Nos. 16-3083, 16-3091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants,
Cross-Appellees.

On Appeal From The United States District Court
For The Western District of Wisconsin, Case No. 3:15-cv-324
The Honorable Judge James D. Peterson, Presiding

PLAINTIFFS-APPELLEES' RESPONSE AND CROSS-APPEAL BRIEF

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3083, 16-3091

Short Caption: One Wisconsin Institute, Inc., et al. v. Mark L. Thomsen, et al.

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Attorney's Signature: s/ Bruce V. Spiva Date: 8/5/2016

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Attorney's Printed Name: Elisabeth C. Frost

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees, Cross-Appellants ("Plaintiffs") filed their complaint on May 29, 2015, stating claims under the Constitution and Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. R.1.[1] Plaintiffs amended their complaint twice, continuing to assert claims under these provisions. R.19, 141. The district court had jurisdiction over all of the claims under 28 U.S.C. §§ 1331, 1343, and 1357.

The district court granted permanent injunctive relief in favor of Plaintiffs and against Defendants-Appellants, Cross-Appellees ("Defendants" or the "State") as to many of Plaintiffs' claims, while rejecting other claims in whole or in part. The judgment sought to be reviewed was entered by the district court on August 1, 2016. A.162-64.[2] This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the appeal is a review of a final order granting judgment after trial. That judgment is final and adjudicated all claims between the parties; no claims remain for disposition in the district court.

Plaintiffs and Defendants filed timely notices of appeal on August 2 and 3, 2016, respectively. R.236, R.240. This Court consolidated the appeals on August 4.

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[1] Citations to the district court record are "R.[ECF Entry Number]." Citations to this Court's docket are "Dkt.[ECF Entry Number]."

[2] Citations to Plaintiffs' Separate Appendix are "SA.[Page Number]." Citations to Defendants' Separate Appendix are "A.[Page Number]."

STATEMENT OF THE ISSUES

1. Do the challenged provisions intentionally discriminate on the basis of race, age, and/or partisan affiliation or viewpoint in violation of the First, Fourteenth, Fifteenth, and/or Twenty-Sixth Amendments?

2. Do certain challenged provisions unduly burden the right to vote in violation of the First and Fourteenth Amendments?

3. Do certain challenged provisions violate Section 2 of the VRA?

4. Should this Court overrule *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014)?

STATEMENT OF THE CASE

Introduction. At the final Senate Republican Caucus meeting prior to the passage of 2011 Wis. Act 23—an omnibus measure containing the voter ID requirement and several other voting restrictions challenged in this case—there initially "wasn't a lot of enthusiasm for the bill in the room." SA.932, R.209 at 95. But then Senator Mary Lazich, Chair of the Senate Committee on Transportation and Elections, "got up out of her chair and she hit … her finger on the table and she said 'Hey, we've got to think about what this could mean for the neighborhoods around Milwaukee and the college campuses across this state.'" SA.932. Assistant Majority Leader Glenn Grothman added, "What I'm concerned about here is winning and that's what really matters here. And you know as well as I do the Democrats would do this if they had the ability to use everything in their power to get things done, so we better get this done quickly while we still have the opportunity.'" SA.934. Some senators were "clearly disturbed by" these remarks, but

generally "the tone of the room [wa]s one of giddiness and happiness." SA.935; R.209 at 95; SA.935. Lazich and Grothman's pitch to their colleagues had its intended effect: Act 23 passed the State Senate on party lines. PX028-692.

Act 23 was just the beginning. Although "Wisconsin had an exemplary election system" before 2011, Act 23 was "the first of eight laws enacted over the next four years that transformed Wisconsin's election system." A.44, 50, 75. These laws were not necessary; "the stated rationales for many provisions of Act 23, and for the election laws that followed it, were meager." A.79. But consistently and predictably, their burdens fall on minority, young, and Democratic voters.

This case challenges several of these recent changes to Wisconsin election law, as well as a law limiting in-person absentee voting to one location per municipality. Following nearly two weeks of trial and based on a voluminous record, the district court found it "nearly inescapable" that "the election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interests." *Id.* To the extent the court invalidated those provisions, it should be affirmed; to the extent it upheld those provisions, it should be reversed.

Facts. Both the 2000 and 2004 presidential elections in Wisconsin were decided by less than one-half of a percentage point. SA.308. In 2008, however, Wisconsin residents voted for President Obama by an overwhelming 14-point margin. *Id.* In 2012, he again carried Wisconsin by a healthy margin. SA.309.

The elections involving President Obama highlighted significant shifts in voting patterns in Wisconsin and nationally. Since 2004, the white share of the

electorate in Wisconsin has steadily declined, while the black and Hispanic shares have increased. A.180-82; A.213; A.75-76. Given that "African Americans and Hispanics … constitute the largest minority voting blocs in Wisconsin and are well-documented Democratic voters," A.180, this shift has obvious political implications. *See* A.183; A.186. In addition, young voters have increasingly voted Democratic in recent years. A.184.

In 2010, however, Republicans fared well. Scott Walker was elected governor and Republicans took control of both houses of the legislature. SA.308. But a few months after that election, 2011 Wis. Act 10 "hit and blew up." SA.930-31. That legislation, which substantially limited collective bargaining for most public employees, caused huge numbers of protestors to come to the Wisconsin State Capitol. *Id.* Governor Walker and a number of state senators were targeted for recalls. *Id.* Recall elections for nine state senators were held in July and August 2011, and two incumbent Republican senators were defeated. Recall elections for governor and other offices were held in June 2012, and another incumbent Republican senator lost his seat.[3]

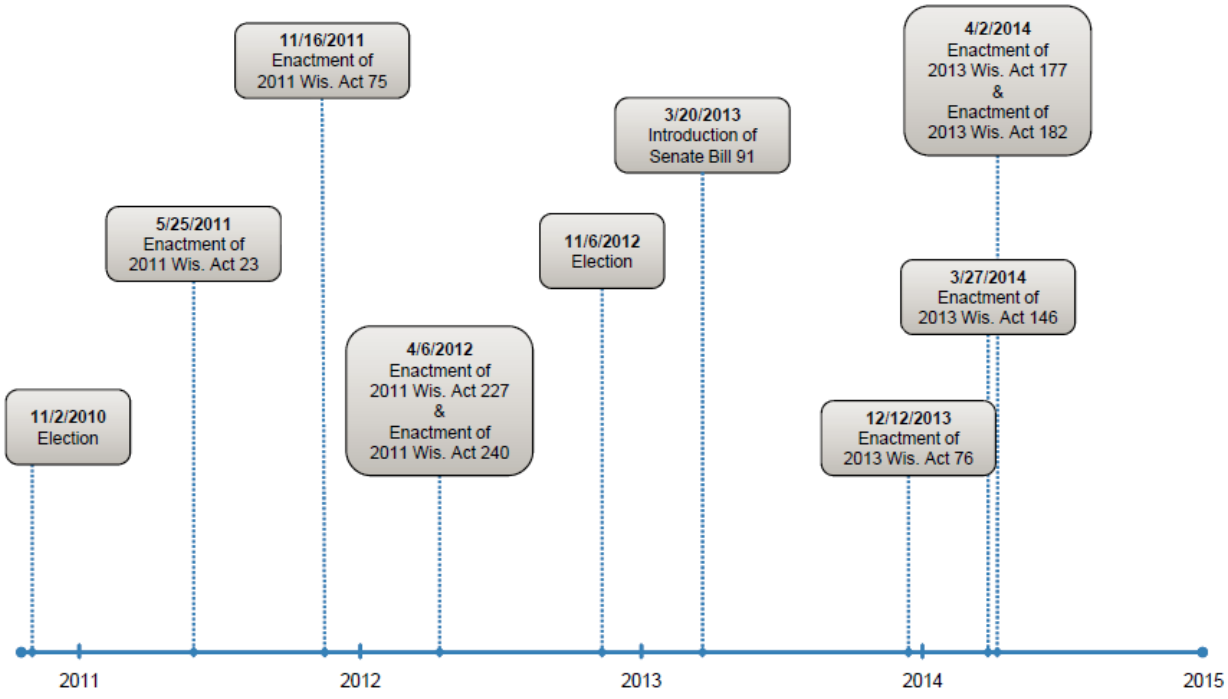
Amidst these events, the legislature took up Act 23. That omnibus legislation (1) created Wisconsin's strict voter ID requirement; (2) limited in-person absentee voting to a 12-day window; (3) eliminated corroboration (i.e., vouching under oath) as a method of proving residence for voter registration; (4) required that "dorm lists" used to prove residence for voter registration include a certification that the

[3] http://tinyurl.com/gwx8htl; http://tinyurl.com/go7zlfm; http://tinyurl.com/hyf3dqg.

students on the lists are U.S. citizens (which federal law prohibits); (5) increased the in-state residency requirement from 10 to 28 days for voting for all offices other than president and vice president, and required individuals who move within Wisconsin later than 28 days before an election—the prior law was 10 days—to vote at their previous ward or election district; (6) generally eliminated straight-ticket voting; and (7) eliminated statewide special registration deputies ("SRDs")—that is, required individuals to be deputized to register voters on a municipality-by-municipality basis rather than on a statewide basis. SA.308-09.

While Act 23 was being debated, it was clear the bill would burden minority and young voters. Legislators repeatedly were advised that the bill would "disproportionately affect several subpopulations: ethnic and racial minorities, high school and college students, senior citizens and disabled, women, and those with low incomes." PX225-002, PX225-004; PX263-002; *see also* A.191-92, 198; R.217 at 163-64; SA.694; SA.390; SA.422. "[T]he Republican leadership insisted that Republicans get in line to support the bill because it was important to future Republican electoral success." A.77; A.64, 89. And subsequent statements by two Republican state senators "show[ed] that legislators believed that Act 23 would have a partisan impact on elections." A.78; SA.311; SA.649. Thus, "[t]he conclusion is hard to resist: the Republican leadership believed that voter ID would help the prospects of Republicans in future elections." A.78.

A series of bills that further restricted voting and voter registration followed the enactment of Act 23, as the following timeline summarizes:



SA.308-10.

In the same session in which Act 23 was passed, the State prohibited clerks from faxing or emailing absentee ballots to voters other than overseas and military voters, 2011 Wis. Act 75, and from returning an absentee ballot to a voter absent certain limited circumstances, such as a spoiled ballot, 2011 Wis. Act 227. Wisconsin also eliminated the requirement that SRDs be appointed at public high schools and most other high schools. A.52; 2011 Wis. Act 240.

The enactment of restrictive voting measures continued in the 2013-2014 legislative session. With 2013 Wis. Act 76, the State overturned an "ordinance in Madison that required landlords to provide voter-registration forms to new

tenants." A.52. Another statute expanded the documentary proof-of-residence requirement for voter registration (which previously applied only within 20 days of an election) to nearly all registrants. A.53; 2013 Wis. Act 182.

Wisconsin further restricted in-person absentee voting by prohibiting it on weekends and on weekdays before 8 a.m. or after 7 p.m., 2013 Wis. Act 146, while taking no action on Senate Bill 91, which would have permitted municipalities to open multiple in-person absentee voting locations, A.52. As with Act 23, there was no doubt these actions would burden minorities and citizens of Milwaukee and Madison. PX 101-031; A.252-53; PX048; PX216; SA.635; SA.652; SA.663; SA.666-67; SA.474-75; SA.437.

Nor was it any secret that Act 146 was designed to reduce access to voting for the disproportionately young, minority, and Democratic voters of Wisconsin's largest cities. Assistant Majority Leader Grothman, the author of the bill, repeatedly made this point. SA.384 ("[T]here were reports in the last election that people were voting in person absentee on evenings, on weekends, particularly in the city of Milwaukee."); SA.431 ("the obvious thing to do is to rein in the towns or -- the big cities"); SA.653 ("We can have some of these ones that are completely out of control, doing maybe 80 hours a week, we can rein them in."). Senate Majority Leader Scott Fitzgerald added, "[T]he question of where is this coming from … and why are we trying to disenfranchise people, … it's because the people I represent … ask me, 'What is going on in Milwaukee?'" SA.444; *accord* SA.440 (reporting constituent complaints that "there's people voting in Milwaukee up until midnight

sometimes"); *see also* SA.689 ("We want to try to keep Madison and Milwaukee from getting around this."); SA.311; R.213 at 109-10; R.219 at 36 (statement of county clerk that "access needed to be taken away in order to level the play field").

In addition, Wisconsin in 2014 enacted legislation regarding the distance between observation areas at polling places and voters. Milwaukee has consistently had problems with election observers. A.80. Racine, another municipality with a large minority population, A.254-55, 288-89, had major problems with election observers in the 2012 recall election but had fewer issues in the 2012 presidential election when, among other things, election inspectors enforced a rule that observers had to stay 6-12 feet away from voters. PX063-002-03. The State's response was to move observers *closer* to voters by requiring "that observation areas … be placed between three and eight feet from the location where voters signed in and obtained their ballots and from the location where voters registered to vote." A.52-53; 2013 Wis. Act 177; *see also* PX215 (bill summary); SA.635.

In the wake of the State Senate's passage of the bill eliminating weekend and evening in-person absentee voting and the observer bill, Republican Senator Dale Schultz—who voted for Act 23 but against some subsequent restrictions—said legislators should stop "mucking around in the mechanics and making it more confrontational at our voting sites … and trying to suppress the vote." SA.645. In reference to his Republican colleagues, Schultz said, "I am not willing to defend them anymore…. I'm embarrassed by this." SA.646.

These laws have made it harder to vote, particularly for minority, young, and Democratic voters. *See generally* A.224. Dr. Ken Mayer conducted "[a]n individual level analysis of the probability of voting" and found that black and Hispanic registrants, as well as those without an ID, "were significantly less likely than other voters to vote in 2014, even if they had voted in earlier elections." SA.517; SA.541-42; SA583. "A control analysis of voting in the 2010 election, prior to the voting and registration changes at issue in this case, showed either no effects or much smaller effects." SA.517; SA.541; SA583; R.222 at 113-14, 116. Dr. Mayer thus found "strong—even conclusive—evidence that the effects are the result of changes to voting and registration practices enacted after the 2010 elections." SA.518.

Aggregate turnout data support this conclusion. In the 2008 primary, Milwaukee's turnout was 1.8% below the statewide average; in the 2012 primary, it was 3.4% below; and in the 2016 primary, it was 10% below. R.215 at 64-66. Dr. Mayer found that, among those in the voter-registration database as of September 2015, the drop off in black and Hispanic turnout exceeded the drop off in white turnout both from 2010 to 2014 and from the 2012 recall to 2014. SA.534-36. Defense expert Dr. McCarty, despite applying a dubious weighting method to account for voters who rolled off the voter-registration system, found that the percentage point gap between white turnout and black and Latino turnout in Wisconsin grew from 2010 to 2014. R.222 at 98-103; R.210 at 47-49. And Census data show that from 2010 to 2014, the white/black turnout differential increased from over four percentage points to over 11 percentage points, and the

white/Hispanic turnout differential increased as well. SA.488; R.210 at 46-47. While the differences in the Census data are not statistically significant, "all of the data are pointing in the same direction," and it is "very unlikely that all [of the analyses] could be moving in the same direction and yet not be meaningful." R.210 at 52, 54.

SUMMARY OF THE ARGUMENT

The record contains extraordinary evidence of discriminatory intent, including not only statements evincing such intent but also evidence of motive and of a relentless effort to pass laws that restrict access to voting and registration based on feeble justifications, knowing that these burdens will fall disproportionately on minorities and students. Several of the challenged provisions impose strikingly disparate burdens that are linked to the ongoing effects of Wisconsin's history of discrimination and/or burdens that outweigh the State's interests in the challenged provisions. The challenged provisions should therefore be invalidated under the Constitution and/or the VRA. Moreover, based on the record in this case regarding the actual implementation and impacts of Wisconsin's voter ID law and recent developments in the case law, this Court should overrule *Frank*.

STANDARD OF REVIEW

"This Court review[s] the court's findings of fact for clear error, and its legal conclusions de novo." *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1054-55 (7th Cir. 2004).

ARGUMENT

I. The Challenged Provisions Are Intentionally Discriminatory

The record compels a finding that the challenged provisions were enacted for the purpose of achieving partisan gain through voter suppression. The district court thus correctly held that "Act 146 reduced the hours allowed for in-person absentee voting specifically to curtail voting in Milwaukee, and, secondarily, in Madison"; the objective was "to maintain control of the state government"; and "the methods … involved suppressing the votes of Milwaukee's residents, who are disproportionately African American and Latino," which "constitutes race discrimination." A.84, 86. The court also properly found it "nearly inescapable" that "the election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interest." A.79.

But this begs the question of *how* the Republican majority thought these laws would serve their partisan interest. And the answer is obvious: through the suppression of minority and youth voting. The district court's resistance to this conclusion was error. Moreover, the court erred in holding that laws enacted to suppress voting by political adversaries need not be invalidated.

A. The Challenged Provisions Discriminate Based on Race and Age

1. The record compels a finding of discriminatory purpose

Voting legislation enacted with the intent to discriminate on the basis of race violates the Fourteenth and Fifteenth Amendments. *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617-19 (1982); *Lane v. Wilson*, 307 U.S. 268, 275 (1939). The Twenty-Sixth

Amendment, which uses language parallel to that in the Fifteenth, ensures "that citizens who are 18 years of age or older shall not be discriminated against on account of age" in the voting context. 117 Cong. Rec. 7534 (1971); *Walgren v. Bd. of Selectmen*, 519 F.2d 1364, 1367-68 (1st Cir. 1975); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 575 (1971).

To establish intentional discrimination, a plaintiff need not show that the challenged act was motivated solely by discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"; "legislators and administrators are properly concerned with balancing numerous competing considerations." *Id.* But discrimination cannot be one of them. *Id.*

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Factors courts consider include the historical background; the sequence of events leading up to the decision; departures from the normal procedural sequence; substantive departures; the legislative or administrative history; and any disparate impact. *Id.* at 267-68. Here, these considerations establish invidious purpose.

First, the historical background and sequence of events leading up to the enactment of the challenged provisions support of a finding of discriminatory intent.

Wisconsin has a lengthy history of racial discrimination, particularly in Milwaukee. *See infra* at 53-56. Wisconsin politicians, including then-Senator Grothman, have made racial appeals. A.85 n.12; SA.656-57.[4] "Voting in Wisconsin is sharply polarized by race" and, recently, by age. A.75; A.184. Wisconsin is undergoing demographic shifts that favor Democrats. A.75. And, "[b]ecause Wisconsin is a closely divided swing state, marginal differences in turnout can be decisive." A.76.

These facts would have given Republican lawmakers in Wisconsin a motive to suppress voting by minority and young voters under ordinary circumstances. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) ("polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them"); A.182. In the 2011-2012 legislative session, Wisconsin was in a state of extreme political conflict, *see supra* at 4, giving the legislative majority a particularly powerful incentive to suppress voting.

Second, "Democrats and members of the public voiced concerns about the discriminatory impact of the laws, and … those concerns largely went unrebutted." A.76-77, 80, 82. "[T]he Republican majority … rejected all amendments designed to alleviate the effects of the voter ID law on African Americans and Hispanics." A.198. It was also clear that Wisconsin's reductions in the in-person absentee voting

[4] The district court did "not ascribe Grothman's personal antagonism toward minority voters to the legislature." A.85 n.12. But Grothman was no back-bencher: he was the Assistant Majority Leader; apparently persuaded his colleagues to vote for Act 23; and was the author of Act 146. His "antagonism toward minority voters" is relevant to the totality of the circumstances.

period and refusal to permit municipalities to open multiple in-person absentee voting locations would disparately burden minority voters. *See supra* at 7; A.84. Given Wisconsin's problems with aggressive observers in minority communities, *see supra* at 8, the State's decision to move observers *closer* to voters is revealing as well.

Similarly, while the legislature permitted student IDs to be used for voting, the requirements to use such IDs are so onerous, A.190, that, at the time the voter ID law was enacted, no college ID met them. SA.803; A.197; *cf. McCrory*, 831 F.3d at 227. Unlike every other form of voter ID, moreover, student IDs must be accompanied by additional documentation—enrollment verification. SA.798; *see McCrory*, 831 F.3d at 236 ("SL 2013-381 elevates form over function, creating hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud."). In addition, the Government Accountability Board ("GAB") Director informed the legislature that "the elimination of the use of a certified list of addresses [for registration] for on-campus students will only serve to deter voter participation by students." PX084-002. Even so, the legislature changed the law to require a citizenship certification on such "dorm lists." PX086-001; SA.820.

Third, the statements in the record establish that the legislature acted based on the motive and knowledge described above. Senator Lazich implored her reticent colleagues to support Act 23 "because of what it 'could mean for the *neighborhoods of Milwaukee* and the *college campuses* across this state,'" A.89 (emphases added), and Assistant Majority Leader Grothman said he was "concerned about … winning

… so we better get this done quickly while we still have the opportunity." SA.934. Similar statements by Republican legislators confirm the challenged restrictions were intended to help Republicans win elections. A.78, 84; SA.311; SA.649. *Compare* R.219 at 36 (testimony of Republican clerk that "access needed to be taken away in order to level the playing field"), *with McCrory*, 831 F.3d at 226 (similar rationale was "as close to a smoking gun as we are likely to see in modern times").[5]

Fourth, "the challenged laws were passed by a process that allowed limited public input and little actual debate." A.76. With respect to a draft of the voter ID law, for instance, the GAB Director complained on May 3, 2011: "There has been no time for the careful evaluation and vetting needed to ensure the best options for voters and election officials is enacted." PX084-002. That bill was passed in committee two days later. PX028-002. On May 9, a different committee passed another version of the bill, which the full State Assembly passed on May 11. PX028-002, 08. On May 16, 2011, a Senate committee waived the public hearing requirement, and the State Senate concurred in the bill a few days later. PX028-008-11; *see also* SA.646; SA.666-67.

[5] The State contends that the targeting of large municipalities by Act 146 is not problematic because "[t]he law also affects Milwaukee's *non*-black and *non*-Hispanic voters." Br.51. But the intentional suppression minority voting does not become constitutional because white voters are also impacted. *See Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984). In addition, the cases the State cites in contending that "large municipality" theories of discrimination have been rejected are readily distinguishable, *see* Br.51-52, as they involved interventions in perceived crises. *Hearne v. Bd. of Educ.*, 185 F.3d 770, 772 (7th Cir. 1999); *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 372 (7th Cir. 1999). Here, Milwaukee voters were targeted "without any other legitimate purpose." A.48.

Fifth, the justifications offered for the challenged provisions were pretextual. As the district court found, "the stated rationales for many provisions of Act 23, and for the election laws that followed it, were meager." A.79; A.111; A.156-57. "Most of [the challenged provisions] were passed with only summary statements of legislative purpose, typically invoking only generic concerns for election integrity or consistency." A.77.

The State's substantive departures and reliance on implausible rationales confirm the point. In cutting in-person absentee voting, for instance, the State argued that this would create uniformity in voting hours. SA.440. It did not. A.85 ("rather than achieving uniformity, the provisions governing hours for in-person absentee voting preserved great disparities"); SA.672; A.634. Moreover, despite the fact that Milwaukee—unlike smaller municipalities—has repeatedly had long lines for voting, SA.440, the legislature refused to pass a bill that would have permitted municipalities to open multiple in-person absentee voting locations and thereby reduce wait times. SA310; PX035.

The State's interest in promoting confidence in elections has also been selective. While the State relies on this (discredited) justification for the voter ID law, A.46, it has ignored the impact of its actions on public confidence elsewhere. SA.806-07 ("[C]ontinued unsubstantiated allegations of voter fraud tend to unnecessarily undermine the confidence that voters have in election officials and the results of the election."); PX057-003. Likewise, the State has pointed to its interests in reducing burdens on election administrators and preventing fraud when

those interests serve the goal of voter suppression; but the challenged provisions *increased* administrative burdens, SA.1023; PX084-001; PX057-002, and the State has taken actions—like cutting in-person absentee voting—that incentivize voting by mail, *see also* R.215 at 71, even though the available research "indicates that mail absentee balloting is more susceptible to fraud than in-person voting." DX004-016; R.220 at 104.

Sixth, the challenged provisions disparately impact minority and young voters. Regression analysis "supports the conclusion that the probability of an African American voting, relative to an average voter, was less in 2014 than it was in 2010." A.140. Consideration of the challenged provisions individually shows that some of those provisions plainly target young voters. A.51-52; *see* A.115 ("Madison is also home to a large student population, with many students renting their homes.").[6] Others impose burdens that fall (likely fall) disparately on minority and/or young voters. A.71, 75, 78-80, 83-84, 144-45.[7]

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[6] In finding no "strong evidence of disparate impact" on young voters, A.89, the district court ignored this targeting. It also considered only whether "young people are more likely to face burdens that they cannot overcome with reasonable effort," suggesting it is irrelevant that young voters are "less likely to have a driver license and documentary proof of residence." *Id.* But the inquiry into "reasonable effort" is misplaced in the intentional-discrimination context; otherwise reasonable burdens cannot be imposed for improper purposes.

[7] The State argues that discriminatory effect must be established to succeed on an intentional discrimination claim. Br.44. *McCrory* explained, however, that "[s]howing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent"; "[i]nterpreting *Arlington Heights* to require a more onerous impact showing would eliminate the distinction between discriminatory results claims … and discriminatory intent claims under § 2 and the Constitution"; and plaintiffs do not have to show that a law "prevented African Americans from voting at the same levels they had in the

Seventh, "the sheer magnitude of 8 Acts and some 15 measures limiting access to registration and voting is unprecedented nationwide." A.212. "[T]hese many laws, some with multiple provisions, comprised the largest set of restrictive electoral measures enacted anywhere in America in recent years." A.224; A.645. Yet "[e]xamination of transcripts for State Assembly and State Senate sessions … indicates that there was very little debate on these measures." A.212; A.77.

This evidence compels a finding of discriminatory purpose. A comparison with *McCrory* is instructive. The *McCrory* court emphasized that "race and party are inexorably linked" in North Carolina. 831 F.3d at 225. In Wisconsin, race, age, and party are linked. A.75; A.184. In both *McCrory* and this case, the challenged provisions targeted the group of voters at issue "with almost surgical precision." 831 F.3d at 214. There, as here, "[i]n response to claims that intentional racial discrimination animated its action, the State offered only meager justifications"—"inapt remedies for the problems assertedly justifying them and … cures for problems that did not exist." *Id.*; A.79. And the laws at issue in both cases were enacted through rushed legislative processes. *McCrory*, 831 F.3d at 227; A.76.

There are differences. Minorities in Wisconsin have faced significant discrimination and perhaps the most severe socioeconomic disparities by race of any state in the country, *see infra* at 54-55, but North Carolina's history of discrimination is worse than Wisconsin's. On the other hand, while *McCrory* pointed out that "the sheer number of restrictive provisions distinguishes [it] from

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past." 831 F.3d at 231-32 & n.8. In any event, the challenged provisions have disparate impacts, as discussed above and below.

others," 831 F.3d at 232, there are far *more* restrictive provisions here. And, the extraordinary direct evidence of discriminatory intent—the statements of legislative leaders—sets this case apart. *Cf. id.* at 226; *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc) ("In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence.").

2. The district court's analysis of intent contains multiple errors

The district court considered the evidence one provision—and often one fact—at a time. A.73-91. There is no indication that the court, for example, evaluated the other challenged provisions in light of its finding that Act 146 was intentionally discriminatory; and the court noted with respect to six of the challenged provisions that "the extra burdens that they impose would fall on anyone who is poorer, less educated, or more transient, regardless of race," while ignoring how the disparate impact resulting from each of those provisions fits into the broader pattern. A.83. The court thus repeated one of the fundamental errors made by the district court in *McCrory*. 831 F.3d at 233.

The court further erred in assessing not whether the justifications offered for the challenged provisions were pretextual but whether the provisions are rational—in some cases based on post-hoc justifications *the court* supplied. A.79-81, 90. This also constituted legal error: "a finding that legislative justifications are 'plausible' and 'not unreasonable' is a far cry from a finding that a particular law would have been enacted without considerations of race." *McCrory*, 831 F.3d at 234.

The court also gave too little weight to the direct evidence of Act 23's purpose. The court was correct that it should not "simplistically assign discriminatory intent to the legislature based on the comments of individuals legislators." A.78. But the statements of Senators Lazich and Grothman were not after-the-fact or stray comments; they were statements by legislative leaders, at the critical final meeting before the passage of Act 23, that were designed to persuade their reluctant colleagues to vote for the Act. And, these and other statements "paint a consistent picture that resonates with the rest of the record …. [T]he Republican leadership believed that voter ID would help the prospects of Republicans in future elections." *Id.* Because the district court failed to draw the conclusion that necessarily follows—that Act 23's supporters believed it would help them *by suppressing the vote of minorities and young voters*—it erred in its assessment of the provisions of Act 23 and the restrictions that followed. Absent these errors, the court would have found that the challenged provisions discriminate on the basis of race and/or age.[8]

[8] The court also erred in asserting that the history of voter ID laws "does not suggest that such laws are inherently motivated by racial animus" and "politicians with no motive to discriminate against minorities have nevertheless supported voter ID laws." A.79-80. The pertinent question is whether the voter ID law at issue *here* (and Act 23 and the legislative program more broadly) were motivated in part by discriminatory intent. The court also believed that the legislature's provision of free IDs for voting shows that it "did not entirely ignore" concerns about the voter ID law's disparate impact. A.80-81. This sets the bar far too low: without some provision of free IDs, the voter ID law plainly would have been unconstitutional. *Cf. Milwaukee Branch NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014). And with respect to the one-location rule, the court misconstrued Plaintiffs' claim. A.84. The problem with that rule is that the legislature refused to *modify* it (despite making other changes to in-person absentee voting) in order to limit in-person absentee voting in Milwaukee.

B. The Challenged Provisions Discriminate Based on Partisan Affiliation or Viewpoint

The district court also erred in failing to invalidate the challenged provisions because they were intended to suppress the votes of Democratic voters. "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash*, 380 U.S. 89, 94 (1965). Likewise, voter qualifications (such as a poll tax) that are not germane to the ability to participate in the electoral process are unconstitutional. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666, 668 (1966).

Under the same reasoning, restrictions that target voters based on their partisan affiliation or viewpoint are impermissible. Indeed, the First Amendment generally proscribes laws that "burden[] or penaliz[e] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). And *McCrory* emphasized that "legislatures cannot … restrict access to the franchise based on the desire to benefit a certain political party." 831 F.3d at 222; *id.* at 226 n.6. The challenged provisions therefore should have been invalidated. A.79 ("[T]he election laws passed between 2011 and 2014 were motivated in large part by the Republican majority's partisan interest.").

In holding instead that cases involving partisan discrimination should be analyzed under the *Anderson-Burdick* framework, the district court wrote that "*Crawford* and *Frank* foreclose the argument that partisan fencing claims should be

handled like claims of intentional race or age discrimination, for which *any* discriminatory legislative intent is sufficient to invalidate a law." A.94. But this is at odds with *Shapiro v. McManus*, 136 S. Ct. 450 (2015), which explained that the theory set forth by Justice Kennedy in *Vieth* is "uncontradicted by the majority in any of our cases," *id.* at 456; the reasoning of *Carrington* and *Harper*; *McCrory*; and the First Amendment's general proscription of viewpoint discrimination. At the very least, this Court should hold that where, as here, voting restrictions were motivated *in large part* by partisan interests, those restrictions are invalid.

II. Several Challenged Provisions Are Invalid Under the *Anderson-Burdick* Test

In assessing whether a law unduly burdens the right to vote, courts apply a "flexible standard"—the *Anderson-Burdick* standard—pursuant to which they "must weigh: 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments …' 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.'" *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Under this test, "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which [the law] burdens [voting rights]," *Burdick*, 504 U.S. at 434, focusing specifically upon the voters for whom the law poses the greatest challenges. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 186, 191, 198, 201 (2008);

Pub. Integrity All., Inc. v. City of Tucson, No. 15-16142, 2016 WL 4578366, at *3 n.2 (9th Cir. Sept. 2, 2016) (en banc).

In weighing competing interests, courts cannot accept at face value vague or speculative state interests. *See Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) ("*OFA*"). Federal courts "retain[] an independent constitutional duty to review [legislative] factual findings where constitutional rights are at stake." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). Further, the *Anderson-Burdick* test does not permit rational-basis review or burden shifting. *Pub. Integrity All.*, 2016 WL 4578366, at *4. "However slight [a] burden [on voting] may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (quotation marks omitted).

A. The State Continues To Administer the Voter ID Law Unconstitutionally

For the second federal election cycle in a row, the State has had to issue an "Emergency Rule" to repair grievous flaws in its voter ID regime. The first "Emergency Rule," released the day before argument in *Frank*, announced a new ID "petition process" ("IDPP") in response to a finding that the voter ID law was operating as a *de facto* poll tax. *See Milwaukee Branch NAACP v. Walker*, 851 N.W.2d 262, 266 & n.5, 277-79 (Wis. 2014); A.65-66; SA.332-41. This Court relied on the State's assurances that the Emergency Rule "require[d] officials to get birth certificates (or other qualifying documents) themselves for persons who ask for that accommodation on the basis of hardship" or "to have the need for documentation waived." *Frank*, 766 F.3d at 756; 768 F.3d at 747. The panel cautioned the State not

to abuse its discretion in administering the IDPP or make it "needlessly hard to get photo ID" in "hardship" cases. 768 F.3d at 747 n.1, 753; *see also Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016) ("*Frank II*") (State may not impose "high hurdles" or require more than "reasonable effort").

The district court's findings here document how the IDPP has been a voting rights "disaster" and "a wretched failure." A.46, 71. The IDPP repeatedly has led to "real incidents of disenfranchisement" where the State admits it has no reason to doubt a voter's qualifications but nevertheless denies the "petition" for the credential required to vote. A.46, 68; *see* SA.95-96, 139-40 (examples of denial letters); SA.1 (photographs of 61 formally denied voters). One voting rights historian testified that the IDPP "represents the first time since the era of the literacy test that state officials have told eligible voters that they cannot exercise their fundamental right to vote—not in the next election, probably not ever." SA.270. African Americans and Latinos make up over 2/3 of the voters who have been required to go through the IDPP and an astonishing 85% of voters who have formally been denied an ID. A.64, 75. The IDPP has become a place where voters of color go to wait for an ID. Some have died—literally died—while waiting for their IDs. *See* Denial 33; Other 23 and 24; SA.3, 1135-36.[9]

[9] Citations to "Denial" and "Other" are to trial exhibits summarizing the experiences of the 61 IDPP petitioners who were formally denied a voter ID along with two dozen other cases of note. "Denial 9" thus refers to Voter No. 9 on the "Denial Chart" (PX341); "Other 22" refers to Voter No. 22 on the "Other Cases of Note Chart." Versions of the "Denial" and "Other" charts with private identifiers redacted appear at SA.342-82; unredacted versions of these exhibits appear in the sealed appendix at SA.4-44.

"[E]ven voters who succeed in the IDPP manage to get an ID only after surmounting severe burdens." A.46; *see* SA.287. The process is "complicated," "arduous," "unnecessarily difficult," and "imposes burdens that far exceed those contemplated in *Crawford* or *Frank*." A.63, 70, 131; *see generally* A.43-47, 63-71, 131-32, 147, 153; SA.292. And although the State assured this Court in September 2014 that it would cover the costs of obtaining birth records for ID petitioners, the district court found the State repeatedly had refused to defray such expenses and did not make "its *first* payment to acquire a vital record for a petitioner" until "*during the second week of trial in this case*," *i.e.* late May 2016. A.69 (emphasis added); *see also id.* at 68; SA.133, 138, 1207-08. The State thus violated the representations it made to this Court for *twenty months*.

The State claims it "voluntarily adopted" its *second* "Emergency Rule" on May 10, 2016, coincidentally just days before the start of trial, and that this new rule "comprehensively addresses" all of the "pre-2016 difficulties" uncovered through discovery. Br.6, 15, 25; *see* SA.850-72. The State questions why the district court "[s]trangely" issued an injunction "that *protects voters' rights to the same degree as does the State's current law*." Br.4 (emphasis added); *see id.* at 26. The State claims "Plaintiffs have not even argued that the State intends to return to its pre-2016 IDPP, nor would such an argument be credible." *Id.* at 25.

These arguments misrepresent the record on multiple levels. Plaintiffs repeatedly have argued that the new Emergency Rule does *not* moot the IDPP challenge. *See* R.208 at 16-19; R.250 at 12-14. And the new changes were *not*

"voluntarily adopted," Br.15, but unveiled on the eve of trial only after the State had spent months trying to defeat Plaintiffs' IDPP claims and it was clear the State was about to lose. *See* SA.281-85, 850-72, 881-99. The changes originated in "the Governor's office" and were imposed on DMV from above; the DMV employees implementing the changes were not consulted; and they were as perplexed with some of these "emergency" measures as Plaintiffs. SA.982-83, 989-91, 998, 1213-14; R.214 at 213-16.

The district court cited to a "Voter ID Petition Process Timeline" (reprinted at SA.327-31) documenting how each of the State's purported IDPP reforms in recent months has been in direct response to the ongoing revelations in this litigation. A.66-70. The State has been "painfully reluctant" to correct the IDPP's many flaws, and "the executive branch … let the IDPP grind on until plaintiffs in this litigation exposed its many flaws." A.82. Indeed, the "Finding of Emergency" approved by Gov. Walker on May 10 conceded that, absent "emergency" actions, "qualified applicants" may not be able to vote this year. SA.850, 864.

Moreover, the State's representations about how the latest Emergency Rule is functioning do not remotely reflect reality. The State repeatedly assures this Court that "*every eligible voter*" is now receiving "a free ID after making one trip to DMV" and that "*[a]ll* voters get a free photo ID upon request." Br.15, 25 (emphasis added). Recent investigative reports and the district court's own follow-up evidentiary hearing and remedial orders demonstrate the falsity of these claims and the State's serial violations of the district court's injunction. *See* SA.298-307, 1224-

27, 1229-39, 1241-47. The district court emphasized *on October 13* that the IDPP *continues* to be "a wretched failure and what we're doing here is to patch it up to put it in good enough shape to get us to the November election, recognizing that it will have to really be fundamentally reformed" after the election and that "close court supervision of the reform process is going to be necessary." SA.1245. The State is now scrambling under close federal judicial supervision to patch up the IDPP to get through the election. *See* SA.305-07.

Even assuming the (imagined) smooth functioning of the Temporary Receipt system, the new Emergency Rule does *not* cure the IDPP's many illegalities. The Emergency Rule "is not a complete or permanent solution," but rather will only "blunt[] the harshest effects of the IDPP" and "give[] the state time to devise a new solution" to the many flaws the court identified. A.47, 70. The Temporary Receipts "are not permanent" and enable someone to vote "only so long as the receipts are renewed"; petitioners "could once again find themselves in IDPP limbo." A.70; *see also* SA.292 (petitioners "stuck in the IDPP" are subjected to "indefinite back-and-forth exchange" with DMV, imposing burdens that "far exceed[] what *Crawford* and *Frank* contemplate"). "[Q]ualified electors are entitled to vote as a matter of constitutional right, not merely by the grace of the executive branch of the state government." A.70. "Kicking the problem down the road does not alleviate the severe burdens that these petitioners must endure, nor does it prevent any future petitioners from suffering the same severe burdens." A.132.

The State claims its new Emergency Rule "comprehensively addresses" the IDPP's many flaws and "is *identical in all respects relevant to voter rights*" to the relief ordered by the district court. Br.6 (emphasis added). False again. The district court found "the IDPP as it currently exists"—even as modified—"has failed to fulfill its constitutional purpose" and "needs to be reformed or replaced." A.46, 82. The latest Emergency Rule is just another temporary band-aid, not the root-to-branch "long-term reform" and "permanent solution" ordered below. SA.287, 291-93.

The district court's findings and the extensive trial record document many ongoing constitutional flaws in the IDPP, none of which are even acknowledged in the State's brief.

1. Continuing IDPP background investigations

The DMV's Compliance, Audit and Fraud Unit ("CAFU") "commonly" obtains "CLEAR background reports," which contain "a substantial amount of deeply personal information" about IDPP petitioners, "including any criminal records, judgments and liens, residence history, home and vehicle ownership, and a list of possible relatives and associates." A.67 n.5; *see, e.g.*, SA.150-221 (example of such a report). DMV does not tell IDPP petitioners about these background investigations. The district court correctly found that "having DMV personnel acquire and review a compilation of personal information imposes a substantial burden on the right to vote." A.67 n.5. These invasive practices continue unabated under the Emergency Rule.

2. Social Security "matching" requirement

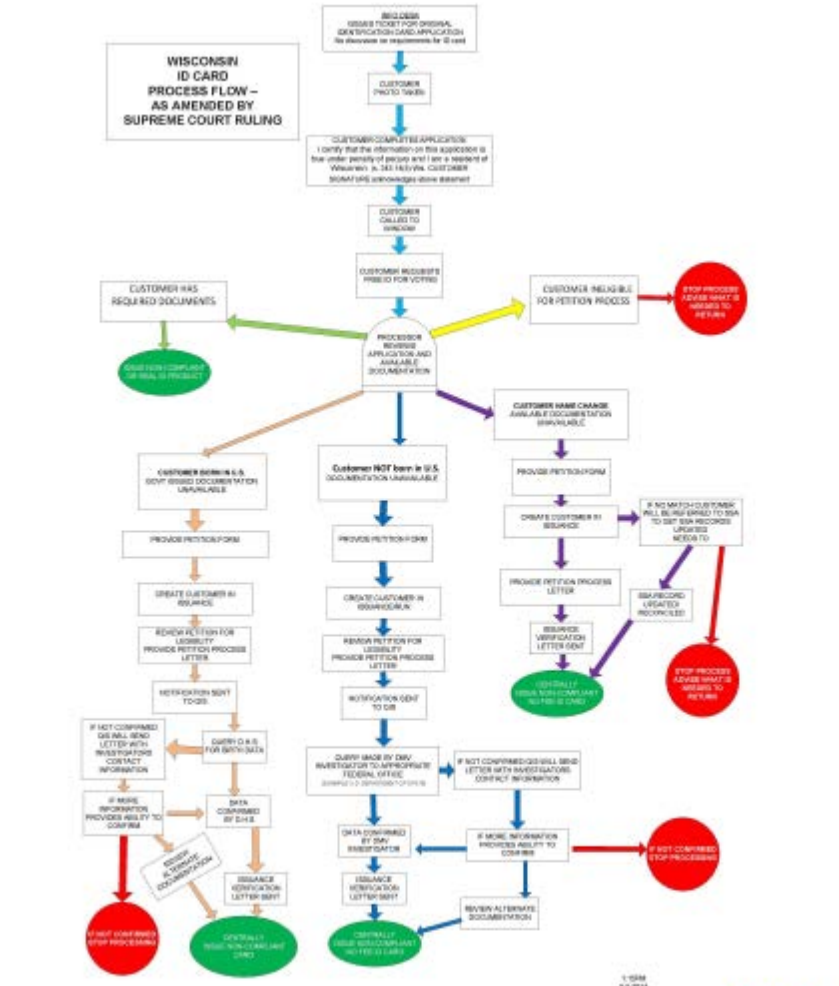
Voter ID petitioners not only must prove their names, dates of birth, and citizenship, but also ensure there is a "match" among their names and birthdates on their petitions, Social Security Administration ("SSA") records, and vital records or secondary proofs used to prove "identity." DMV repeatedly has used this "matching" requirement to instruct ID petitioners either to change their SSA records or legally change their names before receiving the "free" IDs they need to vote. SA.993-96, 1002-03, 1142-43. The State asserts this reduces the risk of one person having "multiple identities" and "maintain[s] integrity in our database." SA.995, 1003, SA1103.

The right to vote is not subordinate to these interests, especially when the "multiple identities" are voters with misspelled names or mistaken birthdates. And DMV's justification becomes even more tenuous given the many "policy" exemptions the agency has created from the strict "matching" requirement: for married women, transgender individuals, victims of domestic abuse and other violence, and petitioners whose names fail to "match" by only one letter. SA.1092-94.

3. Reliance on error-prone and unresponsive bureaucracies

The IDPP has been cobbled together from multiple agencies and is dependent on many other notoriously unreliable government bureaucracies. DMV prepared a "Process Flow Chart" in September 2014 that continues accurately to illustrate the nature of the IDPP decisionmaking structure and points of contact among various intrastate and interstate bureaucracies. SA.967, 1120. That flowchart, reprinted below and at SA.900, strikingly illustrates the cumbersome bureaucratic process

that voters must navigate. *See also* SA. 909-23 (CAFU operating procedures); 966-72, 977-79, 1119-25. The district court aptly described the IDPP as "a very complicated beast of a system" that must "be fundamentally reformed." SA.1245.



Most DMV interactions with ID petitioners are carried out by the Bureau of Field Services (BFS). When BFS submits petitions to Madison, however, they are sent to the Bureau of *Driver* Services (BDS). The Driver Eligibility Unit (DEU) of the BDS is then responsible for contacting the Department of Health Services (DHS), which consults its own records for petitioners born in Wisconsin and

attempts to interact with its vital records counterparts in other states for petitioners born "Out of State" (OOS). DHS then reports back to BDS's DEU whether there is a "match." If there is no "match," the petition is then referred to CAFU, a free-standing DMV unit, which often asks DEU to repeat checking for a "match" through DHS using different combinations of spellings, birthdates, or parent information. This CAFU→DEU→BFS→OOS→BFS→DEU→CAFU loop is often repeated multiple times, and CAFU also reaches out to SSA and frequently contacts OOS government agencies directly. Each of these steps adds additional delay and potential for error. *See* SA.909-23, 966-92, 1119-25.

CAFU audited how BFS handles ID petitions and found an astounding 26-27% error rate between March 2015 and January 2016. SA.698-703. These errors "negatively impact the petition process and may affect a resident's ability to vote." *Id.* The trial record abounds with evidence of serious DMV errors. SA.141, 242, 944-51, 953-63, 1125-27, 1162-66.

Over half of all IDPP petitioners were born either in Illinois (nearly all in Cook County), "a southern state that had a history of *de jure* segregation," or Puerto Rico. A.68; SA.45-66, 324. "[S]trikingly, yet predictably," nearly all of these petitioners have been African American or Latino. A.68. The district court found—based on extensive testimony from CAFU's professional investigators—that each of these jurisdictions "have systematic deficiencies in their vital records systems" and that "[v]oters born in those places were commonly unable to confirm their identities under the DMV's standards." *Id.*; *see* SA.981-89, 1153-55, 1167-72, 1177-78, 1201-

03; Denial 2, 38, 42; Other 1; SA.82, 234. People the State admits are qualified voters—most of them African-American or Latino—have been "stuck and stuck hard" in the IDPP's bureaucratic labyrinth. SA.1138-39; SA.292.

4. Missing or nonexistent records

Many IDPP petitioners never were issued a birth certificate and do not have "secondary documentation" (family Bibles, early school records, etc.). Denial 4-6, 8, 13, 16; SA.1186-87. Although DMV is mailing them "Temporary Receipts" that renew, it refuses to give them regular state IDs. Take "Mrs. Smith," a 100-year-old African-American Milwaukee resident. A.43-44; SA.292. CAFU "found" her in the 1930 Census under her *maiden* name and concedes she is a U.S. citizen, but refuses to issue her a regular ID because she has not presented a marriage certificate linking her *maiden* name to her *married* name. *See* Other 18; SA.2, 245-51, 968, 1172-75, 1195-96. Beyond mailing her a Temporary Receipt every so often, the new Emergency Rule does *nothing* to help "Mrs. Smith."

Many ID petitioners also have been denied a regular, permanent state ID because they were adopted and lack information about their births. Denial 15, 17, 34-35, 38. One young African-American woman was directed to contact a Tennessee "Post Adoption Services" bureau to seek help in tracking down her "adoption paperwork," even though DMV had no reason to doubt she is a U.S. citizen. Denial 35; SA.224-32, 1109-19. She was formally disenfranchised and barred from voting in her first presidential primary election in April 2016. SA.224-45, 1112-13, 1176. Incredibly, on May 10, 2016 (the eve of trial), CAFU *sua sponte* reconsidered and

issued her "free" ID—*some 18 months after she first petitioned.* SA.232, 1115-19, 1159-60, 1176.

5. "Matching" voters' names

The 2016 Emergency Rule does nothing to help Plaintiff Johnny Martin Randle and many other petitioners obtain the regular state IDs to which they are entitled. DMV will not give Mr. Randle such an ID because his Mississippi birth certificate from July 1941 inaccurately records his name as "Johnnie Marten Randall." SA.139-49. Although the DMV Administrator concedes Mr. Randle is who he says he is and is qualified to vote, DMV will not give him a regular state ID unless he submits a Common Law Name Change (CLNC) affidavit, even though his name has never been changed—he *always* has gone by Johnny Martin Randle. SA.1090-97, 1188-92, 1215-18. Mr. Randle believes the CLNC affidavit he is being asked to sign (SA.148-49) is false and misleading, and he fears a formal name change will risk interrupting the monthly SSA disability checks on which he depends. SA.142, 941-42. For this, DMV formally disenfranchised Mr. Randle earlier this year (SA.139-40) and, since May 13, has been sending him short-term Temporary Receipts while insisting that he will not receive a regular ID unless he executes a CLNC affidavit. SA.222-23. Many other eligible voters have been barred from voting because of similarly trivial issues in their vital records. Denial 19, 33, 54; Other 8, 15, 21-22.

The State's requirements became downright surreal when DMV announced its "one-letter" policy on the eve of trial and then changed that policy several times *during* trial to correct an ongoing series of gaffes and oversights. SA.896-97, 905-08.

DMV now distinguishes between situations involving "a discrepancy of one letter in the first middle or last name," versus "more involved" cases of *two* or more erroneous letters. *Id.* This new "rule" is supposed to promote "efficiency." SA.1145, 1147, 1151. Thus, an ID petitioner whose name is "Shaun" is now (theoretically) given his ID on the spot even if his vital records say "Shawn." But if Shaun's birth certificate instead reads "Sean," a two-letter mistake, he must (1) go through the full IDPP, (2) file a CLNC affidavit swearing he has "changed" his name, and (3) conform his records to his SSA files. SA.905-06.

DMV's new "one-letter" rule is frivolous. It has nothing to do with the likelihood that an applicant might attempt to commit fraud, and it bears no semblance to any recognized linguistic or onomastic conventions regarding the spelling of peoples' names. Most important, as CAFU's Supervisor acknowledged, it "has nothing to do with eligibility to vote." SA.1001. If the State is comfortable letting someone named "Ray" cast a ballot without having to go through the IDPP although his vital records say "Roy," there is no justification for requiring "Johnny" to jump multiple additional hurdles simply because his birth certificate says "Johnnie."

This absurd rule also is not evenly enforced. Consider "Reginald," a young African-American man from Racine whose birth certificate reads "Reginal." Under the "one-letter" rule he should have received his voter ID long ago. Instead, DMV insists that Reginald must be in the IDPP and either change his SSA records to "Reginal" or formally "change" his name to "Reginald." Other 20; SA.252-54.

6. "Matching" voters' birthdates

The new Emergency Rule does little if anything to help petitioners whose names are not in dispute, but who have conflicting birthdates in their records. There simply is no way that a voter like Mr. Boyd (Denial 20) can prove it is "more likely than not" he was born on a particular day when the available evidence shows it was sometime between May 1948 and May 1949 but is in conflict over the exact date. SA.111-21. And there is no legitimate reason not to accept a sworn statement from Mr. Boyd's older sister, who repeatedly told CAFU investigators the date and place (Carthage, MS) of her brother's birth, to no avail. SA115-16.[10] For this, Mr. Boyd was formally disenfranchised until May 13, 2016, when the agency began mailing out Temporary Receipts. CAFU's files include many other similar cases. Denial 1-3, 23.

7. Inadequate training and public education efforts

Exacerbating these burdens, the State, following *Frank*, repeatedly refused to fund any additional outreach or public education regarding the voter ID law. SA.904. That changed only after the trial in this case, when the State approved an "emergency" request for a last-minute $250,000 "limited public informational campaign." SA.873, 878; R.208 at 100-04. That compares miserably with the multi-million dollar public education and targeted outreach campaigns that have been undertaken by other States in implementing their voter ID systems. *E.g.*, *N.C. State Conf. of the NAACP v. McCrory*, 2016 WL 1650774, at **19-26, 121 (M.D.N.C. Apr.

[10] DMV consistently has refused to give any weight to testimony from petitioners' relatives—not even from their own mothers. *E.g.,* Denial 4, 6, 10, 12, 14-15. The latest Emergency Rule has not changed this policy.

25, 2016) ($2 million), *rev'd on other grounds,* 831 F.3d 204 (4th Cir. 2016); *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1111 (N.D. Ala. 2016); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1363-69, 1378 (N.D. Ga. 2007).

Several weeks after the State assured this Court in its opening brief that all was well with the IDPP, the district court found that the State has violated the permanent injunction in numerous respects, including by "really doing nothing in response" to the injunction, undertaking "manifestly inadequate" staff training, making "scarcely any effort … to do a particular outreach for the IDPP," and continuing to disseminate "obsolete, incorrect and misleading" information to ID petitioners until *early October,* a month before the election. SA.1225, 1230, 1233, 1235; *see* SA.298-307. The district court now has placed the IDPP under close federal judicial supervision, including reports to the court, "quality assurance measures," DMV staff retraining, and a new set of court-approved public information materials. SA.305-07, 1231-36, 1243-46.

8. A "cure worse than the disease"

CAFU specializes in fraud investigations. Yet after two years, it has not found a *single* instance of attempted fraud and encountered only a *single* IDPP petitioner who was not eligible to vote—a permanent resident who, CAFU found, believed in good faith she had been naturalized. A.68; Denial 14; SA.106-10, 848-49, 1004-06. And since the State allows all IDPP petitioners to vote using Temporary Receipts—even those whose petitions have been denied—it is difficult to see what

legitimate state purpose is being served by the IDPP or the voter ID law. SA.999-1000, 1181-82.

On the other hand, the State's continuing "preoccupation with mostly phantom election fraud" has caused "real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities." A.46. "The evidence in this case showed that portions of Wisconsin's population, especially those who live in minority communities, perceive voter ID laws as a means of suppressing voters." A.62. "Wisconsin's strict version of voter ID law is a cure worse than the disease." A.46.

This Court should not simply affirm the district court's holding that the IDPP is "manifestly unconstitutional" and must "be fundamentally reformed." A.111; SA.1245. The State now has had three strikes in its attempt to implement its voter ID law—the 2014 Emergency Rule, the 2016 Emergency Rule, and the district court's recent emergency order seeking to patch up the worst parts of the IDPP to get through the November election. *See* SA.298-307; *supra* at 23-28. It is ludicrous to keep conducting Wisconsin elections under "emergency" conditions over and over again. There *was* no emergency. Act 23 *is* the emergency. It is "a cure worse than the disease." A.46. Consistent with its repeated emphasis on the importance of a well-functioning safety net, this Court should hold that Wisconsin may not require any specific form of ID as a condition of voting until the State gets its act together and demonstrates it has a well-functioning, voter-friendly safety net in place. The State should be barred from attempting to implement yet another version of its

voter ID system unless and until it can demonstrate compliance with the standards of the Constitution and Voting Rights Act.

B. Reductions in the In-Person Absentee Voting Period

The district court correctly found that the reductions to the in-person absentee voting period (with the exception of the elimination of in-person absentee voting on the day before Election Day) imposed "a moderate burden on the right to vote" unjustified by any legitimate state interest. A.98. Its conclusion that these reductions are constitutionally infirm, A.104, should be upheld.

The State wrongly claims that constitutional protections do not apply here "because *absentee* voting is not constitutionally required." Br.30. Defendants rely principally on *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), but that case does not hold that the *Anderson-Burdick* test is inapplicable to early and absentee voting. As courts have explained, "[t]he *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting." *OFA*, 697 F.3d at 431; *see O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); *Goosby v. Osser*, 409 U.S. 512, 520-22 (1973). *See generally McDonald*, 394 U.S. at 808 ("[W]e cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.").

Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004), also does not support Defendants' argument. *Griffin* involved a claim that Illinois should *adopt* universal no-excuse absentee voting. *Id.* at 1130. Of course, that question is fundamentally different from the question whether, having done so and induced voters to rely on it,

a state may then *curtail* that opportunity without adequate justification. As the district court explained, "Wisconsin's changes to its in-person absentee voting regime came amidst an increase in the use of absentee voting, both nationally and in Wisconsin." A.98. Thus, "this case is not about Wisconsin's outright refusal to allow in-person voting," but the State's denial of "a right that [voters] already have." A.101. Many courts have applied constitutional and statutory protections to early and absentee voting. *E.g.*, *OFA*, 697 F.3d 423; *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008); *see also McC*rory, 831 F.3d at 236; *Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012).

With respect to the burdens resulting from the in-person absentee voting reductions, the district court found "the changes had profound effects in larger municipalities like Madison and Milwaukee." A.98. Those cities "are home to populations of voters who disproportionately lack the resources, transportation, or flexible work schedules necessary to vote in-person absentee during the decreased timeframe." *Id.*; SA.506-07. These "pre-existing disadvantages interact with the new laws to make it more difficult for these voters to vote during the shorter period for in-person absentee voting." A.99. "[E]liminating weekend voting and reducing the number of days on which a clerk's office can accept in-person absentee ballots is problematic for a person whose job or class schedule is less flexible." A.99-100. And, "[c]ombined with the one-location rule, limiting hours leads to longer lines at clerk's offices." A.100; SA.635. Among other burdens, the elimination of weekend voting

foreclosed "Souls to the Polls" efforts. A.207-08; SA.517, 546; R.215 at 74-75, 78, 134.

The State has failed to offer any plausible justification for these burdens. The State claims the reductions created a uniform early voting schedule. Br.31. But "[c]ontrary to defendants' assertion … the new laws do not actually 'provide[] a set date when in-person absentee voting begins.'" A.103. "Municipal clerks are still free to start in-person absentee voting at different times, so long as it is not before the window opens." *Id*. Thus, Acts 23 and 146 did not meaningfully promote uniformity. SA.762, 1068-69; *see also* R.211 at 90-91; R.215 at 92-93; *cf*. *McCrory*, 831 F.3d at 236 ("the record d[id] not offer support … that [it] actually achieved consistency in early voting among the various counties").

The State also claims these reductions decrease costs and burdens on election officials. Br.31. Not so. "[T]he laws that the challenged provisions replaced did not *require* municipal clerks to offer in-person absentee voting during the now-eliminated days and times[.]" A.102-03. "Thus, any burdens on clerks that the state was purporting to address were voluntarily undertaken[.]" A.103. Moreover, trial testimony showed that the reductions to the in-person absentee voting period *increased* burdens on clerks by leaving them with less time to process in-person absentee voters and therefore a more acute strain on their resources. R.210 at 267-70; R.215 at 68-69; SA.836-37. Thus, the State's interests in reducing in-person absentee voting are negligible and clearly outweighed by the burdens those reductions impose on voters. *See OFA*, 697 F.3d at 431 (plaintiffs likely to succeed

in challenge to elimination of last three days of early voting where "approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and … voters are disproportionately women, older, and of lower income and education attainment") (quotation omitted).

C. One-Location Rule

"Requiring all municipalities to have one location for in-person absentee voting may have a superficial appeal. But uniformity for uniformity's sake gets the state only so far. In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496." A.103. "The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location." *Id.* The district court's invalidation of that rule should be affirmed.

The record demonstrates "that a lower density of early voting locations relative to the size of the voting age population decreases overall turnout," SA.506, 565, and that the converse is true—turnout increases as the number of early voting sites increases. R.220 at 146-54; PX071-002; PX485-007, Tbl. 2; PX485-009.

The one-location rule also inevitably results in longer lines in more populous municipalities, thereby burdening voters and decreasing turnout in those municipalities. SA.506-08; R.215 at 92; PX433-045. For example, in Milwaukee County, 15.5% of voters in the 2008 and 2012 general elections experienced wait times of 31 minutes or more—260% higher than the non-Milwaukee percentage of 4.3%. A.209. This, in turn, disproportionately burdens the voting rights of African Americans, Latinos, young voters, and Democrats, all of whom disproportionately

reside in Wisconsin's more highly populated areas. SA.507-08. This combines with the resource disadvantages faced by these groups and their less robust voting habits to aggravate further the burdens these voters face when trying to vote. SA.508. As a result, only 12-14% of voters in Milwaukee and Madison vote via in-person absentee ballot in presidential elections, compared to 25-35% percent of voters in cities near Milwaukee. R.215 at 71-75; PX054.

These problems have been exacerbated by the reductions in the in-person absentee voting period, as more voters in Madison and Milwaukee must be served by a single location in a narrower time frame, increasing pressure on lines and curbing turnout. SA.507-08, 635; R.211 at 90-91; R.215 at 92-93. And this also interacts with a number of other challenged provisions—including the voter ID law and the change to the observer rules—to further increase wait times. A.209; PX490-022.

Remarkably, the State offers no justification for the one-location rule other than its reliance on *McDonald* and an assertion that the rule avoids confusion because "clerks can be found at only one location." Br.31. While *McDonald* has no relevance here for the reasons explained above, a claim that constitutional protections do not apply is particularly strained where, as here, voters are treated differently based on where they live. And "[t]here is simply no evidence that a one-location rule prevents voter confusion, or that any confusion would be as widespread or burdensome as the types of difficulties that voters face when having only one

location at which to vote in-person absentee." A.103-04. No one claims that cities should offer a single polling location on Election Day to avoid confusion.

D. 28-Day Durational Residency Requirement

The district found that Wisconsin's increase in its residency requirement from 10 to 28 days "leads to increased difficulties" for voters who "tend to be more transient or lack access to transportation," and that for those voters the burdens from the increased residency requirement are "significant" and "considerable." A.116-18. "For voters who move into Wisconsin from another state, the 28-day residency requirement disenfranchises them from state and local elections[.]" A.118.

For those who move within Wisconsin fewer than 28 days before an election, there is an option to vote in their former locality, but "that option is realistically available only to those who can travel" or vote by mail, the latter of which "presents its own obstacles" because there is "considerable public distrust of voting absentee by mail" given the State's "cumbersome" process that "presents added security challenges for" clerks. *Id*. Those who must register in their former municipality also "may no longer have documents to prove their residence." A.118-19. "And even if a voter has adequate documentation, the registration form requires signing a certification that the voter has 'resided at the [former] residential address for at least 28 consecutive days immediately preceding this election, with no present intent to move.'" A.119. These voters cannot honestly sign this certification, and for voters who do sign, "there may still be confusion when the municipal clerk sends a confirmation postcard to confirm the new registration at the old address and the card is returned as undeliverable." *Id*.

Hundreds of voters at minimum have been either deterred from voting or disenfranchised by the 28-day requirement. R.215 at 24, 44-45; R.210 at 289-93; R.211 at 67, 70, 107-09; R.218 at 144; SA.638, 642; PX490-018. These burdens fall disproportionately on Wisconsin's "African American and Latino voters, who are more likely to be transient than white voters are." A.118.

There are no acceptable justifications for the increased burdens of the 28-day residency requirement. The State "did not introduce any evidence of a genuine threat of colonization or party raiding. Nor [has the State] explained how a durational residency requirement prevents party raiding, which is a problem that involves voters who are *already registered*." A.120. There simply is no evidence "that increasing a durational residency requirement by 18 days actually inhibits colonization, raiding, or fraud." A.120. In addition, the State's witnesses contradicted its claim that this law "allows more time to gather documents and plan for voting," because the rule is "cumbersome for a person who moves 20 days before an election and is able to gather the" documents. A.121; R.218 at 141. The State's own witnesses testified they saw no need for this rule. SA.793; R.219 at 44. At the same time, the change has confused poll workers and voters and thereby increased the workload for clerks' offices. R.210 at 292; SA.834; PX150.

To be sure, the Supreme Court has upheld residency requirements that exceed 28 days. But in one of those cases, *Marston v. Lewis*, the Court's decision was based on record evidence showing (as the State has failed to do here) that the requirements were appropriately tailored to the states' interests. 410 U.S. 679, 681

(1973). In the other, *Dunn v. Blumstein*, the Supreme Court did not hold that a 30-day registration cutoff was *per se* constitutional. 405 U.S. 330, 343 (1972). Neither case suggests the district court should have assessed this issue any different from how it did: by weighing the state interests against the burdens imposed by this law and making the hard judgment required.[11]

E. Faxing/Emailing Absentee Ballots

The district court also correctly found that "the [S]tate's justifications for flatly prohibiting clerks from sending ballots by fax or email do not outweigh the moderate burdens that the challenged provision places on voters who are affected by it." A.129. When clerks still had the option to send absentee ballots by fax or email, hundreds of voters who were temporarily away from their homes received their ballots this way. A.127; R.210 at 332; R.215 at 86-87; SA.789. "[W]ithout the option for electronic ballots, absentee voters must rely on mail service. This is particularly problematic for students or researchers who are abroad in remote areas, but it also affects domestic travelers, especially for elections in which ballots are not finalized until close to election day." A.127. The court added, "[a]lthough voters are able to request their ballots by fax or email, that does them little good if the mailed ballot itself does not ever arrive, or if it arrives too late for a voter to return it in time to be counted." *Id*. As a result of this law, many voters have been

[11] The State's claim that the district court imposed an impermissible "retrogression standard" is off-base. Br.29. Retrogression is a concept from the VRA Section 5 context; and the district court, as noted, clearly and appropriately engaged in the required *Anderson-Burdick* balancing.

unable to vote. *Id.*; PX491 at 6-9; R.218 at 145; R.210 at 238-33; R.211 87-88; SA.615; SA.789; R.215 at 86-87.

The State responds that the disenfranchisement resulting from this law is of no moment because the number of impacted voters is "exceedingly small." Br.34. This ignores that the *Anderson-Burdick* inquiry looks to the burden on those who are impacted by a law—here, voters who are temporarily away from their permanent residence. *See supra* at 22-23; *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983) (invalidating law that affected approximately 6% of the electorate); *NEOCH v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012).

The State offers three justifications for this law—reduction of administrative burdens, risk of error during manual entry of the ballot, and voter privacy, Br.33-34—each of which was found "not persuasive" by the district court. A.127. "Wisconsin already requires municipal clerks to send ballots by fax or email to military voters and to voters who are permanently overseas, which undercuts most of defendants' justifications." A.127-28. The court also credited testimony from election officials who "could not see reasons for eliminating the practice" and "testified that it did not create significant logistical problems." A.128; R.215 at 86-87. Further, the practice is "permissive, not mandatory," so any administrative burdens are voluntarily undertaken. A.129. Any chance of error "is minimal because two election officials perform the task [of entering the ballot] together," and the State "did not adduce evidence that mistakes ever actually happened." A.128-29. And, a voter who does not wish an election official to see his or her ballot "can

simply avoid voting by fax or email" and that "is the voter's problem, not the state's." A.128.

F. Dorm Lists

The court likewise properly invalidated Act 23's requirement that a certification of citizenship be included with dorm lists used (with college ID) to prove residence for college students registering to vote. Because federal law prohibits the disclosure of students' citizenship information, 20 U.S.C. § 1232g; A.109, Act 23's new requirement has generally caused colleges to stop supplying dorm lists for registration; the Act has thus "taken away a method through which students can register to vote," making it more difficult for college students to register. A.109-10; SA.608.

"[T]he state has not offered even a minimally rational justification for th[is] law." A.110-11. "[N]one of the state's other methods for proving residence require voters to 'confirm' their U.S. citizenship beyond signing a citizenship certification on the registration form. Students sign this certification too." A.111. The State did not even attempt to "explain how this certification procedure, which apparently satisfies the state's interest in confirming citizenship for the overwhelming majority of non-students who register to vote, is insufficient in the context of student voters." *Id*. And "the challenged provision does not allay that concern" anyway: "[n]on-citizen students could easily skirt the requirement of demonstrating citizenship by using one of the other methods for proving residence." *Id.*

The State responds that "reform may take one step at a time." Br.35. This argument was not raised below and is waived. Regardless, this law plainly is not

part of any broader effort to require third-party certification of citizenship for registrants. Even if it were, such an ineffectual first step surely cannot justify the elimination of a mode of registration.

G. Student IDs

The court also correctly struck down the requirement that student IDs used to vote be unexpired. The three requirements for using a college ID "are redundant: (1) the ID card itself must be unexpired; (2) the card must have an expiration date that is no more than two years after its date of issuance; and (3) the voter must present proof of current enrollments." A.155. The court wrote that "[i]f each of these requirements provided some additional level of protection against former students using their IDs to vote, then those requirements might be rational," but "defendants have not explained why any requirement beyond proof of current enrollment is necessary to protect against fraudulent voting with a college or university ID." *Id.*

On appeal, the State asserts for the first time, *cf.* A.156, that the documents the State *requires* a voter to present when using a student ID to vote are easy to fake. Br.36.[12] That argument is waived. Moreover, the (purported) purpose of the voter ID law is *not* to determine whether an individual is currently enrolled as a student but to confirm that individual's identity. Because the fact that a student ID is expired has no relevance to whether that ID can be used to confirm an individual's identity, the requirement at issue is irrational.

[12] The transcript pages the State cites, A.427, 430, do not support the State's assertion.

H. Documentary Proof of Residence and Corroboration

The district court erred in failing to invalidate under the *Anderson-Burdick* test the State's elimination of corroboration (i.e., some else vouching under oath to prove a voter's residency) and the State's new requirement that all voters (not just those who register within 20 days of an election, as under previous law) supply documentary proof of residence when registering to vote. "Between 2006 and 2012, about 35,000 Wisconsin citizens used corroboration to register[.]" A.106. Corroboration was a failsafe for voters who arrived at the polls on Election Day without documentary proof of residence. And, despite the district court's contention that the documentary proof-of-residence requirement could be met "with a little planning," A.106, the record is replete with examples of voters who could not. PX490 at 6; R.211 at 73-74, 81-82; SA.586; SA.605-06. These tend to be students living with their parents, elderly voters living with a relative, and individuals with low incomes who are living with others. R.211 at 66-67; SA.638.

In contrast to the documented burdens these voters face, "Defendants adduced no actual evidence of fraudulent use of corroboration" even though it had been in place since 1972 or "a genuine threat or history of registration-related fraud." A.108. By ignoring the demonstrated burdens placed on voters and the State's failure to demonstrate *any* problems remedied by these restrictions, the district court committed reversible error.

III. Voting Rights Act

A. Legal Standard

"Congress enacted the [VRA] for the broad remedial purpose of rid[ding] the country of racial discrimination in voting. … [T]he Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quotation marks omitted); *accord Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 553 (6th Cir. 2014), *vacated on other grounds by* 2014 WL 10384647 (6th Cir. Oct. 1, 2014) ("*NAACP*"). "The essence of a § 2 claim is that a certain electoral law … interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). "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* … and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able to *elect* their own candidate." *Chisom*, 501 U.S. at 407-08 (Scalia, J., dissenting) (quotation marks omitted); *accord id*. at 397 (majority); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("*LWV*") (violation can be established through showing "that 'any' minority voter is … denied equal electoral opportunities") (quoting 52 U.S.C. § 10301(a)).

A VRA vote-denial claim has two elements: (1) the challenged practice "must impose a discriminatory burden on members of a protected class, meaning that

members of a protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and (2) "that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of a protected class." *LWV*, 769 F.3d at 240; *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *cf. Frank*, 768 F.3d at 754-55.

The State's claim that the vote-denial analysis requires a comparison of the challenged practice with an "objective benchmark" is mistaken. Br.38-39. No court has adopted that view in the vote-denial context; the State relies on vote-*dilution* case law. *See id.* That distinction is important because "determining what an undiluted benchmark should be can be challenging." *NAACP*, 768 F.3d at 556. In contrast, "Section 2 vote denial claims inherently provide a clear, workable benchmark": "whether minority voters 'have *less opportunity than other members of the electorate* to participate in the political process and to elect representatives of their choice.'" *Id.* Nor is it clear why the status quo ante cannot provide an objective benchmark in the vote-denial context. Contrary to the State's position, the Fourth Circuit has held that "an eye toward past practices is part and parcel of the totality of the circumstances," found a state's "previous voting practices … centrally relevant," and concluded that the elimination of "voting opportunities … that African Americans disproportionately used is … relevant to an assessment of whether … African Americans have an equal opportunity to participate." *LWV*, 769 F.3d at 241-42.

B. The District Court Correctly Found That The Restrictions On In-Person Absentee Voting Violate The VRA

The district court found that "forcing all municipalities to offer only one location for in-person absentee voting imposed greater burdens on voters in large municipalities like Milwaukee than it did on voters in smaller towns." A.84. "And because Milwaukee has a predominantly minority population, the one-location rule was all but guaranteed to have a disparate impact." *Id.*; SA.507 (municipality size and black and Latino population share correlated). Further, peer-reviewed research shows that "the association between early voting sites per capita and 2008 and 2012 county turnout is positive and significant." PX071-008; PX485-005.

The court also found that "Wisconsin's restrictions on the hours for in-person absentee voting have had a disparate effect on African Americans and Latinos." A.87. The evidence shows that "weekend and evening voting is particularly important for socioeconomically disadvantaged voters"; "African American and Latino voters have made particularly good use of various forms of early voting"; and "[e]arly voting in groups on Sundays—including church-supported 'Souls to the Polls' efforts—is a widespread practice among African American voters, in Wisconsin and nationwide." A.84; *see* PX206-001 (Milwaukee's share of statewide weekend in-person absentee voting was 53.5% in 2010; 41.8% in the 2012 recall; and 41.6% in the 2012 general); A.207; SA.546; PX485-007.

Overall, "Wisconsin's rules for in-person absentee voting all but guarantee that voters will have different experiences with in-person absentee voting depending on where they live: voters in large cities will have to crowd into one

location to cast a ballot, while voters in smaller municipalities will breeze through the process." A.145. The trial evidence shows that large municipalities had significant problems with long wait times even before the cuts to in-person absentee voting were implemented (or fully implemented). PX433-045; R.215 at 68-69, 92-93; *cf.* SA.846; *see also* A.209. Of course, a reduction in voting opportunities can only make this problem worse. Tellingly, although Wisconsin voting data show that the share of voters in a municipality who use in-person absentee voting generally increases as the number of registered voters increases, A.378-81; R.220 at 44-46, 137-38, Milwaukee has consistently had a *lower* share of in-person absentee voting than has Wisconsin as a whole, A.375-76, and the gap in in-person absentee voting usage between Milwaukee and the rest of the state *increased* from 2010 to 2014. *Id.*; R.220 at 135-36. Plainly, the district court's finding that the in-person absentee voting restrictions disparately burden minority voters was not clearly erroneous.

With respect to the second element—whether the disparate burden is linked to the ongoing effects of discrimination—the record shows that "from 1913 to 2006, only municipalities with more than 5,000 residents had to register voters," and that this law meant that "minorities in Wisconsin disproportionately faced more impediments to voting than white citizens faced" given that 98% of black voters and 91% of Latino voters, but only 68% of white voters, lived in municipalities in which registration was required. A.148-49; *see* SA.491 (system "contributed to lower turnout by blacks and Latinos"). "Few municipalities outside of Milwaukee provide election materials in languages other than English." A.149; SA.491-92. Milwaukee

did not provide Spanish-language ballots until 2012, when it was required by the U.S. Justice Department to do so under the VRA, and no other municipality in Wisconsin has ever provided ballots in any language other than English. SA.491; SA.807. Milwaukee also had illegally segregated schools "more than 20 years after *Brown v. Board of Education*," and "the results of educational inequality have persisted." A.151; SA.496.

Since the 1960s, Milwaukee has been called the "Selma of the North" due to the "[r]acial segregation and animosity [that] have been enduring parts of [its] history." SA.493. In 1967, "[p]ublic disputes over educational and housing discrimination boiled to riots, including one that resulted in four deaths." SA.493-94. Largely in response to school desegregation and open housing laws—the latter of which were passed in 1968 only after repeated efforts and "over 200 nights of public marches"—"white-dominated suburbs quickly developed" through "white flight." SA.492; R. 210 at 72-73. "Even with the passage of the federal Fair Housing Act [in 1968], discriminatory real estate practices such as biased appraisal practices, redlining, and racial 'steering' nonetheless continued to constrain blacks' housing choices to the inner city." SA.492; *see* R.210 at 73. The segregation that resulted from these practices was reinforced by "exclusionary land zoning rules in incorporated municipalities near the city of Milwaukee." SA.492; R.210 at 72-73; A.150. Thus, due at least in part to the history of state-sanctioned and state-tolerated discrimination by Milwaukee and the municipalities surrounding it, "two-thirds of Wisconsin's African American residents now live in Milwaukee, which

remains one of the most segregated cities in the country." A.150-51; SA.492-93; R.210 at 70-73.

This discrimination is not legally distinguishable from discrimination by the State. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Madison Teachers, Inc. v. Walker*, 358 Wis. 2d 1, 62 (2014). That is especially true in the context of the VRA, which should be interpreted broadly and requires a searching totality-of-the-circumstances analysis. *Chisom*, 501 U.S. at 403; *see Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988).

Wisconsin's history of discrimination has resulted in arguably the most extreme socioeconomic disparities by race in the country. SA.492, 498; A.179 ("On most measures Wisconsin ranks at or near the bottom of the states."); R.220 at 65. For example, "[a] recent study indicates that Wisconsin has the highest black unemployment rates in the country, almost twice the national rate." SA.494. Blacks and Latinos are several *times* more likely than whites in Wisconsin to live in poverty. SA.495. And African Americans and Latinos are much more likely than whites in Wisconsin to lack access to a vehicle. A.175; SA.493.[13]

These disparities "have left minority groups condensed into high-density urban areas, which makes them particularly vulnerable to Wisconsin's rules for in-person absentee voting." A.151. The one-location rule means that "voters must

[13] Additional information regarding the "Senate Factors" is set forth in the expert report of Dr. Barry Burden. SA.481-521. Given the undisputed history set forth in that report, the district court clearly erred—or at least drew an artificial distinction between the State and its political subdivisions—in writing that "Wisconsin has a relatively scant history of state-sanctioned discrimination."A.148.

travel farther than they would otherwise have to travel if municipalities could establish more locations," *id.*, which burdens the disproportionately minority voters who lack access to a vehicle. As explained, that rule and the cuts to the in-person absentee voting period mean that the disproportionately minority voters in Milwaukee must wait in longer lines than others to vote. That problem is compounded by "[l]ower levels of educational attainment and employment," which "decrease the flexibility that minority populations will have to spend time waiting in line to vote in-person absentee, which makes the reduced hours problematic as well." A.152; *see also* A.98-100; SA.498-99. Thus, the ongoing effects of Wisconsin's history of discrimination are plainly linked to the disparate burdens imposed by the in-person absentee voting restrictions. The district court's holding that those provisions violate the VRA should be upheld.

C. The District Court Erred In Failing To Invalidate The Voter ID Law Under The VRA

Here, as in *Frank*, the evidence demonstrates that white voters are more likely than African-American or Latino voters to possess qualifying voter ID. *See* 768 F.3d at 752; A.75 ("patterns of ID possession are racially disparate, and that is likely to have a racially disparate effect on turnout"). But the record here, as it relates to Section 2, is different in nearly every other pertinent respect. These differences are critical: *Frank* made clear that its conclusion was based at least in part on certain facts the district court "did *not* find." 768 F.3d at 746. In failing to take these differences into account and instead simply finding that it was bound to

uphold the voter ID law against any challenge seeking to invalidate it, A.45-46, the district court erred.

First, in *Frank* there was evidence of only two individuals who were "hindered" when they tried to obtain or correct birth certificates; 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." 768 F.3d at 746-47. The evidence here shows that scores of voters—almost all black or Latino—have been *disenfranchised* by the voter ID law; that many more have been able to obtain an ID only after surmounting "high hurdles," *Frank II,* 819 F.3d at 386-87; and that many more have understandably been deterred from trying to navigate the IDPP. A.46, 71. 81; *cf. Frank*, 768 F.3d at 748 ("If … the state has made it impossible, or even hard, for them to *get* photo ID, then 'disfranchised' might be an apt description.").

Second, the district court in *Frank* did not find that blacks or Latinos had less opportunity than whites to obtain a photo ID but instead that they were less likely to *use* that opportunity. 768 F.3d at 746-47, 753. The evidence in this case now establishes that blacks and Latinos are actually far *more* likely than whites to use the opportunities available to attempt to obtain IDs. A.74, 81; DX265. And still disparities persist. *Cf. Chisom*, 501 U.S. at 407-08 (Scalia, J., dissenting).

Third, *Frank* noted that the district court "did not make findings about what happened to voter turnout in Wisconsin during the February 2012 primary, when Act 23 was enforced," which meant that the case was "a challenge to Act 23 as written ('on its face'), rather than to its effects ('as applied')." 768 F.3d at 747. Here,

the data show that voters without ID were far less likely to vote in 2014, when many voters believed the voter ID requirement was in effect, than they were in 2010, SA.583; SA.542-46; hundreds have been forced to cast provisional ballots because they did not present a qualifying ID when they attempted to vote, PX463; and voters have either received official "denial" letters or been hung up in (and thus equally disenfranchised by) the IDPP.

Fourth, *Frank* repeatedly noted the lack of evidence from other states regarding the impact of voter ID laws on turnout. 768 F.3d at 747, 751, 753. Two years later, there is now "[g]ood national research suggest[ing] that voter ID laws suppress turnout, and that they have a small, but demonstrable, disparate effect on minority groups." A.62; *accord* PX072-048-52; PX076-014; PX083-016; DX004-003; SA.485.

Fifth, it was "important" in *Frank* that the district court did not "find that differences in economic circumstances are attributable to discrimination by Wisconsin" and that "[t]he judge did not conclude that the state of Wisconsin has discriminated" in education, employment, or housing. 768 F.3d at 753. But it is clear from the record here—discussed above—that the State and/or its political subdivisions are responsible, at least in part, for Wisconsin's extreme socioeconomic disparities.

The record in this case thus contains precisely the evidence that the *Frank* court found wanting. *See also id.* at 747 ("[P]redictions cannot be compared with

results.").[14] The Court should therefore hold that application of *Frank*'s reasoning to the record in this case *confirms* that the voter ID law violates the VRA.

IV. This Court Should Overrule *Frank* and Invalidate the Voter ID Law in Its Entirety

Five judges of this Court concluded two years ago that Wisconsin's voter ID law "has placed an undue burden on the right to vote"; "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"; and "[t]here is only one motivation" for the burdens imposed by Act 23, "and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens." *Frank*, 773 F.3d at 783-84, 796-97 (Posner, J., dissenting).

The record in this case confirms these points. "The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities." A.44, 46. "Wisconsin's strict version of voter ID law is a cure worse than the disease." A.46. And "[t]he conclusion is hard to resist: the Republican leadership believed that voter ID would help the prospects of Republicans in future elections." A.78.

Despite these findings, the district court concluded that "*Crawford* and *Frank* effectively foreclose invalidating Wisconsin's voter ID law outright[.]" A.71, 160-61;

[14] The facts set forth in this section also support invalidating the voter ID law under the *Anderson-Burdick* test and overruling *Frank*.

A.45-46, 62. The district court made clear, however, that "*Crawford* and *Frank* deserve reappraisal." A.62; A.45.

Wisconsin's voter ID regime today does not remotely resemble the sort of minimally burdensome ID system envisioned in *Crawford* and *Frank*. The district court repeatedly emphasized this point. A.131; SA.292. So there should be no disagreement between the judges on one side of *Frank* and those on the other side: Wisconsin's system, as implemented, has been a "wretched failure," a voting rights "disaster," and a "complicated beast of a system," and it has failed after repeated "emergency" efforts to provide the "well-functioning safety net" that is essential to the constitutionality of the system as a whole. A.46-47, 71; SA.1245; *see Frank II,* 819 F.3d at 386-87. It therefore is unnecessary to overrule *Frank* to hold that Wisconsin's voter ID regime may not take effect until there is a demonstrably effective safety net in place—not simply the promise of one.

Although *Frank* need not formally be overruled to enjoin Wisconsin's voter ID law, several legal propositions announced *Frank* have narrowed the scope of this Circuit's protection of the fundamental right to vote and left the Seventh Circuit as an outlier among the courts of appeals. This Court should revisit and reverse these aspects of *Frank*:

1. The panel decision asserted that "[i]t 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)." 768 F.3d at 754. But this ignores that "Section 2, unlike other federal legislation that prohibits racial discrimination,

does not require proof of discriminatory intent. Instead, a plaintiff need show only that the challenged action or requirement has a discriminatory *effect* on members of a protected group." *NAACP*, 768 F.3d at 550 (emphasis added; quotation marks omitted); *Veasey*, 830 F.3d at 243; 52 U.S.C. § 10301(a) ("*result[]* in a denial or abridgement") (emphasis added). The relevant legal standard is even known as the "results test." *E.g.*, *Gingles*, 478 U.S. at 35.

2. *Frank* also erred in suggesting that Section 2 of the VRA only applies where voters have been denied the right to vote. The court effectively wrote the word "abridgement" out of the statute. *Compare* 768 F.3d at 752-53 (district court's findings did 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"), *with* 52 U.S.C. § 10301(a) ("denial or abridgement of the right … to vote"). As the Act's use of that word demonstrates, "Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting." *NAACP*, 768 F.3d at 552; *see also LWV*, 769 F.3d at 243; *Veasey*, 830 F.3d at 253 & n.47.

3. To the extent *Frank* concluded that the Senate Factors are irrelevant in vote-denial cases, 768 F.3d at 754; A.148, it erred. As the en banc Fifth Circuit recently emphasized, "[t]hese factors provide salient guidance from Congress and the Supreme Court on how to examine the current effects of past and current discrimination and how those effects interact with a challenged law." *Veasey*, 830 F.3d at 246. Moreover, *Frank*'s reasoning relied on a plainly inaccurate reading of

the decisions of other courts of appeals. *Compare Frank*, 768 F.3d at 754 ("The Fourth Circuit and the Sixth Circuit … found *Gingles* unhelpful …"), *with LWV*, 769 F.3d at 240; *NAACP*, 768 F.3d at 554-55; *and Veasey*, 830 F.3d at 245-46.

4. *Frank* further erred in holding that courts should consider only discrimination by the jurisdiction whose election practice is at issue in determining whether any racially disparate burden is in part caused by or linked to the ongoing effects of discrimination. 768 F.3d at 753, 755. This cannot be squared "with Section 2's directive to address the 'totality of the circumstances' and with the Supreme Court's admonitions to probe the interaction of the challenged practice 'with social and historical conditions'" and to "consider 'the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.'" *Veasey*, 830 F.3d at 278 (Higginson, J., concurring) (quoting *Gingles*, 478 U.S. at 45, 47). It also ignores that "the Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403 (citations and internal quotation marks omitted). It thus is unsurprising that this holding is an outlier. *See Solomon v. Liberty Cty.*, 899 F.2d 1012, 1032 (11th Cir. 1990) (en banc) (Tjoflat, C.J., specially concurring); *City of Watsonville*, 863 F.2d at 1418; *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984) (Wisdom, J.).

The district court's opinion in this case illustrates why correction of these errors is necessary. Notwithstanding the extreme racial disparities in the IDPP, the

court wrote that the problems voters have in that process "tend to result from historical conditions of discrimination in the petitioner's home state or country"; that it could not "conclude that the burdens that the IDPP imposes are linked to historical conditions of discrimination in Wisconsin"; and that it therefore could not find a Section 2 violation. A.152-53. Such broad license for States to superimpose voting restrictions onto racial disparities resulting from discrimination and thereby impose discriminatory burdens is inconsistent with Section 2's language and purpose. *See* A.153 ("Plaintiffs contend that this is an excessively narrow reading of the Voting Rights Act, because it would allow Wisconsin to ignore rank discrimination by other states. They may be right, but the result appears to follow from *Frank*.").

These burdens are not justified by any material state interest. The evidence in this case has yet again confirmed that "impersonation fraud is a truly isolated phenomenon" that "has not posed a significant threat to the integrity of Wisconsin's elections." A.63. The district court pointed out, however, that "[t]he same cannot be said for Wisconsin's voter ID law," which "has disenfranchised more citizens than have ever been shown to have committed impersonation fraud." A.63-64. The law has "undermine[d] rather than enhance[d] confidence in our electoral system," especially among voters of color who (correctly) perceive the law as a tool of voter suppression. A.62. Wisconsin's voter ID system should therefore be enjoined in its entirety, and *Frank* should be overruled to the extent it supports a different result.

CONCLUSION

Plaintiffs respectfully request that the Court affirm the district court to the extent it invalidated challenged provisions and reverse the district court with respect to the rulings that Plaintiffs have cross-appealed.

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Respectfully submitted,

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I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32:

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Dated this 19th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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