because of age or infirmity, lack of ability to pay for birth certificates, or the difficulty of obtaining them from public-records bureaus thousands of miles away in other states—and therefore would have to travel to the county seat after every election to file an affidavit of eligibility, but could not ascertain how many people were in that category. The trial in Wisconsin produced the same inability to quantify.

The findings not made affect how to interpret the findings that were made. Take the conclusion (based on the testimony of a "marketing consultant") that 300,000 registered voters lack acceptable photo ID. The number is questionable; the district judge who tried the Indiana case rejected a large estimate as fanciful in a world in which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car (even people who do not own cars need licenses to drive friends' or relatives' cars), buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank

account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal. Could 9% of Wisconsin's voting population really do none of these things? (Some may have photo ID that is not accepted for elections, such as a veteran's card, but the record does not show how many people get through life with the sort of photo ID that Wisconsin does not accept for voting.) Nonetheless, we accept the district court's finding in this case. What is its legal significance?

Plaintiffs describe registered voters who lack photo ID as "disenfranchised." If the reason they lack photo ID is that the state has made it impossible, or even hard, for them to get photo ID, then "disfranchised" might be an apt description. But if photo ID is available to people willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time. And *Crawford* tells us that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198.

Registering to vote is easy in Wisconsin.[2] Yet of those eligible, only 78% have registered. (In raw

[2] In order to register, a person must provide proof of residence (such as a driver's license, utility bill, bank statement, or residential lease) and any one of (1) the applicant's driver's license number and expiration date, (2) a Wisconsin Department of Transportation ID number and its expiration date, or (3) the last four digits of the applicant's Social Security number. Residents can register by mail or through a Special Registration

numbers, 4.247 million were eligible in 2012, and of that number only 3.318 million were registered. The difference is almost a million, vastly exceeding the number of registered voters who lack photo ID. U.S. Census Bureau, Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012 (May 2013).) This proportion is lower than the 91% of registered voters who have qualifying photo ID. We know from registration data (and the fact that not all registered persons cast ballots) that any procedural step filters out some potential voters. No one calls this effect disfranchisement, even though states could make things easier by, say, allowing everyone to register or vote from a computer or smartphone without travel or standing in line. Yet if 22% of the eligible population does not perform even the easiest step, registration, it is difficult to infer from the fact that 9% have not acquired photo ID that that step is particularly difficult. A more plausible inference would be that people who do not plan to vote also do not go out of their way to get a photo ID that would have no other use to them. This does not imply that a need for photo ID is an obstacle to a significant number of persons who otherwise would cast ballots.

Some of the district court's other findings support the conclusion that for most eligible voters not having a photo ID is a matter of choice rather than a state-created obstacle. We have mentioned the court's finding that 2.4% of white adult residents in Milwaukee County do not now have in their possession either a qualifying photo ID or the documentation

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Deputy (someone trained by a municipality to collect voter registration forms) until 20 days before an election. They can register in a municipal clerk's office until the Friday before an election. And they can register at a polling place on election day.

needed to get one. (This is the same thing as the proposition that 97.6% do have a photo ID or the qualifying documents.) The judge estimated that 4.5% of blacks and 5.9% of Latinos lack both. But if 9% of eligible voters lack a photo ID, this necessarily means that more than half of eligible voters who lack a photo ID do have a birth certificate or other qualifying documents among the family records. (One witness testified that, of persons who lack qualifying photo IDs, 32% also lack the documents needed to get one; this means that 68% of all persons who lack a photo ID could get one without hassle.) If people who already have copies of their birth certificates do not choose to get free photo IDs, it is not possible to describe the need for a birth certificate as a legal obstacle that disfranchises them.

Because the burden of getting a photo ID in Wisconsin is no greater than the burden in Indiana, the district court's constitutional holding must rest on its finding that photo IDs do not serve any important purpose—for if that's right, then under the constitutional standard laid out in *Crawford* even a modest burden is forbidden.

The district judge concluded that the only kind of fraud that photo IDs address is impersonation of voters at the polls, and he found that impersonation does not happen in Wisconsin. (He allowed that some frauds may go undetected but thought that the number is trivial.) Although the judge recognized that some voter-impersonation frauds had been detected—on one occasion, for example, a man cast an absentee ballot for his deceased wife—the judge thought that a photo ID would not necessarily prevent these. He observed that the man could have submitted a photocopy of his deceased wife's photo ID. The state

also contended that requiring identification of voters at the polls promotes public confidence in the integrity of elections, but the judge found that there is no relation between voter-identification statutes and public confidence. It follows, the judge concluded, that Wisconsin's Act 23 serves no legitimate purpose.

One problem with relying on these findings is that the first of them—the conclusion that voter impersonation is rare if not nonexistent—is identical to a finding made in the Indiana litigation. The district judge in Indiana found that there had never been a documented instance of voter-impersonation fraud in that state. The Supreme Court recited this finding, 553 U.S. at 194–96, yet found it inadequate to conclude that the statute does not serve any purpose. That's because the Supreme Court thought that a photo ID requirement has other benefits (*id*. at 191–97): it deters fraud (so that a low frequency stays low); it promotes accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct); it promotes voter confidence. The Court took the last of these as almost self-evidently true. And the need for documentation such as a birth certificate to get a photo ID suggests another benefit: it will prevent some people who should not have registered (because they are too young or not citizens) from voting when they are unable to get a qualifying photo ID. Wisconsin allows registration on election day, and a photo ID can help to verify (or refute) representations a person makes when trying to register.

The dissenting Justices were not impressed by the benefits their colleagues touted. Justice Souter (joined by Justice Ginsburg) heaped scorn on them, deeming them unsubstantiated and at any event too modest to

justify an appreciable burden. 553 U.S. at 223–37 (dissenting opinion). (Justice Breyer, who also dissented, did so because in his view the photo ID requirement discouraged too many people from voting; he did not join Justice Souter's view that the law served no valid purpose.) In this litigation, plaintiffs produced the testimony of a political scientist who agrees with Justice Souter, and the district judge found as a fact that the majority of the Supreme Court was wrong about benefits such as better record keeping and promoting public confidence. Maybe that testimony will eventually persuade the Justices themselves, but in our hierarchical judicial system a district court cannot declare a statute unconstitutional just because he thinks (with or without the support of a political scientist) that the dissent was right and the majority wrong.

To put this in legalese, 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 these litigants or about a single state. Judges call the latter propositions "adjudicative facts." On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court. See, *e.g.*, *Armour v. Indianapolis*, 132 S. Ct. 2073, 2080 (2012); *A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002).

The district judge heard from one political scientist, whose view may or may not be representative of the profession's. After a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a "fact"

that they do not, even if 20 political scientists disagree with the Supreme Court.

Photo ID laws promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as Crawford concluded) and not in Wisconsin. This means that they are valid in every state—holding constant the burden each voter must bear to get a photo ID—or they are valid in no state. Functionally identical laws cannot be valid in Indiana and invalid in Wisconsin (or the reverse), depending on which political scientist testifies, and whether a district judge's fundamental beliefs (his "priors," a social scientist would say) are more in line with the majority on the Supreme Court or the dissent.

Wisconsin-specific findings *do* matter to some issues; if the burden of getting a photo ID in Wisconsin were materially greater than the burden in Indiana, then Wisconsin's law could indeed be invalid while Indiana's stands. But no one suggests that photo ID laws promote confidence in Indiana but not Wisconsin; the district court's finding concerns the nation as a whole. (The political scientist who testified at trial relied not on his own work, or even on work in a refereed scholarly journal, but on 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), which reported the results of one opinion poll of people living throughout the country.)

That photo IDs promote confidence, even if they have no other effect, is widely accepted outside the field of voting. Take the photo ID requirement for boarding an aircraft. As far as we are aware, a need to produce photo ID has never prevented a hijacking or act of terrorism; no one even argues that it has.

Magnetometers, x-ray machines, and other technical resources find guns, knives, and explosives. (Find them frequently: many people who possess photo ID try to carry these items onto planes.) But the public *feels* safer when everyone must show a photo ID, which makes the requirement a rational one. Perhaps that is why both state and federal judiciaries require photo ID of people entering courthouses, even though it is the magnetometers and other technical gear, not the ID, that finds the weapons.

If the public thinks that photo ID makes elections cleaner, then people are more likely to vote or, if they stay home, to place more confidence in the outcomes. These are substantial benefits. One district judge's contrary view is not enough to condemn a state statute as unconstitutional. By contrast, 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.

We have said enough to demonstrate that *Crawford* requires us to reject a constitutional challenge to Wisconsin's statute. (The Supreme Court of Wisconsin reached the same conclusion in *Milwaukee Branch of NAACP* and *League of Women Voters v. Walker*, 2014 WI 97 (July 31, 2014), both of which reversed injunctions that had been issued by state judges.) In Crawford plaintiffs relied exclusively on the Constitution; in this suit plaintiffs also contended, and the district judge found, that the state law violates §2 of the Voting Rights Act, 52 U.S.C. §10301, formerly 42 U.S.C. §1973:

> (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.

The judge recognized that most case law concerning the application of §2 concerns claims that racial gerrymandering has been employed to dilute the votes of racial or ethnic groups. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991). In *Gingles* the Justices borrowed nine factors from a Senate committee report (often called the "*Gingles* factors") as the standard for applying §2.

The judge found that line of cases unhelpful for situations involving eligibility to vote. The judge recognized that a separate line of §2 cases does involve eligibility and has concluded that felon-disfranchisement statutes do not violate §2 even though these laws have a disparate impact on minorities. (Both blacks and Latinos are more likely to have felony convictions than are whites.) *See 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). But the judge deemed all of those decisions irrelevant too, because most felon-disfranchisement laws predate the Voting Rights Act.

The judge thought that §2 offers the best guide to its own interpretation and emphasized the rule that laws must not "result[] in a denial" of the right to vote. Act 23 has such a result, the judge concluded, because white registered voters are more likely to possess qualifying photo IDs, or the documents necessary to get them. We have mentioned one statistical disparity: 97.6% of whites, 95.5% of blacks, and 94.1% of Latinos currently possess either qualifying photo IDs or the documents that would permit Wisconsin to issue them.[3] (In other words, these registered voters

[3] We have given the percentages of persons who have these documents. Plaintiffs express the figures differently, giving the percentages of persons who lack the documents (2.4% of whites, 4.5% of blacks, and 5.9% of Latinos), then dividing one percentage by another to yield an expression such as "registered Black voters in Wisconsin were 70% more likely than white voters to lack a driver's license or state ID" (LULAC Br. 2). That is a misuse of data. Dividing one percentage by another produces a number of little relevance to the problem. If 99.9% of whites had photo IDs,

have, or can get, photo IDs without asking any public-records office for any additional document, such as a birth certificate.) If instead of asking who has either photo IDs or the documents required to get them, we ask only who had qualifying photo IDs as of the trial, the district judge estimated that 92.7% of whites, 86.8% of blacks, and 85.1% of Latinos did. Finally, the judge found that it would be harder for blacks and Latinos, on average, to get the documents they need, because for the five years ending in 2011 some 75% of Wisconsin's white residents had been born in that state, while only 59% of blacks and 43% of Latinos had been born there. Getting birth certificates from other states is harder than getting them from Wisconsin, the judge found. The decision of the Supreme Court of Wisconsin and the state's new regulations may reduce that burden but cannot eliminate it; persons who rely on the waiver procedure still must apply for it, which means that on average black and Latino residents must file more paperwork than white residents.

Although these findings document a disparate outcome, they do not show a "denial" of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter. Nor did the district court find that differences in economic circumstances are attributable to discrimination by Wisconsin. The judge explained his findings this way: "the reason Blacks and Latinos are disproportionately likely to lack an ID

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and 99.7% of blacks did, the same approach would yield the statement "blacks are three times as likely as whites to lack qualifying ID" (0.3 / 0.1 = 3), but such a statement would mask the fact that the populations were effectively identical. That's why we do not divide percentages.

is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." 2014 U.S. Dist. LEXIS 59344 at *119. The judge did not conclude that the state of Wisconsin has discriminated in any of these respects. That's important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974). Section 2(a) forbids discrimination by "race or color" but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters.

Section 2(b) tells us that §2(a) does not condemn a voting practice just because it has a disparate effect on minorities. (If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote-dilution cases.) Instead §2(b) tells us: "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" (emphasis added). Act 23 does not draw any line by race, and the district judge did not find that blacks or Latinos have less "opportunity" than whites to get photo IDs. Instead the judge found that, because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate §2. In voting-dilution cases, citizens lumped into a district can't extricate themselves except by moving, so clever district-line drawing can disadvantage minorities. But Act 23

extends to every citizen an equal opportunity to get a photo ID.

To the extent outcomes help to decide whether the state has provided an equal opportunity, we must look not at Act 23 in isolation but to the entire voting and registration system. If blacks and Latinos do not get photo IDs at the same frequency as whites, that will reduce their relative share of voting in Wisconsin. By how much? We don't know, because (for reasons we have covered) it may be that the people who do not get photo IDs are also those least likely to vote with or without photo IDs. Experience from other states would help to understand the full effect, but the record lacks that information. But we do know, from data published by the Census Bureau, that blacks do not seem to be disadvantaged by Wisconsin's electoral system as a whole. In 2012 79.6% of Wisconsin's eligible white non-Hispanic residents were registered to vote. That year, 81% of the state's eligible black residents were registered to vote. (Only 46.8% of Latino residents were registered; this might be caused by errors in the data; the Census Bureau provides an 18.4% margin of error for this figure.) In 2012 75% of the state's eligible white non-Hispanic registered voters went to the polls; 78.5% of the state's eligible black voters cast ballots. Even if Act 23 takes 2.1% off this number (the difference between the 97.6% of white voters who already have photo ID or qualifying documents, and the 95.5% of black voters who do), black turnout will remain higher than white turnout.

We are not saying that, as long as blacks register and vote more frequently than whites, a state is entitled to make changes for the purpose of curtailing black voting. Far from it; that would clearly violate §2. Our point, rather, is that when the validity of the

state's voting laws depends on disparate impact, as the district court held, it is essential to look at everything (the "totality of circumstances", §2(b) says) to determine whether there has been such an impact. Otherwise §2 will dismantle every state's voting apparatus.

No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system. At oral argument, counsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates §2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates §2. Motor-voter registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses. (The district judge cited with approval, 2014 U.S. Dist. LEXIS 59344 at *102 n.32, a study concluding that in Milwaukee County 73% of white adults, 47% of black adults, and 43% of Hispanic adults have valid drivers' licenses; this implies an equally large difference in registration rates using the motor voter protocol.) Yet it would be implausible to read §2 as sweeping away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it).

For the sake of argument, let us put all of the felon-disfranchisement cases to one side, even though they offer strong support for our reading of §2, in voter-qualification situations, as an equal-treatment

requirement. Three appellate opinions have applied §2 to voter-qualification rules other than felon-disfranchisement statutes: *Gonzalez v. Arizona*, 677 F.3d 383, 404–10 (9th Cir. 2012) (en banc); *Ohio State Conference of NAACP v. Husted*, No. 14---3877 (6th Cir. Sept. 24, 2014), stayed under the name *Husted v. NAACP*, No. 14A336 (S. Ct. Sept. 29, 2014); and *League of Women Voters of North Carolina v. North Carolina*, No. 14-1845 (4th Cir. Oct. 1, 2014). *Gonzalez* held that Arizona's voter ID statute (which requires voters to present one qualifying photo ID or two qualifying non-photo IDs) is valid under §2; the court cited *Gingles* but did not use most of its nine factors or establish an alternative approach. The Fourth Circuit and the Sixth Circuit, by contrast, found *Gingles* unhelpful in voter-qualification cases (as do we) and restated the statute as calling for two inquiries.

> Based on our reading of the plain language of the statute and relevant Supreme Court authority, we agree with the Sixth Circuit that a Section 2 vote-denial claim consists of two elements:
>
> - First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning 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.'" *Husted*, 2014 WL 4724703, at *24 (quoting [52 U.S.C. §10301(a)–(b), formerly] 42 U.S.C. §1973(a)-(b));
> - Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce

> discrimination against members of the protected class." *Id.* (quoting *Gingles*, 478 U.S. at 47).

League of Women Voters, slip op. 33–34. We are skeptical about the second of these steps, because it does not distinguish discrimination by the defendants from other persons' discrimination. In vote-dilution cases, the domain of *Gingles*, the government itself draws the district lines; no one else bears responsibility. But if we were to adopt this approach for the sake of argument, our plaintiffs would fail at the first step, because in Wisconsin everyone has the same opportunity to get a qualifying photo ID.

Photo ID laws have been politically contentious. *Crawford* remarked on the apparently partisan nature of the disagreement between those who favor and those who oppose these statutes. The lead opinion stated: "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. . . . The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" 553 U.S. at 204. That is true of Wisconsin as well.

One final comment. Even if Act 23 violated §2 or the Constitution because of its disparate impact on economically disadvantaged voters, the district court's injunction could not be affirmed. It reads:

> [T]he named Defendants and Defendants' officers, agents, servants, employees, and attorneys, and all those acting in concert or participation with them, or having actual or

> implicit knowledge of this Order by personal service or otherwise, are hereby permanently enjoined from conditioning a person's access to a ballot, either in-person or absentee, on that person's presenting a form of photo identification.

2014 U.S. Dist. LEXIS 59344 at *124. The injunction is perpetual and unconditional. Even if Wisconsin offers a photo ID to everyone registered to vote, without the need for supporting documentation, it *still* can not require anyone to present photo ID at a polling place. Under the injunction's language, it is irrelevant how well the changes required by *Milwaukee Branch of NAACP* or adopted by regulation work in alleviating difficulties that some persons encounter in getting photo IDs.

A district judge's remedial authority is limited to ending the illegal conduct—and the problem identified by the district court is not photo ID in the abstract, but how income and education affect the probability of having photo ID. The injunction should have allowed the state an opportunity to make photo ID more readily available.

Details of the injunction do not matter, however, given our conclusion that Act 23 does not violate either §2 or the Constitution. The judgment of the district court is reversed.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT
October 6, 2014

Nos.: 14-2058 & 14-2059

RUTHELLE FRANK, *et al*.,

Plaintiffs-Appellees

v.

SCOTT WALKER,
Governor of State of Wisconsin, *et al*.,

Defendants-Appellants

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

Plaintiffs-Appellees

v.

DAVID G. DEININGER, Member, Government
Accountability Board, *et al*.,

Defendants-Appellants

Originating Case Information:
District Court Nos: 2:11-cv-01128 & 2:12-cv-00185
Eastern District of Wisconsin
District Judge Lynn Adelman

Before: FRANK H. EASTERBROOK, Circuit Judge
DIANE S. SYKES, Circuit Judge
JOHN DANIEL TINDER, Circuit Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 11-CV-01128

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al.,

Defendants.

Case No. 12-CV-00185

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

Plaintiffs,

v.

JUDGE DAVID G. DEININGER, et al.,

Defendants.

DECISION AND ORDER

In May 2011, the Wisconsin Legislature passed 2011 Wisconsin Act 23 ("Act 23"), which requires Wisconsin residents to present a document including photo identification ("photo ID") in order to vote. 2011 Wis. Sess. Laws 104 (codified as amended in scattered

sections of Wis. Stat. Ch. 5 and 6).[1] The plaintiffs in the two cases captioned above claim the law violates the Fourteenth Amendment and/or Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

In the *Frank* case, individuals who are eligible to vote in Wisconsin contend that Act 23 violates both the Fourteenth Amendment and Section 2 of the Voting Rights Act. In the *LULAC* case, four organizations argue that Act 23 violates Section 2 of the Voting Rights Act. With the agreement of the parties, I handled the cases together without formally consolidating them and, in November 2013, conducted a two week trial to the court. In this decision, which constitutes my findings and conclusions under Federal Rule of Civil Procedure 52, I address the major issues presented. In an effort to make the opinion as readable as possible, I have placed several relatively technical discussions of expert testimony in appendices rather than in the text.

Before proceeding, I note that I am only addressing two of the plaintiffs' claims—the *Frank* plaintiffs' claim that Act 23 places an unjustified burden on the right to vote and the claim of both the *Frank* and *LULAC* plaintiffs that Act 23 violates Section 2 of the Voting Rights Act. I do not address the *Frank* plaintiffs' remaining claims, which are all constitutional claims. My reason for not addressing the remaining claims is based on the "longstanding principle of judicial restraint" under which courts are

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[1] Act 23's photo ID requirement was in effect only in the February 2012 election. In March 2012, two separate Wisconsin circuit courts enjoined the statute on state constitutional grounds. As of the date of this decision, one of the injunctions remains in effect and both cases are pending in the Wisconsin Supreme Court.

to "avoid reaching constitutional questions in advance of the necessity of deciding them." *Camreta v. Greene*, __ U.S. __, 131 S.Ct. 2020, 2031 (2011) (internal quotation marks omitted). As explained below, all of the plaintiffs are entitled to permanent injunctive relief against enforcement of the photo ID requirement on the ground that the requirement violates Section 2 of the Voting Rights Act. This makes consideration of any of the *Frank* plaintiffs' constitutional claims unnecessary. Still, I believe it is wise to consider the constitutional claim of whether Act 23 places an unjustified burden on the right to vote. As my analysis below will demonstrate, the Section 2 statutory claim and the unjustified-burden constitutional claim overlap substantially, in that many factual findings are relevant to both claims. Indeed, the Section 2 analysis is largely identical to the unjustified-burden analysis, except that the Section 2 analysis involves the additional question of whether Act 23 has a disproportionate impact on Blacks and Latinos and produces a "discriminatory result."[2] Thus, it would likely not be a wise use of judicial resources to address the Section 2 claim but leave the unjustified-burden claim unresolved. Addressing only the former claim could result in an appeal and then a remand to this court for consideration of the constitutional claim, and then a second appeal involving only the constitutional claim. Of course, by not addressing all constitutional claims, I am leaving the door open to successive appeals. But unlike the unjustified-burden constitutional claim, the remaining constitutional

[2] Because the Section 2 and unjustified-burden analyses are highly similar, with the Section 2 analysis presenting additional questions that the unjustified-burden analysis does not, I discuss the unjustified-burden claim first.

claims do not overlap substantially with the Section 2 claim and could more easily be addressed in separate proceedings.

My analysis proceeds as follows. First, I give an overview of the relevant provisions of Act 23. Second, I address the *Frank* plaintiffs' claim that Act 23 violates the Fourteenth Amendment because it imposes substantial burdens on the many eligible voters who do not currently possess photo IDs, and because such burdens are not justified by the state interests that Act 23 purports to serve. Third, I address the plaintiffs' claim that Act 23 violates Section 2 of the Voting Rights Act because it has a disproportionate impact on the voting rights of Blacks and Latinos. Finally, I briefly address some remaining procedural matters, namely, the *Frank* plaintiffs' motion for class certification and the defendants' motion to dismiss the claims of certain *Frank* plaintiffs.

I. Overview of Act 23

Under Act 23, in order to vote, a person must present one of nine forms of photo ID to prove his or her identity.[3] An acceptable photo ID includes one of the following that is unexpired or that expired after the most recent general election:[4] (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. Wis. Stat. § 5.02(6m)(a). A person may also present: (5) a naturalization certificate issued within the last two

[3] To qualify to vote in Wisconsin, a person must be a citizen of the United States, 18 or older and a resident of the state for 28 consecutive days prior to the election. Wis. Stat. § 6.02(1).

[4] A general election is one held "in even-numbered years . . . in November . . . ." Wis. Stat. § 5.02(5).

years, (6) an unexpired receipt issued when a person applies for a Wisconsin driver's license, which is valid for 60 days as a temporary license, (7) an unexpired receipt issued when a person applies for a state ID card, which is valid for 60 days as a temporary ID card, (8) an unexpired ID card issued by a federally recognized Indian tribe in Wisconsin or (9) an unexpired ID card issued by an accredited Wisconsin university or college that contains the date of issuance, the person's signature and an expiration date no later than two years from the date of issuance. Wis. Stat. § 5.02(6m)(b)–(f). If a person presents a student ID, the person must also produce a document showing that he or she is currently enrolled. Wis. Stat. § 5.02(6m)(f).

Act 23 does not allow an individual to use a Veteran's ID Card, the photo ID that the United States Department of Veterans' Affairs issues when veterans leave the military. Trial Transcript ("Tr.") 871. An individual also cannot use an ID from one of Wisconsin's 16 two-year technical colleges. The Wisconsin Government Accountability Board ("GAB"), a non¬partisan board consisting of six retired judges which administers Wisconsin elections, found that technical college IDs which met the requirements set out for student IDs were acceptable, but a legislative committee required the GAB to promulgate an administrative rule on the matter. The GAB did so, but both the legislative committee and the Governor must approve the rule and neither has done so. Tr. 879–80, 883.

When voting in-person, an individual must state his or her name and address and produce one of the accepted forms of photo ID. The clerk or poll worker will then check the poll list to determine if there is a registered voter with matching information and

inspect the ID to see if the name on it conforms to the name on the poll list and the photograph reasonably resembles the individual. Wis. Stat. § 6.79(2)(a). If these requirements are met, the individual will be allowed to sign the poll book and receive a ballot. If an individual does not have a qualifying ID, he or she may cast a provisional ballot. However, such ballot will be counted only if the individual appears at the municipal clerk's office with an acceptable ID by 4:00 p.m. on the Friday after the election. Wis. Stat. §§ 6.79(3)(b), 6.97(3)(b). Individuals requesting absentee ballots must also present photo IDs. Wis. Stat. §§ 6.86(1)(ar), 6.87(1). A requester must mail in a photocopy of an acceptable photo ID with his or her request. Wis. Stat. § 6.87(1).

The statute provides limited exceptions. The photo ID requirement does not apply to: (1) absentee voters who have previously supplied acceptable photo IDs and whose names and addresses have not changed, Wis. Stat. § 6.87(4)(b)3, (2) absentee voters who are in the military or overseas, Wis. Stat. § 6.87(1), (3) voters who have confidential listings as a result of domestic abuse, sexual assault or stalking, Wis. Stat. § 6.79(6), (4) voters who have surrendered their driver's licenses due to a citation or notice of intent to revoke or suspend the license who present a copy of the citation or notice, Wis. Stat. § 6.79(7), and (5) absentee voters who are elderly, infirm or disabled and indefinitely confined to their homes or certain care facilities, Wis. Stat. §§ 6.86(2), 6.875. Additionally, an individual with a religious objection to being photographed can apply for a Wisconsin state ID card that does not include a photo. Wis. Stat. § 343.50(4g).

Individuals who lack a qualifying photo ID can apply for a Wisconsin state ID card at the Wisconsin

Department of Motor Vehicles ("DMV"). The cost for such a card is normally $18.00, but Act 23 requires the DMV to waive the fee if the applicant is a citizen who will be at least 18 on the date of the next election, and the applicant asks that the card be issued without charge for voting purposes. Wis. Stat. § 343.50(5)(a)3. To obtain a state ID card, a person must obtain certain primary identification documents and appear at a DMV service center to submit an application and be photographed.

II. Fourteenth Amendment Claim: Unjustified Burden on the Right to Vote

The *Frank* plaintiffs are eligible Wisconsin voters who claim that Act 23's photo ID requirement violates the Fourteenth Amendment because it imposes an unjustified burden on their right to vote. The Constitution does not expressly provide a right to vote, but it does so implicitly. *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 665–66 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting that the right to vote is "a fundamental political right, because preservative of all rights"). Further, the right to vote is a fundamental right protected by both the due process and equal protection clauses of the Fourteenth Amendment. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (the right to vote is one of the liberty interests protected by the due process clause); *Harper*, 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal

Protection Clause of the Fourteenth Amendment."). Thus, states may not enact laws that unduly burden the right to vote. No litmus test, however, neatly separates valid and invalid election laws. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008). Rather, the Supreme Court has adopted a balancing test that courts must apply on a case-by-case basis. *Id*.

The test adopted by the Court recognizes 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 process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). It further recognizes that an election regulation, "whether it governs the registration and qualification of voters . . . or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. Thus, courts applying the balancing test must weigh "'the character and magnitude of the asserted injury'" to the right to vote against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).The rigor of the inquiry into the state's interests depends on the extent to which the challenged election law burdens the right to vote. *Id*. Even very slight burdens "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

In *Crawford*, the Supreme Court considered a claim similar to that of the *Frank* plaintiffs. The *Crawford* plaintiffs challenged an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present a photo ID. 553 U.S. at 185. A majority of the Court determined that the plaintiffs had failed to prove that the statute was invalid. Although no opinion expressed the rationale of a majority of the Court, six Justices agreed that the *Anderson*/*Burdick* balancing test applied to the plaintiffs' claim. *See Crawford*, 553 U.S. at 189–91 (opinion of Stevens, J.); *id*. at 204–08 (opinion of Scalia, J.). The opinions differed, however, with respect to how the balancing test was to be applied. Justice Scalia's view of the test was that a law could be evaluated only on the basis of its "reasonably foreseeable effect on *voters generally*," rather than on its effect on subgroups of voters. *Id*. at 206 (emphasis in original). In contrast, Justice Stevens seemed to assume that a law could be invalid based on its effect on a subgroup of voters. *Id*. at 200–03. Here, however, he concluded that the plaintiffs had failed to produce a record that enabled the Court to determine whether the law placed an excessive and/or unjustified burden on the rights of a subgroup of voters. *Id*. at 200 ("[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."). Justice Stevens determined that this gap in the record left the Court with no choice but to weigh the state's justifications for the law against its "broad application to all Indiana voters." *Id*. at 202–03. He and the Justices who joined his opinion concluded that because

99% of Indiana's voting-age population already possessed photo IDs that would allow them to comply with the new law, *id*. at 188 n.6, the state's general interests in the law were sufficient to justify the burdens it imposed on Indiana voters generally. *Id*. at 202–03.

Because in *Crawford* a majority of the Court agreed that a photo ID requirement such as provided in Act 23 is to be evaluated under the *Anderson*/*Burdick* balancing test, I will apply that test here. However, because a majority of the Court could not agree on how to apply the test, *Crawford* is not binding precedent on that matter. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks and alteration omitted). Here, the opinion authored by Justice Stevens is the narrowest. Like Justice Scalia, Justice Stevens concluded that the Indiana law was valid because the state interests justified the law's burden on "all Indiana voters." *Crawford*, 553 U.S. at 202–03. But Justice Stevens did not expressly answer the further constitutional question answered by Justice Scalia: whether a law could be invalidated based on the burdens imposed on a subgroup of voters. Justice Scalia answered "no" to this question, *id*. at 204–08, while Justice Stevens determined only that the plaintiffs had not shown that the Indiana law imposed excessive burdens on a subgroup of voters, *id*. at 200–03. Because Justice Stevens's opinion is narrowest, and because Justice Stevens did not determine whether a law could be invalidated based

on the burdens it imposes on a subgroup of voters, *Crawford* is not precedential as to that question.

To find the rule of decision, then, I revert back to *Anderson* and *Burdick*, which are cases that produced majority opinions. And as I read these cases, they require invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters. Both cases emphasized that "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden *the plaintiff's rights*.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789) (emphasis added). The focus of this language is the rights of an individual plaintiff rather than the rights of "voters generally." *Crawford*, 553 U.S. at 206 (opinion of Scalia, J.). This implies that an unjustified burden on some voters will be enough to invalidate a law, even if, because the law burdens other voters only trivially, the state's interests are sufficient to justify the burden placed on such other voters. Moreover, in *Anderson*, the Court explicitly framed the question presented as whether the Ohio law at issue placed an unconstitutional burden on the voting rights of a subgroup of the state's voters—namely, the subgroup composed of Anderson's supporters. 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."). For these reasons, I conclude that a law like Act 23 is invalid if it imposes burdens on a subgroup of a state's

voting population that are not outweighed by the state's justifications for the law.

Given the above legal standards, I will proceed as follows. First, I will identify the state interests the defendants put forward to justify Act 23 and assess the extent to which Act 23 is necessary to serve those interests. Second, I will identify and assess the magnitude of the burdens Act 23 imposes on the right to vote. Finally, I will determine whether the state's interests are sufficiently weighty to justify those burdens.

A. The State's Justifications for Act 23

The defendants claim that Act 23's identification scheme serves four state interests: (1) detecting and preventing in-person voter-impersonation fraud; (2) promoting public confidence in the integrity of the electoral process; (3) detecting and deterring "other types of voter fraud;" and 4) promoting orderly election administration and accurate recordkeeping. Defs.' Post-Trial Br. at 8.

1. Detecting and preventing in-person voter-impersonation fraud

The defendants claim that Act 23 will deter or prevent voter fraud by making it harder to impersonate a voter and cast a ballot in his or her name without detection. Detecting and preventing in-person voter-impersonation fraud is a legitimate state interest, *see Crawford*, 553 U.S. at 196, and the photo ID requirement does, to some extent, serve that interest by making it harder to impersonate a voter at the polls. However, as explained below, because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable

future, this particular state interest has very little weight.

The evidence at trial established that virtually no voter impersonation occurs in Wisconsin. The defendants could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past. The only evidence even relating to voter impersonation that the defendants introduced was the testimony of Bruce Landgraf, an Assistant District Attorney in Milwaukee County. Landgraf testified that in "major elections," by which he means gubernatorial and presidential elections, his office is asked to investigate about 10 or 12 cases in which a voter arrives at the polls and is told by the poll worker that he or she has already cast a ballot. Tr. 2056–57. However, his office determined that the vast majority of these cases—approximately 10 each election—have innocent explanations, such as a poll worker's placing an indication that a person has voted next to the wrong name in the poll book. Tr. 2057. Still, about one or two cases each major election remain unexplained, and the defendants contend that these one or two cases could be instances of voter-impersonation fraud. I suppose that's possible, but most likely these cases also have innocent explanations and the District Attorney's office was simply unable to confirm that they did.[5] Moreover, the most Landgraf's testimony

[5] Landgraf did not explain the methods his office used to determine that there were innocent explanations for the vast majority of cases, but the defendants introduced into evidence memos discussing the steps the District Attorney's office took to investigate two potential "stolen vote" cases. Defs.' Ex. 1033, 1034. In both cases, the investigator interviewed the voter and the poll workers who recorded the allegedly fraudulent vote and reviewed the entry for the vote in the poll book. *Id*. This was the extent of the District Attorney's investigation.

shows is that cases of potential voter-impersonation fraud occur so infrequently that no rational person familiar with the relevant facts could be concerned about them. There are over 660,000 eligible voters in Milwaukee County,[6] and if the District Attorney's office finds two unexplained cases each major election, that means that there is less than one questionable vote cast each major election per 330,000 eligible voters. The rate of potential voter-impersonation fraud is thus exceedingly tiny.

The evidence introduced by the plaintiffs confirms that voter-impersonation fraud does not occur in Wisconsin. The plaintiffs offered the testimony of Lorraine Minnite, a professor at Rutgers University who specializes in the study of the incidence of voter fraud in contemporary American elections. Professor Minnite studied elections in Wisconsin during the years 2004, 2008, 2010 and 2012 to determine whether she could identify any incidents of voter fraud. She consulted a variety of sources of information, including newspaper databases, news releases by the Wisconsin Attorney General, criminal complaints, decisions by state courts, and documents issued by the GAB. From these sources, Minnite was able to identify only one case of voter-impersonation fraud. Tr. 1036–42. And the single case of voter-impersonation fraud did not involve *in-person* voter impersonation. Rather, that case involved a man who applied for and cast his recently deceased wife's absentee ballot.[7] Tr. 1041.

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[6] Frank Ex. 600 at 34 (Table 2).

[7] Act 23's photo ID requirement applies to absentee ballots, and thus had it been in effect at the time of this incident it may have prevented the man from voting his deceased wife's absentee ballot. However, the man could have easily circumvented Act 23 in this instance if he possessed his deceased wife's ID, since to

Thus, from Minnite's work, it appears that there have been zero incidents of in-person voter-impersonation fraud in Wisconsin during recent elections.

Some have suggested that voter fraud might be more widespread than the low number of prosecutions indicates because the laws that prohibit voter fraud are underenforced. *See Crawford*, 472 F.3d at 953. However, the defendants do not suggest that there is any underenforcement of such laws in Wisconsin. And the evidence at trial indicates that such laws are vigorously enforced. In 2004, a Joint Task Force was created to investigate and prosecute voter fraud that occurred in Milwaukee during the 2004 presidential election. LULAC Ex. 68 ¶ 28. The task force included the United States Attorney, the Milwaukee County District Attorney, the Milwaukee City Attorney and a representative of the Milwaukee Police Department. In 2002, the United States Department of Justice started the Ballot Access and Voting Integrity Initiative in response to allegations of voter fraud across the country. LULAC Ex. 68 ¶¶ 20, 25. From 2002 to 2005, one of the goals of this initiative was to identify and prosecute individuals who committed voter fraud. Previously, the Department had only brought charges against conspiracies to corrupt the

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vote absentee all a person needs to do is mail a copy of a photo ID with the request for an absentee ballot. Tr. 1041–42; Wis. Stat. § 6.87(1). *Cf. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (noting that a photo ID requirement for absentee ballots is pointless because "[t]he voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo").

political process and not against individuals acting alone. One of the cities the Department focused on was Milwaukee. And, in September 2008, the Wisconsin Attorney General announced that his office was partnering with the Milwaukee County District Attorney to form an "Election Fraud Task Force" to detect, investigate and prosecute election fraud crimes in Milwaukee County. LULAC Ex. 812 ¶ 4. Before the 2010 general election, the Election Fraud Task Force expanded to include the district attorneys of 11 more counties. Id. ¶ 5. The task force not only followed-up on complaints about voter fraud, but it also dispatched teams of assistant attorneys general and special agents for the Division of Criminal Investigation to polling places across Wisconsin during the 2008, 2010 and 2012 elections, including the special June 2012 recall election. Accordingly, the lack of prosecutions for voter-impersonation fraud in Wisconsin cannot be attributed to underenforcement.

The defendants contend that the absence of known instances of voter-impersonation fraud could be explained by the fact that such fraud is difficult to detect. However, the witnesses called by the defendants to testify about their efforts to investigate voter fraud did not indicate that voter-impersonation fraud is difficult to detect. When Michael Sandvick, a former Milwaukee police officer, was asked at trial whether or not voter fraud was difficult to detect, he answered, "There are different types of voter fraud. Some of them are hard to detect and some of them are not." Tr. 2036. When asked what types are hard to detect, he gave only one example: someone using a fake address to vote. He did not mention voter impersonation.

Moreover, if voter impersonation is occurring often enough to threaten the integrity of the electoral

process, then we should be able to find more evidence that it is occurring than we do. If, for example, voter impersonation is a frequent occurrence, then we should find more than two unexplained cases per major election in which a voter arrives at the polls only to discover that someone has already cast a ballot in his or her name. Another way to determine whether voter impersonation is occurring is a method suggested by the defendants' expert witness, M.V. Hood III, a professor of political science at the University of Georgia. *See* M.V. Hood III & William Gillespie, *They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud*, 93 Social Science Quarterly 76 (March 2012). Professor Hood and his coauthor explain that one way to commit voter-impersonation fraud is to impersonate a registered voter who is recently deceased. Obviously, the deceased voter cannot show up at the polls, and thus a person who wanted to cast an illegal ballot could appear at the place where the deceased voter was registered and give the deceased voter's name. Hood's method for detecting this type of fraud involves comparing a database of deceased registered voters to a database of persons who had cast ballots in a recent election. If the researcher is able to match entries in both databases, then further investigation could be undertaken to determine whether voter impersonation had occurred. Hood and his coauthor applied this methodology to the 2006 elections in Georgia and found no evidence of ballots being illegally cast in the name of deceased voters. *Id*. at 81–92.

Thus, although voter-impersonation fraud may be difficult to detect, it is not invisible. If it is occurring in Wisconsin to any significant extent, then at trial the defendants should have been able to produce evidence that it is. The absence of such evidence confirms that

there is virtually no voter-impersonation fraud in Wisconsin.

The defendants also contend that even if there currently is no voter impersonation in Wisconsin, the state has an interest in taking steps to prevent voter-impersonation fraud from becoming a problem in the future. In support of this contention, the defendants point out that the Supreme Court has stated that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986). However, the Supreme Court has also stated that states cannot burden the right to vote in order to address dangers that are remote and only "theoretically imaginable." *Williams v. Rhodes*, 393 U.S. 23, 33 (1968). In the present case, no evidence suggests that voter-impersonation fraud will become a problem at any time in the foreseeable future. As the plaintiffs' unrebutted evidence shows, a person would have to be insane to commit voter-impersonation fraud. The potential costs of perpetrating the fraud, which include a $10,000 fine and three years of imprisonment, are extremely high in comparison to the potential benefits, which would be nothing more than one additional vote for a preferred candidate (or one fewer vote for an opposing candidate), a vote which is unlikely to change the election's outcome. Tr. 1017–19, 1342. Adding to the cost is the fact that, contrary to the defendants' rhetoric, voter-impersonation fraud is not "easy" to commit. To commit voter-impersonation fraud, a person would need to know the name of another person who is registered at a particular polling place, know the address of that person, know

that the person has not yet voted, and also know that no one at the polls will realize that the impersonator is not the individual being impersonated. Tr. 1341. The defendants offered no evidence at trial to support the notion that it is easy to obtain this knowledge. Thus, given that a person would have to be insane to commit voter-impersonation fraud, Act 23 cannot be deemed a reasonable response to a potential problem.[8]

2. Promoting public confidence in the integrity of the electoral process

The defendants claim that the photo ID requirement serves the state's interest in promoting confidence in the integrity of the electoral process. It is true that the state has an interest in protecting the public's confidence in the integrity of elections so that citizens are encouraged to participate in the democratic process. *Crawford*, 553 U.S. at 197. However, the defendants produced no empirical support for the notion that Act 23's photo ID requirement actually furthers this interest. In contrast, one of the plaintiffs' expert witnesses, Barry Burden, a professor of political science at the University of Wisconsin–Madison, testified that the available empirical evidence indicates that photo ID requirements have no effect on confidence or trust in the electoral process. He described a study conducted by Stephen Ansolabehere and Nathaniel Persily and published in

[8] I also note that, if the state were concerned with preventing voter fraud from becoming a problem in the future, it would be taking steps to combat forms of voter fraud other than in-person voter impersonation. As Professor Barry Burden explained, "[i]f there is fraud taking place on any scale, it's going to be more likely to happen with absentee ballots and with voter registration, but that's not where [Act 23] targeted its efforts in an effort to stop voter fraud." Tr. 1342.

the Harvard Law Review which looked at the relationship between photo ID laws and voter confidence in the electoral process. *See* 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, 1756 (2008). Burden explained that this study employed multivariate analysis of survey data and found "zero relationship" between voter ID laws and a person's level of trust or confidence in the electoral process. Tr. 1385.

Perhaps the reason why photo ID requirements have no effect on confidence or trust in the electoral process is that such laws undermine the public's confidence in the electoral process as much as they promote it. As Professor Minnite testified, the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process:

> Q. And based on your research, do you think the public thinks there's more voter fraud than there actually is?
>
> A. Yes.
>
> Q. And why do you think that occurs?
>
> A. Well, I think people don't pay a lot of attention to these issues. I would imagine that concern about voter fraud is probably not on the very top of everyone's list of concerns with respect to public policy or so forth, and so they don't know a lot about it.

They don't know a lot about how elections are run. They don't know about all the details. They don't pay a lot of attention when politicians are fighting over ID laws. They only know what they may pick up on a little bit from the news here and there. And when you have a lot of this discussion about voter fraud when voter fraud allegations are being made and they're being picked up in the media and they're being repeated over and over and over again, the public might generally have a sense that there might be a little bit of a problem.

And I've also written about how—and this is my view, how there's kind of—we have a kind of cynicism about politics in the United States. And we have what I call the voter fraud myth, connecting to sort of the larger cultural myth about the corruption of politics and that people who engage in politics are somehow corrupt.

So it sort of connects to a broader sense to perhaps a new kind of cynicism when people are catching every now and then on the news or in the newspaper another story about somebody may have voted twice or . . . [an] "illegal" citizen may have cast an illegal ballot.

So in general, the sort of context over the last so many years that's been created to the average person, I think they don't know what to make of it.

So they defer to what we would call, in survey research, elite opinion. And when they

> hear people in important positions in government saying there's a lot of fraud out there, when this particular law is meant address all this fraud, they're going to intend to maybe take that on authority because they'll say I don't know. I don't know how to run elections. I don't hear too much about it, but I hear an important person or government official saying there's a lot of fraud, I think that's really influenced people to think that the problem is really bigger than it is.

Tr. 1019–20. Burden likewise testified that unsubstantiated allegations of voter fraud made by public officials undermine confidence in the electoral system. Tr. 1388–89. And Kevin Kennedy, the director of the GAB, in a letter to the Speaker of the Wisconsin State Assembly, offered the same opinion: "Speaking frankly on behalf of our agency and local election officials, absent direct evidence I believe continued unsubstantiated allegations of voter fraud tend to unnecessarily undermine the confidence that voters have in election officials and the results of the elections." Tr. 1389.

Another way that photo ID laws undermine confidence in the electoral process is by causing members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people. *See* Tr. 578–79, 582–83 (testimony that Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system); Tr. 951 (Lorene Hutchins, a Wisconsin voter, testified that she believes Act 23 is designed to keep certain people

from voting); Tr. 396 (testimony that many voters believe Act 23 was designed to confuse voters).

For these reasons, I conclude that Act 23 does not further the state's interest in promoting confidence in the electoral process.

3. Detecting and deterring other types of fraud

The defendants contend that the photo ID requirement will help detect and deter forms of voter fraud other than voter impersonation. However, the defendants do not adequately explain how that could be so. The first type of unlawful voting the defendants cite is "voting under invalid voter registrations." Defs.' Post-Trial Br. at 12–13. The examples the defendants give of this kind of voter fraud are voting by a registered voter who has been convicted of a felony and voting by a non-citizen who has managed to register to vote. However, the defendants do not explain how the requirement to present an ID at the polls will prevent these types of unlawful voting, and I cannot think of any way that it could. If a person is registered and has a valid ID, that person will be allowed to vote. No evidence in the record indicates that persons convicted of a felony or non-citizens will be unable to present qualifying forms of ID. The defendants also claim that the photo ID requirement will help prevent unlawful voting by registered Wisconsin voters who no longer maintain residency in the state but who have not yet been removed from the poll list and unlawful double voting by individuals who register to vote in more than one state. Again, however, the defendants fail to explain how the requirement to present a photo ID will prevent these forms of unlawful voting, and I cannot think of any way that it could. Thus, I find that Act 23 does not serve the state's interest in preventing types

of voting fraud other than in-person voter-impersonation fraud.

4. Promoting orderly election administration and accurate recordkeeping

The final state interest cited by the defendants is the state's interest in promoting orderly election administration and accurate recordkeeping. Again, there is no question that this is an important state interest. *See Crawford*, 553 U.S. at 196. However, the defendants have not identified any way in which Act 23's photo ID requirement serves this interest that is distinct from the state's interest in detecting and preventing voter fraud. *See id*. (mentioning the state's interest in promoting orderly election administration and accurate recordkeeping in the course of a discussion of the state's interest in detecting and preventing voter fraud). Thus, Act 23 serves the state's interest in orderly election administration and accurate recordkeeping only to the extent that it serves the state's interest in detecting and preventing voter fraud. For the reasons already discussed, Act 23 only weakly serves the latter interest.

B. The Burdens Imposed by Act 23

Act 23 applies to all Wisconsin residents. However, the burdens it imposes on the right to vote fall primarily on individuals who do not currently possess a photo ID. For those who already have a qualifying ID, such as a driver's license, the barrier to voting that Act 23 creates is extremely low: such individuals must simply remember to bring their IDs to the polls. But, as I will discuss, many eligible voters do not currently have a photo ID. And the daily lives of many of these individuals are such that they have not had to obtain

a photo ID for purposes such as driving.[9] For these eligible voters, the requirement that they obtain a photo ID in order to vote erects a more substantial barrier. They must do whatever it takes to gather the necessary documents and make a special trip to the DMV in order to procure an ID that they will expect to use for no purpose other than to vote.

Although it is true that those individuals who already have IDs must have at one time experienced the burdens and inconveniences of obtaining them (and must continue to experience the burdens and inconveniences of keeping their IDs valid), the photo ID requirement creates a unique barrier for those who would not obtain a photo ID but for Act 23. The individuals who obtained their IDs before the photo ID requirement went into effect (or who would today obtain an ID for reasons unrelated to voting) expect to derive benefits from having those IDs that are unrelated to voting. For example, a person who obtains a driver's license receives a daily benefit—the ability to drive—from having experienced the burden of gathering the necessary documents and visiting the DMV. Once the photo ID requirement was adopted, that person received the benefit of being able to vote

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[9] Tr. 40–41 (Alice Weddle testified that she does not have a qualifying ID, does not drive, has never flown on an airplane, has never left the United States and does not have a bank account); Tr. 55 (Plaintiff Eddie Holloway testified that he does not have a qualifying ID and has never traveled on an airplane); Tr. 207–08 (Plaintiff Shirley Brown testified that she does not have an ID and has never left the country or flown on a plane); Tr. 703–04 (Rose Thompson testified that before Act 23, she had no need for a photo ID); Tr. 434 (Kenneth Lumpkin testified that inner-city businesses understand that many of their customers do not have a photo ID and that they adapt as, for example, by cashing checks without requiring an ID).

at no additional cost. In contrast, a person whose daily life did not require possession of a photo ID prior to the imposition of the photo ID requirement is unlikely to derive any benefit from possessing a photo ID other than the ability to continue voting. Yet that person must pay the same costs—in the form of the hassle of obtaining the underlying documents and making a trip to the DMV—as the person who obtained the ID for driving. This difference in expected benefits results in Act 23 imposing a unique burden on those who need to obtain an ID exclusively for voting, with the result that these individuals are more likely to be deterred from voting than those who already possess an ID for other reasons.

Based primarily on the testimony of plaintiff's expert, Leland Beatty, a statistical marketing consultant with extensive experience in business and politics, I find that approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID.[10] To put this number in context, in 2010 the race for governor in Wisconsin was decided by 124,638 votes, and the race for United States Senator was decided by 105,041 votes. *See* LULAC Ex. 2 ¶ 10 & Table 2. Thus, the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections. In addition to these registered voters without an ID, there are a number of persons who are eligible to vote but not yet registered who lack an ID. Because Wisconsin permits same-day registration at the polls, any eligible voter may become a registered voter on election day. One of the plaintiffs' expert witnesses, Matthew Barreto, a professor at the University of Washington and an expert on voting

[10] In Appendix A, I discuss in detail how I arrived at this figure.

behavior, survey methods and statistical analysis, conducted a telephonic survey of eligible voters in Milwaukee County. Professor Barreto found that there were 63,085 eligible voters in Milwaukee County alone who lack a qualifying ID.[11]

A substantial number of the 300,000 plus eligible voters who lack a photo ID are low-income individuals who either do not require a photo ID to navigate their daily lives or who have encountered obstacles that have prevented or deterred them from obtaining a photo ID. At trial, I heard from eight witnesses who intend to vote in Wisconsin elections but who do not currently possess a qualifying photo ID. Seven of these witnesses are low income. Alice Weddle testified that she is unemployed, receives Social Security and Medicare/Medicaid benefits and has no bank accounts or credit cards. She attempted to obtain an ID but was unable to do so because she does not have a birth certificate. Eddie Holloway testified that he would be homeless if his sister did not agree to take him in, and that he is on various forms of public assistance. He testified that he attempted to obtain an ID but was unable to do so because of an error on his birth certificate that he cannot afford to have corrected. Rickey Davis testified that he is unemployed, has no bank accounts and attempted to obtain a photo ID but could not get one because he does not have a birth certificate. Shirley Brown testified that she lives on Social Security disability and attempted to obtain an ID but was unable to do so because she does not have a birth certificate. Melvin Robertson testified that he has no education beyond grade school and that he would like to obtain an ID but cannot because he lacks

[11] In Appendix B, I discuss Professor Barreto's conclusions in more detail.

a birth certificate. Rose Thompson testified that after Act 23 was enacted, she attempted to obtain an ID but could not afford to pay the fees associated with obtaining her birth certificate from Mississippi. Sim Newcomb testified that he does not drive, relies on public transportation, has not recently traveled outside the United States, does not travel on airplanes, and that to the extent he needs a photo ID for banking, he is able to use his Veteran's ID card, which is not an acceptable ID under Act 23. He testified that he attempted to obtain a Wisconsin ID card but could not satisfy the DMV's documentation requirements.[12]

Professor Barreto's research sheds additional light on the demographic makeup of those who lack an ID and lends further support to the conclusion that a substantial number of the 300,000 plus voters who lack an ID are low income. Barreto found that between 20,494 and 40,511 eligible voters in Milwaukee County who lack an ID earn less than $20,000 per year. Frank Ex. 600 at 31. As already noted, Barreto found that the *total* number of eligible voters in Milwaukee County who lack an ID is 63,085. Thus, individuals who make less than $20,000 per year comprise between 32% and 64% of the population of eligible voters without an ID. Barreto also found that 80.5% of the eligible voters without an ID have no education past the high-school level. Frank Ex. 600

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[12] Many other witnesses, including public officials and employees of service organizations, testified that they have encountered many low-income voters who lack qualifying IDs. These witnesses include Nicole Collazo-Santiago, Yolanda Adams, Carmen Cabrera, Pastor Michelle Yvette Townsend de Lopez, Anita Johnson, Kenneth Lumpkin, Richard Bolar, Jayme Montgomery Baker, and Reverend Willie Brisco. Tr. 128–30, 137–49, 154, 163–72, 371–73, 397–400, 433, 436, 445–47, 491–92, 578, 582.

at 29. Because individuals with less education are likely to be lower income,[13] this finding also shows that a substantial number of voters who lack an ID are low income.

In light of the fact that a substantial number of the 300,000 plus voters who lack an ID are low income, Act 23's burdens must be assessed with reference to them rather than with reference to a typical middle- or upper-class voter. Although the latter voter may have little trouble obtaining an ID, he or she is not the type of voter who will need to obtain one in order to comply with Act 23. Thus, in the discussion that follows, I identify the burdens associated with obtaining a qualifying photo ID and explain how they will impact low-income voters.

For almost all low-income voters who lack an ID, the easiest ID to obtain will be the free state ID card, which is issued by the DMV. To obtain a state ID card, a person generally must present documents that satisfy four requirements: (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. *See* Wis. Admin. Code § Trans 102.15. The DMV will only accept certain documents to satisfy each of these requirements.[14]

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[13] Tr. 1208 (Plaintiffs' expert, Marc Levine, a Professor of History, Urban Studies and Economic Development at the University of Wisconsin-Milwaukee, testified that education levels correlate "quite highly" with levels of employment.).

[14] The DMV allows a person to apply for either a REAL ID compliant or non-compliant card. A REAL ID compliant card is a card that satisfies the minimum issuance standards set out in the REAL ID Act of 2005, and it will be accepted by the federal government for official purposes (such as entering a federal building or boarding a commercial airplane). In this opinion, I set

However, if a person has a Wisconsin driver's license or state ID card that has been expired for fewer than eight years, the person will be allowed to renew using a procedure that generally requires only proof of a social security number. Tr. 1092–94; Defs.' Ex. 1074.

To prove name, date of birth and United States citizenship, most people will need to produce a birth certificate. The evidence at trial showed that a substantial number of eligible voters who lack Act 23-qualifying IDs also lack birth certificates. Professor Barreto, in his survey of Milwaukee County eligible voters, found that 25,354 persons lacked both a qualifying ID and a birth certificate.[15] Tr. 301–02. Seven of the witnesses who testified about their own lack of a qualifying ID stated that it was the lack of a birth certificate that was preventing them from obtaining an ID. Tr. 37–38, 93–94, 209–11, 401, 418–19, 708–09; Frank Ex. 606 at 7–12.

To obtain a Wisconsin birth certificate, a person must produce either a driver's license or a state ID card or two documents from the following list: (1) a government-issued ID with photograph, (2) a United States passport, (3) a checkbook or bankbook, (4) a major credit card, (5) a health-insurance card, (6) a recent, signed lease, or (7) a utility bill or traffic ticket. Tr. 1663; Frank Ex. 138. The person must also

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out the requirements for obtaining a non-compliant card because they are a little more flexible.

[15] Of those who lacked both an ID and a birth certificate, some were able to satisfy the name, date of birth, and citizenship requirements using other documents, and thus only 20,162 of the 25,354 persons who lacked birth certificates would have been unable to satisfy those requirements. Tr. 301–02.

pay a fee of $20. Wis. Stat. § 69.22(1)(a).[16] Those who were not born in Wisconsin will need to determine how to obtain a birth certificate from their place of birth. It generally takes more time and expense to obtain a birth certificate from outside one's state of residence than it does to obtain a birth certificate from within the state. *See* LULAC Ex. 811 ¶ 60. Professor Barreto found that 46.9% of eligible voters in Milwaukee County who lack both an accepted photo ID and a valid birth certificate were born outside Wisconsin. Frank Ex. 600 at 24.

Individuals who need a free state ID card must also produce a document that the DMV will accept as proof of identity. Professor Barreto found that there are approximately 1,640 eligible voters in Milwaukee County alone who do not have qualifying photo IDs and do not have any of the documents the DMV accepts to prove identity. Frank Ex. 600 at 37. Newcomb, one of the eight witnesses who testified about their inability to obtain an ID, testified that when he tried to obtain a state ID card he was unsuccessful because he lacked proof of identity. Tr. 845–46. Other witnesses, Dewayne Smith and Carl Ellis, testified that they did not have proof of identity when Act 23 first passed and had to obtain such proof before they could apply for state ID cards. Tr. 562–63, 566–67, 856–58.

Most voters who do not have proof of identity will need to procure a social security card, as this is the most commonly available document to use to prove identity. Defs.' Ex. 1077; Tr. 467, 1819. To obtain a

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[16] After the passage of Act 23, two Wisconsin counties, Dane and Milwaukee, allocated sums to pay for Wisconsin birth certificates for persons born in those counties. Tr. 494, 535–36, 1793.

social security card, a person must visit the Social Security Office and show "convincing documentary evidence of identity." 20 C.F.R. § 422.10(c). Such 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." *Id*. Voters who need free state ID cards to vote will not have driver's licenses, state ID cards or passports, so they will need to present one of the other items on the list. If they do not have one of these items, they will need to procure one by visiting a school, hospital or another governmental agency, where they may again be asked for an ID, and the document may cost money. *See* Tr. 857 (Smith had to ask his sister to show the hospital her photo ID so he could get his medical records to apply for a social security card); Tr. 121 (marriage certificate from the State of Illinois costs $11).

The remaining documentary requirement to obtain a state ID card is proof of residence. For most voters, this requirement will be easy to satisfy, as the DMV accepts a variety of documents that most individuals are likely to have on hand. Still, homeless voters who do not have a relationship with a social-service agency will be unable to prove residency. Tr. 1889 (homeless people can only prove residence by getting a letter from a social service agency). And they will be unable to provide the DMV with a physical address where it can send their ID cards once they are ready. *Id*. This will make it impossible for them to obtain a state ID card because the DMV does not allow individuals to pick up ID cards in-person. *Id*.

Having explained the general legal requirements for obtaining a free state ID card and identified the

necessary underlying documents, I consider the practical obstacles a person is likely to face in deciding whether to obtain an ID for voting purposes. Again, because most individuals who lack ID are low income, I consider these obstacles from the perspective of such an individual.

The first obstacle to obtaining an ID will be to identify the requirements for obtaining a free state ID card. I am able to summarize the requirements for obtaining an ID because I have access to the Wisconsin Statutes and Administrative Code and heard testimony on the topic at trial. A typical voter who needs an ID, however, must educate him or herself on these requirements in some other way. Although this may be easy for some, for others, especially those with lower levels of education, it will be harder. Moreover, a person who needs to obtain one or more of the required documents to obtain an ID, such as a birth certificate, must determine not only the DMV's documentation requirements, but also the requirements of the agency that issues the missing document. This adds a layer of complexity to the process. *See*, *e.g.*, Tr. 93–94 (Davis testified that the DMV told him he needs to order his birth certificate from Tennessee but he has no idea how to go about ordering it).

Assuming the person is able to determine what he or she needs to do to obtain an ID, the person must next consider the time and effort involved in actually obtaining the ID. This will involve at least one trip to the DMV. There are 92 DMV service centers in the state. Defs.' Ex. 1071. All but two of these close before 5:00 p.m. and only one is open on weekends. Tr. 1083–84, 1806–07. So, it is likely that the person will have to take time off from work. The person will either need to use vacation time if it's available or forego the

hourly wages that he or she could have earned in the time it takes to obtain the ID. *See* Tr. 845 (Newcomb was unable to take paid time off from work to obtain an ID). The person will also have to arrange for transportation. Since this person does not have a driver's license and is low income, most likely he or she must use public transportation or arrange for another form of transportation. *See* Tr. 845–46 (Newcomb does not have a car and had to take a 45-minute bus ride to get to the DMV); Tr. 211 (Brown paid $3.00 each way to a driver from Medicare so she could get to the DMV); Tr. 562, 566–67 (Ellis walked to the DMV, which took 45 minutes each way, because he does not have a car and could not afford bus fare); Tr. 151–52 (Adams testified that the DMV in Kenosha is "out in the county," which means people who live in the inner-city and do not have cars must take the bus to get there); Tr. 430–33 (Lumpkin stated that the location of the DMV in Racine County is a problem because it 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); *see also* Frank Ex. 635 at 50–51 (GAB received a lot of complaints from voters who were having a hard time getting to the DMV, even from people in the City of Milwaukee, which has a "pretty good" public transportation system). Further, for some individuals public transportation will be of no help because not all of the DMV's service centers are accessible by public transit. Tr. 1848.

If the person does not have all of the documents the DMV requires to obtain an ID, then the person will most likely have to visit at least one government agency in addition to the DMV. If that is the case, then the person will likely have to take even more time off of work and pay additional transportation costs. Tr. 856–58 (Smith testified that he had to take the bus

and ask for rides from others in order to visit the DMV, the Social Security Office, and other locations). Perhaps it is possible for a person to obtain a missing underlying document by mail, but even so that will require time and effort.

A person who needs to obtain a missing underlying document is also likely to have to pay a fee for the document. For some low-income individuals, it will be difficult to pay even $20.00 for a birth certificate. *See* Tr. 1988–89 (Robert Spindell, a member of the Board of Election Commissioners for the City of Milwaukee, stated that he personally knows individuals who will cannot pay even $20.00 for a birth certificate); *see also* Tr. 431–32 ("[W]hen the choice is made whether or not to pay $33 for an ID or to put some food on the table, I think any of us can kinda guess which way people will go."). Three witnesses, Thompson, Davis and Ellis, testified that they could barely afford to pay for a birth certificate. Tr. 88, 564–66, 704–05. And Raymond Ciszewski testified that he has met many low-income individuals in Milwaukee who have trouble paying for their birth certificates. Ciszewski is a volunteer at St. Benedict's Church in Milwaukee. Tr. 530–31. He works in the church's birth-certificate program, which helps low-income individuals obtain birth certificates by paying the birth-certificate fee to the extent it exceeds $5.00. Tr. 534–35. The program primarily serves homeless individuals, persons recently out of jail and persons in rehabilitation programs. Tr. 532–33. Ciszewski testified that over the last seven years he has helped over 600 people acquire birth certificates who would not otherwise have been able to afford them, and many of these people could barely

afford the $5.00 co-pay the church requires. Tr. 532, 534–36.[17]

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[17] Some voters will find that there is no birth certificate on file for them in the states where they were born. This is not a common problem, but it will affect some voters. Tr. 1103, 1161. Melvin Robertson and Nancy Wilde testified that they were born in Wisconsin, but the Wisconsin Vital Records Office does not have birth certificates on file for them. Tr. 401, 418–19 (Robertson); Frank Ex. 607 at 6–14 (Wilde). Missing birth certificates are also a common problem for older African American voters who were born at home in the South because midwives did not issue birth certificates. Tr. 37–38, 205–06, 209, 372, 431, 700. And Amish Mennonite voters frequently lack birth certificates. Tr. 1856–57. There are also some voters whose official birth records have been destroyed, for example, in a natural disaster like Hurricane Katrina. Tr. 479–80, 1856–57.

If there is no birth record on file in a person's state of birth, a person can use the MV3002 procedure to prove citizenship and name and date of birth. This procedure requires a person to ask his or her state of birth to complete DMV form MV3002, certifying that there is no birth record on file. Wis. Adm. Code § Trans. 102.15(1), (3)(b). A person must then submit the completed MV3002 to a DMV team leader or supervisor for review along with alternative documentation that provides "strong evidence" of the person's "name, date of birth and place of birth." Tr. 1872; *see also* Wis. Adm. Code § Trans. 102.15(1), (3)(b). Team leaders and supervisors have the discretion to decide on a case¬by-case basis whether a person's alternative documentation is "strong" enough. Tr. 1872; Wis. Adm. Code § Trans. 102.15(3)(c). As a result, whether a voter is able to obtain a state ID card will depend on which DMV service center the voter visits and which supervisor is on duty.

The DMV does not, however, publicize the MV3002 procedure because it wants to minimize exceptions. Tr. 474, 1872, 1877–78. As a result, a person who needs to use the MV3002 may never learn about it. Consequently, those who need to use it are more likely to give up trying to get an ID than to be granted an exception. The testimony of Debra Crawford illustrates this problem. Crawford testified that she first took her mother, Bettye

An additional problem is whether a person who lacks an ID can obtain one in time to use it to vote. For many who need an ID, it will take longer than a day or two to gather the necessary documents and make a

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Jones, to the DMV service center in Waukesha County to get a free state ID card for voting purposes. But a customer service representative at the DMV told Jones she could not get a state ID card because she did not have a certified copy of her birth certificate. Tr. 60–61. Crawford explained that her mother was born at home in Tennessee in 1935 and had never been issued a birth certificate, and Jones offered the DMV an official letter from the State of Tennessee stating that it had no birth record on file. Tr. 56–57, 61–62. The customer service representative told her this was not sufficient. Tr. 62. Crawford asked to speak with a manager, and the manager agreed with the front-line staff member and insisted that Jones produce a birth certificate. Tr. 62.

Crawford asked the vital-records office in Tennessee to conduct another search, which again produced no birth record. Tr. 64. She then started the complicated process of applying for a delayed birth certificate. Tr. 64–72. While she was doing this, she contacted the DMV again via email to confirm that the birth certificate really was required and was again told that it was. Tr. 74. When she asked a third time if an exception could be made for extenuating circumstances, she was told, "The supervisor at the DMV station you go to has the authority to make exceptions; however, I doubt one would be made for not having either a birth certificate or passport." Tr. 74. Once she learned that supervisors had some discretion, Crawford decided to take her mother to the DMV service center in Milwaukee County in the hopes of finding a more helpful supervisor. Tr. 75. There the supervisor agreed to waive the birth certificate requirement after viewing Jones's alternative documentation. Tr. 75. If Crawford had known about the MV3002 procedure, Jones's experience with the DMV might have been much different. As it was, Jones only received a state ID card because her daughter made multiple inquiries and took Jones to two different DMV service centers. A voter in Jones's position who is less tenacious will have to go through the difficult process of obtaining a delayed birth certificate in order to preserve her right to vote.

trip to the DMV. Indeed, if a person needs to obtain a birth certificate, especially from another state, it might take weeks or longer to obtain it. Tr. 1114, 1660–61. If an election is imminent, a person may be unable to procure an ID in time to vote or to validate a provisional ballot by the Friday after the election.

Another problem that arises is a person's having errors or discrepancies in the documents needed to obtain an ID. For example, the DMV requires the name on a person's social security card and birth certificate to match. If there is an error in a person's social security record, the person must visit the Social Security Office and correct the record. Tr. 1884.[18] If there is an error in a person's birth certificate, the person must get it amended.[19] Making additional trips

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[18] Janet Turja, a manager at the DMV's service center in Waukesha County, testified that she encounters individuals with errors in their social security records about once or twice a week. Tr. 480. And Diane Hermann-Brown testified that she had to take her mother to the Social Security Office because her middle name was "Lois" but Social Security had it listed as "Loise." Tr. 1795–96.

[19] Six witnesses testified at trial that they have had problems with birth certificates, either their own or a parent's, that contained errors that the DMV said had to be corrected. *See* Tr. 43–51 (Holloway's name is "Eddie Lee Holloway, Jr." but the birth certificate says "Eddie Junior Holloway" and he has not been able to correct it); Frank Ex. 606 at 8–9; Frank Ex. 1087 (Ruthelle Frank's maiden name was "Wedepohl" but it is spelled "Wedepal" on her birth certificate); Tr. 952–53, 965–68 (Lorene Hutchins's birth certificate was missing her first name); Tr. 95–100 (Genevieve Winslow's maiden name was "Genevieve Kujawski" but her birth certificate says "Ganava Kujansky"); Tr. 113–14 (Miriam Simon's mother's maiden name was "Shirley Grace Mendel" but birth certificate says "Genevieve Shirley Mendel"); Tr. 1615–16 (William Trokan's father's name was "Andrew Trokan" but birth certificate says "Andro Trokan"). Amending a birth certificate can be expensive and time-

to government agencies to resolve discrepancies will require more time off work and additional transportation costs.

The defendants contend that the burden on those with errors or discrepancies in their underlying documents is mitigated by the fact that the DMV has discretion to grant exceptions. Although it is true that the DMV will sometimes make exceptions for such persons, this fact is not made known to applicants, Tr. 1121–24, 1891–94, and thus those who might benefit from the exception procedure are unlikely to learn of it. Consequently, those with errors in their underlying documents are more likely to give up trying to get an ID than to be granted an exception. The testimony of Genevieve Winslow illustrates this problem. Winslow is eligible to vote in Wisconsin. She testified that she did not have a qualifying photo ID when Act 23 went into effect, so she visited the DMV service center in Milwaukee County on Grange Avenue to apply for a

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consuming. The process depends on a person's state of birth and the type of error in the birth certificate, but most states charge a fee for an amended birth certificate. *See*, *e.g.*, Wis. Stat. § 69.22(5)(a) (standard fee for an amended birth certificate in Wisconsin is $30.00), *see also* Frank Ex. 606 at 9–10 (Frank was told it could cost up to $200.00 to get her Wisconsin birth certificate amended). And a person might need to travel to the place where he or she was born to collect documents that verify the person's name, date of birth, or place of birth, such as early school records or a baptismal certificate. *See* Tr. 569–71 (the birth date on Reverend Willie Brisco's Mississippi birth certificate was wrong and his grandmother in Mississippi had to collect his hospital and school records and travel 210 miles to apply for an amendment for him). A person might even have to hire a local attorney to apply for an amendment. Tr. 959–63 (to get her Mississippi birth certificate amended Katherine Clark had to hire an attorney and the process took more than six months and cost more than $2000).

free state ID card for voting purposes. Tr. 111. She brought with her a certified copy of her birth certificate, a certified copy of her marriage certificate, her social security card, her Medicare card, her property tax bill and her expired passport. Tr. 106. But the DMV employee who reviewed her application told her she could not get an ID because her name is misspelled on her birth certificate. Tr. 99–100. Her maiden name was Genevieve Kujawski, but her birth certificate says "Ganava Kujansky" (Ganava is the Polish version of Genevieve). Tr. 95–96. The employee told Winslow she would need to get her birth certificate amended. Tr. 106–07. Winslow and her son asked to speak with two different supervisors, who both agreed that Winslow would need to get an amended birth certificate. Tr. 107. Her son was frustrated by this experience and decided to call Winslow's state senator, Senator Tim Carpenter. Tr. 100–01. An aide in the senator's office told Winslow's son to contact James Miller, an official at the DMV. Tr. 100–01, 109–10. Miller said Winslow should return to the same DMV service center with the same documentation and ask for a particular supervisor. Tr. 110–11. When she did this, the DMV issued her an ID. Tr. 111–12. No one ever explained to Winslow why she was able to get an ID. They just told her it was a "special deal." Tr. 101.[20]

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[20] Two other witnesses testified that to get an exception they also had to get a public official involved. Miriam Simon testified that her mother, Shirley Simon, who passed away shortly before trial, was eligible to vote in Wisconsin. Simon took her mother to the DMV service center in Milwaukee County on Mill Road after the passage of Act 23 so she could obtain a free state ID card for voting purposes. Tr. 116. Her mother brought a certified copy of her birth certificate, her social security card and a utility bill. Tr. 117. But the employee at the DMV who reviewed Simon's mother's application told her she could not get a state ID card

because there was an error on her birth certificate. Tr. 118–19. Her mother's maiden name was Shirley Grace Mendel, but her birth certificate said "Genevieve Shirley Mendel." Tr. 113–14. All of her other documentation listed her married name, which was "Shirley M. Simon." Tr. 117. Simon had anticipated a problem with her mother's birth certificate and had brought an affidavit from her uncle explaining that the hospital had made an error when submitting the information for the birth certificate. Tr. 117–18. The affidavit was drafted in the 1970s and her mother had previously used it to obtain a passport. *Id*. The DMV employee said the affidavit was insufficient and suggested that Simon's mother get an amended birth certificate. Tr. 118–19. Like Winslow, Simon was frustrated by this experience and decided to call her mother's state senator, Senator Chris Larsen, for help. An aide in the senator's office told Simon that the senator would have someone from the DMV call her. Tr. 119–20. Shortly thereafter, she received a call from DMV supervisor Barney Hall. Tr. 120–21. He told her that if she got a marriage certificate for her mother, the DMV would be able to issue her an ID. *Id*. She did this and returned to the DMV where a supervisor issued her mother a state ID card. Tr. 122–23.

William Trokan testified that he took his father, Andrew Trokan, to the DMV in Milwaukee County on Mill Road to get a free state ID card for voting purposes. Tr. 1614–15. His father brought a certified copy of his birth certificate, his social security card, his employee ID from Milwaukee County and a utility bill. Tr. 1615. But the DMV employee who reviewed his father's application said he could not get an ID because his birth certificate listed his first name as "Andro," which is the Slovak spelling of Andrew. Tr. 1615. All of his other documentation said "Andrew." Tr. 1615–16. Trokan asked to speak with a supervisor, but the supervisor agreed that the birth certificate would need to be amended before the DMV could issue a state ID card. Tr. 1616. Trokan left frustrated and, like Winslow, called Senator Carpenter. Tr. 1616–1617. Senator Carpenter said he would set up an appointment for Trokan and his father to return to the DMV. Tr. 1617–18. During this second visit, the DMV issued Trokan's father a state ID card. Id.

Kristina Boardman, the deputy administrator of the DMV, testified that the DMV has also received emails from public

Given the obstacles identified above, it is likely that a substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting. Although not every voter will face all of these obstacles, many voters will face some of them, particularly those who are low income. And the evidence at trial showed that even small obstacles will be enough to deter many individuals who lack an ID from voting. Professor Burden testified about the "calculus of voting," which is "the dominant framework used by scholars to study voter turnout." LULAC Ex. 811 at 811; Tr. 1278–83. Under this framework, even small increases in the costs of voting can deter a person from

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officials on behalf of other voters who had trouble obtaining state ID cards, and high-ranking DMV officials have intervened on behalf of those voters. For example, she received an email from Senator Carpenter's office about Leo Navulis, a voter who was denied a free state ID card because his name is spelled wrong on his birth certificate. Tr. 1109. Navulis visited the DMV service center in Milwaukee County on Chase Avenue and presented a certified copy of his birth certificate and a social security card, but he was turned away because his social security card said "Leo Peter Navulis" while his birth certificate said "Leo Packus Navwulis." Frank Ex. 428. Boardman reviewed Navulis's case and told the supervisor at the DMV service center to make an exception and issue Navulis an ID. *Id*. Boardman also received some emails from Governor Scott Walker's office asking officials at the DMV to assist voters who were having trouble obtaining state ID cards. For example, she received an email about Audrey Anderson, who had asked the governor for help because her mother had been denied an ID because there were errors in her birth certificate. Tr. 1861–63; Frank Ex. 429. In response to the email, Boardman asked another DMV official to meet with Anderson and try to resolve the situation. *Id*.

voting, since the benefits of voting are slight. Tr. 1279–80. As Burden explained:

> [The framework] suggests that voting is a low-cost, low-benefit activity and that very slight changes, marginal changes in the costs can have large effects on participation. So even small factors like weather or illness, day-to-day interruptions can deter a person from voting. Obviously administrative costs imposed by the state could be part of that as well.

Tr. 1279–80; *see also* Tr. 1220–21 (Professor Levine also testified about the calculus of voting). Thus, for many voters who lack an ID, even minor burdens associated with obtaining one will be enough to deter them from voting. *Cf. Crawford* 472 F.3d at 951 ("[E]ven very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in."). But in light of the evidence presented at trial, it is also clear that for many voters, especially those who are low income, the burdens associated with obtaining an ID will be anything but minor. Therefore, I conclude that Act 23 will deter a substantial number of eligible voters from casting a ballot.

C. Weighing the Burdens Against the State Interests

In the previous section I determined that Act 23's burdens will deter or prevent a substantial number of the 300,000 plus voters who lack an ID from voting. "Substantial" is of course not a precise quantity, but a more precise measurement is impracticable. There is no way to determine exactly how many people Act 23 will prevent or deter from voting without considering

the individual circumstances of each of the 300,000 plus citizens who lack an ID. But no matter how imprecise my estimate may be, it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes. *Cf. Crawford*, 472 F.3d at 953–54 (assessing whether "there are fewer impersonations than there are eligible voters whom the [Indiana photo ID] law will prevent from voting"). Thus, Act 23's burdens are not justified by the state's interest in detecting and preventing in-person voter impersonation. Moreover, because the state's interest in safeguarding confidence in the electoral process is evenly distributed across both sides of the balance—a law such as Act 23 undermines confidence in the electoral process as much as it promotes it—that interest cannot provide a sufficient justification for the burdens placed on the right to vote. Accordingly, the burdens imposed by Act 23 on those who lack an ID are not justified.

Having found a violation of the Fourteenth Amendment, I turn to the appropriate remedy. The lead opinion in *Crawford* noted that, even if the Indiana photo ID law placed an unjustified burden on some voters, the plaintiffs had not demonstrated that the proper remedy would be to invalidate the entire statute. 553 U.S. at 203. In the present case, however, invalidating Act 23 is the only practicable way to remove the unjustified burdens placed on the substantial number of eligible voters who lack IDs. The plaintiffs suggest that I could order the defendants to allow eligible voters without photo IDs to vote without showing an ID or by signing an affidavit affirming their identities and lack of an ID. However, ordering such relief would be the functional equivalent of enjoining the current law and replacing it with a new law drafted by me rather than the state

legislature. It is not clear that this approach would amount to a narrower remedy than simply enjoining the current law. Moreover, the Supreme Court has instructed the federal courts to avoid "judicial legislation," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 (1995), and this is an apt term for the remedy envisioned by the plaintiffs. To grant this remedy, I would need to make a policy judgment as to whether eligible voters who do not have IDs should be required to sign affidavits of identity before receiving a ballot. And, if I found that an affidavit was required, I would need to decide what language the affidavit should contain. Once I issued this relief, I would have to supervise the state's election-administration officials to ensure that they were properly implementing my instructions. These tasks are outside the limited institutional competence of a federal court, and therefore I may not rewrite the photo ID requirement to conform it to constitutional requirements. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329–30 (2006). I conclude that the only practicable remedy is to enjoin enforcement of the photo ID requirement.[21]

III. Section 2 of the Voting Rights Act

Both the *LULAC* plaintiffs and the *Frank* plaintiffs contend that Act 23's photo ID requirement violates Section 2 of the Voting Rights Act. Before addressing the merits of this claim, I address the defendants' argument that the *LULAC* plaintiffs lack standing to sue under the Voting Right Act.

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[21] I also note that the defendants have not suggested that any remedy other than enjoining enforcement of the photo ID requirement would be an appropriate remedy in this case.

A. Standing of LULAC plaintiffs

The defendants contend that the four *LULAC* plaintiffs lack standing to pursue a claim for injunctive relief under Section 2 of the Voting Rights Act. Whether they do has little practical significance, as the plaintiffs in the *Frank* case unquestionably have standing to pursue a claim for injunctive relief under Section 2, and only one plaintiff with standing is needed. *See Crawford*, 472 F.3d at 951. Nonetheless, because one or more of the plaintiffs with standing might drop out of this case before it is finally resolved, I will determine whether all four of the *LULAC* plaintiffs have standing to seek injunctive relief under Section 2.

The defendants argue that the *LULAC* plaintiffs lack Article III standing and also lack what is known as "statutory standing." I will begin with Article III standing, which requires a plaintiff to show that he or she has suffered an injury in fact that is fairly traceable to the challenged acts of the defendant and that is likely to be redressed by a favorable judicial decision. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *Id*. at 561. We are at the trial stage of this case, and so the elements of standing must be supported by the evidence adduced at trial. *Id*. The only element of Article III standing that is in dispute is whether the *LULAC* plaintiffs have suffered an injury in fact. For this reason, I will not discuss the traceability or redressability elements.

The *LULAC* plaintiffs contend that they have established standing in two ways. First, they contend that they have standing to seek redress for their own injuries. Second, they contend that they have "associational" standing, which allows an organizational plaintiff to bring suit to redress an injury suffered by one or more of its members, even if the organization itself has not been injured. *See*, *e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Turning first to the question of whether the *LULAC* plaintiffs have suffered their own injuries, I conclude that they have. It is well-established that an organization suffers a cognizable injury in fact when it devotes resources, however minimal, to dealing with effects of a law that are adverse to its interests. *See*, *e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Crawford*, 472 F.3d at 951. I find based on the evidence adduced at trial that all four *LULAC* plaintiffs have devoted resources to dealing with the effects of Act 23 and would devote additional resources to dealing with those effects if the state-court injunctions were lifted. Each plaintiff devoted resources to educating its members and others whose interests it serves about the law and to helping individuals obtain qualifying forms of photo ID, and each plaintiff would do so again if Act 23 were reinstated. Tr. 146–49, 185–88 (LULAC); Tr. 375, 386 (Cross Lutheran Church); Tr. 343–47, 357–58 (Milwaukee Area Labor Council); Tr. 489–92, 519–20 (Wisconsin League of Young Voters). Accordingly, all four plaintiffs have standing to seek injunctive relief to redress their own injuries.

The defendants advance two reasons why the *LULAC* plaintiffs do not have standing in their own right. First, relying on a case from the Fifth Circuit,

the defendants point out that not every diversion of resources establishes an injury in fact. *See NAACP v. City of Kyle, Texas*, 626 F.3d 233, 238 (5th Cir. 2010). But *Kyle* does not suggest that the diversion of resources demonstrated by the plaintiffs in this case fails to qualify as an injury in fact. The resources found insufficient in that case were resources spent litigating the very claim at issue in the suit.[22] *Id*. at 238. In the present case, no plaintiff is claiming litigation expenses as an injury in fact. Rather, they point to resources expended on educating their members and others about the requirements of Act 23 and on ensuring that those members and others obtain forms of identification that would allow them to vote. This is precisely the kind of expenditure of resources that the Seventh Circuit deemed sufficient to support standing in *Crawford*, 472 F.3d at 951.

Second, the defendants contend that the *LULAC* plaintiffs lack standing because they voluntarily spent resources in response to Act 23 and were not compelled to do so. This argument, as another court has recognized, "finds no support in the law." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008). If a voluntary as opposed to compelled expenditure of resources were insufficient to confer standing, then *Crawford* was wrongly decided, as Indiana's photo-identification law did not

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[22] The court also found that although the plaintiffs claimed to have spent resources on "prelitigation" activities, they failed to prove that they actually expended resources on such activities in response to the challenged law. *Kyle*, 626 F.3d at 238–39. The court found the plaintiffs had only "conjectured" that in the absence of the law they would have spent their resources elsewhere. *Id*. at 239. In the present case, I find that the *LULAC* plaintiffs have shown concretely that but for Act 23, they would have spent their resources elsewhere.

"compel" the Democratic Party to expend resources on getting its supporters to the polls.[23] *Crawford*, 472 F.3d at 951. The only support the defendants can find for their argument is a single sentence in a Seventh Circuit opinion, which the defendants take out of context. The sentence is "No one has standing to object to a statute that imposes duties on strangers." *Freedom From Religion Foundation v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011). Taken out of context, this sentence implies that a person lacks standing to challenge a statute unless the statute imposes a legal duty on him or her, and that therefore a voluntary expenditure of resources made in response to the effects of the statute would not qualify as an injury in fact. But the law at issue in that case was a law requiring the President of the United States to issue each year a proclamation designating the first Thursday in May as a National Day of Prayer. *Id*. at 805. This law imposed no duties on anyone other than the President, and in addition it could not have prompted the plaintiff or anyone other than the President to expend any resources at all, voluntarily or not. Thus, placed in its proper context, the sentence cited by the defendants stands for the simple proposition that a person does not have standing to challenge a law that causes him or her no injury in fact. It does not stand for the proposition that a voluntary expenditure of resources does not qualify as an injury in fact.

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[23] I realize that the opinion in *Crawford* states that the Indiana law "compell[ed]" the Democratic Party to devote resources to getting its supporters to the polls, but it is obvious that the opinion was not using "compelled" in the sense of "required by law." The Indiana law did not require the Democratic Party to do anything.

Having found that the *LULAC* plaintiffs have standing to sue to redress their own injuries, I need not decide whether they also have standing to sue on behalf of their members. However, in the event that it becomes a relevant question on appeal, I will determine whether the *LULAC* plaintiffs also have standing to sue on behalf of their members. An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343.

With respect to the first *Hunt* element, a member of one of the plaintiffs would have standing in his or her own right if that member is suffering an injury in fact. The defendants argue that the only way a member of the plaintiffs—that is, an individual voter—could be suffering an injury as a result of Act 23 is if that member currently lacks an acceptable form of photo ID and is unable to obtain an acceptable form of photo ID. However, the part of Act 23 that the plaintiffs challenge is the provision requiring a voter to *present* a photo ID at the polls. It is the need to present such an ID that injures a voter and confers standing to sue. *See Common Cause / Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) (holding that "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing"). This means that even those members of the plaintiffs who currently possess an acceptable form of ID have standing to sue. *Id*. at 1352 ("[T]he lack of an acceptable photo identification is not necessary to challenge a statute

that requires photo identification to vote in person.").[24] Thus, every member of the plaintiff organizations who is a Wisconsin voter has suffered an injury in fact. As the defendants do not dispute that each plaintiff has members who intend to vote in Wisconsin elections, I conclude that all four LULAC plaintiffs have members who are injured by Act 23.

Moreover, even if the lack of an acceptable photo ID were a prerequisite to standing, at least one of the *LULAC* plaintiffs, Cross Lutheran Church, has members who lack such an ID. Weddle, an African American member of the Church, testified at trial that she currently does not possess an acceptable form of photo identification. Tr. 35–36. I find her testimony credible and conclude that she does not, in fact, possess an acceptable form of photo identification. The defendants contend that Weddle could if she tried hard enough obtain an acceptable form of identification, but this has no bearing on her standing to sue. The premise of this lawsuit is that voters should not have to bear the burdens associated with obtaining and presenting identification in order to vote. A plaintiff who must bear those burdens in order to vote is necessarily injured by Act 23, whether or not he or she would be successful in obtaining and presenting an ID. Accordingly, I find that Cross Lutheran Church has members who have standing to challenge Act 23 on the ground that they lack acceptable forms of ID.[25]

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[24] I also note that IDs expire, and so even if a person currently holds a valid ID, Act 23 burdens that person with the obligation of keeping it valid.

[25] A representative of Cross Lutheran Church testified that it has members besides Weddle who lack acceptable forms of identification. Tr. 373. From this testimony, I conclude that

The second *Hunt* element requires that the lawsuit be "germane" to the organization's purpose. I find that this lawsuit is germane to each *LULAC* plaintiff's purpose. LULAC's mission is to "advance the economic condition, educational attainment, political influence, housing, health, and civil rights of the Hispanic population of the United States." Tr. 158–59. It is hard to imagine a suit that is more germane to this mission than the present suit, which seeks to remove a barrier to minority participation in the political process and thus advance the political influence of Hispanics. Cross Lutheran Church believes that God requires it to fight for the civil rights of its members. Tr. 365–66, 377–78. Again, it is hard to imagine a suit that is more germane to this purpose than the present suit. One of the purposes of the Milwaukee Area Labor Council is "[t]o organize for social and economic justice, to propose and support legislation that is beneficial to working families, and to oppose legislation that harms working people." Tr. 342–43. Again, the present suit is germane to this purpose. Finally, this lawsuit is obviously germane to one of the purposes of the League of Young Voters Education Fund, which is to encourage young people of color to vote. Tr. 518.

The third *Hunt* element asks whether the claim asserted or the relief requested requires the participation of the organization's members in the lawsuit. I conclude that the participation of members is not required. The claims were tried without substantial participation by the plaintiffs' members, and nothing about the relief requested—an injunction—requires

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Weddle is not the only member of the Church who lacks acceptable identification.

their participation. Accordingly, this element is satisfied.

Having concluded that the four *LULAC* plaintiffs have Article III standing, I turn to the defendants' remaining standing argument, which is that the plaintiffs lack "statutory standing." As I noted in a prior opinion, *LULAC* ECF No. 84, "statutory standing" is not a matter of standing in the Article III sense but a question of substantive law. The question is whether the statute under which the plaintiffs sue, here Section 2 of the Voting Rights Act, authorizes the plaintiffs to sue. *See Steel Co v. Citizens for a Better Environment*, 523 U.S. 83, 92 (1998).

With respect to that question, Section 2 allows suits to be instituted by "aggrieved person[s]." *See* 42 U.S.C. § 1973a. The Supreme Court has determined that similar language in Title VII of the Civil Rights Act of 1964 incorporates the "zone of interests" test. *Thompson v. North American Stainless, LP*, __ U.S. __, 131 S.Ct. 863, 870 (2011). Under this test, a plaintiff may not sue unless he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. Id. at 870. The test denies a right to sue where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id*. (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)).

The defendants contend that only individuals seeking to enforce their right to vote are within the zone of interests of Section 2, and that organizations seeking to protect the voting rights of individuals are not within the zone of interests. I disagree. The word "person" in an act of Congress is presumed to include

organizations, *see* 1 U.S.C. § 1, and thus the text of the statute does not suggest that a cause of action under Section 2 is limited to individuals. Moreover, the Senate Report on the bill that added the "aggrieved persons" language to the Voting Rights Act confirms that Congress intended to confer a right to sue on organizations seeking to protect the voting rights of their members and others. *See* S. Rep. No. 94-295, at 40 (1975), *reprinted* in 1975 U.S.C.C.A.N. 774, 806–07 ("An 'aggrieved person' is any person injured by an act of discrimination. It may be an individual or an organization representing the interests of injured persons."). The evidence adduced at trial establishes that all four *LULAC* plaintiffs are organizations representing the interests of individuals whose voting rights are burdened by Act 23. Therefore, I find that all four *LULAC* plaintiffs fall within the zone of interests of Section 2 and are aggrieved persons within the meaning of Section 2.

In support of their argument that the plaintiffs are not aggrieved persons, the defendants cite *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989), and various district court cases that rely on *Roberts*.[26] In *Roberts*, the Eighth Circuit held that "an unsuccessful candidate attempting to challenge election results does not have standing under the Voting Rights Act." 883 F.2d at 621. Neither this holding nor the reasoning that led to it supports the defendants' argument that organizations representing the interests of injured voters cannot be aggrieved persons under Section 2. In

[26] The defendants cite one district court case that does not rely on *Roberts*, *Assa'ad–Faltas v. South Carolina*, 2012 WL 6103204 (D.S.C. Nov. 14, 2012), but as I cannot see any way in which that case supports the defendants' argument, I will not discuss it further.

fact, the Eighth Circuit implied that had the plaintiff in Roberts been suing to protect the rights of other voters, he would have been an aggrieved person. *Id*. ("Nor does Roberts allege that he is suing on behalf of persons who are unable to protect their own rights."). Accordingly, the defendants' reliance on *Roberts* and the district court cases decided in its wake is misplaced.

In sum, I find that all four *LULAC* plaintiffs have Article III standing in two ways: they have standing to seek redress for their own injuries and also associational standing. I also find that all four plaintiffs have statutory standing.

B. Merits

Section 2 of the Voting Rights Act prohibits states from imposing or applying "any voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). To prove a Section 2 violation, a plaintiff does not need to prove discriminatory intent. *See Chisom v. Roemer*, 501 U.S. 380, 394 & n.21 (1991). Rather, a Section 2 violation 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 [§ 1973(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." 42 U.S.C. § 1973(b). In the present case, the plaintiffs claim that the requirement to show a photo ID is a voting practice that results in Blacks and Latinos

having less opportunity to participate in the political process and to elect representatives of their choice.

Before going further, I must determine how to apply Section 2 in the context of a challenge to a voting practice like the requirement to present a photo ID at the polls. Much of the Section 2 jurisprudence was developed in the context of so-called "vote dilution" cases. The term "vote dilution"—which is contrasted with the term "vote denial"—describes cases involving structural devices, such as at-large elections and redistricting plans, that can be used to minimize or cancel out the effect of minority votes. At-large elections can be used to minimize or cancel out the effect of minority votes because they submerge a minority group that would likely constitute a majority in a single-member district within a larger white majority. Redistricting plans can be used to minimize or cancel out the effect of minority votes because they scatter a minority voting bloc that would likely constitute a majority in a properly drawn district among several irregular districts, with the result that the minority voting bloc within any single district is too small to constitute a majority. The present case does not involve at-large elections, redistricting plans, or similar structural devices, and the legal standards developed for dealing with those devices do not necessarily apply here. For example, the so-called "Senate factors" or "*Gingles* factors," *see Thornburg v. Gingles*, 478 U.S. 30 (1978), play a central role in vote-dilution cases. However, those factors were developed to assist courts in resolving the tension between, on the one hand, ensuring that structural practices such as at-large elections and redistricting plans are not used to dilute minority voting power, and, on the other, the Congressional directive that Section 2 does not require proportional representation. *See Baird v.*

City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 722 (2006). Factors developed for this purpose are not necessarily relevant to cases, like this one, that do not present that tension, and in any event the federal courts have largely disregarded the Senate factors in Section 2 cases that do not involve challenges to at-large elections, redistricting plans, and the like. *See* Tokaji, *supra*, at 720–21 (arguing that the Senate factors do not help courts decide cases that do not involve vote dilution and observing that the lower courts have mostly disregarded those factors in vote-denial cases). Thus, I cannot resolve the present issue by applying the legal standards developed for vote-dilution cases.[27]

Although the vast majority of Section 2 cases involve vote dilution, appellate courts have extensively discussed Section 2 in the context of felon disenfranchisement, which does not involve vote dilution and falls into the category of "vote denial." *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). However, the consensus that has emerged in those cases is that laws disenfranchising felons do not violate Section 2 because those laws existed when the Voting Rights Act was enacted in 1965 and the legislative history of the Act supports the conclusion that Congress did not intend to invalidate them. *See*, *e.g.*, *Farrakhan*, 623

[27] The defendants agree that the Senate factors are designed for vote-dilution cases and that they should not be applied in the present case. Defs.' Post-Trial Br. at 48–50.

F.3d at 993 (finding that "[f]elon disenfranchisement laws have a long history in the United States," and that "Congress was no doubt aware of these laws when it enacted the VRA in 1965 and amended it in 1982, yet gave no indication that felon disenfranchisement was in any way suspect"). This reasoning obviously does not apply to voter photo identification requirements, which are a recent phenomenon. *See* Kathleen M. Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 Geo. Wash. L. Rev. 292, 296–98 (2013) (describing history of voter ID legislation, which begins in the year 2000). Thus, the felon-disenfranchisement cases are not helpful.

Because the cases contain only limited guidance,[28] I will focus on the text of the statute. *See Gonzalez v. City of Aurora*, 535 F.3d 594, 597 (7th Cir. 2008) (emphasizing the importance of considering the text of Section 2). The key language states that a violation of Section 2 is established if the totality of the circumstances shows that the challenged voting practice results in a political process that is not "equally open to participation by members [of a minority group]," in that the members of that group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The meaning of this language is clear: "Section 2 requires an electoral process 'equally open' to all, not a process that favors one group over another." *Gonzalez*, 535 F.3d at 598. Justice Scalia, in a dissent in a vote-dilution case,

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[28] There is one appellate case applying Section 2 in the photo ID context, *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc). However, that case does not set out a comprehensive test governing Section 2 photo ID cases.

provided the following illustration of the meaning of Section 2: "If, 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 . . . ." *Chisom*, 501 U.S. at 407–08 (Scalia, J., dissenting). Based on the text, then, I conclude that Section 2 protects against 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. The presence of a barrier that has this kind of disproportionate impact prevents the political process from being "equally open" to all and results in members of the minority group having "less opportunity" to participate in the political process and to elect representatives of their choice.

The next question is whether the evidence adduced at trial shows that Wisconsin's photo ID requirement creates a barrier to voting that is more likely to appear in the path of a voter if that voter is Black or Latino. The photo ID requirement applies to all voters, regardless of race. However, as explained in Section II.B, above, the requirement places a unique and heightened burden on those who must obtain an ID if they wish to continue voting in Wisconsin. These individuals are more likely to be deterred from voting than those who obtained their photo IDs for other reasons, such as driving. The evidence adduced at trial demonstrates that this unique burden disproportionately impacts Black and Latino voters. As the defendants concede, the plaintiffs' evidence "shows that minorities are less likely than whites to currently possess qualifying ID." Defs.' Post-Trial Brief at 1. Because the defendants concede that minorities are

less likely than whites to currently possess a photo ID, it is not necessary for me to discuss the evidence adduced at trial in support of this point and make explicit findings of fact. Nonetheless, because the parties presented substantial evidence on this question at trial and explicit findings might prove useful in the event of an appeal, I will explain how the evidence adduced at trial leads to the conclusion that, in Wisconsin, Blacks and Latinos are less likely than whites to possess a qualifying form of photo identification.

Three of the plaintiffs' expert witnesses offered testimony supporting the conclusion that Blacks and Latinos in Wisconsin are less likely than whites to possess a qualifying ID. First, the plaintiffs presented the testimony of Leland Beatty. As discussed in more detail in Appendices A and C,[29] Beatty compared a list of Wisconsin registered voters to a list of individuals holding a Wisconsin driver's license or state ID card and attempted to determine how many registered voters could be matched to a corresponding driver's license or state ID card. Then, using the assistance of a third party, Beatty determined the likely race of the Wisconsin registered voters who could not be matched to a driver's license or state ID card and computed the percentage of registered voters of each race who lacked such forms of ID. After performing this analysis, Beatty concluded that minority registered voters in Wisconsin "were substantially more likely to be

[29] Appendix A discusses Beatty's methodology and findings insofar as they bear on the question of the number of Wisconsin voters who lack an ID. Appendix C discusses Beatty's methodology and findings insofar as they bear on the question of whether the voters who lack an ID are disproportionately Black and Latino.

without a matching driver's license or state ID than white voters." Tr. 645. Specifically, he found that data for the year 2012 showed that African American voters in Wisconsin were 1.7 times as likely as white voters to lack a matching driver's license or state ID and that Latino voters in Wisconsin were 2.6 times as likely as white voters to lack these forms of identification. Tr. 646–47, 658; LULAC Ex. 2. He also found that data for the year 2013 showed that African American voters in Wisconsin were 1.4 times as likely as white voters to lack a matching driver's license or state ID and that Latino voters were 2.3 times as likely as white voters to lack these forms of identification. Tr. 686; LULAC Ex. 817 ¶¶ 4, 9. I consider Beatty's findings and opinions credible and have given them significant weight in making my findings of fact.

Before moving on, I note that Professor Hood performed a matching analysis that was similar to Beatty's, except that he did not attempt to identify the race of the registered voters who did not possess an ID. As discussed in more detail in Appendix A, under some of Hood's criteria for determining whether a given registered voter could be matched to an ID, Hood found that the number of registered voters who could not be matched was smaller than the number found by Beatty: Beatty found that about 317,000 registered voters lacked an ID, while under the loosest of Hood's criteria only about 167,000 registered voters lacked an ID. For the reasons explained in Appendix A, I find Beatty's number more reliable than Hood's. But it is worth noting that when Beatty analyzed the racial breakdown of the voters Hood deemed to be without IDs, he found that the disproportionate impact on Blacks and Latinos was even greater: using Hood's numbers, Beatty found that both Blacks and Latinos

were more than twice as likely as whites to lack driver's licenses or state ID cards. Tr. 682–84.

Next, the plaintiffs presented the testimony of Professor Barreto. Like Beatty, Barreto offered opinions on the existence of racial disparities in the possession of photo identification. However, the scope of Barreto's opinions differ from Beatty's in three ways. First, while Beatty examined ID possession by individuals who are registered to vote, Barreto examined ID possession by individuals who are eligible to vote. Second, while Beatty examined statewide possession rates, Barreto focused on Milwaukee County. Third, while Beatty focused on possession of driver's licenses and state ID cards, Barreto investigated possession rates of all forms of Act 23-qualifying ID.

As indicated in Section II.B and Appendix B, Barreto's opinions were based on a telephonic survey of Milwaukee County residents. The results of the survey showed that a sizable portion of the population of eligible voters in Milwaukee County do not possess either a qualifying form of ID or the documents needed to obtain a qualifying form of ID. Frank Ex. 600 at 16–17. Moreover, the results showed that Black and Latino eligible voters are less likely than white voters to possess a qualifying form of ID. Specifically, Barreto found that while only 7.3% of eligible white voters lack a qualifying form of ID, 13.2% of eligible African American voters and 14.9% of eligible Latino voters lack a qualifying form of ID. Tr. 304.

The defendants offer several reasons why I should give Barreto's findings limited weight. I have already discussed these reasons somewhat in Appendix B, in the context of determining the number of Wisconsin voters who lack IDs and the burdens they will face.

Here I will discuss these reasons in the context of determining whether those who lack qualifying IDs are disproportionately likely to be Black or Latino.

First, the defendants contend that Barreto's findings are outdated. The survey was conducted in January of 2012, and the trial of this matter was held in November of 2013. The defendants note that between the time of the survey and the time of trial, Wisconsin's free ID program was in effect, that a significant number of people obtained IDs through this program during that time, and that a disproportionate share of free IDs were issued to Black and Latino voters. Thus, argue the defendants, it is possible that the free ID program mitigated somewhat the disparity in possession rates by the time of trial. I agree that this is possible. But the defendants do not suggest that the free ID program *eliminated* the disparity in possession rates identified in Barreto's survey. Moreover, at the time of Barreto's survey, the free ID program had been in effect for six months,[30] and thus to some extent the survey results do account for the issuance of free IDs. Finally, it would be speculative to conclude that those who obtained free IDs since the time of Barreto's survey are individuals who previously lacked a qualifying form of ID. Many of the free IDs could have been issued as replacement IDs to individuals who already possessed IDs at the time of Barreto's survey, or as duplicate IDs to individuals who already possessed another form of ID at the time of the survey, such as a driver's license.[31] And looking at the number

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[30] The free ID program began in July 2011, Tr. 1806, and Barreto's survey was conducted between December 2011 and January 2012.

[31] As discussed in Appendix B, although the DMV is not supposed to issue state ID cards to individuals who already

of free IDs issued in isolation fails to take into account possible changes in the population of eligible voters: perhaps there has been an increase in the population of eligible voters, and although many new voters have obtained free IDs, many others have not obtained any form of ID. The defendants' own expert witness agreed that it would be speculative to draw conclusions about the disparity in possession rates based on the issuance of free IDs alone. Tr. 1559–61. Finally, Beatty updated his matching analysis just prior to trial, and he found that racial disparities in possession rates persist. Thus, despite the age of Barreto's survey, I remain convinced that his results support the conclusion that Blacks and Latinos are less likely than whites to possess qualifying forms of ID.

The defendants also point out that Barreto studied possession rates in Milwaukee County rather than statewide, and that therefore his findings do not prove that the disparities he found exist at the state level. This is a fair point, but it is weakened by the fact that Beatty studied statewide possession rates and found that the disparities Barreto identified in Milwaukee County do exist at the state level. Moreover, Milwaukee is the largest county in the state and has the state's largest populations of Blacks and Latinos, and thus findings based on a study of Milwaukee County alone are suggestive of what a statewide study would find. Tr. 284–85, 1517–20. Finally, there is no reason to think that in other parts of the state minorities possess IDs at such high rates and whites possess IDs at such low rates that the disparities

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possess a valid driver's license, the data that the DMV provided to Beatty and Hood reflects that the DMV has issued many individuals both a driver's license and a state ID card. *See also* Tr. 739.

found in Milwaukee County would be cancelled out if individuals from outside of Milwaukee were included in the study. To the contrary, a study of voting-age adults in Wisconsin published in 2005 found that Blacks and Latinos residing outside of Milwaukee County were less likely than whites to possess a valid driver's license. *See* John Pawasarat, *The Drivers License Status of the Voting Age Population in Wisconsin*, p. 22 (UW-Milwaukee Employment and Training Institute, June 2005); LULAC Ex. 58.[32] Accordingly, I conclude that Barreto's findings, when added to the other evidence in this case, support the conclusion that minorities in Wisconsin are less likely than whites to possess a qualifying ID.

The remaining expert witness who offered testimony on the disparity in ID possession rates among minorities and white voters is Professor Burden. He identified a consensus in the literature showing that Black and Latino voters in Wisconsin and elsewhere in the United States are less likely than white voters to possess photo IDs. Tr. 1329–34. Burden cited the following studies: (1) a study performed by Professor Barreto and others showing that minorities in Indiana were less likely than whites to possess photo IDs, see Matt A. Barreto, et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: Political Science & Politics 111 (2009); (2) an article coauthored by the defendants' expert witness, Professor Hood, which found that Blacks and Latinos in Georgia were less

[32] This study reported that in Milwaukee County, 73% of white adults, 47% of Black adults, and 43% of Hispanic adults possessed valid driver's licenses. The study reported that in the balance of the state, 85% of white adults, 53% of Black adults, and 52% of Hispanic adults possessed valid driver's licenses.

likely than whites to have driver's licenses, *see* M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 Am. Politics Research 555 (2008) (Def. Ex. 1005); (3) a study by the American Automobile Association showing that, in the United States, 18-year-old whites are significantly more likely than 18-year-old Blacks and Latinos to have driver's licenses, *see* AAA Foundation for Traffic Safety, *Timing of Driver's License Acquisition and Reasons for Delay among Young People in the United States, 2012*, at 11, table 3 (August 2013), *available at* www.aaafoundation.org/research/completed-projects (last viewed April 28, 2014); and (4) the study by Pawasarat, discussed above, finding that in 2005 Black and Latino adults in Wisconsin were much more likely than white adults to lack valid driver's licenses, LULAC Ex. 58. Burden's testimony and the literature he cites reinforce the conclusion that Black and Latino voters in Wisconsin are more likely than white voters to lack qualifying IDs.

The defendants have pointed to no evidence introduced at trial or studies performed by others showing that Blacks and Latinos in Wisconsin or elsewhere possess IDs at the same or nearly the same rates as whites. To the contrary, as noted, they concede that "minorities are less likely than whites to currently possess qualifying ID." Defs.' Post-Trial Br. at 1. Thus, in light of the evidence presented at trial and the defendants' admission, the conclusion that Blacks and Latinos disproportionately lack IDs is inescapable.[33]

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[33] The defendants contend that some of the evidence at trial shows that there is a "trend toward greater driver license and state ID possession rates for minorities." Defs.' Post-Trial Br. at

Although the defendants concede that Blacks and Latinos disproportionately lack IDs, they argue that the plaintiffs have not shown that Blacks and Latinos are incapable of obtaining qualifying IDs. This argument depends on the premise that a violation of Section 2 cannot be found unless the challenged voting practice makes it impossible for affected minorities to vote. As defense counsel argued in his closing:

> Even if the Court accepts all of the plaintiffs' expert testimony and declarations in this case regarding statistics and data and estimates, plaintiffs have not shown that those Wisconsin voters who currently lack a form of Act 23 ID can never, ever obtain a form of Act 23 ID . . . . It is not enough to show that minorities are less likely to have a form of Act 23 ID when those voters are fully capable of getting a form of Act 23 ID.

Tr. 2134, 2142. Under the defendants's view of the law, the example given by Justice Scalia in *Chisom*—a

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39. Primarily, they rely on Beatty's findings, which show that, in 2013, the possession rates for Blacks and Latinos were higher than they were in 2012. However, as Beatty explained, one cannot infer that a trend exists from only two data points. Tr. 689. Moreover, Beatty had more complete data in 2013 than he did in 2012, and this might explain the difference in possession rates. Tr. 689–90. In any event, even if there were a trend showing improvements in possession of qualifying IDs by minorities, this would have no legal significance. The most a trend would show is that it is possible that at some point in the future Act 23 would not have a disproportionate impact on minorities. But I must grant or deny relief based on the conditions that were shown to exist at the time of trial, not on conditions that may or may not exist at some unknown point in the future. Thus, the question of whether there is a trend toward greater minority possession rates is irrelevant.

county's permitting voting registration for only three hours one day a week and thereby making it more difficult for Blacks to register than whites—would not involve a violation of Section 2, since it would of course be *possible* for every Black person in the county to register during the one three-hour window per week. However, no authority supports the defendants' view of the law. The cases the defendants cite state that "a bare statistical showing" of disproportionate impact is not enough to prove a Section 2 violation. *See* Tr. 2134–35, citing *Smith v. Salt River Project Ag. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). But what these cases mean is that beyond showing a disproportionate impact on minorities, a Section 2 plaintiff must show that the disproportionate impact is tied in some way to the effects of discrimination. There is nothing in these cases indicating that a Section 2 plaintiff must show that the challenged voting practice makes it impossible for minorities to vote or that minorities are incapable of complying with the challenged voting procedure. Therefore, I reject the defendants' argument that Act 23 could violate Section 2 only if minorities who currently lack IDs are incapable of obtaining them.[34]

The defendants also argue that the plaintiffs' have not shown that minorities "face different considerations than whites in obtaining qualifying ID." Defs.' Post-Trial Br. at 1–2. In making this argument, the defendants imply that the burden of having to obtain an ID is not, by itself, a burden that

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[34] Of course, some minorities who lack IDs will find it impossible to obtain them. Several African American witnesses testified at trial about their unsuccessful attempts to obtain IDs. *See* Tr. 36–38 (Weddle); 43–52 (Holloway); 88 (Davis); 210–12 (Brown); 704–05 (Thompson); 844–47 (Newcomb).

could result in the denial or abridgment of the right to vote, and that the plaintiffs must point to some more serious burden that disproportionately impacts Black and Latino voters before they could establish a violation of Section 2. I disagree. Even if the burden of obtaining a qualifying ID proves to be minimal for the vast majority of Blacks and Latinos who will need to obtain one in order to vote, that burden will still deter a large number of such Blacks and Latinos from voting. As discussed in Section II.C, the plaintiffs' expert witnesses testified that, under the dominant framework used by scholars to study voter turnout, even small increases in the costs of voting can deter a person from voting, since the benefits of voting are slight and can be elusive. Tr. 1279–80, 1220–21. Under this framework, the need to obtain an ID is likely to deter a substantial number of individuals who lack IDs from voting, even if most of these individuals could obtain an ID without much trouble. These individuals, who prior to Act 23 were unwilling to pay the costs necessary to obtain an ID, are unlikely to pay those costs in order to comply with Act 23 when the expected benefits of voting are slight. Act 23 thus creates a political process in which white voters, who are more likely to already possess qualifying IDs than Black and Latino voters, will not face the deterrent effect of having to obtain an ID that they would not obtain but for the requirement to present it at the polls, while Blacks and Latinos who wish to vote and who lack qualifying IDs must pay the cost, in the form of time or bother or out-of-pocket expense, to obtain what is essentially a license to vote. This is not a political process that is "equally open to participation" by Blacks and Latinos. 42 U.S.C. § 1973(b). It is one in which a disproportionate share of the Black and

Latino populations must shoulder an additional burden in order to exercise the right to vote.

But even if the defendants were correct that the plaintiffs needed to show that Blacks and Latinos face different considerations than whites in obtaining qualifying IDs, the plaintiffs would still have shown that Act 23 violates Section 2. There are additional hurdles that Blacks and Latinos who lack IDs are more likely to have to overcome than whites who lack them. First, as Professor Barreto's survey indicates, Black and Latino voters who lack a qualifying ID are more likely than white voters to also lack one or more of the underlying documents they would need to obtain a qualifying ID as a first-time applicant. In Milwaukee County, only 2.4% of white eligible voters lack both a qualifying ID and one or more of the underlying documents needed to obtain an ID, while 4.5% of Black and 5.9% of Latino eligible voters lack both an ID and at least one underlying document.[35] Frank Ex. 600 at 23–24; Tr. 307–08. The defendants note that Barreto did not determine whether it would be impossible for those who lack both an ID and an underlying document to obtain the underlying document, but this misses the point. The point is that Barreto's survey shows that even among the pool of white and minority voters who lack IDs, Black and Latino voters are more disadvantaged than whites because they are more likely to have to overcome two hurdles in order to vote rather than one. First, they will have to obtain the missing underlying document, which will likely

[35] Professor Barreto determined that the difference between whites and Blacks, and the difference between whites and Latinos, are statistically significant. Frank Ex. 600 at 23. This means that the differences identified in the survey are likely to be real and not merely the result of chance. Tr. 304–05.

involve some time (such as a trip to the office of vital records) and expense (such as the fee for obtaining a birth certificate). Then, they will have to obtain state ID cards, which will involve the time and expense of going to the DMV. The need to overcome two hurdles instead of one makes the burden more substantial for a disproportionate share of Blacks and Latinos.

Another reason why it will be more difficult for many Blacks and Latinos to obtain IDs is that Blacks and Latinos are more likely to have been born outside of Wisconsin than whites. Professor Burden identified survey results showing that for the 5-year period ending in 2011, 75% of white residents were born in Wisconsin, yet only 59% of Blacks and 43% of Latino residents were born in the state. LULAC Ex. 811 ¶ 60. As discussed in Section II.B, it generally takes more time and expense to obtain a birth certificate from outside one's state of residence than it does to obtain a birth certificate from within the state. *See also id*. Therefore, Blacks and Latinos who need to obtain a birth certificate are likely to find themselves facing a more daunting task than their white counterparts.[36] Moreover, Latino voters who speak primarily Spanish will face additional difficulties as they try to navigate a process that was designed to accommodate those who speak English. *See* Tr. 171 (witness testified that she did not see Spanish forms at DMV and could not

[36] Many older voters of color face the additional problem of never having had an official birth certificate in the first place. As late as 1950, nearly a quarter of nonwhite births in rural areas in the United States went unregistered, as opposed to 10% of white births in rural areas in the United States. S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4:1 Populations Studies: A Journal of Demography 86, 98–99 (1950), *available at* ECF No. 37-13 in Case No. 12-C-185.

get help from bilingual personnel); Tr. 133 (witness testified that she has worked with Latinos who encountered language barriers at the DMV).[37]

Up to this point, I have only discussed the evidence establishing that Act 23 has a disproportionate impact on Blacks and Latinos. But courts have stated that, to succeed on a Section 2 claim, a plaintiff must do more than establish that the challenged voting practice results in a disproportionate impact. *See*, *e.g.*, *Smith v. Salt River Project*, 109 F.3d 586, 595 (9th Cir. 1997) (noting that "a bare statistical showing of disproportionate impact on a racial minority" does not, by itself, prove a violation of § 2). Rather, the plaintiff must also show that the challenged voting practice produces a "discriminatory result." *Id*. What this seems to mean is that the plaintiff must show that the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination and is not merely a product of chance. *See Gingles*, 478 U.S. at 47 ("The essence 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.").

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[37] Many Latino voters who were born in Puerto Rico will have trouble obtaining their birth certificates because the Puerto Rican government annulled all birth certificates of individuals born there prior to 2010. To obtain a new birth certificate, a person must either travel to Puerto Rico or pay a "hefty charge" to obtain a new birth certificate by mail. Tr. 131. Professor Barreto found that 16.7% of eligible Latinos in Milwaukee County were born in Puerto Rico and that 38.4% of those born in Puerto Rico had yet to obtain a new birth certificate. Frank Ex. 600 at 25.

I find that the plaintiffs have shown that the disproportionate impact of the photo ID requirement results from the interaction of the requirement with the effects of past or present discrimination. Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty.[38] Individuals who live in poverty are less likely to drive or participate in other activities for which a photo ID may be required (such as banking, air travel, and international travel),[39] and so they obtain fewer benefits from possession of a photo ID than do individuals who can afford to participate in these activities. In addition, as explained in Section II.B, low-income individuals who would like to obtain an ID generally find it harder to do so than do those with greater resources. *Cf. Texas v. Holder*, 888 F.

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[38] Tr. 1193–95 (Black median household income in Metropolitan Milwaukee is 42% that of whites; this disparity is the second worst out of the 40 largest metropolitan areas; Hispanic median household income is 56% that of whites; this disparity is ninth from the bottom out of the 36 largest metropolitan areas); Tr. 1196–97 (in Metropolitan Milwaukee, Black poverty rate is 39%, Hispanic poverty rate 30%, and white poverty rate is 8%; disparity between Blacks and whites is the largest of 40 largest metropolitan areas; disparity between Hispanics and whites is the seventh largest out of 36 metropolitan areas); Tr. 1263–64 (poverty rate for Blacks is 39.2% in Metropolitan Milwaukee and 38.8% statewide); *see also* LULAC Ex. 811 ¶ 30 (Professor Burden explains that the poverty rate in Wisconsin is 11% for Whites, 38% for Latinos, and 39% for Blacks, and that the Latino-White and Black-White gaps are both greater than the national average).

[39] Tr. 1302 (Professor Burden explained that "being in an inner-city core and having somewhat lower levels of socio-economic status, blacks and Latinos in Wisconsin are more likely to use public transportation or to walk as a means to get around the city. That means they're less likely to own a vehicle, less likely to drive, less likely to own a driver's license."); *see also supra* note 9.

Supp. 2d 113, 138 (D.D.C. 2012) (finding that "the burdens associated with obtaining an ID will weigh most heavily on the poor"), *vacated on other grounds*, 133 S. Ct. 2886 (2013). Thus, we find that Blacks and Latinos are less likely than whites to obtain a photo ID in the ordinary course of their lives and are more likely to be without one.

The reason Blacks and Latinos are disproportionately likely to live in poverty, and therefore to lack a qualifying ID, is because they have suffered from, and continue to suffer from, the effects of discrimination. At trial, Professor Levine of the University of Wisconsin-Milwaukee testified that residential segregation and housing discrimination are major causes of the socioeconomic disparities between whites and minorities in Wisconsin. By certain measures, Milwaukee ranks the worst of the 102 largest metropolitan areas in Black/white segregation and the ninth worst in Latino/white segregation. Tr. 1201–02. This level of segregation is, as Levine testified, "the cornerstone from which all of these other socioeconomic disparities flow." Tr. 1202–03. It prevents Black and Latino populations in central Milwaukee from accessing suburban employment opportunities. Tr. 1203. And there is a robust correlation between metropolitan areas that have high levels of segregation and low levels of Black male employment. Tr. 1208. Levine also testified that contemporary segregation can be traced in part to Milwaukee's history of housing discrimination. Tr. 1204–06.

The socioeconomic disparities between whites and minorities in Wisconsin are also traceable to the effects of discrimination in employment. Levine described one study of the Milwaukee labor market, conducted in the early 2000s, which showed that white

job applicants received call-back interviews more than twice as frequently as Black applicants, and that even white applicants with criminal records received call-back interviews more frequently than Black applicants. Tr. 1211–13. Levine concluded that this study showed that "discrimination was alive and well in the Milwaukee labor market." Tr. 1212. Levine testified that racial disparities in education also contribute to the lower socioeconomic status of Blacks and Latinos in Wisconsin, and that these disparities are likewise a product of discrimination. Tr. 1214–16.

Professor Levine summarized his findings concerning the effects of discrimination on the socioeconomic status of Blacks and Latinos in Wisconsin as follows:

> There's little question that across the gamut of indicators that I've looked at that Milwaukee, and to the extent that I have indicators on Wisconsin, reveal the sharpest, most pervasive, most persistent, and most entrenched racial and ethnic socioeconomic disparities of virtually any region of the country.
>
> Across these indicators, in indicator after indicator, be it poverty, be it income, be it employment, be it minority business ownership, be it educational achievement, be it incarceration rates, the Black community and the Hispanic community in Wisconsin exhibit, without question, the effects of the historical legacy of discrimination as well as contemporary practices of discrimination.

Tr. 1217.[40] Similar testimony from Professor Burden, *see* Tr. 1298–1314, lends further support to the conclusion that the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing. Based on this evidence, I conclude that Act 23's disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result.

A remaining question is whether Section 2 requires or allows me to take the state's interest in the challenged voting practice into account. There is nothing in the text of Section 2 indicating that the state's interest is relevant, but one of the "unenumerated" Senate factors—whether the policy underlying the challenged voting practice is "tenuous"—suggests that it is. See Gingles, 478 U.S. at 37. Moreover, it seems reasonable to understand Section 2 as allowing a state to maintain a voting practice despite any discriminatory result it produces if the practice is clearly necessary to protect an important state interest. However, as discussed in Section II.A., Act 23 only weakly serves the state interests put forward by the defendants. Accordingly, I conclude that those

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[40] Although many of Levine's findings were derived from evidence concerning Metropolitan Milwaukee rather than Wisconsin, he noted that 72% of Wisconsin's Black population and 45% if its Latino population live in Metropolitan Milwaukee. He concluded that, given this concentration of minorities in the Milwaukee area, any trends that apply to Metropolitan Milwaukee "essentially become statewide trends." Tr. 1263.

interests are tenuous and do not justify the photo ID requirement's discriminatory result.

To summarize my findings of fact and conclusions of law regarding the plaintiffs' Section 2 claim: Act 23 has a disproportionate impact on Black and Latino voters because it is more likely to burden those voters with the costs of obtaining a photo ID that they would not otherwise obtain. This burden is significant not only because it is likely to deter Blacks and Latinos from voting even if they could obtain IDs without much difficulty, but also because Blacks and Latinos are more likely than whites to have difficulty obtaining IDs. This disproportionate impact is a "discriminatory result" because the reason Black and Latino voters are more likely to have to incur the costs of obtaining IDs is that they are disproportionately likely to live in poverty, and the reason Black and Latino voters are disproportionately likely to live in poverty is connected to the history of discrimination against Blacks and Latinos in Wisconsin and elsewhere. Finally, Act 23 only tenuously serves the state's interest in preventing voter fraud and protecting the integrity of the electoral process, and therefore the state's interests do not justify the discriminatory result. Accordingly, the photo ID requirement results in the denial or abridgment of the right of Black and Latino citizens to vote on account of race or color.

A remaining matter is to identify the appropriate remedy.[41] The plaintiffs request a permanent injunction against enforcement of the photo ID requirement,

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[41] Although I have already granted the *Frank* plaintiffs a permanent injunction on the ground that Act 23 places an

and the defendants have not argued that this is not a proper remedy. Moreover, such an injunction is the only practicable remedy—surely it would make little sense to allow Blacks and Latinos to vote without showing IDs while continuing to require white voters to show IDs. Thus, I will enjoin the defendants from requiring voters to present photo IDs in order to cast a ballot.

The *LULAC* plaintiffs point out that the Wisconsin legislature might amend the photo ID provisions of Act 23 in response to this decision. They ask me to make clear that I will schedule expedited proceedings to address any claim that an amendment to Act 23 has cured the defects identified in this opinion and provides grounds for relief from the permanent injunction. I will do so. Should the State of Wisconsin enact legislation amending the photo ID requirement, and should the defendants believe that, as amended, the photo ID requirement no longer violates Section 2, they may file a motion for relief from the permanent injunction. If an election is imminent at the time that the defendants file their motion, I will schedule expedited proceedings on the motion. However, I also note that, given the evidence presented at trial showing that Blacks and Latinos are more likely than whites to lack an ID, it is difficult to see how an amendment to the photo ID requirement could remove its disproportionate racial impact and discriminatory result.

IV. Other Matters

There are two remaining procedural matters to consider. The first is the *Frank* plaintiffs' motion for

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unjustified burden on the right to vote, I separately consider whether I would grant the same remedy under Section 2.

class certification and the second is the defendants' motion to dismiss the claims of certain plaintiffs. Given that the relief granted in this case is a permanent injunction against enforcement of the requirement that eligible voters present a photo ID to cast a ballot, these matters are moot. The motion for class certification is moot because, as the defendants concede, all members of the proposed classes will benefit from the permanent injunction whether or not classes are certified, and there is no reason to formally certify a class. Defs.' Br. in Opp. to Mot. For Class Cert. at 8, 20 (arguing that if Act 23 were enjoined there would be "no need for any classes as the remedy would invalidate the entire photo identification requirement and cover all of the citizens and registered voters in the State of Wisconsin"). Similarly, the motion to dismiss the claims of certain plaintiffs is moot—those plaintiffs will benefit from the relief requested regardless of whether they are dismissed as plaintiffs. *Cf. Crawford*, 472 F.3d at 951 (noting that as long as one plaintiff has standing to seek the injunctive relief requested, question of standing of additional parties can be ignored).

V. Conclusion

For the reasons stated, IT IS ORDERED that the named Defendants and Defendants' officers, agents, servants, employees, and attorneys, and all those acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, are hereby permanently enjoined from conditioning a person's access to a ballot, either in-person or absentee, on that person's presenting a form of photo identification.

IT IS FURTHER ORDERED that the *Frank* plaintiffs' motion for class certification is DENIED as MOOT.

IT IS FURTHER ORDERED that the defendants' motion for judgment on partial findings is DENIED as MOOT.

FINALLY, IT IS ORDERED that the Clerk of Court shall enter final judgment consistent with this opinion.

Dated at Milwaukee, Wisconsin, this 29 day of April 2014.

s/ Lynn Adelman
LYNN ADELMAN
District Judge

Appendix A: Wisconsin Voters Who Lack A Qualifying ID

I base my finding that approximately 300,000 registered voters in Wisconsin lack a qualifying ID primarily, but not exclusively, on the testimony of plaintiffs' expert, Leland Beatty. Beatty is a statistical marketing consultant with extensive experience both in business and politics. He sought to determine the number of registered voters who, as of September 2013, did not possess either a driver's license or state ID card, which matched the information maintained in the list of registered voters. Drivers' licenses and state ID cards are the two most common forms of Act-23 identification.[1] To do this, Beatty obtained databases from both the DMV and GAB. The DMV database contained information about individuals with driver's licenses or state ID cards with expiration dates in September 2013 or later. The GAB database contained information about individuals who were registered to vote as of September 2013. Beatty compared the information in the databases to determine how many registered voters could be "matched" to a DMV product.

Initially, Beatty created three definitions of a "match." First, he counted a pair of entries as a match if a person having the same first name, last name, date of birth, residence county and zip code could be found in both the GAB and DMV databases. Second, he counted a pair of entries as a match if a person having the same first name, last name and date of birth could

[1] Previous to the trial, Beatty prepared reports based on pre-September 2013 data. I will focus, however, on the results Beatty obtained from the September 2013 data, as such data best reflects the facts that existed at the time of trial.

be found in both databases. Third, he counted a pair of entries as a match if a person having the same last name, date of birth and zip code could be found in both databases. This latter definition of a match was designed to account for individuals who were identified by a nickname in one database and their formal first name in the other.

After running these matches, Beatty attempted to "recover" or "reclaim" some of the non-matches by determining whether circumstances justified deeming them a match. First, he attempted to match people with multiple-word first or last names such as individuals with names like Mary Ann or Maryann or those with hyphenated last names. Beatty isolated the records of individuals with multi-word names and accepted a pair of entries as a match if either word in the multi-word name matched. Second, he attempted to match individuals who may have recently changed their last name as indicated by a field in the DMV database. He did this by treating any person listed in the DMV database as having a former last name as a registered voter with either a driver's license or a state ID card if he could find a person in the GAB database having the same first name, middle initial and date of birth.[2]

After reclaiming as many unmatched registered voters as he could, Beatty determined that 317,735

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[2] Beatty testified that this last definition of match, i.e., persons with former last names who could be matched based on first name, middle initial, and date of birth, might have resulted in a slight overcount of the number of voters with "matching" IDs, since in such cases the last name on the ID would not match the last name that would appear in the poll book. Thus, a poll worker would likely deny the person access to a ballot if he or she tried to use the ID to vote. Tr. 688.

registered voters possessed neither a driver's license nor a state ID card. The total number of registered voters in Wisconsin was 3,395,688.[2] Thus, 9.4% of registrants lacked a matching driver's license or state ID card.

In response to Beatty, the defendants offered the testimony of M.V. Hood III, a University of Georgia professor of political science. Hood also attempted to match registered voters in the GAB database with individuals in the DMV database in order to identify the number of registrants who possessed a qualifying ID. Hood, however, used different criteria than Beatty for determining what counted as a match, and he concluded that between 167,351 (4.9% of registrants) and 368,824 (10.9% of registrants) did not possess a driver's license or state ID card.[3]

The significant differences between the criteria employed by Beatty and Hood involve the use of the identification number associated with an entry. In the DMV database, the identification number is the number that appears on a person's driver's license or state ID card. In 2006, as required by the Help America Vote Act, Wisconsin began asking voters to write down this number when they registered to vote. Thus, for post-2006 registrants, the entries in the GAB

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[2] I calculated the total number of registered voters by taking the number from the bottom of the "total voters" column of the table that appears in paragraph nine of Beatty's 2013 declaration (3,373,749) and adding 21,939, which is the number of unmatched registered voters who were excluded from the totals in the table because their race could not be determined. *See* LULAC Ex. 817 ¶¶ 8 & 9.

[3] I derive the percentages by dividing the number of registered voters who lack an ID by 3,395,695, which is the number of registered voters in the GAB database that Hood used.

database include an identification number. Hood used these numbers in two ways. First, he assumed that two entries qualified as a match if they had matching identification numbers. Second, employing some of his more "relaxed" criteria, he assumed that if a person had an identification number associated with his or her entry in the GAB database, that person also possessed a driver's license or a state ID card, even if the person could not be matched to a specific driver's license or state ID card by other means. Hood's use of identification numbers in these two ways caused him to find a greater number of matches between registered voters and DMV products than did Beatty. And as explained below, I find that his use of identification numbers in these ways renders his conclusions about the number of registered voters without an ID suspect. Therefore, I give greater weight to Beatty's conclusions than I do Hood's.

Regarding Hood's automatically counting a pair of entries as a match if they contained the same identification number: In the course of his work, Beatty noticed a large number of cases in which two individuals with the same identification number had different names or dates of birth. As an example, Beatty points to a case in which an identification number in the GAB database was assigned to a person with the first name Damon who was born in 1980 and resides in Milwaukee County, while the same identification number in the DMV database was assigned to a person with the first name Danielle who was born in 1971 and resides in Marinette County.[4] LULAC Ex. 202 ¶ 6. On the basis of these observations, Beatty concluded that identification numbers were not

[4] I have omitted the last names of these individuals to protect their privacy. However, their last names are different.

unique. The defendants argue that Hood was right to assume that identification numbers are unique, but the only evidence they provide in support of this contention is Hood's testimony, which in turn is based on an interview he conducted with Debra Kraemer, a DMV employee who told Hood that DMV identification numbers are unique. Kraemer did not testify at trial, and the defendants have not explained how she determined that identification numbers are unique. Thus, I will not credit her hearsay statement. Besides interviewing Kraemer, Hood made no effort to verify whether identification numbers are unique, such as examining his matches to determine whether the names, dates of birth, etc., matched.[5] Tr. 1546. Moreover, the defendants have not attempted to explain why, if identification numbers are unique, Beatty was able to find instances in which the same identification number was assigned to two different individuals, as in the case of Damon and Danielle. For these reasons, I conclude that Hood's decision to automatically count a pair of entries as a match if they had matching identification numbers renders his conclusions about the number of registered voters without an ID suspect.[6]

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[5] Hood testified that he "did some manual checking," but he did not explain what he meant by that and, in the same breath, admitted that really he just assumed that state ID numbers were unique. Tr. 1545.

[6] I add that although Beatty did not automatically assume that entries with matching identification numbers were matches, he did give these entries a chance to match by name, date of birth, zip code and the other criteria he applied to all entries in the databases. Thus, while Beatty would not have counted the Damon and Danielle case as a match, he would have counted any entries with matching identification numbers as matches if those entries satisfied his other criteria.

Regarding Hood's decision to deem a person with an identification number in the GAB database as possessing an ID: During his interview with Kraemer, Hood learned that DMV identification numbers are not permanent and that they are generated using an algorithm based on a person's name, sex, and date of birth. Any changes or corrections to a person's name or date of birth will cause the DMV to issue a new identification number. In light of this information, Hood hypothesized that some of the individuals with identification numbers in the GAB database who did not match an entry in the DMV database had informed the DMV of changes or corrections to their names or dates of birth. This would have caused the DMV to issue a new identification number, and this identification number would be different than the GAB identification number and also could have explained why Hood was unable to generate a match using the person's name and date of birth. Hood also hypothesized that some of his unmatched voters with identification numbers may have been in possession of a DMV product that expired before September 11, 2013, the latest date on which an ID could expire and still appear in the database Hood received from the DMV. If the ID expired after the date of the last general election, the person holding it could use it to comply with Act 23 until the date of the next general election. *See* Wis. Stat. § 5.02(6m)(a). On the basis of these hypotheses, which he did not meaningfully test,[7]

[7] Hood sent 20 names of individuals with identification numbers in the GAB database and no corresponding product in the DMV database to Kraemer, and Kraemer determined that 85% of those cases could be explained by changes to a person's name. However, as Hood admitted, no reasonable social scientist would draw conclusions about a population of about 80,000 from a sample of only 20. Tr. 1537–38.

Hood, under his more relaxed criteria, counted every person in the GAB database with an identification number associated with his or her name as a registered voter who possessed a driver's license or a state ID card that could be used for voting. Hood determined that, under his relaxed criteria, the number of voters without a DMV product ranged from 167,351 to 285,425. *See* Defs.' Ex. 1001 at 6–7 & Table 2.

In general, I think it is reasonable to assume that a person with an identification number in the GAB database at one time possessed either a driver's license or a state ID card. After all, if a number appears in GAB database, it means that the person had a DMV identification number at the time he or she registered to vote and wrote that number down on the registration form. But the fact that a person at one time had a matching DMV product tells us little about whether that person *currently* has a matching DMV product. Possibly a significant number of people with identification numbers in the GAB database still have the driver's licenses or state ID cards they used when they registered, but assuming Hood's hypotheses are true, those cards will either be expired or they will have names on them that differ from the names that appear in the poll books. If they are expired, they could not be used to comply with Act 23 unless they expired between November 6, 2012 and September 12, 2013, and there is no evidence indicating that the number of IDs with expiration dates within this range is likely to be significant. If the IDs have different names on them, then it is unlikely that they could be used to comply with Act 23 because the names on the IDs will likely not conform to the names that appear in the poll books. *See* Wis. Stat. § 6.79(2)(a). Thus, I do not agree that individuals with identification numbers in the

GAB database can, on that basis alone, be counted as individuals who currently possess a driver's license or state ID card that could be used to comply with Act 23. As Beatty did not automatically count such individuals as possessing a DMV product, I give greater weight to his opinion on the number of registered voters lacking IDs than I do to Hood's.

The defendants point out that Beatty did not investigate whether those who lack a valid driver's license or a valid state ID card nonetheless possess some other form of qualifying ID, such as a passport or a military ID. They then note that it is possible that the percentage of voters who possess only a form of ID other than a driver's license or a state ID card could be large. While this is possible, the defendants have pointed to no evidence suggesting that it is *likely* that a large percentage of the 317,735 voters who lack a valid driver's license or a valid state ID card possess some other form of ID. And plaintiffs' evidence is to the contrary. As discussed in greater detail in Appendix B, Matthew Barreto, an associate professor of political science at the University of Washington, conducted a telephonic survey of eligible voters in Milwaukee County and asked the survey respondents about the forms of ID they possessed. One of his findings was that the percentage of Milwaukee County eligible voters who had *only* a form of ID *other than* a driver's license or a state ID card was 0.3%. Tr. 300. Although Barreto's survey was conducted in Milwaukee County rather than statewide and targeted eligible voters rather than registered voters, there is no reason to think that the percentage of registered voters in the state who possess only a form of ID other than a driver's license or a state ID card is much higher than 0.3%. Applying this percentage to the number of registered voters in the GAB database provided to

Beatty (3,395,688), we can estimate that about 10,000 voters in Wisconsin possess only a form of qualifying ID other than a driver's license or state ID card. If we subtract this estimate from the number of registered voters without a valid driver's license or state ID card, the estimated number of voters without any form of Act 23-qualifying ID in the state becomes 307,735. As this is an estimate rather than a precise measurement, I will round down to 300,000 and find that this is the number of registered voters in Wisconsin who, at the time of trial, did not possess a qualifying form of ID. This is approximately 9% of the population of registered voters in Wisconsin.

Appendix B: Expert Opinions of Matthew Barreto

Professor Matthew Barreto is an expert on voting behavior, survey methods and statistical analysis who, in January 2012, conducted a telephonic survey of eligible voters in Milwaukee County. Barreto designed the survey in collaboration with Professor Gabriel Sanchez of the University of New Mexico. The survey asked voters whether they had a qualifying photo ID as defined in Act 23. It also asked voters whether they had all of the primary documents required to obtain a free state ID card as a first-time applicant. The results showed that, of 661,958 eligible voters in Milwaukee County, 9.53% or 63,085 voters did not possess an acceptable form of photo ID, and 34.1% of these voters—21,512 people—also lacked the primary documents required to get a free state ID card as a first-time applicant. Frank Ex. 600 at 16–17, 34, 37. Barreto concluded that the most common problem for individuals who lack primary documents is the requirement that they show proof of citizenship and name and date of birth. The survey results showed that 32% of the eligible voters in Milwaukee County who lack a photo ID—20,162 people—do not have certified copies of their birth certificates or any of the other documents necessary to prove citizenship. Frank Ex. 600 at 37. Barreto also found that approximately 2.6% of the eligible voters in Milwaukee County who lack a qualifying photo ID—approximately 1,640 people—do not have any of the documents necessary to prove identity. *Id*.

The defendants argue first that Barreto's data it is outdated because the survey was conducted in January 2012 and the trial took place in November 2013. They suggest that, between the time of the survey and the time of trial, many of the individuals

who lacked an ID at the time of Barreto's survey might have obtained one through the state's free ID program. They offer evidence showing that, between July 2011 and September 2013, the DMV issued 74,030 free state ID cards to Milwaukee County residents for voting purposes. Defs.' Ex. 1001 at 19 (Table 9).

I agree that it is possible that some of those who lacked an ID at the time of Barreto's survey have obtained one, but I find it unlikely that the free ID program substantially reduced the number of eligible voters without an ID. First, at the time of Barreto's survey, the free ID program had already been in effect for six months. Thus, the survey results account for the issuance of some of the free IDs. Second, some of the free IDs the DMV issued were replacement or renewal IDs that went to individuals who already had an ID. See Tr. 1818 (noting that a person can get a replacement or renewal card as part of the free ID program). Third, it is very likely that some of the free IDs were issued to individuals who already had driver's licenses. Although the DMV is not supposed to issue state ID cards to individuals who already possess a driver's license, data from the DMV shows that many individuals in Wisconsin possess both a driver's license and a state ID card. In April 2012, one of the plaintiffs' experts, Leland Beatty, reviewed the DMV's records and found 112,397 duplicate records in the driver's license and state ID card databases. LULAC Ex. 2. In these cases, the driver's license holder and the ID card holder had the same first name, last name, date of birth, gender, ethnicity, county of residence and zip code. LULAC Ex. 2. When Beatty updated his work in September 2013, he found that the number of duplicates had increased. Tr. 736, 739. Overall he found that about 30% of state ID card holders also

have a driver's license. Tr. 690.[1] One reason for the high number of duplicates might be that there is a common misconception that under Act 23 a person must obtain a special ID card from the DMV in order to vote even if he or she already has a driver's license. Tr. 1814. Fourth, looking at the number of free IDs issued in isolation fails to take into account possible changes in the population of eligible voters: possibly that population increased. The defendants' own expert agreed that it would be speculative to draw conclusions about current possession rates based on the issuance of free IDs alone. Tr. 1559–61. For all of these reasons, I find it unlikely that the free ID program has significantly changed the number of eligible voters who lack an ID.[2]

Alternatively, the defendants argue that Barreto's survey results should be given little weight because it will be easy for most of those who lack photo IDs to get free state ID cards. As evidence of this, they point to the testimony of Professor Hood. Hood reviewed Barreto's survey and found that it "was conducted in a professional manner using commonly accepted survey research practices," and he agreed that the survey results show that only 90.5% of eligible voters in Milwaukee County have a qualifying photo ID under

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[1] The defendants' expert, M.V. Hood III, reached a similar conclusion. When he compared the driver's license database to the state ID card database in 2012, he found 114,607 duplicate records. Defs.' Ex. 1003 ¶ 7. In 2013, he found 146,137 duplicates. Defs.' Ex. 1001 at 3.

[2] The defendants suggest that the November 2012 presidential election may have prompted a large number of individuals who lacked an ID at the time of Barreto's survey to obtain one. But Act 23 was enjoined well before that election. Thus, individuals who lacked an ID would have had little incentive to obtain one.

Act 23. Defs.' Ex. 1003 ¶¶ 20, 26. However, he noted that the survey results show that an additional 6.9% of survey respondents who do not currently have a qualifying photo ID stated that they have had a Wisconsin driver's license or state ID card at some point in their lives. *Id*. ¶¶ 27–28. He believes that all of these individuals should be able to easily obtain free state ID cards for voting purposes because they successfully obtained them in the past. *Id*. Thus, he concludes that 97.4% of eligible voters in Milwaukee County either have a qualifying ID or could easily obtain one.

I reject Hood's conclusion that it will be easy for all 6.9% of the voters who held IDs at some point in the past to obtain a state ID card because I do not know anything about the circumstances of these voters. I do not know how long ago they held their IDs, and I do not know if they currently possess all of the primary documents required to obtain a state ID card. Even if a voter at some point had all of the documents required to get a state ID card, he or she could have lost some of the necessary documents. This is especially true for low-income voters, who Barreto found are more likely to lack a qualifying ID. Frank Ex. 600 at 28–31. It is also important to note that the DMV's documentation requirements have changed and become more strict over time. For example, the DMV used to accept a baptismal certificate or hospital birth certificate as proof of citizenship, but now it will only accept a certified copy of a birth certificate. Tr. 1848–49. Thus, a person who was able to meet the documentation requirements at some point in the past may not be able to do so today even if they still have all of the documents they used to obtain their first ID card.

Hood's analysis does, however, raise a question about how many of the eligible voters in Milwaukee County who currently lack IDs will be treated as first-time applicants by the DMV. The DMV treats anyone who had a Wisconsin driver's license or state ID card that expired within the last eight years as a renewal applicant, and it only requires renewal applicants to show proof of identity and, if the person has moved, proof of residence to get a state ID card. Tr. 1092–94; Defs.' Ex. 1074. Barreto's survey data shows that approximately 9.53% of eligible voters in Milwaukee County—approximately 63,085 people—do not have qualifying photo IDs under Act 23. The DMV will treat approximately 17,210 of these voters as first-time applicants because they are part of the 2.6% of people identified by Hood who have never had a Wisconsin driver's license or state ID card. Defs.' Ex. 1003 ¶ 27. But it is unclear how many of the remaining approximately 45,875 voters will be treated as first-time applicants because these voters have had Wisconsin driver's licenses or state ID cards at some point in the past. Anyone in this group who has had an ID that expired within the last eight years will be treated as a renewal applicant.

Because of the uncertainty about who will be treated as a first-time applicant, the record does not indicate exactly how many eligible voters in Milwaukee County lack a qualifying photo ID *and* the primary documents required to get one. I know from Barreto's report that 21,512 voters lack an ID and the documents required to get an ID if they are first time applicants, but I do not know how many of these voters will actually be treated as first-time applicants because Barreto did not consider this question. Barreto's data does, however, prove three things: (1) approximately 9.53% of the eligible voters in Milwaukee County, or 63,085

voters, do not have qualifying IDs under Act 23, (2) the DMV will treat at least 17,210 of these voters as first-time applicants if they apply for a state ID card because they have never had a Wisconsin driver's license or state ID card, and (3) there are approximately 1,640 eligible voters in Milwaukee County alone who lack qualifying IDs and proof of identity, which the DMV will require them to show regardless of whether they are a first-time or renewal applicant.

Appendix C: Beatty's Methodology in Determining Disproportionate Impact

Beatty performed a "matching" analysis of databases maintained by the GAB and the DMV. The GAB database contained a list of Wisconsin registered voters, and the DMV databases contained lists of Wisconsin residents who have a current driver's license and/or state ID card. Beatty's methodology proceeded in two major steps. First, he determined how many registered voters in the GAB database could be matched to either a driver's license or a state ID card in the DMV database. I have explained how he performed this step in Appendix A. Second, Beatty attempted to identify the race of the remaining unmatched voters. I explain this step of his methodology below.

Beatty submitted certain information about the unmatched voters to a third party, Ethnic Technologies, to determine their likely race. The reason Beatty did this is that the GAB database did not include information about race, and thus he had to determine the race of the voters who could not be matched to a DMV product through some other process. Ethnic Technologies is a firm that uses information about the name of a person and where that person lives to determine his or her likely race and ethnicity (among other characteristics). Typical clients of the firm include companies and organizations that engage in direct marketing in which it is important to know the race or ethnicity of the individuals receiving the company's marketing materials. Tr. 598–601.

Beatty explained the general process that a firm like Ethnic Technologies uses to identify race and ethnicity as follows:

> [Beatty]: They [Ethnic Technologies] use a system that breaks out each part of a person's name so that they have a mini database that's built up over a long period of time where they understand name prefixes, middle parts of last names, name suffixes that are highly predictive of country of origin. They begin with the first name. The first name is very indicative of the cultural values of the namer of a person. Typically parents. So they begin there and where there are names that are only found in one particular type of—one particular race, that's gonna be determinative. If the first name is not determinative they move to the last name where they literally parse it apart syllable by syllable and understand what the name means, what its derivation is, and what country of origin it was likely from.
>
> Q. And is there other information beyond first and last name that goes into that analysis?
>
> A. Yes. If it's still not decisive they use the middle name which like the first name is very indicative of the cultural values of the namer. If we're still uncertain we look at that actual latitude and longitude, put it in a block, and understand if it is predominantly, overwhelmingly, marginally one race or another.
>
> Q. And when you say that latitude and longitude, what do you mean by that?

A. It's—latitude and longitude is a way of measuring a particular spot on the earth. And if you know the latitude and longitude you can place it right into a neighborhood.

Q. You mean of the individual's residence.

A. Yes.

Q. And when you say in a certain block what do you mean by that?

A. A census block in urban areas is often literally a city block. In rural areas it may cover a wider expanse, but mostly in urban areas it's close to an exact city block.

Q. And is there information available about the racial demographics of the residents of a census block?

A. Yes, there's both census data, there's commercial data, but also we aggregate the voter file itself to understand the voter makeup in that block.

Tr. 636–37.

John Mas, a former employee of Ethnic Technologies, provided examples to illustrate Ethnic Technologies' general methodology: "So the premise is that you look at a person's first name and you can infer a little bit about their culture or their background or you can look at their last name. If you heard Alex Rodriguez you wouldn't think that he's a Chinese person playing baseball." Tr. 606. The firm then refines its analysis by drawing inferences based on the neighborhood in which the person lives: "So you could have people with the last name Lee, like Bruce Lee or Stan Lee and help decipher if he's Chinese or Jewish. So if you know where they live you can know that

Bruce Lee if he lived in Chinatown more than likely would be Chinese, or Stan Lee if he lived in Riverdale, New York was Jewish." Tr. 608.

Using the data Beatty provided, Ethnic Technologies was able to identify the likely race of 91.6% of the unmatched voters in 2012 and 93.1% of the unmatched voters in 2013. Beatty then computed the percentage of registered voters of each race that lacked a matching driver's license or state ID. This produced the following results: In 2012, 9.5% of white voters, 16.2% of Black voters, and 24.8% of Hispanic voters lacked a matching ID. In 2013, 8.3% of white voters, 11.5% of Black voters, and 19.2% of Hispanic voters lacked a matching ID.

The defendants offer two criticisms of Beatty's methodology. Their first criticism is that Beatty's analysis failed to account for the possibility that unmatched voters might possess a form of qualifying ID other than a driver's license or a state ID card. This is a fair point, but as other evidence in this case establishes, only an extremely small number of people possess a form of qualifying ID other than a driver's license or a state ID card and do not also possess either a driver's license or a state ID card. Tr. 300 (testimony of Professor Barreto reporting that only 0.3 percent of Milwaukee County residents had *only* a form of ID other than a driver's license or state ID card). Thus, although some unmatched voters will possess a form of qualifying ID other than a driver's license or state ID card, it is highly unlikely that these unmatched voters are so numerous that they would affect Beatty's ultimate conclusion that minorities are substantially more likely than whites to lack a qualifying form of ID.

The defendants' second criticism of Beatty's methodology has to do with his use of Ethnic

Technologies to determine the race of the unmatched voters. The defendants point out that Ethnic Technologies determined the likely race of the unmatched voters by inputting the voters' names and locations into its proprietary software program, and that no witness gave precise details about the algorithm on which that software is based. However, the general principles underlying the software are known. As Beatty testified, the software first attempts to match a person's first name to an ethnicity, then examines the last name and possibly middle name, and finally uses information about the neighborhood in which the person lives to estimate the person's race and ethnicity. Ethnic Technologies also explains that this is the general principle underlying its software on its website. *See* LULAC Ex. 211; www.ethnictechnologies.com (last viewed April 28, 2014).

Moreover, even though we do not know the precise details surrounding Ethnic Technologies' software, there is ample evidence in the record indicating that Ethnic Technologies' software is reliable enough for the purposes it was used in this case, which is to estimate the racial makeup of a population. First, there is a consensus in the academic literature that although the general principles employed by Ethic Technologies—known as onomastics, Tr. 662–63—do not perfectly determine a person's race, they "provide[] a sufficient level of classification confidence to be used in the measurement of inequalities and in the design and delivery of services that meet the needs of ethnic minorities." Pablo Mateos, *A Review of Name-based Ethnicity Classifications Methods and their Potential in Population Studies*, Population, Space and Place, July/August 2007, at 243; LULAC Ex. 213 at 26. Here, we are attempting to measure a racial inequality, and thus software based on onomastics is a proper tool to

use. Second, a study supported by a grant from the National Cancer Institute found that Ethnic Technologies' software was "nearly perfect in estimating white race"—meaning that the software almost never identified a person as nonwhite when the person self-identified as white. Jessica T. DeFrank et al., *Triangulating Differential Nonresponse by Race in a Telephone Survey*, Preventing Chronic Disease, July 2007, at 1, 5; LULAC Ex. 212. It is true that the software misidentified a large number of self-identified Black individuals as white, *id*., but this does not undermine Beatty's conclusion that Black voters are more likely than white voters to lack photo ID. If anything, it indicates that the disparity in possession rates is even greater, as it implies that many of the unmatched voters whom Ethnic Technologies identified as white are actually Black.[1] Moreover, as Beatty testified, Ethnic Technologies has improved its software since the time of the CDC study, and today the software has less of a tendency to misidentify Blacks as whites. Tr. 661–62.

A final factor indicating that Ethnic Technologies' software is reliable is the fact that Ethnic Technologies has been able to remain in business since 1995. Tr. 597. Marketers would not continue to hire Ethnic Technologies to estimate the race and ethnicity of their target audiences if its software were unreliable. And Beatty himself testified that he has been using Ethnic Technologies in his work for many years and has found their results to be very reliable. Tr. 634–35, 662–63.

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[1] As Beatty explained, there is a tendency to misidentify Black individuals as white because they often have the same names and live in the same neighborhoods as whites. Tr. 661.

In sum, I conclude that Beatty's methods, and the conclusions he reached after applying those methods, are reliable and should be given significant weight.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos.: 14-2058 & 14-2059

RUTHELLE FRANK, *et al*.,
Plaintiffs-Appellees
v.
SCOTT WALKER, in his official capacity as Governor of State of Wisconsin, *et al*.,
Defendants-Appellants

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF WISCONSIN, *et al*.,
Plaintiffs-Appellees
v.
DAVID G. DEININGER, *et al*.,
Defendants-Appellants

Originating Case Information:
District Court Nos: 2:11-cv-01128-LA
Eastern District of Wisconsin

Originating Case Information:
District Court Nos: 2:11-cv-00185-LA
Eastern District of Wisconsin

October 15, 2014

ORDER

Before: FRANK H. EASTERBROOK, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

Upon consideration of the PLAINTIFFS-APPELLEES' EMERGENCY MOTION TO STAY JUDGMENT AND MANDATE PENDING FURTHER REVIEW, filed on October 7, 2014, by counsel for the appellees,

IT IS ORDERED that the motion for a stay of mandate is GRANTED. This stay will expire automatically if the time to file a petition for certiorari expires without a petition being filed, or if a petition is filed and denied. If a petition is filed and granted, the stay will continue pending the Supreme Court's decision.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 14-2058 & 14-2059

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RUTHELLE FRANK, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT WALKER, Governor of Wisconsin, *et al.*,

Defendants-Appellants.

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

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, Member, Government Accountability Board, *et al.*,

Defendants-Appellants.

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On Suggestion of Rehearing En Banc.

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DECIDED OCTOBER 10, 2014

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A judge in active service requested a vote on the question whether to rehear this appeal en banc. Chief Judge Wood and Judges Posner, Rovner, Williams, and Hamilton voted in favor of rehearing en banc. The proposal to rehear this case en banc therefore fails by an equally divided court.

This order does not affect the ability of any party to seek rehearing by the panel or the full court, see Fed. R. App. P. 35, nor does it affect the time available for filing a petition, see Fed. R. App. P. 40.

POSNER, *Circuit Judge*, joined by *Chief Judge* WOOD and *Circuit Judges* ROVNER, WILLIAMS, and HAMILTON, dissenting from denial of rehearing en banc.

The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* 161 (2014), states that "en banc rehearing is authorized without a party's invitation. A member of the court may ask for a vote on whether to rehear a case en banc." I asked for a vote on whether to rehear these appeals en banc. The judges have voted, the vote was a 5 to 5 tie, and as a result rehearing en banc has been denied. We—the five who voted to grant rehearing en banc—believe that the decision to allow the panel's opinion (reported at 2014 WL 4966557 (Oct. 6, 2014)) reversing the district court to stand, without consideration of the case by the full court, is a serious mistake.

The movement in a number of states including Wisconsin to require voters to prove eligibility by presenting a photo of themselves when they try to vote has placed an undue burden on the right to vote, a right that the Supreme Court has found latent in the Constitution. *E.g.*, *Illinois State Board of Elections v.*

Socialist Workers Party, 440 U.S. 173, 184 (1979). The photo identification voting laws also raise issues under section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), which forbids electoral laws, practices, or structures that, interacting with social and historical conditions, deny or abridge, on account of race or color, a citizen's right to vote. *See*, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In upholding the Wisconsin photo ID law in the face of compelling evidence that it abridges the right to vote without justification, the panel opinion places particular weight on the Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Affirming a decision by this court, *see* 472 F.3d 949 (7th Cir. 2007), the Supreme Court upheld an Indiana law requiring photo identification of voters. The panel calls Wisconsin's law "similar." It would be more accurate to say that the laws belong to the same genre, namely strict photo ID voter eligibility laws. The two states' laws are importantly dissimilar, not only in their terms but in the evidentiary records of the two cases. Although in *Crawford* as in this case the record contained no evidence of in-person voter impersonation at polling places "actually occurring in Indiana at any time," there had been scattered instances of such fraud in recent American elections. 553 U.S. at 195–96. And there was no evidence that the Indiana law was likely to disenfranchise more than a handful of voters. Given the record, the Supreme Court was unwilling "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weights their burdens against the State's broad interests in protecting election integrity," especially since "on the basis of the evidence in the record it is not possible to quantify either the

magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id*. at 200. Judge Evans, dissenting from our decision in *Crawford*, called the Indiana law "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic." 472 F.3d at 954. But he cited no evidence to support his conjecture—a conjecture that now seems prescient, however.

Crawford was decided by the Supreme Court almost six and a half years ago, on the basis of the evidence presented in that case and the particulars of the Indiana statute. The decision does not resolve the present case, which involves a different statute and has a different record and arises against a background of a changed political culture in the United States. It is a disservice to a court to apply its precedents to dissimilar circumstances. *Crawford* dealt with a particular statute and a particular evidentiary record. The statute at issue in this case has different terms and the case challenging it a different record, the terms and the record having been unknown to either our court (affirmed by the Supreme Court in *Crawford*) or the Supreme Court.

The panel opinion recognizes that there are differences between the two statutes and the two records, but does not recognize the significance of the differences. The Indiana statute challenged in *Crawford* was less restrictive than the Wisconsin statute challenged in this case. Indiana accepts any Indiana or U.S. government-issued ID that includes name, photo, and expiration date. Wisconsin's statute permits voters to use only a Wisconsin drivers' license or Wisconsin state card, a military or tribal ID card, a passport, a naturalization certificate if issued within

two years, a student ID (so long as it contains the student's signature, the card's expiration date, and proof that the student really is enrolled in a school), or an unexpired receipt from a drivers' license/ID application. Wisconsin does not recognize military veteran IDs, student ID cards without a signature, and other government-issued IDs that satisfy Indiana's criteria.

Indiana's statute does not require absentee voters to present photo identification, and permits voters to vote absentee if they expect to be absent from their district on election day, are older than 65, can't vote in person because of illness or injury or are caring for someone with an illness or an injury, are scheduled to work during the 12-hour period in which the polls are open, are members of the military, are celebrating a religious holiday, or are in the state's "address confidentiality" program (victims of domestic violence, for example). Thus, many people who might find it difficult to obtain photo identification can vote absentee and are therefore excused from having to present a photo ID. Wisconsin, in contrast, requires absentee voters to submit a photo ID the first time they request an absentee ballot, and in subsequent elections as well if they change their address or are required to re-register to vote, or if they change their name, as many women still do upon marrying. A recent national survey found that

> millions of American citizens do not have readily available documentary proof of citizenship. Many more—primarily women—do not have proof of citizenship with their current name. The survey also showed that millions of American citizens do not have government-issued photo identification, such

> as a driver's license or passport. Finally, the survey demonstrated that certain groups—primarily poor, elderly, and minority citizens—are less likely to possess these forms of documentation than the general population.

Brennan Center for Justice, "Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification," www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (visited October 8, 2014, as were the other websites cited in this opinion).

Wisconsin's statutory exceptions to the requirement that one must have a photo ID to be permitted to vote, which are more limited than those recognized by the Indiana law, include members of the military, overseas voters who have no intention of ever returning to live in the United States, participants in the state's confidentiality program, and voters who being infirm or disabled are indefinitely confined to their homes or to care facilities.

The Indiana statute permits voters without a photo ID to cast a provisional ballot and within ten days after the election present a photo ID to a circuit court clerk's office; indigent voters unable to procure a photo ID by that deadline can, by executing an affidavit confirming their identity and indigence, have their ballots counted. Wisconsin has no provision for indigent voters. It does permit voters to cast a provisional ballot and later supply a photo ID, but requires that they do so by the Friday after the election, which gives them just three days to comply in national elections, since such elections are always held on Tuesdays.

These are not trivial differences between the two statutes.

The panel opinion cites the recommendation of the Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 18 (2005), that photo IDs be required for voting, but omits the Commission's statement that they "should be easily available and issued free of charge," *id.* at 19, and its recommendation that states should "play an affirmative role in reaching out to non-drivers by providing more offices, including mobile ones, to ... provide photo IDs free of charge," and allow "voters who do not have a photo ID during a transitional period [to] receive a provisional ballot that would be counted if their signature is verified." *Id.* at iv.

I turn now to the evidence in the respective cases. In our *Crawford* opinion we pointed out that none of the plaintiffs claimed that they wouldn't vote in the upcoming election because of the photo ID law. "No doubt there are at least a few such people in Indiana, but the inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic party . . . to work harder to get every last one of their supporters to the polls." 472 F.2d at 952; *see also* the Supreme Court's plurality opinion, 533 U.S. at 187. In the present case, in contrast, eight persons testified that they want to vote in the November 4 election but have been unable to obtain the required identification. In *Crawford* it was estimated that about 43,000 Indiana residents lacked the requisite identification, which was 1 percent of the state's voting population, while in this case the district court found that 300,000 registered voters—9 percent of all registered voters in Wisconsin—lack qualifying identification. Many of them also lack the documents they'd need in order to obtain a photo ID, or face other impediments to getting one but are not within the

narrow band of voters excused from having to present a photo ID when voting. According to an expert witness, at least 20,162 eligible voters in Milwaukee County alone possess neither a photo ID nor the documents they would need to obtain one. And in the district court's words a "substantial number of the 300,000 plus eligible voters who lack a photo ID are low-income individuals . . . who have encountered obstacles that have prevented or deterred them from obtaining a photo ID."

The panel was literally correct that the district court "did not find that substantial numbers of persons eligible to vote have tried to get a photo ID but been unable to do so," but its literalism missed the point. To encounter "obstacles that have prevented or deterred" persons from obtaining a photo ID means either having tried but failed to obtain a photo ID or having realized that (for these persons) the obstacles to obtaining it were insurmountable, so there would be no point in trying to overcome them.

The district court's opinion presented a litany of the practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID if they need one in order to be able to vote because they don't have a driver's license:

> The first obstacle to obtaining an ID will be to identify the requirements for obtaining a free state ID card. I am able to summarize the requirements for obtaining an ID because I have access to the Wisconsin Statutes and Administrative Code and heard testimony on the topic at trial. A typical voter who needs an ID, however, must educate him or herself on these requirements in some other way. Although this may be easy for some, for

others, especially those with lower levels of education, it will be harder. Moreover, a person who needs to obtain one or more of the required documents to obtain an ID, such as a birth certificate, must determine not only the DMV's documentation requirements, but also the requirements of the agency that issues the missing document. This adds a layer of complexity to the process. . . .

Assuming the person is able to determine what he or she needs to do to obtain an ID, the person must next consider the time and effort involved in actually obtaining the ID. This will involve at least one trip to the DMV [Department of Motor Vehicles]. There are 92 DMV service centers in the state. All but two of these close before 5:00 p.m. and only one is open on weekends. So, it is likely that the person will have to take time off from work. The person will either need to use vacation time if it's available or forego the hourly wages that he or she could have earned in the time it takes to obtain the ID. . . . The person will also have to arrange for transportation. Since this person does not have a driver's license and is low income, most likely he or she must use public transportation or arrange for another form of transportation. . . . Further, for some individuals public transportation will be of no help because not all of the DMV's service centers are accessible by public transit.

If the person does not have all of the documents the DMV requires to obtain an ID, then the person will most likely have to visit at

least one government agency in addition to the DMV. If that is the case, then the person will likely have to take even more time off of work and pay additional transportation costs. . . . Perhaps it is possible for a person to obtain a missing underlying document by mail, but even so that will require time and effort.

A person who needs to obtain a missing underlying document is also likely to have to pay a fee for the document. For some low-income individuals, it will be difficult to pay even $20.00 for a birth certificate. . . .

An additional problem is whether a person who lacks an ID can obtain one in time to use it to vote. For many who need an ID, it will take longer than a day or two to gather the necessary documents and make a trip to the DMV. Indeed, if a person needs to obtain a birth certificate, especially from another state, it might take weeks or longer to obtain it. If an election is imminent, a person may be unable to procure an ID in time to vote or to validate a provisional ballot by the Friday after the election.

Another problem that arises is a person's having errors or discrepancies in the documents needed to obtain an ID. For example, the DMV requires the name on a person's social security card and birth certificate to match. If there is an error in a person's social security record, the person must visit the Social Security Office and correct the record. If there is an error in a person's birth certificate, the person must get it amended.

> Making additional trips to government agencies to resolve discrepancies will require more time off work and additional transportation costs.

Frank v. Walker, 2014 WL 1775432, at *14–16 (E.D. Wis. Apr. 29, 2014) (citations and footnotes omitted).

In upholding the Indiana statute, both our *Crawford* opinion and the Supreme Court's plurality opinion noted that Indiana voter rolls were substantially inflated—they contained 1.3 million more names than there were eligible voters. The Supreme Court also cited a report by the Commission on Federal Election Reform which stated that although "there is no evidence of extensive fraud in U.S. elections or of multiple voting . . . both occur, and it could affect the outcome of a close election. . . . Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." 553 U.S. at 194. (We'll see, by the way, that the Commission's statement that "photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check" is for the most part no longer true.)

There is no evidence that Wisconsin's voter rolls are inflated, as were Indiana's—and there is compelling evidence that voter-impersonation fraud is essentially nonexistent in Wisconsin. "The [state] could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." *Frank v. Walker*, *supra*, at *6. There are more than 660,000 eligible voters in Milwaukee County. According to the state's own evidence, in only one or two instances per major election in which a voter in Milwaukee County is turned away from the polls because a poll worker tells him he's voted already is

there even a suspicion—unconfirmed—of fraud. An expert witness who studied Wisconsin elections that took place in 2004, 2008, 2010, and 2012 found zero cases of in-person voter-impersonation fraud.

It is important to bear in mind that requiring a photo ID is ineffectual against other forms of voter fraud, of which there are many. Here is a nonexhaustive list (from Voter Fraud Facts, "Types of Voter Fraud," http://voterfraudfacts.com/typesofvoterfraud.php (emphases omitted)):

> Electorate Manipulation Including Manipulation of Demography and Disenfranchisement;
>
> Intimidation Including Violence or the Threat of Violence, Attacks on Polling Places, Legal Threats and Economic Threats;
>
> Vote Buying; Misinformation;
>
> Misleading or Confusing Ballot Papers;
>
> Ballot Stuffing;
>
> Misrecording of Votes;
>
> Misuse of Proxy Votes;
>
> Destruction or Invalidation of Ballots;
>
> Tampering with Electronic Voting Machine.

Voter-impersonation fraud may be a subset of "Misinformation." If so, it is by all accounts a tiny subset, a tiny problem, and a mere fig leaf for efforts to disenfranchise voters likely to vote for the political party that does not control the state government. Those of us who live in Illinois are familiar with a variety of voting frauds, and no one would deny the propriety of the law's trying to stamp out such frauds.

The one form of voter fraud known to be too rare to justify limiting voters' ability to vote by requiring them to present a photo ID at the polling place is in-person voter impersonation.

The panel opinion states that requiring a photo ID might at least prevent persons who "are too young or are not citizens" from voting. Not so. State-issued IDs are available to noncitizens, Wis. Adm. Code § Trans. 102.15(2)(bm)—all that's required is proof of "legal presence in the United States"; a noncitizen who is a permanent resident of the United States needs only a copy of his foreign passport and appropriate immigration documents to obtain a photo ID. A student ID must (to entitle the bearer to vote) be accompanied by proof of enrollment and contain the student's signature and date of issuance, but need not include date of birth. Wis. Stat. § 5.02(6m)(f).

Another erroneous statement in the panel opinion is that requiring a photo ID could help "promote[] accurate recordkeeping (so that people who have moved after the date of registration do not vote in the wrong precinct)." Wisconsin's photo ID law has nothing to do with voting in the correct precinct. According to testimony by the director and general counsel of the Wisconsin Government Accountability Board, the address on a voter's ID does not have to match his or her voting address.

We can learn something both about the significance of voter-impersonation fraud and the likely motivation for the Wisconsin statute from a report by the National Conference of State Legislatures, *Voter Identification Requirements | Voter ID Laws*, www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. The report was issued on September 12th of this year and thus

covers all requirements applicable to the forthcoming November election.

We learn from the report that 32 states require voters to present some form of identification at the polling station but that of these only 17 require photo identification. The other 15 usually will accept a utility bill, a non-photo ID, or some other document that includes the voter's name and address. The 32 states also differ in the strictness with which the identification requirement is enforced. The report classifies as "strict" those 12 states, including Wisconsin, that require the voter to show identification before a ballot will be counted at the polling place, or to cast a provisional ballot and take additional steps, such as presenting acceptable ID at a board of elections office within a specified period after election day.

According to the report, only 9 states, including Wisconsin, impose strict photo identification requirements. The other states permit at least some voters to cast a ballot without necessarily requiring any further action on the part of the voter after election day for a vote to be counted. Instead, these states may, for example, require the voter to sign an affidavit, or a poll worker to vouch for the voter.

The data are summarized in the following table and map.

TABLE 1

Voter Identification Laws in Force in 2014

	Photo ID	Non-Photo ID
Strict	Arkansas Georgia Indiana Kansas Mississippi Tennessee Texas Virginia **Wisconsin**	Arizona North Dakota Ohio
Non-Strict	Alabama Florida Hawaii Idaho Louisiana Michigan Rhode Island South Dakota	Alaska Colorado Connecticut Delaware Kentucky Missouri Montana New Hampshire Oklahoma South Carolina Utah Washington

All the strict photo ID states are politically conservative, at least at the state level, as are five of the eight non-strict photo ID states (all but Hawaii, Michigan, and Rhode Island). Table 2 provides specifics on the political makeup of the governments of the nine strict photo ID states at the time their photo ID laws were enacted.

TABLE 2

STATES WITH STRICT PHOTO ID LAWS—POLITICAL MAKEUP WHEN THE LAWS WERE ADOPTED

Arkansas: Democratic governor, but both the House and Senate were under Republican control.

Georgia: Republican governor, Republican control of both the House and Senate.

Indiana: Republican governor, Republican control of both the House and Senate.

Kansas: Republican governor, Republican control of both the House and Senate.

Mississippi: Adopted by the voters through a ballot initiative. Republicans, who already controlled the governorship and the state Senate, won a majority of seats in the House in that same election.

Tennessee: Republican governor, Republican control of both the House and Senate.

Texas: Republican governor, Republican control of both the House and Senate.

Virginia: Republican governor, Republican control of both the House and Senate.

Wisconsin: Republican governor, Republican control of both the House and Senate.

The basic pattern holds for the three strict non-photo ID states. Arizona adopted such a law by initiative in 2004, at a time when the state had a Democratic governor but the Republicans controlled both houses of the state legislature (as they have between 1993 and 2013, except for a brief period

between 2001 and 2002 when the senate was evenly divided). Both North Dakota and Ohio had Republican governors, and Republicans controlled both houses of the legislatures, when those states' strict ID statutes were enacted.

The 12 non-strict non-photo ID states are also predominantly conservative; only 4 are liberal (Connecticut, Delaware, New Hampshire, and Washington). Of the 18 states that don't require identification, about half are liberal.

The data imply that a number of conservative states try to make it difficult for people who are outside the main-stream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver's license or feel comfortable dealing with officialdom, to vote, and that liberal states try to make it easy for such people to vote because if they do vote they are likely to vote for Democratic candidates. Were matters as simple as this there would no compelling reason for judicial intervention; it would be politics as usual. But actually there's an asymmetry. There is evidence both that voter-impersonation fraud is extremely rare and that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting. This implies that the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic.

Some of the "evidence" of voter-impersonation fraud is downright goofy, if not paranoid, such as the nonexistent buses that according to the "True the Vote" movement transport foreigners and reservation Indians to polling places. *See* Stephanie Saul, "Looking, Very Closely, for Voter Fraud: Conservative

Groups Focus on Registration in Swing States," Sept. 16, 2012, www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html?pagewanted=all&_r=0. Even Fox News, whose passion for conservative causes has never been questioned, acknowledges that "Voter ID Laws Target Rarely Occurring Voter Fraud," Sept. 24, 2011, www.foxnews.com/ politics/2011/09/24/voter-id-laws-target-rarely-occurring-voter-fraud, noting that "even supporters of the new [photo ID] laws are hard pressed to come up with large numbers of cases in which someone tried to vote under a false identify."

Elsewhere we learn that "even though voter identification laws were being touted as necessary to prevent in-person voter fraud, repeated investigations of these allegations show that there is virtually no in-person voter fraud nationally. A study of 2,068 alleged cases conducted by the News21 journalism consortium found that since 2000 there have been only ten cases of in-person voter fraud that could have been prevented by photo ID laws. Out of 146 million registered voters, this is a ratio of one case of voter fraud for every 14.6 million eligible voters—more than a dozen times less likely than being struck by lightning." Richard Sobel, "The High Cost of 'Free' Photo Voter Identification Cards" 7 (Charles Hamilton Houston Institute for Race & Justice, Harvard Law School, June 2014), www.charleshamiltonhouston.org/wp-content/uploads/2014/08/FullReportVoterIDJune2014.pdf (footnotes omitted).

And think: voting is a low-reward activity for any given individual, for he or she knows that elections are not decided by one vote. When the rewards for an activity are low, even a modest cost of engaging in it is a potent discourager. Think too of the risks to

politicians of orchestrating a massive campaign of voter-impersonation fraud, since only a massive campaign will increase a candidate's vote total by enough to swing all but the very closest elections, and massive election fraud could result in heavy punishment of the orchestrators. Besides the risks to the politicians, think of how much it would cost to orchestrate an effective voter-impersonation fraud, given the number of voters who must be bribed, and in amounts generous enough to overcome their fear of being detected, and if detected prosecuted.

M.V. Hood III and William Gillespie, in their article "They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud," 93 *Social Sci. Q.* 76 (2012), find that "after examining approximately 2.1 million votes cast during the 2006 general election in Georgia, we find no evidence that election fraud was committed under the auspices of deceased registrants." Co-author Hood was the State of Wisconsin's expert witness in the present case¬ and testified that Georgia's voter ID law indeed "had the effect of suppressing turnout."

Keith G. Bentele and Erin E. O'Brien, in their article "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies," 11 *Perspectives on Politics* 1088 (2013), present evidence that restrictive voter access policies such as photo ID requirements are indeed, as we noted earlier, highly correlated with a state's having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly blacks. And Lorraine C. Minnite, in her book *The Myth of Voter Fraud* (2010), bases her conclusion that voter-impersonation fraud is rare on the small number of federal criminal prosecutions for election fraud,

despite evidence that such crimes have been an enforcement priority for the Justice Department, and on an investigation of complaints of election fraud in four states (California, Minnesota, New Hampshire, and Oregon), finding that few of the complaints involved voter impersonation.

Consider now the other side of the balance—the effect of strict voter ID laws on lawful turnout. The panel opinion does not discuss the cost of obtaining a photo ID. It assumes the cost is negligible. That's an easy assumption for federal judges to make, since we are given photo IDs by court security free of charge. And we have upper-middle-class salaries. Not everyone is so fortunate. It's been found that "the expenses [of obtaining a photo ID] for documentation, travel, and waiting time are significant—especially for minority groups and low-income voters—typically ranging from about $75 to $175. . . . Even when adjusted for inflation, these figures represent substantially greater costs than the $1.50 poll tax outlawed by the 24th amendment in 1964." Sobel, *supra*, at 2.

The panel opinion suggests that obtaining a photo ID to vote can't be a big deal, because one needs a photo ID to fly. That's a common misconception. *See* Transportation Security Administration, *Acceptable IDs*, www.tsa.gov/traveler-information/acceptable-ids. Since, despite the 9/11 attacks that killed thousands, a photo ID is not considered essential to airline safety, it seems beyond odd that it should be considered essential to electoral validity.

The panel piles error on error by stating that "photo ID is essential [not only] to board an airplane . . . [but also to] pick up a prescription at a pharmacy, open a bank account . . ., buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal."

In 35 states, including Wisconsin, you don't need a photo ID to pick up all prescriptions. Centers for Disease Control and Prevention, *Law: Requiring Patient Identification Before Dispensing*, www.cdc.gov/homeandrecreationalsafety/Poisoning/laws/id_req.html. Bank customers do not need a photo ID to open a bank account. U.S. Dept. of the Treasury, Office of the Comptroller of the Currency, *Answers & Solutions; Answers About Identification*, www.helpwithmybank.gov/get-answers/bank-accounts/identification/faq-bank-accounts-identification-02.html. Federal law does not require a photo ID to purchase firearms at gun shows, flea markets, or online. U.S. Dept. of Justice, Office of the Inspector General, *Review of ATFs Project Gunrunner* 10 (Nov. 2010), www.justice.gov/oig/reports/ATF/ e1101.pdf. It's true that our courthouse requires a photo ID to enter, but the Supreme Court requires no identification at all of visitors.

The panel does say, in the same paragraph of its opinion, that it "accept[s] the district court's finding [that 300,000 registered voters lack acceptable photo ID in Wisconsin] in this case," but coming after a recitation that mistakenly implies that one can do virtually nothing in this society without a photo ID, the implication is that those 300,000 have only themselves to blame for not being allowed to vote.

Robert S. Erikson & Lorraine C. Minnite, "Modeling Problems in the Voter Identification—Voter Turnout Debate," 8 *Election L.J.* 85, 98 (2009), notes that "recent research . . . strongly suggests that strict voter ID laws will negatively affect certain voters, including minorities, at least in the short-run," though the authors acknowledge doubt about the statistical robustness of the evidence. A study by R. Michael Alvarez, Delia Bailey, and Johnathan N. Katz, entitled

"The Effect of Voter Identification Laws on Turnout," California Institute of Technology, Social Science Working Paper 1267R (Jan. 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084598, finds that "the strictest forms of voter identification requirements—combination requirements of presenting an identification card and positively matching one's signature with a signature either on file or on the identification card, as well as requirements to show picture identification—have a negative impact on the participation of registered voters relative to the weakest requirement, stating one's name. We also find evidence that the stricter voter identification requirements depress turnout to a greater extent for less educated and lower income populations, for both minorities and non-minorities."

The aggregate effect of strict voter identification requirements in depressing turnout does not appear to be huge—it has been estimated as deterring or disqualifying 2 percent of otherwise eligible voters (Nate Silver, "Measuring the Effects of Voter Identification Laws," *N.Y. Times*, July 15, 2012, http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/). But obviously the effect, if felt mainly by persons inclined to favor one party (the Democratic Party, favored by the low-income and minority groups whose members are most likely to have difficulty obtaining a photo ID), can be decisive in close elections. The effects on turnout are bound to vary, however, from state to state, depending on the strictness of a state's ID requirements for voting and the percentage of the state's population that lacks the required ID. Remember that at the time of the *Crawford* case only 43,000 Indiana residents lacked the required identification; 330,000 registered Wisconsin voters lack it—

and Wisconsin has a smaller population (5.7 million versus Indiana's 6.5 million). Hence the effects of the photo ID requirement on voter suppression are likely to be much greater in Wisconsin, especially since as we saw earlier its law is stricter than Indiana's.

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*. 1727 (2008), finds that perceptions of voter-impersonation fraud are unrelated to the strictness of a state's voter ID law. This suggests that these laws do not reduce such fraud, for if they did one would expect perceptions of its prevalence to change. The study also undermines the suggestion in the panel's opinion (offered without supporting evidence) that requiring a photo ID in order to be allowed to vote increases voters' confidence in the honesty of the election, and thus increases turnout. If perceptions of the prevalence of voter-impersonation fraud are unaffected by the strictness of a state's photo ID laws, neither will confidence in the honesty of elections rise, for it would rise only if voters were persuaded that such laws reduce the incidence of such fraud.

The panel opinion dismisses the Absolabehere and Persily article on the ground that because it was published in the *Harvard Law Review*, it was not peer-reviewed. So much for law reviews. (And what about Supreme Court opinions? They're not peer-reviewed either.) Persily, incidentally, was chosen to be Research Director for the Presidential Commission on Election Administration, a nonpartisan body co-chaired by the former counsel to Governor Romney's, and the former counsel to President Obama's, 2012 presidential election campaigns.

The studies we've cited and the evidentiary record compiled in the district court show that Wisconsin is wise not to argue that voter-impersonation fraud is common in its state. Instead it argues that such fraud is uncommon because it's deterred by the statutory requirement of having a photo ID to be permitted to vote. But were it true that requiring a photo ID is necessary to deter voter-impersonation fraud, then such fraud would be common—maybe rampant—in states that do not require a photo ID. A glance back at Table 1 will reveal that 12 states do not require a photo ID or any strict non-photo substitute. If Wisconsin's deterrence rationale is sound, we should expect voter-impersonation fraud to be common in those states. Wisconsin does not argue that, and we know of no evidence that it could produce in support of such an argument. Nor does it argue that there is something special about Wisconsin—some unusual compulsion to engage in voter-impersonation fraud in the absence of strict photo ID requirements—that would make the experience in the 12 non-strict non-photo ID states irrelevant to the likely effect of the Wisconsin law in deterring (or rather not deterring) voter-impersonation fraud.

Despite the absence of any evidence that voter-impersonation fraud is an actual rather than an invented problem, whether in Wisconsin or elsewhere in the United States, the panel opinion contends that requiring a photo ID for eligibility to vote increases "public confidence in the electoral system." The emphasis it places on this contention suggests serious doubt by the panel members that the photo ID law actually reduces voter impersonation. But there is no evidence that such laws promote public confidence in the electoral system either. Were there such evidence it would imply a massive public misunderstanding,

since requiring a photo ID in order to be permitted to vote appears to have no effect on election fraud.

The panel is not troubled by the absence of evidence. It deems the supposed beneficial effect of photo ID requirements on public confidence in the electoral system "'a legislative fact'—a proposition about the state of the world," and asserts that "on matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." In so saying, the panel conjures up a fact-free cocoon in which to lodge the federal judiciary. As there is no evidence that voter-impersonation fraud is a problem, how can the fact that a legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials? If the Supreme Court once thought that requiring photo identification increases public confidence in elections, and experience and academic study since shows that the Court was mistaken, do we do a favor to the Court—do we increase public confidence in elections—by making the mistake a premise of our decision? Pressed to its logical extreme the panel's interpretation of and deference to legislative facts would require upholding a photo ID voter law even if it were uncontested that the law eliminated no fraud but did depress turnout significantly.

The concept of a legislative fact comes into its own when there is no reason to believe that certain facts pertinent to a case vary from locality to locality, or from person to person; a typical definition of legislative facts is broad, general facts that are not unique to a particular case and provide therefore an appropriate basis for legislation of general application.

For example, black lung disease (pneumoconiosis) is either a progressive disease, like asbestosis, or it is not. Nothing supports the idea that it is progressive for Miner A and halts for Miner B.

Even legislative facts are not sacrosanct, though "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 444 U.S. 93, 111 (1979). And anyway voter fraud, voter habits, voter disenfranchisement are not legislative facts, owing to the great variance across and even within states in the administration of elections. Some states have small enough populations, or at least some of their voting precincts have small enough populations, that poll workers are likely to know personally every voter who shows up at the polls to vote. No one is going to tell the poll worker that he or she is someone else, because it would be pointless. Other states, or areas, are populous, urban, and impersonal. The poll workers in a precinct in Manhattan probably have never laid eyes on most of the voters who show up at election time. The likelihood of other forms of voter fraud similarly depends on how a locality conducts its elections. We learned (if we didn't already know) at the time of *Bush v. Gore* that every locality in the country conducts elections in its own way—voting machines, paper ballots, computer punchcards, whatever—a situation unsuited to the application of the concept of legislative fact.

The panel says that "after a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge [in fact every federal judge other than at least five Supreme

Court Justices *en bloc*] cannot say as a 'fact' that they do not, even if 20 political scientists disagree with the Supreme Court." Does the Supreme Court *really* want the lower courts to throw a cloak of infallibility around its factual errors of yore? Shall it be said of judges as it was said of the Bourbon kings of France that they learned nothing and forgot nothing?

The panel opinion mentions none of the pertinent academic and journalistic literature, except the Ansolabehere and Persily article, which it disdains. Nor does the opinion acknowledge that voting is a low-reward activity, as evidenced by the fact that turnout tends to be low. The panel opinion states that "if photo ID is available to people willing to scrounge up a birth certificate and stand in line at the office that issues driver's licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time." But that ignores Sobel's study, discussed earlier, and the broader point that time is cost. The author of this dissenting opinion has never seen his birth certificate and does not know how he would go about "scrounging" it up. Nor does he enjoy waiting in line at motor vehicle bureaus. There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.

The panel opinion bolsters its suggestion that "scrounging" up a birth certificate is no big deal by stating that six voter witnesses in the district court "did not testify that they had tried to get [a copy of their birth certificate], let alone that they had tried but failed." That's another error by the panel, for five of

these witnesses testified that they *had* tried, but had failed, to obtain a copy of their birth certificate in order to be able to obtain a photo ID to be able to vote, and the sixth (who died shortly before the trial) had repeatedly but unsuccessfully tried to obtain a copy of her birth certificate. Illustrative is the testimony of one of the six that she had tried to get a voter ID in 2005 but was told she could not without a birth certificate. She was given a form to send to Mississippi, where she had been born, to request a copy of her birth certificate. She received a response two weeks later that "there was no such person"—she hadn't been born in a hospital and so there was no record of her birth. She is registered to vote, has worked as a poll worker, and had voted in the 2012 election.

A community organizer testified that she had tried to help another one of the witnesses obtain a copy of his birth certificate so that he could obtain a photo ID. He had been born in Milwaukee, but the vital-records office had no record of his birth and asked him for additional documentation, including elementary school records—which he did not have, unsurprisingly since he is 86. He had voted in previous elections but will be unable to vote in the forthcoming November 4 election. The testimony of the other witnesses was similar.

Any reader of this opinion who remains unconvinced that scrounging for one's birth certificate can be an ordeal is referred to the Appendix at the end of this opinion for disillusionment.

The panel opinion notes that 22 percent of eligible voters in Wisconsin don't register to vote, and infers from this—since registration is not burdensome (you don't need to present a photo ID in order to register)—

that the 22 percent simply aren't interested in voting. Fair enough. But the panel further infers that the 9 percent of registered voters who don't have photo IDs must likewise be uninterested in voting, since they are unwilling to go to the trouble of getting a photo ID. Wrong. The correct inference from the fact that *registered* voters lack photo IDs is the opposite of the panel's assertion that their failure to vote proves them to be uninterested in voting. Why would they have bothered to register if they didn't want to vote? Something must have happened to deter them from obtaining the photo ID that they would need in order to be permitted to vote: the inconvenience, for some registered voters the great difficulty, of obtaining a photo ID.

A remarkably revelatory article by Edwin Meese III and J. Kenneth Blackwell, entitled "Holder's Legacy of Racial Politics," *Wall Street Journal*, Sept. 29, 2014, p. A19, defends the photo ID movement as necessary to prevent voter impersonation encouraged by Democratic politicians. Yet the article states that in Texas the adoption of a photo-ID law increased turnout in counties dominated by minorities and that minority participation in Indiana rose after its photo-ID law upheld in *Crawford* went into effect. The article further states that in Georgia there was a *big* positive effect on black voting after that state's photo-ID law went into effect. The authors' overall assessment is that "voter-ID laws don't disenfranchise minorities or reduce minority voting, *and in many instances enhance it*" (emphasis added). In other words, the authors believe that the net effect of these laws is to increase minority voting. Yet if that is true, the opposition to these laws by liberal groups is senseless. If photo ID laws increase minority voting, liberals should rejoice in the laws and conservatives deplore

them. Yet it is conservatives who support them and liberals who oppose them. Unless conservatives and liberals are masochists, promoting laws that hurt them, these laws must suppress minority voting and the question then becomes whether there are offsetting social benefits—the evidence is that there are not.

To conclude, the case against a law requiring a photo ID as a condition of a registered voter's being permitted to vote that is as strict as Wisconsin's law is compelling. The law should be invalidated; at the very least, with the court split evenly in so important a case and the panel opinion so riven with weaknesses, the case should be reheard en banc.

APPENDIX: SCROUNGING FOR YOUR BIRTH CERTIFICATE IN WISCONSIN

Scott Walker
Governor

Dennis G. Smith
Secretary

State of Wisconsin
Department of Health Services

DIVISION OF PUBLIC HEALTH
STATE VITAL RECORDS OFFICE
1 WEST WILSON STREET, ROOM 158
P O BOX 309
MADISON WI 53701-0309

608-266-1373
FAX: 608-255-2035
dhs.wi.gov/VitalRecords

TO: Ms. Nancy Lea Wilde
[redacted] Airport St.
Schofield, WI 54476.

FROM: **Mark Alfred**
Customer and Special Services Supervisor
Vital Records

DATE: **March 13th, 2012.**

Dear Ms. Wilde,

I received your letter requesting that we complete the DMV Form MV3002 entitled "Name and Birth Date Certification" in order for you to obtain a state ID card. The State Vital Records office is the only office that can certify that no record exists. You will need to complete an application for a Birth Record with the appropriate fee and we will send you a "Not Found "letter if necessary.

If you are absolutely certain that you do not have a birth record then I have enclosed the necessary documents and procedures to obtain a Delayed Birth Registration document. With this document your birth date is actually be recorded and it is a certified document indicating that there is a record of your birth.

I have also enclosed my business card if you need to contact me or you have any questions.

Thank you.

Sincerely,

Mark Alfred
State Vital Records Office
Division of Public Health.
608-266-0330.

STATE OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES
MARK ALFRED
SUPERVISOR
CUSTOMER & SPECIAL SERVICES UNIT
STATE VITAL RECORDS OFFICE
DIVISION OF PUBLIC HEALTH
TELEPHONE: (608) 266-0330
E-MAIL: mark.alfred@dhs.wisconsin.gov
FAX: (608) 255-0355
ONE WEST WILSON STREET, ROOM 158
P.O. BOX 309
MADISON, WISCONSIN 53701-0309
www.wisconsin.gov/vitalrecords/

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Division of Public Health
F-05201 (Rev. 02/12)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.

DOCUMENTARY EVIDENCE REQUIREMENTS FOR DELAYED BIRTH REGISTRATION FOR PERSONS AGE 7 YEARS OR OLDER AT THE TIME OF FILING IN VITAL RECORDS

PENALTIES: Any person who willfully and knowingly supplies any false information in the preparation or amendment of a birth certificate is guilty of a Class I felony and shall be fined not more than $10,000 or imprisoned for not more than 3 years and 6 months, or both, per s. 69.24(1), Wis. Stats.

In order to file a Delayed Birth Registration, Wisconsin law requires the registrant (the child) or the registrant's parent or legal guardian to present documentary evidence to prove the facts of the birth. The evidence requirements are explained below.

SECTION I – EVIDENCE REQUIREMENTS

1. Wisconsin law requires that the following items (facts of birth) must be documented by evidence:
   - The full name of the registrant;
   - The date of birth;
   - The place of birth (there MUST be direct evidence to show the birth occurred in Wisconsin);
   - The full maiden name of the mother, and;
   - The full name of the father, unless the mother and father were not married.
2. If the registrant is AGE SEVEN OR OLDER at the time the Delayed Birth Registration is filed in Vital Records, **three** pieces of documentary evidence are required to support the facts of birth.
3. Any document presented as evidence, except for an Affidavit of Personal Knowledge (form F-05006), must have been established at least 10 years prior to filing the Delayed Birth Registration in Vital Records, OR prior to the registrant's tenth birthday.
4. At least one piece of evidence must be from early childhood, prior to the registrant's tenth birthday.
5. Only one piece of evidence may be an Affidavit of Personal Knowledge (form F-05006).
6. No piece of evidence may be from the same source as any other piece of evidence.
7. You cannot create a piece of documentary evidence for the purpose of filing a Delayed Birth Registration document.

SECTION II – SUGGESTED DOCUMENTS

1. Form F-05018, Certification of Birth Facts for Delayed Birth Registration from Baptismal Record: This form **must** be completed by the current pastor of the church where the baptism occurred. If the Registrant was baptized, this form may be used.
2. Form F-05019, Certification of Birth Facts for Delayed Birth Registration from Physician, Hospital, School, Census, Clinic, Nursery, etc.: This form **must** be completed by the custodian of the original record. If the registrant was born in a hospital, was registered on the Census, was enrolled in school or day care, or was examined by a doctor, this form may be used.
3. Form F-05006, Affidavit of Personal Knowledge of a Birth for Delayed Birth Registration: Only one affidavit of personal knowledge may be submitted as evidence. This form **must** be completed by a person at least ten years older than the registrant and who has personal knowledge of the facts of birth, preferably a parent of the registrant.
4. Vital Records: If the registrant was married in Wisconsin or has children born in Wisconsin, the vital records filed in our office may be used as evidence of some facts of birth. List the marriage and birth information on the back of form F-05010, Application for Delayed Birth Registration. If the registrant was married or has children born in another state, you may present as evidence certified copies of the vital records purchased from the state where the event occurred.
5. Social Security Administration Numident: If the registrant has a Social Security Number, a numident printout is available from any Social Security Administration office. You must present the original printout received from the Social Security Administration. For more information, contact the Social Security Administration at (800) 772-1213.

   Our office has the ability to request a numident printout directly from the Social Security Administration (SSA) without cost. If you would like to have our office request a numident printout from SSA for you, please complete Section III, question 5 on the Application for Delayed Birth Registration (F-05010).
6. U.S. Census Report: A blank application form is enclosed. You must present the original document received from the U.S. Census Bureau.
7. Military Discharge: You must present a certified copy received from a county register of deeds or the Wisconsin Department of Veterans Affairs.

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Division of Public Health
DPH 5010 (Rev. 04/05)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.
Page 1 of 2

APPLICATION FOR DELAYED BIRTH REGISTRATION

(This is a two-page form. Print back to back.)

Personally identifiable information requested on this form will be used to process your request to file a Delayed Birth Registration. Failure to supply this information may result in denial of your request.

Call (608) 267-0914 if you have questions regarding the completion of this form.

PENALITIES: Any person who willfully and knowingly supplies false information in the preparation of or application for a birth certificate is guilty of a Class I felony [a fine of not more than $10,000 or imprisonment of not more than three years and six months, or both, per Chapter 69.24(1), Wis. Stats.].

THE APPLICANT MUST BE THE SUBJECT OF THE BIRTH RECORD (REGISTRANT) OR A PARENT OR LEGAL GUARDIAN OF THE REGISTRANT.

Type or print in **BLACK INK.**

Do **NOT** use cross-outs, write-overs, erasures, correction tape, or correction fluid. If a mistake is made, prepare another form.

SECTION I - FACTS OF BIRTH

1. BIRTH NAME OF REGISTRANT		
First	Middle	Birth Last Name

2. SEX	3. DATE OF BIRTH		
☐ Male ☐ Female	Month	Day	Year

4. PLACE OF BIRTH (Check either "Hospital" or "Home" and provide the appropriate information.)				
☐ Hospital or ☐ Birthing Ctr.	Name of Facility	City, Village or Township	County	State
☐ Home	City, Village or Township	County		State

5. FATHER'S FULL BIRTH NAME		
First	Middle	Birth Last Name

6. MOTHER'S FULL BIRTH NAME		
First	Middle	Birth Last Name

7. WERE PARENTS MARRIED TO EACH OTHER AT THE TIME OF THIS BIRTH?
☐ Yes ☐ No

SECTION II - NOTARIZATION

I, the undersigned, under penalty of perjury, declare that the above information and statements are true and correct, to the best of my knowledge and belief.

CERTIFICATION OF NOTARY PUBLIC

NOTARY SEAL

Subscribed and sworn before me this _____ day

of _____ (Month), _____ (Year).

_____, Notary
SIGNATURE - Notary Public

of _____ County, State of _____

My commission expires _____
(Month / Day / Year)

_____
NAME OF NOTARY - Typed or Printed

APPLICANT INFORMATION

_____
NAME OF APPLICANT - Typed or Printed

_____
RELATIONSHIP TO REGISTRANT

_____
STREET ADDRESS

_____ _____ _____
CITY, VILLAGE OR TOWNSHIP STATE ZIP CODE

(_____) _____ _____
TELEPHONE NUMBER DATE SIGNED

_____
SIGNATURE - Applicant

SECTION III - ADDITIONAL SUPPORTING EVIDENCE

1. If the Registrant was born in a hospital or a birthing center, submit form DPH 5019 or a letter from the hospital stating that it does not have a record of the birth and complete the following:

NAME OF HOSPITAL OR BIRTHING CENTER	
LOCATION OF HOSPITAL/BIRTHING CENTER - City, Village or Township	LOCATION OF HOSPITAL/BIRTHING CENTER - County

2. If the Registrant was baptized, submit form DPH 5018 and complete the following:

NAME OF CHURCH	
LOCATION OF CHURCH - City, Village or Township	LOCATION OF CHURCH - County
DATE OF BAPTISM (Month / Day / Year)	NAME OF PASTOR

3. If the Registrant was married in Wisconsin, complete the following:

FULL BIRTH NAME OF SPOUSE (First / Middle / Surname)	
DATE OF MARRIAGE (Month / Day / Year)	COUNTY OF MARRIAGE

4. If the Registrant has children born in Wisconsin, complete the following:

FULL BIRTH NAME OF CHILD	DATE OF BIRTH (Month / Day / Year)	COUNTY OF BIRTH

5. Our office has the ability to request verification of the information provided in your application for a Social Security Number (numident printout) directly from the Social Security Administration (SSA) without cost. The information provided in the numident printout might be acceptable documentary evidence of the facts of birth. If you would like to have our office request a numident printout from SSA for you, please provide your Social Security Number.

   This information will only be used to process your request to file a Delayed Birth Registration. Providing your Social Security Number is not mandatory and failing to do so will not result in denial of your request.

SOCIAL SECURITY NUMBER:	

VITAL RECORDS OFFICE USE ONLY

Request Classifier Number _____ Request Fee _____

DEPARTMENT OF HEALTH SERVICES
Division of Public Health
F-05006 (Rev. 11/09)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.

AFFIDAVIT OF PERSONAL KNOWLEDGE OF A BIRTH FOR DELAYED BIRTH REGISTRATION

PENALITIES: Any person who willfully and knowingly supplies false information in the preparation or amendment of a birth certificate is guilty of a Class I felony [a fine of not more than $10,000 or imprisonment of not more than three years and six months, or both, per Chapter 69.24(1), Wis. Stats.].

Call (608) 267-0914 if you have questions regarding the completion of this form.

THE PERSON COMPLETING THIS FORM (AFFIANT) MUST BE AT LEAST 10 YEARS OLDER THAN THE REGISTRANT AND MUST HAVE PERSONAL KNOWLEDGE OF THE FACTS OF THE REGISTRANT'S BIRTH.

Type or print in BLACK INK.
Do NOT use cross-outs, erasures, write-overs, correction tape, or correction fluid on this form. If a mistake is made, prepare another form.

SECTION I - FACTS OF BIRTH

1. BIRTH NAME OF SUBJECT				
First	Middle	Birth Surname		
2. SEX	3. DATE OF BIRTH			
☐ Male ☐ Female	Month	Day	Year	
4. PLACE OF BIRTH (Check either "Hospital" or "Home" and provide the appropriate information.)				
☐ Hospital	Name of Facility	City, Village, or Township	County	State
☐ Home	Street Address	City, Village, or Township	County	State
5. FATHER'S FULL BIRTH NAME				
First	Middle	Birth Surname		
6. MOTHER'S FULL BIRTH NAME				
First	Middle	Birth Surname		
7. I KNOW THIS INFORMATION IS CORRECT BECAUSE:				

SECTION II - NOTARIZATION

I, the undersigned, under penalty of perjury, declare that I have personal knowledge of the facts of this birth and that the above information and statements are true and correct, to the best of my knowledge and belief.

CERTIFICATION OF NOTARY PUBLIC

NOTARY SEAL

Subscribed and sworn before me this _____ day of _____ (Month), _____ (Year).

_____, Notary
SIGNATURE - Notary

County of _____ State of _____

My commission expires _____ (Month / Day / Year)

_____
NAME OF NOTARY - Typed or Printed

AFFIANT INFORMATION

_____
NAME OF AFFIANT - Typed or Printed

_____ _____
RELATIONSHIP TO SUBJECT AFFIANT'S DATE OF BIRTH

_____
STREET ADDRESS

_____ _____ _____
CITY, VILLAGE OR TOWNSHIP STATE ZIP CODE

( ) _____ _____
TELEPHONE NUMBER DATE SIGNED

_____
SIGNATURE - Affiant

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Division of Public Health
DPH 5019 (Rev. 04/05)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.

CERTIFICATION OF BIRTH FACTS FOR DELAYED REGISTRATION
PHYSICIAN, HOSPITAL, SCHOOL, CENSUS, CLINIC, NURSERY, ETC.

PENALITIES: Any person who willfully and knowingly supplies false information in the preparation of a birth certificate is guilty of a Class I felony [a fine of not more than $10,000 or imprisonment of not more than three years and six months, or both, per Chapter 69.24(1), Wis. Stats.].

Call (608) 267-0914 if you have questions regarding the completion of this form.

THIS FORM MUST BE COMPLETED BY THE RECORD CUSTODIAN WHERE THE ORIGINAL RECORD IS ON FILE.

Type or print in BLACK INK.
Do NOT use cross-outs, write-overs, erasures, correction tape, or correction fluid. If a mistake is made, prepare another form.

SECTION I - FACILITY INFORMATION

The information entered on this form is from the original record maintained by

1. NAME OF FACILITY		
2. LOCATION OF FACILITY		
City, Village, or Township	County	State

SECTION II - INFORMATION FROM THE ORIGINAL RECORD (Please enter "Not Stated" for any item not shown on the record.)

I certify that the following entries are exactly as they appear in the original record in my custody.

1. NAME OF SUBJECT					
First	Middle	Birth Surname			
2. DATE OF BIRTH			**3. PLACE OF BIRTH**		
Month	Day	Year	City, Village, or Township	County	State
4. FATHER'S FULL BIRTH NAME					
First	Middle	Birth Surname			
5. MOTHER'S FULL BIRTH NAME					
First	Middle	Birth Surname			

6. SEX	7. DATE OF ENTRY ON RECORD			8. TYPE OF RECORD
	Month	Day	Year	
☐ Male ☐ Female				

SECTION III - NOTARIZATION

I, the undersigned, under penalty of perjury, declare that the above information and statements are true and correct, to the best of my knowledge and belief, and are supported by the information contained in the original record.

CERTIFICATION OF NOTARY PUBLIC

NOTARY SEAL

Subscribed and sworn before me this _____ day of _____, _____.
Month Year

_____, Notary
SIGNATURE - Notary Public

County of _____ State of _____

My commission expires _____.
(Month / Day / Year)

_____
NAME OF NOTARY - Typed or Printed

RECORD CUSTODIAN

_____
NAME - Typed or Printed

_____
STREET ADDRESS OF FACILITY

_____ _____ _____
CITY, VILLAGE OR TOWNSHIP STATE ZIP CODE

(_____) _____ _____
TELEPHONE NUMBER DATE SIGNED

_____
SIGNATURE - Record Custodian

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Division of Public Health
DPH 5019 (Rev. 04/05)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.

CERTIFICATION OF BIRTH FACTS FOR DELAYED REGISTRATION
PHYSICIAN, HOSPITAL, SCHOOL, CENSUS, CLINIC, NURSERY, ETC.

PENALITIES: Any person who willfully and knowingly supplies false information in the preparation of a birth certificate is guilty of a Class I felony [a fine of not more than $10,000 or imprisonment of not more than three years and six months, or both, per Chapter 69.24(1), Wis. Stats.].

Call (608) 267-0914 if you have questions regarding the completion of this form.

THIS FORM MUST BE COMPLETED BY THE RECORD CUSTODIAN WHERE THE ORIGINAL RECORD IS ON FILE.

Type or print in BLACK INK.
Do NOT use cross-outs, write-overs, erasures, correction tape, or correction fluid. If a mistake is made, prepare another form.

SECTION I - FACILITY INFORMATION

The information entered on this form is from the original record maintained by

1. NAME OF FACILITY		
2. LOCATION OF FACILITY		
City, Village, or Township	County	State

SECTION II - INFORMATION FROM THE ORIGINAL RECORD (Please enter "Not Stated" for any item not shown on the record.)

I certify that the following entries are exactly as they appear in the original record in my custody.

1. NAME OF SUBJECT		
First	Middle	Birth Surname

2. DATE OF BIRTH			3. PLACE OF BIRTH		
Month	Day	Year	City, Village, or Township	County	State

4. FATHER'S FULL BIRTH NAME		
First	Middle	Birth Surname

5. MOTHER'S FULL BIRTH NAME		
First	Middle	Birth Surname

6. SEX	7. DATE OF ENTRY ON RECORD			8. TYPE OF RECORD
	Month	Day	Year	
☐ Male ☐ Female				

SECTION III - NOTARIZATION

I, the undersigned, under penalty of perjury, declare that the above information and statements are true and correct, to the best of my knowledge and belief, and are supported by the information contained in the original record.

CERTIFICATION OF NOTARY PUBLIC

NOTARY SEAL

Subscribed and sworn before me this _____ day

of _____ (Month), _____ (Year).

_____, Notary
SIGNATURE - Notary Public

County of _____ State of _____

My commission expires _____ (Month / Day / Year).

_____
NAME OF NOTARY - Typed or Printed

RECORD CUSTODIAN

_____
NAME - Typed or Printed

_____
STREET ADDRESS OF FACILITY

_____ _____ _____
CITY, VILLAGE OR TOWNSHIP STATE ZIP CODE

( ) _____ _____
TELEPHONE NUMBER DATE SIGNED

_____
SIGNATURE - Record Custodian

DEPARTMENT OF HEALTH AND FAMILY SERVICES
Division of Public Health
DPH 5018 (Rev. 04/05)

STATE OF WISCONSIN
Chapter 69.14, Wis. Stats.

CERTIFICATION OF BIRTH FACTS FOR DELAYED REGISTRATION BAPTISMAL RECORD

PENALITIES: Any person who willfully and knowingly supplies false information in the preparation of a birth certificate is guilty of a Class I felony [a fine of not more than $10,000 or imprisonment of not more than three years and six months, or both, per Chapter 69.24(1), Wis. Stats..

Call (608) 267-0914 if you have questions regarding the completion of this form.

THIS FORM MUST BE COMPLETED BY THE PRESENT PASTOR OF THE CHURCH WHERE THE BAPTISM OCCURRED.

Type or print in **BLACK INK.**
Do **NOT** use cross-outs, write-overs, erasures, correction tape, or correction fluid.

SECTION I - CHURCH INFORMATION

The information entered on this form is from the original baptismal record maintained by

1. NAME OF CHURCH		
2. LOCATION OF CHURCH		
City, Village or Township	County	State

SECTION II - BAPTISMAL INFORMATION (Please enter "Not Stated" for any item not shown on the record.)

I certify that the following entries are exactly as they appear in the baptismal register of this church.

1. NAME OF SUBJECT		
First	Middle	Birth Surname

2. DATE OF BIRTH			3. PLACE OF BIRTH		
Month	Day	Year	City, Village, or Township	County	State

4. FATHER'S FULL BIRTH NAME		
First	Middle	Birth Surname

5. MOTHER'S FULL BIRTH NAME		
First	Middle	Birth Surname

6. SEX	7. DATE OF BAPTISM			8. NAME OF PASTOR AT TIME OF BAPTISM
	Month	Day	Year	
☐ Male ☐ Female				

SECTION III - NOTARIZATION

I, the undersigned, under penalty of perjury, declare that the above information and statements are true and correct, to the best of my knowledge and belief, and are supported by the records maintained by the church.

CERTIFICATION OF NOTARY PUBLIC

NOTARY SEAL

Subscribed and sworn before me this _____ day of _____ (Month), _____ (Year).

_____, Notary
SIGNATURE - Notary

County of _____ State of _____

My commission expires _____ (Month / Day / Year)

_____
NAME OF NOTARY - Typed or Printed

PRESENT PASTOR

_____
NAME - Typed or Printed

_____
STREET ADDRESS OF CHURCH

_____ _____ _____
CITY, VILLAGE OR TOWNSHIP STATE ZIP CODE

( ) _____ _____
TELEPHONE NUMBER DATE SIGNED

_____
SIGNATURE - Present Pastor

FORM **BC-600**
(9-14-2011)

U.S. DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. CENSUS BUREAU

APPLICATION FOR SEARCH OF CENSUS RECORDS

IMPORTANT INFORMATION

PLEASE READ AND FOLLOW CAREFULLY

This application is for use in requesting a search of census records.* Copies of these census records often are accepted as evidence of age, citizenship, and place of birth for employment, social security benefits, insurance, and other purposes.

If the applicant is located, an official transcript will be provided including the following information:

Personal Census Information	Available for census year(s)
• Census year	1910–2000
• County where taken	1910–1980
• State where taken	1910–2000
• Name	1910–2000
• Relationship to head of household	1910–2000
• Name of person in whose household you were counted	1910–2000
• Age at the time of the census	1910–1950, 1970–2000
• Date of birth	
Year and quarter	1960
Month and year	1970–1980
Year	1990
Month/day/year	2000
• Place of birth	1910–1950
• Citizenship if requested or if foreign born	1910–1950
• Occupation (if requested)	1910–1950

The U.S. Census Bureau's records are arranged according to the address at the time of the census. Censuses are taken primarily for statistical, not legal, purposes. Attention is called to the possibility that the information shown in the census record may not agree with that given in your application. **The record must be copied exactly as it appears on the census form.** The U.S. Census Bureau CANNOT make changes even though it realizes that enumerators may have been misinformed or made mistakes in writing down the data they collected. Those agencies that accept census transcripts as evidence of age, relationship, or place of birth usually overlook minor spelling differences but would be reluctant to consider a record that was changed years later at an applicant's request.

If you authorize the U.S. Census Bureau to send your record to someone other than yourself, you must provide the name and address, including ZIP Code, of the other person/agency.

Birth certificates, including delayed birth certificates, are **not issued** by the U.S. Census Bureau. You can obtain the birth certificate from the Health Department or the Department of Vital Statistics of the state in which the applicant was born.

* Information from 1930 and earlier censuses is public information and is available from the National Archives.

The completed application should be mailed to the U.S. Census Bureau, P.O. Box 1545, Jeffersonville, IN 47131, together with a money order or check payable to "Commerce–Census."

INSTRUCTIONS FOR COMPLETING THIS FORM
PRINT OR TYPE INFORMATION EXCEPT SIGNATURE
PLEASE FOLLOW NUMBERED INSTRUCTIONS

DETACH HERE

1. Purpose

The purpose for which the information is desired must be shown so that a determination may be made under 13 U.S.C. 8(a) that the record is required for proper use. For proof of age, most agencies require documents closest to date of birth; therefore we suggest you complete information for the EARLIEST CENSUS AFTER DATE OF BIRTH.

2. Signature

Each application requires a signature. The signature should be the same as that shown on the line captioned "full name of person whose census record is requested." When the application is for a census record concerning another person, the requester must sign the application, and the authority of the requester must be furnished as stated in instruction 3 below. If signed by marking (X), please indicate the name of the person whose mark it is and have witnesses sign as instructed. IF SIGNATURE IS PRINTED, please indicate that is the usual signature.

3. Confidential information given to other than person to whom it relates

(a) Census information is confidential and ordinarily will not be furnished to another person unless the person to whom it relates authorizes this in the space provided or if there is other proper authorization as indicated in 3(b), 3(c), and 3(d).

(b) Minor children – Information regarding a child who has at this time not reached the legal age of 18 may be obtained upon the written request of either parent or guardian.

(c) Mentally incompetent persons – Information regarding persons who are mentally incompetent may be obtained upon the written request of the legal representative, supported by a certified copy of the court order naming such legal representative.

(d) **Deceased persons – If the record requested relates to a deceased person, the application MUST be signed by (1) a blood relative in the immediate family (parent, brother, sister, or child), (2) the surviving wife or husband, (3) the administrator or executor of the estate, or (4) a beneficiary by will, or insurance. IN ALL CASES INVOLVING DECEASED PERSONS, a certified copy of the death certificate MUST be furnished, and the relationship to the deceased MUST be stated on the application. Legal representatives MUST also furnish a certified copy of the court order naming such legal representatives; and beneficiaries MUST furnish legal evidence of such beneficiary interest.**

4. Fee required

The $65.00 fee is for a search of one census for one person only. The time required to complete a search depends upon the number of cases on hand at the particular time and the difficulty encountered in searching a particular case. The normal processing time is 3 to 4 weeks. The fee covers return postage of your search results by regular mail. You do not need to include a return envelope for normal processing. For an additional fee of $20 the search can be completed in one business day after we receive it. If you want your search results returned to you by express mail you must include a self-addressed, prepaid express mail envelope with your application. You may also submit your application by express mail for faster service.

No more than one census will be searched and the results furnished for one fee. Should it be necessary to search more than one census to find the record, you will be notified to send another fee before another search is made. Tax monies are not available to furnish the information. **If a search has been made, the fee cannot be returned even if the information is not found.**

5. Full schedules

The full schedule is the complete one-line entry of personal data recorded for that individual ONLY. The names of other persons will not be listed. If the applicant specifies "full schedule," the Census Bureau will furnish, in addition to the regular transcript, whatever other information appears on the named person's record in the original schedule, but only for THAT PERSON. In this case the information is typed on a facsimile of the original census schedule and verified as a true copy. There is an additional charge of $10.00 for EACH full schedule requested.

The Census Bureau also will provide "full schedule" information for those other members of the same household for whom authorizations are furnished. (See instruction 3 for authorization requirements). A fee of $10.00 is required for each person listed on the full schedule.

LIMITATIONS – Certain information, such as place of birth, citizenship, and occupation, is available only for census years 1910 through 1950. Full schedule information is not available for census years 1970, 1980, 1990, and 2000.

DO NOT RETURN WITH APPLICATION

6. Census years 1910–1920–1930–1940– 1950–1960–1970–1980–1990–2000

The potential of finding an individual's census record is increased when the respondent provides thorough and accurate address information FOR THE DAY THESE CENSUSES WERE TAKEN. If residing in a city AT THE TIME THESE CENSUSES WERE TAKEN, it is necessary to furnish the house number, the name of the street, city, county, state, and the name of the parent or other head of household with whom residing at the time of the census. If residing in a rural area, it is VERY IMPORTANT to furnish the township, district, precinct or beat, AND the direction and number of miles from the nearest town.

1990 and 2000 Request – It is VERY IMPORTANT to provide a house number and street name or rural route and box number. Always include a ZIP Code.

7. Locator Map (optional)

Box 7 is provided for a sketch of the area where the applicant lived at the time of the requested census.

**IF YOU NEED HELP FILLING OUT THIS APPLICATION,
PLEASE CALL 812–218–3046, MONDAY THROUGH FRIDAY
7:00 A.M. THROUGH 4:30 P.M. EASTERN TIME**

DETACH HERE

FORM BC-600 (9-14-2011)

OMB No. 0607-0117

FORM **BC-600** (9-14-2011)

U.S. DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. CENSUS BUREAU

APPLICATION FOR SEARCH OF CENSUS RECORDS

RETURN TO: U.S. Census Bureau, P.O. Box 1545, Jeffersonville, IN 47131

DO NOT USE THIS SPACE – OFFICIAL USE ONLY

$ _____ **(Fee)**
☐ **Money Order**
☐ **Check**
☐ **Other**

Case number

Papers received (itemize)	Returned

Received by	Date	Returned by	Date

NAME OF APPLICANT

1. Purpose for which record is to be used *(See Instruction 1)*

☐ Passport (date required) _____
☐ Proof of age
☐ Other – *Please specify* _____
☐ Genealogy

I certify that information furnished about anyone other than the applicant will not be used to the detriment of such person or persons by me or by anyone else with my permission.

2. Signature – Do not print *(Read instruction 2 carefully before signing)*

PRESENT MAILING ADDRESS

Number and street

City | State | ZIP Code

Telephone number (Include area code)

IF SIGNED BY MARK (X), TWO WITNESSES MUST SIGN HERE

Signature | Signature

NOTICE – Intentionally falsifying this application may result in a fine of $10,000 or 5 years of imprisonment, or both (title 18, U.S. Code, section 1001).

3. If the census information is **to be sent to someone other than the person whose record is requested,** give the name and address, including ZIP Code, of the other person or agency.

This authorizes the U.S. Census Bureau to send the record to: *(See instruction 3)*

_____
_____
_____
_____

FEE REQUIRED: *(See instructions 4 and 5)*

4. A check or money order **(DO NOT SEND CASH)** payable to "Commerce – Census" must be sent with the application. This fee covers the cost of a search of no more than one census year for one person only.

5. Fee required . . . . . **$ 65.00**

___ **extra copies @ $2.00** $_____
___ **full schedules @ $10.00** $_____
___ **expedited fee @ $20.00** $_____
TOTAL amount enclosed $_____

FULL NAME OF PERSON WHOSE CENSUS RECORD IS REQUESTED

First name | Middle name | Maiden name *(If any)* | Present last name | Nicknames

Date of birth *(If unknown, estimate)* | Place of birth *(City, county, State)* | Race | Sex

Full name of father *(Stepfather, guardian, etc.)* | Nicknames

Full maiden name of mother *(Stepmother, etc.)* | Nicknames

First marriage *(Name of husband or wife of applicant)* | Year married *(Approximate)* | Second marriage *(Name of husband or wife of applicant)* | Year married *(Approximate)*

Names of brothers and sisters

Name and relationship of all other persons living in household *(Aunts, uncles, grandparents, lodgers, etc.)*

PLEASE COMPLETE REVERSE SIDE

FORM BC-600 (8-14-2011)

6. GIVE PLACE OF RESIDENCE FOR APPROPRIATE CENSUS DATE *(SEE INSTRUCTIONS 1 AND 6)*

Census date	Number and street *(Read instruction 6 first)*	City, town, township *(Read instruction 6 first)*	County and State	Name of person with whom living *(Head of household)*	Relationship of head of household
April 15, 1910 *(See instruction 6)*					
Jan. 1, 1920 *(See instruction 6)*					
April 1, 1930 *(See instruction 6)*					
April 1, 1940 *(See instruction 6)*					
April 1, 1950 *(See instruction 6)*					
April 1, 1960 *(See instruction 6)*					
April 1, 1970 *(See instruction 6)*					
April 1, 1980 *(See instruction 6)*					
April 1, 1990 *(See instruction 6)*		ZIP Code			
April 1, 2000 *(See instruction 6)*		ZIP Code			

7. LOCATOR MAP (Optional)
PLEASE DRAW A MAP OF WHERE THE APPLICANT LIVED, SHOWING ANY PHYSICAL FEATURES, LANDMARKS, INTERSECTING ROADS, CLOSEST TOWNS, ETC., THAT MAY AID IN LOCATING THE APPLICANT FOR THE CENSUS YEAR REQUESTED.

HAVE YOU SIGNED THE APPLICATION AND ENCLOSED THE CORRECT FEES?

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

———

Nos. 14-2058 & 14-2059

———

RUTHELLE FRANK, *et al*.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, Governor of Wisconsin, *et al*.,

Defendants-Appellants.

———

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

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, Member, Government Accountability Board, *et al*.,

Defendants-Appellants.

———

On Motion for Reconsideration.

———

DECIDED SEPTEMBER 26, 2014 —

OPINIONS ISSUED SEPTEMBER 30, 2014

———

Before EASTERBROOK, SYKES, and TINDER, *Circuit Judges*.

PER CURIAM. Last April a district court enjoined the application of 2011 Wis. Act 23, which requires a photo ID for voting, even though Wisconsin's law is comparable to Indiana's, which the Supreme Court upheld in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). After the district court's decision, the Supreme Court of Wisconsin reversed two similar injunctions issued by state courts but ordered state officials to make it easier for registered voters to obtain documentation (such as birth certificates) that they may need to obtain photo IDs, or to waive the documentation requirement if obtaining birth certificates proves difficult or expensive. *League of Women Voters v. Walker*, 2014 WI 97 (July 31, 2014); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98 (July 31, 2014). With the state injunctions lifted, Wisconsin asked us to stay the federal injunction so that it could use the photo ID requirement in this fall's election. After receiving briefs and hearing oral argument on the merits of the state's appeal, we granted the motion for a stay. Plaintiffs ask us to reconsider that decision.

When a court is asked to issue a stay, the first and most important question is whether the applicant has made a strong showing that it is likely to succeed on the merits. *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009). We thought this standard satisfied, given *Crawford, League of Women Voters*, and *Milwaukee Branch of NAACP*. None of these decisions is dispositive, because the district judge made findings of fact different from those that the Supreme Court of the United States and the Supreme Court of Wisconsin

had before them. But those decisions give Wisconsin a strong prospect of success on appeal.

A second important consideration is the public interest in using laws enacted through the democratic process, until the laws' validity has been finally determined. This is the view the Supreme Court has taken in the same-sex-marriage cases now before it. Even after federal courts held some states' laws invalid, the Court issued stays so that the laws remain in effect pending final resolution. *See McQuigg v. Bostic*, No. 14A196 (S. Ct. Aug. 20, 2014); *Herbert v. Evans*, No. 14A65 (S. Ct. July 18, 2014). This court has followed the same approach for Wisconsin's and Indiana's marriage laws. After holding them unconstitutional, *see Baskin v. Bogan*, No. 14-2386 (7th Cir. Sept. 4, 2014), we nonetheless issued stays so that they could remain in force pending final decision by the Supreme Court. Our panel concluded that Wisconsin's photo ID law should be handled in the same way. Indiana has required photo ID at every election since 2005; it is hard to see why Wisconsin cannot do the same, while the validity of its statute remains under review.

Plaintiffs' motion for reconsideration asserts that the stay "imposes a radical, last-minute change" in election procedures and "virtually guarantees substantial chaos", contrary to decisions such as *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Plaintiffs tell us that the state's election officials will be unable to prepare properly during the 53 days between the stay (September 12, 2014) and the next election (November 4, 2014). This overlooks the fact that the state's election officials themselves asked for the stay. Whether 53 days (more than seven weeks) is long enough to make changes is a question of fact on which

the record in this litigation is silent. Plaintiffs have offered their beliefs, which undoubtedly are sincerely held, but not evidence.

Act 23 was enacted in May 2011, and only persons with photo ID were allowed to vote in the February 2012 primary election. The procedures having been formulated, and voters having had time to get qualifying IDs, the state would have continued to enforce Act 23, but for two injunctions (since reversed) issued by state judges after the February 2012 primary. Wisconsin therefore is not starting from scratch in September 2014. It would be extraordinary for a federal court to tell state officials that they are *forbidden* to implement a state law, just because federal judges predict that they will turn out to be wrong in thinking that 7+ weeks, plus work done between May 2011 and the district court's injunction in April 2014, is enough.

The stay this court has issued does not "impose" any change. It lifts a federal prohibition and permits state officials to proceed as state law allows or requires. Our order of September 12 was explicit: "The State of Wisconsin may, if it wishes (and if it is appropriate under rules of state law), enforce the photo ID requirement in this November's elections." If seven weeks is too short, then state officials need not make any change; nothing has been "imposed" on them. Whether to use the photo ID requirement, in the absence of a federal injunction, is a matter of state law, for determination by Wisconsin's executive and judicial branches. Wisconsin could decide, for example, that it would be too cumbersome to implement the change with respect to this year's absentee ballots, but not with respect to live voting in November. Our decision does not foreclose such a possibility.

Purcell, on which plaintiffs rely, dealt with a judicial order, issued less than five weeks before an election, forbidding use of Arizona's voter ID requirement. Without giving reasons, the Ninth Circuit required a state to depart from procedures established by state law; the Supreme Court held this to be improper. (The court of appeals later held that Arizona's ID requirement is valid, reinforcing the conclusion that it had been a mistake to enjoin it. *See Gonzalez v. Arizona*, 677 F.3d 383, 404–10 (9th Cir. 2012) (en banc).) In this case, by contrast, the court has not compelled the state to do anything; instead it has permitted the state to enforce a statute that the state tells us it wants (and is able) to enforce. There is a profound difference between compelling a state to depart from its rules close to the election (*Purcell*) and allowing a state to implement its own statutes (this case).

According to plaintiffs, equitable considerations favor leaving the injunction in force because many voters who today lack acceptable photo IDs will be unable to get them before November's election. Yet Act 23 was enacted in May 2011. Voters in Wisconsin who did not already have a document that Wisconsin accepts (a driver's license, for example) have had more than three years to get one. The statute gave voters eight months to acquire necessary documents before Act 23's first implementation (in the February 2012 primary); a further two years and nine months will have passed by this fall's election.

The district judge did not find that any particular number of registered voters in Wisconsin has tried, but been unable, to obtain one of the several kinds of photo ID that Wisconsin will accept at the polls. The judge did observe that eight persons testified that they

had tried and failed but did not decide whether their experience is representative, or even whether their testimony was accurate. After the district court's decision, the Supreme Court of Wisconsin fixed the problems these eight said they had encountered. The number of registered voters without a qualifying photo ID (which the judge estimated at 300,000, or 9% of the 3,318,000 total) thus appears to reflect how many persons have not taken the necessary time, rather than a number of persons who have been disfranchised. We do not apply the label "disfranchised" to someone who has elected not to register, even though that step also requires an investment of time. In Wisconsin approximately 78% of those eligible have registered to vote, and approximately 74% of those who did register cast votes in the last presidential election. Both figures are lower than the 91% who already possess acceptable photo IDs, yet no one infers from the 78% registration proportion or the 74% voting proportion that Wisconsin has disfranchised anyone.

Crawford concluded that requiring would-be voters to spend time to obtain photographic identification does not violate the Constitution. "For most voters who need them, the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198. The burden of getting a photo ID in Wisconsin is not materially different from the burden that *Crawford* deemed acceptable.

The motion for reconsideration is denied.

A judge called for a vote on the request for a hearing en banc. That request is denied by an equally divided

court. Chief Judge Wood and Judges Posner, Rovner, Williams, and Hamilton voted to hear this matter en banc.

WILLIAMS, *Circuit Judge*, with whom WOOD, *Chief Judge*, and POSNER, ROVNER, and HAMILTON, *Circuit Judges*, join, dissenting from the denial of rehearing en banc. After absentee ballots had already been mailed and then returned with ballots cast, and with this November's elections fast approaching, the panel issued an order staying the district court's injunction and authorizing Wisconsin to require voter identification in elections that are only weeks away. Our court should not have altered the status quo in Wisconsin so soon before its elections. And that is true whatever one's view on the merits of the case. Our stay order was improper, and it should not stand.

This stay will substantially injure numerous registered voters in Wisconsin, and the public at large, with no appreciable benefit to the state. *Cf. Nken v. Holder*, 556 U.S. 418, 434 (2009) (providing factors court is to consider when deciding whether to issue stay: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies). To alter the status quo so soon before an election, and with the state's "election machinery already in progress," *Reynolds v. Sims*, 377 U.S. 533, 585 (U.S. 1964), will have significant impact. The district court found that 300,000 registered voters—*registered voters*, not just persons eligible to vote—lack the most common form of identification needed to vote in the upcoming elections in Wisconsin. (To put this number

in context, the 2010 governor's race in Wisconsin was decided by 124,638 votes and the election for United States Senator by 105,041 votes.) And how does the state reply to the fact that numerous *registered voters* do not have qualifying identification with elections so imminent? It brazenly responds that the district court found that "more than 90% of Wisconsin's registered voters already have a qualifying ID" and can vote and that "the voter ID law will have little impact on the vast majority of voters." But the right to vote is not the province of just the majority. It is not just held by those who have cars and so already have driver's licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age. It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state's registered voters; for the state to take this position is shocking.

It is simply impossible—as a matter of common sense and of logistics—that hundreds of thousands of Wisconsin's voters will both learn about the need for photo identification and obtain the requisite identification in the next 36 days (26 business days). Doing so would require the state to issue around 6,000 photo identifications per day up to the election. Yet obtaining the necessary identification can take months for voters who were born outside Wisconsin and who lack birth certificates. Make no mistake, that is no small number of the registered voters at issue. *See Frank v. Walker*, 2014 WL 1775432, at *13 (E.D. Wis. 2014) (nearly 50% of eligible voters in Milwaukee County who lack both accepted photo identification and valid birth certificate were born outside Wisconsin). And for the registered voter in Wisconsin lucky enough to already

have all the documents who must then get identification through the Department of Motor Vehicles, most DMV offices in Wisconsin are only open two days a week (and these are weekdays, not weekends).

Those thousands of absentee ballots that were mailed to voters before the panel's order? They do not count when returned in the manner their instructions direct, for they do not comply with the Wisconsin voter identification law. That is true for the absentee ballots that voters had already sent back in before the panel's order, and any returned from here until the election. *Cf. Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000) (improper to change party-identification procedures after absentee ballots already mailed); *Perry v. Judd*, 471 Fed. Appx. 219, 227 (4th Cir. Jan. 17, 2012) (unpublished) (changing rules after absentee ballots printed would be improper).

Changing the rules so soon before the election is contrary not just to the practical realities of an impending election, but it is inconsistent with the Supreme Court's approach to such cases. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), for example, the district court had declined to enjoin a voter ID law, but then the Ninth Circuit issued an emergency stay. The Supreme Court unanimously reversed the appellate court's last-minute reversal of the district court. It cautioned that court orders affecting elections can lead to "voter confusion and consequent incentive to remain away from the polls," and it said that this risk increases as an election draws closer. *Id.* at 4-5. *Purcell* was not the first time the Court recognized these realities. *See*, *e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (denying requested relief, despite unconstitutionality of statute, because "the confusion that would attend such a last-minute change poses a

risk of interference with the rights of other Ohio citizens" and "relief cannot be granted without serious disruption of election process"); *Reynolds*, 377 U.S. at 585 ("where an impending election is imminent and a State's election machinery is already in process, equitable considerations might justify a court in withholding the granting of immediately effective relief"); *see also Westermann v. Nelson*, 409 U.S. 1236, 1236-37 (1972) (Douglas, J., in chambers) (denying request to have candidate's name printed on ballot where absentee ballots had already been sent and returned even though "[t]he complaint may have merit" because "the time element is short," the "election machinery is already underway," and "orderly election processes would likely be disrupted by so late an action"). Here, too, the status quo before the panel's order should be restored—the status quo that all in Wisconsin had been operating under, and the status quo that if not restored will irreparably harm registered voters in Wisconsin. We, as "the Court of Appeals," are "required to weigh . . . considerations specific to election cases," and to "give deference to the discretion of the District Court," and we must do this because the Supreme Court tells us to. *Purcell*, 549 U.S. at 4. Weighing those considerations properly here would mean the stay would not stand.

A full discussion on the merits will wait for another day, but a likelihood of success on the merits is one factor in the stay decision, *see Nken*, 556 U.S. at 434, and the panel's grant of the stay seems premised on a conclusion that the state is likely to succeed on the merits in light of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). That premise is dead wrong. The Supreme Court opinion in *Crawford* made very clear that its decision was specific to the evidence in the record in that case. Or, to be more precise, to the

complete and utter lack of evidence. The Court pointed out that the district court there found that the petitioners "had 'not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [Indiana's voter identification law] or who will have his or her right to vote unduly burdened by its requirements.'" *Id*. at 187 (plurality opinion of Stevens, J.) (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)). It noted the district court's emphatic rejection of the plaintiffs' expert report, *id*., and stated that the record did not even contain the number of registered voters in Indiana without voter identification, *id*. at 200. The Court found that "the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification," *id*. at 201, and stated that "[t]he record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed," *id*. The single affidavit of one woman who was denied photo identification because she did not have an address, said the Court, "gives no indication of how common the problem is." *Id*. at 202. And so it was no surprise that the Court concluded that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute." *Id*. at 189. The Court reiterated that it was deciding the case based on the record before it at the end of its analysis, too, stating, "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 one class of voters." *Id*. at 202.

The record that has been made in this litigation is entirely different from that made in *Crawford*. In every way. The plaintiffs put on detailed evidence of

the substantial burdens Wisconsin's voter identification law imposes on numerous voters. They put on multiple witnesses. They put on qualified experts. They made this a record-heavy case. And after hearing the voluminous evidence presented to the federal district court in Wisconsin, the experienced judge concluded that Wisconsin's voter identification law had a disproportionate impact on African Americans and Latinos, was unconstitutional, and violated the Voting Rights Act. (Note also that while the panel's order called the Wisconsin and Indiana laws "materially identical," the Wisconsin law does not have an affidavit option that allows indigent voters without identification to vote provisionally as the Indiana law at issue in *Crawford* did. *Cf. Crawford*, 553 U.S. at 185-86 ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted" if affidavit executed at clerk's office within ten days); *see* Ind. Code § 3-11.75-5-2.5(c).) *Crawford* simply does not direct a victory to the state in this case.

Nor will the state be irreparably injured absent a stay. The Supreme Court has said that irreparable harm to the party seeking the stay is one of the two "most critical" factors in deciding whether to issue a stay, *Nken*, 556 U.S. at 434, yet it is very hard to see any irreparable harm to the state. The state has conducted hundreds of elections without a voter identification requirement. It had been preparing for months to do the same again. (Indeed, the voter identification law was designed to have a rollout period of 8 months before a primary and 16 months before a general election—not mere weeks.) The state has not pointed to a single instance of an in-person impersonation at the polling place in any of these

elections. Waiting until the 2016 election for the state to implement whatever law is in place on the merits will give it plenty of time to properly implement that law.

Moreover, that stays were issued in same-sex marriage cases means nothing for this eve-of-election case. The uncertainty, confusion, and long-term harm that would result from allowing thousands of marriages that are valid for a time but might later be wiped away led to stays in those cases.[1] (And of course there is no presumption against enjoining unconstitutional state laws pending appeals, lest the panel opinion leave a contrary impression.) The scale balancing the harms here, on the other hand, is firmly weighted down by the harm to the plaintiffs. Should Wisconsin citizens not have their votes heard, the harm done is irreversible. And as the district court found, for many voters without qualifying identification, the burdens associated with obtaining such identification "will be anything but minor" and will deter a substantial number of eligible voters from voting. On the other side of the scale is the state's interest in guarding against a problem it does not have and has never had. The state can wait one more

[1] Take Utah's experience, for example, where the Tenth Circuit did not initially issue a stay. Over 1,000 same-sex couples obtained marriage licenses after the district court enjoined the state's law. Jessica Miller, *10th Circuit Court: Utah's Same-Sex Marriage Ban Is Unconstitutional*, June 26, 2014, *available at* http://www.sltrib.com/sltrib/news/58114139-78/marriage-court-utah-sex.html.csp. The Supreme Court stayed the district court's injunction, the law against same-sex marriage went back into effect, and now those couples are in limbo as to the validity of their marriage licenses. *See Herbert v. Evans*, No. 14A65 (S. Ct. July 18, 2014).

election to implement its law if it is found to be constitutional.

Our court should not accept, as the state is willing to do, the disenfranchisement of up to 10% of Wisconsin's registered voters. We certainly should not do so when there is no evidence in Wisconsin whatsoever of the type of fraud the law is designed to prevent against. Our court should not have altered the status quo in Wisconsin so soon before its elections. The district court's injunction against the implementation of the Wisconsin law should remain in place, and the panel's order lifting that injunction should be revoked.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
September 26, 2014

Before

DIANE P. WOOD, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 14-2058

Appeal from the United States District Court
for the Eastern District of Wisconsin.

RUTHELLE FRANK, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, in his official capacity
as Governor of State of Wisconsin, *et al*.,

Defendants-Appellants.

No. 11-CV-00185
Lynn Adelman, *Judge*.

No. 14-2059

Appeal from the United States District Court for the Eastern District of Wisconsin.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF WISCONSIN, *et al*.,

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, *et al*.,

Defendants-Appellants.

No. 12-CV-00185

Lynn Adelman, *Judge*.

ORDER

On September 12, 2014, a panel of this court stayed the injunction that the district court had issued. Plaintiffs have filed a motion for reconsideration, asking the court to vacate the stay and reinstate the injunction. The panel that issued the stay has voted to deny the motion for reconsideration. A judge called for a vote on the request for a hearing en banc. That request is denied by an equally divided court. Chief Judge Wood and Judges Posner, Rovner, Williams, and Hamilton voted to hear this matter en banc. In the coming days, members of the court may file opinions explaining their votes.

APPENDIX G

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604
September 12, 2014

Nos. 14-2058 and 14-2059

Appeals from the United States
District Court for the
Eastern District of Wisconsin.

RUTHELLE FRANK, *et al*.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, in his official capacity as
Governor of State of Wisconsin, *et al*.,

Defendants-Appellants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF
WISCONSIN, *et al*.,

Plaintiffs-Appellees,

v.

DAVID G. DEININGER, *et al*.,

Defendants-Appellants.

Nos. 11-CV-01128 and 12-CV-00185
Lynn Adelman, *Judge.*

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

ORDER

On August 21, 2014, this court issued an order providing that the motion for a stay would be considered by the panel assigned to decide the case on the merits. This order further provided that the state was free, in the interim, to implement the changes to the procedures for obtaining (or excusing reliance on) birth certificates, and similar documents, that the Supreme Court of Wisconsin adopted in *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98 (July 31, 2014).

Having read the briefs and heard oral argument, this court now stays the injunction issued by the district court. The State of Wisconsin may, if it wishes (and if it is appropriate under rules of state law), enforce the photo ID requirement in this November's elections.

The district court held the state law invalid, and enjoined its implementation, even though it is materially identical to Indiana's photo ID statute, which the Supreme Court held valid in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). It did this based on findings that it thought showed that Wisconsin did not need this law to promote an important governmental interest, and that persons of lower income (disproportionately minorities) are less likely to have driver's licenses, other acceptable photo ID, or the birth certificates needed to obtain them, which led the court to hold that the statute violates §2 of the Voting Rights Act, 42 U.S.C. §1973.

After the district court's decision, the Supreme Court of Wisconsin revised the procedures to make it easier for persons who have difficulty affording any fees to obtain the birth certificates or other

documentation needed under the law, or to have the need for documentation waived. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98 (July 31, 2014). This reduces the likelihood of irreparable injury, and it also changes the balance of equities and thus the propriety of federal injunctive relief. The panel has concluded that the state's probability of success on the merits of this appeal is sufficiently great that the state should be allowed to implement its law, pending further order of this court.

The appeals remain under advisement, and an opinion on the merits will issue in due course.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 11-CV-01128
Case No. 12-CV-00185

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, *et al*.,

Defendants.

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

Plaintiffs,

v.

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

Defendants.

DECISION AND ORDER

In this decision and order, I address the defendants' motion for a stay pending appeal of my order of April 29, 2014, in which I permanently enjoined the defendants from conditioning a person's access to a ballot on that person's presenting a form of photo identification. *See* Fed. R. Civ. P. 62(c) & Fed. R. App. P. 8(a)(1). The standard for granting a stay

pending appeal mirrors that for granting a preliminary injunction. *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). Stays, like preliminary injunctions, are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on the merits. The goal is to minimize the costs of error. *Id*. To determine whether to grant a stay, I must consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. *Id*. As with a motion for a preliminary injunction, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Id*.

A. Likelihood of Success on the Merits

On appeal, the defendants argue that I misinterpreted the law applicable to the plaintiffs' claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act. In general, the law applicable to such claims is unsettled, and thus I acknowledge that the defendants have some likelihood of success on the merits. However, having considered the specific arguments that the defendants raise in their motion for a stay, I conclude that their likelihood of success on the merits is low. I discuss these arguments below, as well as the defendants' argument that the scope of the injunction is too broad.

1. Fourteenth Amendment

In their motion for a stay pending appeal, the defendants initially argued that my disposition of the plaintiffs' Fourteenth Amendment claim is likely to be

reversed because I made three errors: (1) deciding the claim when my disposition of the plaintiffs' claim under the Voting Rights Act made it unnecessary to do so, Mot. to Stay at 7; (2) enjoining the law as to all voters when I found that the law placed an unjustified burden on only a subgroup of voters, *id*. at 8; and (3) giving insufficient weight to the state's interest in preventing or deterring voter-impersonation fraud, *id*. at 9–10. In a recent letter, the defendants raise a fourth argument: that the decision of the Wisconsin Supreme Court in *Milwaukee Branch of the NAACP v. Walker*, 2014 WI 98, __ Wis. 2d __, indicates that "Act 23 is lawful." Letter of Aug. 1, 2014, at 1. I address each argument in turn.

First, in my original order, I acknowledged that, given my resolution of the plaintiffs' claim under the Voting Rights Act, I could have declined to resolve the Fourteenth Amendment claim. Dec. & Order at 2–3. But as I explained, the two claims overlap substantially, in that many of the factual findings I made at the conclusion of a nearly two-week trial were relevant to both claims, and therefore it would have been inefficient to resolve the claim under the Voting Rights Act but not the claim under the Fourteenth Amendment. *Id*. The defendants do not fully develop their argument that this approach constituted reversible error; instead, they merely assert in conclusory fashion that the decision to address the Fourteenth Amendment claim was error. Mot. to Stay at 7. Thus, I see no reason to think that the defendants are likely to succeed on this argument on appeal.

The defendants' second argument is that I should not have enjoined the photo-ID requirement in its entirety because I found that many Wisconsin voters already have a qualifying ID and thus will not

experience unjustified burdens. The defendants suggest that I should have fashioned some other remedy that was limited to the voters who will experience the unjustified burdens that I identified. Mot. to Stay at 8. But as I explained in my original order, there is no practicable way to remove the unjustified burdens on the voters who do not currently possess an ID without enjoining the photo ID requirement as to all voters. Dec. & Order at 38–39. Indeed, the defendants did not, in their post-trial brief, identify any practicable remedy short of enjoining Act 23 in its entirety, and they do not, in their motion for a stay pending appeal, identify any such remedy. Thus, I conclude that the defendants are not likely to succeed on this argument.

The defendants' third argument is that my "application of the *Anderson*/*Burdick* balancing test was incorrect"[1] because I "gave insufficient weight to the legitimate and important state interests that the Supreme Court recognized in *Crawford*."[2] Mot. to Stay at 9. Specifically, the defendants contend that I gave insufficient weight to the state's interest in preventing and deterring voter-impersonation fraud. They argue that *Crawford* establishes that a state has a "legitimate and important interest" in preventing and deterring voter-impersonation fraud even in the absence of evidence that such fraud has occurred. Mot. to Stay at 9. I agree that *Crawford* generally establishes that a state has a legitimate and important interest in preventing or deterring voter-impersonation fraud, even in the absence of evidence that such

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[1] *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

[2] *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181 (2008).

fraud has occurred. But *Crawford* does not hold that a court may not consider the evidence (or lack thereof) that such fraud has occurred when deciding how much *weight* to assign to that particular interest under the *Anderson/Burdick* balancing test. If the evidence shows that voter-impersonation fraud is prevalent, then the state's interest in preventing and deterring such fraud may be "sufficiently weighty to justify" the burdens placed on the rights of individual voters. *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). But if the evidence shows that voter-impersonation fraud is rare or nonexistent, then the state's interest is assigned less weight. In the present case, the evidence showed that virtually no voter-impersonation fraud occurs in Wisconsin and that it is unlikely to become a problem in the foreseeable future. For these reasons, I determined that the state's interest in preventing or deterring voter-impersonation fraud was insufficiently weighty to justify the burdens Act 23 placed on a substantial number of voters. The defendants have not shown that this application of the *Anderson/Burdick* balancing test was erroneous.

The defendants remaining argument concerning the Fourteenth Amendment claim is that the Wisconsin Supreme Court's decision in *Milwaukee Branch of the NAACP v. Walker*, establishes that Act 23 is lawful. In their letter to me, the defendants do not expand on this argument, but in their appellate filings, they argue that the state supreme court's construction of an administrative regulation "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." Consol. Reply Br. of Defendants-Appellants at 5. To explain the defendants' argument,

I must first briefly discuss the relevant part of *NAACP v. Walker*.

The Wisconsin Supreme Court began its discussion of the administrative regulation at issue here by noting that, at the state trial-court level, the plaintiffs provided evidence that they were required to make payments to government agencies to obtain certain primary documents, such as birth certificates, that the division of motor vehicles ("DMV") requires them to produce in order to obtain free state ID cards for voting. *NAACP*, 2014 WI 98, ¶¶ 50 & 52, __ Wis. 2d __. The court then determined that the DMV's requiring a person to produce a document that he or she cannot obtain without making a payment to a government agency resulted in a severe burden on the right to vote. *Id.* ¶¶ 60–62. In an effort to eliminate this severe burden, the court construed a regulation of the Wisconsin Department of Transportation that granted the administrator of the DMV discretion to issue state ID cards to persons who could not produce a birth certificate or other specifically identified document as proof of name and date of birth. *Id.* ¶¶ 66–71. That regulation states that if a person is "unable" to provide a birth certificate or other specifically identified document, and such documents are "unavailable" to the person, the person may make a written petition to the administrator of the DMV for an exception to the requirement to produce a birth certificate or similar document. Wis. Admin. Code § Trans 102.15(3)(b) & (c).[3] Under the Wisconsin Supreme Court's

[3] The full text of § Trans 102.15(3)(b) & (c) provides as follows:

(b) If a person is unable to provide documentation under [§ Trans 102.15(3)(a)], and the documents are unavailable to the person, the person may make a written petition to the administrator of the division of motor vehicles for an exception to

construction of this regulation, a person is "unable" to provide a birth certificate or similar document, and such documents are "unavailable" to the person, "so long as [the person] does not have the documents and would be required to pay a government agency to obtain them." *NAACP*, 2014 WI 98, % 69.

Under the Wisconsin Supreme Court's construction of this regulation, then, a person is entitled to petition for an exception to the birth-certificate requirement if the person cannot obtain a birth certificate without paying a fee to a government agency. But this does not mean that the person will be able to obtain a free state ID for voting without producing a birth certificate. This is so because, under the regulation at issue, a person must still provide "[w]hatever documentation is available which states the person's name and date of birth," Wis. Admin. Code § Trans 102.15(3)(b)3., and then the administrator, in his or her discretion, may accept or reject "such extraordinary proof of name and date of birth," *id*. § Trans 102.15(3)(c). There is no guidance in the regulation that indicates what kind of documentation might constitute "extraordinary proof of name and date of birth" or what factors the

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the requirements of par. (a). The application shall include supporting documentation required by sub. (4) and:

1. A certification of the person's name, date of birth and current residence street address on the department's form;

2. An explanation of the circumstances by which the person is unable to provide any of the documents described in par. (a); and

3. Whatever documentation is available which states the person's name and date of birth.

(c) The administrator may delegate to the administrator's subordinates the authority to accept or reject such extraordinary proof of name and date of birth.

administrator should consider when exercising his or her discretion to determine whether the documentation the person has produced constitutes extraordinary proof. In NAACP, the Wisconsin Supreme Court did not provide any guidance to the administrator concerning the meaning of "extraordinary proof" or set forth any standard that might guide the exercise of the administrator's discretion. Instead, the court offered this cryptic instruction: "the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner." 2014 WI 98, ¶ 70.

Another problem is that it is not clear how members of the public who need to obtain a free state ID will learn that the DMV now has discretion to issue IDs to persons who cannot obtain birth certificates without paying fees to government agencies. At the trial in this case, the plaintiffs demonstrated that the DMV does not publicize its exception procedure, which involves using Form MV3002, because the DMV wants to minimize exceptions. Dec. & Order at 32–33 n. 17. In light of this evidence, I concluded that a person who might need an exception is more likely to give up trying to get an ID than to be granted an exception. *Id.* at 32–36 & n.17. Nothing in the supreme court's decision requires the DMV to do a better job of informing the public that the MV3002 procedure exists.

Thus, from the mere fact that a person may *petition* for an exception to the birth-certificate requirement if the person cannot *obtain* a birth certificate without paying a fee to a government agency, it does not follow that the person will actually obtain a free ID card without producing a birth certificate, and so the defendants have not shown that the Wisconsin

Supreme Court's construction of § Trans 102.15(3)(b) and (c) "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." Consol. Reply Br. of Defendants-Appellants at 5. In any event, having to pay a fee to obtain a birth certificate is only one of many burdens that a person who needs to obtain an ID for voting purposes might experience. *See* Dec. & Order at 29–36. So even if I assumed that the supreme court's construction of § Trans 102.15(3)(b) and (c) eliminates the burden of having to pay a fee to obtain a birth certificate or similar document, I could not conclude that the burdens Act 23 places on the right to vote have been lessened to such a degree that the state's interests are now sufficient to justify them. Accordingly, the state supreme court's decision does not significantly increase the defendants' likelihood of success on the Fourteenth Amendment claim.

2. Section 2 of the Voting Rights Act

The defendants argue that my disposition of the plaintiffs' Section 2 claim is likely to be reversed for two reasons: (1) I incorrectly determined that the *LULAC* plaintiffs have "statutory standing," and (2) my interpretation of how Section 2 applies in a "vote denial" case was erroneous. I have already addressed the statutory-standing argument twice and will not discuss it further, except to note that even if the defendants prevail on this argument on appeal, they will not succeed in reversing my disposition of the Section 2 claim, as the *Frank* plaintiffs unquestionably have statutory standing.[4]

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[4] The defendants suggest that if it is determined on appeal that the *LULAC* plaintiffs lack statutory standing, then any evidence

With respect to my interpretation of Section 2, the defendants argue that I am likely to be reversed because my interpretation "would potentially invalidate other laws not reasonably subject to challenge, such as voter registration laws." Mot. to Stay at 11. The defendants argue that my interpretation has the potential to invalidate voting practices that are unquestionably legitimate (or, in their words, "not reasonably subject to challenge") if they have disproportionate impacts on the poor, as a greater percentage of minorities than whites are poor, and this is due to the history of discrimination against minorities. The suggestion is that my interpretation will lead to an absurd result by invalidating laws that Congress, in passing Section 2, could not have intended to invalidate. But what unquestionably legitimate voting practice is likely to have a disproportionate impact on the poor? In their motion to stay, the defendants point to voter registration, but they do not explain how voter registration is likely to have a disproportionate impact on the poor. In their appellate filings, the defendants point to "all existing voting practices that require in-person voting" by giving the following example:

> [A]ssume that a plaintiff could prove that minority voters are less likely to own automobiles than white voters. Further assume that this is because minorities are more likely to be poor and that the higher rate of poverty among minorities is the result of

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presented by the *LULAC* plaintiffs will need to be "subtracted" from the evidence at trial. Mot. to Stay at 16. However, at trial, the defendants stipulated that any evidence offered by the *LULAC* plaintiffs would also be considered evidence offered by the *Frank* plaintiffs, and vice versa. Tr. at 7.

> historical or current societal discrimination. Under the district court's analysis, all existing voting practices that require in-person voting may constitute a violation of Section 2 because in-person voting is more difficult without an automobile.

Consol. Reply Br. at 18. Here, however, the final premise of the defendants argument—that in-person voting is more difficult without an automobile—is likely false. Based on the evidence presented at trial, I can conclude that lower-income minorities, especially those who do not own automobiles, are likely to live in urban areas, where it is easier to walk to a polling place than to drive. So it is very difficult to envision a plaintiff using disparities in rates of automobile ownership as a basis for challenging an existing voting practice that requires a person's presence at the polls.

In any event, even if it could be shown that an unquestionably legitimate voting practice would have a disproportionate impact on the poor, and therefore on minorities, that practice would not necessarily be invalidated under my interpretation of Section 2. As I noted in my original decision, if the voting practice was clearly necessary to protect an important state interest—an interest that is not "tenuous"—that voting practice could be sustained even if it has a disproportionate impact on minorities. Dec. & Order at 67–68. Any voting practice that could be described as "unquestionably legitimate" or "not reasonably subject to challenge" will almost certainly be clearly necessary to protect an important state interest. Consequently, I conclude that there is no merit to the defendants' argument that my interpretation of Section 2 will lead to results that Congress did not intend.

The defendants also argue that it was error for me to cite Justice Scalia's dissenting opinion in *Chisom v. Roemer*, 501 U.S. 380 (1991), in the course of interpreting Section 2. The defendants make the obvious point that a dissent has no precedential value. But I did not cite Justice Scalia's dissent for its precedential value. I cited it because it illuminates the plain meaning of Section 2: it shows that I am not the only jurist to have read the text of Section 2 and come to the conclusion that it means that a state may not adopt a voting practice that makes it more difficult for minorities to vote than whites. The defendants also note that Justice Scalia's dissent was part of a "vote dilution" case, not a vote-denial case. But even though that is true, it does not alter the fact that the example Justice Scalia gave—a county's making it more difficult for Blacks to register to vote than whites—involved vote denial rather than vote dilution. Indeed, Justice Scalia himself described his example as involving a "*nondilution* § 2 violation[]." *Chisom*, 501 U.S. at 408 (emphasis in original). So the dissent is instructive on the meaning of Section 2 as applied to a vote-denial claim.

The defendants also argue that I should have upheld Act 23 under Section 2 because Act 23 does not cause any of the racial disparities I identified, such as the disparity in poverty rates for whites and minorities and the resulting disparity in ID-possession rates. But although Act 23 does not cause these disparities, it clearly *interacts* with them in a way that makes it harder for minorities to vote. And it is this interaction with the effects of discrimination that produces a discriminatory result.[5] *Thornburg v. Gingles*, 478 U.S.

[5] Some of the classic practices used to prevent minorities from voting—literacy tests and poll taxes—did not, by themselves,

30, 47 (1986) ("The essence 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." (Emphasis added)).[6] The Ninth Circuit has specifically rejected the idea that a voting practice that produces a disproportionate racial impact may survive scrutiny under Section 2 so long as the voting practice, by itself, is not responsible for any underlying racial disparities. *See Farrakhan v. Washington*, 338 F.3d 1009, 1016–20 (9th Cir. 2003). As the court stated, "demanding 'by itself' causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by [other] circuits in Section 2 cases, as they also require a broad, functionally-focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact 'is better explained by other factors independent of race.'" *Id*. at 1018 (quoting *Smith v. Salt River Agric. Improvement &*

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cause the underlying disparities that allowed the practices to effectively suppress minority voting. Literacy tests did not cause illiteracy; they exploited the fact that, because of the effects of discrimination, Blacks were less likely to be able to read than whites. Likewise, poll taxes did not cause poverty; they exploited the fact that, because of the effects of discrimination, Blacks were more likely to be poor than whites.

[6] Although *Thornburg* was a vote-dilution case, not a vote-denial case, the Court did not limit the language I have quoted to vote-dilution cases. Rather, the Court made clear that Section 2 applies to vote-denial cases as well as vote-dilution cases, *id*. at 478 U.S. at 45 n.10, and the quoted language identifies "the essence of a Section 2 claim," not the essence of a vote-dilution claim.

Power Dist., 109 F.3d 586, 591 (9th Cir. 1997)). The court continued:

> Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination. Therefore, under *Salt River* and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown *where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances*.

Id. at 1019 (emphasis added).[7] In other words, the question in a Section 2 case is whether the challenged practice magnifies or exacerbates an existing racial disparity caused by discrimination in other areas, thereby importing the effects of that discrimination into the electoral process. In the present case, the evidence showed that discrimination in areas such as employment, housing, and education caused higher poverty rates for minorities than for whites, with the result that a greater percentage of the minority population lacks a photo ID and will have more

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[7] In *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010), the en banc court found that the voting practice at issue in the *Farrakhan* case I cited in the text—a felon disenfranchisement law—did not violate Section 2. However, the court did not disturb the holding that a Section 2 analysis requires consideration of factors external to the challenged voting mechanism itself. *See* 623 F.3d at 995 (Thomas, J., concurring).

difficulty obtaining an ID. Act 23 thus imports the effects of discrimination in these areas into the electoral process and produces a discriminatory result.

The defendants also contend that my interpretation of Section 2 is incorrect because my interpretation "focuses not on causation but on mere likelihood." Mot. to Stay at 12. This is in reference to the following language in my opinion: "Section 2 protects against 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." Dec. & Order at 52. The defendants argue that my interpretation focuses on whether a voting practice "*could potentially* create more difficulty for minorities to vote than non-minorities," rather than on whether it actually creates more difficulty for minorities to vote than non-minorities. Mot. to Stay at 13 (emphasis in original). This is wrong. Under my interpretation, a voting practice violates Section 2 only when it *actually* creates more difficulty for minorities to vote. And I found that Act 23 actually creates more difficulty for minorities to vote than non-minorities, in that Act 23 will prevent or deter a greater percentage of minorities from voting than whites. Dec. & Order at 61–63. The phrase "more likely than whites" (and related phrases) refers to the fact that although not every minority will be deterred or prevented from voting, a greater percentage of minorities will be deterred or prevented from voting than whites. Perhaps what the defendants mean to argue is that a voting practice does not violate Section 2 unless it prevents or deters *every* member of a racial group from voting. But there is no support for this narrow view of Section 2. The text states that a violation of Section 2 occurs when the political process is not "equally open to participation" by members of a minority group 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." 42 U.S.C. § 1973(b). If a voting practice will prevent or deter a greater percentage of minorities from voting than whites, the political process is not "equally open to participation" by minorities, in that they will not have the same opportunity as whites to participate in the political process and to elect representatives of their choice.

Finally, the defendants argue that because my conclusion that Act 23 violates Section 2 depends on the premise that a greater percentage of minorities than whites are poor, I have turned income or wealth into a protected class. That is incorrect. I concluded that Act 23 produces a discriminatory result because it interacts with the effects of racial discrimination, including higher poverty rates for minorities than for whites. If the reason a greater percentage of minorities than whites in Wisconsin are poor were unrelated to racial discrimination, then showing that minorities are more likely than whites to be poor would not have been sufficient to show that Act 23 produces a discriminatory result. Thus, the root cause of Act 23's disproportionate impact is discrimination on account of race, not income or wealth.

3. Scope of Injunction

The defendants' final argument is that I issued a permanent injunction that is impermissibly broad, in that I enjoined the defendants from enforcing any requirement to produce a photo ID to gain access to a ballot, not simply the photo-ID requirement embodied in Act 23. Importantly, however, I stated that if the State of Wisconsin enacted a new photo-ID law, the defendants could file a motion for relief from the

permanent injunction, and that I would schedule expedited proceedings on any such motion, if necessary. Dec. & Order at 69. The defendants contend that I would have no jurisdiction to hear such a motion while an appeal from the order granting the original injunction was pending, because ordinarily a district court loses jurisdiction over a case between the time a notice of appeal is filed and the time the mandate issues. However, Federal Rule of Civil Procedure 62(c) states that while an appeal from an order granting an injunction is pending, the district court may modify the injunction. Moreover, to the extent there were any doubt over whether I would have jurisdiction to consider a motion to modify the injunction, the procedure outlined in Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1 would apply. These rules provide that if a timely motion is made in the district court for relief that the district court lacks authority to grant because an appeal is pending, the district court may inform the court of appeals that it would grant the motion (or that the motion raises a substantial issue), and then the court of appeals may remand the case to the district court for a ruling on the motion. Thus, if the State of Wisconsin enacts a new photo-ID law, the defendants are not precluded from seeking relief from the present injunction.

With respect to the question of whether I erred in enjoining the defendants from enforcing any photo-ID requirement, not just Act 23, I first note that even if this were error, it would not be grounds for staying my order pending appeal. If the court of appeals concludes that the injunction is impermissibly broad, the court will not reverse my order in its entirety. Rather, the court will vacate the injunction and remand with instructions to enter an injunction limited to Act 23.

See PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (stating that court of appeals will "restrict the breadth" of an overbroad injunction). Thus, the argument that the injunction is too broad does not support the defendants' motion for a stay pending appeal. At best, it is an argument that supports *modifying* the injunction pending appeal, which the defendants have not asked me to do.

In any event, the defendants have not shown that I erred in enjoining them from enforcing any photo-ID requirement, not just Act 23. An injunction "must . . . be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion." *Russian Media Group. LLC v. Cable America, Inc.*, 598 F.3d 302, 307 (7th Cir. 2010). To make an injunction effective, a district court may enjoin "similar conduct reasonably related to" the violation established in the litigation. *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841 (7th Cir. 2013). In the present case, I concluded that to render the injunction effective, it was necessary to enjoin similar conduct reasonably related to the enforcement of Act 23. While the present case was under consideration, the Wisconsin Assembly adopted an amendment to Act 23, and the state's governor announced that he would call a special session of the legislature to modify Act 23 in the event that the courts did not uphold it. Now, it is possible that the state could make changes to Act 23 that result in its surviving scrutiny under the Voting Rights Act and the Fourteenth Amendment. However, given the evidence presented during the trial, it seemed doubtful that the kind of changes being discussed at the time would have had that result. Thus, to prevent the defendants from circumventing the injunction by enforcing a new photo-ID requirement that continued to place unjustified burdens on a

substantial number of voters and that produced a discriminatory result, I enjoined the defendants from enforcing any photo-ID requirement, not just Act 23 as it then existed, until such time as it could be determined whether the new law removed the unjustified burdens and discriminatory result. In my discretion, I determined that an injunction of this breadth was necessary to render the relief afforded to the plaintiffs effective.

The defendants contend that, although a district court has authority to enjoin a defendant from engaging in conduct that is similar to the conduct found to be unlawful in the litigation, I abused my discretion by imposing a remedy that could be likened to the preclearance requirement of Section 5 of the Voting Rights Act, which the Supreme Court addressed in *Shelby County v. Holder*, __ U.S. __, 133 S. Ct. 2612 (2013). But the preclearance requirement of Section 5 prevents a covered jurisdiction from enforcing *any* changes to state election law until they have been precleared by the federal government. Id. at 2624. The injunction I issued allows the State of Wisconsin to enforce any changes to its election law that it wants, so long as the law at issue does not require a person to present a photo ID as a condition to receiving a ballot. Nothing in *Shelby County* suggests that once a specific voting practice has been shown to be unlawful under Section 2, a court may not enjoin a state from adopting a similar voting practice without first seeking relief from the injunction. Thus, the defendants' reliance on *Shelby County* is misplaced.

B. Irreparable Harm and the Public Interest

The other factors that I must consider when deciding whether to stay an injunction pending appeal

are the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. The irreparable harm that will result to the defendants if the stay is denied in error is tied to the interests the defendants put forward to justify Act 23 in the first place: preventing in-person voter-impersonation fraud and promoting public confidence in the integrity of the electoral process. But as I found in deciding this case on the merits, there is virtually no in-person voter-impersonation fraud in Wisconsin, and there is no evidence that laws such as Act 23 promote public confidence in the integrity of the electoral process. Thus, if a stay pending appeal is denied in error, the defendants would suffer very little irreparable harm—almost certainly no in-person voter-impersonation fraud will have occurred during the time that the appeal was pending, and the public's confidence in the integrity of the electoral process will not have declined.

On the other side of the balance, the irreparable harm that the plaintiffs would suffer if a stay were granted in error would be significant. To begin with, some of the named individual plaintiffs, including Shirley Brown and Eddie Lee Holloway, Jr., would be unable to vote during any election that occurred while the stay was in effect, as they lack a photo ID and have been unable to obtain a photo ID. Similarly, many members and individuals represented by the organizational plaintiffs in the *LULAC* case would be prevented or deterred from voting because of Act 23. Finally, under the public-interest factor, I take into account the fact that a large number of individuals who are not parties to this case and who might not be represented by any of the *LULAC* organizations would

also be prevented or deterred from voting if Act 23 were reinstated pending appeal.

In short, in balancing the potential for irreparable harm to each party, I reiterate my finding that "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." Dec. & Order at 38. Thus, the balance of the harms weighs against a stay pending appeal.

C. Sliding Scale

Having found that the defendants' likelihood of success on appeal is low, that the defendants would suffer very little irreparable harm if a stay pending appeal were denied in error, and that the plaintiffs and members of the public would suffer significant irreparable harm if a stay pending appeal were granted in error, I conclude that, under the sliding-scale approach, I should not stay the permanent injunction pending appeal.

CONCLUSION

For the reasons stated, IT IS ORDERED that the defendants' motion for a stay pending appeal is DENIED.

Dated at Milwaukee, Wisconsin, this 13th day of August 2014.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX I

Wis. Stat. § 5.02 Definitions.

In chs. 5 to 12, unless the context requires otherwise:

* * *

(6m) "Identification" means any of the following documents issued to an individual:

(a) One of the following documents that is unexpired or if expired has expired after the date of the most recent general election:

1. An operator's license issued under ch. 343.
2. An identification card issued under s. 343.50.
3. An identification card issued by a U.S. uniformed service.
4. A U.S. passport.

(b) A certificate of U.S. naturalization that was issued not earlier than 2 years before the date of an election at which it is presented.

(c) An unexpired driving receipt under s. 343.11.

(d) An unexpired identification card receipt issued under s. 343.50.

(e) An identification card issued by a federally recognized Indian tribe in this state.

(f) An unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.30 (1) (d), that contains the date of issuance and signature of the individual to whom it is issued and

that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented.

* * *

(16c) "Proof of identification" means identification that contains the name of the individual to whom the document was issued, which name conforms to the individual's voter registration form, if the individual is required to register to vote, and that contains a photograph of the individual, except as authorized in S. 343.14 (3m) or 343.50 (4g).

* * *

Wis. Stat. § 6.79 Recording electors.

* * *

(2) VOTING PROCEDURE.

(a) Unless information on the poll list is entered electronically, the municipal clerk shall supply the inspectors with 2 copies of the most current official registration list or lists prepared under s. 6.36 (2) (a) for use as poll lists at the polling place. Except as provided in subs. (6) and (7), each eligible elector, before receiving a serial number, shall state his or her full name and address and present to the officials proof of identification. The officials shall verify that the name on the proof of identification presented by the elector conforms to the name on the poll list or separate list and shall verify that any

photograph appearing on that document reasonably resembles the elector. The officials shall then require the elector to enter his or her signature on the poll list, supplemental list, or separate list maintained under par. (c) unless the elector is exempt from the signature requirement under s. 6.36 (2) (a). The officials shall verify that the name and address stated by the elector conform to the elector's name and address on the poll list.

* * *

(3) REFUSAL TO PROVIDE NAME, ADDRESS, OR PROOF OF IDENTIFICATION.

* * *

(b) If proof of identification under sub. (2) is not presented by the elector, if the name appearing on the document presented does not conform to the name on the poll list or separate list, or if any photograph appearing on the document does not reasonably resemble the elector, the elector shall not be permitted to vote, except as authorized under sub. (6) or (7), but if the elector is entitled to cast a provisional ballot under s. 6.97, the officials shall offer the opportunity for the elector to vote under s. 6.97.

* * *

(6) CONFIDENTIAL NAMES AND ADDRESSES. An elector who has a confidential listing under s. 6.47 (2) may present his or her identification card issued under s. 6.47 (3), or give his or her name and identification serial number issued under s. 6.47

(3), in lieu of stating his or her name and address and presenting proof of identification under sub. (2). If the elector's name and identification serial number appear on the confidential portion of the list, the inspectors shall issue a voting serial number to the elector, record that number on the poll list and permit the elector to vote.

(7) LICENSE SURRENDER. If an elector receives a citation or notice of intent to revoke or suspend an operator's license from a law enforcement officer in any jurisdiction that is dated within 60 days of the date of an election and is required to surrender his or her operator's license or driving receipt issued to the elector under ch. 343 at the time the citation or notice is issued, the elector may present an original copy of the citation or notice in lieu of an operator's license or driving receipt issued under ch. 343. In such case, the elector shall cast his or her ballot under s. 6.965.

* * *

Wis. Stat. § 6.86 Methods for obtaining an absentee ballot.

(1)

* * *

(ar) Except as authorized in s. 6.875 (6), the municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality. The clerk shall retain each absentee ballot application until destruction is authorized under s. 7.23 (1). Except as authorized in s. 6.79 (6) and (7), if a qualified elector applies for an absentee ballot in person

at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application and shall verify that any photograph appearing on that document reasonably resembles the elector. The clerk shall then enter his or her initials on the certificate envelope indicating that the absentee elector presented proof of identification to the clerk.

* * *

(2)

(a) An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the board, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.

* * *

Wis. Stat. § 6.87 Absent voting procedure.

(1) Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy clerk authorized by the municipal clerk shall write on the official ballot, in the space for

official endorsement, the clerk's initials and official title. Unless application is made in person under s. 6.86 (1) (ar), the absent elector is exempted from providing proof of identification under sub. (4) (b) 2. or 3., or the applicant is a military or overseas elector, the absent elector shall enclose a copy of his or her proof of identification or any authorized substitute document with his or her application. The municipal clerk shall verify that the name on the proof of identification conforms to the name on the application. The clerk shall not issue an absentee ballot to an elector who is required to enclose a copy of proof of identification or an authorized substitute document with his or her application unless the copy is enclosed and the proof is verified by the clerk.

* * *

(4)(b)

* * *

2. Unless subd. 3. applies, if the absentee elector has applied for and qualified to receive absentee ballots automatically under s. 6.86 (2) (a), the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct.

3. If the absentee elector has received an absentee ballot from the municipal clerk by mail for a previous election, has provided proof of identification with that ballot, and has not changed his or her name or address

since providing that proof of identification, the elector is not required to provide proof of identification.

4. If the absentee elector has received a citation or notice of intent to revoke or suspend an operator's license from a law enforcement officer in any jurisdiction that is dated within 60 days of the date of the election and is required to surrender his or her operator's license or driving receipt issued to the elector under ch. 343 at the time the citation or notice is issued, the elector may enclose a copy of the citation or notice in lieu of a copy of an operator's license or driving receipt issued under ch. 343 if the elector is voting by mail, or may present an original copy of the citation or notice in lieu of an operator's license or driving receipt under ch. 343 if the elector is voting at the office of the municipal clerk.

5. Unless subd. 3. or 4. applies, if the absentee elector resides in a qualified retirement home, as defined in s. 6.875 (1) (at), or a residential care facility, as defined in s. 6.875 (1) (bm), and the municipal clerk or board of election commissioners of the municipality where the facility or home is located does not send special voting deputies to visit the facility or home at the election under s. 6.875, the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot that contains the certification of an authorized representative of the facility

or home that the elector resides in the facility or home and the facility or home is certified or registered as required by law, that contains the name and address of the elector, and that verifies that the name and address are correct.

* * *

Wis. Stat. § 6.875 Absentee voting in certain residential care facilities and retirement homes.

(6)

* * *

(b)

* * *

1. Upon their visit to the home or facility under par. (a), the deputies shall personally offer each elector who has filed a proper application for an absentee ballot the opportunity to cast his or her absentee ballot. In lieu of providing a copy of proof of identification under s. 6.87 (4) (b) 1. with his or her absentee ballot, the elector may submit with his or her ballot a statement signed by both deputies that contains the name and address of the elector and verifies that the name and address are correct. The deputies shall enclose the statement in the certificate envelope. If an elector presents proof of identification under s. 6.87 (4) (b) 1., the deputies shall make a copy of the document presented by the elector and shall enclose the copy in the certificate envelope. If an elector is present who has not filed a proper application for an absentee ballot, the

2 deputies may accept an application from the elector and shall issue a ballot to the elector if the elector is qualified, the elector presents proof of identification, whenever required, or submits a statement containing his or her name and address under this subdivision, and the application is proper. The deputies shall each witness the certification and may, upon request of the elector, assist the elector in marking the elector's ballot. The deputies shall not accept an absentee ballot submitted by an elector whose ballot was not issued to the elector by the deputies. All voting shall be conducted in the presence of the deputies. Upon request of the elector, a relative of the elector who is present in the room may assist the elector in marking the elector's ballot. No individual other than a deputy may witness the certification and no individual other than a deputy or relative of an elector may render voting assistance to the elector.

* * *

Wis. Stat. § 6.97 Voting procedure for individuals not providing required proof of residence.

(1) Whenever any individual who is required to provide proof of residence under s. 6.34 in order to be permitted to vote appears to vote at a polling place and cannot provide the required proof of residence, the inspectors shall offer the opportunity for the individual to vote under this section. Whenever any individual, other than a military elector, as defined in s. 6.34 (1) (a), or an overseas elector, as defined in s. 6.34 (1) (b), or an elector who has a confidential listing under s. 6.47 (2),

appears to vote at a polling place and does not present proof of identification under s. 6.79 (2), whenever required, the inspectors or the municipal clerk shall similarly offer the opportunity for the individual to vote under this section. If the individual wishes to vote, the inspectors shall provide the elector with an envelope marked "Ballot under s. 6.97, stats." on which the serial number of the elector is entered and shall require the individual to execute on the envelope a written affirmation stating that the individual is a qualified elector of the ward or election district where he or she offers to vote and is eligible to vote in the election. The inspectors shall, before giving the elector a ballot, write on the back of the ballot the serial number of the individual corresponding to the number kept at the election on the poll list or other list maintained under s. 6.79 and the notation "s. 6.97". If voting machines are used in the municipality where the individual is voting, the individual's vote may be received only upon an absentee ballot furnished by the municipal clerk which shall have the corresponding number from the poll list or other list maintained under s. 6.79 and the notation "s. 6.97" written on the back of the ballot by the inspectors before the ballot is given to the elector. When receiving the individual's ballot, the inspectors shall provide the individual with written voting information prescribed by the board under s. 7.08 (8). The inspectors shall indicate on the list the fact that the individual is required to provide proof of residence or proof of identification under s. 6.79 (2) but did not do so. The inspectors shall notify the individual that he or she may provide proof of residence or proof of identification to the municipal clerk or executive director of the

municipal board of election commissioners. The inspectors shall also promptly notify the municipal clerk or executive director of the name, address, and serial number of the individual. The inspectors shall then place the ballot inside the envelope and place the envelope in a separate carrier envelope.

(2) Whenever any individual who votes by absentee ballot is required to provide proof of residence in order to be permitted to vote and does not provide the required proof of residence under s. 6.34, the inspectors shall treat the ballot as a provisional ballot under this section. Upon removing the ballot from the envelope, the inspectors shall write on the back of the ballot the serial number of the individual corresponding to the number kept at the election on the poll list or other list maintained under s. 6.79 and the notation "s. 6.97". The inspectors shall indicate on the list the fact that the individual is required to provide proof of residence but did not do so. The inspectors shall promptly notify the municipal clerk or executive director of the municipal board of election commissioners of the name, address, and serial number of the individual. The inspectors shall then place the ballot inside an envelope on which the name and serial number of the elector is entered and shall place the envelope in a separate carrier envelope.

(3)

(a) Whenever an elector who votes by provisional ballot under sub. (1) or (2) because the elector does not provide proof of identification under s. 6.79 (2) or 6.86 (1) (ar) later appears at the polling place where the ballot is cast before the closing hour and provides the proof of identification, the inspectors shall remove the

elector's ballot from the separate carrier envelope, shall note on the poll list that the elector's provisional ballot is withdrawn, and shall deposit the elector's ballot in the ballot box. If the inspectors have notified the municipal clerk or executive director of the board of election commissioners that the elector's ballot was cast under this section, the inspectors shall notify the clerk or executive director that the elector's provisional ballot is withdrawn.

(b) Whenever the municipal clerk or executive director of the municipal board of election commissioners is informed by the inspectors that a ballot has been cast under this section, the clerk or executive director shall promptly provide written notice to the board of canvassers of each municipality, special purpose district, and county that is responsible for canvassing the election of the number of ballots cast under this section in each ward or election district. The municipal clerk or executive director then shall determine whether each individual voting under this section is qualified to vote in the ward or election district where the individual's ballot is cast. If the elector is required to provide proof of identification under s. 6.79 (2) or 6.86 (1) (ar) and fails to do so, the elector bears the burden of correcting the omission by providing the proof of identification at the polling place before the closing hour or at the office of the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election. The municipal clerk or executive director shall make a record of the procedure used to determine the validity

of each ballot cast under this section. If, prior to 4 p.m. on the Friday after the election, the municipal clerk or executive director determines that the individual is qualified to vote in the ward or election district where the individual's ballot is cast, the municipal clerk or executive director shall notify the board of canvassers for each municipality, special purpose district and county that is responsible for canvassing the election of that fact.

(c) A ballot cast under this section by an elector for whom proof of identification is required under s. 6.79 (2) or 6.86 (1) (ar) shall not be counted unless the municipal clerk or executive director of the board of election commissioners provides timely notification that the elector has provided proof of identification under this section.

* * *

Wis. Stat. § 343.50 Identification cards.

* * *

(5) VALID PERIOD; FEES.

(a)

* * *

3. The department may not charge a fee to an applicant for the initial issuance, renewal, or reinstatement of an identification card if the applicant is a U.S. citizen who will be at least 18 years of age on the date of the next election and the applicant requests that the identification card be provided without charge for purposes of voting.

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