No. 14-803

In The

Supreme Court of the United States

RUTHELLE FRANK, *et al.*,

Petitioners,

v.

SCOTT WALKER, GOVERNOR OF WISCONSIN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS (NALEO) IN SUPPORT OF PETITIONERS

EMMET J. BONDURANT
Counsel of Record
JEREMY D. FARRIS
BONDURANT MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
bondurant@bmelaw.com
(404) 881-4100

Counsel for Amicus Curiae NALEO

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioners presented two questions to this Court:

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

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

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INTEREST OF *AMICUS CURIAE*

The National Association of Latino Elected and Appointed Officials ("NALEO") is a 501(c)(4) nonpartisan membership organization whose constituency includes the nation's more than six thousand elected and appointed Latino officials. NALEO is committed to eliminating racial and ethnic discrimination against Latinos and all Americans in elections and political access. NALEO has participated as an *amicus* before this Court, most recently in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). NALEO files this brief in support of Petitioners.[1]

SUMMARY OF THE ARGUMENT

The right to vote is paramount. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). For too long, Latinos suffered open and covert discriminatory state actions that frustrated that right. This Court has recognized those

[1] This *amicus* brief is filed in support of Petitioners with the consent of the parties, and letters confirming that consent are being filed herewith in accordance with this Court's Rule 37.3(a). The *amicus* hereby represents that counsel of record received timely notice of its intent to file this brief under Rule 37.2(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than the *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

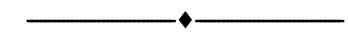
burdens. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006) ("*LULAC*") ("Texas has a long, well-documented history of discrimination that has touched upon the rights of African Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process."); *accord White v. Regester*, 412 U.S. 755, 767-70 (1973); *Katzenbach v. Morgan*, 384 U.S. 641, 644 (1966). In this case, this Court confronts the continuing burden of that fundamental right.

Latino voters have an interest that this Court grant review. Recently-enacted photo-ID laws burden the exercise of the right to vote, and Latino voters suffer disproportionately under their requirements. For historical and socioeconomic reasons, Latinos are less likely to have and to be able to obtain acceptable IDs that States have newly required. Further, the recent enactment of voter photo-ID laws rests on false assumptions about alleged voter fraud – assumptions that stigmatize Latinos and foster anti-Latino and anti-immigrant sentiment. The burden and stigma placed on Latinos by the recent state photo-ID requirements, including Wisconsin's Act 23, are needless and contrary to federal law.

This Court should grant *certiorari* in this case because the court of appeals, when presented with a fully-formed record, misstated and misapplied *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), as well as section 2 of the Voting Rights Act. The appellate court erroneously held that Petitioners had not shown a violation of either the

Equal Protection Clause or section 2. This case allows this Court to clarify constitutional and statutory requirements touching the fraught issue of state voter-ID laws, at a time when such requirements have become necessary to ensure equal treatment of Latinos. It also presents an opportunity for this Court to rely upon the Elections Clause pre-emption analysis set forth in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). Congress has already spoken as to state voter-ID requirements. In section 303(b) of the Help America Vote Act, Congress issued a mandate requiring States to require certain voters to show certain forms of ID. These requirements were enacted consistent with Congress's role over the past fifty years in protecting equal access to elections. Under *Inter Tribal Council*, Congress's mandate pre-empts Wisconsin's recent photo-ID requirements, at least as to voters who registered by mail and vote in federal elections.

The appellate court's errors, and the Seventh Circuit's division on rehearing *en banc*, indicate that *Crawford* is insufficient to guide courts when adjudicating the legality of increasingly restrictive photo-ID laws. Latino voters deserve the correct and certain application of federal law. Accordingly, the petition should be granted.



ARGUMENT

I. THIS CASE PRESENTS RECURRING QUESTIONS OF NATIONAL IMPORT AND SPECIAL SIGNIFICANCE TO LATINOS THAT THIS COURT SHOULD NOW RESOLVE.

A. Restrictive Voter-ID Laws, Including Act 23, Correspond With An Unprecedented Growth In The Latino Electorate.

Latinos are one of the fastest growing electorates in the United States. *See* Pew Research Center, *Latino Voters and the 2014 Midterm Elections* ("*Latino Voters 2014*"), 5 (2014), *available at* http://tinyurl.com/nbq7klq. Between 2006 and 2014 alone, the number of Latino voters increased from 17.3 million to more than 25 million – from 8.6% to 11% of all American voters. Pew Research Center, *5 Takeaways About the 2014 Latino Vote* (Nov. 10, 2014), http://tinyurl.com/qdxleoo. Relatedly, from 2007 to 2014, the number of Latino elected officials nationwide increased from 5,129 to 6,084, nearly 19%. NALEO Educational Fund, *National Directory of Latino Elected Officials* (2014), *available at* http://tinyurl.com/mxasg64. The Latino population is projected to grow in relative importance: Latinos will account for 40% of the increase in eligible voters between 2012 and 2030, by which year there will be 40 million adult Latino citizens. Pew Research Center, *An Awakened Giant: The Hispanic Electorate is Likely to Double by 2030* (Nov. 14, 2014), http://tinyurl.com/aw9lu52.

Since this Court decided *Crawford* seventeen states have enacted increasingly restrictive voter-ID laws; nine have enacted strict photo-ID requirements. *See* Nat'l Conf. of State Legislatures, *History of Voter ID* (Oct. 16, 2014), http://tinyurl.com/orpzfcd. These photo-ID requirements were enacted as public interest in the unprecedented growth of the Latino population has intensified. NALEO Educational Fund, *Latino Voters at Risk: The Impact of Restrictive Voting and Registration Measures on the Nation's Fastest Growing Electorate* ("*Latino Voters at Risk*"), 3 (2012), *available at* http://tinyurl.com/ktcrdna. The enactment of restrictive voter-ID laws has also accelerated as Latino voters have exerted increasingly recognizable influence on electoral outcomes. *See, e.g.*, Latino Decisions, *Obama Wins 75% of Latino Vote*, *Marks Historic Latino Influence in Presidential Election* (Nov. 7, 2012), http://tinyurl.com/awxabew. "[T]roubling blend[s] of politics and race" such as these correspond to the adoption of state laws that threaten Latinos' rights to an equal opportunity to participate in the political process. *LULAC*, 548 U.S. at 442. In this context, Wisconsin enacted Act 23 – one of the most restrictive voter-ID laws in the nation. *See* Nat'l Conf. of State Legislatures, *Voter Identification Requirements/Voter ID Laws* (Oct. 31, 2014), http://tinyurl.com/q7vqhpz.

Enacted in May 2011, Act 23 requires that a voter present proof of identification to vote at a polling place. Wis. Stat. § 6.79. It also requires a voter to provide proof of identification to obtain an absentee

ballot, irrespective of whether a voter applies for an absentee ballot in person at the clerk's office or by mail. *Id.* §§ 6.86; 6.87. Act 23 provides a limited exception for absentee voters who previously supplied acceptable photo ID and whose names and addresses have not changed. *Id.* § 6.87(4)(b)3. Under Act 23, "proof of identification" requires a photo-ID, *id.* § 5.02(16c), and only a narrow set of photo-IDs are acceptable, *see id.* § 5.02(6m)(a)-(f).

B. Strict Photo-ID Laws Disproportionately Burden Latinos' Right To Vote.

Recent state photo-ID requirements, including Act 23, disproportionately impair Latino access to elections. *Latino Voters at Risk*, at 1, 38. Latinos are less likely than their counterparts to already possess a qualifying ID. For example, they are less likely to have driver's licenses. *Latino Voters at Risk*, at 14 (internal citations omitted); *see also* Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws*, GAO-14-634, 21-25 (2014). This is because Latino voters are disproportionately younger, *Latino Voters 2014*, at 8 (finding in 2008 that 33% of Hispanic voters were ages 18 to 29, as opposed to 18% of white, 21% of Asian, and 25% of black voters in that same cohort), and live in urban areas, *see* Pew Hispanic Center, *U.S.-Born Hispanics Increasingly Drive Population Developments*, at 2 (2002), *available at* http://tinyurl.com/pxuwtke. Young people and urban dwellers are less likely to have acquired licenses. *See, e.g.*, Michael Sivak & Brandon Schoettle, *Update:*

Percentage of Young Persons With a Driver's License Continues to Drop, 13 Traffic Inj. Prevention 341 (2012). As they are less likely to already possess a qualifying ID, Latinos disproportionately face the deterrent of having to obtain an ID that they would not have sought but for the photo-ID prerequisite to voting.

Latino voters are also more likely to face significant, and potentially insurmountable, barriers to obtaining an acceptable ID. Latino voters disproportionately lack the underlying documents needed to obtain a qualifying ID, including a birth certificate. This is especially the case for older Latinos. *See* Alice Hetzel, *History and Organization of the Vital Statistical System*, at 59 (Nat'l Ctr. for Health Statistics, 1997), *available at* http://tinyurl.com/oojs2h4 (documenting that states with large Latino populations were many of the last jurisdictions to enter the Census Bureau's birth-registration area). It is also true of Latino voters in Milwaukee County, Wisconsin. *See* Matt A. Barreto, *Rates of Possession of Accepted Photo Identification, Among Different Subgroups in the Eligible Voter Population, Milwaukee County, Wisconsin*, at 20-21 (Apr. 23, 2012), *available at* http://tinyurl.com/qhnzgpp.

Additionally, Latino voters are less likely to have the funds, the ability to take time off from work during limited DMV office hours, and the transportation needed to obtain a government-issued photo ID from distant DMV offices. *Latino Voters at Risk*, at 14 (internal citation omitted); *accord* Matt A. Barreto,

Accepted Photo Identification and Different Subgroups in the Eligible Voter Population, State of Texas, 2014, at 28-29 (June 27, 2014), *available at* http://tinyurl.com/p5s3a2d. They are more likely to be indigent. *See* Kaiser Family Found., *Poverty Rate by Race/Ethnicity* (2013), http://tinyurl.com/lg6d8u2. And they have less income than their counterparts. *See* Bureau of Labor Statistics, *Economic News Release*, *Table 3, Median Usual Weekly Earnings of Full-Time Wage and Salary Workers by Age, Race, Hispanic or Latino Ethnicity, and Sex, Fourth Quarter 2014 Averages, Not Seasonally Adjusted* (Jan. 21, 2015), *available at* http://tinyurl.com/pbkcfv6. Latino voters face an additional logistical barrier in the form of unavailability of language assistance at ID-issuing agencies. *Latino Voters at Risk*, at 14 (internal citation omitted). With fewer resources on average, Latino voters are more likely to encounter various challenges to obtaining an ID. *Id.* at 9 (internal citations omitted).

Consistent with the foregoing analysis of the factors affecting the likelihood of possessing an acceptable ID, after studying the impact Wisconsin's Act 23 could have had on the November 2012 election, the NALEO Educational Fund estimated that of the 139,036 Latino Wisconsinites eligible to vote, 22,000 could have been deterred or prevented from voting, had state-court injunctions not prevented the law's effect. *Latino Voters at Risk*, at 38.

The district court's findings about the impact of Act 23 on Wisconsinite Latinos confirm the NALEO Educational Fund's 2012 analysis. The district court

found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID," Pet'rs' App. at 50, and that a substantial number of those voters "are low-income individuals who either do not require a photo ID to navigate their daily lives or who have encountered obstacles that have prevented or deterred them from obtaining a photo ID," *id.* at 51. The district court then found it "inescapable" that "in Wisconsin, Blacks and Latinos are less likely than whites to possess a qualifying form of photo identification." *Id.* at 84, 90. The court found credible testimony that in 2012 and 2013, Latinos were, respectively, 2.6 and 2.3 times as likely as white voters to lack acceptable photo ID. *Id.* at 85. The district court also found it disproportionately more difficult for Latinos to obtain acceptable ID because Latinos are less likely to have a Wisconsin birth certificate, *see id*. at 95, and "are disproportionately likely to live in poverty," *id.* at 97-98. And the court found that, in Wisconsin, Latino voters "who speak primarily Spanish will face additional difficulties as they try to navigate a process that was designed to accommodate those who speak English." *Id.* at 95.

C. Strict Photo-ID Laws Have Been Enacted Under Circumstances That Stigmatize Latinos.

Photo-ID requirements have been enacted under circumstances that stigmatize Latinos. The recent enactment of an increasing number of state photo-ID

requirements is based on erroneous assumptions about alleged voter fraud which foster anti-Latino and anti-immigrant sentiment. *Latino Voters at Risk*, at 4. For example, Texas Lieutenant Governor David Dewhurst wrote in 2007, in support of a Texas voter ID proposal, that: "I want people to consider that with eight to twelve million illegal aliens currently living in the U.S., the basic American principle of one person, one vote, is in danger." *Id.* at 44 (internal citation omitted). Similarly, Former Maryland Governor Robert Ehrlich wrote in the *Baltimore Sun* that: "Ballot security concerns are heightened in so-called sanctuary states, where undocumented aliens are encouraged to live and work . . . mak[ing] the realization of free and fair elections far more difficult." Robert L. Ehrlich, Jr., *Voter ID Laws Uphold System's Integrity*, Baltimore Sun, Feb. 26, 2012, at 24a, *available at* http://tinyurl.com/melclvd.

This equation of alleged fraud and unauthorized immigration, at a time when many undocumented residents are Latino, creates the public misimpression that illegal Latino votes are being cast and should be suppressed. The refrain of widespread voter fraud, which ostensibly grounds the photo-ID requirements, is false. *See* Richard L. Hansen, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN, 41-73 (2012); Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, April 12, 2007, at A1, *available at* http://tinyurl.com/8unx4me; Pet'rs' App. at 146-49 (Posner, J., dissenting). In particular, there has never

been any verified evidence publicly presented of any, much less widespread, systemic voting by undocumented residents. *See* Lipton & Urbana, at A1 (finding that a five-year Justice Department investigation "turned up virtually no evidence of any organized effort to skew federal elections").

In the district court's estimation, "the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread." Pet'rs' App. at 44. And the false conflation of voter fraud and Latinos "undermin[es] the public's confidence in the electoral process," *id.*, harming Latinos and serving no constructive end.

D. This Court Should Grant *Certiorari* To Clarify The Legality Of Recurring Restrictive Photo-ID Laws.

This Court granted *certiorari* to hear *Crawford* because of its importance. 553 U.S. at 188. This case is much more so. In the wake of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), litigants will increasingly request courts to make "hard judgment[s]" in weighing the burdens that voter-ID laws impose on the right to vote against the interests that states offer to justify those laws. *Crawford*, 553 U.S. at 190. Also, after *Shelby County*, litigants will ask courts to determine whether restrictive state voter-ID laws, which disproportionately impact protected minorities, violate section 2 of the Voting Rights Act. The growth in the Latino electorate, the pattern of adoption of

restrictive voting laws on the heels of demographic change, and the contemporary increase in restrictive voter-ID laws that disproportionately burden Latino voters strongly indicate the recurring nature of the legal issues presented by this case. *See LULAC*, 548 U.S. at 442. Indeed, challenges to restrictive state voter-ID laws in at least two states, North Carolina and Texas, are currently pending in federal courts. *See N. Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6 (2014); *Veasey v. Perry*, No. 14-41127 (5th Cir. 2014).

This Court should now determine the issues presented by this case. *Crawford*, which was decided in the summary-judgment posture, is insufficient to guide courts in the "hard judgment[s]" required under the Equal Protection Clause and section 2. For instance, even though the appellate court's decision conflicts with decisions of this Court, *see infra*, the Seventh Circuit sharply divided on whether to rehear the case *en banc*. Hence, it is unlikely that the courts of appeal will reach a consensus. This lack of guidance causes recurring uncertainty and disuniformity in an area where certainty and uniformity are essential to legitimate government.

The cost of the status quo, in which states enact ever more restrictive photo-ID requirements, is disproportionately borne by Latino voters. Such requirements disproportionately impair Latino political access as the Latino electorate is exerting noticeable influence in elections. This is all the more true where, as here, the law is justified by the casting

of unwarranted suspicion on the Latino community. Act 23 was not only adopted under troubling circumstances, but also has the potential to prevent or deter as many as hundreds of thousands of Wisconsinites, a disproportionate number of them Latino and black, from voting. This Court should grant *certiorari* to address those burdens as they are nationally significant and repeatedly recur.

II. THIS COURT SHOULD ALSO GRANT *CERTIORARI* BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT THAT PROTECT EQUAL POLITICAL ACCESS FOR LATINOS.

A. The Appellate Court Misapplied And Misstated *Crawford*'s Holding.

The court of appeals extended *Crawford* far beyond its holding and misstated the burden that *Crawford* indicated would support a facial attack. In *Crawford*, a majority of this Court determined that under the test set forth by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the plaintiffs failed to show, in the summary-judgment posture, that the burden that Indiana's photo-ID law placed on voting rights was not justified by identified state interests. *See* 553 U.S. at 202-03 (opinion of Stevens, J.); *id.* at 209 (opinion of Scalia, J.). This Court determined that the *Crawford* plaintiffs had shown only a minor burden. *Id.* at 202-03. Applying *Crawford*, the appellate court ruled that the differences between the Indiana statute and Act

23 did not justify a different outcome, despite the district court's factual findings to the contrary made on different evidence after an extensive bench trial. Pet'rs' App. at 2.

The Indiana and Wisconsin statutes create materially different burdens, and the records presented in *Crawford* and the instant case are categorically different. *See id.* at 131 (Posner, J., dissenting); *id.* at 181-82 (Williams, J., dissenting). In *Crawford*, Justice Stevens, who authored the narrower, precedential opinion, found that although the statute placed only a minor burden on many, it imposed a "special burden" on the right to vote of those persons who both lacked a qualifying photo ID and, "because of economic or other personal limitations," found it difficult to secure the required documentation necessary to obtain a qualifying ID. *Id*. at 199. He concluded, however, that this "special burden" was mitigated because, under the Indiana statute, indigent voters could still vote by affidavit. *Id.* In this case, the district court found that "[a] substantial number of the 300,000 plus eligible voters who lack a photo ID" suffered from the "special burden" that Justice Stevens identified because of their lack of a birth certificate and other indigence-related obstacles. *See* Pet'rs' App. at 51, 54. Unlike Indiana's voting-by-affidavit option, "Wisconsin has no [such] provision for indigent voters," *id.* at 134 (Posner, J., dissenting), even though an affidavit exception would foreseeably mitigate disparate effects on Latino voters. The appellate court failed to apprehend that characteristics including the absence of

such an exception cause Act 23 to impose a heavier burden than the Indiana statute. Hence, it does not follow from *Crawford* that the "special burden" imposed by Act 23 would not support a facial attack. To the contrary, that burden cannot be justified by the specious interests offered by Wisconsin. *See id.* at 141-56 (Posner, J., dissenting) (finding the proffered state interests baseless).

Further, the court of appeal's attempt to redefine Petitioners' required showing of burden conflicts with *Crawford*. The appellate court determined that Petitioners needed to demonstrate "that substantial numbers of persons eligible to vote have tried to get a photo ID but been unable to do so," Pet'rs' App. at 4-5, and that the enforcement of Act 23 caused a decrease in "voter turnout," *id.* at 6-7. The appellate court reasoned that the failure to make this showing left the case "in the same posture as Indiana's." *Id.* at 7. But *Crawford* did not require such a showing of burden; instead, it found the record did not demonstrate the number of voters lacking photo ID. 553 U.S. at 200. Moreover, *Crawford* found that a photo-ID requirement imposed a "special burden" on indigent voters who faced obstacles to secure the documentation necessary to obtain a photo ID. *Id.* at 199. Employing *Crawford*'s measure of the burden, the district court explicitly found after an extended bench trial that "approximately 300,000 registered voters . . . lack a qualifying ID," Pet'rs' App. at 50, and that a "substantial number" of the 300,000 suffered the "special burden" identified by Justice Steven's opinion.

In Wisconsin, as throughout the country, a disproportionate number of these voters "specially burdened" are Latino. The district court correctly applied *Crawford*; the court of appeals did not.

B. The Appellate Court Misstated What Constitutes A Violation Of Section 2.

Section 2 of the Voting Rights Act proscribes any state election "standard, practice, or procedure" that abridges the right to vote on account of race or color. 52 U.S.C. § 10301(a). Section 2 is violated if "the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process." *Id.* § 10301(b). Section 2 easily reaches state voter-ID regulations. *See Holder v. Hall*, 512 U.S. 874, 915 (1994) (Thomas J., concurring) (finding that "§ 2(a) must be understood as referring to any standard, practice, or procedure *with respect to voting*").

The appellate court held that Petitioners' showing that Act 23 causes a disparate effect on minorities is insufficient to prove a section 2 violation. Pet'rs' App. at 18. The court interpreted section 2 to require a showing that a state election practice creates "less opportunity" for minorities to participate in the political process. *Id.* It then determined that the district court "did not find that blacks and Latinos have less 'opportunity' than whites to get photo IDs," but only

that blacks and Latinos are less likely to have already obtained a photo-ID. *Id.* "And," the appellate court concluded, "that does not violate §2." *Id.* The court of appeals determined that section 2(b) is an "equal-treatment requirement," not "an equal-outcome command." Accordingly, it held that the district court's finding of disparate effect could not substantiate a section 2 violation. *Id.* at 20.

Contrary to the appellate court's interpretation, a violation of section 2 can "be prove[n] by showing discriminatory effect alone." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *accord Chisom v. Roemer*, 501 U.S. 380, 404 (1991). The district court found discriminatory effect in clear evidence that Act 23's requirements would result in Latinos having less opportunity to vote: "[A]pproximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID," Pet'rs' App. at 50, and Latino voters were 2.6 and 2.3 times as likely as white voters in 2012 and 2013, respectively, to lack acceptable ID, *id.* at 85. Latino voters were likewise found less likely to be able to obtain a qualifying ID. Pet'rs' App. at 95.

The appellate court's ruling is flawed for a further reason. Act 23 does not treat Latinos and all Wisconsin citizens equally and thus does not satisfy section 2(b)'s "equal-treatment requirement," as the appellate court styled it. If Act 23 had required every eligible Wisconsin voter to obtain a new neon-magenta holographic voter ID, then perhaps the statute would have treated each Wisconsin voter equally,

affording each an equal opportunity to obtain the required neon-magenta holographic ID. But Wisconsin did not do that. Rather, Act 23 required every eligible Wisconsin voter to present one of a set of acceptable mostly pre-existing IDs that Latinos, blacks, and other underrepresented voters are less likely than whites to have *ex ante*. Thus, Act 23 disproportionately imposes on Latinos and blacks the burden to obtain an ID just for the sake of voting – this amounts to "less opportunity" under section 2. *See Chisom*, 501 U.S. at 408 (Scalia, J., dissenting) (finding that if it were disproportionately burdensome for black citizens to present themselves at severely limited hours for voter registration, even though the office would be open to all, then the hours limit would cause "*less opportunity to participate*" and would consequently violate section 2) (emphasis added) (internal quotations omitted).

Act 23 does not uniformly impose a "single burden" on all voters. *Cf. Crawford*, 553 U.S. at 205 (Scalia, J., concurring). As the district court found, Act 23 imposes no burden on voters who already have acceptable IDs. *See* Pet'rs' App. at 93. The statute's classifications of acceptable IDs are drawn such that disproportionately more Latinos and blacks lack them *ex ante*. So, the requirement to present a qualifying ID imposes an unequal burden on Latinos and blacks. It is as if Wisconsin required *only* certain less well-off citizens, who are more likely to be Latinos and blacks than whites, to obtain a new neon-magenta holographic ID to vote, while not requiring that ID for the

majority of its citizens. That is unequal treatment, and it violates section 2.

The correct application of section 2's protections is of fundamental importance to the growing Latino electorate and to Latino elected officials whose presence in office has increased in lockstep. Particularly after *Shelby County*, Latino voters rely upon section 2 to safeguard equal access to the ballot box. *See League of Women Voters of N. Carolina*, 135 S. Ct. at 6 (Ginsburg, J., dissenting). Since June 2013, complaints alleging section 2 violations of critical importance to the Latino community have been filed to redress such matters as North Carolina's voter-ID requirement and other ballot-access provisions, *see id*; Texas's voter-ID requirement, *see Veasey v. Perry*, No. 13-cv-193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014); and redistricting in Pasadena, Texas, *see Patino v. City of Pasadena*, No. 4:14-cv-03241 (S.D. Tex. Nov. 12, 2014). This Court's correction of the appellate court's misstatement of section 2 would ensure Latinos' ability to obtain relief and secure equal political access.

C. Federal Law Pre-empts Wisconsin's Photo-ID Requirements, As Applied To Voters Who Registered By Mail, And Thus The Appellate Court's Ruling Conflicts With *Inter Tribal Council*.

Section 303(b) of the Help America Vote Act of 2002 ("HAVA"), Pub. L. No. 107-252, codified at 52

U.S.C. § 21083(b), pre-empts Wisconsin's photo-ID requirement, as applied to voters who registered by mail. The appellate court's upholding Wisconsin's photo-ID requirements conflicts with this Court's determination in *Inter Tribal Council* that "the States' role in regulating congressional elections . . . 'terminates according to federal law.'" 133 S. Ct. at 2257 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). In HAVA, Congress intended to extend broad and equal access to elections and specifically addressed identification for voters in congressional elections who register by mail, *see* 52 U.S.C. § 21083(b), and Wisconsin's power to regulate the same terminates according to Congress's pronouncement. As this Court resolved the proof-of-citizenship requirement in *Inter Tribal Council*, 133 S. Ct. at 2260, it may cleanly resolve the fraught issue of voter identification throughout the nation by clarifying the scope of Congress's pre-emptive intent in section 303(b) of HAVA.

"[T]he Elections Clause empowers Congress to regulate *how* federal elections are held." *Inter Tribal Council*, 133 S. Ct. at 2257. The Clause confers upon Congress the power to provide "a complete code for congressional elections," *id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)), and, thus, the power to alter or supplant state regulations of those elections, *id.* (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). Regulations that Congress enacts pursuant to the Elections Clause necessarily "supersede those of the State which are

inconsistent therewith." *Id.* (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). Because Wisconsin's photo-ID requirements, as applied to voters who registered by mail, are inconsistent with HAVA, they are pre-empted.

As this Court noted in *Crawford*, 553 U.S. at 192-93, section 303(b) of HAVA sets forth explicit identification requirements for States to impose on individuals registering to vote for the first time who submit their applications by mail. 52 U.S.C. § 21083(b)(2). Section 303(b) obliges States to require individuals who registered to vote by mail, and who have not previously voted in an election for federal office, to present identification when voting. *Id.* § 21083(b)(1)-(2). Valid forms of identification include current photo-ID or a current utility bill, bank statement, government check, paycheck, or other government document showing the voter's name and address. *Id.* § 21083(b)(2)(A)(i)-(ii). Section 303(b) does not require States to require that individuals who have registered by mail and have voted previously in an election for federal office in the State – and thus have presented identification required under subsection 303(b)(2)(A) – to present identification when voting in a second or subsequent federal election. The federal statute requires States to require proof of identification at the time of voting only from an "individual [who] has not previously voted in an election for Federal office in the State." *Id.* § 21083(b)(1)(B)(i). HAVA created moderate requirements of limited scope, capable of implementation that mitigates

disparate negative effects on Latinos and other underrepresented voters.

Wisconsin's photo-ID requirements are inconsistent with section 303(b) of HAVA. First, section 303(b)(1) requires Wisconsin to require voters who registered by mail and who vote in their first federal election to present identification when voting in person. *See* 52 U.S.C. § 21083(b)(1), (b)(2)(A)(i) ("in the case of an individual who votes in person"). But the identification that HAVA requires States to accept need not be photo identification. *See* 52 U.S.C. § 21083(b)(2)(A)(i)(II), (ii)(II). Wisconsin, by contrast, requires voters, including voters who registered by mail, to present photo ID in every election when voting in person. Wis. Stat. § 6.79.

Further, Wisconsin does not accept the forms of identification that section 303(b) of HAVA requires States to accept at the time of voting; Wisconsin accepts them only at the time of registration. *Compare* Wis. Stat. § 6.34(3), *with* 52 U.S.C. § 21083(b)(2)(A). Wisconsin requires applicants for voter registration, including those applicants who make their applications by mail, to provide a HAVA-compliant document proving residence "[u]pon completion of a registration form." Wis. Stat. § 6.34(2). Section 303(b) of HAVA, by contrast, requires States to require those voters who registered by mail and vote in their first federal election to prove residence and identification *when voting*, either in person, by presenting a valid document, or by mail, by enclosing a copy of the document with their absentee ballot. 52 U.S.C. § 21083(b)(2)(A).

Wisconsin's acceptance of those documents that HAVA requires it to accept only at the time of registration and not at the time of voting is inconsistent with the requirements of the federal statute.

In sum, as applied to voters who registered by mail, Wisconsin's photo-ID requirements are inconsistent with section 303(b) of HAVA in three ways: First, Wisconsin requires voters, including voters who register by mail, to present *photo* ID when voting, but HAVA allows voters who registered by mail to present *non-photo*-ID when voting. *Compare* Wis. Stat. §§ 6.79, 6.86, 6.87, *with* 52 U.S.C. § 21083(b)(2)(A)(i), (ii). Second, Wisconsin requires voters, including voters who register by mail, to present photo ID in *every* election in which they vote in person, but HAVA requires States to require voters who registered by mail to prove identification only in their *first* federal election in the state. *Compare* Wis. Stat. §§ 6.79, 6.86, 6.87, *with* 52 U.S.C. § 21083(b)(1). Third, Wisconsin allows the HAVA-permissible proofs of identification to prove residence *upon completion of registration*, but HAVA requires States to require them *when voting*. *Compare* Wis. Stat. § 6.34(2), *with* 52 U.S.C. § 21083(b)(2)(A)(i), (ii).

Wisconsin's photo-ID requirements are preempted under *Inter Tribal Council*. There, this Court held that the National Voter Registration Act's ("NVRA") requirement that States "accept and use" the federal form to register voters precluded a State from requiring an applicant "to submit information beyond that required by the form itself." *See* 133

S. Ct. at 2260. Congress mandated that States accept the federal form in the NVRA, in the interest of enhancing Latinos' and all citizens' participation in elections. This Court found that "[t]he implication of such a mandate is that its object is to be accepted as sufficient for the requirement it is meant to satisfy." *Id.* at 2254. This Court concluded that Arizona's demand that applicants for voter registration submit information beyond that "required by the Federal Form . . . [was] 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *Id.* at 2257 (quoting *Siebold*, 100 U.S. at 397).

Wisconsin's photo-ID requirements at issue are "inconsistent with" the mandate that Congress imposed on the States in section 303(b) of HAVA in the same way that Arizona's proof-of-citizenship requirement was "inconsistent with" the NVRA's requirement that States "accept and use" the federal form. In Act 23, Wisconsin imposed several identification requirements on voters who registered by mail *beyond* those which Congress demanded States to require of those same voters. Contrary to HAVA, Act 23 directs poll workers to reject forms of identification – namely, those without a photo – that Congress explicitly deemed acceptable proofs of identification. Further, going beyond Congress's mandate, Wisconsin requires voters who registered by mail to prove identity not only at their first federal election but at every subsequent congressional election.

Wisconsin's power to regulate, in federal elections, the proof of identification of voters who registered by

mail "terminates according to" Congress's demands on the States under section 303(b) of HAVA. *See Inter Tribal Council*, 133 S. Ct. at 2257 (internal quotations omitted). Wisconsin's voter-ID regulations, as applied to voters who registered by mail and who vote in federal elections, impose requirements beyond those mandated by HAVA. Act 23 also conflicts with Congress's purpose in HAVA to improve election administration so that Latinos and all eligible citizens would be assured of equal access to the polls. *See, e.g.,* H.R. Rep. No. 107-329(I), at 31-43 (2001). In the light of *Inter Tribal Council*, the inconsistency between the federal and state statutes is clear. The lower court's upholding Wisconsin's photo-ID requirements cannot stand because they are pre-empted.

This Court should consider that federal law pre-empts Wisconsin's photo-ID requirements. There is no question of this Court's power to do so. Petitioners' claims that Wisconsin has abridged their right to vote undeniably present a "case or controversy" over which this Court has jurisdiction. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (internal citation omitted).

Addressing HAVA's pre-emption of conflicting State photo-ID requirements serves important interests beyond those of the parties. There is a strong federal interest in ensuring the supremacy of federal

law over conflicting and disuniform state voter-ID enactments. Further, the federal courts – and likely this one – will have to decide the pre-emptive effect of HAVA before reaching any final resolution of the constitutionality of state voter-ID laws. This Court should not delay resolving the issue of pre-emption, requiring it to decide this case on potentially unnecessary constitutional issues.

* * *

Federal laws have played a historically indispensable role in protecting Latino voters when State and local policies have imperiled equal political access. *See, e.g.*, *Latino Voters at Risk*, at 6-8 (noting importance of federal law prohibiting literacy tests and requiring language assistance at the polls). The correct interpretation of federal law once again has a critical role to play, at this moment of unprecedented demographic change for the United States, in guaranteeing equal political access in our democracy.

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CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

EMMET J. BONDURANT
Counsel of Record
JEREMY D. FARRIS
BONDURANT MIXSON &
ELMORE LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 881-4100

Counsel for Amicus Curiae
National Association
of Latino Elected and
Appointed Officials