Nos. 14-2058 & 14-2059

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, *et al.*,

Plaintiffs-Appellees

v.

SCOTT WALKER, in his Official Capacity as Governor of Wisconsin, *et al.*,

Defendants-Appellants

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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

Plaintiffs-Appellees

v.

DAVID G. DEININGER, *et al.*,

Defendants-Appellants

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

LEGISLATIVE HISTORY: **PAGE**

RULES:

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INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973. The Department of Justice is charged with the VRA's enforcement, 42 U.S.C. 1973j(d), and thus has a substantial interest in how courts construe its provisions. Last year, the Department filed an amicus brief in another court of appeals regarding Section 2's application to late

registration and early voting locations, see *Wandering Medicine* v. *McCulloch*, No. 12-35926 (9th Cir.) (filed Mar. 26, 2013), and we have brought Section 2 challenges against photographic voter identification (voter ID) laws in Texas, see *United States* v. *Texas*, No. 2:13cv263 (S.D. Tex.), and North Carolina, see *United States* v. *North Carolina*, No. 1:13cv861 (M.D.N.C.). The United States therefore has a significant interest in this Court's application of Section 2 in this case.

This case also concerns the role of *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), in voter ID challenges. States have relied on *Crawford* to justify restrictive voter ID practices challenged under Section 2. The United States participated as *amicus curiae* before the Supreme Court in *Crawford*, and has an important interest in how courts interpret and employ the case in as-applied constitutional and Section 2 challenges to voter ID laws.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court correctly determined that Wisconsin's voter ID law violates the Fourteenth Amendment as applied to a substantial number of eligible voters who lack a qualifying ID and face special burdens in acquiring one.

2. Whether the district court correctly determined that Wisconsin's voter ID law violates Section 2 of the VRA.

STATEMENT OF THE CASE

1. Wisconsin's Voter ID Law

This appeal involves challenges to Wisconsin Act 23, a 2011 enactment that imposes a photographic voter ID requirement for in-person and absentee voters. 2011 Wis. Sess. Laws 104.[1] Prior to Act 23, voters could vote simply by stating their names and addresses. Defs.' Br. 5.[2] Under Act 23, they must present one of nine forms of qualifying ID to prove their identity. App. 163.

Acceptable forms of ID include one of the following that is unexpired or expired after the most recent general election: (1) a Wisconsin driver's license; (2) a Wisconsin state ID card; (3) an ID card issued by a United States uniformed service; and (4) a United States passport. App. 163. A person also may present: (5) a naturalization certificate issued within the last two years; (6) an unexpired receipt, valid for 60 days as a temporary license, issued when a person applies for a Wisconsin driver's license; (7) an unexpired receipt, valid for 60 days as a temporary ID card, issued when a person applies for a state ID card; (8) an unexpired tribal ID card recognized by Wisconsin; or (9) an unexpired ID card issued by an accredited Wisconsin college or university that contains the date of issuance, the person's signature, and an expiration date no later than two years from the date of issuance, provided the voter also presents proof of enrollment. App. 163.

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[1] Act 23 is enjoined on state law grounds pending a decision by the Wisconsin Supreme Court. Defs.' Br. 7.

[2] "Defs.' Br. ___" refers to pages in defendants-appellants' opening brief. "App. ___" refers to pages in defendants-appellants' consolidated separate appendix.

Individuals who lack a qualifying ID may apply for a Wisconsin state ID card at the Wisconsin Department of Motor Vehicles (DMV); the DMV must waive the usual $18 fee for any applicant who will be at least 18 years of age as of the next election and who requests that the card be issued free of charge for voting purposes. App. 165. To obtain a free ID, a person must present certain primary identification documents at a DMV service center, submit an application, and be photographed. App. 165.

Act 23 requires that an in-person voter state his or her name and address at the polls and produce qualifying ID. App. 164. The election official checks that the name on the ID conforms to the poll list, that the picture reasonably resembles the voter, and that the name and address the voter states matches that on the poll list. App. 164. If the voter lacks qualifying ID, he or she may cast a provisional ballot that will be counted only if the voter appears at the municipal clerk's office with an acceptable form of ID by 4:00 p.m. the Friday after the election. App. 164. Absentee voters must have qualifying ID on file or include a copy of such ID with their ballot requests. App. 164. There are limited exceptions to the voter ID requirement, but none applies solely because a voter is elderly, poor, homeless, or has a disability. App. 164-165.

2. Procedural History

a. In *LULAC* v. *Deininger*, four organizations alleged that Act 23 violates Section 2 of the VRA because it disproportionately injures African-American and Hispanic voters. App. 55-69. In *Frank* v. *Walker*, individual plaintiffs brought a

suit seeking to represent eight classes of Wisconsin voters. They argued that, as applied to several of these classes, Act 23 violates the Fourteenth Amendment by unjustifiably burdening the right to vote. They also raised other constitutional claims and asserted a Section 2 claim similar to *LULAC*. App. 1-54, 70-148. Both cases were heard by the same district court judge in a two-week bench trial. App. 161.

b. On April 29, 2014, the court issued findings of fact and conclusions of law. App. 160-249. It explained that, because the as-applied constitutional and Section 2 claims "overlap substantially, in that many factual findings are relevant to both claims," it would decide both. App. 161-162.

i. On the constitutional issue, the court applied the balancing test the Supreme Court adopted in *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). App. 166-167, 169. In *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), a majority of the Supreme Court had applied that test in a facial constitutional challenge to an Indiana voter ID law. App. 167-168. The district court stated, however, that the Court had not agreed on how the test would be used in an as-applied challenge, and that *Crawford* was not "precedential as to that question." App. 168-169. Rather, the district court relied on *Anderson* and *Burdick*, stating that "they require invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters." App. 169.

The court examined the State's four asserted justifications for Act 23: (1) detecting and preventing in-person voter fraud; (2) promoting public confidence in the electoral process; (3) detecting and deterring other types of voter fraud; and (4) promoting orderly election administration and accurate recordkeeping. App. 170. The court concluded that these interests, although "legitimate" or "important" in principle, either carried little weight or were not actually furthered by Act 23. App. 170-181. Specifically, the court found that the interest in combating in-person fraud carried very little weight because the evidence showed that Wisconsin had no history of, or foreseeable problem with, such fraud. App. 170-176. As for promoting public confidence in the electoral process, the court found that the evidence showed that Act 23 undermines public confidence as much as it promotes it. App. 176-179. With respect to detecting and deterring other types of voter fraud, the court found defendants did not adequately explain how Act 23 would prevent that fraud. App. 179-180. Finally, the court found that the State's interest in orderly election administration was essentially derivative of its interest in preventing fraud. App. 180-181.

The court also considered the magnitude of the burdens that Act 23 imposes on the exercise of the right to vote. App. 181-197. The court explained that, while Act 23 applies to all Wisconsin residents, its burdens "fall primarily on" and "create[ ] a unique barrier for" those individuals who do not currently possess a qualifying ID and would not need to obtain one for reasons other than to vote. App. 181-182. The court found that roughly 300,000 eligible voters, or 9% of Wisconsin's

registered voters, lack qualifying ID and that a substantial number of them "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." App. 182-183.

The court then identified the burdens that low-income voters face when attempting to obtain ID in order to vote, focusing its discussion on burdens attending the qualifying ID easiest to obtain: a free, state ID card. App. 185. The court stated that the typical individual's "first obstacle" is understanding the law's requirements – which include providing proof of name, date of birth, citizenship, identity, and Wisconsin residence, and are usually satisfied by presenting a birth certificate and social security card – and how they are fulfilled. App. 185-188. The court discussed the evidence showing the difficulty, or impossibility in some cases, of obtaining these documents if a person does not already have them, as well as the costs associated with obtaining them. App. 186-188.

The court then explained that once an individual has gathered the necessary documents, he or she still will need to make at least one trip to the DMV. App. 189. "There are 92 DMV service centers in the state," the court stated, "[a]ll but two" of which "close before 5:00 p.m. and only one [of which] is open on weekends." App. 189. The court thus found that a person will need to go to the DMV during daytime work hours, either by "us[ing] vacation time if it's available or forego[ing] the hourly wages that he or she could have earned in the time it takes to obtain the ID." App. 189. The court explained that because, by definition, individuals needing an ID lack

a driver's license, they will need to rely on some other form of transportation, which can increase the time and cost of getting to a DMV service center, not all of which are accessible by public transit. App. 189-190. The court found that the time and cost of obtaining a free ID is even more pronounced if a person lacks the necessary underlying documents because the person will likely have to visit at least one more government agency and pay a fee for any document. App. 190. The court found that even nominal fees may significantly burden some low-income individuals. App. 190-191.

Even assuming a person has the proper documents and successfully applies for a free ID, the court found that "a person may be unable to procure an ID in time to vote or to validate a provisional ballot." App. 192. The court also found that costly and time-consuming complications arise when a person's underlying documents contain errors, such as misspellings, and that the DMV does not always resolve these problems in the applicant's favor. App. 192-196.

The court therefore found that Act 23 creates substantial obstacles for many eligible voters, including, among others, low-income individuals, the elderly, and voters who were born outside of Wisconsin or who have errors in their underlying documents. The court stated that "even minor burdens associated with obtaining" an ID "will be enough to deter" many eligible voters who lack an ID from voting, and that "for many voters, especially those who are low income, the burdens associated with obtaining an ID will be anything but minor." App. 196-197. Thus,

the court concluded that Act 23 will deter a substantial number of individuals from voting. App. 197.

The court then balanced the State's claimed interests against the burdens Act 23 imposes on substantial numbers of voters who lack qualifying ID. The court found that these burdens were outweighed neither by the interest in combating in-person voter fraud, because Act 23 "will prevent more legitimate votes from being cast than fraudulent votes," nor by the interest in ensuring electoral confidence, because "Act 23 undermines confidence in the electoral process as much as it promotes it." App. 197. Having found a constitutional violation, the court held that the only "practicable way" to remove the unjustified burdens would be to enjoin Act 23. App. 197-198.

ii. The court also addressed plaintiffs' Section 2 claim. The court stated its belief that the "Senate Factors" were largely inapplicable in the voter ID context; relying on Section 2's plain text and meaning, the court stated it must determine whether Act 23 "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." App. 208-211.

The court stated that the burden of obtaining ID in order to vote "disproportionately impacts Black and Latino voters." App. 211. Although defendants admitted this disparity, the court also credited the reports and testimony of plaintiffs' experts who found that minorities in Wisconsin are less likely than whites to possess qualifying ID. App. 211-218.

The court rejected defendants' argument that, in order to show a Section 2 violation, plaintiffs had to prove that minorities who lack ID would be incapable of obtaining it. App. 218-219. The court explained that defendants had not pointed to any 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" that practice. App. 219.

The court also rejected defendants' argument that, for there to be a denial or abridgement of the right to vote, plaintiffs had to show that minorities face "different considerations than whites in obtaining qualifying ID." App. 219-220. The court stated that even assuming plaintiffs needed to show that minorities face "different considerations" in obtaining qualifying ID, they still had established a violation. App. 221. It cited evidence showing that minority voters are more likely than white voters to lack the documents necessary to obtain a free ID, are more likely to be born outside of Wisconsin and thereby face additional time and costs in obtaining necessary documents, and are more likely to face language barriers in a process "designed to accommodate" English speakers. App. 221-222.

The court then considered whether "the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination." App. 223. It reiterated that minorities in Wisconsin are more likely than whites to live in poverty and thus more likely to lack qualifying ID, and found that this disparity was attributable to the effects of racial discrimination in housing, employment, and education. App. 223-226. Based on this evidence, the

court concluded that Act 23 would have a racially discriminatory result. App. 226. The court stated that because Act 23 "only weakly serves" the State's claimed interests, "those interests are tenuous and do not justify" this discriminatory result. App. 226-227. Thus, the court enjoined Act 23 under Section 2. App. 227-228.

SUMMARY OF ARGUMENT

These cases mark the first occasion in which a court of appeals will review both as-applied constitutional and Section 2 challenges to a voter ID law on a fully developed record. Following the Supreme Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), States have attempted to rely on *Crawford* to justify restrictive voter ID practices that make it much more difficult for eligible voters to cast a ballot. But *Crawford* addressed only a facial constitutional challenge to Indiana's voter ID law, and left open the door to future as-applied constitutional claims. Moreover, *Crawford* did not involve any race-based claims under the VRA; it neither sanctioned state voter ID laws that have a racially discriminatory result, nor insulated those laws from Section 2 challenges.

Here, as to plaintiffs' as-applied constitutional claim, the district court credited plaintiffs' evidence demonstrating that, under Act 23, many eligible voters would no longer be able to vote or would encounter significant obstacles in order to vote. Having identified voters to whom Act 23's application created a significant burden and consistent with *Anderson/Burdick*'s balancing test, the court thus was required to examine closely the State's asserted interests for enacting Act 23. Because it found those interests minimal at best, the court properly concluded that

Act 23 imposes an unjustified burden on the right to vote, in violation of the Fourteenth Amendment, as applied to those voters.

With respect to plaintiffs' Section 2 claim, the district court properly examined whether, as a result of Act 23, minority voters have less opportunity relative to other members of the electorate to participate in the political process. In evaluating plaintiffs' claim, the court properly considered the "totality of circumstances" – including whether social, political, and historical conditions in Wisconsin hinder minorities' political participation and whether the State's asserted justifications for Act 23 are "tenuous" – and correctly concluded that Act 23 will have a racially discriminatory result, in violation of Section 2.

ARGUMENT

I

In An As-Applied Constitutional Challenge, Courts Must Weigh The State's Asserted Interests For Enacting A Restrictive Voter ID Requirement Against The Burdens The Requirement Imposes On Eligible Voters

A. Crawford *Permits Courts To Evaluate A State's Claimed Interests In Enacting A Restrictive Voter ID Law*

In *Crawford* v. *Marion County Election Board*, state and local Democrats – along with elected officials and nonprofit groups representing elderly, poor, and minority voters and voters with disabilities – challenged an Indiana voter ID law enacted for the asserted purposes of preventing voter fraud and safeguarding voter confidence. 553 U.S. 181, 186-187 (2008). The plaintiffs argued that Indiana's law was facially invalid under the Fourteenth Amendment because it unduly burdened the right to vote. *Id.* at 187. On summary judgment, the district court ruled in the

State's favor, explaining that plaintiffs failed to offer evidence of any individuals or groups who would be unable to vote or would incur appreciable burdens in order to vote. *Id.* at 187-188. This Court affirmed in a split decision, and a divided Court denied rehearing en banc. *Id.* at 188.

The Supreme Court affirmed, thus upholding the law's constitutionality. *Crawford*, 553 U.S. at 189. Justice Stevens, joined by the Chief Justice and Justice Kennedy, authored the lead opinion, which set forth the applicable legal standard and rejected plaintiffs' facial challenge largely based on insufficient evidence. *Id.* at 189-204. His opinion left the door open to as-applied challenges. *Ibid.* Justice Stevens explained that in evaluating whether a challenged voting restriction is unduly burdensome, the Court applies the balancing test laid out in *Anderson* v. *Celebrezze*, 460 U.S 780, 789 (1983), and *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). *Crawford*, 553 U.S. at 189-190. Under this test, a court must "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed." *Id.* at 190 (citation and internal quotation marks omitted). Justice Stevens noted that "[h]owever slight that burden may appear, * * * it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation" on voting. *Id.* at 191 (citation and internal quotation marks omitted).

Justice Stevens recognized the State's legitimate interests in "moderniz[ing] election procedures," "preventing voter fraud," ensuring "orderly administration and accurate recordkeeping," and "safeguarding voter confidence." *Crawford*, 553 U.S.

at 191, 196. He then assessed the burdens that Indiana's law imposed, noting that, for most voters who lack ID, the inconvenience of making a trip to the DMV for a free ID, gathering underlying documents that might require a fee, and posing for a photograph is not a substantial burden on the right to vote. *Id.* at 198. Yet, he recognized that, for "a limited number of persons," the law might impose "a special burden." *Id.* at 199. He emphasized plaintiffs' "heavy burden of persuasion" in a facial challenge, however, and stated that, on the sparse record presented, which contained no evidence relating to the extent of the law's burden on *any* individuals, "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. Justice Stevens thus concluded that the State's asserted interests were "sufficient" to withstand plaintiffs' facial and factually unsupported challenge. *Id.* at 203.

Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment. Under *Burdick*, Justice Scalia would have assessed the burden the law imposes on the overall electorate; he concluded that requiring photo ID is a generally applicable, nondiscriminatory measure, supported by Indiana's asserted interests, that does not impose a severe or unjustified overall burden on the right to vote. *Crawford*, 553 U.S. at 204-209. Justice Souter, joined by Justice Ginsburg, dissented, as did Justice Breyer. Justice Souter stated that *Burdick* requires "a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State's reasons for imposing those precise burdens," and stated that Indiana's

law might prohibit some low-income and elderly individuals, as well as individuals with disabilities, from voting based on a relative lack of DMV branches, limited public transit, and the costs of obtaining underlying documents. *Id.* at 210-216. Justice Souter would have struck down the law based on Indiana's failure to show that its claimed interests outweigh the non-trivial burdens the law imposed on some voters. *Id.* at 209, 223-237. Justice Breyer would have applied a slightly different balancing test; he would have struck down the law because it disproportionately burdened voters who lack qualifying ID and because less restrictive alternatives were available. *Id.* at 237-241.

In sum, the Court's acceptance of the State's claimed interests as "sufficient" in *Crawford* was driven by the plaintiffs' failure to provide the Court with any burdens-related evidence to weigh against the State's claimed interests. Although *Crawford* upheld Indiana's law, it neither provided States free rein to enact restrictive voter ID laws, nor insulated their claimed interests from examination in an as-applied challenge.

B. The District Court Correctly Concluded That Act 23 Imposes An Unjustified Burden On The Right To Vote In Violation Of The Fourteenth Amendment

Defendants invoke *Crawford* as controlling and argue that the district court misapplied *Anderson/Burdick*'s balancing test by examining whether the State's asserted interests justify the severe burdens that Act 23 imposes on a substantial number of eligible voters. Defs.' Br. 36-54. But defendants cannot use *Crawford* as a shield to insulate Act 23 on a factually developed record. In contrast to *Crawford*, plaintiffs in this case brought an as-applied constitutional challenge; they supplied

evidence of severe burdens that the plaintiffs in *Crawford* failed to present. The district court was therefore obligated to weigh those burdens against the State's claimed interests.

Given the evidence presented, the district court correctly applied the balancing test described in *Anderson/Burdick*. As stated in *Burdick*:

> 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."

504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); see *Crawford*, 553 U.S. at 189-190 (describing this standard). This inquiry requires a court to employ "an analytical process that parallels its work in ordinary litigation." *Anderson*, 460 U.S. at 789. Moreover, the "rigorousness" of the inquiry "depends upon the extent to which a challenged regulation burdens" constitutional rights. *Burdick*, 504 U.S. at 434. Thus, "severe restrictions * * * must be narrowly drawn to advance a state interest of compelling importance," while "reasonable, nondiscriminatory restrictions" can generally be justified by "important regulatory interests." *Ibid.* (citation and internal quotation marks omitted).

Here, plaintiffs presented, and the district court credited, ample evidence that allowed the court to resolve the balancing test in their favor. In conducting that test, the court properly made findings of fact regarding the significant burdens Act 23 imposes on particular groups of eligible voters who lack qualifying ID and

properly analyzed whether defendants' claimed interests in enacting a restrictive voter ID law justified those burdens. These burdens included, for example, the difficulty of understanding Act 23's requirements and navigating government agencies; the fees and travel costs inherent in obtaining the underlying documents necessary to obtain a free ID; the travel time and costs necessary to visit a DMV service center during limited operating hours; the difficulty of correcting errors in an individual's underlying documents; and the highly discretionary nature of the DMV's ability to grant an exception and issue a free ID to an individual despite his or her failure to present proof of identity. App. 181-197.

In presenting such evidence, plaintiffs here, unlike those in *Crawford*, demonstrated that Act 23 severely restricts the right to vote for many eligible voters, including, among others, low-income individuals, the elderly, and voters who were born outside of Wisconsin or who have errors in their underlying documents. Thus, the district court was required to examine defendants' claimed interests closely. This fact-based examination does not undermine a State's right to enact a voter ID requirement, even as a prophylactic measure, to combat voter fraud and protect electoral integrity. Rather, where the facts in an as-applied challenge establish that a law imposes a serious burden on a significant number of voters, it simply requires an examination of the fit between the State's claimed interests and those burdens.

Because the district court applied the correct legal standard and found plaintiffs' evidence credible, this Court should affirm the court's holding that Act 23

is invalid as applied to those voters for whom it significantly burdens the right to vote.

II

Defendants Are Advocating An Incorrect Legal Standard For Evaluating Section 2 Claims In The Voter ID Context

A. The Plain Language Of The VRA Confirms That Voter ID Laws Are Subject To Scrutiny Under Section 2 And That Plaintiffs Do Not Have To Show That Such Laws Deprive Them Completely Of The Right To Vote

Section 2 of the VRA prohibits 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). The VRA defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, * * * casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 42 U.S.C. 1973*l*(c). Voter ID laws are undeniably subject to scrutiny under the VRA.

Moreover, Section 2's text frames the relevant inquiry in this case: whether, as a result of Act 23, African-American and Hispanic voters have "*less* opportunity" relative to white voters "to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b) (emphasis added); see App. 210-211 (focusing on Section 2's text). Thus, to prevail under Section 2, a plaintiff need not prove that the challenged practice results in a complete denial of the right to vote. Rather, all a plaintiff needs to establish is that the challenged practice

"result[s] in the denial of *equal access* to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982) (Senate Report) (emphasis added); see *id.* at 28 ("Section 2 protects the right of minority voters to be free from election practices * * * that deny them the same opportunity to participate in the political process as other citizens enjoy.").

Section 2(b)'s focus on "*less* opportunity" is consistent with Section 2(a)'s prohibition of those voting practices that result in a "denial or *abridgement*" of the right to vote. 42 U.S.C. 1973(a) and (b) (emphasis added). After all, in a dilution case, minority voters are not denied the right to vote; their votes simply have less weight than those of other voters. The abridgement of minority voters' access to the political process is also a Section 2 violation.

Nevertheless, defendants argue (Defs.' Br. 30) that plaintiffs' claim fails because they did not show that minority voters who lack a qualifying ID will be unable *ever* to obtain such ID. But Section 2, by its terms, contains a comparative standard: minority voters cannot be given "less" opportunity than other voters to participate in the political process and to elect their preferred candidates. It does not require proof that, as a result of the challenged practice, they will have no opportunity ever to vote. Defendants' formulation fundamentally and improperly alters the statutory test and would give jurisdictions a green light to enact measures with a discriminatory result. Under their formulation, for example, it would not raise problems under Section 2 for a jurisdiction to require voters in school board elections to possess high school diplomas or their equivalent, even if

there was a large disparity in graduation rates between white and minority voters. While a high school graduation requirement might make voting decidedly more difficult for minority voters than for white voters, members of the minority group would have no Section 2 claim under defendants' standard because it would be possible for them to obtain GEDs in order to retain their ability to vote. That simply is not the law.

B. The District Court Correctly Determined That "The Totality Of Circumstances" Establishes That, Under Act 23, Minority Voters "Have Less Opportunity Than Other Members Of The Electorate" To Cast Their Ballots

In response to the Supreme Court's decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), which held that Section 2 prohibited only intentionally discriminatory practices, Congress amended Section 2 in 1982 by adding a subsection that restored the evidentiary standard developed in earlier cases that did not require proof of discriminatory intent to establish a statutory violation. See Senate Report 15, 27-28; *Ketchum* v. *Byrne*, 740 F.2d 1398, 1403-1405 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

Under Section 2(b), a violation is established by showing that, "based on the totality of circumstances," members of a racial 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). Thus, a court evaluating a Section 2 claim must engage in a fact-intensive inquiry to determine whether, as a result of the challenged practice, members of a protected class have less opportunity

relative to other voters in that jurisdiction to participate in the political process and to elect preferred candidates. See *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986).[3]

In its report on the 1982 amendments, the Senate Judiciary Committee (Senate Committee) identified several factors that may inform a court's evaluation of whether a challenged practice denies voters an equal opportunity to participate in the political process and to elect representatives of their choice on account of race. These "Senate Factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

---

[3] Where a plaintiff shows that minority voters have less opportunity relative to non-minority voters to vote and therefore to participate in the political process, the plaintiff necessarily also will establish that members of that group have less opportunity to elect candidates of their choice. See *Chisom* v. *Roemer*, 501 U.S. 380, 397 (1991) ("Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.").

> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report 28-29.

The Senate Committee indicated that this list was not exhaustive, and that no particular factor or number of factors need be proven to sustain a Section 2 claim.[4] Senate Report 29. Indeed, the Senate Committee stated that the relevance of certain factors will vary with "the kind of rule, practice, or procedure called into question." Senate Report 28. The Supreme Court agreed that the list of factors "is neither comprehensive nor exclusive," *Gingles*, 478 U.S. at 45, and explained that "[t]he 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

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[4] Section 2 was amended in response to *Bolden*, a vote dilution case, and the Senate Factors were derived primarily from two cases that also involved vote dilution claims. Senate Report 21-23, 27-30 & n.113; *White* v. *Regester*, 412 U.S. 755 (1973); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc). Thus, the Senate Committee was quite careful to say that not all of these factors necessarily had to be proven to establish a Section 2 violation, given that some claims would not involve dilution through, for instance, the use of multi-member districts or at-large elections.

representatives," *id.* at 47. Although vote dilution claims have comprised the majority of Section 2 claims, the statute also applies to discriminatory practices that prevent or hinder an eligible voter from casting a ballot or having his or her ballot counted. See, *e.g.*, *id.* at 45 n.10.

When examining voting practices that affect an individual's ability to cast a ballot, including voter ID laws, certain Senate Factors will be more relevant than others. In the view of the United States, Senate Factors One, Two, Five, Eight, and Nine – that is, (1), the jurisdiction's history of official racial discrimination in voting; (2), the extent to which voting is racially polarized; (5), socioeconomic disparities attributable to racial discrimination that hinder the minority group's participation in the political process; (8), a lack of responsiveness to the minority group's needs; and (9), the "tenuous[ness]" of the law – are the most relevant factors in assessing challenges to voter ID laws. A court's consideration of these factors helps in assessing whether the social, political, and historical conditions in a jurisdiction might cause an inequality in a minority group's participation opportunities relative to other voters. Cf. *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-406 (9th Cir. 2012) (en banc) (finding these factors relevant in a Section 2 challenge to Arizona's voter ID law), aff'd on other grounds, *sub nom*. *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

Defendants argue (Defs.' Br. 24-25) that demonstrating only a disparity in the rates at which white and minority voters possess qualifying ID is not enough to prove a Section 2 claim. But the district court did not base its decision on a holding

that a mere statistical showing, without more, violates Section 2. App. 223 ("[A] plaintiff must do more than establish that the challenged voting practice results in a disproportionate impact."). Rather, it correctly conducted "a searching practical evaluation of the past and present reality" of voting in Wisconsin. *Gingles*, 478 U.S. at 45 (citations and internal quotation marks omitted); see *Ketchum*, 740 F.2d at 1404 ("Plaintiffs * * * need only show 'that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.'" (quoting Senate Report 27)). Like other courts to examine practices challenged under Section 2, the district court in this case examined "the totality of circumstances" and relied on the most relevant Senate Factors to evaluate whether "the political, social, and economic legacy of past discrimination" against minorities in Wisconsin "may well hinder their ability to participate effectively in the political process." *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006) (citation and internal quotation marks omitted).

In particular, the court properly examined whether Act 23 interacts with social, political, and historical conditions to result in African-American and Hispanic voters having "less opportunity" relative to other voters to participate in the political process and to elect candidates of their choice. In looking beyond Act 23's racially disproportionate impact, the court correctly considered the stark socioeconomic disparities between racial minorities and whites in Wisconsin, as well as whether the policies underlying Act 23 were "tenuous." App. 170-181, 223-227. In determining whether those policies were "tenuous," the court relied in part on its

inquiry under *Anderson/Burdick*, in which it held that the State's claimed interests for enacting its voter ID law were not supported factually or furthered significantly by Act 23. App. 226-227. Moreover, the court considered, consistent with Section 2, whether the State's claimed interests justified such a pronounced racially discriminatory result. App. 227.

In arguing that the district court erred in applying Section 2, defendants rely on circuit court cases affirming decisions in which plaintiffs failed to present evidence showing that the practices they challenged would have a prohibited result. Defs.' Br. 24 & n.4.[5] By contrast, the court here offered a detailed examination of how socioeconomic disparities between Wisconsin's minority and white voters, along

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[5] In *Gonzalez*, the Ninth Circuit declined to disturb the district court's findings and conclusions regarding plaintiffs' failure to establish a Section 2 violation, where the court found plaintiffs had produced no evidence showing that Latino voters disproportionately lacked ID and "failed to explain how Proposition 200's requirements interact with the social and historical climate of discrimination to impact Latino voting." 677 F.3d at 406-407 & nn.33-34. In this case, by contrast, the court properly found that minority voters disproportionately lack the requisite ID and then explained how Act 23 interacted with current conditions in Wisconsin to burden minority voting.

Similarly, in affirming the district court's holding that the plaintiffs in *Ortiz* v. *City of Philadelphia Office of the City Commissioners*, 28 F.3d 306 (3d Cir. 1994), had failed to show that Pennsylvania's voter purge statute violated Section 2, the court stated that the statute did not cause racial disparities in the number of inactive minority and white voters and that inactive voters purged from voter lists presumably could re-register to vote. *Id.* at 312-315 & nn.14, 17. The court emphasized that the plaintiffs had not challenged any voter registration procedures, noting that "if [they] had alleged that, because of disadvantages in education, housing, health, income, and the like, minority citizens could not afford to travel to registration centers, or in some other way avail themselves of registration opportunities, the dissent's * * * [concern about a discriminatory result] might have some meaning." *Id.* at 317. Those sorts of difficulties were precisely the ones identified by the court in this case.

with a history of racial discrimination in housing, employment, and education, help to explain both the decreased rate at which minorities currently possess qualifying ID and the increased difficulty they face in obtaining them. In this case, unlike the cases defendants cite, the court thoroughly analyzed "the interaction of the voting practice with the effects of past or present discrimination." App. 223.

In so doing, the court correctly interpreted Section 2's prohibition on any voting practice that "results in a denial or abridgement of the right * * * to vote on account of race or color," 42 U.S.C. 1973(a), to mean that a plaintiff "must show that the disproportionate impact is tied in some way to the effects of discrimination." App. 219. Plaintiffs were not required to show, as defendants suggest (Defs.' Br. 31), that Act 23 itself produced the socioeconomic disparities the district court relied upon. Rather, plaintiffs were required only to show that those disparities make it more difficult for minority voters to obtain qualifying ID and, therefore, to vote. As the Supreme Court explained in *Gingles*, the "essence" of a Section 2 claim is that the challenged practice "interacts with social and historical conditions to cause an inequality in the [participation] opportunities enjoyed by * * * [minority] and white voters." 478 U.S. at 47.

Here, plaintiffs proved that, "based on the totality of circumstances" – including Act 23's disproportionate racial impact, the socioeconomic disparities and present effects of discrimination that hinder minorities' ability to meet Act 23's stringent requirements, and the tenuous justifications for Act 23 – minority voters "have less opportunity * * * to participate in the political process and to elect

representatives of their choice." 42 U.S.C. 1973(b). Plaintiffs thus established that Act 23 "results in a denial or abridgement of the right * * * to vote on account of race or color," 42 U.S.C. 1973(a), in violation of Section 2.

CONCLUSION

This Court should affirm the district court's holdings that Act 23 violates the Fourteenth Amendment and Section 2 of the VRA.

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 12-point Century Schoolbook font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Date: July 30, 2014

CERTIFICATE OF SERVICE

I certify that on July 30, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

ADDENDUM

Section 2 of the Voting Rights Act (42 U.S.C. 1973). Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(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 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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.