Nos. 14-2058 and 14-2059

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, *et al*.,
Plaintiffs-Appellees,

v.

SCOTT WALKER, *et al.,*
Defendants-Appellants.

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

v.

DAVID G. DEININGER, *et al.,*
Defendants-Appellants.

On Appeal from the U.S. District Court for the Eastern District of Wisconsin,
The Honorable Lynn S. Adelman

MOUNTAIN STATES LEGAL FOUNDATION' S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Proposed Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Fed. R. App. P. 29(c)(1), and Circuit Rule 26.1, the undersigned hereby certifies that Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation incorporated under the laws of the State of Colorado. MSLF is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to MSLF's participation.

Pursuant to Federal Rule of Appellate Procedure 29(b), Mountain States Legal Foundation ("MSLF"), by and through its undersigned attorney, hereby moves for leave to file an amicus curiae brief in support of Defendants-Appellants urging reversal. The grounds for this Motion are as follows:

1. MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

2. Counsel for MSLF has contacted counsel for all parties regarding this Motion. Defendants-Appellants take no position on the Motion. Plaintiffs-Appellees in *Frank v. Walker,* No. 14-2058, have provided written consent to MSLF filing an amicus curiae brief. Plaintiffs-Appellees in *LULAC v. Deininger*, No. 14-2059, did not consent to MSLF filing an amicus brief because they did not believe they could consent in light of the Seventh Circuit policy articulated in section XXII(B) of the Practitioner's Handbook for Appeals.

3. MSLF recognizes that "whether to allow the filing of an amicus curiae brief is a matter of judicial grace" and that this Court will only grant leave to file an amicus curiae brief if "the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the

parties." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003) (Posner, J., in chambers) (internal quotations omitted).

4. This case presents issues of national importance regarding a government's ability to ensure electoral integrity through voter identification laws. These issues are not limited to the jurisdiction of this Court, and cases involving voter identification laws are being litigated in several courts across the country. *See Veasey v. Perry*, 2:13-cv-193 (S.D. Texas 2013) (consolidated with *United States v. Texas*, 2:13-cv-263 (S.D. Texas 2013)) (challenge to Texas voter ID law); *United States v. North Carolina*, 13-cv-861 (M.D. North Carolina 2013) (challenge to North Carolina voter ID law); *Kobach v. United States Election Assistance Commission*, No 14-3062 (10th Cir. 2014) (consolidated with *Bennett v. United States Election Assistance Commission*, No. 14-2072 (10th Cir. 2014)) (State voter registration laws).

5. Specifically, at issue in this case is the scope of Congress's authority to enact legislation, including the Voting Rights Act, pursuant to the Enforcement Clause of the Fifteenth Amendment and to what extent the Fourteenth Amendment restricts a state government's ability to regulate its own elections. MSLF's proposed amicus curiae brief provides a unique prospective on both of these issues, and MSLF's past experience in cases involving the Voting Rights Act will assist this Court in the disposition of this case.

6. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

7. Especially relevant to this case, MSLF attorneys have represented clients in challenging Congress's authority to enact legislation, including amendments to Section 2 of the Voting Rights Act , under the Enforcement Clause of the Fifteenth Amendment. *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). MSLF has also filed amicus curiae briefs with the U.S. Supreme Court demonstrating the limited nature of Congress's Fifteenth Amendment enforcement power, which does not alter the constitutional structure establishing three coequal branches of government. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). Finally, MSLF has filed amicus curiae briefs supporting a state's authority to regulate elections to ensure electoral integrity. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

8. Accordingly, MSLF "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1064 (7th Cir. 1997).

9. MSLF's proposed amicus curiae brief is filed concurrently with this Motion.

WHEREFORE, MSLF respectfully requests leave to file the accompanying amicus curiae brief.

DATED this 30th day of June 2014.

Respectfully submitted,

s/ Steven J. Lechner
Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Tel: (303) 292-2021
Fax: (303) 292-1980
lechner@mountainstateslegal.com

Attorney for Proposed Amicus Curiae

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS URGING REVERSAL

Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Appellants urging reversal.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism and separation of powers is at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Especially relevant to this case, MSLF attorneys have represented clients who challenged Congress's authority to enact legislation, including Section 2 of the Voting Rights Act ("VRA"), under the Enforcement Clause of the Fifteenth Amendment. *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). MSLF has also filed amicus briefs with the Supreme Court demonstrating the limited nature of Congress's Fifteenth Amendment enforcement power, which does not alter the constitutional structure establishing three co-equal branches of government. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Finally, MSLF has filed amicus curiae briefs supporting a state's authority to regulate elections to ensure electoral integrity. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013).

SUMMARY OF ARGUMENT

In May 2011, the Wisconsin Legislature passed 2011 Wisconsin Act 23 ("Act 23"), which requires Wisconsin residents to present identification ("ID") in order to vote. 2011 Wis. Sess. Laws 104. Act 23 requires a person to present one of nine forms of photo ID to prove his or her identity, with several exceptions. Wis. Stat. § 5.02(6m).

In late 2011 and early 2012, two separate lawsuits were filed by Wisconsin citizens against Wisconsin officials, alleging that Act 23 violated the Fourteenth Amendment to the U.S. Constitution and Section 2 of the Voting Rights Act ("VRA"). The two cases were consolidated and, after a two-week bench trial, the district court held that (1) Act 23 violated the Fourteenth Amendment because it places an unjustified burden on the right to vote and (2) that Act 23 violates Section 2 of the VRA because the photo ID requirement is likely to have a greater effect on racial minorities. *Frank v. Walker*, 11-CV-01128, 2014 WL 1775432 at *18, 33 (E.D. Wis. Apr. 29, 2014) The district court erred in both respects.

As to the constitutional claim, the district court ruled that Appellants could not prove there was a concern in Wisconsin and, therefore, the state's interests did not justify the purported severe burdens of the photo ID requirement on those that lack qualifying ID. In *Crawford v. Marion County*, 553 U.S. 181 (2008), however, six justices of the Supreme Court held that a nearly identical Indiana photo ID law did not violate the Fourteenth Amendment. The Court ruled that the photo ID law creates only a minimal burden, not significantly greater than the burden of voting itself. *Crawford*, 553 U.S.at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring). Importantly, the Court recognized the important state interest in preventing voter fraud, even though there was little evidence before the Court that voting fraud in Indiana was a significant problem. *Id.* at 194 (opinion of Stevens,

J.). Here, the district court ignored these important aspects of the *Crawford* decision and, accordingly, this Court should reverse the judgment of the district court and hold that Act 23 does not violate the Fourteenth Amendment.

The district court also erred by ruling that Act 23 violates Section 2 of the VRA. In reaching this conclusion, the district court erroneously expanded the scope of the rights protected by Section 2 beyond those rights already protected by the Fifteenth Amendment. Because Congress passed the VRA pursuant to the Enforcement Clause of the Fifteenth Amendment, Section 2's reach is limited to enforcing the provision of the Fifteenth Amendment. A more expansive reading of Congress's Fifteenth Amendment enforcement power would disrupt the separation of powers between Congress and the judiciary, and allow Congress to alter the Constitution through ordinary legislations. Accordingly, in order for Section 2 of the VRA to be constitutional, Act 23 can only violate the VRA if it "denie[s] or abridge[s]" the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV.

Because Act 23 treats all potential voters equally, regardless of race or color, the district court erred by ruling that Act 23 violated Section 2 of the VRA. Furthermore, Act 23 does not violate the Fifteenth Amendment because the photo ID requirement does not "deny" or "abridge" the right to vote. Act 23 is a minimal burden on the right to vote, and does not prevent anyone from voting. As a result,

Act 23 does not violate Section 2 of the VRA, which can only "enforce" the provision of the Fifteenth Amendment. Accordingly, this Court should reverse the judgment of the district court and hold that Act 23 does not violate Section 2 of the VRA.

ARGUMENT

I. ACT 23'S PHOTO ID REQUIREMENT IS NOT AN UNDUE BURDEN ON WISCONSIN VOTERS.

This Court should reverse the judgment of the district court because Act 23 does not place an undue burden on Wisconsin voters. In short, the district court incorrectly exaggerated Act 23's burdens on Wisconsin voters and incorrectly underestimated Wisconsin's important state interests in preventing voter fraud and ensuring the integrity of elections. As a result, the district court improperly concluded that Act 23 creates an unjustified burden on Wisconsin voters. *Frank*, 2014 WL 1775432 at *3–18.

A. The District Court Incorrectly Exaggerated Act 23's Burdens On Wisconsin Voters.

Although the right to vote is a fundamental right, the Supreme Court has recognized that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)

("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (The Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones."). When a court reviews a voting regulation, it must weigh "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *accord Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (same). The burdens imposed by a regulation "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford,* 553 U.S. at 191 (opinion of Stevens, J.) (quoting *Norman v. Reed,* 502 U.S. 279, 288–89 (1992)).

In *Crawford*, six justices of the Supreme Court agreed that the inconveniences associated with obtaining photo ID are no greater than the usual burdens of voting. In the opinion of the Court, Justice Stevens stated that:

> [T]he inconvenience of making a trip to the [motor vehicle office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford, 553 U.S.at 198 (opinion of Stevens, J.) ; *id.* at 209 (Scalia, J., concurring) ("The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not 'even represent a significant increase over the usual burdens of voting.' And the State's interests are sufficient to sustain that minimal burden.") (internal citations omitted).[2] Because the Court has recognized that the burden of needing an ID to vote is minimal, nearly any legitimate state interest can justify a photo ID requirement. *Id.* at 204 (opinion of Stevens, J.) ("The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process." (internal quotation omitted)); *id.* at 209 (Scalia, J., concurring) ("And the State's interests are sufficient to sustain that minimal burden.").

The district court interpreted *Crawford* as a fact-specific holding and stated that "a majority of the Court could not agree on how to apply the [relevant] test." *Frank*, 2014 WL 1775432 at *5. Yet, in *Crawford*, Justice Scalia expressly stated that, when evaluating the burdens of a voting regulation, a court should only look at the reasonably foreseeable effects on voters generally, not the effects on a certain class of voters. 553 U.S. at 206 (Scalia, J., concurring). Justice Stevens, on the other hand, did not expressly answer the question of whether a disproportionate

[2] Justice Stevens announced the decision of the Court and was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia's concurrence was joined by Justices Thomas and Alito.

burden on a certain class of voters could affect a court's analysis of a voting regulation, and instead ruled that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 200. The district court latched onto this purported ambiguity and focused on the nine percent of eligible voters in Wisconsin that do not have a qualifying ID. *Frank*, 2014 WL 1775432 at *5, 12. The district court then speculated that "it is likely that a substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting . . . ." *Id.* at *17. Based on this speculation, the district court ruled that the burdens of the photo ID requirement outweighed the government's interest in ensuring fair elections. *Id.*

Act 23, however, is nearly identical to the Indiana photo ID law challenged in *Crawford*. The Indiana law upheld in *Crawford* applies to in-person voting and not to absentee ballots submitted by mail.[3] *Crawford*, 553 U.S.at 185; Ind. Code § 3–11–8–25.1. It provides an exception for persons living and voting in a state-licensed facility, such as a nursing home. *Id.* at 186; Ind. Code § 3–11–8–25.1. A voter who is indigent or has a religious objection to being photographed may cast a

[3]Generally, Indiana does not allow absentee votes by mail. A voter voting by absentee ballot must vote in the office of the circuit court clerk or at a satellite office unless a county election board or the state election commission unanimously vote that circumstances prevent a voter from voting at a polling place. Ind. Code § 3-11-4-1.

provisional ballot that will be counted if he or she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. *Id.*; Ind. Code §§ 3–11.7–5–1, 3–11.7–5–2.5(c). A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit court clerk's office within 10 days. *Id.*; Ind. Code § 3–11.7–5–2.5(b). Finally, Indiana offers free photo identification to qualified voters able to establish their residence and identity. *Id.*; Ind. Code § 9–24–16–10(b)

Similarly, Act 23 provides exceptions to the ID requirement for: (1) absentee voters who have previously supplied acceptable photo IDs and whose names and addresses have not changed, Wis. Stat. § 6.87(4)(b)3; (2) absentee voters who are in the military or overseas, Wis. Stat. § 6.87(1); (3) voters who have confidential listings as a result of domestic abuse, sexual assault or stalking, Wis. Stat. § 6.79(6); (4) voters who have surrendered their driver's licenses due to a citation or notice of intent to revoke or suspend the license who present a copy of the citation or notice, Wis. Stat. § 6.79(7); and (5) absentee voters who are elderly, infirm or disabled and indefinitely confined to their homes or certain care facilities, Wis. Stat. §§ 6.86(2), 6.875. Furthermore, an individual with a religious objection to being photographed can apply for a Wisconsin state ID card that does not include a photo. Wis. Stat. § 343.50(4g).

Individuals who lack a qualifying ID can apply for a Wisconsin state ID card at the Wisconsin Department of Motor Vehicles ("DMV"). The cost for a state ID card is $18.00, but, similar to the act upheld in *Crawford*, Act 23 requires the DMV to waive the fee if the applicant is a citizen who will be at least 18 on the date of the next election, and the applicant asks that the card be issued without charge for voting purposes. Wis. Stat. § 343.50(5)(a)3. Act 23, like the Indiana law, further mitigates any inconveniences by offering election identification certificates free of charge to registered voters who lack photo identification and allowing voters to cast provisional ballots if they appear at the polls without photo identification.[4] *See id*. at 199 (opinion of Stevens, J.) ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted."); Wis. Stat. § 6.79(3)(b).

The district court's decision fails to accurately assess the burden on those purported 300,000 Wisconsin citizens who do not have a qualifying ID. Although

[4] The one difference between Act 23 and the act challenged in *Crawford* is that Act 23 does not allow someone who is indigent to cast a provisional ballot. The potential burden to an indigent voter, however, is minimized by the fact that the fee to receive an ID is waived upon request. Wis. Stat. § 343.50(5)(a)3. Furthermore, if the district court decided that this one difference between Indiana and Wisconsin's laws was the deciding factor in the case, it should have held Act 23 unconstitutional as applied to indigent voters, rather than facially invalid. *See* Consolidated Brief and Short Appendix of Defendants-Appellants ("Appellants' Br.") at 59–61.

the burden on those people may be different from those who already have an ID, the burden is still insignificant. In *Crawford*, Justice Stevens recognized that "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[5] 553 U.S. at 198. As a result, even if the district court was correct that a court should look at the purported burdens on a subset of voters, his ruling that the burden of getting an ID to vote is significant essentially defies the judgment of six justices of the Supreme Court. [6]

B. The District Court Underestimated Wisconsin's Interests In Ensuring Electoral Integrity.

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[5] Furthermore, as demonstrated by Defendants-Appellants, the handful of witnesses that purportedly had difficulty obtaining an ID does not mean that the requirement is overly burdensome for Wisconsin voters, or even the subset of potential voters that do not already have qualifying IDs. Appellants' Br. 47–54. In *Crawford*, Justice Stevens ruled that statements by individual voters did not provide "any concrete evidence of the burden imposed on voters who currently lack photo identification." 553 U.S. at 201. Although the plaintiffs in this case arguably provided more evidence than the plaintiffs in *Crawford*, the evidence in this case is still anecdotal and "gives no indication of how common the problem is." *Id.* at 202 (Opinion of Stevens, J.).

[6] Furthermore, Justice Stevens concluded his opinion by stating that the burdens "of the statute to the *vast majority* of Indiana voters" are justified by the government interest in ensuring electoral integrity. *Crawford*, 553 U.S.at 204 (emphasis added). Therefore, the district court's focus on a substantial minority of voters who do not have photo ID, rather than the vast majority of voters who do have ID, was incorrect. *Frank*, 2014 WL 1775432 at * 5. Regardless, Act 23 only creates a minimal burden on those without photo ID, as demonstrated above.

The district court also contradicted *Crawford* regarding the government's interests in requiring photo IDs in order to prevent voter fraud. The district court ruled that "because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future, this particular state interest has very little weight." *Frank*, 2014 WL 1775432 at *6.

In *Crawford*, however, the Court did not require Indiana to prove that voter impersonation was an issue in order for the government to have an interest in preventing voter fraud. *Crawford*, 553 U.S. at 194–96 (Opinion of Stevens, J.). In fact, Justice Stevens found that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194. Despite the lack of evidence that voter fraud was an issue in Indiana, Justice Stevens stated that:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.

Id. at 196 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring) ("the State's interests . . . are sufficient to sustain that minimal burden" of requiring ID). Furthermore, Justice Stevens also stated that the State's interest in promoting public confidence in the integrity of the electoral process is closely related to the

State's interest in preventing voter fraud but "has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197 (opinion of Stevens, J.).

Therefore, despite the district court's assertions to the contrary, the Court's decision in *Crawford* did not rely on facts specific to Indiana. The record before the Court was not unique to the statute at issue in that case and, in fact, the Court relied on a Report from the Commission on Federal Election Reform applicable to elections across the country. *Id.* at 193; *id.* at 195 ("[i]t remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists"). As a result, the district court contradicted the Court's ruling in *Crawford*, and minimized the importance of Wisconsin's interest in ensuring electoral integrity.

Other courts have recognized that a state does not need to prove actual voter fraud in that state in order to justify a photo ID law. In *Am. Civil Liberties Union of New Mexico v. Santillanes*, the Tenth Circuit ruled that the district court in that case "imposed too high a burden on the City" by requiring it to prove that actual voter fraud occurred within the city. 546 F.3d 1313, 1323 (10th Cir. 2008). The court recognized that "[p]revention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement

for local elections." *Id.* As a result, the Tenth Circuit upheld the photo ID law in that case. *Id.* at 1525 ("*Crawford* clearly guides this court in concluding that the Albuquerque photo identification law is a valid method of preventing voter fraud."). Similarly, in *Common Cause/Georgia v. Billups*, the Eleventh Circuit correctly recognized that Georgia did not have the burden of proving, as the plaintiffs alleged, "that in-person voter fraud existed and that requiring photo identification is an effective remedy . . . ." 554 F.3d 1340, 1353 (11th Cir. 2009).

Therefore, the district court below incorrectly held that Act 23 violates the Fourteenth Amendment. The minimal inconvenience imposed by the law, which is nearly identical to the law challenged in *Crawford*, are justified by Wisconsin's legitimate and important interests in preventing voter fraud and ensuring electoral integrity. Accordingly, this Court should reverse the judgment of the district court and hold that Act 23 does not violate the Fourteenth Amendment.

II. ACT 23 DOES NOT VIOLATE SECTION 2 OF THE VRA.

Act 23 does not violate Section 2 of the Voting Rights Act because its minimal burdens apply equally to all voters in Wisconsin and Act 23 does not deny or abridge the right to vote of any Wisconsin citizen. Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or

color." 42 U.S.C § 1973(a). Section 2 provides that a plaintiff can establish a violation if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C § 1973(b). When Section 2 is interpreted within the context of the Fifteenth Amendment, it is clear that Act 23 does not violate Section 2 of the VRA.

A. This Court Must Interpret Section 2 Of The VRA Within The Context Of The Fifteenth Amendment.

1. Under the Enforcement Clause of the Fifteenth Amendment, Congress can only prevent a state from denying or abridging the right to vote based on race or color.

This Court must interpret Section 2 of the VRA within the context of the Fifteenth Amendment because the VRA was passed pursuant to the Enforcement Clause of the Fifteenth Amendment. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command."); *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980)

("Congress's [F]ifteenth [A]mendment enforcement authority reaches only legislation directed against racial or color discrimination"); *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1230 (11th Cir. 2005) (Congress's power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments "is not absolute"). The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" and it authorizes Congress "to enforce this article by appropriate legislation." U.S. Const. Amend. XV §§ 1, 2.

The Enforcement Clause of Fifteenth Amendment is similar to the language of the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, which give Congress the "power to enforce," each amendment "by appropriate legislation." U.S. Const. Amend. XIII, § 2; U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV, § 2. These three amendments were ratified during 1865 and 1870 following the end of the Civil War and were meant to address unequal treatment of United States citizens by the States. United States Senate, *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, http://www.senate.gov/artandhistory/history/common/generic/CivilWarAme

ndments.htm (last visited June 30, 2014). Because these three amendments were passed at the same time and the enforcement clauses use the same language, the clauses must be interpreted as having the same meaning. *See City of Boerne v. Flores*, 521 U.S. 507, 518–19 (1997) ("In assessing the breadth of [the Fourteenth Amendment's] enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article.'"); *Id.* at 518 (describing the enforcement power under the Fourteenth Amendment as a "parallel power" to the enforcement power under the Fifteenth Amendment); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

The Court has described Congress's enforcement power under both the Fourteenth and Fifteenth Amendments as "'remedial.'" *Boerne*, 521 at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.*; *see also id.* at 525 (The Enforcement Clause, does not authorize Congress to pass "'general legislation upon the rights of the citizen . . . .'" (quoting *Civil Rights Cases*, 109 U.S. 3, 13–14 (1883))). In the context of the Fourteenth

Amendment, the Court recognized that "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id*. at 529. The same is true of the enforcement power under the Fifteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("*Morgan*") (comparing "similar power" to enforce provisions of the Fourteenth and Fifteenth Amendments).

Therefore, under both the Fourteenth and the Fifteenth Amendments, Congress only has the remedial power to enforce the provisions of those amendments. *Shelby Cnty*, 133 S. Ct. at 2629 ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command."); *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d at 553 ("Congress's fifteenth amendment enforcement authority reaches only legislation directed against racial or color discrimination"). As a result, Congress did not have the power to expand the scope of the rights protected by the Fifteenth Amendment when it passed the VRA. *Shelby Cnty*, 133 S. Ct. at 2631 (holding the reauthorization of Section 4(b) of the VRA unconstitutional because it was not an appropriate application of Congress's Fifteenth Amendment enforcement power.). Instead, the VRA can only ensure that a

citizen's right to vote is not "denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV § 1.

2. A correct interpretation of Congress's Fifteenth Amendment enforcement power maintains the traditional separation of powers between Congress and the Judiciary.

An expansive interpretation of the Enforcement Clause would grant Congress nearly limitless power. *Boerne*, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning . . . it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."). Instead, a correct interpretation of Congress's limited enforcement powers recognizes that the design of the Thirteenth, Fourteenth, and Fifteenth Amendments "has proved significant . . . in maintaining the traditional separation of powers between Congress and the Judiciary." *Boerne*, 521 U.S. at 523–24.

"[T]he principle of separation of powers . . . underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). In short,

the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id.* (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers"); *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."). Therefore, to protect individual liberty, this Court must ensure that Congress only acts within its defined powers. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *Mistretta*, 488 U.S. 380 ("the central judgment of the Framers of the Constitution" was that "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); The Federalist No. 51 (James Madison) (C. Rossiter ed., Mentor 1999) (the

"separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty").

To ensure that Congress only acts within its defined powers, this Court must interpret Section 2 of the VRA as protecting only what is guaranteed by the Fifteenth Amendment. Thus, assuming Section 2 of the VRA is constitutional, a law can only violate that statute if it "denie[s] or abridge[s]" the right to vote "on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1. Any broader interpretation of the VRA expands congressional power and alters the balance and separation of powers between the three co-equal branches of government. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

B. ACT 23 Does Not Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color.

The district court concluded, based on the evidence presented at trial, that Black and Latino voters are more likely than voters of other races to lack qualifying ID, and these voters are more likely to have difficulty obtaining qualifying ID. *Frank*, 2014 WL 1775432 at *33. Based on these purported effects, the district court incorrectly held that Act 23 violates Section 2 of the VRA. *Id.* The district court's conclusion erroneously expands the meaning

of the rights protected by the Fifteenth Amendment. As demonstrated by Defendants-Appellants, the district court applied a test that is inconsistent with both the language of Section 2 and the language of the Fifteenth Amendment. *See* Appellants' Br. at 27. In so doing, the district court unlawfully expanded the scope of the rights protected by Section 2 and the Fifteenth Amendment to include a purported right against any voting legislation that might affect some minorities differently. Appellants' Br. at 28 (Demonstrating that Section 2 "does not address likelihoods or probabilities of burdens, but instead focuses on 'results.'").

Act 23 does not violate the Fifteenth Amendment because it does not deny or abridge the right to vote on account of race, color, or previous condition of servitude. U.S. Const. Amend. XV. Accordingly, Act 23 does not violate Section 2 of the VRA, which can only "enforce" the provision of the Fifteenth Amendment. *Id.* Act 23's photo ID requirement applies equally to people of all races and colors. Wis. Stat. § 6.79 ("[E]ach eligible elector, before receiving a serial number, shall state his or her full name and address and present to the officials proof of identification."). All citizens, regardless of race, must present a photo ID when voting. *Id.* Any purported difficulties with obtaining an ID are the same for anyone who lacks an ID, regardless of race or color. *See Crawford*, 553 U.S. at 198 (opinion of

Stevens, J.). As a result, one cannot reasonably argue that Act 23 "denies" the right to vote based on race, because Act 23 does not apply different voting regulations to voters of different races.

Furthermore, Act 23's minimal burdens do not rise to the level of denying or abridging the right to vote for any Wisconsin citizen of voting age. Based upon the teachings of *Crawford*, Act 23 "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198 (opinion of Stevens, J.); *Id.* at 209 (Scalia, J. concurring) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable."). If Act 23 does not deny or abridge the right to vote of any individual citizen, then Act 23, which applies equally to every citizen, does not deny or abridge the right to vote based on race or color. Accordingly, this Court should reverse the judgment of the district court and hold that Act 23 does not violate Section 2 of the VRA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Dated this 30th day of June 2014.

Respectfully submitted,

Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,219 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated this 30th day of June, 2014.

s/ Steven J. Lechner
Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system on June 30, 2014, and that all other participants are registered with that system and service was effected through this Court's CM/ECF system.

s/ Steven J. Lechner
Steven J. Lechner
Counsel of Record
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae