No. 14-803

In the Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,
v.
SCOTT WALKER, *et al.*,
Respondents.

-and-

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) OF WISCONSIN, *et al.*,
Petitioners,
v.
THOMAS BARLAND, *et al.*,
Respondents.

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

BRIEF OF LATINOJUSTICE PRLDEF, HISPANIC NATIONAL BAR ASSOCIATION, HISPANIC FEDERATION, AND NATIONAL COUNCIL OF LA RAZA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JUAN CARTAGENA
JOSE L. PEREZ
JACKSON CHIN
MARTHA PARDO
LATINOJUSTICE PRLDEF
99 Hudson Street
14th Floor
New York, NY 10013
(212) 219-3360

DANIEL R. WALFISH
Counsel of Record
WILL B. DENKER
SAGIV Y. EDELMAN
MILBANK, TWEED, HADLEY & MCCLOY LLP
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000
dwalfish@milbank.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—cont'd

Page(s)

TABLE OF AUTHORITIES—cont'd

Page(s)

Constitutional Provisions

Statutes and Rules

TABLE OF AUTHORITIES—cont'd

Page(s)

Other Authorities

TABLE OF AUTHORITIES—cont'd

Page(s)

BRIEF OF LATINOJUSTICE PRLDEF, HISPANIC NATIONAL BAR ASSOCIATION, HISPANIC FEDERATION, AND NATIONAL COUNCIL OF LA RAZA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community especially across the Eastern United States. It has worked to secure the voting rights and political participation of Latino voters since 1972, when it initiated a series of suits to create bilingual voting systems throughout the United States.

The Hispanic National Bar Association ("HNBA") is a nonprofit, nonpartisan, national professional association that represents the interests of over 100,000 attorneys, judges, law professors, and other legal professionals of Hispanic descent in the United States. The HNBA has thirty-eight affiliated bars in various states across the country. The continuing mission of the HNBA is to improve the study, prac-

[1] Counsel of record for all parties received timely notice of *amicus* LatinoJustice PRLDEF's intent to file this brief. Respondents' written consent to the filing of this brief is being submitted herewith. Petitioners lodged a blanket consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

tice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. Since its inception 40 years ago, the HNBA has served as the national voice for Hispanics in the legal profession and has promoted justice, equity, and opportunity for Hispanics.

Hispanic Federation ("HF") is the nation's premier Latino nonprofit membership organization. HF uplifts millions of Hispanic children, youth and families through public policy advocacy, innovative community programs and strengthening Latino nonprofits. By working with a dynamic network of leading Latino community-based organizations, HF is able to fulfill its mission to empower and advance the Hispanic community. As part of its advocacy strategy, HF works with its network leadership to educate policymakers, funders, the public and media about the needs and aspirations of Latinos in the areas of education, health care, immigration, economic empowerment, civic participation, the environment and more. HF has historically fought for freedom, justice and equality for Latinos and all Americans regardless of race, ethnicity, national origin, immigration status, English proficiency, gender or sexual orientation.

The National Council of La Raza ("NCLR") – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – as-

sets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization headquartered in Washington, DC, serving all Hispanic subgroups in all regions of the country. It has state and regional offices in Chicago, Los Angeles, Miami, New York, Phoenix, and San Antonio.

Amici regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. This is such a case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition raises a critical issue of national importance impacting millions of Latino voters. Wisconsin's Act 23, like the increasing number of state statutes of its kind, disenfranchises the poor and disproportionately burdens *amici*'s constituents. The stark reality, documented by the District Court after a lengthy trial but shrugged off by the Court of Appeals, is that many low-income voters (a) lack photo identification (ID), and (b) are not in a position to easily obtain it. Puerto Ricans and other Latinos face special challenges. Among other things, Latinos (as the District Court found in Wisconsin, and as *amici*'s experience indicates is true in other States) are more likely to experience language difficulties and other hurdles in trying to obtain either a photo ID or the documentation needed to obtain one. Puerto Rican birth certificates, for example, are especially problematic.

The population of Latinos is growing rapidly nationwide, and this is especially true of most of the eleven States that have implemented strict photo ID voting laws: Eight rank among the twenty states with the fastest growing Hispanic populations between 2000 and 2010. Rather than allow the voice of Latino communities to increase in proportion to their size in a given State, statutes like Act 23 inhibit the flourishing of Latinos' political influence. The justifications offered for Act 23 do not withstand scrutiny and have more to do with a "troubling blend of politics and race," *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 438 (2006), than anything else. Indeed, Act 23 should be understood against the historical unwillingness in many localities to enfranchise minorities, including language minorities. This Court's review is urgently needed to give meaning to the constitutional and statutory guarantees of the right to vote.

ARGUMENT

I. THE PETITION RAISES AN ISSUE OF FUNDAMENTAL NATIONAL IMPORTANCE

Wisconsin's Act 23 is a modern, more subtle iteration of efforts stretching back well over a century to disenfranchise Latinos and other minorities through voting-related laws and election barriers. Wisconsin is not alone. In the wake of *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), which upheld Indiana's voter ID law on grounds that are largely inapplicable here, many states (including ones with rapidly growing Latino populations) are following suit with strict voter ID laws. This Court's review is accordingly that much more essential.

A. The Fifteenth Amendment, ratified after the Civil War in 1870, guarantees that the right 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." U.S. Const. amend. XV. Almost immediately after its enactment, various states and localities employed creative methods to prevent, abridge, and dilute the minority vote.

Beginning in 1890, certain states conditioned voter eligibility on the ability to pass a literacy test and complete a registration form, knowing full well that more than two-thirds of adult African Americans were illiterate. See *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Meanwhile, alternate tests – including "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter" – "were prescribed in [such] States to assure that white illiterates would not be deprived of the franchise." *Id.* at 311. And, like a game of legislative "Whac-A-Mole," just as one method was outlawed by Congress or declared unconstitutional by this Court, a new one popped up to take its place. See *Guinn* v. *United States*, 238 U.S. 347 (1915) and *Myers* v. *Anderson*, 238 U.S. 368 (1915) (invalidating grandfather clauses); *Lane* v. *Wilson*, 307 U.S. 268 (1939) (striking down procedural hurdles); *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953) (outlawing the white primary); *United States* v. *Thomas*, 262 U.S. 58 (1960) (nullifying improper challenges); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) (forbidding racial gerrymandering); *Schnell* v. *Davis*, 336 U.S. 933 (1949), *Alabama* v. *United States*, 371 U.S. 37 (1962), and *Louisiana* v. *United States*, 380 U.S. 145 (1965) (condemning discriminatory application of voting tests).

Black citizens were not the only targets. Latinos were forced to endure decades of voter discrimination before Congress stepped in to enforce the Fifteenth Amendment. For instance, in the first half of the twentieth century, Mexican Americans in states like Texas were subject to "vigilante mobs, poll taxes, white primaries, intimidation at the polls and denial of interpreters." Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 212 (2004). Even more, literacy tests were used to impede Latino voters throughout the Southwest and in New York (where they started in 1922, soon after Puerto Ricans were granted citizenship and began migrating in greater numbers). See NALEO Educ. Fund, *Latino Voters at Risk: The Impact of Restrictive Voting and Registration Measures on the Nation's Fastest Growing Electorate* 6 (2012), http://www.naleo.org/downloads/LatinoVotersatRisk.pdf. Despite growing numbers of Latinos who spoke only Spanish, many states refused to provide election information in any language other than English. *Id.* at 7-8. Spanish-speakers were thus de facto denied the right to vote.

By 1965, the intimidation of minority voters had become so extreme that Congress acted. Piecemeal litigation and legislation had failed to combat the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309. So Congress passed the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301 et seq., including its critical enforcement provision: Section 2. "Section 2 is permanent, applies nationwide," and, as amended, "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right of any citizen of the United

States to vote on account of race or color.'" *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2619 (2013) (quoting current 52 U.S.C. § 10301(a)).

Cognizant of the decades of voting-related discrimination against Latinos in particular, Congress also included Section 4(e), 52 U.S.C. § 10303(e), to secure the rights of Puerto Ricans who had "been denied the right to vote because of their inability to read and write English." *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966). And, in reauthorizing the VRA in 1975, Congress recognized that it was necessary to adopt specific subsections to protect language minorities. Having found that, "where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process," Congress sought to guarantee non-English speakers the right to register and vote, including by requiring certain jurisdictions to conduct bilingual elections. Pub. L. 94-73, §§ 203, 301, 89 Stat. 400, 401-403 (1975), now codified at 52 U.S.C. §§ 10303(f), 10503. Each VRA provision has been reauthorized and extended with every Congressional reauthorization of the Act, most recently in 2006 (extended until 2032). See James T. Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195, 199 n.15 (2006).

B. Despite the VRA and its successes, the reality, as every Member of this Court acknowledges, is that "voting discrimination still exists; no one doubts that." *Shelby*, 133 S. Ct. at 2619 (opinion of Court); accord *id.* at 2633 (Ginsburg, J., dissenting). This case exemplifies the issue. At the time of *Crawford*, only Indiana and Georgia had photo ID voting requirements. In *Crawford*'s wake, however, 17 states have enacted new, more restrictive voter ID laws.

See Richard Sobel, *The High Cost of 'Free' Photo Voter Identification Cards* 7 n.12 (Charles Hamilton Houston Inst. for Race & Justice, Harvard Law School 2014) (hereinafter Sobel). And Wisconsin is one of eleven states that have enacted strict photo ID requirements (*i.e.*, laws that require photo ID, without exception, in order to cast a regular ballot).[2]

The demographics of those eleven "strict" photo ID states are revealing: Many have large and rapidly growing Latino populations, coupled with a history of voting-related discrimination. Nationwide, the Hispanic population grew 43% between 2000 and 2010; as a share of the total population, this was an increase from 12.5% to 16.3%. Meanwhile, eight out of the eleven states with strict voter ID laws rank among the top twenty states with the fastest growing Hispanic populations between 2000 and 2010: Tennessee (third, with 134% growth), Arkansas (fifth, 114%), North Carolina (sixth, 111%), Mississippi (eighth, 106%), Georgia (eleventh, 96%); Virginia (twelfth, 92%), Pennsylvania (fifteenth, 83%), and Indiana (seventeenth, 82%).[3] Growth in the other

---

[2] Judge Posner's "Table 1", Pet. App. 143a, lists nine, not eleven, states with strict Photo ID laws. The other two states are Pennsylvania and North Carolina, the statutes of which were not in effect at the time of Judge Posner's dissent. Pennsylvania's voter ID law, Act of Mar. 14, 2012, P.L. 195, No. 18 (amending Election Code, 25 Pa. Stat. § 2600 et seq.), although enacted in 2012, was permanently enjoined in 2014, see *Applewhite* v. *Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014), and North Carolina's does not take effect until 2016, see N.C. Gen. Stat. § 163-166.13.

[3] See Jeffrey S. Passel, D'Vera Cohn, and Mark H. Lopez, *Hispanics Account for More Than Half of Nation's Growth in Past Decade, Appendix: Additional Charts and Tables*, PEW

three states, including Wisconsin, was also substantial: Wisconsin's Hispanic population grew by 74%; Texas' by 42%; and Kansas' by 59%. *Id.* Further, until *Shelby*, five strict voter ID states (Georgia, Mississippi, North Carolina, Texas, and Virginia) required federal preclearance to implement restrictive voter ID laws under Section 5 – an indicium of those states' acute history of voter discrimination.[4]

These trends are perverse. It should go without saying that, in a representative democracy, as the Latino population proportionally increases in a given state, so too should its voice. Strict voter ID laws, however, will inhibit Latinos' political influence.

C. Proponents of Act 23 and similar statutes argue that the laws aid in, among other things: "(1) detecting and preventing in-person voter-impersonation fraud; [and] (2) promoting public confidence in the integrity of the electoral process." Pet. App. 36a; see also *id*. at 10a-11a; accord Br. in Opp. 1 ("Voter ID protects against fraud and bolsters voter confidence in the election process.").

[Footnote continued from previous page]

RESEARCH CENTER (Mar. 24, 2011), http://www.pewhispanic.org/2011/03/24/appendix-additional-charts-and-tables/.

[4] That *Shelby* held Section 4's coverage provisions no longer constitutionally tailored to contemporary voting circumstances does not mean that all vestiges of past discrimination in those and other jurisdictions have faded. To the contrary, this Court took care in *Shelby* to explain that it "issue[d] no holding on § 5 itself, only the coverage formula," and invited Congress to "draft another formula based on current conditions." 133 S. Ct. at 2631. And, of course, *Shelby* "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2." *Id.*

Those justifications ring hollow. If strict photo ID requirements were indeed a useful deterrent to impersonation fraud, "we should expect voter-impersonation fraud to be common" – or even reported, as opposed to basically unheard-of – "in those states" that "do not require a photo ID or any strict non-photo substitute." Pet. App. 153a (Posner, J., dissenting). No such evidence or even argument was marshaled below.

Worse, photo ID laws achieve the opposite effect of what proponents say they do: "[S]uch laws undermine the public's confidence in the electoral process as much as they promote it." Pet. App. 44a. Set aside that "perceptions of voter-impersonation fraud are unrelated to the strictness of a state's voter ID law," Pet. App. 152a (Posner, J., dissenting) (citing Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1727 (2008)), as the District Court found based on competent evidence. Pet. App. 43a-44a. Laws like Act 23 feed perceptions that "the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id*. at 46a (citing testimony that, in the District Court's paraphrase, "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system," *id*.).

Moreover, the politics involved in the voter ID laws are unmistakable. "All the strict photo ID states are politically conservative, at least at the state level[.]" Pet. App. 144a (Posner, J., dissent-

ing).[5] Additionally, the evidence suggests "that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting." *Id.* at 146a. In particular, "the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic." *Id.*

Ultimately, voter ID laws like Wisconsin's reflect what this Court has previously termed a "troubling blend of politics and race" in the face of "growing" political participation by Latinos and other minorities. *Perry*, 548 U.S. at 438. As a matter of Equal Protection and Section 2 jurisprudence, as well as common sense, such statutes fail to justify the burdens they impose (to which we next turn). This Court's review is needed to clarify that such statutes are unlawful and have a discriminatory effect or purpose, and to ensure that minorities and others are not unfairly shut out of the political process.

II. WISCONSIN'S PHOTO ID LAW, LIKE OTHER STATE STATUTES OF ITS KIND, IMPOSES SIGNIFICANT, UNJUSTIFIED BURDENS ON LATINOS

A. Act 23 places significant burdens on Wisconsin's Latino population, as the District Court's meticulous findings demonstrate. The District Court heard evidence, including extensive expert testimony, and concluded that Act 23 disproportionately burdens the poor in general and Latinos in

---

[5] This is true of North Carolina and Pennsylvania in addition to the nine States with strict photo ID laws listed in Judge Posner's Tables 1 and 2. See footnote 2, *supra*; Pet. App. 143a-145a.

particular, and violates both the Equal Protection Clause and Section 2 of the VRA.

The Seventh Circuit panel derided the District Court's findings, despite the Court of Appeals' obligation to review factual determinations deferentially. See Fed. R. Civ. P. 52(a)(6). As this Court recently explained in *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 838 (Jan. 20, 2015): "A district court judge who has presided over, and listened to, the entirety of a proceeding has a comparatively greater opportunity to gain [relevant] familiarity than an appeals court judge[.]" Here, the District Court heard extensive evidence concerning the real-world impact of Act 23, which the Seventh Circuit disregarded. But it is not the province of appellate judges to substitute their assumptions about the world for a District Court's findings of fact after a trial.

The panel held that *Crawford* – a case that addressed only Indiana's voter ID law – controlled the question whether Act 23 violated the Equal Protection Clause.[6] Ironically the panel noted that the District Judge in *Crawford* had compiled an "extensive" evidentiary record justifying the outcome in that case. Pet. App. 7a. In essence, the panel adopted a "heads I win, tails you lose" approach: The factual findings of a District Court in another case in another state regarding an *absence* of the evidence that would be needed to invalidate *Indiana's* statute were held *against* petitioners here; at the same time,

---

[6] The VRA was not even before the Court in *Crawford*, and so the panel's concept of immutable "legislative facts" has no bearing on the VRA clam.

the painstaking factual findings of *this* District Court, in *this* State underlying its invalidation of Wisconsin's Act 23 were ignored or swept aside.

B. Chief among the District Court's factual findings were that, in Wisconsin, approximately 300,000 registered voters lack a qualifying photo ID, and that these voters are disproportionately likely to be Latino or Black. Pet. App. 50a, 83a-90a.

At the outset, it is worth noting that the rough magnitude of Wisconsin voters lacking a photo ID is not seriously contested. Judge Easterbrook's opinion ridiculed as "questionable" the conclusion that 300,000 registered voters in Wisconsin lack photo ID. Pet. App. 7a. It did so, in part, because the District Judge in *Crawford*, presiding over a trial in *Indiana*, "rejected a large estimate as fanciful[.]" *Id.* at 7a. But Wisconsin and Indiana are two different states – with two different identification-issuing regimes – and here, the *defense's* estimate in Wisconsin was 167,351 to 368,824. See Pet. App. 107a. Wisconsin is less populous than Indiana, see Pet. App. 152a (Posner, J., dissenting), and the defense's range was more similar to the District Court's figure than it was to the *Crawford* estimate of 43,000 Indiana residents of voting age lacking the requisite identification. Based on the defense's own estimates, between approximately 300 to 750% more *registered voters* in Wisconsin lack a photo ID than do *voting-age residents* in Indiana, and Wisconsin has a smaller population than Indiana.

The District Court attributed the disproportionate lack of photo IDs among Latinos to the reality that Latinos in Wisconsin are more likely to

live in poverty than whites, Pet. App. at 97a-98a (citing testimony of Professors Levine and Burden), and that people who live in poverty are less likely to engage in activities that may require photo ID, such as owning a car, driving, or traveling by airplane.[7] *Id.* at 49a n.9 (citing testimony from three Wisconsin voters who have never flown and lack a qualifying ID), 97a & n.39 (citing expert testimony); see also David Long & Dan Veroff, Univ. of Wis., Madison, LATINOS IN WISCONSIN: A STATISTICAL OVERVIEW 31 (Mar. 2014) (hereinafter Long & Veroff) (89.9% of Wisconsin's Latino population lives in urban areas). In metropolitan Milwaukee, for instance, the Hispanic median household income is 56% that of whites; this disparity is the ninth largest among the country's 36 largest metropolitan areas. Pet. App. 97a n.38. The Hispanic poverty rate is 30%, while the white poverty rate is 8% – the seventh largest disparity out of the country's 36 largest metropolitan areas. *Id.* Throughout Wisconsin, the poverty rate for Latinos is more than double the rate of the total population. Long & Veroff, *supra*, at 54.

The District Court found that Latinos and Blacks are disproportionately likely to live in poverty because they suffer the effects of past and present discrimination in the areas of education, employment, and housing. Pet. App. 98a-100a.[8] The Court

---

[7] But see Pet. App. 149a (Posner, J., dissenting) (photo ID not required to fly).

[8] The District Court, drawing on testimony from experts Levine and Burden, noted for instance that Milwaukee ranks ninth worst of the twelve largest metropolitan areas in the country in Latino/white segregation and worst of the 102 largest metropolitan areas in Black/white segregation. Pet. App. 98a. The Dis-

of Appeals dismissed this finding on the ground that the District Court did not make findings that the discrimination at issue was committed by Wisconsin officially. Pet. App. 17a, 18a, 22a. Even if that were a fair characterization of the District Court's findings, the Court of Appeals' approach conflicts with that of three other Circuits that did *not* require plaintiffs mounting Section 2 challenges to voter-qualification statutes to demonstrate official discrimination – another reason for this Court to accept review. See *Gonzalez* v. *Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc); *Ohio State Conference of NAACP* v. *Husted*, 768 F.3d 524 (6th Cir. 2014); *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224 (4th Cir. 2014).

C. Turning from the number of citizens who simply lack a photo ID to those who might seek to *obtain* one, Act 23 again disproportionately burdens Latinos. The District Court found that Latinos are less likely to possess the underlying documents needed to acquire a qualifying ID, a disadvantage insofar as such voters must "overcome two hurdles to vote rather than one." Pet. App. 94a. Obtaining a qualifying ID typically requires a voter to produce a certified birth certificate proving citizenship, name, date of birth, identity, and Wisconsin residency. Wis. Admin. Code § Trans. 102.15. This is often

---

[Footnote continued from previous page]

trict Court also quoted an expert: "[I]n indicator after indicator . . . the Black community and the Hispanic community in Wisconsin exhibit, without question, the effects of the historical legacy of discrimination as well as the contemporary practices of discrimination." Pet. App. 99a.

particularly complicated for Wisconsin's Latinos, given that they are almost twice as likely to have been born outside Wisconsin as whites. Pet. App. 95a (citing testimony of Professor Burden demonstrating that 75% of white residents were born in Wisconsin, as compared to only 43% of Latino residents); see also Long & Veroff, *supra*, at 11 (45% of Latino residents were born in Wisconsin as of the 2010 Census).

Unsurprisingly, the District Court found that it takes more time and expense to obtain a birth certificate from outside the state of one's residence than it takes to obtain one from within. Pet. App. 55a ("46.9% of eligible voters in Milwaukee County who lack both an accepted photo ID and a valid birth certificate were born outside Wisconsin"). This problem again tends to be experienced acutely by the Latino population, one-third of which in Wisconsin was foreign-born as of the 2010 Census. Long & Veroff, *supra*, at 11. Similarly, the District Court found that "older voters of color face the additional problem of never having had an official birth certificate in the first place." Pet. App. 95a n.36.

Puerto Ricans face unique challenges. In 2010, the Puerto Rican government annulled all birth certificates issued to individuals born there prior to 2010. See 24 L.P.R.A. § 1325. Puerto Ricans constitute almost 14% of Wisconsin's Latino population. See Long & Veroff, *supra*, at 10. The District Court accepted expert testimony that 16.7% of eligible Latino voters in Milwaukee County were born in Puerto Rico, and that 38.4% of those had not acquired a new birth certificate. Pet. App. 96a n.37. To obtain a new birth certificate from Puerto Rico

one must either travel there or pay what one witness described as a "hefty charge" to receive a new birth certificate by mail. *Id.*

Latino voters who endeavor to spend the time and expense to obtain a birth certificate face the "daunting task," Pet. App. 95a, of navigating a process that is not designed to accommodate people who primarily speak Spanish. Consider Judge Posner's "Scrounging for Your Birth Certificate in Wisconsin" Appendix, Pet. App. 160a-171a, from the perspective of a voter with a low level of education, limited English skills, or both. Approximately 17% of Wisconsin's Latino population report speaking English "not well" or "not at all," and 40% have not graduated from high school. (Only 10% of Wisconsin's total population has not graduated from high school.) Long & Veroff, *supra*, at 22, 57. Successfully filling out the complicated forms can be a serious challenge, starting with locating the proper forms to fill out in the first place. For instance, to get to the Spanish-language birth certificate application (which misspells the Spanish word for "birth") on the Wisconsin Department of Health Services website, applicants must first navigate the English-language website, which contains more than 1,000 forms across fifty separate webpages. See FORMS LIBRARY, https://www.dhs.wisconsin.gov/forms/index.htm (last visited Feb. 7, 2015).[9]

---

[9] The website also provides a tutorial explaining how to request a birth certificate – but the tutorial is only available in English. REQUEST FOR A BIRTH CERTIFICATE, https://www.dhs.wisconsin.gov/vitalrecords/birth.htm (last visited Feb. 7, 2015).

For those without internet access or who otherwise attempt to fill out the forms at a Department of Motor Vehicles office (DMV), the process is still fraught with language barriers. One witness at the trial recounted that, during her trip to a Wisconsin DMV, there were no Spanish forms or bilingual personnel available, and that she knew other Latinos who had encountered language barriers at the same DMV. Pet. App. 95a-96a.

There are also out-of-pocket costs, which, for impoverished Latinos and others, can be burdensome to the point of prohibitive. To obtain a birth certificate in Wisconsin, one must pay a fee of $20, Wis. Stat. § 69.22(1)(a), plus the additional cost of travel to and from the DMV. See Pet. App. 58a. Moreover, 90 out of Wisconsin's 92 DMVs close before 5:00 p.m. on weekdays, and only one is open on weekends. *Id*. at 57a. Many individuals therefore have to forgo precious hourly wages even to visit the DMV in the first place. *Id*. at 57a-58a.

D. Respondents' Brief in Opposition argues (at 13-17) that a jerry-built fix by Wisconsin's Supreme Court and a similar Emergency Rule promulgated by its Department of Motor Vehicles literally on the eve of the oral argument in the Court of Appeals somehow meaningfully changed the facts on the ground. There is no merit to this contention.

The measures in question purport to create potential exceptions, available upon special request, to the requirement that an applicant for a photo ID present supporting documents. But, as the District Court found, "it is not clear how members of the public who need to obtain a free state ID will learn

that the DMV now has" the relevant discretion. Pet. App. 198a. The District Court found that an individual who might qualify for the exception "is more likely to give up trying to get an ID than to be granted an exception" and that the new measures therefore would *not* eliminate the financial burdens associated with Act 23. *Id*.

At the oral argument, the panel engaged in an extraordinary colloquy with the State's counsel. One judge confessed that he had been unable to find the text of the Emergency Rule (as opposed to a press release) on the State government's web site, and asked that the Rule be filed with the Court of Appeals, preferably with a customized, shortened internet address. (The State's counsel had explained that the Rule should be accessible by first visiting a web page with an unwieldy address and then conducting a search.) Another judge then asked if the Rule could also be posted on the web site of Wisconsin's General Accountability Board, which oversees the State's elections. Audio Recording: Oral Arg., *Ruthelle Frank v. Scott Walker*, No. 2014-2058, at 55:10-56:20 (Sept. 12, 2014).[10] These judges missed the forest for the trees. For one thing, there are well-known disparities in internet use by income, educational level, and ethnicity. *E.g.*, Kathyrn Zickuhr and Aaron Smith, *Digital differences*, PEW RESEARCH CENTER 5 (Apr. 13, 2012), http://pew internet.org/Reports/2012/Digital-differences.aspx (Hispanics and those with low educational attainment and income use internet in significantly

---

[10] *Available at* http://media.ca7.uscourts.gov/sound/2014/rt.14-2058.14-2058_09_12_2014.mp3.

lower numbers). More generally, the District Judge made a point of observing that the "fee to obtain a birth certificate is only one of many burdens" – namely difficulty, time, hassle, and so on – "that a person who needs to obtain an ID for voting purposes might experience." Pet. App. 199a. The State's half-measures do nothing to address those other burdens.

E. The situation discerned by the District Court and documented by its thorough findings is not an outlier. Nine of the eleven other states with strict voter ID laws, see pages 8-9, *supra,* have large numbers of Latinos living in poverty: As of the 2010 Census, 30.0% or more of the Latino population was in poverty in Arkansas, Georgia, North Carolina, Pennsylvania, and Tennessee; 25.0-29.9% of the Latino population was in poverty in Indiana, Mississippi, and Texas; and 20.0 to 24.9% were in poverty in Kansas. Suzanne Macartney, Alemayehu Bishaw, and Kayla Fontenot, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011*, U.S. CENSUS BUREAU 9, 20 (Feb. 2013), http://www.census.gov/prod/2013pubs/acsbr11-17.pdf.

Many of these states, moreover, have a high percentage of voting-age citizens that live more than 10 miles from the nearest state ID-issuing office: Mississippi (34.8%), Wisconsin (30.1%), Pennsylvania (24.0%), Tennessee (21.0%), Georgia (19.9%), Kansas (13.2%), and Texas (12.7%). See Keesha Gaskins & Sundeep Iyer, Brennan Ctr. for Justice, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 3 (2012). A 2006 survey of Latino officials revealed that 86.2% of the respondents reported a need for Spanish-speaking language

assistance in public elections activities, and less than half of the respondents reported that oral language assistance was available in Spanish at some stage of the election process. See James T. Tucker, *"I Was Asked If I Was A Citizen": Latino Elected Officials Speak Out on the Voting Rights Act* 11-12 (Sept. 2006), http://naleo.org/downloads/NALEO_VRA_Report.pdf.

The costs of acquiring voter identification cards are also significant in many of these states. A recent study of individuals who attempted to obtain so-called "free" voter identification cards in Texas, Pennsylvania, and South Carolina revealed that the all-in costs associated with obtaining a qualifying ID range between $75 and $175. Sobel, *supra*, at 15.

Wisconsin, in other words, is not unique. The Court has an exceptionally well-developed evidentiary record on the basis of which it can and should evaluate Act 23. But *amici* can assure this Court that the conundrums faced by underprivileged Latinos in Wisconsin exist in *other* states with sizable populations of low-income Latinos. Many members of these populations will necessarily lack photo IDs and therefore face the necessity, in the District Judge's words, of "pay[ing] the cost, in the form of time or bother or out-of-pocket expense, to obtain what is essentially a license to vote." Pet. App. 93a. As the District Judge aptly observed: "This is not a political process that is 'equally open to participation' by Blacks and Latinos." *Id*. (quoting current 52 U.S.C. § 10301(b)).

* * *

The panel decision ignored or dismissed as irrelevant all of the evidence that Act 23 imposes unjustified burdens on the right to vote. Instead, the panel thought that "Act 23 extends to every citizen an equal opportunity to get a photo ID." Pet. App. 18a-19a. This notion of "equal opportunity" evokes the old comment about a law that, "'in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" *Griffin* v. *Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in judgment). This Court's review is essential to enforce the constitutional and legislative guarantees against voting-related burdens and discrimination.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

JUAN CARTAGENA
JOSE L. PEREZ
JACKSON CHIN
MARTHA PARDO
LATINOJUSTICE PRLDEF
99 Hudson Street
14th Floor
New York, NY 10013
(212) 219-3360

DANIEL R. WALFISH
Counsel of Record
WILL B. DENKER
SAGIV Y. EDELMAN
MILBANK, TWEED, HADLEY & MCCLOY LLP
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000
dwalfish@milbank.com

Counsel for Amici Curiae

February 2015