**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

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

Plaintiffs,

v. Case No. 15-CV-324

GERALD C. NICHOL, *et al.*,

Defendants.

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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In its 135-page brief in support of its motion for summary judgment, *see* ECF No. 77 ("Defs. Br." or "D. Br."), the State does not once mention the expert reports that Plaintiffs served on the State a full month before the State's summary judgment filing. This critical omission is fatal to the State's motion because those reports provide powerful support to Plaintiffs' claims.

As discussed in more detail below, the expert report of Dr. Barry Burden, a Professor of Political Science at the University of Wisconsin-Madison ("UW-Madison") who was a faculty member in the Department of Government at Harvard University for seven years before coming to Madison, details Wisconsin's history and the ongoing effects of discrimination and finds that "[t]he dramatic disruption of voting practices resulting from the challenged provisions is likely to negatively affect minority voters more than white voters" and that "[t]he challenged laws inhibit the opportunity to participate based on political views, age, and other seemingly arbitrary voter characteristics." PPFOF 1-3.

The expert report of Dr. Ken Mayer, a Professor of Political Science at UW-Madison who joined the faculty more than 25 years ago, teaches courses on election law, electoral systems, and other topics, and is a faculty affiliate at the UW-Madison La Follette School of Public Affairs, provides substantial empirical support for these conclusions based on recent Wisconsin elections. PPFOF 4. Based on his analysis, Dr. Mayer finds that "the changes to voting and registration enacted since 2011 impose substantial burdens on voters when registering or casting a ballot"; that "these burdens have the greatest effect on identifiable subgroups, particularly racial minorities, young voters, students, and registrants without ID, depressing their turnout by making it significantly harder to register and vote"; and that the negative impact from his empirical analysis "is largest in 2014 and almost entirely absent in 2010, which is strong —

even conclusive — evidence that the effects are the result of changes to voting and registration practices enacted after the 2010 elections." PPFOF 5-7.

Dr. Lorraine Minnite, an Associate professor in the Department of Public Policy and Administration at Rutgers, The State University of New Jersey-Camden, who studies the incidence and effect of voter fraud in American elections and has published a full-length scholarly book on the subject, has also submitted an expert report. PPFOF 8. After conducting a lengthy assessment of evidence of voter fraud, Dr. Minnite concludes that "fraud committed by voters in registering to vote or at the polls is exceedingly rare"; that "American political parties compete as much by demobilizing voters as by mobilizing them, and that it is black Americans who are usually singled out as the targets of demobilization"; and that, "[w]hile proponents of electoral policies that reduce voter access to the ballot purportedly believe that such policies are justified as fraud prevention measures, in the absence of evidence of a problem with voter fraud" and "given historical patterns and evidence and the context for party competition, . . . such policies actually serve as a form of voter suppression." PPFOF 9-11.

Dr. Allan Lichtman, a Distinguished Professor of History at American University who has written scholarly works on quantitative and qualitative methodology in social science and been an expert in numerous voting and civil rights cases, submitted an expert report on behalf of Plaintiffs as well. PPFOF 12. In his report, Dr. Lichtman details current racial disparities on a number of socioeconomic measures and finds, among other things, that "Wisconsin is one of the most unequal states in the nation as gauged by disparities between African Americans and whites on socio-economic measures"; that the "increase in the minority share of the vote in Wisconsin threatens Republicans' electoral prospects"; that the "voter photo ID provision adopted in 2011 in Wisconsin was the most restrictive identification law in the nation at that time"; that

Wisconsin "exceeded all other states in the number of new restrictive voting and registration measures enacted between 2011 and 2014"; and that, "[b]ased on considerable evidence, . . . the majority Republicans deliberately and knowingly enacted a voter photo ID requirement and numerous other legislative measures that placed disparate burdens on the opportunities for African Americans and Hispanics to register and vote in Wisconsin." PPFOF 13-17.

In addition to this evidence, Plaintiffs' claims in this case are supported by evidence from the depositions of Wisconsin Government Accountability Board ("GAB") Director and General Counsel Kevin Kennedy, GAB Elections Divisions Administrator Michael Haas, and GAB Lead Elections Specialist Diane Lowe, and Rule 30(b)(6) depositions of the GAB and the Wisconsin Division of Motor Vehicles ("DMV"), as well as declarations from a number of individuals, including the chief election officials from the Cities of Milwaukee and Madison and individuals involved in get-out-the-vote, voter-registration, and voter-education work. As set forth below, this evidence, taken together with the evidence from the expert witnesses, overwhelmingly establishes that the provisions challenged in this case (the "challenged provisions") impose severe and unjustified burdens on the right to vote and were intended to suppress and in fact suppress disproportionately African-American, Latino, youth, and Democratic voting in Wisconsin. Plaintiffs' claims should proceed to trial.

## SUMMARY JUDGMENT STANDARD

While the standard for summary judgment is well known, "it is worth emphasizing that the non-moving party does not bear the burden of *proving* his case; the opponent of summary judgment need only point to evidence that can be put in an admissible form at trial, and that, if believed by the fact-finder, could support judgment in his favor." *Marr v. Bank of Am., N.A.*, 662 F.3d 963, 966 (7th Cir. 2011) (emphasis in original). Under this standard, the role of the

Court "is to see if the opponent has identified such evidence in the record[.]" *Id*. In so doing, "at summary judgment a court may not assess the credibility of witnesses, choose between competing inferences or balance the relative weight of conflicting evidence; it must view all the evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in favor of the non-moving party." *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005). Thus, all that is required to defeat a motion for summary judgment "is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Here, and as explained in detail below, Plaintiffs' evidence not only permits a finding in their favor for each claim in the suit, it compels it. For this reason, Defendants' motion for summary judgment must be denied.

## ARGUMENT

### I. STANDING AND MOOTNESS

The first four sections of the State's summary judgment brief are devoted to standing and mootness objections. The State repeatedly mischaracterizes plaintiffs' claims, ignores squarely controlling Supreme Court and Seventh Circuit authority, and fails to advise this Court that most of its standing arguments are simply recycled from its earlier briefs in *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015). Judge Adelman repeatedly rejected many of the identical Article III and "statutory standing" arguments the State makes here; the State made its standing objections a principal part of its appeal to the Seventh Circuit; and the Seventh Circuit brushed aside those objections and resolved the case on the merits. This is significant because, as Judge Easterbrook has emphasized, "unless the case presents a justiciable controversy, the judiciary

must not address the merits." *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) ("Article III jurisdiction is always an antecedent question").

One would not learn any of this from reading the State's brief, which fails even to cite, let alone come to terms with, the Article III and "statutory standing" rulings in *Frank v. Walker* and many other controlling on-point decisions. The State's Article III and "statutory standing" objections are no more persuasive now than when it made them before.

### A. Plaintiffs Have Article III Standing To Challenge the Voter ID and Voter Registration Restrictions

The State contends that "[m]ore than 50 separate claims are pending" in this litigation. D. Br. at 2. Yet it challenges plaintiffs' Article III standing only with respect to a few of those claims—specifically, claims relating to the "voter photo ID law" and "claims challenging changes to voter registration requirements." *Id.* at 34, 36. The State raises no Article III standing objections to plaintiffs' challenges to its reductions in in-person absentee ("early") voting, changes in residency requirements, enactment of a law encouraging invasive poll monitoring, elimination of straight-party voting on the official ballot, or elimination for most citizens of the option to obtain an absentee ballot by fax or email. *See* Amended Cpt. ¶¶ 64-88, 119-142. The State has not challenged plaintiffs' standing on any of those claims.

Plaintiffs therefore focus on demonstrating their Article III standing with respect to their challenges to Wisconsin's voter ID and voter registration laws. Since so much of the State's brief is simply borrowed from its *Frank* briefs, it is surprising that it neither cites to *Frank*'s discussion of this issue nor attempts to explain why *Frank* was wrong in rejecting the same

Article III standing objections the State is making again here.[1]

**1. The Individual Plaintiffs Have Article III Standing**

The State argues that that the six individual plaintiffs lack Article III standing to challenge Wisconsin's voter ID law because they each already have either a Wisconsin driver's license or a U.S. passport (or both) that they can present to obtain and cast a ballot. *See* D. Br. at 34-35. The State made this same argument in *Frank v. Walker* and lost. The State argued there "that the only way … an individual voter … could be suffering an injury as a result of Act 23 is if that member currently lacks an acceptable form of photo ID." 17 F. Supp. 3d at 866. Judge Adelman rejected that argument:

> [T]he part of Act 23 that the plaintiffs challenge is the provision requiring a voter to *present* a photo ID at the polls. It is the need to present such an ID that injures a voter and confers standing to sue. … This means that even those members of the plaintiffs who currently possess an acceptable form of ID have standing to sue.

*Id.* (emphasis added); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) ("Requiring a registered voter either to produce photo identification to vote in person

[1] Although this Court recently dismissed Counts 1 and 2 of the Amended Complaint, *see* Opinion and Order, Dec. 17, 2015, Dkt. 66:2, the voter ID issues continue to be highly relevant for at least three reasons. *First*, as the State acknowledges, "Plaintiffs also challenge the voter photo ID law under" several additional counts which remain in litigation. D. Br. at 57. *Second*, as emphasized by plaintiffs and the Court in dismissing Counts 1 and 2, plaintiffs retain the ability to raise their voter ID claims on appeal and to ask the Seventh Circuit to reconsider and/or distinguish the panel decision in *Frank*. Plaintiffs intend to supplement the record with updated evidence of the arbitrary, capricious, and discriminatory impacts of Act 23's voter ID provisions for the Seventh Circuit's (re)consideration. In addition, the *Frank* panel decision itself emphasized that new as-applied claims may be pursued if evidence emerges that the State is abusing its discretion in the actual implementation and administration of Act 23's voter ID requirements, including the "extraordinary petition" process mandated by the Wisconsin Supreme Court. *See* 768 F.3d at 747 n.1 ("Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated."). Plaintiffs believe the emerging evidence demonstrates that the State is exercising its "considerable discretion," *id.*, in an abusive and racially discriminatory manner that only further exacerbates the disproportionate impacts of the voter ID law on people of color. Plaintiffs intend to move to reinstate their direct voter ID challenges to

or to cast an absentee or provisional ballot is an injury sufficient for standing," so "the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person"); *City of Memphis v. Hargett*, 414 S.W.3d 88, 99-100 (Tenn. 2013) (plaintiffs had standing to pursue claims "which are predicated upon their entitlement to vote in person, free of the photo ID requirement," even though they "could have procured a valid photo ID card free of charge or avoided the photo ID requirement by casting an absentee ballot").

The individual plaintiffs in this case likewise object to having to present an official government photo ID in order to vote. *See* PPFOF 33. These plaintiffs have Article III standing to litigate their objections to Wisconsin's voter ID and related laws for all the reasons set forth in *Frank*, *Common Cause/Georgia*, and *Hargett*. The State has offered no reason for distinguishing or disregarding these decisions; it has not even *acknowledged* these contrary authorities.[2]

Wisconsin voters who possess acceptable photo ID under Act 23 also bear the burden of bringing it with them to the polls on Election Day. If it is lost or stolen, or if they forget to bring it, they face greater hurdles to voting and, in many cases, may find themselves completely disenfranchised.[3] Moreover, many voters are discouraged in general or even intimidated by the

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the extent authorized by footnote 1 of the *Frank* panel decision and newly emerging evidence of how the "safety valve" ordered by the Wisconsin Supreme Court is operating in the real world.

[2] As Judge Adelman also observed, "IDs expire, and so even if a person currently holds a valid ID, Act 23 burdens that person with the obligation of keeping it valid." *Frank*, 17 F. Supp. 3d at 866 n.24. The individual plaintiffs complain about those burdens as well. *See* PPFOF 33.

[3] There have been several news reports of politicians who have forgotten to bring voter ID. In Indiana, Julia Carson was told that her congressional ID, which had a photo but no expiration date, was not acceptable; she was only able to vote after a poll worker telephoned a superior, and confirmed that Carson was a member of the U.S. Congress. *See* Amy Goldstein, *Democrats Predict Voter ID Problems*, Washington Post, Nov. 3, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201897.html. In Arkansas, Asa Hutchinson, who was running in the Republican primary for Governor, was only able to vote after a staffer retrieved his ID. *See* Clare Kim, *Pro-Voter ID Candidate Asa Hutchinson Forgets ID Needed to Vote*, May 20, 2014, *available at* http://www.msnbc.com/the-last-word/asa-hutchinson-forgets-

imposition of the voter ID law and, thus, it is the requirement that they present ID—whether they have the required ID or not—that causes them not to vote. PPFOF 34. Finding that presentation of an ID is an injury is not only sufficient to confer standing, but necessary to prevent greater disenfranchisements, burdens, and "abridgements" from occurring.

"'A plaintiff need not have the franchise wholly denied to suffer injury; rather, *[a]ny* concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient.'" *Common Cause/Georgia*, 554 F.3d at 1351-52 (emphasis added, citation omitted); *see also id.* (even "a small injury, 'an identifiable trifle,' is sufficient to confer standing"). Much like a challenge to a law imposing a $1.50 poll tax does not require a plaintiff to show that she cannot pay the tax to challenge it, *see Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), lack of the required identification is not necessary to establish Article III standing to challenge a photo ID law. *Common Cause/Georgia*, 554 F.3d at 1351-52. Accordingly, the six individual plaintiffs—registered and politically active Wisconsin voters who intend to continue voting in the future—are directly and imminently harmed by the voter ID law and its requirement that they present official photo IDs to vote.

The State likewise argues that the six individual plaintiffs lack Article III standing to challenge any of the changes to voter registration requirements because (1) they already are registered to vote, and (2) they "have not alleged that they will need to change their voter registration in the future." D. Br. at 36. At least one of the individual plaintiffs, however, intends to move to new locations in Wisconsin and thus predictably *will* be subject to the new voter registration restrictions in the future. *See* PPFOF 35.

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photo-id-vote. Hutchinson's spokesperson described the experience as a "little bit of an inconvenience." *Id.* Needless to say, average voters are normally not recognizable or influential enough to have a poll worker's rejection of their ID overruled at the polls, nor do they travel with

Moreover, as detailed in the accompanying Proposed Findings of Fact and declarations, many of the individual plaintiffs have a long history of working to register their fellow citizens to vote and getting them to the polls (including through early voting). These plaintiffs intend to continue their registration and GOTV efforts. The State's challenged registration and voting restrictions have made it much more difficult and often impossible for these plaintiffs to engage in their registration and GOTV efforts. *See* PPFOF 36-38.

"Preventing an individual from registering others to vote [and from getting out the vote] has been recognized as a legally sufficient injury for the purpose of standing"—a form of "civic harm" that allows citizens like the individual plaintiffs to challenge restrictions on the ability of *other* citizens to register and vote. *North Carolina State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 341 (M.D.N.C.), *aff'd in part, rev'd in part, and remanded on other grounds*, 769 F.3d 224 (4th Cir. 2014), *cert. denied*, 769 F.3d 224 (2015); *see also Coal for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 398-99 (8th Cir. 1985) (organization had standing "on the basis of" its individual members, who were injured by "the Board's refusal to appoint [them] as deputy registration officials . . . *preventing them from registering new voters*") (emphasis added); *People Organized for Welfare & Emp't Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 170 (7th Cir. 1984) (suggesting that organization might have Article III standing if it "had been trying to advance its goal [of improving the lot of the poor and unemployed] by registering new voters itself" but was "prevented" from doing so); *cf. Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 142 (2d Cir. 2000) (individual had standing to challenge new restrictions on candidate nominating petitions because she had interest in witnessing petition signatures to help her favored candidate gain access to the ballot); *Common Cause v. Bolger*, 512

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staffers who can quickly retrieve forgotten driver's licenses. In similar situations, their burdens could be quite significant, and they may be completely disenfranchised.

F. Supp. 26, 30 (D.D.C. 1980) (candidates challenging incumbents were injured by congressional franking privilege because they were forced to raise additional funds).

**2. The Organization Plaintiffs Have Article III Standing**

An organization can suffer Article III injury in two ways. First, it can "bring suit to redress an injury suffered by one or more of its members, even if the organization itself has not been injured"—an injury that establishes "associational" (or "derivative," or "representative") standing. *Frank*, 17 F. Supp. 3d at 864. *Second*, the organization can "seek redress for [its] own injuries," which can include "devot[ing] resources, however minimal, to dealing with effects of a new law that are adverse to its interests." *Id.* It is well-established that organizations involved in registering voters and getting them out to vote suffer Article III injury if new registration and voting laws interfere with their registration and GOTV efforts, or cause them to divert resources away from other activities to deal with the additional burdens and costs of the new laws. *See Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Frank*, 17 F.3d at 864-65.

The State deals with these two forms of organizational standing by mischaracterizing the first and entirely ignoring the second, even though federal courts in Wisconsin and elsewhere repeatedly have held that a variety of organizations have standing under the "diversion of resources" theory to challenge state voter suppression laws.

As for "associational" standing, the State contends that One Wisconsin and Citizen Action are not membership organizations like political parties, trade groups, unions, or religious congregations, and therefore lack standing "because they have no members." D. Br. at 37; *see also id.* at 35. The State takes far too narrow a view of what constitutes a "member" of a civil rights organization. One Wisconsin and Citizen Action are funded through contributors, work to

implement their goals through thousands of committed volunteers or supporters, and serve their constituents on an ongoing basis through one election cycle after another. *See* PPFOF 39. "[I]t would exalt form over substance" to hold that only a "traditional voluntary membership organization" has "associational standing" under Article III to bring suit on behalf of its "constituency." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344-45 (1977).[4]

As for the other form of standing—*not even acknowledged* by the State *anywhere* in its 135-page brief—the federal courts repeatedly and unanimously have held that organizations participating in the political process have Article III standing to challenge voter suppression laws that cause the organizations to divert time and money away from other priorities in order to deal with the negative impacts of the new laws. The lead case is *Crawford* itself, in which the Seventh Circuit (per Judge Posner) held that Indiana's voter ID law injured the Democratic Party "by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." 472 F.3d at 951. That specific holding was upheld by the Supreme Court in *Crawford*. *See* 553 U.S. at 189 n.7 ("We also agree with the unanimous view of [the Seventh Circuit decision] that the Democrats have standing to challenge the validity of" Indiana's voter ID law).

This principle applies not apply only to political parties, but to organizations like One Wisconsin and Citizen Action as well. Among the many on-point federal authorities supporting this proposition—every one of them left uncited by the State's brief—*see, e.g., Common*

[4] *See also Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003) (rejecting "overly formalistic" view of membership, and holding that "constituents" can be "the functional equivalent of members for purposes of associational standing"); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (holding that disability-rights "advocacy center" had "associational standing" under Article III to raise claims on behalf of its "constituents"); *cf. Disability Rights Wisconsin, Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 803 (7th Cir. 2008) (reserving question of when advocacy groups have Article III "associational" standing to raise claims on behalf of their non-member "constituents").

*Cause/Georgia v. Billups*, 554 F.3d at 1350 (Georgia voter ID law injured the NAACP by requiring it to "divert resources from its regular [voter registration and GOTV] activities to educate and assist voters in complying with the statute that requires photo identification"; "the NAACP 'cannot bring to bear limitless resources' and the diversion of its resources to address the requirement of a photo identification will cause its 'noneconomic goals to suffer'") (citation omitted); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (NAACP and other civil rights organizations had Article III standing to challenge Florida's imposition of new voting requirements because they "reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and voters on compliance with [the new requirements] and to resolving the problem of voters left off the registration rolls on election day); *Frank v. Walker*, 17 F. Supp. 3d at 864 (upholding standing of four organizations based on "resources expended on educating their members and others about the requirements of Act 23 and on ensuring that those members and others obtain forms of identification that would allow them to vote"—"precisely the kind of expenditure of resources that the Seventh Circuit deemed sufficient to support standing in *Crawford*"); *Veasey v. Perry*, 29 F. Supp. 3d at 903-04 (upholding numerous organizations' standing to challenge Texas voter ID law because "[i]n situations where a violation of individuals' rights will cause a drain on the resources of an association committed to the individuals' rights, the association has stated a case or controversy sufficient to confer standing on the association."); *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 827-28 (S.D. Tex. 2012) (organizations had standing to challenge registration laws that "dramatically increase[d] the administrative costs of conducting registration drives and ban[ned] them from using many common … practices," and "'frustrate[d] and hamper[ed]' their ability to register voters"), *rev'd and remanded on other grounds sub nom. Voting for Am., Inc. v. Steen*,

732 F.3d 382 (5th Cir. 2013).[5]

As detailed in the Proposed Findings of Fact and supporting declarations, One Wisconsin and Citizen Action have each diverted substantial money, staff time, and other resources away from other important priorities in order to help its constituents overcome the many additional hurdles to registration and voting imposed by the challenged laws. *See* PPFOF 40-48 (detailing how, "[i]n light of the complexity of the new laws, and the lack of any comprehensive marketing campaign by the state, One Wisconsin has had to expend more resources on communication and voter education efforts than it would have otherwise," including by diverting "considerable time, effort, and resources" away from dealing with other priorities like the student debt crisis and lobbying for voter protection legislation); PPFOF 43 (detailing how "Citizen Action has had to divert time, money, and attention away from other important work in order to focus on [its] voter education efforts" to counteract the confusion caused by the challenged laws, including staff time and salaries, overtime, transportation, and printing costs).

If past is prologue, we expect the State will argue in its reply that One Wisconsin and Citizen Act are not legally *required* to respond to the challenged registration and voting laws by diverting resources away from other activities. If it does, that argument was thoroughly refuted by Judge Adelman when the State raised it last time around in *Frank*. *See* 17 F. Supp. 3d at 865 ("If a voluntary as opposed to compelled expenditure of resources were insufficient to confer standing, then *Crawford* was wrongly decided, as Indiana's photo-identification law did not 'compel' the Democratic Party to expend resources on getting its supporters to the polls."); *see*

[5] *See also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353–54 (11th Cir.2005) ("it is clear that [an organization's] right to conduct voter registration drives is a legally protected interest"); *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1270 (D. Colo. 2010) (upholding Article III standing of organizations that "had to divert substantial resources from their normal election activities in 2008 to counteract the actual and threatened effects of" new voter registration restrictions).

*also Browning*, 522 F.3d at 1166 (rejecting identical argument that organizational standing exists only if the challenged law "requires" or "compels" the organization to act; such an argument "*finds no support in the law*.") (emphasis added).[6]

The State cites twice to Judge Easterbrook's pronouncement that "[n]o one has standing to object to a statute that imposes duties on strangers." D. Br. at 35, 37, citing *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011). That decision does not remotely support the proposition that civil rights organizations lack Article III standing to challenge voter suppression laws. *FFRF* involved a challenge to a federal statute requiring the President to designate a National Day of Prayer. The law "impose[d] duties on the President alone"; citizens were free to ignore the Day of Prayer without any adverse consequences; and "offense at the behavior of the government … differs from a legal injury." *FFRF*, 641 F.3d at 805-07. Moreover, FFRF and its individual members "ha[d] not altered their conduct one whit or incurred any cost in time or money" in response to the statute. *Id.* at 808.

The circumstances in *FFRF* have nothing to do with voter suppression laws that directly harm eligible voters by making it more difficult for them to register and vote, thereby requiring the plaintiff organizations to divert their limited resources from other activities in order to counteract the harms caused by the challenged measures to their missions, members, and constituents. As *Crawford* and the many other federal decisions cited above repeatedly have held, these kinds of diversions of resources readily establish Article III organizational standing.

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[6] It will be especially outrageous if the State makes this argument in its reply given that the GAB relies so heavily on outside voting-rights organizations to educate and assist the public in dealing with the confusion and bureaucratic maze caused by the challenged laws. The Director of the GAB has acknowledged that, since the Legislature refuses to fund any public education program, GAB must depend on outside groups to undertake this difficult work. PPFOF 390. The State cannot credibly (1) ask for outside groups to divert scarce resources so as to help educate and assist bewildered and discouraged voters, while (2) simultaneously arguing that such groups have no standing because no one is *forcing* them to help do its job.

### B. Plaintiffs' Challenge to the 28-Day Residency Requirement Is Not Moot.

The State argues that plaintiffs' challenges to the 28-day durational residency requirement are "moot" because, although some plaintiffs "*were* subject to the residency requirement" in the past, they no longer are and thus the requirement will no longer impact them "whatsoever." D. Br. at 39 (emphasis added). The State argues that the challenges to the voting residency requirements may only proceed as a class action, which plaintiffs have failed to pursue. *Id.* at 37-39.

This mootness defense fails for multiple reasons. To begin, at least one of the individual plaintiffs intends to move elsewhere in Wisconsin in the future (such as upon graduation from college), and thus will be subject to the potential burdens and inconveniences of the 28-day residency requirement. *See* PPFOF 35.

Moreover, the State's mootness argument completely ignores that the individual and organizational plaintiffs alike have a protected interest in working to register other citizens and getting them out to vote, as discussed in detail above. The 28-day residency requirement directly burdens plaintiffs' efforts to register as many voters as possible and get them out to the polls. *See* PPFOF 49. The decisions cited by the State discussed situations in which an individual plaintiff had "sued only on her own behalf" and then satisfied the durational residency requirement during the course of the litigation. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 399-400 (1975). Plaintiffs here are seeking to protect a different interest—their interest in working to register *other* eligible voters and getting *them* to the polls.

### C. One Wisconsin and Citizen Action Have "Statutory Standing" To Sue Under the VRA

Under 42 U.S.C. § 10302, "the Attorney General or an aggrieved person" may bring a claim to enjoin violations of Section 2. The State does not challenge the individual plaintiffs'

right to bring a Section 2 claim. But it argues that "[t]he corporation Plaintiffs"—One Wisconsin and Citizen Action—"lack statutory standing to assert claims under the Voting Rights Act." D. Br. at 40. It reasons that "[s]tanding under the Voting Rights Act does not extend to non-persons like the two corporation Plaintiffs that *have no race and no right to vote*." *Id.* at 43 (emphasis added); *see also id.* at 3 ("Corporations cannot assert Voting Rights Act claims because they have no race and no right to vote."); *id.* at 40 (reiterating that corporate entities "have no race").[7]

The State evidently did not research its assertion that corporations "have no race," because federal courts repeatedly have ruled just the opposite. *See, e.g., Carnell Construction Corp. v. Danville Redevelopment & Housing Auth.*, 745 F.3d 703, 715 (4th Cir.) (corporation "may establish an imputed racial identity for purposes of demonstrating standing to bring a claim of race discrimination under federal law") (collecting numerous authorities), *cert. denied*, 135 S. Ct. 357, 361 (2014); *Triad Associates, Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 590-91 (7th Cir. 1989) (citing numerous decisions holding that corporations in appropriate circumstances have standing to allege race discrimination), *abrogated on other grounds by Board of Cty. Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1995).

Moreover, the State once again fails to mention that another Wisconsin federal court already has considered and rejected this identical "statutory standing" argument, as have many other federal courts. The State raised this same argument *four times* during the course of *LULAC*

[7] For ease of reference we will use the State's "statutory standing" phrase in this discussion. But as Judge Adelman emphasized the *first* time he rejected the State's "statutory standing" argument in *LULAC of Wisconsin v. Deininger*, "that is not the best way to describe the argument that defendants make" with respect to the "aggrieved person" requirement. *See* Decision and Order, Case No. 12-C-185, Dkt. 84, at 1 (E.D. Wis. Sept. 17, 2013). "Rather, what the defendants argue is that the Voting Rights Act does not grant the organizations a cause of action. It seems to me that whether this is correct is a matter of substantive law rather than a matter of standing." *Id.* at 1-2. Judge Adelman reiterated this point in his *second* decision rejecting the State's "statutory standing" argument. *See Frank*, 17 F. Supp. 2d at 867 ("The question is whether the statute under which the plaintiffs sue, here Section 2 of the Voting Rights Act, authorizes the plaintiffs to sue.").

*of Wisconsin v. Deininger*, the companion case tried together with *Frank v. Walker*, arguing that the Section 2 claims of four organizational plaintiffs must be dismissed because only human beings can be "aggrieved persons" within the meaning of the VRA.[8] Judge Adelman rejected those objections *three times*;[9] the State made this "statutory standing" objection one of its principal arguments on appeal, *see* Seventh Circuit brief cited in note 8 *supra*; and the Seventh Circuit ignored these objections and went right to the merits.

Judge Adelman pointed both to the plain statutory language and to the unambiguous legislative history—neither of which is acknowledged by the State here—in holding that organizations can be "aggrieved persons" under 42 U.S.C. § 10302:

> By statute, the word 'person' in an Act of Congress must be interpreted to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals, unless the context indicates otherwise. 1 U.S.C. § 1. Here, the context does not indicate otherwise. Moreover, the Senate Report on the bill that added the 'aggrieved person' language to the Voting Rights Act states that such a person may be either an individual or an organization. See S. Rep. No. 94-295, at 40 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 806-07 ("An 'aggrieved person" is any person injured by an act of discrimination. It may be an individual or an organization representing the interests of injured persons."). Thus, based on the plain text of the statute and its legislative history, I conclude that the Voting Rights Act grants a cause of action to organizations like the four [organizational] plaintiffs in this case.

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[8] The State *first* raised this "aggrieved person" argument in an August 30, 2013 "Expedited Nondispositive Motion for the Court To Advance Consideration of It Jurisdiction," Case No. 2:12-cv-85-LA, Dkt. 77, at 2-4. The State raised this argument the *second* time in its December 20, 2013 Post-Trial Brief, Dkt. 111, at 64-69. The State raised the same argument the *third* time in its May 12, 2014 Motion to Stay Permanent Injunction Pending Appeal, Dkt. 133, at 15-18. The State raised the "aggrieved person" argument for the *fourth* time in its June 23, 2014 opening Seventh Circuit brief in *Frank v. Walker* (heard on appeal together with *LULAC of Wisconsin v. Deininger*), Case Nos. 14-2058 & 14-2059, 2014 WL 3044079, at **55-56 & n.8.

[9] *See* Decision and Order, *LULAC of Wisconsin v. Deininger*, Case No. 12-C-185, Dkt. 84, at 1 (E.D. Wis. Sept. 17, 2013); *Frank v. Walker*, 17 F. Supp. 2d at 867-68. After the State raised its "statutory standing" objection for the *third* time, Judge Adelman responded: "I have already addressed the statutory-standing argument twice and will not discuss it further[.]" *Frank v. Walker*, 17 F. Supp. 3d at 894 (denying motion for stay of injunction pending appeal).

Decision and Order in *LULAC of Wisconsin v. Deininger*, Case No. 12-C-185, Dkt. 84, at 1 (E.D. Wis. Sept. 17, 2013); *see also Frank v. Walker*, 17 F. Supp. 2d at 867-68.[10]

In addition to ignoring the *Frank/LULAC* decisions on this point, the State fails to acknowledge a recent Texas federal court decision rejecting this same "statutory standing" objection in Section 2 litigation. The Texas court catalogued a long bullet-point list of federal decisions in which organizations "have been permitted to enforce Section 2 of the VRA" through actions for declaratory and injunctive relief. *Veasey*, 29 F. Supp. 3d at 906-07 (collecting authorities). The court also noted that "[d]efendants have failed to supply any case in which organizations … were denied standing to bring a Section 2 challenge." *Id.* at 907. The State in this case likewise has failed to cite any case denying organizational/diversion-of-resource standing to bring a Section 2 challenge to voter suppression laws. *See also Lopez v. Merced Cnty., Cal.*, No. 06-1526, 2008 WL 170696, at *10-11 (E.D. Cal. Jan. 16, 2008) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested. The 1975 Amendment's use of the term 'aggrieved person' [] cited by the Senate Report, support[s] an expansive interpretation.") (internal citations omitted).

The State cites to several decisions that it relied on in *Frank v. Walker*, but which Judge Adelman expressly addressed and distinguished. The State neither acknowledges that its reliance on these cases already has been rejected by another federal court, nor does it attempt to respond to Judge Adelman's detailed critique of its reliance on these cases. For example, the State relies heavily on *Thompson v. North American Stainless LP*, 131 S. Ct. 863 (2011), in arguing that "statutory standing inquiries focus on whether the prospective plaintiff falls within

[10] The "aggrieved person" provision was added pursuant to the 1975 Voting Rights Act Extension, Pub. L. No. 94-73, Title IV, § 401, 89 Stat. 406.

the 'zone of interests' sought to be protected by the statutory provision." D. Br. at 41. But that decision held only that suit is forbidden where "the plaintiff's interests are *so marginally related to or inconsistent with the purposes implicit in the statute* that it cannot reasonably be assumed that Congress intended to permit the suit." 131 S. Ct. at 870 (emphasis added). Judge Adelman responded to the State's reliance on *Thompson* as follows in his *first* decision rejecting the State's "statutory standing" objections:

> In the present case, the defendants do not argue that any of the four organizations falls outside the zone of interests sought to be protected by the Voting Rights Act. Moreover, it strikes me as obvious that at least some of the organizations … fall within that zone: they are organizations concerned with advancing voting rights, their members are individuals that the Voting Rights Act was designed to protect, and the legislative history of the Act explicitly states that organizations representing the interests of injured voters were intended to be granted rights to sue. Accordingly, to the extent that the Voting Rights Act incorporates the zone-of-interests test, it is clear that at least some of the remaining plaintiffs have satisfied that test.

*LULAC of Wisconsin v. Deininger*, Case No. 12-C-185 Dkt. 84, slip op. at 4-5. The State neither acknowledges nor responds to this judicial critique. Indeed, just as in *LULAC*, the State nowhere even argues that One Wisconsin and Citizen Action "fall[] outside the zone of interests sought to be protected by the Voting Rights Act." *Id.* Those two organizations clearly fall within that protected zone. Protecting voting rights is not "marginal" to these organizations—it is a core part of their missions. *See* PPFOF 50.

The State likewise repeatedly cites to *Roberts v. Wasmer*, 883 F.2d 617, 621 (8th Cir. 1989), and a series of district court decisions applying that precedent in arguing that "'[a]ggrieved persons' under the Voting Rights Act are those persons who claim that their right to vote has been infringed because of their race." D. Br. at 42-43; *see also id.* at 16. Once again, the State does not acknowledge that Judge Adelman demonstrated why its reliance on *each* of

these decisions is misplaced, and it does not attempt to respond to his analysis at all. As Judge Adelman explained:

> In *Roberts*, the Eighth Circuit held that 'an unsuccessful candidate attempting to challenge election results does not have standing under the Voting Rights Act.' 883 F.2d at 621. Neither this holding nor the reasoning that led to it supports the defendants' argument that organizations representing the interests of injured voters cannot be aggrieved persons under Section 2. In fact, the Eighth Circuit implied that had the plaintiff in *Roberts* been suing to protect the rights of other voters, he would have been an aggrieved person. *Id.* ("Nor does Roberts allege that he is suing on behalf of persons who are unable to protect their own rights."). Accordingly, the defendants' reliance on *Roberts* and the district court cases decided in its wake is misplaced.

17 F. Supp. 3d at 868.

The State also argues that this Court should reject organizational standing under Section 2 based on the decision in *Assa'ad-Faltas v. South Carolina*, No. 3:12-1786-TLW-SVH, 2012 WL 6103204, at *4 (D.S.C. Nov. 14, 2012). *See* D. Br. at 42. It offers no further explanation of what this decision says or means for standing here. The State also cited to *Assa'ad-Faltas* in the *Frank/LULAC* cases, prompting this footnote by Judge Adelman (quoted here in its entirety):

> The defendants cite one district court case that does not rely on *Roberts*, *Assa'ad-Faltas v. South Carolina*, 2012 WL 6103204 (D.S.C. Nov. 14, 2012), but as I cannot see any way in which that case supports the defendants' argument, I will not discuss it further.

17 F. Supp. 3d at 868 n.26. Perhaps the State will finally explain in its reply brief what *Assa'ad-Faltas* has to do with the "statutory standing" of civil rights organizations to challenge voter suppression laws under Section 2.[11]

[11] The State's reliance on several other district court decisions is equally off-base. *See* D. Br. at 42, citing *Clay v. Garth*, No. 1:11CV85-B-S, 2012 WL 4470289, at *2 (N.D. Miss. Sept. 27, 2012); *McGee v. City of Warrenville Heights*, 16 F. Supp. 2d 837, 845 (N.D. Ohio 1998); and *Illinois Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1267, 1270 (N.D. Ill. 1991). Like *Roberts v. Wasmer*, *Clay* and *McGee* involved unsuccessful candidates who claimed they had been

The State also fails to acknowledge that the Supreme Court and Seventh Circuit have rejected virtually identical "corporations-are-not-persons" arguments in holding that even for-profit corporations fall within the scope of the Religious Freedom Restoration Act, which restricts governments from placing substantial burdens on "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a)-(b) (emphasis added). Like Judge Adelman in *Frank*, both courts looked first to the Dictionary Act and then to the challenged statute's "broader contextual purpose." *Korte v. Sebelius*, 735 F.3d 654, 673-75 (7th Cir. 2013) (Dictionary Act definition governs except in the unusual case where using it would be "like 'forcing a square peg into a round hole'") (citation omitted), *cert. denied*, 134 S. Ct. 2903 (2014); *see also Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2768-69 (2014) ("the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard").

The same reasoning applies here: Organizations like One Wisconsin and Citizen Action can protect the rights of their constituents and members just like corporations can protect the rights of their owners. If a corporation can "exercise" religion, it certainly can fight race discrimination in voting.

## II. UNDUE BURDENS ON THE RIGHT TO VOTE (*ANDERSON-BURDICK*)

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quotation omitted). "A state election law, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting

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defeated because of Section 2 violations. *Illinois Redistricting Commission* involved state agencies and officials seeking to bring a Section 2 claim. These are the same decisions (along with *Roberts* and *Assa'ad-Faltas*) that the State repeatedly cited to Judge Adelman and the Seventh Circuit without success. *See* the four briefs cited in note 8 *supra*.

process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Therefore, courts apply a "flexible standard"—the *Anderson-Burdick* standard—"when considering a challenge to a state election law, and must weigh: 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id*. (quoting *Burdick*, 504 U.S. at 434).

"This balance means that, if the regulation severely burdens the First and Fourteenth Amendment rights of voters, the regulation 'must be narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Burdick*, 504 U.S. at 434); *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("*OFA*") ("[W]hen a state's classification 'severely' burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard."); *McLaughlin v. N. Carolina Bd. of Elections*, 65 F.3d 1215, 1220 (4th Cir. 1995) (holding that under *Burdick* " election laws which place 'severe' burdens upon constitutional rights are subject to strict scrutiny"). "When the state election law 'imposes only reasonable, nondiscriminatory restrictions' upon the rights of voters, the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Burdick*, 504 U.S. at 434); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling opinion). However, a law that imposes even moderate burdens on the right to vote is subject to the "ad hoc balancing" required by *Anderson/Burdick* and must pass more than mere rational basis review.

*See McLaughlin* 65 F.3d at 1221 n.6 (rejecting proposition that "election laws that impose less substantial burdens need pass only rational basis review" and holding that "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational"). Thus, and as the U.S. Supreme Court has made clear, "[h]owever slight [a] burden [on voting] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (controlling opinion) (citation and quotation marks omitted).

In weighing competing interests, courts applying the *Anderson-Burdick* test cannot accept at face value vague or speculative state interests. Instead, courts must "consider 'the precise interests put forward by the State as justifications for the burden imposed by its rule[.]'"*Common Cause Indiana*, 800 F.3d at 921 (quoting *Burdick*, 504 U.S. at 434); *see also OFA*, 697 F.3d at 434 (restriction unconstitutional where state provided "no evidence" to support its "vague" justifications). Further, "the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 927 (quoting *Anderson*, 460 U.S. at 789); *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 547 (6th Cir. 2014) (explaining that valid state interest is insufficient if the challenged practice is "not logically linked to" it and that, while "scattered historical examples of voter fraud" may be sufficient to justify a restriction under rational basis review, such evidence was insufficient under "more searching review" required for a significant burden), *vacated on other grounds sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)

In determining how severely a measure burdens the right to vote, the pertinent question is not the extent to which the measure burdens all citizens or voters generally, but rather the extent to which it burdens individuals who are impacted by it. *See Crawford*, 553 U.S. at 198, 201 (controlling opinion) (relevant burdens "are those imposed on persons who are eligible to vote but do not possess a current photo identification" and assessing burdens on "indigent voters"); *see also id.* at 186, 191 (controlling opinion) (explaining that a voting restriction could be found unconstitutional based on burdens it imposes "on a political party, an individual voter, or a discrete class of voters" and noting that poll taxes violate the Fourteenth Amendment, even if they are not generally burdensome, because of the burdens they impose on poor voters); *NAACP*, 768 F.3d at 543-44 (assessing burdens on "African American, lower-income, and homeless voters"). Courts have thus held unconstitutional laws that burden only a small percentage of voters. *See Anderson*, 460 U.S. at 784 (invalidating law that affected the approximately 6% of the electorate who supported Anderson); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012) ("NEOCH") (law that affected 0.248% of total ballots cast likely unconstitutional); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 244, 244 (4th Cir. 2014) ("[E]ven one disenfranchised voter—let alone several thousand—is too many."). Where, as here, plaintiffs challenge multiple voting restrictions, the effects must be measured cumulatively, not in isolation, and must be justified with evidence of correspondingly weighty interests. *See, e.g.*, *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) ("[W]e evaluate the combined effect" of ballot access rules); *Wood v. Meadows*, 207 F.3d 708, 713 (4th Cir. 2000) (considering other statutory provisions when analyzing constitutionality of filing deadline). As set forth below, the burdens imposed by the challenged provisions—both individually and in combination with each other—outweigh the State's interest in these provisions.

### A. Restrictions on In-person Absentee Voting

#### 1. Reductions in the In-person Absentee Voting Period

Prior to 2011, Wisconsin did not limit the days and times municipalities could provide for in-person absentee voting, and voters could cast in-person absentee ballots up until 5 p.m. on the Monday before an election. Wis. Stat. § 6.86(1)(b) (2011). However, in 2011, the General Assembly limited in-person absentee voting to the period beginning 12 days before an election and eliminated it during the final weekend and Monday before an election. *See* 2011 Wis. Act 23, § 57 (A.B. 7); Wis. Stat. § 6.86(1)(b)). The legislature in 2013 then furthered curtailed in-person absentee voting by eliminating it on all weekends and after 7 p.m. on weekdays. *See* 2013 Wis. Act. 146, § 1 (S.B. 324); Wis. Stat. § 6.86(1)(b). Many Wisconsin municipalities, in particular the larger ones, offered in-person absentee voting during the days, weekends, and hours that have now been eliminated. PPFOF 172-179. For the reasons set forth below, these reductions, both alone and in combination with the other laws challenged herein, unconstitutionally burden the right to vote.

As an initial matter, Defendants are simply incorrect that constitutional protections do not apply to laws reducing the days and hours for absentee voting because voting absentee is a "privilege" and not a "right." Defs.' Br. at 65-66. In support of this argument, Defendants rely principally on *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969), in which the Supreme Court held that Illinois was not required to send absentee ballots to unsentenced inmates. This argument has been made before, and it failed.

In *OFA*, the Plaintiffs challenged Ohio's elimination of the final three days of in-person absentee voting for nonmilitary voters on *Anderson-Burdick* grounds. 697 F.3d at 430. Citing to *McDonald*, Ohio argued that this reduction in in-person absentee voting did not trigger

heightened scrutiny because absentee voting was, in essence, a gratuity subject only to rational basis review. *Id.* The Sixth Circuit rejected this argument.

As the Sixth Circuit explained, "[t]he *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting." *Id.* at 431; *see also McDonald*, 394 U.S. at 808 ("[W]e cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting."). However, the *OFA* "[p]laintiffs did not need to show that they were legally prohibited from voting, but only that burdened voters have few alternate means of access to the ballot." *Id*. (quotation omitted); *see also Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) ("[A] law severely burdens voting rights if the burdened voters have few alternate means of access to the ballot.") (citing *Burdick*, 504 U.S. at 436–37). The plaintiffs in *OFA* had shown this, like the Plaintiffs here, by submitting evidence that voters who were "disproportionately women, older, and of lower income and education attainment . . . represent[ed] a large percentage of those who participated in early voting in past elections." *Id*. Consequently, the court held that "[p]laintiffs have demonstrated that their right to vote [wa]s unjustifiably burdened by the changes in Ohio's early voting regime." *Id*.

As *OFA* and other cases make clear, the *McDonald* holding rested on a failure of proof, not law. Defendants' argument that *McDonald* legally precludes Plaintiffs' challenge to the reduction in in-person absentee voting is therefore wrong. *See O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) ("Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof."); *Goosby v. Osser*, 409 U.S. 512, 520–22 (1973) (holding that inmates had asserted a cognizable challenge to Pennsylvania statute prohibiting "persons confined in a penal institution from voting by absentee ballot" and explaining that *McDonald* itself suggested that result).

The other cases Defendants cite for this proposition are similarly unavailing. *Snyder v. King* involved the question of whether the Indiana Legislature could disenfranchise a convict for the period of his or her incarceration, not whether an otherwise eligible voter was entitled to vote absentee. 958 N.E.2d 764, 785 (Ind. 2011) ("[T]he General Assembly may exercise its police power to deprive all convicted prisoners of the right to vote for the duration of their incarceration."). *Hallahan v. Mittlebeeler*, a 1963 case from Kentucky that addressed whether the state could make absentee voting available to some, but not all voters, holds little value not only because it predates the modern constitutional regime that governs state election laws, but also because it did not address the core claim here that curtailing that availability of in-person absentee voting will effectively prevent some voters from voting. 373 S.W.2d 726, 728 (Ky. 1963).

Finally, *Griffin v. Roupas* does not support Defendants' argument. *Griffin* involved a claim by working mothers that Illinois should adopt universal no-excuse absentee voting because their work and family duties prevented from voting on Election Day, which the court dismissed at the pleadings stage. *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). However, the question of whether a state should adopt absentee voting in the first instance is distinct from the question of whether, having done so and induced thousands of people to rely on that method of voting, it may then withdraw that opportunity without adequate justification.

Rates of absentee voting, both in Wisconsin and nationally, have increased significantly since 2004, and the number of affected voters and the burdens imposed by restricting absentee voting today are thus larger than when *Griffin* was decided. PPFOF 169. More fundamentally, and as detailed in the Plaintiffs' Proposed Findings of Fact, voting is habitual and disruptions caused by reducing the number of days and hours available for in-person absentee voting raises

the cost of voting for the substantial number of Wisconsin voters who had relied on those now-eliminated days. PPFOF 170 (Under the costs of voting analysis, "[a] person votes if the probability of one's vote determining the outcome multiplied by the net psychological benefit of seeing one's preferred candidate win the election is greater than the 'costs' of voting." These costs "include the time, resources, and activity needed to overcome the administrative requirements and other barriers to registering to vote and successfully casting a ballot."); *id.* ("Political science research demonstrates that voting participation is largely a product of habit. As long as the habit is not disrupted, voting in an election actually makes voting in the next election more likely. Once a person becomes a voter, he or she tends to remain a regular voter, at least in major federal elections. The power of habit comes in part from the fact that once having voted, the costs of participating again are much lower. A successful voter has already figured out where, how, and when to register and where, how, and when to cast a ballot. If one of these parameters is altered, it is a disruption that adds new and unexpected costs to the voting calculus."). Thus, the confusion and hardship resulting from the elimination of a previously available voting opportunity distinguishes the situation here from a situation in which a litigant, such as those in *Griffin*, seeks to expand absentee voting beyond its current availability. For these reasons, other courts have rejected arguments that *Griffin* applies to challenges to a reduction in early or in-person absentee voting. *See NAACP*, 768 F.3d at 545 n. 5 (distinguishing *Griffin* because that court had "nothing more than a complaint before it because of the procedural posture of the case" and explaining that plaintiffs' evidence "substantiate[d] their claim that the voting rights of groups they represent are in fact significantly burdened by" reductions in the absentee voting period); *cf. Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012) (holding that, in preclearance case under Section 5 of the Voting Rights Act, reducing early

voting period from discretionary range of 12-14 days to 8 days constituted a "materially increased burden on African-American voters' effective exercise of the electoral franchise," which "would impose a sufficiently material burden to cause some reasonable minority voters not to vote"). In sum, Defendants' cannot shield from constitutional scrutiny Wisconsin's severe reductions in the days and hours for in-person absentee voting.

Under this scrutiny, these restrictions cannot pass muster. Thousands of voters voted during these now-eliminated periods. Approximately 60,000 voters cast in-person absentee ballots on the Monday before the November 2008 general election, a day which was eliminated by Act 23. PPFOF 171. More than 2,000 voters in Madison voted on the weekend available in 2012, which was then eliminated by 2013 Act 146. PPFOF 174. (More than 2,000 Madison voters "utilized in-person absentee voting during the one weekend when in-person absentee voting was available" in 2012). In Milwaukee in 2012, more than 5,000 voters utilized the sole weekend that remained after the enactment of Act 23. PPFOF 180-181.

Furthermore, these restrictions disproportionately burden the voting rights of younger, lower-income, African-American, and Latino voters. As detailed in Plaintiffs' Proposed Findings of Fact, these groups suffer disproportionately from disadvantages in areas such as education, income, employment, and voter habituation. PPFOF 66-106, 225. These disadvantages increase the costs of voting for these groups, meaning that reductions in voting opportunities can burden and, in some cases, result in an outright denial of their right to vote. PPFOF 2, 192.

For example, the elimination of weekend and evening in-person absentee voting disproportionately burdens lower-income individuals, who tend disproportionately to be African American and Latino voters in Wisconsin and whose less flexible job schedules and increased

resource constraints make voting during weekday working hours more difficult. PPFOF 193 (Albrecht Decl. ¶ 24 ("The residents of many of the districts [in Milwaukee] with high turnout for in-person absentee voting are among the working poor and have to work multiple jobs in order to make ends meet. These voters tend to have particularly inflexible schedules, and voting early allows them to avoid concerns about being unavailable during polling hours on Election Day."); Gagner Decl. ¶ 13 (eliminating weekend and evening in-person absentee voting makes it harder to vote due to work schedule); Witzel-Behl Decl. ¶ 9 ("]T]he elimination of weekend early voting hours is particularly likely to burden low-income voters who work two shifts during the week or lack the transportation or child care they need to vote during the week."); Sundstrom Decl. ¶ 10 ("Now that the legislature has reduced the number of in-person absentee voting days, and cut weekends entirely, it is not at all convenient for people who work, especially for lower income people who might work two jobs or have particularly inflexible schedules. Based on my conversations with voters, it is less likely that people with inflexible work schedules, which tend to be lower income people, will be able to vote at all."); Trindl Decl. ¶ 19 ("The reduction in evening and weekend hours makes it more difficult for those voters who work to access in-person absentee voting during the period it is offered.")). Similarly, the elimination of in-person absentee voting on weekends disparately impacts African-American voters by preventing "Souls to the Polls" efforts on Sundays in areas such as Milwaukee. PPFOF 194. These reductions also burden voters with lower level of literacy or English proficiency—who, again, are disproportionately African American and Latino—whose unfamiliarity with the voting process deters them from the polls and who benefit from the increased resources and staff available during in-person absentee voting. PPFOF 195.

These reductions in in-person absentee voting likewise disproportionately impact younger and student voters whose lower levels of voter habituation and access to economic and transportation resources make it more difficult to vote in the now-reduced period for in-person absentee voting or on Election Day. PPFOF 196. And, the reductions impede GOTV efforts by making it harder to mobilize voters. PPFOF 197.

Indeed, the evidence shows that these groups disproportionately use absentee voting, a direct consequence of the increased barriers to voting faced by these voters. Minorities vote absentee at significantly higher rates than whites, with 22.4 percent of African-American and Latino voters in Wisconsin voting absentee in 2008, 2010, and 2012, compared to 15.9 percent of whites. PPFOF 198. Similarly, weekend in-person absentee voting was disproportionately used in areas with high student, African-American, and Latino populations. GAB data shows that, before the elimination of weekend in-person absentee voting, voters in Madison and Milwaukee made up the lion share of all weekend in-person absentee voters, constituting 65 percent of those in 2010, 66 percent during the 2012 recall, and 49 percent during the November 2012 general election who voted on weekends in Wisconsin. PPFOF 199. While these numbers are likely imprecise, *see* PPFOF 200, they leave no doubt that weekend in-person absentee voting was crucial for voters in Milwaukee and Madison, both of which have high populations of minorities and college students.

These reductions in the period for in-person absentee voting also exacerbate the problem of long lines during both the in-person absentee voting period and on Election Day, particularly in larger municipalities with higher African American and Latino populations. PPFOF 201. Indeed, 16.4 percent of African American and Latino voters experienced wait times of 31 minutes or more in the 2008 and 2012 general elections, compared to 5.2 percent of whites.

PPFOF 202. Eliminating the days and times on which these voters voted before Election Day only compounds the problem of long lines by bottlenecking these voters to vote in a narrower timeframe. The problem of long lines is further aggravated by the fact that larger municipalities are limited to a single in-person absentee voting location, leading to depressed turnout in the areas with the highest concentrations of minorities. PPFOF 203. On top of these problems, Wisconsin's voter ID law, its new restrictions on the ability of voters to register to vote, the elimination of straight-ticket voting, and its law facilitating disruptive behavior by election observers all slow down the voting process and cause even more congestion at the polls. PPFOF 204.

Furthermore, the state's vague and illusory justifications for reducing the in-person absentee voting period fail to justify these burdens. Defendants claim that these reductions ease the burdens on local election officials and save money. Dfs.' Br. at 74. However, nothing in the prior law required municipalities to offer in-person absentee voting during the now-eliminated days and times, and each municipality could set a schedule that best accommodated the needs of its residents and its resources. PPFOF 205 ("I mean I think one of the arguments in favor of the hours was that everybody would be the same, but the reality is in many places, they don't offer that many hours because they don't have as many people . . . [I]t provides a uniform window, but it doesn't provide uniform hours because there's a lot of places where there's no voting on certain days of the week or it's only in the afternoon. Q And prior to that change, there was a uniform window also, correct? A. It was still a uniform window in the sense that there was nothing that said you couldn't vote on how early you started or how late, how early you could start or how late you could run or weekends or holidays."). In those municipalities that chose to provide in-person absentee voting more than 12 days before an election, the burden on clerks'

offices was light. PPFOF 206. Moreover, these reductions impose burdens on clerks' offices because they have less time to process in-person absentee voters, thereby straining their resources during the remaining in-person absentee voting period. PPFOF 207. These reductions have also created hassles for clerks who work part time and have other full-time jobs because they cannot schedule appointments with voters during off hours or on weekends. PPFOF 208. For these reasons, election officials in cities such as Madison, Milwaukee, and Green Bay complained about the change. PPFOF 209.

Furthermore, reducing the period for in-person absentee voting did not reduce costs, as Defendants contend, but increased costs by causing more people to vote by mail, which is significantly more expensive and time-consuming for clerks' offices. PPFOF 210 ("Factoring in materials, postage, and the time spent by staff of the Clerk's Office, the cost, as of 2013, of an absentee ballot cast by mail was approximately $4.79, while an absentee ballot cast in person was about 55 cents. Mailing out absentee ballots is a time-consuming process for the Clerk's Office—much more so than handling in-person absentee voting."). Not only does this burden clerks' offices, but it increases the likelihood that a voter's absentee ballot will not be counted. The post office has mistakenly returned absentee ballots to the voter or the person who witnessed the voter's certification due to confusion about the proper address on the absentee ballot envelope. PPFOF 211.

These reductions also cannot be justified by the state's purported interest in uniformity. As under the prior law, clerks' offices are not required to offer in-person absentee voting during the now-allotted time, and the number of hours offered varies widely across municipalities under the current law. PPFOF 212. Thus, there is no more uniformity for the times and days for in-person absentee voting across Wisconsin's municipalities now than there was before the

enactment of 2011 Act 23 and 2013 Act 146. The only change is that municipalities are now constrained in their ability to provide in-person absentee voting opportunities that meet their localized needs. The result is thus not uniformity, but an unequal treatment of voters who reside in Wisconsin's more populous areas and who are afforded fewer *per capita* resources due to the constrained absentee-voting schedule, a problem only worsened by the rule limiting each municipality to a single in-person absentee voting location. PPFOF 213.[12]

In sum, Wisconsin's reductions in the days and times for in-person absentee voting did nothing to ease the burden on clerks' offices. They increased those burdens. They did not reduce costs, they increased them. They did not promote uniformity, but disparate treatment.

At the same time, these reductions deprived the state's voters of voting opportunities that thousands had availed themselves of in previous elections and on which young, lower-income, African-American, and Latino voters have disproportionately relied. Because these "burdened voters have few alternate means of access to the ballot[,]" Act 23's and Act 146's reductions in the period for in-person absentee voting cannot survive the scrutiny required by *Anderson-Burdick*. *OFA*, 697 F.3d at 431 (quotation omitted); *see also Citizens for Legislative Choice*, 144 F.3d at 921 (6th Cir. 1998) ("[A] law severely burdens voting rights if the burdened voters have few alternate means of access to the ballot.") (citing *Burdick*, 504 U.S. at 436–37). Indeed, other courts have not hesitated to strike down more minor reductions to early or in-person absentee voting, and the evidence *a fortiori* compels the same result here. *See NAACP*, 768 F.3d 545 (enjoining Ohio's elimination of the first week of early voting due to the "burdens African American, lower-income, and homeless voters will face in voting, absent the times eliminated");

[12] With respect to Act 146's elimination of weekend voting, Defendants contend that this was needed because "[a] strict reading of the [prior] statute hypothetically authorized a voter to go to a clerk's office at midnight on a holiday and request a ballot." Dfs.' Br. at 76. Tellingly, they offer no evidence that this improbable situation ever actually occurred.

*OFA*, 697 F.3d at 431 (holding that Ohio's elimination of early voting during the final weekend and Monday before an election was unconstitutional where evidence showed that "approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately women, older, and of lower income and education attainment" (quotation omitted)); *Florida v. United States*, 885 F. Supp. 2d at 328-29 (prohibiting reduction in early voting period from range of 12-14 days to 8 days).

**2. Absentee Voting Locations**

Wisconsin limits each municipality to a single in-person absentee voting location. Wis. Stat. § 6.855. In 2014, the number of adults per municipality ranged from 33 to 433,496, a ratio of 13,136 to one, with the result that the number of voters in larger municipalities served by a single location is necessarily many times that in less populous areas. PPFOF 139. This unequal distribution of in-person absentee voting locations severely burdens voters in Wisconsin's larger municipalities, a fact borne out by research showing that a lower density of early voting locations relative to the size of the voting age population decreases overall voter turnout. PPFOF 140.

Because one location must serve a larger volume of voters, lines are inevitably longer in more populous municipalities, thereby decreasing voter turnout in these areas. PPFOF 141. For example, in Milwaukee County, 15.5 percent of voters in the 2008 and 2012 general elections experienced wait times of 31 minutes or more, 260 percent higher than the non-Milwaukee percentage of 4.3 percent. PPFOF 142. This, in turn, disproportionately burdens the voting rights of African Americans, Latinos, young voters between the ages of 18 and 22, and Democrats, all of whom disproportionately reside in Wisconsin's more highly populated areas. PPFOF 143. This combines with the resource disadvantages faced by these groups and their less robust voting habits to aggravate further the burdens these voters face when trying to vote.

PPFOF 144. As a result, only 12 to 14 percent of voters in Milwaukee and Madison—Wisconsin's two largest cities—vote via in-person absentee ballot, compared to 25 to 35 percent of voters in neighboring cities. PPFOF 145.

These problems have been exacerbated by Act 23's and Act 146's reductions in the in-person absentee voting period. PPFOF 146. Without the ability to provide expanded in-person absentee voting opportunities to accommodate the needs of their residents, more voters in cities like Madison and Milwaukee must be served by a single location in a narrower time frame, further increasing the pressure on lines and decreasing voter turnout. PPFOF 147. Moreover, these burdens are not limited to larger cities. Even voters in smaller municipalities and Native American communities have faced long lines as a result of the combined effects of restriction the in-person absentee voting period and the one-location rule, deterring voters in those areas from voting. PPFOF 148 ("In addition, the fact that in-person absentee voting is only offered in one location causes long lines during popular elections, such as the presidential and fall elections, even in smaller communities. And for Native Americans who are used to voting anywhere in the municipality within the reservation during tribal elections, the long lines and seemingly arbitrary designation of one location are burdensome and deter some people from voting."). The elimination of straight-ticket voting, new registration requirements, the Voter ID law, and disruptive behavior of some election observers all further adversely impact wait times by making voting a lengthier process. PPFOF 149. As consequence of these laws, the single-location rule burdens Wisconsin's voters—in particular the African-Americans, Latino, lower-income, and younger voters who reside in the state's larger municipalities—even more than it did in the past. PPFOF 150.

Furthermore, Defendants' assertion that this rule serves the interests "in orderly and cost-efficient election administration" are belied by the facts. Dfs.' Br. at 82. For example, no single location is available in Milwaukee that is easily accessible by public transportation, centrally located and accessible from Milwaukee's neighborhoods, and large enough to serve the city's approximately 500,000 residents. PPFOF 151. Allowing more locations would therefore both encourage voter participation and reduce crowding and long lines at the polls. PPFOF 152. For this reason, the Milwaukee Election Commission has since 2005 requested the discretion to offer in-person absentee voting at multiple locations. PPFOF 153. Indeed, even GAB, whose officials are Defendants in this case, recommended that municipalities be permitted to use multiple in-person absentee voters to promote the "convenience factor for voting." PPFOF 154. Thus, permitting municipalities to open more locations would serve, not impair, the state's interest in "efficient election administration." PPFOF 155.

When viewed in the light most favorable to Plaintiffs, this evidence shows that limiting each municipality to a single in-person absentee location adversely impacts Wisconsin's voters—particularly those in Wisconsin's larger cities—without promoting any legitimate state interest. For this reason, it must fail under *Anderson-Burdick*.

**B. Residency Requirements**

With 2011 Act 23, the Wisconsin Legislature increased from 10 to 28 days the residency requirement for voting in Wisconsin elections. 2011 Wis. Act. 23, § 10-12; Wis. Stat. § 6.02(1)-(3). Under this law, voters who move into Wisconsin from out of state within 28 days of an election are denied the right to vote for any office other than president or vice-president. Wis. Stat. § 6.15(1). Voters who move within Wisconsin are not eligible to vote in their new wards or districts until they have resided there for 28 days. Instead, voters who move within Wisconsin

28 days before an election must vote in their old wards or districts. *Id.* § 6.02(2). These requirements unconstitutionally burden the right to vote for the reasons explained below.

As the Supreme Court held in *Dunn v. Blumstein*, state residency requirements for voting are subject to strict and exacting scrutiny. 405 U.S. 330, 343 (1972) (striking down Tennessee law requiring a person to be resident in state for a year and in county for three months in order to vote). "It is *not sufficient* for the State to show that durational residence requirements further a *very substantial* state interest." *Id.* (emphasis added). "In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity." *Id.* "Statutes affecting constitutional rights must be drawn with precision, and must be tailored to serve their legitimate objectives." *Id.* (quotations and citations omitted)."And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Id.* "If it acts at all, it must choose less drastic means." *Id.* (quotation omitted).

Under this standard, Wisconsin cannot justify the 28-day residency requirement for either new Wisconsin residents or those who move within the state. This requirement plainly burdens both classes of voters. For new Wisconsin residents who move to the state within 28 days before an election, the law completely disenfranchises them from voting for all offices except president and vice-president. This is not a hypothetical risk, and actual voters who have moved to Wisconsin have already been denied the right to vote by this law. PPFOF 217.

For those who move within the state, the 28-day residency requirement burdens their right to vote in numerous ways. First, it disenfranchises them from voting for local offices in the new locality where they reside, an impairment no less significant because the office is smaller. Wis. Stat. § 6.02(2). Moreover, it adversely impacts their ability to cast a ballot by forcing them

either to vote absentee, which requires them to know about this rule before Election Day, or travel to their old polling place. PPFOF 219.

Voters who move within the 28-day period but who were not registered at their previous address face a particularly difficult situation. These voters must still register at their previous address to vote. PPFOF 220. However, many of these voters no longer have valid proof-of-residency documents. PPFOF 221. The 28-residency rule also forces these voters into an uncomfortable situation. When they register at their previous address, such individuals must sign a certification that they intend to reside at that address, which deters such individuals from registering because they cannot honestly represent that they intend to reside at their old address. PPFOF 222. Furthermore, the confirmation mailing clerks' offices send out to new registrants will be returned as undeliverable because these voters no longer live at the address where they registered, confusing clerks as to whether those persons' ballots may be counted and exposing them to the risk that they will be referred to a district attorney for prosecution. PPFOF 223. Understandably, these burdens have deterred a number of Wisconsin voters from voting. PPFOF 224.

Furthermore, these burdens fall disproportionately on poorer and more transient voters who move more frequently, as well as voters with lower levels of educational attainment, access to transportation, and voter habituation, all of which tend disproportionately to be minority and younger voters in Wisconsin. PPFOF 225. Rates of mobility for African Americans and Hispanics are significantly higher than those for whites. PPFOF 226. And, African Americans and Latinos disproportionately lack access to the transportation resources needed to travel to their previous residence. PPFOF 227 ("Blacks living in the "Inner Core" often lack the resources and the need to own an automobile and to hold a driver's license. According to 2000 U.S. Census

data on the population of Milwaukee, whites comprised 51% of residents but only 37% of public bus riders. Conversely, blacks and Latinos comprised roughly 49% of the city's residents, but 63% of public bus riders. These statistics indicate that minorities are less likely to have a car available (and a driver's license) to take advantage of when polling places are open. Data from the 2005 American Community Survey for Milwaukee County indicate that the rate at which households lack access to a vehicle is 9% for whites, 14% for Latinos, and 25% for blacks. Similar disparities in transportation exist in Dane County, where 7% of white households lack access to a vehicle compared to 12% for Latinos and 25% for blacks. Restrictions in the dates and hours available to vote and additional requirements for documentation to register and vote will be disproportionately burdensome for these groups.")). The 28-day residency requirement also disproportionately burden college students—who move more frequently—with the result that a greater number have been forced to vote absentee or return to their previous voting location. PPFOF 228. This law also impedes Plaintiffs' GOTV and voter-registration efforts by hindering their ability to mobilize their core constituencies. PPFOF 229.

The state's purported justifications for the 28-day residency requirement cannot justify these burdens. First, the State cites to a string of decisions upholding residency requirements imposed by various states for the proposition that the 28-day residency requirement is valid as a matter of law. Dfs.' Br. at 129, 133. However, these decisions were all based on record evidence showing that those requirements were appropriately tailored to the states' interests, evidence that is completely absent here. *See Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (upholding Georgia's residency requirement where "[t]he State offered extensive evidence to establish the need" and "Plaintiffs introduced no evidence"); *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (upholding Arizona's residency requirement "[o]n the basis of the evidence before

the District Court" and "uncontradicted testimony").[13] Thus, it is incorrect to cite these cases, as the State does, as providing safe harbors for 30- or 50-day residency requirements within which it can set any requirement it likes without justification.

In contrast to the evidentiary support provided by the states in those cases, the State here has offered not a single piece of evidence to support its conclusory assertion that the 28-day residency requirement was needed to preserve "the integrity of the election process" or the "purity of the ballot box" or to prevent "voter confusion." Dfs.' Br. at 133. Similarly, while the State claims that this requirement was needed to prevent "colonization, raiding, and fraud," it cites not a single incident or even allegation that this ever occurred when the 10-day residency period was in effect. *Id*. As this Court has explained, "confidence based on anything other than rational reasons supported by evidence is either foolishness or superstition, neither of which are reasons to pass legislation or to uphold it as constitutional." MTD Order at 5.

Again, whether these interests are legitimate is not the pertinent question. The pertinent question is "the extent to which those interests make it necessary to burden the plaintiff's rights." *Common Cause Indiana*, 800 F.3d at 927. "And, if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn*, 405 U.S. at 343. Here, the evidence demonstrates that the State has chosen the way of "greater interference," and the 28-day residency requirement must therefore fail.

[13] The State also cites to *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and to *Swamp v. Kennedy*, for this proposition. However, these cases concerned rules governing the primary nominating process, which implicates different associational and political rights than the right to vote at issue here. *Rosario*, 410 U.S. at 752 (challenge to New York's enrollment period for closed primary); *Swamp*, 950 F.3d at 384 (challenge to Wisconsin's prohibition on "multiple party nominations"). Thus, both are inapposite, and neither supports the State's contention that its interests in election administration are furthered by the 28-day residency requirement.

Even GAB's Director disavowed any knowledge of the election administration interests that are served by this rule. PPFOF 230 (Kennedy Dep. Tr. 208:13 - 208:15 ("Q. And what, if any, election administration interests are served by that increase in the residency period? A I don't know.")). In contrast to the State's unsubstantiated assertions, Plaintiffs' uncontroverted evidence shows that eliminating the 10-day requirement was a needless imposition on Wisconsin's voters. PPFOF 231 (Albrecht Decl. ¶ 34 ("The 10-day residency rule did not create any problems for voter registration in Milwaukee that would have been solved by a longer residency period."); Witzel-Behl Decl. ¶ 12 ("The residency rules previously in place in Wisconsin—which required voters to reside in a location for 10 days before an election in order to establish residency—did not create any problems. From the perspective of election administration, there was no reason to change the residency requirement to 28 days.")). Indeed, the 28-day requirement did not fix any problems, it created them.

It increased the workload for clerks' offices who must now explain the new rule to an increased number of confused and intimidated voters. PPFOF 232. Similarly, it has created confusion among poll workers as to how to treat the registrations of voters who register at their previous address and whose confirmation notices are returned as undeliverable. PPFOF 233.

In sum, not only did the 28-day residency requirement fail to further any state interest, it impaired those interests. And, it did so while simultaneously burdening the voting rights of Wisconsin's more transient populations—namely, poorer, minority, and young voters. Viewing this evidence in the light most favorable to Plaintiffs, the State's purported bases for enacting the 28-day residency requirement cannot support the burdens it imposes on Wisconsin's voters.

### C. Registration Restrictions

Since 2010, Wisconsin has enacted a number of measures restricting its voters' ability to register to vote. It has required documentary proof of residence, whereas the previous law only required documentation of residence for those who registered 20 days or fewer before an election. 2013 Wis. Act 182; Wis. Stat. § 6.34(2). It enacted this measure on top of having earlier eliminated corroboration as a means of proving residency, whereby one voter could "vouch" for the residence of another. *See* 2011 Wis. Act 23, §§ 29, 40-41. With Act 23, it also eliminated statewide special registration deputies ("SRDs"), requiring each SRD to be registered by the municipality in which they intended to register voters. 2011 Wis. Act 23, § 26; Wis. Stat. § 6.26(2). It required colleges and universities to certify that a student is a U.S. citizen in order for that student to be able to register with a student ID. 2011 Wis. Act 23, § 33m (A.B. 7); Wis. Stat. § 6.34(3)(a)7.b. It eliminated SRDs at high schools and mandated that high schools not be used as voter registration locations. 2011 Wis. Act 240, § 2; Wis. Stat. § 6.28. Finally, it prohibited local municipalities such as Madison from requiring landlords to provide voter registration forms to new tenants. 2013 Wis. Act 76, § 2; Wis. Stat. § 66.0104(2)(d)1.a.

Provisions regulating the voter-registration process trigger heightened constitutional scrutiny. *Anderson*, 460 U.S. at 788 ("Each provision . . . [that] governs the registration and qualifications of voters . . . inevitably affects . . . the individual's right to vote and his right to associate with others for political ends."); *see also League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1159 (N.D. Fla. 2012) ("*LWV III*") ("Every court that has addressed a constitutional challenge to provisions regulating voter-registration drives has concluded that the governing standards are those set out in *Anderson*[.]"); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) ("In short, to participate in voter registration is to take a position and express a point of view in the ongoing debate

whether to engage or to disengage from the political process. The Court concludes that the act of voter registration is expressive conduct worthy of First–Amendment protection."); *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1333 (S.D. Fla. 2006) ("*LWV I*") (granting preliminary injunction against Florida's voter registration law because it "reduced the quantum of political speech and association" by inhibiting plaintiffs' ability to "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions"); *Project Vote v. Blackwe*ll, 455 F. Supp. 2d 694 (N.D. Ohio 2006) ("[P]articipation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment."). Defendants make no effort to engage with this case law, and consequently fail to engage in any meaningful analysis of Wisconsin's restrictions on voter registration according to the balancing test required by *Anderson/Burdick*. As set forth below, these restrictions unjustifiably burden the ability of Wisconsin's residents to register to vote and engage in voter drives.

**1. Documentary Proof of Residence for Registration**

Requiring documentary proof of residence has burdened Wisconsin's voters, and in some cases resulted in otherwise eligible voters being denied the right to vote. PPFOF 240 (Trindl Decl. ¶ 12; Johnson Decl. ¶ 15 (requirement has "caused numerous eligible voters who wanted to register to be unable to do so due to a lack of sufficient documentation."); Witzel-Behl Decl. ¶ 11 ("The changes to the rules for voter registration enacted since the beginning of 2011 have made it more difficult to register to vote. Since the legislature adopted the requirement that documentary proof of registration be included with voter registrations submitted during open registration, the Clerk's Office has received a couple thousand voter registration forms without

documentary proof of residence.")). For example, in Lac du Flambeaux, a Native American resident was unable to register after he moved in with his mother to care for her because he lacked the necessary documentation, despite the fact that the Chief Election Inspector had been his teacher and knew him personally. PPFOF 241.

These burdens disproportionately affect lower-income, African-American, and Latino voters, who, due to their lower socio-economic status, move more frequently and thus are more likely both to need to reregister and to lack the necessary proof. PPFOF 242 (Sundstrom Decl. ¶ 7 ("In my experience registering voters at off-site locations, the voters who are more frequently turned away for lack of proof of residence are voters who rent, who move frequently, and who tend to be lower income. Much of Milwaukee's poverty is concentrated among Latino and African-American populations, so those voters are disproportionately affected by the proof of residency requirement."); Johnson Decl. ¶ 15 ("In my experience this requirement has also made it more difficult to register voters in the African-American community."); Lichtman Rpt. at 40-41 (imposes a disproportionate burden on minorities because African Americans in Wisconsin are approximately twice as likely to have moved in the previous year compared to whites, and Latinos are more than 50 percent as likely to have moved)). For the same reasons, requiring documentary proof of residence imposes severe burdens on homeless voters. PPFOF 243.

Requiring documentary proof of residence also imposes particular burdens on elderly voters, whose documentation is often in the name of an adult child. PPFOF 244 (Kennedy Dep. Tr. 121:7 - 20; Kennedy Dep. Ex. 11 at 11 (Kennedy testimony before the General Assembly that eliminating corroboration "could work a real hardship on the elderly and women. In many cases current identifying documents such as bank statements and utility bills are in the name of the husband or an adult child.")). Moreover, voters in nursing homes often do not have the

necessary documentation of their residence. PPFOF 245. As a consequence, this requirement, along with the elimination of corroboration as a means of providing residence, has made it virtually impossible for nursing home residents to register to vote. PPFOF 246. Requiring proof of residency burdens student voters, who also move more frequently and are therefore less likely to possess the necessary documentation. PPFOF 247.

Requiring proof-of-residency documentation also impairs the work of those engaged in off-site voter-registration drives by making the process more burdensome and confusing. PPFOF 248. SRDs must verify that they were provided with a voter's proof of residence, a process that is both time consuming for the SRDs and has resulted in them being able to register fewer people. PPFOF 249 (Lowe Dep. Tr. 49:9 - 19; Sundstrom Decl. ¶ 6 ("Now, even off-site registration requires proof of residency. As a result, we turn away more people than we register because so many do not have the proper proof of residency with them. What is acceptable proof is arbitrary. For example, a bank statement is acceptable, but not a credit card statement. Having to stay apprised of these distinctions and educate potential voters is a very time consuming process. Although we give them information about what they do need to register, there is no way to know if they end up registering."); Gosey Decl. ¶ 7; Nelson Decl. ¶ 9; Tasse Decl. ¶ 12 ("In my experience the proof of residency requirement has significantly slowed down the registration process, making it more difficult to register voters on campus or where lots of students gather and even turning some students off from completing a voter registration form."); Johnson Decl. ¶ 15 ("The state's expanded proof-of-residency requirement for voter registration have substantially hindered my voter registration efforts as well. In my experience, the proof of residency requirement has significantly slowed the voter registration process and has caused numerous eligible voters who wanted to register to be unable to do so due to a lack of sufficient

documentation. In my experience this requirement has also made it more difficult to register voters in the African-American community."); Kaminski Decl. ¶¶ 9, 12-13; Kaminski Decl. Ex. B at 2).

For those not registered as SRDs, they must now obtain a copy of the voter's proof of residence, a requirement that has reduced the effectiveness of their voter registration efforts. PPFOF 250 (Kennedy Dep. Tr. 152:19 - 152:22 ("Q. So if it's somebody doing the registration who's not a special registration deputy, the form can only be submitted if they're able to make a copy of proof of residence? A That's right."); Lowe Dep. Tr. 49:20 - 51:9; Lowe Dep. Ex. 60 (email among GAB staff discussing how the proof-of-residency requirement will reduce the number of registration drives)). Indeed, requiring proof of residency at off-site registration is the biggest impediment registrars face to registering new voters. PPFOF 251. And, those who are least likely to be able register during off-site registration drives are African Americans, Latinos, lower income, and students. PPFOF 252.

Because of these burdens and confusion, a number of the voter registrations that have been collected during voter registration drives have been ineffective because they lacked the necessary proof of residency. PPFOF 253. In Milwaukee, more than half of the registrations by mail lacked the required proof of residence document after this law was enacted. PPFOF 254. Indeed, the confusion is so great that even county clerks, who train poll workers and who are presumed to know the law better than voters, have had difficulty understanding the law. PPFOF 255.

Furthermore, the State does not even attempt to offer a justification for requiring documentary proof of residence beyond a mere assertion that it protects the integrity of elections.

Dfs.' Br. at 109-10. It cites not a single incident in which an ineligible voter was able to register or vote under the prior law. This is perhaps unsurprising.

In the words of Neil Albrecht, Executive Director of the City Election Commission in Milwaukee, "[t]he requirement that voter registrations be accompanied by proof of residence during the open registration period is a classic example of a solution looking for a problem." PPFOF 256. Before this law, when a person registered more than 20 days before an election, clerks mailed that person a confirmation postcard that would be returned as undeliverable if that person did not reside at that address, which the evidence shows was a sufficient amount of time for the verification process. PPFOF 257. Not only was the prior law sufficient to safeguard the State's interests, the new law has not made the voter registration process any more secure. PPFOF 258. Moreover, instead of making election administration more efficient, it has slowed down the process of registering voters for election workers and increased wait times for those voters who need to register at their polling location. PPFOF 259 (Kennedy Dep. Tr. 149:3 - 149:6; Witzel-Behl Decl. ¶17 ("This means more work for my staff, which attempts to follow up with these individuals who have unsuccessfully attempted to register. And if we do not receive documentary proof of residence, we are not allowed to register the voter. I also expect that this will increase lines for registration on Election Day, as an increased number of voters will need to register because their prior effort to register was rejected."); Trindl Decl. ¶12; Kaminski Decl. Ex. C at 3 ("These new laws make it more difficult to register before the election, and the new restrictions on proof-of-residence documentation can make registrations take longer, on average, to process. It is easy to see how this could result in more people needing to register at the polls on Election Day and longer lines at the registration table.")). Viewing this evidence in the light

most favorable to Plaintiffs, the State has failed to justify the burdens imposed by its requirement that all voters provide proof of their residence, regardless of when they register.

**2. Elimination of Corroboration**

As explained previously, prior to 2011 Wis. Act 23, voters could prove their residency by having another elector of their municipality corroborate or "vouch" for their address. Thousands of Wisconsinites used this method of registering to vote. From 2006 to October 2012, 35,332 Wisconsin citizens had registered using corroboration. PPFOF 260.

The elimination of corroboration has denied otherwise eligible voters the right to vote. The Native American resident of Lac du Flambeaux discussed above—who lived with his mother and therefore lacked documentary proof of his residence—was well known in the community and could have registered with corroboration. Indeed, the Chief Inspector at his polling location had been his teacher. PPFOF 241. In Waukesha, election officials had to turn away a woman whose residency documents were in the name of her husband. PPFOF 262. During the 2012 recall election, a young voter who lived with his girlfriend was unable to vote because he did not have proof of residence, despite the fact that he lived next door to the Chief Inspector, who knew him personally and could have verified his residence. PPFOF 263.

Moreover, like the proof-of-residency requirement, the elimination of corroboration poses a particular burden on elderly, who often do not have documentary proof of residence because those documents are in the name of a child or because they reside in a nursing home. PPFOF 264. Combined with the proof-of-residency requirement, the elimination of corroboration has made it virtually impossible for elderly voters in nursing homes to vote. *Id.* The elimination of corroboration likewise disparately impacts women voters, whose residency documents are sometimes in the name of their husband. PPFOF 266. And, like the documentary

proof-of-residence requirement, the elimination of corroboration imposes particular burdens minority, lower-income, and homeless voters who suffer from higher rates of residential instability and are less likely to be able to show proof of their residence. PPFOF 266-267. It similarly burdens the voting rights of young voters, many of whom live with their parents and do not have documents in their name. PPFOF 268.

These burdens are not justified by any State interest, and the State does not even offer a discussion of what interests are furthered by eliminating corroboration. Rather, it merely mentions corroboration in passing in the context of asserting that requiring documentary proof of residency was justified. Dfs.' Br. at 109-110. However, like that requirement, corroboration has not furthered any legitimate state interest. It has not reduced the likelihood of fraud, which the evidence shows was never a problem when corroboration was allowed. PPFOF 269. Indeed, registration fraud is virtually non-existent in Wisconsin. PPFOF 271. Instead, it has merely made election administration more difficult. PPFOF 270.

**3. Elimination of Statewide Registration Deputies**

The elimination of statewide SRDs law has burdened Wisconsin's residents by reducing the number and scope of statewide registration drives. Some Wisconsin communities do not offer an SRD program at all, and eliminating statewide SRDs completely deprives those residents of the benefits provided by SRDs. PPFOF 272.

Eliminating SRDs also severely burdens the political and associational rights of those engaged in off-site voter-registration drives by restricting the scope of SRDs' activities and increasing the administrative hurdles associated with being deputized in multiple municipalities. PPFOF 273. For example, this restriction has impeded the efforts of the League of Conservation Voters to register Native Americans, whose reservations and communities are spread across

multiple municipalities. PPFOF 274. Similarly, it has hindered Plaintiff Citizen Action's ability register voters by sowing confusion among both voters and SRDs as to whether an SRD able to register a particular voter. PPFOF 275. And, it has severely restricted the League of Women Voters' ability to register new citizens after naturalization ceremonies in Milwaukee, because those citizens travel from all over the state to attend the ceremony. PPFOF 276.

These burdens on voter-registration activities are compounded by the proof-of-residency requirement and the elimination of corroboration as a means of proving residency, all of which make it more difficult and time consuming for voters to register. PPFOF 277 (Gosey Decl. ¶7 ("The requirement to show proof of residency when registering to vote has hindered my ability to register my fellow students. Students seldom carry proof of residence with them, so when I register a student to vote they often have to access their school enrollment records online, using either on a computer or on a phone, to provide sufficient proof of residence. This extra step in the registration process makes each registration take longer than it otherwise would. As someone who registers students who are often in large groups, this added time causes me miss many perhaps otherwise interested students and likely keeps others from seeking to get registered."); Johnson Decl. ¶15 ("The state's expanded proof-of-residency requirement for voter registration have substantially hindered my voter registration efforts as well. In my experience, the proof of residency requirement has significantly slowed the voter registration process and has caused numerous eligible voters who wanted to register to be unable to do so due to a lack of sufficient documentation. In my experience this requirement has also made it more difficult to register voters in the African-American community.")). Furthermore, with fewer people able to register off-site as a result of the elimination of SRDs and other restrictions such as the proof-of-

residency requirement, more people must go to their polling location to register, causing further congestion and strain on election workers. PPFOF 278.

The State is unable to explain how any legitimate interest is furthered by imposing these burdens on its voters. It cites to two inapposite cases in support of this restriction. Dfs.' Br. at 106. In *Coalition for Sensible & Humane Solutions. v. Wamser*, the Eight Circuit upheld St. Louis's requirement that deputy registrars be employees of the Board of Elections or various government offices. 771 F.2d 395, 399 (8th Cir. 1985). This was justified on the ground only those persons had the expertise to register voters properly. *Id*. The State also cites to a 1972 case from Milwaukee in which the court denied a preliminary injunction to plaintiffs seeking to be appointed as registrars in the City of Milwaukee. *Latin Am. Union For Civil Rights, Inc. v. Bd. of Election Comm'rs of City of Milwaukee*, 349 F. Supp. 987, 988 (E.D. Wis. 1972). The latter opinion provides no analysis in reaching this conclusion, and *Wamser* is inapposite because the State is not contending that SRDs are as a class unqualified to register voters.

While the State claims that statewide SRDs made mistakes, it offers no support beyond conclusory assertions as to how restricting SRDs to individual municipalities might improve upon this practice. Dfs.' Br. at 107. Indeed, some of those who are SRDs under the current law, such as a number of the declarants in this case, were also statewide SRDs previously, and SRDs can still register in multiple municipalities. PPFOF 272. The difference is not improved competency, but only the administrative hurdles over which SRDs must leap to serve Wisconsin's citizens. Thus, the State has offered no justification for restricting the geographic scope of SRDs, a restriction that Plaintiffs' evidence shows to have burdened its voters.

Viewing this evidence in the light most favorable to Plaintiffs, the State's elimination of statewide SRDs fails to survive *Anderson-Burdick*'s scrutiny. *See, e.g.*, *LWV III* , 863 F. Supp.

2d at 1159; *LWV I*, 447 F. Supp. 2d at1333 (S.D. Fla. 2006) (granting preliminary injunction against Florida's voter registration law because it "reduced the quantum of political speech and association" by inhibiting plaintiffs' ability to "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions"); *Project Vote v. Blackwe*ll, 455 F. Supp. 2d at 708 (N.D. Ohio 2006) ("Because the restrictions on voter registration activities outlined above, viewed separately or in combination, do not promote the exercise of the right to vote but, rather, chill the exercise of that right through an unusual and burdensome maze of laws and penalties relating to a major step in the voting process—registration—the public interest can only be protected through elimination of these barriers.").

**4. Elimination of High School SRDs**

Eliminating SRDs at high schools and mandating that high schools not be required to accept registration forms from students and staff burdens the rights of young voters by making it harder for them to register to vote. Wisconsin provided SRDs at high schools since the 1970s, and was an important means of engaging young people in the political process and habituating them to the process of voting and civic participation. PPFOF 279. Despite these benefits, the State has eliminated this program, and the evidence contradicts the State's claim that this serves any true purpose. GAB's Director could only "speculate" as to what election administration interests might be served by the elimination of high school SRDs. PPFOF 280. And, according to the City Clerk of Madison, the requirement was not burdensome. PPFOF 281. Viewing this evidence in the light most favorable to Plaintiffs, the elimination of SRDs at high schools unconstitutionally burdens Wisconsin's younger voters.

**5. Proof of Citizenship on Dorm Lists**

Prior to 2011 Act 23, Wisconsin allowed colleges and universities to provide "dorm lists" to municipal clerks, and college students could use their student IDs to register in conjunction with those lists. Act 23 changed this by requiring that colleges and universities certify that students were U.S. citizens. Thus, under the current law, students may use their IDs only if they also provide either 1) a fee receipt, or 2) a certified list of students who are U.S. citizens. 2011 Act 23, Wisconsin also § 33m; Wis. Stat. § 6.34(3)(a)7.b.

This law burdens the voting rights of college students by making it harder for them to register to vote. The federal Family Educational Rights Privacy Act prohibits the disclosure by colleges of students' citizenship information. PPFOF 283. For this reason, GAB officials opposed this change. PPFOF 284. As a result of concerns about FERPA compliance, many colleges have stopped providing dormitory residence lists, eliminating one of the means students could prove their eligibility to vote. PPFOF 285.

The State waves away the burdens that this imposes on college students by arguing that they may still register with their college IDs by providing a fee receipt. Dfs.' Br. 106. However, this proves too much. Neither the fee receipt nor any other form of proof of residence requires proof of citizenship. PPFOF 286. Moreover, because colleges and universities have largely stopped providing these lists, the ability of the State to determine a student's citizenship is not actually being served. PPFOF 395. Thus, only college students—and, of those, only college students relying on a particular type of proof of registration—must prove their citizenship in order to register. PPFOF 396. This law is not only plainly discriminatory, but fails to serve any rational or legitimate interests of the State.

**6. Prohibition on Local Ordinances**

In 2012, Madison passed an ordinance requiring landlords to distribute voter registration forms to new tenants. PPFOF 287. However, in 2013, the legislature promptly struck this ordinance down by prohibiting local ordinances such as. 2013 Wis. Act 76, § 2; Wis. Stat. § 66.0104(2)(d)1.a. This is another occasion of the State making it harder, rather than easier, for people to vote with no justification.

During the brief period when landlords in Madison were required to provide voter registration forms to their tenants, Madison registered about 500 voters who submitted the forms their landlords had provided to them. PPFOF 288. Eliminating this measure, which encouraged voter participation, disproportionately impacted the students, African Americans, and Latinos who make up the bulk of Madison's rental population. African Americans in Madison are 85 percent more likely to be renters in Madison than whites, and the percentage of Latinos renting rather than owning homes in Madison is 46 percent higher than whites. PPFOF 289.

The only interest the State cites in favor eliminating this ordinance is a vague, unsupported interest in maintaining "uniform laws for mandated landlord/tenant communications throughout the State." Dfs.' Br. at 111. It cites no evidence of complaints from landlords or any other problems created by Madison's ordinance. Thus, because this law serves no State interest, its burden on voters, however, minimal cannot be justified.

**D. Election Observers**

In 2013, Wisconsin also permitted election observers to stand between three and eight feet from the area where voters check in and obtain their ballot 2013 Wis. Act 177, § 2 Wis. Stat. § 7.41(2). Moving election observers closer to the polling table burdens voters by facilitating the intimidation of voters. Election observers have frequently caused disruption and delays in the voting process and engaged in abusive behavior toward poll workers and voters. PPFOF 302.

They have demanded to see proof of residence documents, which they are not entitled to see. PPFOF 303. In Milwaukee, election observers deterred a first-time voter from voting and registering despite the fact that he had all of the required documentation. PPFOF 304. Abusive and disruptive election observers disproportionately target high minority areas such as Racine and Milwaukee. PPFOF 305. And, hostile out-of-town election observers have deterred Native Americans from voting in those communities. PPFOF 306.

To deal with these problems, GAB issued an emergency administrative rule establishing that election observers not be permitted to be closer than 6 feet to the location where voters announce their presence and register to vote. PPFOF 307. GAB issued guidelines and press releases explaining to observers the rules for proper behavior. PPFOF 308. Moving poll workers farther away from the check-in table reduced interference by election observers. PPFOF 309.

Nevertheless, the Assembly enacted 2013 Wisconsin Act 177, which moves the buffer zone for election observers from six to 12 feet, as required previously by GAB's administration rule, to three to eight feet. This change burdens voters by facilitating the disruptive behavior of election observers. PPFOF 310-311.

Moreover, moving election observers closer to the polling table does not serve any legitimate state interest. The State claims that this provision promotes orderly elections and voter confidence, but this assertion, which is not supported by a single proposed finding of fact, is belied by the evidence. Dfs.' Br. at 118-121. Election observers frequently disrupt and slow down the voting process. PPFOF 312. They are often confused about the law, but nevertheless intimidate poll workers and cause them to make mistakes. PPFOF 313 (Lowe Dep. Tr. 64:2 - 65:19; Lowe Dep. Ex. 63 (email from GAB official discussing how election observers in Racine

created "utter chaos")). In some areas, election observers has been so abusive that a number of poll workers have refused to serve again and some municipalities are unable to recruit a sufficient number of workers. PPFOF 314 (Lowe Dep. Tr. 66:18 - 67:1; Lowe Dep. Ex. 64 (GAB memorandum detailing poll workers in Racine who refused to work again as a result of disruptive behavior during the June 2012 recall election)). The problems in Racine were so bad that GAB asked the Racine Police Department to staff officers at polling locations to prevent disruptions. PPFOF 315 (Lowe Dep. Tr. 67:2 - 19; Lowe Dep. Ex. 65 (email from GAB official to Racine Police Department asking for assistance in preventing abuses by election observers)). Viewing this evidence in the light most favorable to Plaintiffs, permitting election observers to be moved closer to voters fails to pass constitutional muster.

**E. No Faxing or Emailing of Absentee Ballots**

Under current law, clerks' offices are no longer permitted to fax or email absentee ballots to voters. 2011 Wis. Act 75, § 50; Wis. Stat. § 6.87(3)(d). This provision unjustifiably burdens voters who are traveling but do not meet the definition of either a permanent overseas or military voter, a number of whom are college students studying abroad. PPFOF 324. Many voters have been unable to vote as a result of this law. PPFOF 325. In particular, in Madison this restriction has prevented some voters from voting in every election since it went into place. PPFOF 326. For example, one Madison voter is currently in Ecuador, and there is not enough time between the 2016 spring primary on February 16, 2016, and the 2016 spring election on April 5, 2016, for that voter to receive and then return a ballot by mail in time for it to be counted. PPFOF 327. Another Madison voter who is currently studying abroad in Vietnam will not be able to vote in the upcoming spring primary because she cannot receive mail at her apartment in Vietnam, cannot obtain a post office box due to her visa status, and the U.S. embassy in Vietnam is not

willing to receive the ballot on her behalf. PPFOF 328. Allowing clerks' offices to fax or email absentee ballots would alleviate these and similar problems. PPFOF 329.

Furthermore, the evidence controverts the State's purported interests in this prohibition. It is far more expensive to mail a ballot to a different country than it is to email that ballot. PPFOF 330. In fact, GAB's Director could not identify a single interest furthered by this prohibition. PPFOF 331. And, the evidence contradicts the State's suggestion that emailed or faxed ballots posed any difficulties for election officials. PPFOF 332 (Albrecht Decl. ¶¶ 47-48 ("The Election Commission had no problems with these email kits. Returning the ballots was simple, and I am unaware of any instance in which a voter forwarded his or her ballot to another voter. Although the emailed ballot cannot be inserted directly into the tabulator after election officials receive it, it is simple to reconstruct these ballots and was not burdensome to do so. It certainly is much less work than working with a voter to attempt—sometimes unsuccessfully—to figure out a way to get a ballot to a remote location and back by mail in time for the ballot to be counted.")). Given the number of voters who have been denied the right to vote as a result, and the State's unfounded and controverted reasons for imposing this measure, the prohibition on the emailing or faxing of absentee ballots to all except military and permanent overseas voters cannot withstand scrutiny.

**F. Elimination of Straight-Ticket Voting**

Act 23 also eliminated straight-ticket voting, whereby a voter could cast a ballot for all candidates of a single party. 2011 Wis. Act. 23, §6. Plaintiffs' evidence shows that this measure has burdened Wisconsin's voters by making voting a lengthier and more confusing process. PPFOF 319 (Gagner Decl. ¶ 16 ("Straight-ticket voting help streamline voting for those individuals who want to vote an entire party, especially during fall elections and presidential

elections when there are many options on the ballot."); Trindl Decl. ¶ 18 ("Not offering straight tick slows down the voting process for such people."); Johnson Decl. ¶ 18 ("[T]he elimination of straight-ticket voting has caused confusion among some voters, leading to longer wait time for voters.")). The result is even longer lines at the polls, exacerbating the long lines at polling locations resulting from the reductions in in-person absentee voting and the voter registration restrictions discussed above. PPFOF 320 (Lichtman Rpt. at 44 ("The elimination of straight-ticket voting in Act 23 also has an adverse impact on waiting time since it makes voting lengthier for those who would otherwise use this option."); Albrecht Decl. ¶ 50 ("[B]y forcing voters who otherwise would have voted straight ticket to make more decisions when casting a ballot, the elimination of straight-ticket voting will increase the time that the average voters spends casting a ballot, which will in turn increase wait times for all voters.")). Furthermore, the elimination of straight-ticket voting imposes particular burdens on voters with lower levels of educational attainment and limited English proficiency by complicating the process of reading and understanding the ballot. PPFOF 321 (Albrecht Decl. ¶ 51 ("Second, the elimination of straight-ticket voting will make the act of voting more difficult for voters with low levels of literacy or who are not proficient in English or (in the case of Milwaukee voters) Spanish. Aside from creating a negative voting experience for such voters, the requirement that voters cast ballots in multiple races can lead to mistakes."); Johnson Decl. ¶ 18 ("[B]ased on my work and interaction with voters in the African-American community I believe that the elimination of straight-ticket voting has caused confusion among some voters, leading to longer wait time for voters. I also believe that language minorities are negatively impacted by the elimination of straight-ticket voting.")). And, the elimination of straight-ticket voting has increased, not decreased as the State contends, mistakes in the casting of ballots. In 2012, over 1,000 over votes were cast in

Milwaukee in the presidential contest as a result of this measure. PPFOF 332. Viewing this evidence in the light most favorable to Plaintiffs, the State has failed to justify the burdens this measure, both in isolation and in combination with the other laws discussed herein, imposes on its voters.

**G. Returning Absentee Ballots**

With Act 227 in 2011, Wisconsin also prohibited clerks' offices from returning absentee ballots to voters to correct mistakes, such as over votes or improperly marked ballots, unless the ballots were spoiled or damaged or there was no certificate or an improperly completed certification. 2011 Wis. Act 227, § 4. This provision disparately impacts those with lower levels of educational attainment— who are disproportionately African Americans and Latinos in Wisconsin—who are more likely to misunderstand the ballot and make mistakes. PPFOF 334. This, combined with other laws that have made voting more complicated such as the elimination of straight-ticket voting, has imposed yet another barrier to the franchise.

While the State argues that returning miscast absentee ballots to voters imposes difficulties on election workers, *see* Dfs.' Br. at 90, it offers no explanation as to why clerks' offices should be *prohibited* from offering this form of assistance. For this reason, and viewing the evidence in the light most favorable to Plaintiffs, the prohibition on helping voters correct mistakes on absentee ballots, both alone and in combination with the other laws discussed herein, imposes an undue burden on Wisconsin's voters.

**H. Implementation of voter ID "extraordinary proof" petition process**

It often is overlooked that the Wisconsin Supreme Court agreed with Judge Adelman's determination in *Frank v. Walker* that Act 23, as construed and enforced by the State between June 2011 and August 2014, had imposed a "severe burden" on the right to vote. *Milwaukee*

*Branch NAACP v. Walker*, 2014 WI 98, ¶¶ 7 & n. 5, 60, 851 N.W.2d 262, 266 & n.5, 277 (2014) (emphasis added); *see also id*. ¶¶ 4-7, 50-65, 78-80, 851 N.W.2d at 265-66, 274-78, 280-81. Specifically, the Wisconsin Supreme Court held that the State had unconstitutionally required voters to pay for the official documents that must be obtained in order to receive the so-called "free" voter ID. The Wisconsin Supreme Court repeatedly referred to such a practice as a "*de facto* poll tax." *Id*. ¶¶ 50, 54-55, 57, 851 N.W.2d at 274-76.

The Wisconsin Supreme Court nevertheless upheld Act 23 on a prospective basis by adopting a newly fashioned "saving construction," not of Act 23 itself, but of Wis. Admin. Code Trans. § 102.15(3)(b), which provides an "extraordinary proof" petition process for voters unable to comply with Act 23's rigid documentation requirements. The state court held that DMV supervisors must henceforth exercise their "discretion" during the "extraordinary proof" petition process so that voters can obtain exemptions from having to pay for birth certificates or other government records needed to obtain a voter ID. 2014 WI 98, ¶¶ 66-70, 851 N.W.2d at 278-79.

The Seventh Circuit relied heavily on this "saving construction" and the State's promised remedial measures in staying and then overturning the district court injunction:

> After the district court's decision, the Supreme Court of Wisconsin revised the procedures to make it easier for persons who have difficulty affording any fees to obtain the birth certificate or other documentation needed under the law, or to have the need for documentation waived. … This reduces the likelihood of irreparable injury, and it also changes the balance of equities and thus the propriety of federal injunctive relief.

*Frank v. Walker*, 766 F.3d 755, 756 (7th Cir.), *reh'g en banc denied by an equally divided court*, 769 F.3d 494 (7th Cir.), *vacated*, 135 S. Ct. 7 (2014); *see also Frank v. Walker*, 768 F.3d at 747 ("Wisconsin recently issued regulations requiring officials to get birth certificates (or other qualifying documents) themselves for persons who ask for that accommodation on the basis of

hardship."). Judge Easterbrook expressed hope that the State's new remedial procedures would make it easier for Wisconsin voters to "scrounge up" their birth certificates and other ancient records needed to obtain voter ID. 768 F.3d at 748; *but see id*. at 796-808 (Posner, J., dissenting from denial of rehearing en banc by an equally divided court) (disputing panel's "suggestion that 'scrounging' up a birth certificate is no big deal," and attaching a documentary supplement titled "APPENDIX: SCROUNGING FOR YOUR BIRTH CERTIFICATE IN WISCONSIN").

The Seventh Circuit concluded that the DMV's new procedures should be given an opportunity and that Act 23 could again be challenged on an as-applied basis if the State abused its considerable discretion in implementing the amended process. The new procedures "leave much to the discretion of the employees at the Department of Motor Vehicles who decide whether a given person has an adequate claim for assistance or dispensing with the need for a birth certificate. *Whether that discretion will be properly exercised is not part of the current record, however, and could be the subject of a separate suit if a problem can be demonstrated*." 767 F.3d at 747 n.1 (emphasis added).

Stunning evidence is beginning to emerge in discovery demonstrating that the State has indeed abused its broad discretion in implementing the new "extraordinary proof" petition procedures. Plaintiffs cannot discuss the specifics of that evidence in this brief because the State has designated the entire transcript of the Department of Motor Vehicles' Rule 30(b)(6) deposition, along with all documents subpoenaed from the DMV that were introduced at that deposition, as confidential information that may only be filed under seal with the Court. Plaintiffs appreciate that the DMV's highly intrusive "extraordinary proof" petition process requires citizens who want to vote to produce extremely private information about personal and family history, including adoption records, divorce records, evidence of family estrangements,

and other matters. But the presence of such private information does not justify a blanket designation of all DMV evidence as "confidential" material that must be filed under seal, out of the public eye. Such a tactic may temporarily avoid embarrassing the DMV, but it is an abuse of the confidentiality order that has been entered in this case. DMV should redact private personal information with a scalpel, and allow the remaining evidence of its abuses of discretion and malfeasance to be made public.

In response to the DMV's blanket confidentiality designations, plaintiffs are filing under seal—and under protest—the accompanying declaration of Charles G. Curtis, Jr. ["Curtis Decl."], one of their attorneys in this case, which attaches the DMV Rule 30(b)(6) deposition transcript and selected deposition exhibits. Plaintiffs also are filing a short list of sealed Additional Plaintiffs' Proposed Findings of Fact ("Additional PPFOFs (UNDER SEAL)") summarizing key revelations of the DMV Rule 30(b)(6) deposition and exhibits.

Without revealing any individual private information, plaintiffs believe the new DMV evidence about the "extraordinary proof" petition process can be summarized as follows:

- Even without formally entering the "extraordinary proof" petition process, voters can seek an "exception" to the strict voter ID proof requirements from one or more of several dozen DMV supervisors, "team leaders," and regional managers. This process is guided by no written policies, is subject to no review to ensure fair and uniform standards, and is left entirely to the discretion of the officials making the decision. "If they feel comfortable based on the documentation presented authorizing the exception, they can do that independently." Additional PPFOF (UNDER SEAL) ¶¶ 1-2.

- For those turned away by one or more supervisors, "team leaders," or regional managers, the next step is to "enter" the "extraordinary proof" petition process by filing Form DOT MV3012 ("Unavailable Documentation"). The petition is then investigated by agents with the DMV's Compliance, Audit and Fraud Unit ("CAFU"). The agents may contact other jurisdictions' vital records agencies on the petitioners' behalf; the other jurisdictions sometimes cooperate, sometimes refuse to help, and other times simply ignore CAFU's inquiries. The agents also may consult various databases and encourage the petitioners to search for other ancient records. Family members are sometimes questioned for further information. *See id.* ¶¶ 3-7.
- CAFU's investigative findings are then set forth in Case Activity Reports that are forwarded to a small group of senior DMV officials, dubbed "the Triad" by some staffers, who make the final call. Here again there are no written policies or guidelines to guide "the Triad's" discretion. *See id.* ¶¶ 8-9.
- DMV has received some 600 formal MV2012 petitions since September 2014. DMV estimates that about 18 have been denied, though many more have been "suspended" due to inactivity or "withdrawn" when the would-be voter gives up in anger and frustration. There is evidence this has repeatedly happened. *See id.* ¶¶ 10-12.
- DMV's files are replete with evidence of customer complaints about receiving inaccurate and misleading information, complaints from agency personnel about the lack of any standards or guidance, and audits showing sub-par agency performance in administering the "IDPP" (*i.e.*, the "ID Petition Process"). A 2015 CAFU analysis revealed an astounding 27% error rate in petitions processed between March and August 2015. *See id.* ¶¶ 13-14.

- DMV expects increased demand for voter IDs in this Presidential election year, but it has taken no steps to prepare for that increased demand. It already has a backlog of dozens of "open" petitions, has cut back on staff, and has no extra staff or budget allocated to deal with the expected increased demand. *See id.* ¶¶ 15-16.
- The DMV has denied the petitions of many eligible voters because of minor discrepancies in the spelling of their names or uncertainties about their exact dates of birth—even though DMV acknowledges it has no doubts these disenfranchised voters are U.S. citizens. In one denial after another — sometimes coming after months-long investigations — DMV has insisted that voters must correct their name-and-birthdate discrepancies either though court proceedings or by changing their Social Security records so as to achieve consistency between those records and a petitioner's other proof documents. As DMV admits, these burdens are imposed even where there is no doubt whatsoever that a petitioner is a U.S. citizen. *See id.* ¶¶ 17-19.
- One senior citizen who was "turned away" by DMV had been "born in a concentration camp in Germany," and his German birth certificate had been lost in a fire. Discovery has yet not verified whether this voter was ultimately able to obtain the ID he needed to vote. *See id.* ¶ 20.
- The record shows several instances in which the DMV has required voters who were adopted and lacked information about the precise circumstances of their births to search for that information before being allowed to vote. In at least one instance, DMV directed the petitioner to an out-of-state "Post Adoption Services" bureau to seek help in tracking down her "adoption paperwork," even though DMV had no reason to doubt the woman was a U.S. citizen. DMV keeps track of such "interesting

cases" where "we were able to connect people with their birth record through the petition process." *See id.* ¶¶ 21-23.

- One senior citizen who ultimately prevailed in the IDPP had a healthcare worker who had "tried eight different times to give [the voter's] baptism certificate to the DMV" as substitute proof of "identity," without success. Senior DMV officials ultimately accepted the baptism certificate along with proof that the voter's parents were buried in Wisconsin as sufficient evidence to allow him to continue voting. *See id.* ¶ 24.

Far from providing an "accommodation on the basis of hardship" that will "make it easier" to obtain a voter ID—as the Seventh Circuit hoped would occur—the IDPP has simply compounded the arbitrary, capricious, and abusive nature of the voter ID regime in Wisconsin. It is simply outrageous for a citizen's right to vote to turn on the unguided, unchecked discretion of mid-level DMV personnel and a "Triad" of senior agency officials, and for that right to be denied based on irrelevant discrepancies in names, spellings, and exact birthdates, especially where it is conceded that the people seeking to vote are U.S. citizens.

**I. Cumulative Impact**

As explained above, each of the measures challenged in this suit has imposed a unique burden on Wisconsin's voters. Taken together, they have created, in the words of the Executive Director of the Milwaukee Election Commission, a "perfect storm." PPFOF 360 (Albrecht Decl. ¶ 52 ("The changes to Wisconsin's election laws since the beginning of 2011 have created a perfect storm for across-the-board confusion for both voters and poll workers. In addition to the numerous changes in the law, there are now two separate lists of approved documentation to keep track of—one for proof of residence and another for voter ID. The sometimes arbitrary distinctions between the forms of ID that can be used to prove residence and those that can be

used to prove identity only add to the confusion. For example, college students can use a fee receipt from their school along with a student ID to meet the proof-of-residence requirement, but this same combination typically does not meet the voter ID requirement even if the student ID has a photo of the student.")). The result is a confusing patchwork of onerous restrictions that have depressed voter participation and impeded effective election administration.

To begin with, the State passed one of the most onerous voter ID laws in the country. PPFOF 361. Even when this law was enjoined, it had an adverse impact on voter turnout. Those who did not possess a driver's license or ID were approximately 20 percent less likely to vote in 2014. PPFOF 362. And, the voter ID law results in longer lines at that polls by increasing by two-and-a-half times the time required to check in and obtain a ballot. PPFOF 363.

Furthermore, the reductions in the period for in-person absentee voting have deprived lower-income, young, African-American, and Latino voters of opportunities that enhanced their ability to exercise the franchise. PPFOF 320. The result is not only that fewer of these voters will be able to cast ballot, but that more voters will be forced to utilize the significantly reduced resources available to them. The result is more congestion and longer wait times at the polls. PPFOF 201.

These reductions further taxed an already overburdened election system. The ability to offer an in-person absentee voting schedule that accommodated the needs of their residents was crucial for cities such as Madison and Milwaukee to be able to overcome the limitations of the one-location rule. Without this discretion, voters in these municipalities have been even more disparately impacted by this rule and face even longer wait times at the polls. PPFOF 201.

On top of these problems, the State has layered numerous additional obstacles to voting. The 28-day residency requirement has prevented otherwise eligible voters from voting and

created confusion among both voters and poll workers. PPFOF 218, 233. The raft of restrictions on voter registration have similarly burdened and denied the right to vote and caused even greater confusion. The proof-of-residency requirement has impaired the rights of both voters and those engaged in voter-registration drives. PPFOF 248-253. Furthermore, the arbitrary distinctions between the types of documents that must be used to register and those required to cast a ballot have confused and confounded voters and poll workers alike. PPFOF 364 (Albrecht Decl. ¶ 52 ("[T]here are now two separate lists of approved documentation to keep track of—one for proof of residence and another for voter ID. The sometimes arbitrary distinctions between the forms of ID that can be used to prove residence and those that can be used to prove identity only add to the confusion. For example, college students can use a fee receipt from their school along with a student ID to meet the proof-of-residence requirement, but this same combination typically does not meet the voter ID requirement even if the student ID has a photo of the student.")). And, it has slowed down the process of registering voters. PPFOF 259. The proof-of-residency requirement compounded the difficulties resulting from the elimination of corroboration as a means of proving residence, with result that it is nearly impossible for some voters—such as women whose documents are in their husbands' names and elderly voters in nursing homes—to register. PPFOF 265-266.

By eliminating statewide SRDs and SRDs at high schools, the State has further impeded voter participation. The result is two-fold. Fewer citizens register to vote, and more citizens must show up at their polling location to register, adding yet another factor contributing to congestion at the polls and hassles for election workers. PPFOF 278. For good measure, the State also made it more difficult for college students to register by requiring "dorm lists" to be accompanied by proof of citizenship before a student ID could be used to register—a proof that

is not required for any other form of registration—and also prohibited local municipalities from taking measures to encourage voter participation by striking down Madison's tenant-registration ordinance. PPFOF 395-396, 402.

The State did not stop there. It encouraged the abusive and disruptive behavior of poll workers by allowing the observation area to be moved closer to voters. PPFOF 302-310. It prohibited city clerks from undertaking the simple and cost-efficient expedient of emailing or faxing absentee ballots to voters (except military or permanent overseas voters). PPFOF 323-324. And, it eliminated straight-ticket balloting and prohibited clerks from alerting voters to mistakes on their absentee ballots, all of which complicated the voting process and disparately impacted those most in need of assistance in casting a ballot. PPFOF 318, 333-334.

The interaction of these laws has been devastating. As the evidence shows, the probability that a registered African-American voter voted in 2014 decreased between 2.4 and 3.9 percent compared to 2010. PPFOF 365. The probability was between 7.1 and 9.6 percent lower for Latinos. PPFOF 366. And, for those living in student wards, it was between 4.5 and 6.7 percent lower. PPFOF 367.

These burdens simply cannot be justified by any State interests. To the contrary, these laws have interfered with election administration as much as they have with exercising the right to vote. The sheer number of these laws makes them difficult to administer, leading to mistakes and diminished public confidence. PPFOF 368 (Albrecht Decl. ¶ 53 ("These changes to the law have resulted in mistakes by poll workers and they are certain to result in more mistakes in the future. Both the confusing set of requirements now in place and mistakes by poll workers erode public confidence in the voting process and ultimately may impact voter participation."); Lowe Dep. Tr. 64:17 - 65:19 ("Q Yes, please. Thank you. We have somebody that knows how to run

a deposition. All right. So this is an email exchange between you and Ms. Hongisto again, is that right? A Yes. Q And am I right in understanding that she is indicating that her poll workers were making mistakes with respect to proof of residence? A Yes. Q And she indicates that they were overwhelmed, is that right? A I think that was her word. Maybe it was my word. Q Well, let me actually focus on the final email, the one that you wrote at the top of Page 1. You indicate to Ms. Hongisto that even as an expert in this area as you are, you can't remember all the changes that had come down within the last year as of July 2012, so it would be unreasonable to expect the poll workers to also remember all those, is that fair? A Yes. Q And you indicate that in Racine, observers took over the polling place and created utter chaos, is that right? A That's correct. Q And are both of those statements accurate to your knowledge? A To my knowledge."); Lowe Dep. Ex. 63). They consume more of election workers' already-limited time and resources, and they increase costs. PPFOF 207. The perverse result of all of this is that these laws have made it more difficult to recruit poll workers and volunteers, reducing even more greatly the resources election administrators have on hand. PPFOF 369.

In sum, before these laws, Wisconsin was a national leader in voter participation and election administration. PPFOF 370. Nevertheless, the State has taken a system that was not broken and systematically dismantled the very procedures and laws that made it a model for other states around the country. The combined effect of these laws has been a morass of disenfranchisement, diminished voter confidence, and bureaucratic red tape. For these reasons, the First and Fourteenth Amendments to the U.S. Constitution invalidate each and every brick in the wall the State has erected to the ability of citizens to vote.

## III. VOTING RIGHTS ACT

### A. Applicable Legal Framework

Under Section 2 of the VRA, "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizens of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A violation of the VRA "is established if, based on the totality of the circumstances, it is shown that the political processes . . . in the State . . . are not equally open to participation by members of" a particular racial group "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." 52 U.S.C. § 10301(b).

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting," and "the Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and internal quotation marks omitted); *see also NAACP*, 768 F.3 at 553 ("The Supreme Court has . . . held that the Voting Rights Act should be interpreted broadly."). Indeed, "[i]n 1982, Congress amended the Voting Rights Act to make clear that Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need only show that the challenged action or requirement has a discriminatory effect on members of a protected group." *NAACP*, 768 F.3d at 550; *see also Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015) ("Unlike discrimination claims brought pursuant to the Fourteenth Amendment, Congress has clarified that violations of Section 2(a) can 'be proved by showing discriminatory effect alone.'") (quoting *Gingles*, 478 U.S. at 35).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and

white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Consistent with this language, several courts of appeals have held that a vote-denial claim under the VRA has two elements. As the Fourth Circuit explained:

> Based on our reading of the plain language of the statute and relevant Supreme Court authority, we agree with the Sixth Circuit that a Section 2 vote-denial claim consists of two elements:
>
> - First, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of a protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice;
>
> - Second, that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of a protected class.

*League of Women Voters*, 769 F.3d at 240 (citation and internal quotation marks omitted); *Veasey*, 796 F.3d at 504 ("We now adopt the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims.").

This analysis is informed by a number of principles discussed in Section 2 cases. *First*, the *Frank* court emphasized the importance, in a establishing a Section 2 violation, of showing that differences in social and historical conditions by race or ethnicity are attributable to discrimination *by the State*. 768 F.3d at 753; *see also id.* at 755 ("We are skeptical about the second of these steps, because it does not distinguish discrimination by the defendants from other persons' discrimination."). This focus on State-based discrimination, rather than discrimination more broadly, makes the Seventh Circuit an outlier among the courts of appeals, *see Veasey*, 796 F.3d at 504 n.17, and is difficult to square with the Supreme Court's findings that "Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting" and that "the Act should be interpreted in a manner that provides

the broadest possible scope in combating racial discrimination," *Chisom*, 501 U.S. at 403 (citations and internal quotation marks omitted). Plaintiffs therefore submit that this aspect of *Frank* (and other aspects) should be overturned on appeal, though they acknowledge that it controls here. Regardless, this distinction makes little difference in this case because, as discussed below, the disparate burdens that the provisions challenged under Section 2 impose on African Americans and Latinos are in part caused by or linked to social and historical conditions that stem from discrimination by the State. *See, e.g.*, *Veasey*, 796 F.3d at 504 n.17 ("Unlike in *Frank*, the district court found both historical and contemporary examples of discrimination in both employment and education by the State of Texas, and it attributes SB 14's disparate impact, in part, to those effects.").

*Second*, the case law makes clear that "Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting." *NAACP*, 768 F.3d at 552; *accord League of Women Voters*, 769 F.3d at 243 ("[N]othing in Section 2 requires a showing that voters cannot register or vote under any circumstance."). Indeed, the text of the statute refers not only to the "denial" but also the "abridgement" of the right to vote. 52 U.S.C. § 10301(a); *see also Black's Law Dictionary 7* (9th ed. 2009) (defining "abridge" as "[t]o reduce or diminish"); *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) ("When the word [abridge] is used in connection with . . . the word deny, it means to circumscribe or burden.") (15th Amendment case); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (prohibition on "abridgement" of the right to vote reaches any "onerous procedural requirements which effectively handicap exercise of the franchise by [voters of color]") (15th Amendment case).

Thus, in *Veasey*, the Fifth Circuit rejected the argument that "the district court erred by failing to ask whether SB 14 causes a racial *voting* disparity, rather than a disparity in voter ID possession." 796 F.3d at 506 n.21 (emphasis in original). The court explained that "Section 2 asks whether a standard, practice, or procedure results in 'a denial *or abridgement* of the right . . . to vote'" and that "[a]bridgement is defined as 'the reduction or diminution of something,' while the Voting Rights Act defines 'vote' to include 'all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted.'" *Id.* (internal quotation marks, alteration, and citation omitted; emphasis in original). "The district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession," the Fifth Circuit concluded, "falls comfortably within this definition." *Id.*[14]

*Third*, it is clear that facially neutral laws can violate Section 2. As Justice Scalia has written, "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, . . . Section 2 would . . . be violated." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). Consistent with this principle, courts have found that several facially neutral voting practices violate or could violate Section 2. *Stewart*, 444 F.3d at 877-79 (use of old voting technology in predominantly minority communities); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam) (same); *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987) (restrictions on registration); *Brooks v. Gant*, No. CIV. 12-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (limits on early voting); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-

[14] The *Frank* court did not address the scope of Section 2's proscription of abridgement of the right to vote. Instead, it discussed the district court's approach to "the rule that laws must not 'result[] in a denial' of the right to vote" and held that the district court's findings did not "show a 'denial' of

095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (polling place closures); *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982) (relocation of polling place). Indeed, a contrary rule would be inconsistent with the purpose of legislation that targets not only discriminatory *intent* but also discriminatory *effects*. *Cf. Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 17-18 (2015) ("Recognition of disparate impact liability . . . plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

*Fourth*, the Supreme Court has pointed to nine factors that are relevant to Section 2 claims. These "Senate Factors" (so known because they were originally identified by the Senate Judiciary Committee in connection with the 1982 amendments to Section 2) are the following:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;

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anything by Wisconsin, as § 2(a) requires; unless Wisconsin makes it *needlessly* hard to get photo ID, it has not *denied* anything to any voter." *Frank*, 768 F.3d at 752-53 (last emphasis added).

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

*Gingles*, 478 U.S. at 44-45. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *id.* at 45 (citation and quotation marks omitted), and this list is "neither exclusive nor controlling," *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986).

The State asserts that "[t]he Seventh Circuit expressly rejected the *Gingles* factors as 'unhelpful' to resolving Section 2 claims in 'voter-qualification cases'" and that "the Court should not consider the *Gingles* factors because they are irrelevant to resolving Plaintiffs' Section 2 vote denial claims." Defs. Br. at 21 (citing *Frank*, 768 F.3d at 754). The language in *Frank* is not so clear. To be sure, after describing an en banc Ninth Circuit voter ID case in which "the court cited *Gingles* but did not use most of its nine factors or establish an alternative approach," the *Frank* court wrote that "[t]he Fourth Circuit and the Sixth Circuit, by contrast, found *Gingles* unhelpful in voter-qualification cases (as do we) and restated the statute as calling for two inquiries." 768 F.3d at 754. The State's reading of this language—that *Frank*'s reference to *Gingles* was a reference to the *Gingles* (or Senate) *Factors*—is a fair one, particularly given context. Nevertheless, the quoted language from *Frank* is better read not as a finding that the Senate Factors are irrelevant but rather as a statement that vote-dilution case law is generally not apt in the vote-denial context—that is, that the Seventh Circuit's reference to "*Gingles*" was a reference to vote-dilution case law, not the Senate Factors.

Under the State's reading, the pertinent statement from the Seventh Circuit ("[t]he Fourth Circuit and the Sixth Circuit, by contrast, found *Gingles* unhelpful in voter-qualification cases (as do we)") would be flatly incorrect. In the Fourth Circuit case cited by *Frank*, the court wrote that the Senate Factors "may shed light on whether the two elements of a Section 2 claim are met." *League of Women Voters*, 769 F.3d at 240. In the Sixth Circuit case cited by *Frank*, the court noted that the Senate Factors are pertinent "particularly to vote dilution claims," but it also wrote, "[W]e see no reason why the Senate factors cannot be considered in assessing the 'totality of the circumstances in a vote denial claim, particularly with regard to the second element. . . . And several of the few Circuit court decisions to address vote denial claims have expressly stated that the Senate factors are relevant to vote denial claims." *NAACP*, 768 F.3d at 554. The Sixth Circuit added that it found "Senate factors one, three, five, and nine particularly relevant to a vote denial claim" but that "[a]ll of the factors . . . can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process." *Id.* at 555.

Moreover, the State's reading of *Frank* with respect to the Senate Factors would put the position of the Seventh Circuit at odds with other case law from the courts of appeals. *See Veasey*, 796 F.3d at 505 (discussing the Senate Factors and stating that, "[w]hile the State argues that these factors are inapposite in the 'vote denial' context, we disagree"); *Gonzalez v. Arizon*a, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc) (considering the Senate factors in evaluating a Section 2 challenge to Arizona's voter ID law), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, —— U.S. ——, 133 S. Ct. 2247 (2013); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (explaining that, in a vote denial claim, "courts consider a non-exclusive list of objective factors (the 'Senate factors') detailed in a Senate

Report accompanying the 1982 amendments" as part of evaluating whether, under the "totality of the circumstances," "the political processes . . . are not equally open to participation by [members of a protected class]") (alterations in original).

Regardless, the question whether the "Senate Factors" apply is, to a significant extent, only of academic interest. One of the two elements of a Section 2 vote-denial claim requires an assessment of whether a discriminatory burden imposed by an election law or practice is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of a protected class," *League of Women Voters*, 769 F.3d at 240 (internal quotation marks omitted), and the State, while noting that *Frank* expressed skepticism about this element, appears to agree that the two elements discussed in *League of Women Voters* and other circuit court case law control here. *See* Def. Br. at 20. Moreover, the plain language of the VRA makes clear that courts must assess "the totality of the circumstances" in determining whether the political processes in a state are equally open to racial and ethnic minorities. 52 U.S.C. § 10301(b); *see also Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997) ("[T]he 'totality of the circumstances' test established in § 2(b) was initially applied only in 'vote denial' claims such as this."). Whether through a step-by-step analysis of the nine Senate Factors or a less-structured, holistic analysis, these inquiries—into social and historic conditions and the totality of the circumstances—necessarily require consideration of many of the issues upon which the Senate Factors touch. Accordingly, while Plaintiffs address social and historic conditions and the totality of the circumstances below through the lens of the Senate Factors, they note that the substance of that analysis is pertinent here irrespective of whether the Senate Factors are formally considered part of the analysis.

### B. The State's Legal Arguments

The State makes a series of other legal arguments that do not reflect the state of the law, have previously been rejected by courts of appeals, and would stand VRA vote-denial case law on its head. To begin with, the State, citing *Holder v. Hall*, 512 U.S. 874, 881 (1994), asserts that "Section 2 plaintiffs must establish that the challenged practice results in less minority opportunity to vote compared to what would result from an objective benchmark, not compared to what would result from a plaintiff's preferred minority-maximizing alternative." Defs. Br. at 22. It is not clear why the status quo ante—a return to which is the relief requested here—does not provide an objective benchmark.[15] More importantly, the State is relying on inapt vote-dilution case law. *See Holder v. Hall*, 512 U.S. at 876 ("This case presents the question whether the size of a governing authority is subject to a vote dilution challenge under § 2 of the Voting Rights Act."); *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (considering whether Section 5 prohibits preclearance of a dilutive, but nonretrogressive redistricting plan). *See generally* Defs. Br. at 17-18 (discussing distinction between vote-dilution and vote-denial case law).

The importance of the distinction between vote-denial and vote-dilution case law varies by context, but the Sixth Circuit has explained that vote-dilution case law regarding the importance of an objective benchmark does not apply in the vote-denial context:

> The case law Defendants cite on the need for objective benchmarks involve vote dilution claims. A vote dilution claim requires courts to make the difficult judgment of whether a challenged practice impermissibly dilutes minorities' voting strength, or whether minorities' lack of electoral success in fact simply

[15] This benchmark generally could not be used in vote-*dilution* cases. Redistricting generally occurs in connection with the Census and, absent extraordinary stagnation in the residential patterns within a state, a return to the status quo ante is not a viable option. That is, a redistricting plan that is struck down must be replaced with something new, further explaining the need for the objective-benchmark rule in the vote-dilution context.

> stems from mere . . . political defeat at the polls. Thus, determining what an undiluted benchmark should be can be challenging, particularly because Section 2 expressly states that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

*NAACP*, 768 F.3d at 556 (internal citations, quotation marks, and footnote omitted). The *NAACP* court further explained that "Section 2 vote denial claims inherently provide a clear, workable benchmark": "whether minority voters have *less opportunity than other members of the electorate* to participate in the political process and to elect representatives of their choice." *Id.* (internal quotation mark omitted; emphasis in original). Thus, the State's objective-benchmark argument is without merit.

It follows that there need not be "a nationwide, objective benchmark that the federal judiciary can rely on without comparison to the prior status quo." Defs. Br. at 23. Notably, however, Defendants' assertion that this should be the measure of abridgement is uncited—presumably because it directly contradicted by the case law. *See Veasey*, 796 F.3d at 512 ("[W]e conclude that the district court performed the 'intensely local appraisal' required by *Gingles*.'"). *NAACP*, 768 F.3d at 559 ("The focus is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. The text of Section 2 does not direct courts to compare opportunities across States."); *League of Women Voters*, 769 F.3d at 243 (Section 2, "on its face, is local in nature," and a conclusion "as to North Carolina" would not "somehow throw other states' election laws into turmoil"). *See generally Gingles*, 478 U.S. at 46 ("[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2," because liability depends on the "totality of the circumstances," which may vary in different jurisdictions.) (citation omitted); *id.* at 78-79 (liability under Section 2 is "peculiarly dependent upon the facts of each case") (citations and quotation marks omitted).

To the extent that the State suggests that it is irrelevant in the Section 2 context whether there has been a change in the voting law, as that was the domain of Section 5, *see* Defs. Br. at 23, that argument is also mistaken. As the *Bossier Parish* Court explained, Section 5 applies "*only* to retrogression;" Section 2 challenges "involve *not only* changes but (much more commonly) the status quo itself." 528 U.S. at 333-34 (emphases added). *See generally Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (explaining that "some parts of the Section 2 analysis may overlap with the Section 5 inquiry").

In *League of Women Voters*, the Fourth Circuit, in cataloguing the district court's "numerous grave errors," first pointed to the district court's holding that "Section 2 does not incorporate a retrogression standard and that the court therefore was not concerned with whether the elimination of" certain election practices would "worsen the position of minority voters in comparison to the preexisting voting standard, practice, or procedures—a Section 5 inquiry." 769 F.3d at 241 (internal quotation marks omitted). The court explained that, contrary to the district court's holding, "an eye toward past practices is part and parcel of the totality of the circumstances." *Id.* In the case at hand, the Fourth Circuit found that the state's "previous voting practices [we]re centrally relevant under Section 2." *Id.* at 242; *see also id.* at 241-42 ("'The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is . . . relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters.'") (quoting *NAACP*, 768 F.3d at 558).

Finally, the State makes the radical argument—so radical that the proposed intervenors flatly asserted that the State "will not pursue this argument because it conflicts with the State's ability to pursue various race-based initiatives," ECF No. 34, Memo. of Law in Supp. of Mot. to

Intervene at 10—that "if Plaintiffs' interpretation of Section 2 is accepted, the statute would exceed Congress's power to enforce the Fifteenth Amendment." Defs. Br. at 24. Again without citation, the State asserts that Section 2's results test is only constitutional if it "prohibits only practices that depart from an objective benchmark in a manner that proximately causes minorities to have less opportunity to vote than non-minorities." *Id.* at 25.

An unbroken line of cases decided over the past three decades has concluded that Section 2 is constitutional as applied to evaluating state practices that abridge the right to vote. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) ("[a]gainst this background it would be irresponsible for a State to disregard the § 2 results test"); *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *United States v. Blaine County*, 363 F.3d 897, 904-07 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005). Moreover, none of the several recent circuit court decisions discussed above that apply the Section 2 results test has felt the need to engage in scrutiny of that test or of Section 2 more broadly. *See Veasey*, 796 F.3d 487; *Frank*, 768 F.3d at 744; *League of Women Voters*, 769 F.3d at 224; *NAACP*, 768 F.3d at 524. And it would be strange indeed to apply constitutional avoidance to the application of a statute that the Supreme Court has said "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403.

Moreover, assuming *arguendo* that the "congruence and proportionality" test from *City of Boerne v. Flores*, 521 U.S. 507 (1997), applies, Section 2's results test certainly meets that test.[16] Determining whether prophylactic legislation is authorized involves three steps: A court first

[16] The "rational means" test in *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *see also* S. Rep. No. 87-417 at 222 n.153 (standard is analogous to test in *McCulloch v. Maryland* for statutes enacted pursuant to the Necessary and Proper Clause), is less searching than *City of Boerne*'s "congruence and proportionality" test. Because Section 2 easily meets the standard under *City of Boerne*, it follows that it meets the rational means test.

must define "with some precision" the scope of the constitutional right that Congress seeks to enforce, *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); then the court looks at "whether Congress identified a history and pattern" of unconstitutional violations of that right, *id.* at 367; and finally, the court must assess the means Congress has chosen to address these violations to determine whether its remedy is a congruent and proportional response to those violations, *see Boerne*, 521 U.S. at 520.

Here, first, the constitutional right to vote is a fundamental right that helps secure remaining rights and should be construed as broadly as possible. *Chisom*, 501 U.S. at 403; *see also Rice v. Cayetano*, 528 U.S. 495, 512 (2000) (right to vote free of racial discrimination is a "fundamental principle" of Constitution); *Katzenbach*, 384 U.S. at 652, 654 (right to vote is "precious and fundamental" and "preservative of all rights") (internal citations omitted). Second, Congress "identified a history and pattern" of unconstitutional violations of the right to vote, holding an in-depth series of hearings and recounting with particularity the history of voting discrimination. *See* S. Rep. No. 87-417 at 7 ("Congress undertook a detailed and searching examination, including 14 days of hearings in the House and Senate"); *Garrett*, 531 U.S. at 373 ("Congress explored with great care the problem of racial discrimination in voting"). And, where a statute is designed to protect a fundamental right or prevent discrimination based on a suspect classification, both of which are present here, it is "easier [] to show a pattern of state constitutional violations," at *Boerne*'s second step. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 176 (2007) (enforcement powers at their peak when Congress legislates to ensure voting is free from racial discrimination).

Third, Section 2 is a congruent and proportional response to voting discrimination because it targets the precise issues at the heart of the constitutional violations. Indeed, courts have repeatedly recognized that Section 2 is justified by substantial evidence and that it provides an appropriate means of addressing the problem that it targets. *See City of Boerne*, 521 U.S. at 526 ("strong remedial and preventive measures" necessary to respond to "widespread and persisting deprivation of constitutional rights"); *see also Hibbs*, 538 U.S. 721 (2003) (pattern of constitutional violations supported enactment of VRA); *Garrett*, 531 U.S. at 373–74 ("[t]he contrast . . . is stark" between the evidence supporting VRA's enactment compared to other legislation); *United States v. Morrison*, 529 U.S. 598, 626 (2000) (VRA appropriately targets state constitutional violations). In short, the State's argument is without merit and should be rejected.

### C. The Senate Factors

Analysis of the Senate Factors (or of social and historic conditions and the totality of the circumstances) conclusively demonstrates that there is a history of discrimination—including significant official discrimination—in Wisconsin. This analysis provides compelling evidence that provisions that make it more difficult to vote will disproportionately burden minority voters at least in part because of Wisconsin's history and the ongoing effects of discrimination.

#### 1. Senate Factors 1 and 3

Wisconsin has an unfortunate and ongoing history of "official voting-related discrimination" (Senate Factor 1) and voting practices that have "enhanced the opportunity for discrimination" (Senate Factor 3). Wisconsin's "original state constitution only permitted blacks to vote if a majority of the public voted to approve the practice." PPFOF 51. From 1913 until 2006, municipalities were required to have voter registration only if they had more than 5,000

residents. PPFOF 52. Because "in 2006 approximately 98% of blacks and 91% of Latinos" but "only 68% of whites" "lived in municipalities where registration was required," this registration rule subjected a far larger percentage of minority voters than white voters to the burden of voter registration and in turn "contributed to lower turnout by blacks and Latinos." PPFOF 53. "This system of unequal election practices persisted for nearly a century" and "was ended by the passage of the federal Help America Vote Act (HAVA), not by any action initiated by policy makers in the state." PPFOF 54.

Wisconsin's electoral system has also been decidedly hostile to Spanish speakers and other language minorities. Spanish-language ballots were not provided in Milwaukee until 2012, when the city was required to provide such ballots pursuant to the Voting Rights Act. *See* PPFOF 55. In April of that year, the Justice Department sent special monitors to oversee the conduct of elections in Milwaukee. PPFOF 56. Director Kennedy's understanding is that this occurred in part as "normal practice for a new Section 203 jurisdiction" and in part because of the Justice Department's perception—which Director Kennedy shares—that "Milwaukee might not have been taking this seriously." PPFOF 57; *see also id.* (Albrecht Decl. ¶ 5 (noting that, "for a long time, there was a failure to recognize that Milwaukee has many monolingual Spanish-speaking citizens who face significant cultural and language barriers to voting and, in many cases, have had negative experiences when they have attempted to vote," and that "the challenge of building trust remains")).

No other municipality in the state has ever provided ballots in any language other than English. *See* PPFOF 58. Indeed, Wisconsin election officials have taken "the position that an official ballot could not be in any other language [besides English] unless it was required by law." PPFOF 59. Further, "[f]ew counties or municipalities outside Milwaukee even provide

materials such as voter registration forms in languages other than English." PPFOF 60. The websites for the Rock County and Beloit City Clerks do not offer or even mention Spanish-language materials, even though "Census data show that speaking Spanish at home occurs in 6.2% of Rock County households and 14.9% of Beloit City households." PPFOF 61. Likewise, the websites for the clerks for "Kenosha County (10.6% Spanish speaking) and the city of Kenosha (7.7% Spanish speaking)" do not offer Spanish-language materials. PPFOF 62.

This systemic disregard of voters with limited English proficiency plainly imposes disparate burdens on Hispanic voters. According to American Community Survey data from 2010, "33.2 percent of Hispanics in Wisconsin speak English 'less than very well.'" PPFOF 63. And "[r]esearch shows that Spanish-language ballots increase voter turnout among those with limited English skills." PPFOF 64; *see also id.* (Albrecht Decl. ¶ 5 ("Latinos in Milwaukee have historically not voted in numbers that are representative of their share of the city's population.")).

Further, while all of the provisions challenged under Section 2 in this case impose discriminatory burdens—and, as detailed below, were enacted with discriminatory intent, *see infra* Section IV—two are particularly worthy of mention in connection with Senate Factors 1 and 3. First, as discussed in detail above and below, Wisconsin had substantial problems with election observers, particularly in cities with large African-American populations and in African-American precincts, and the legislature responded *by moving observers closer to voters*. Second, despite the widespread and growing popularity of in-person absentee voting, as well as well-publicized lines in Milwaukee that literally go out the door, Wisconsin—more than 50 years after *Reynolds v. Sims*, 377 U.S. 533 (1964)—has maintained and even rebuffed efforts to undo its provision limiting in-person absentee voting to a single location per municipality irrespective of population. *See generally* PPFOF 164, 354. It is difficult to conceive of better modern examples

of provisions that "enhance[] the opportunity for discrimination" or are discriminatory on their face.

**2. Senate Factor 5**

Dr. Burden's and Dr. Lichtman's expert reports address in great detail the extent to which minorities in Wisconsin "bear effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process" (Senate Factor 5). *See* PPFOF 66. Dr. Burden explains that, "[s]temming in large part from historic legacies of unequal treatment, segregation, and discrimination, blacks, Latinos, and whites in Wisconsin experience radically different outcomes in these areas." PPFOF 67. The evidence in this case demonstrates that disparities in these and other socioeconomic markers are directly related to discrimination by the State.[17]

Wisconsin's history of discrimination is substantial. One historian has explained that "unequal treatment of blacks was generally illegal in Wisconsin from the Civil War until the 1960s, 'but de facto segregation and discrimination were common.'" PPFOF 68. "[I]n parts of Wisconsin 'it wasn't until after World War II that it was safe for black Americans to be anywhere in evidence after dark.'" PPFOF 69. "A more recent era of contentious racial debates in Milwaukee occurred under Mayor Henry Maier, who served from 1960 to 1988." PPFOF 70. One historian wrote that Maier "'was out of touch with the city's blacks…his position on civil

[17] For two reasons, this section contains evidence of discrimination both by the State and by private actors. First, as set forth above, Plaintiffs believe that *Frank*'s unique distinction between public and private discrimination in conducting its VRA analysis should be overruled and that all of the information contained in this section is pertinent for that reason. Second, much of Wisconsin's history of discrimination cannot so neatly be divided into public and private discrimination. For instance, while the discriminatory hiring practices of employers in Milwaukee discussed in the text are the acts of private individuals, it would be implausible and ahistorical to suggest that such discrimination is wholly unrelated to the history of official discrimination in a city with a history of racial segregation and animosity that has been called the Selma of the North.

rights accurately represented the majority of his white constituency, and he probably believed he could safely ignore black voters.'" PPFOF 71.

"The 1960s were a particularly hostile era" for African Americans in Milwaukee due to the then-recent arrival into the city of increasing numbers of African Americans. PPFOF 72. "Public disputes over educational and housing discrimination boiled to riots, including one that resulted in four deaths in 1967." PPFOF 73. Largely in response to school desegregation and open housing laws—the latter of which was passed in Milwaukee in 1968 only after repeated efforts by the one African-American member on Milwaukee's Common Council and "over 200 nights of public marches in the city"—"white-dominated suburbs quickly developed" through "white flight" from Milwaukee as African Americans moved into the city at higher rates in the 1960s and 1970s. PPFOF 74. Some of this history is recounted in *Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264, 270 (E.D. Wis. 1968), in which the Eastern District of Wisconsin wrote, in 1968, that "race [wa]s a factor of almost transcendent significance."

"Even with the passage of the federal Fair Housing Act [in 1968], discriminatory real estate practices such as biased appraisal practices, redlining, and racial 'steering' nonetheless continued to constrain blacks' housing choices to the inner city." PPFOF 75. And the resulting segregation was reinforced by "exclusionary land zoning rules in incorporated municipalities near the city of Milwaukee." PPFOF 76. In 1976, a federal judge held that Milwaukee's schools were illegally segregated, and that case "settled in 1979 when the Milwaukee school board agreed to implement a five-year plan to desegregate." PPFOF 77; *see Armstrong v. O'Connell*, 451 F. Supp. 817, 827 (E.D. Wis. 1978) (explaining that the Superintendent and Assistant Superintendent of Education "testified in essence that the Board of School Directors of the City of Milwaukee and its administration" are and have "been since 1950, unalterably opposed to any

form of forced integration and, from an educational point of view, do[] not believe in any substantial racial integration in the schools at this time"). In short, "[r]acial segregation and animosity have been enduring parts of Milwaukee's history" and "[f]or these reasons the city has been called the 'Selma of the North.'" PPFOF 78.

A study conducted in the Milwaukee area in the summer of 2001 with pairs of black and white individuals applying for jobs found that "'employers, at least in Milwaukee, continue to use race as a major factor in their hiring decisions'"; "that blacks 'may also be more strongly affected by the impact of a criminal record'"; and that "the callback rate was higher for white applicants *with* criminal records than for the equivalent black applicants *without* records." PPFOF 79 (emphases added). Further, data collected from Dane and Milwaukee Counties after the passage of legislation in 2009 showed that African Americans and Latinos, as compared to whites, were 2.2 to 3.8 times more likely to be stopped by law enforcement; were more likely to have their vehicles searched; and were more likely to be ticketed, despite *not* being more likely to have weapons, drugs, or stolen goods. PPFOF 80.

The effects of Wisconsin's history of discrimination are evident—and they are severe. To begin with, Wisconsin's black and Latino populations "are highly geographically concentrated." PPFOF 81. Two-thirds of African Americans residing in Wisconsin live in Milwaukee, which has "been identified by demographers as one of the most segregated cities in America." PPFOF 82. One demographer who evaluated 102 metropolitan areas concluded that Milwaukee has the "highest level of black-white segregation and the ninth highest level of Latino-white segregation." PPFOF 83. "Research from the University of Wisconsin-Milwaukee indicates that the 'suburbanization gap' between black and white males was the largest of 40 metropolitan areas studied." PPFOF 84. And, as of 2000, "the Milwaukee metropolitan area had

the lowest number of black suburbanites among all metropolitan areas with over one million people, with just 1.6% of blacks living in the suburbs." PPFOF 85. Dr. Burden notes that "[m]uch of the black population today remains confined to the 'Inner Core,' which was created in large part by restrictive housing covenants in place as late as the 1940s." PPFOF 86.

Substantial racial disparities exist across a number of other socioeconomic factors as well:

- Latino households in Milwaukee and Dane Counties are much more likely than white households to lack access to a vehicle. Black households in Milwaukee County are nearly three times, and black households in Dane County are over three times, more likely than white households in those counties to lack access to a vehicle. American Community Survey data from 2010 indicates that in Wisconsin 23.1% of non-Hispanic black households, 8.7% of Hispanic households, and 5.5% of white households lack an available vehicle. PPFOF 87-89.

- "A recent study indicates that Wisconsin has the highest black unemployment rates in the country, almost twice the national rate." The "unemployment rate in Wisconsin in 2014 was 19.9% for blacks, 9.1% for Latinos, and 4.3% for whites." Milwaukee's employment gap between black and white males in 2010 was 32.7 percentage points—"the largest of 40 metropolitan areas studied by researchers at the University of Wisconsin-Milwaukee" and "almost a tripling of the gap since 1970." PPFOF 91-92.

- "A recent study shows that both black and Latino earnings in Wisconsin are 30 percentage points lower than those of whites." "The poverty rate in Wisconsin in 2013 was 7% for whites, 32% for Latinos, and 39% for blacks." These disparities are much greater than the national average. Moreover, "research estimates that, at a minimum, one third of the wage gap between blacks and whites is due to racial discrimination," while "the scholarly literature shows evidence of discrimination against black and Latino consumers in the areas of employment, housing, purchasing, and lending." PPFOF 93-96.

- Infant mortality rates for Latinos exceed those of whites in Wisconsin, and "[t]he rate for blacks is almost three times that of whites. These disparities are more severe than for the rest of the nation and have generally worsened over time." Although the state legislature created a Special Committee on Infant Mortality in 2010, "[a]fter two years of hearings, studies, and data collection by the committee, the legislature failed to pass a bill to address its recommendations." Further, "[d]ata from the Centers for Disease Control and other sources demonstrate that blacks and Latinos are generally in poorer health than whites." PPFOF 97.99.

- "Educational disparities between minorities and whites are substantial and enduring. Recent federal data indicate that high school graduation rates in Wisconsin were 66% for blacks, 78% for Latinos, and 93% for whites"; this gap between the black and white graduation rates "is the largest in the nation." Test scores for fourth and eighth graders in Wisconsin in mathematics and reading also reveal significant racial disparities. PPFOF 100-101.

- African Americans are incarcerated at more than *10 times* the rate of whites in Wisconsin, and the state's incarceration rate for blacks (or at least black men) is the highest in the country. PPFOF 102.

In short, "Wisconsin displays substantial and enduring racial disparities in areas such as education, income, employment, criminal justice, and health." PPFOF 103.

As some of the data discussed above indicates, "[t]hese disparities are frequently larger than those in the rest of the United States." PPFOF 104. Indeed, Dr. Lichtman's report, citing "a study that ranks the states according to the black-to-white ratio of various socio-economic measures," explains that, "[o]n most measures Wisconsin ranks at or near the bottom of the states." PPFOF 105. Wisconsin is the third-worst state in the country in black/white disparities in the unemployment rate; the second-worst state in black/white disparities in family poverty rates, percent of high school graduates, and average eighth grade math scores; and the worst state in black/white disparities in dropout rates. PPFOF 106.

### 3. Senate Factors 2, 6, 7, 8, 9

There is substantial evidence relating to nearly every other Senate Factor as well.[18] Racially polarized voting (Senate Factor 2) "is sizable and enduring in Wisconsin." PPFOF 107. Exit polls for the 2012 presidential election in Wisconsin show that "support for the Democratic ticket was 94% among blacks, 66% among Latinos, and 48% among whites." PPFOF 108. Other recent major statewide elections have had similar black-white gaps in

[18] The only Senate Factor not discussed in this section is Senate Factor 6: "if there is a candidate slating process, whether the members of the minority group have been denied access to that process."

Democratic voting. PPFOF 109. Indeed, "[e]xit poll data demonstrates that Republican electoral success in Wisconsin turns in part on the white voter turnout relative to minority turnout." PPFOF 110. Racial polarization has been present even in Democratic primaries. PPFOF 111.

Campaigns in Wisconsin have also featured racial appeals (Senate Factor 6). Dr. Burden writes that "various campaigns have displayed racial appeals that are both implicit and explicit," and, "[i]n the rare case where a minority candidate runs for a prominent office, racial messages are even more prominent." PPFOF 112. For example, in a campaign in 2008, Louis Butler, the state's first African-American supreme court justice, was attacked in an ad that the *Milwaukee Journal-Sentinel* described as amounting "to race-baiting"; that a column in the *Minneapolis Star-Tribune* described as "a reprise of the 1988 Willie Horton gambit" and a "race-baiting ad"; and that the Wisconsin Judicial Campaign Integrity Committee called "highly offensive and deliberately misleading," with "the race-baiting style of the Willie Horton spot from the 1988 presidential race." PPFOF 113. "Butler became the first Supreme Court incumbent defeated since 1967" and only the fifth incumbent to lose 'an election in the 159-year history of the Court." PPFOF 114.

In the 2006 gubernatorial election, Mark Green ran a television commercial asserting, "As illegal aliens stream in, [Governor Jim Doyle] actually wants to give them welfare and subsidized home loans' and 'even wants to give illegal aliens in-state tuition breaks at the [University of Wisconsin], while Wisconsin kids are being turned away." PPFOF 115. WISC-TV found parts of this ad misleading. PPFOF 116.

Shortly before the 2012 general election, approximately 85 billboards "stating that voter fraud is a felony subject to punishment of three years in prison and [a] $10,000 fine" were put up

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There is no evidence in the case one way or the other regarding any candidate slating processes in Wisconsin.

in the Milwaukee metropolitan area. PPFOF 117. The *Milwaukee Journal-Sentinel* reported that "Democrats and civil rights groups complained that the signs…were concentrated in minority neighborhoods and intended to suppress the election turnout." PPFOF 118. The sponsor of the billboards was ultimately revealed to be Stephen Einhorn, who, with his wife, "had contributed nearly $50,000 to Scott Walker's campaigns between 2005 and 2012." PPFOF 119.

In assessing Senate Factor 7 ("the extent to which members of the minority group have been elected to public office in the jurisdiction"), Dr. Burden concludes that "[b]lacks are not well represented in Wisconsin public life." PPFOF 120. Vel Phillips, who served one term as Secretary of State, is the only black candidate ever to have been elected statewide; Gwen Moore is the only African American who has ever been elected to Congress from Wisconsin; and there are only two Latino members of the State Assembly and no Latino members of the State Senate. PPFOF 121. Milwaukee has never had a black or Latino mayor. PPFOF 122.

There has also been a significant "lack of responsiveness on the part of elected officials to the particularized needs of minority group members" in Wisconsin (Senate Factor 8). "Blacks and Latinos suffer severe disparities in education, health, employment, income, and criminal justice in part due to state policies," and "[m]any of these disparities are more severe than in the rest of the country and have worsened over time." PPFOF 123. "There is also social science evidence that local election officials in Wisconsin are less responsive to minority constituents seeking information about how to participate in state elections." PPFOF 124.

While in-person absentee voters in Milwaukee "frequently face lines that extend for several blocks, forcing them to wait outside," there have frequently been news stories about long lines to vote in Milwaukee, and the Milwaukee Election Commission has, since 2005,

"advocated for the discretion to offer in-person absentee voting at multiple locations," the rule limiting in-person absentee voting to a single location remains in place—and the legislature has *reduced* the period available for early voting. PPFOF 125. Indeed, Executive Director Albrecht notes that he does "not recall one action by the legislature during [his] 10 years as an election administrator that has increased voter access or participation, particularly for groups that have historically been disenfranchised." PPFOF 126. "When government has intervened to address the needs of blacks and Latinos," it was seldom the state legislature and governor who acted"; "[i]nstead, state courts, federal courts, and the federal government were frequently the actors who forced the state to respond." PPFOF 127.

The justifications for the challenged provisions are tenuous (Senate Factor 9)—at best. As set forth above and below, the challenged provisions are either unsupported or supported only by the thinnest of reeds. Moreover, "[t]he challenged provisions are a significant shift away from long-term trends in Wisconsin election law. Wisconsin has prided itself on an inclusive election system that has generally become more accommodating over time," and "[v]oters have adapted to that system." PPFOF 128. As the Senate report from which the Senate Factors were derived states with respect to the tenuousness factor, "If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact." S. Rep. No. 97-417 at 29 n.117, 1982 U.S.C.C.A.N. at 207.

**4. The Voter ID Law**

As documented above, the State has abused its discretion in administering Act 23's voter ID requirements, including the "extraordinary proof" petition process. But the State's implementation efforts not only have been arbitrary and capricious--they have had a strikingly disproportionate impact as well. Specifically:

- DMV data demonstrate that 44% of all voters who have had to obtain "free" voter ID are either African-American or Hispanic. Although African-Americans make up 5.6% of the voting age population in Wisconsin, they make up 35.6% of the group that has been forced to secure "free" ID in order to continue voting. And although Hispanics represent 3.3% of the voting age population, they make of 8.3% of the group that has had to obtain voter ID. This is powerful, direct evidence of racially disproportionate impacts. *See* PPFOF ¶¶ 335-337.
- Although DMV's document production is ongoing and plaintiffs have been unable to obtain full data yet, it appears that DMV's "extraordinary petition" proof process--and the denials of voting rights that result from that process--fall disproportionately hard on African-Americans and Latinos. Of the first group of petitions that DMV denied in June 2015, over half appear to have been from African-Americans and Latinos. Many more such petitions from voters of color have been denied, resulting in a complete denial of their right to vote, based on minor discrepancies in names, spellings of names, and birthdates among the voters' proof documents. It is clear that many voters forced to petition were born in the Jim Crow south, in Chicago, in Puerto Rico, and in other places where birth records are incomplete and unreliable. DMV time and again has denied petitions to obtain needed voter ID based on trivial discrepancies, even while acknowledging that there are no doubts that petitioners are U.S. citizens. *See* Additional PPFOF (UNDER SEAL) ¶¶ 25-29.

**5. Impact on Voting and Voter Registration**

The social and historical conditions discussed above directly impact the accessibility of voting and voter registration for African Americans and Latinos in Wisconsin. "Decades of

political science research shows that voter participation is significantly affected by" the demographic factors discussed above. PPFOF 129. For instance, "[n]umerous studies have shown that educational attainment is the single best predictor of whether an individual votes," as "education lowers the 'costs' of voting by providing language skills, direct information about the electoral process, and confidence that facilitate participation." PPFOF 130. Thus, "[t]he racial and ethnic disparities in education naturally produce disparities in voter participation." PPFOF 131.

"Income also affects voter participation. Individuals with lower household incomes are significantly less likely to vote because it is comparably more burdensome for them to make time to do so." PPFOF 132. Likewise, "[g]eneral health is clearly related to . . . turnout": "a person moving from 'excellent' to 'poor' health is estimated to be 12 percentage points less likely to vote." PPFOF 133. And, "[a] disability makes the average person approximately 20 percentage points less likely to vote, likely because it increases the burdens and costs associated with voting." PPFOF 134.

Most significantly here, "demographic markers are strongly associated with the likelihood of an individual being deterred from voting by [the] introduction of a newly restrictive voting practice that raises costs and disrupts voting habits. PPFOF 135. The underrepresentation of African Americans and Latinos in public office in Wisconsin reinforces the impact of the above-described socioeconomic disparities, as "underrepresentation of these groups has contributed to their lower levels of electoral participation and contributes to the likelihood that adding burdens to the voting process will more likely deter blacks and Latinos from voting because the perceived benefits of voting are not as high as they would be if minority-preferred candidates enjoyed greater electoral success." PPFOF 136. And the other

factors discussed above—such as a history of voting-related discrimination, racial appeals in campaigns, a lack of responsiveness on the part of elected officials to the particularized needs of minority group members, and the voter ID law—plainly exacerbate these impacts further. Thus, taken together, the Senate Factors provide compelling evidence that, because of the ongoing effects of Wisconsin's history of discrimination, any burdens imposed by the challenged provisions will fall disproportionately on African Americans and Latinos. *See generally* PPFOF 137 (Burden Rep. at 31 ("[V]oting was more costly for" African Americans and Latinos "before the challenged changes in election law were implemented. These voters generally had less established voting habits and had fewer resources to help overcome the costs of voting.")).

### D. Challenged Provisions

The evidence in this case overwhelmingly establishes that the provisions challenged under Section 2 impose disproportionate burdens on African Americans and Latinos such that they have less opportunity than other members of the electorate to participate in the political process. In cases involving challenges to multiple provisions, courts should assess the burdens that the provisions impose cumulatively. As the *League of Women Voters* court explained, "a panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." 769 F.3d at 242 (brackets omitted); *see also id.* (finding that the district court erred by "consider[ing] each challenged electoral mechanism only separately"). Here, the disproportionate burdens imposed by the provisions challenged under Section 2 are evident both from a cumulative assessment and from individual consideration of the challenged provisions.

#### 1. Cumulative Impacts

Evidence from political science research, empirical analyses of voter behavior in Wisconsin, and lay witnesses establishes that the provisions challenged under Section 2 impose disproportionate burdens on minority voters.

**a. Political Science Research**

"The 'calculus of voting' is the dominant theoretical framework used by scholars to study voter turnout." PPFOF 338. Under this framework, a voter is expected to cast a ballot if the benefits of doing so outweigh the costs for that voter. PPFOF 339. "[F]or many individuals small changes in benefits or costs may alter the likelihood of voting dramatically. The decision to vote is sensitive enough to costs that even election day weather has been shown to depress turnout." PPFOF 340. Because the costs of voting "include the time, resources, and activity needed to overcome the administrative requirements and other barriers to registering to vote and successfully casting a ballot," election laws directly affect the costs of voting. PPFOF 341.

Increases in the costs of voting impact different groups of voters differently. "Costs are especially consequential for individuals with less education, fewer resources, and less of a voting habit," because, for such voters, "the complications of registering, finding the correct polling place, and making the time to vote are frequently quite costly." PPFOF 342. With respect to the habit of voting in particular, Dr. Burden explains that "[p]olitical science research demonstrates that voting participation is largely a product of habit," that "[d]isruptions to voting habits raise costs and deter participation," and that "a modest change to election procedures is enough to deter voting." PPFOF 343. (emphasis in original). Indeed, studies "demonstrate that removing options consistently reduces participation, especially among those with fewer resources to navigate the disruption," and "[r]esearch has demonstrated how costs of voting depress turnout especially for racial and ethnic minorities." PPFOF 344 (emphasis in original).

Here, in the expert opinion of Dr. Burden, there has been a "dramatic disruption of voting practices resulting from the challenged provisions," and this disruption is "likely to deter participation by groups of residents who have more fragile voting habits and fewer resources to overcome the disruptions to those habits," including African Americans and Latinos. PPFOF 345. Dr. Burden therefore explains that it is his "considered opinion that the specific changes to Wisconsin election law challenged by plaintiffs in this litigation, both individually and jointly, implicate the Senate Report factors in ways that demonstrate how the state's black and Latino voters are more likely than other voters to be deterred or prevented from voting by the challenged provisions and thus have less opportunity to participate in the electoral process." PPFOF 346.

**b. Empirical Evidence**

Empirical evidence from recent Wisconsin elections is consistent with Dr. Burden's conclusions. As set forth in his expert report, Dr. Mayer conducted "[a]n individual level analysis of the probability of voting in 2014" and found "that registrants who are Black, Hispanic, . . . or do not possess an ID were significantly less likely than other voters to vote in 2014, even if they had voted in earlier elections." PPFOF 347. Significantly, "[a] control analysis of voting in the 2010 election, prior to the voting and registration changes at issue in this case, showed either no effects or much smaller effects." PPFOF 348.

Based on his analysis, Dr. Mayer "conclude[s] that the changes to voting and registration enacted since 2011 impose substantial burdens on voters when registering or casting a ballot" and that "those burdens have the greatest effect on identifiable population subgroups, particularly racial minorities, young voters, students, and registrants without ID, depressing their turnout by making it significantly harder to register and vote." PPFOF 349. Given that "[t]he negative

impact is largest in 2014 and almost entirely absent in 2010," there "is strong — even conclusive — evidence that the effects are the result of changes to voting and registration practices enacted after the 2010 elections." PPFOF 350. Dr. Mayer's conclusion is therefore unequivocal: "There is no doubt that the changes to voting enacted in Wisconsin since 2011 have significantly lowered the probability that a voter can cast a ballot in 2014, with the effects falling particularly hard on racial minorities . . . and those without ID." PPFOF 351.

Current Population Survey data for Wisconsin provide additional support for this conclusion. These data indicate that, from 2008 to 2012 and from 2010 to 2014, white turnout in Wisconsin increased, while turnout among blacks and Latinos decreased. PPFOF 352. Focusing on the differences from 2010 to 2014, Dr. Burden finds that, while these differences are not statistically significant, "it is more likely than not that black and Latino turnout fell and white turnout rose over the time period when the challenged provisions were enacted and (mostly) implemented." PPFOF 353. Thus, the empirical evidence strongly supports the conclusion that the provisions challenged under Section 2 impose disproportionate burdens on African-American and Latino voters.

**c. Longer Lines and Increased Confusion**

The record in this case also includes abundant evidence that many of the provisions challenged under Section 2 will increase the already-lengthy wait times that some voters face and add to confusion among voters and election officials. Much of this evidence is discussed above. *See supra* Section II. Importantly here, the evidence shows that African Americans and Latinos will be disproportionately burdened as a result of increased wait times and confusion.

With respect to wait times, the evidence shows that Milwaukee—where a majority of Wisconsin's African-American population and a disproportion share of the state's Latino

population lives—has had recurring problems with long wait times to vote and that Racine, which has African-American and Latino populations that are more than three times larger than the state as a whole, also has had problems with long wait times. PPFOF 354-355.

Because these cities, as compared to smaller municipalities, have greater densities of voters—particularly for in-person absentee voting in Milwaukee—the effect of an increase in the amount of time required to process voters will have a greater overall impact on lines in these cities than it will in smaller municipalities. Moreover, because these cities had long wait times to begin with, there is little if any slack in the system, meaning that increased time for voting will result directly in longer lines. In smaller municipalities, in contrast, which did not have long lines, PPFOF 356, the slack in the system will permit many municipalities to avoid increases (or at least increases as significant as those in Milwaukee and Racine) in wait times to vote. As a result, African-American and Latino voters in Wisconsin will bear a disproportionate share of the burden from increased wait times to vote. And this effect will be compounded by the fact that the lower incomes of African Americans and Latinos in Wisconsin make it "comparably more burdensome for them to make time to [vote]." PPFOF 357.

The confusion that has resulted from the challenged provisions also disproportionately impacts African-American and Latino voters. PPFOF 358. Moreover, confusion or uncertainty generally has resulted in disproportionate burdens on minority voters in Wisconsin. As explained, election observers, who have disproportionately targeted predominantly black and Latino precincts with aggressive and bullying behavior, PPFOF 302-306, have created the most problems when election inspectors have been uncertain about the rules. *See* PPFOF 359.

In sum, the evidence overwhelmingly points to the conclusion that the cumulative effects of the provisions challenged under Section 2 impose discriminatory burdens on African Americans and Latinos in Wisconsin.

**2. Provision-Specific Impacts**

The evidence also demonstrates that, when considered individually or with other provisions that relate to the same issue (such as the restrictions on in-person absentee voting or on voter registration), the provisions challenged under Section 2 impose discriminatory burdens on African Americans and Latinos in Wisconsin.

**a. Restrictions on In-Person Absentee Voting**

Each of the challenged restrictions on in-person absentee voting disproportionately burdens minority voters. With respect to the rule limiting in-person absentee voting to one location per municipality, Dr. Burden explains that, "[i]n 2014 the correlation between the size of the adult population and the percent of a group in the municipality was positive and statistically significant for blacks . . . [and] Latinos." PPFOF 156. Thus, African-American and Latino voters in Wisconsin were "required to use early voting locations that served significantly larger numbers of people." PPFOF 157. This directly impacts access to voting: "Research has shown that a lower density of early voting locations relative to the size of the voting age population decreases overall turnout." PPFOF 158. Minorities are also disproportionately burdened by the one-location rule because they are more likely than whites to lack access to a vehicle, PPFOF 159, and overall traveling distances to vote when there is a single location are necessarily longer than they would be if there were multiple voting sites. *See also* PPFOF 142, 160.

Executive Director Albrecht's declaration confirms that the one-location rule has been particularly problematic in Milwaukee, where a significant share of the state's minority population lives, as well as in Madison:

> The one-location rule has reduced in-person absentee voting in Milwaukee and Madison. Election Commission staff compared Milwaukee's and Madison's turnout for in-person absentee voting in the 2012 general election with that of 14 other municipalities in Wisconsin and found that, other than a town with 358 registered voters, in-person absentee voting accounted for a higher percentage of total ballots cast in all of the other municipalities we analyzed. . . . [T]he percentage of votes cast by in-person absentee ballot in Milwaukee (12.57%) was only about 3/4 of the percentage statewide (16.68%). In five of the six municipalities we assessed in Waukesha and Ozaukee Counties, which neighbor Milwaukee County, 25-27% of ballots were cast by in-person absentee voting; in the other municipality, which had 427 registered voters, 19.32% of ballots were cast in-person absentee. In Whitefish Bay, the other municipality we assessed in Milwaukee County, in-person absentee voting accounted for 34.58% of ballots cast.

PPFOF 163. Albrecht explains that "[t]hese discrepancies are a direct result of the fact that Milwaukee's and Madison's voters are deterred from using in-person absentee voting by the difficulty of traveling to a single in-person absentee voting location and the likelihood that they will have to wait in long lines due to the one-location rule." PPFOF 164.

The disparate impacts that the one-location rule imposes on minority voters have been magnified by the recent reductions in the in-person absentee voting period. To alleviate the problems from the one-location rule, "Milwaukee and Madison offer[ed] extended evening and weekend hours during high turnout elections," and, in 2012, nearly 5,000 Milwaukee residents voted during the one weekend that was available for in-person absentee voting. PPFOF 179, 181. Even so, "the growth rate for in-person absentee voting in Milwaukee from 2008 to 2012 was only about 14%—much lower than it previously had been and lower than the growth rate in other municipalities in Wisconsin." PPFOF 182. Now, moreover, weekend in-person absentee voting—which was much more likely to be used in Milwaukee and Madison than in other parts

of the state—has been eliminated, making the burden on the disproportionately minority voters of Milwaukee even more severe. *See* PPFOF 183 (Kaminski Decl. ¶ 24 & Ex. E ("municipalities were already limited to one early voting location regardless of size and, by treating municipalities equally, the bill eliminating weekend and evening early voting does not treat voters equally")).

Even aside from the exacerbation of the one-location rule, the reductions to the in-person absentee voting period burden minority voters disproportionately. "African Americans and Hispanics were more likely than whites to use early voting." PPFOF 184. Data from in-person absentee voting in Milwaukee shows that *within* Milwaukee, African Americans have been disproportionately likely to use in-person absentee voting. *See* PPFOF 185; *see also id.* (Albrecht Decl. ¶ 23 ("My personal observations have been consistent with what these numbers show. A majority of the voters I have seen using in-person absentee voting have been African American. This pattern has been particularly noticeable on the weekend. On the Sunday when in-person absentee voting was available for the 2012 presidential election, African-American churches encouraged voting after services and organized transportation to the polls.").

Dr. Mayer reports that, "[i]n 2010, the last statewide election in which . . . registration was permitted in the 3 days before an election, significantly more people registered over this period in municipalities with higher African American population concentrations[,] . . . even after removing Milwaukee from the analysis, and controlling for municipality size." PPFOF 186. Moreover, "[r]esearch on early voting has found consistently that minority voters are more likely than white voters to vote on the weekend before an election." PPFOF 187.

"In-person absentee voting generally, and lengthier and more flexible in-person absentee voting periods specifically, are also valuable in ensuring that voters with limited English

proficiency, low literacy, or discomfort or unfamiliarity with the voting process are able to get to the polls." PPFOF 188. Executive Director Albrecht explains that such voters "benefit from in-person absentee voting because there are more resources and staff support available during early voting than on Election Day." PPFOF 189. In addition, "[i]n-person absentee voting is particularly valuable to the working poor, who are often working multiple jobs." PPFOF 190. Unsurprisingly, "[t]he residents of many of the districts [in Milwaukee] with high turnout for in-person absentee voting are among the working poor and have to work multiple jobs in order to make ends meet. These voters tend to have particularly inflexible schedules, and voting early allows them to avoid concerns about being unavailable during polling hours on Election Day." PPFOF 191.

Because minority voters are more likely than whites to use in-person absentee voting, a reduction in the in-person absentee voting period will plainly burden minority voters disproportionately. *See* PPFOF 192 (Albrecht Decl. ¶ 19 & Ex. D ("The reality is that the majority of early voters in the City of Milwaukee are African American. . . . When the question is asked, 'who in Milwaukee will be most affected by [the elimination of weekend and evening early voting hours],' the answer is African Americans."); *see also* Johnson Decl. ¶¶ 12-13 (explaining that she has "coordinated rides to the polls from African-American churches on Sundays when the state permitted early voting on the weekend" but can no longer do so and that "limitations [on early voting] and long lines have made it significantly more difficult for African-Americans to vote early or on Election Day"); Witzel-Behl Decl. ¶ 9 ("Based on my experience, the elimination of weekend early voting hours is particularly likely to burden low-income voters who work two shifts during the week or lack the transportation or child care they need to vote during the week."); Sundstrom Decl. ¶ 10 ("Now that the legislature has reduced the number of

in-person absentee voting days, and cut weekends entirely, it is not at all convenient for people who work, especially for lower income people who might work two jobs or have particularly inflexible schedules. Based on my conversations with voters, it is less likely that people with inflexible work schedules, which tend to be lower income people, will be able to vote at all."). *See generally* Kennedy Dep. at 83:8-17 (Kennedy previously stated that there were concerns that the post-2012 changes to in-person absentee voting would "have an impact on people who live in urban areas who might be working during those hours").)

**b. Restrictions on Voter Registration**

The three restrictions on voter registration challenged under Section 2—the elimination of corroboration, the expansion of the documentary proof-of-residence requirement, and the elimination of statewide SRDs—all interact with the socioeconomic disparities discussed above to impose disproportionate burdens on minority voters who are seeking to register to vote. Generally speaking, African Americans and Latinos in Wisconsin are far more likely than whites to move, *see* PPFOF 225, and therefore to need to change their registration information—and to be burdened by restrictions on voter registration—even if they are already registered.

The elimination of corroboration and the expansion of the documentary proof-of-residence requirement also have the effect of requiring voters to have some form of documentation to register. *See also* PPFOF 292 (Lichtman Rep. at 40 (expansion of the documentary proof of residence requirement "makes more onerous the elimination of corroboration by expanding the universe of potential voters required to present proof of residence when voting"); Kaminski Decl. ¶ 16 (the League of Women Voters found in the 2014 general election that "many people were unable to register due to a lack of documentation" and that providing proof of residence was a major obstacle for specific groups of voters, including

the poor)). As discussed above, African American and Latino voters are less likely than white voters to have the types of ID commonly used to prove residence. *See also* PPFOF 227. In addition, "[m]inority residents are also more likely to move and thus less likely to have identification that reflects current residency. Recent Census data shows that while only 12.5% of whites lived in a different household one year ago, 20.1% of Latinos and 26.1% of blacks did so." PPFOF 293. The elimination of corroboration and the expansion of the documentary proof-of-registration requirement will therefore make it more difficult for minorities in particular to register to vote.

The documentary proof-of-residence requirement and the elimination of statewide SRDs also make voter-registration drives less common and less effective. PPFOF 294. Given the well-known data that minority voters are far more likely than white voters to register through registration drives, *see, e.g.*, ACLU, *The Facts About Voter Suppression*, *available at* https://www.aclu.org/facts-about-voter-suppression ("In 2008, 11.4% of African-American, 9.6% of Hispanic, and 5.4% of white voters used voter registration drives," which may be hampered by this change), and that, as explained above, minority voters in Wisconsin are more likely than whites to need to register, this reduction in the number and effectiveness of voter-registration drives disproportionately impacts minority voters.

In addition, corroboration makes voter registration more difficult for groups of voters who, because of the economic disparities detailed above, are disproportionately likely to be minorities. PPFOF 295. Specifically, the evidence shows that the elimination of corroboration has imposed disparate burdens on poor, homeless, and transient voters. *See* PPFOF 296 (Albrecht Decl. ¶ 27 (corroboration especially valuable for particular groups of voters, including "people in extreme poverty" and "people in transient situations"); Kaminski Decl. ¶ 10

("elimination of corroboration has been especially burdensome" to particular groups of voters, including homeless voters); Lichtman Rep. at 39 ("corroboration is most likely to benefit homeless persons and persons who recently moved and may not yet have the documentation necessary to prove residence")).

There is also direct evidence that African Americans and groups of voters who are disproportionately likely to be minorities have been disproportionately burdened by the documentary proof-of-residence requirement. *See* PPFOF 297 (Johnson Decl. ¶ 15 ("In my experience [the expanded proof-of-residence] requirement has also made it more difficult to register voters in the African-American community."); Sundstrom Decl. ¶ 7 ("In my experience registering voters at off-site locations, the voters who are more frequently turned away for lack of proof of residence are voters who rent, who move frequently, and who tend to be lower income. Much of Milwaukee's poverty is concentrated among Latino and African-American populations, so those voters are disproportionately affected by the proof of residency requirement."); Kaminski Decl. ¶ 12 & Ex. E (League of Women Voters warned that "the expansion of the documentary proof-of-registration requirement will impact many people who have recently moved or are temporarily living with family or friends and who do not have a document such as a Wisconsin driver's license or bank statement with their own name and current address") (internal quotation marks omitted).)

The evidence shows that the elimination of statewide SRDs imposes disproportionate burdens on minority voters as well. Anita Johnson explains, for instance, the elimination of statewide SRDs "has caused significant confusion and hardship among voters seeking to register and deputies regarding whether or not a deputy is able to register a particular voter, particularly among groups of voters who move more often such as racial minorities, young voters, and poor

voters." PPFOF 298. As noted above, the elimination of statewide SRDs has also impaired voter-registration drives.

**c. Expansion of the Residency Requirements**

The change in the residency requirement from 10 to 28 days will also burden minority voters disproportionately. As explained above, minorities and low-income people are more likely than other voters to move. PPFOF 225. "Thus, these groups will disproportionately be required to find time and appropriate transportation to return to the previous voting location or make use of the absentee ballot process," *id.*, or the voters impacted by these changes simply will not vote. *See also* PPFOF 300 (Lichtman Rep. at 46 ("The increase in the residency requirement has a disparate effect on African Americans and Hispanics, who are more likely than whites to move into Wisconsin from another state. . . . Similarly, the greater mobility of African Americans and Hispanics as compared to whites also indicates that the requirement that recent movers must only vote at their previous ward or election district places a disparate burden on members of these minority groups."); Johnson Decl. ¶ 16 ("In my educational work I have noticed an increased sense of confusion among voters, particularly in the African-American community, since the expanded residency requirements fall more heavily on voters who move more often, including racial minorities, young, and poor voters."); Albrecht Decl. ¶ 34 ("The greatest impact from the change to the residency period is on people in poverty and transient people generally.")).

**d. Change to Observer Rules**

Election observers have caused substantial disruptions in Wisconsin elections. The evidence shows that a large share of such harassing observer conduct has occurred in Milwaukee and Racine, cities with disproportionately large minority populations. PPFOF 316 (Lowe Dep.

75:3-20 (issues with observers "mostly occur in cities like Racine, Milwaukee. . . . "[T]hat seems to be where the observers want to go observe," even though the observers are not usually from those cities); *see also id.* at 68:10-22 (Milwaukee and Racine have had problems with disruptive observers in several elections); Kaminsky Decl. ¶ 17 & Ex. B at 2-3 (describing particular problems with election observers in Milwaukee, Racine, and La Crosse in the 2012 recall elections and that some people left polling places without voting); *id.* ¶ 18 (many of the incidents of voter intimidation and harassment in the November 2012 election occurred in Milwaukee); Albrecht Decl. ¶¶ 37-38 (explaining that Milwaukee has had problems with election observers and repeat problems with particular observers)).

Moreover, this inappropriate conduct has been especially likely to occur in predominantly African American precincts and during in-person absentee voting in Milwaukee (which is disproportionately used by African Americans). PPFOF 317.

Executive Director Albrecht explains that this racial targeting can be explicit: "On more than one occasion, upon the arrival of individuals from African-American churches or community groups that provide transportation to the polls during in-person absentee voting, I have heard an observer say something along the lines of, 'Here's the busload of brown people coming up from Illinois." PPFOF 317. By moving observers closer to voters, and thus making it easier for observers to intimidate voters and interrupt the voting process, the change in the observer rules plainly burdens minority voters disproportionately.

**e. Elimination of Straight-Ticket Voting**

The elimination of straight-ticket voting interacts with the disparities discussed above to impose disproportionate burdens on minority voters as well. As Executive Director Albrecht explains, this change "make[s] the act of voting more difficult for voters with low levels of

literacy or who are not proficient in English or (in the case of Milwaukee voters) Spanish." PPFOF 321. This results in the disenfranchisement of many voters: "In 2012, over 1,000 overvotes were cast in Milwaukee in the presidential contest." PPFOF 322. For the reasons discussed above, moreover, the elimination of straight-ticket voting will increase the average amount of time that voters take to cast a ballot, increasing lines in a manner that disproportionately burdens African Americans. *See also* PPFOF 321 (Johnson Decl. ¶ 18 ("[B]ased on my work and interaction with voters in the African-American community I believe that the elimination of straight-ticket voting has caused confusion among some voters, leading to longer wait times for voters. I also believe that language minorities are negatively impacted by the elimination of straight-ticket voting.")).

### E. Conclusion

As set forth above, the evidence in this case—from expert witnesses, election administrators, and from citizens involved in get-out-the-vote, voter-registration, and voter-education work—conclusively shows that the provisions challenged under Section 2, whether considered cumulatively or individually, impose discriminatory burdens on African Americans and Latinos. The evidence also establishes that these discriminatory burdens are directly linked to social and historical disparities that result in part from the State's history of discrimination. Plaintiffs have therefore more than met their burden of showing that, viewed in the light most favorable to the Plaintiffs, the evidence establishes that the provisions challenged under Section 2 violate the VRA.

## IV. INTENTIONAL RACE DISCRIMINATION

The Fourteenth and Fifteenth Amendments prohibit registration and voting restrictions that are adopted or maintained for a racially discriminatory purpose. *See Rogers v. Lodge*, 458 U.S. 613, 617–19 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

> [D]iscriminatory intent need not be proved by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

*Rogers v. Lodge*, 458 U.S. at 618 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 242, 266 (1977)). Registration and voting restrictions violate the Fourteenth and Fifteenth Amendments "if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617 (citation omitted); *see also Hunter v. Underwood*, 471 U.S. 222, 227-29 (1985) (acknowledging that "[p]roving the motivation behind official action is often a problematic undertaking," but nevertheless striking down facially neutral voting restriction on the basis of legislative history analysis demonstrating racial animus behind the law); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Fifteenth Amendment outlaws "onerous procedural requirements" that, while racially neutral on their face, "effectively handicap exercise of the franchise by [African-Americans] although the abstract right to vote may remain unrestricted as to race").

Plaintiffs need not show that race was the only reason for the challenged action, but rather that race was a motivating factor. *See Arlington Heights*, 429 U.S. at 265–66; *see also Hunter*, 471 U.S. at 232 ("an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks"); *Ketchum v. Byrne*, 740 F.2d

1398, at 1410 n.11 (7th Cir. 1984) (discussing but not resolving "the complex burden of proof questions presented by the alternative modes of analysis available in proving intentional discrimination in cases involving mixed motive"); *Rybecki v. State Bd. of Elections of Illinois*, 574 F. Supp. 1082, 1106-12 (N.D. Ill. 1982) (Cudahy, Circuit Judge, writing for three-judge district court) (emphasizing that case law "does not require that the purpose to discriminate be the only underlying purpose for the challenged" voting law, and holding that the Illinois Legislative Redistricting Commission's plan for redistricting the Illinois General Assembly unconstitutionally diluted African-American voting strength in certain districts on Chicago's south and west sides).

The Supreme Court has condemned "incumbency protection" measures that reflect a "troubling blend of politics and race," in which the incumbent party imposes voting restrictions that fall disproportionately on voters of color, who tend overwhelmingly to vote for the other party—a practice that "undermine[s] the progress of … racial group[s] that ha[ve] been subject to significant voting related discrimination and that [are] becoming increasingly politically active and cohesive." *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 403, 439, 442 (2006) (construing Section 2). And as this Court has cautioned, "because of the difficulty of proving a party's subjective state of mind, cases involving motivation and intent are often inappropriate for summary judgment." *Turner v. Rataczak*, 28 F. Supp. 3d 818 (W.D. Wis. 2014).

To meet their proof burden, plaintiffs on December 10, 2015 filed the expert report of Dr. Allan J. Lichtman, Distinguished Professor of History (and former Chair of the History Department) at American University, titled "Intentional Discrimination." See, e.g., 12-16. Dr. Lichtman has served as a consultant or expert witness—for both plaintiffs and defendant

governments—in over 80 voting and civil rights cases, and his work has been cited favorably by the Supreme Court and lower federal courts. PPFOF 12; Licthman Rep. at 2-3. Dr. Lichtman's report is 59 pages long (single spaced), has 83 footnotes, and cites hundreds of sources, all focused on the discriminatory purpose analysis. The report "closely follows the methodological guidelines of the United States Supreme Court" in *Arlington Heights*, focusing on evidence of "(1) discriminatory impact; (2) historical background; (3) the sequence of events leading up to the challenged action; (4) procedural or substantive deviations from the normal decision-making process; and (5) contemporaneous viewpoints expressed by the decision-makers." PPFOF 391. As Dr. Lichtman emphasizes, "[t]he purpose of this report is not to make legal conclusions, but to establish substantive findings about discriminatory intent." *Id.* He sets forth 17 "major" findings relevant to the intent issue, backs each of those findings up with extensive evidence, and draws the following ultimate conclusion:

> In sum, based on standard historical methods of analysis, the analysis of quantitative information, and my 45 years of experience in analyzing voting and elections, I reach the following conclusion: After Republicans achieved unified control of Wisconsin state government in 2011, the majority in the legislature enacted Act 23 and other measures relating to voting and registration with the intent and purpose of achieving partisan advantage through the limitation of African American and Hispanic voting and registration opportunities as compared to opportunities for whites in Wisconsin.

*Id.; see also* PPFOF 371-387 (summarizing 17 "major opinions" undergirding Lichtman's ultimate conclusion).

What is the State's response to this painstaking analysis of the intent issue by a nationally recognized scholar? The State simply pretends that plaintiffs have failed to come forward with *any* evidence of discriminatory intent. The State repeatedly lectures that "[t]his is the put up or shut up moment for Plaintiffs' claims of intentional racial discrimination"; fails even to

*acknowledge* the evidence plaintiffs have "put up"; and instead falsely contends that "*Plaintiffs apparently have no evidence supporting their claim*s" of purposeful discrimination and have failed to "put up" any admissible evidence in support of these claims. D. Br. at 50-52, 63-64 (emphasis added).

Given that the State had Dr. Lichtman's report on "Intentional Discrimination" for over a month before moving for summary judgment, its claims that plaintiffs have failed to "put up" any evidence of purposeful discrimination are not only baffling, but frivolous. Plaintiffs object to this abuse of summary judgment procedures and the State's failure even to acknowledge, let alone "put up" a response to, Dr. Lichtman's expert report.

Plaintiffs include 17 paragraphs in their Proposed Findings of Fact that track the 17 "major opinions" drawn by Dr. Lichtman in his expert report and provide appropriate page citations for the exhaustive underlying details of, and support for, these "major opinions" regarding the intentional discrimination issue. PPFOF 371-387. Perhaps the State will now "shut up" saying that plaintiffs "apparently have no evidence supporting their claims" of intentional discrimination and instead respond to the evidence plaintiffs "put up" long before defendants moved for summary judgment.

In addition to the many factors analyzed by Dr. Lichtman, plaintiffs call this Court's attention to the following points:

**Legislative refusal to fund legally required "public information campaign."** The GAB has a statutory duty to "[e]ngage in outreach to identify and contact groups of electors who may need assistance in obtaining or renewing a document that constitutes proof of identification for voting … and provide assistance to the electors in obtaining or renewing that document." 2011 Wisconsin Act 23, § 95 (creating Wis. Stats. § 7.08(12)). In addition, "[i]n conjunction

with the first regularly scheduled primary and election at which the voter identification requirements of this act initially apply, the government accountability board shall conduct a public informational campaign for the purpose of informing prospective voters of the voter identification requirements of this act." *Id.* § 144 ("Nonstatutory provisions") (emphasis added). Yet the Wisconsin Legislature has refused GAB's repeated funding requests to carry out these duties. PPFOF 390. The battleground State of Wisconsin is thus heading toward the 2016 elections without an effective voter ID public education program in place.

**Excess delegation run amok.** Discriminatory purpose also can be established if a registration or voting law delegates "too much discretion to local officials." *Veasey v. Abbott*, 796 F.3d 487, 507 n.22 (5th Cir. 2015). The Fifteenth Amendment forbids voter qualifications and procedures that are "so ambiguous, uncertain, and indefinite in meaning that they confer upon [local registrars] arbitrary power to register or to refuse to register whomever they please." *Davis v. Schnell*, 81 F. Supp. 872, 877-78 (S.D. Ala.) (three-judge district court) ("understand and explain" provisions were unconstitutional because they conferred unchecked discretion on local bureaucrats to determine "those who may note and those who may not"—a "'naked and arbitrary power to give or withhold consent'").

Yet as discussed above, Wisconsin claims the same kind of "naked and arbitrary power to give or withhold consent" in administering the "extraordinary proof" voter ID petition process. Additional PPFOF (UNDER SEAL) ¶¶ 1-2, 9-13. This "ambiguous, uncertain, and indefinite" exemption process, and the "arbitrary power" it confers on DMV officials and supervisors to determine who may and may not vote, is reason enough to find the "abuse of discretion" that Judge Easterbrook was referring to in footnote 1 of his Frank panel opinion. *See* 768 F.3d at 747 n.1.

## V. INTENTIONAL DISCRIMINATION AGAINST YOUNG VOTERS

### A. Applicable Legal Standard

Under the 26th Amendment, "[t]he right of citizens of the United States, who are eighteen years of age or older, shall not be denied or abridged by . . . any State on account of age." The phrasing of that amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26 at 2 (1971); *see also* Note, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012). The framers of the 26th Amendment used those other amendments as models because, beyond simply extending the right to vote to all citizens between the ages of 18 and 21, they sought to ensure "that citizens who are 18 years of age or older shall not be discriminated against on account of age" in the voting context. 117 Cong. Rec. 7534 (1971) (statement of Rep. Richard Poff). The text of the 26th Amendment serves that broad anti-discriminatory purpose by proscribing not only the *denial* but also the *abridgement* of the right to vote.

The 26th Amendment's broad scope reflects the historical context in which it was enacted. As the California Supreme Court explained the year the amendment was ratified, "America's youth entreated, pleaded for, demanded a voice in the governance of this nation. . . . And in the land of Vietnam they lie as proof that death accords youth no protected status." *Jolicoeur*, 5 Cal. 3d at 575. The amendment's backers argued "that the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote." *Walgren v. Howes*, 482 F.2d 95, 101 (1st Cir. 1973) (footnote omitted). Accordingly, "[t]he goal was not merely to empower voting

by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 345 (1972); *accord Jolicoeur*, 5 Cal. 3d at 575 (the Senate Report for SJR 7, later enacted as the 26th Amendment, "indicates that Congress . . . disapproved of . . . treatment . . . that it [feared] would give youth 'less of a sense of participation in the election system' and 'might well serve to dissuade them from participating in the election,' a result inconsistent with the goal of encouraging 'greater political participation on the part of the young'") (quoting S. Rep. 92-26, 1971 U.S.C.C.A.N. 362).

Consistent with its broad language and history, courts interpreting the 26th Amendment have explained that it guards against both blatant and subtle forms of discrimination. *See Jolicoeur*, 5 Cal. 3d at 571 ("The [26th] Amendment . . . 'nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise . . . although the abstract right to vote may remain unrestricted[.]'") (quoting *Lane*, 307 U.S. at 275 (15th Amendment case)); *see also Colo. Project-Common Cause v. Anderson*, 178 Colo. 1, 8 (1972) (holding based on "[h]istory and reason" that the 26th Amendment's "prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of ballots and its concomitants"). Thus, while the First Circuit concluded in *Walgren v. Board of Selectmen of the Town of Amherst*, 519 F.2d 1364, 1368 (1st Cir. 1975), that there was no violation of the 26th Amendment where the Town of Amherst had decided to hold an election when its college population was on break, the court explained that the town had tried to move the election to a time when school was in session but was unable to do so due to the short time

period the town had to make a decision and that "the finding that defendants acted in good faith in a crisis atmosphere [wa]s significant." The First Circuit added that it "would not wish the end result of this . . . litigation to be construed as authority for setting critical election dates during college recesses in communities having a very large if not majority proportion of students who are also eligible voters in the 18-20 year age group, without a showing of some substantial justification," and that "[w]ere [it] to adjudicate this as a restriction for all time, . . . [it] might well come to a different conclusion." *Id.* at 1367-68.

The Supreme Court has considered the scope of the 26th Amendment on only one occasion. In *Symm v. United States*, 439 U.S. 1105 (1979), the Court summarily affirmed a district court's conclusion, in line with the cases discussed above, that a voter-registration practice that made it more difficult for students than for other voters to register was unconstitutional. That district court decision, *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), relied on the history of the 26th Amendment and Supreme Court precedent holding that:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "The exercise of rights so vital to the maintenance of democratic institutions," cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

*Id.* at 1260 (quoting *Carrington v. Rash*, 380 U.S. 89, 94 (1965)) (internal citations omitted). The *Texas* decision also quoted extensively from the California Supreme Court's opinion in *Jolicoeur*, which found that a registrar's refusal to register unmarried minors at addresses other than their parents' addresses "violate[d] the letter and spirit of the 26th Amendment," as it would "clearly frustrate youthful willingness to accomplish change at the local level through the political system"; "give any group of voters less incentive 'in devising responsible programs' in

the town in which they live"; and guarantee the franchise to "[o]nly the most dedicated partisan." *Jolicoeur*, 5 Cal. 3d at 575; *see also Texas*, 445 F. Supp. at 1256-57.[19]

**B. Challenged Provisions**

In this case, there is powerful evidence that the provisions challenged under the 26th Amendment—namely, the voter ID law, the challenged restrictions on in-person absentee voting, the challenged restrictions on voter registration, the changes to the residency and observer rules, and the elimination of straight-ticket voting and the faxing and emailing of ballots to most voters—were enacted with the intent, at least in part, to suppress the youth vote.

*First*, some of the provisions challenged under the 26th Amendment directly target students without serving any material state interest. In particular, the elimination of the requirement that SRDs be appointed at high schools targets the youngest potential voters. And while there is limited evidence regarding the effectiveness of this program, the evidence shows that several thousand students registered at their high schools in the late 1970s. PPFOF 392. Moreover, removing a means of registering plainly makes registration less likely. The apparent

[19] For all of the reasons set forth above—that is, in light of the text of the 26th Amendment, its history, and the case law interpreting it—the State's position that the 26th Amendment did nothing more than lower the voting age to 18 is untenable. Of note, in full context, the case that the State cites for the proposition that the "Twenty-sixth Amendment simply bans age qualifications above 18" and "does not . . . forbid all age-based discrimination in voting," Defs. Br. at 55, makes precisely the opposite point. In *Gaunt v. Brown*, 341 F. Supp. 1187, 1191 (S.D. Ohio 1972), the court wrote, "We found the Twenty-sixth Amendment does not grant the right to vote to 18-year-olds and was not intended to. It simply bans age qualifications above 18." In other words, the 26th Amendment does not lower the voting age *per se*; it simply has that effect because it bans discrimination by age in the voting context for those who are 18 or older. Also, while the State cites certain language from *North Carolina State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C.), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. League of Women*, 769 F.3d 224, the State fails to mention that the court also noted that "the Twenty-Sixth Amendment was patterned after the Fifteenth" and that the court found it "unnecessary to decide" the merits of the Twenty-Sixth Amendment claim because it found that it could rule on that aspect of the motion for a preliminary injunction on irreparable injury grounds. *Id.* at 365.

state interest for this change—that some high schools did not like to register voters, *see* PPFOF 393 —is weak, at best.

The requirement that colleges and universities include a certification as to the citizenship of students on any dorm list provided to a clerk for use in voter registration also targets young voters for no serious reason. Before the legislature required the citizenship certification, "many students used [the dorm list] option to prove their residency to register to vote." PPFOF 394. Now, because a certification of students' citizenship would create issues under federal law, nearly all colleges and universities in Wisconsin have stopped providing dorm lists, thereby eliminating this mode of registration for most students. *See* PPFOF 395 (Albrecht Decl. ¶ 28 (Marquette, UW-Milwaukee, the Milwaukee School of Engineering, and the Milwaukee Institute of Art & Design have stopped providing dorm lists); Witzel-Behl Decl. ¶ 21 (UW-Madison and Edgewood College have stopped providing dorm lists); Lowe Dep. at 39:9-40:18; Haas Dep. at 200:11-201:19). Tellingly, there is no other means proving registration that requires a third party's certification (or any other evidence beyond the word of the registrant) of the registrant's citizenship. PPFOF 396; *see also id.* (Lowe Dep. at 37:23-39:8 & Dep. Ex. 58 (unfair that students using their IDs—and only such individuals—also have to come up with another document to prove residence, even if the student ID has an address on it)).

The voter ID law effectively targets college students as well by making student IDs unnecessarily difficult to use for voting. Indeed, Director Kennedy informed the legislature, prior to the enactment of the voter ID law, that it was highly unlikely that universities and colleges would adopt the standards set by the legislature because of student security concerns. PPFOF 397 (Kennedy Dep. at 248:3-8; *see also* Lichtman Rep. at 33 (in contrast to the laws in the three other states that had photo ID requirements at the time that Wisconsin enacted Act 23,

"Wisconsin imposed more restrictions on the use of student identification cards"); Witzel-Behl Decl. ¶ 33 ("UW-Madison's student IDs are not compliant with the voter ID law, and . . . approximately 14,000 students are from other states.")).

In addition, as with the use of student IDs for proof of residence, the voter ID "rules are different for the use of a student ID than they are for most IDs because they require two sets of documents," including a document showing that the voter using a student ID is, at the time of the IDs use for voting, enrolled as a student. PPFOF 398. Asked if this proof of enrollment requirement served any election administration purpose, Director Kennedy said, "I can't say. I think it was just the provision the Legislature put in because it saw student IDs as different." PPFOF 399. Moreover, the GAB's current position is that colleges are not permitted mitigate these burdens on young voters by putting stickers on their ID cards to make them voter ID compliant, as "it's pretty clear from talking to the Legislature that they wouldn't sign off on that rule." PPFOF 400.

Other changes target Madison and Milwaukee, which have disproportionately large shares of young voters.[20] The state legislature preempted an ordinance in place in Madison requiring landlords to provide voter-registration applications to new tenants that "provided a registration form to a very mobile population," and resulted in about 500 registrations from voters who had received applications in the fall before a general election. PPFOF 402-403. In addition, bill author Glenn Grothman, speaking about the elimination of weekend in-person absentee voting, said he wanted to "nip this in the bud" before it spread beyond Madison and Milwaukee. PPFOF 404.

[20] Census data indicate that 18-24 year olds make up 9.66% of Wisconsin's population, 13.69% of Milwaukee's population, and 19.53% of Madison's population. Similarly, 18-29 year olds make up 16.21% of Wisconsin's population, 22.44% of Milwaukee's population, and 30.67% of Madison's population. PPFOF 401.

*Second*, the evidence indicates that the provisions challenged under the 26th Amendment impose disproportionate burdens on young voters and/or on residents of Madison and Milwaukee, who are more likely to be young voters than are other Wisconsin residents. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (disproportionate impact of an action "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions"); *see also Davis*, 426 U.S. at 242 (if true, fact "that the law bears more heavily on one race than another" is relevant to determination whether there was "invidious discriminatory purpose").

Corroboration. The GAB's Lead Election Specialist testified that the changes to the voter registration laws since 2011 have created challenges for college students registering to vote. PPFOF 405. Indeed, several witnesses explain that young voters were particularly likely to use corroboration and will be burdened by its elimination. PPFOF 406 (Kaminski Decl. ¶¶ 10, 16 ("The elimination of corroboration has been especially burdensome to young voters," among others.); *id.* ¶ 11 (in the 2012 recall elections, the League of Women Voters "received a number of reports from around the state about individuals who did not have adequate documentation but did have one or more registered voters, including parents, who could have vouched for them"); Witzel-Behl Decl. ¶ 18 ("Corroboration was also frequently used by 18 year olds, many of whom live with their parents and do not have documents in their name. The parents of these individuals could corroborate their residence."); Albrecht Decl. ¶ 27 ("Corroboration was particularly valuable for" particular groups of people, including "students in non-university housing who may have had their lease in the name of only one of several roommates.").)

Documentary Proof of Residence. The expansion of the documentary proof-of-residence requirement has been burdensome for young voters as well. As Director Kennedy explained to

the legislature as part of his testimony on the voter ID law, many students do not carry a driver's license because they live on campus, use public transportation, or do not drive. PPFOF 407; *see also id.* (Kaminski Decl. ¶ 13 (two registration drives at UW-Whitewater and one at a museum yielded 17 registrations and 23 voters who did not have documentary proof of residence; "registration effort at Madison Area Technical College resulted in the registration of 34 individuals, while 25 were turned away because they did not have documentary proof of residence with them").) Moreover, the expansion of the documentary proof of residence requirement has slowed the registration process and thus made the voter-registration activities of student activists more difficult. PPFOF 408 (Gosey Decl. ¶ 7 (registration process slowed, causing her to miss otherwise interested students); Tasse Decl. ¶ 12 (expanded documentary proof-of-resident requirement "significantly slowed down the registration process, making it more difficult to register voters on campus or where lots of students gather and even turning some students off from completing a voter registration form")).

Statewide SRDs. The elimination of statewide SRDs also burdens young citizens in particular. *See* PPFOF 409. The statewide SRD program "facilitated voter registration . . . at rural high schools that serve multiple municipalities." PPFOF 410. And the absence of a statewide SRD program makes efforts to register voters at schools that serve multiple municipalities—including not only rural high schools but other types of schools as well—much more difficult. *See* PPFOF 411.

Early Voting. As discussed above, the one-location rule and the reductions to the in-person absentee voting period burden Milwaukee and Madison residents in particular. *See* PPFOF 412. Moreover, Carmen Gosey, Chair of the Legislative Affairs Committee for the student government body at UW-Madison, states that these restrictions on in-person absentee

voting have "made it harder for students to find time to vote." PPFOF 413. She explains that, between classes, extracurricular activities, and work, many students have little available time during the week and that, "[b]ased on [her] experience as a student and member of student government [she] believe[s] that more students would be able to vote if they were allowed to vote on the weekend during the in-person absentee voting period." PPFOF 414.

Residency Requirements. Several witnesses have explained that the changes to the residency requirements will disparately impact young voters. *See* PPFOF 415 (Johnson Decl. ¶ 16 ("In my educational work I have noticed an increased sense of confusion among voters, particularly in the African-American community, since the expanded residency requirements fall more heavily on voters who move more often, including racial minorities, young, and poor voters."); Kennedy Dep. at 210:2-7 (in the 2012 recall election, "[t]here were certainly issues with students in terms of their qualifications to vote because of the 28" day residency period); Lowe Dep. at 96:15-97:3 (Lowe received a lot of questions about how the expanded residency requirement affected college students and one result of the change is that an increased number of college students have to vote absentee either from school or their parents' residence or make a trip back to the other location); Haas Dep. at 120:11-121:7 (change to the residency period "could make it more challenging for some students to register at their campus address"); Trindl Decl. ¶ 15 (there have been instances in which the 28-day rule prevented college students from registering); Kennedy Dep. at 210:18-19 (a lot of people move in the summertime, "particularly students")).

Observers and Faxing/Emailing of Ballots. There is also evidence indicating that the changes to the observer rules and the elimination of the faxing and emailing of absentee ballots disproportionately burdens young voters. *See* PPFOF 416 (Kaminski Decl. ¶ 17 & Ex. B at 2 (in

the 2012 recall election, "some polling sites [were] particularly vigilant about college students, at times to the point of being hostile to toward them," and "[a]t some sites in La Crosse, Milwaukee, and Racine, there were a number of challenges to young people being able to register"); Witzel-Behl Decl. ¶ 10 ("Madison has had problems with aggressive election observers affiliated with the Republican Party or Republican candidates and a group of women from Waukesha who carry binders that say, 'We're watching.'"); Burden Rep. at 26 (young people are more likely than older people to move); Witzel-Behl Decl. ¶¶ 26-27 (before change regarding emailing and faxing of ballots, "Madison sent more ballots via email to voters who were overseas than any other municipality in Wisconsin," but now clerks' offices are "no longer permitted to fax or email ballots to voters who are temporarily overseas, such as students participating in study-abroad programs"). *See generally* Kennedy Dep. at 27:23-28:7 (referring to "people who expect technology to serve them, meaning people my age and younger who are used to doing things" online, and noting that he has "had representatives of the University of Wisconsin-Madison tell us that their students probably haven't gotten 10 pieces of mail in their lifetime"); Burden Rep. at 25 ("Absentee voting procedures in Wisconsin prior to 2011 were often more challenging for . . . young people," and "[t]hese disproportionate burdens have been exacerbated rather than alleviated by changes in election law since 2011."); *see also id.* at 30-31 (young voters less likely than older voters to have their absentee ballots counted in 2014).)

Voter ID. There is substantial evidence that the voter ID law will disproportionately impact young voters as well. GAB Lead Elections Specialist Diane Lowe has "acknowledge[d] that the photo ID requirement will make it much more difficult for students to vote in the college town." PPFOF 417. This is

> [b]ecause they not only need the college ID, but they need another document to go with it. . . . [I]f they do live in dorms, . . . in college housing, they aren't going

> to have most likely some of . . . the regular forms of ID that people might have. They might have a driver's license, they might not when they're away from home. So most of them will rely on their ID, but they will also have to have another document that proves that they're enrolled.

*Id.* Lowe's understanding based on her experience is that most college students in the University of Wisconsin system or at private colleges in Wisconsin do not have driver's licenses. PPFOF 418. In doing outreach related to voter ID in 2011 and 2012, the GAB targeted students, who it believed were less likely than others to have IDs. PPFOF 419. And, Dr. Mayer's analysis shows that, while 8.4% of registered voters in Wisconsin overall do not possess a driver's license or DOT photo ID, 21.4% of registrants who reside in student wards do not possess IDs. PPFOF 420.

While UW-Madison offers a form of ID—which is different from the regular student ID—that can be used for voting, it is not issued to students automatically and students must take affirmative action to obtain one. PPFOF 421. This has created confusion among students. PPFOF 422 (Gosey Decl. ¶ 9 (she has "come across many new students and students from out-of-state who do not possess an acceptable ID for voting in Wisconsin and who are confused by the Wisconsin law," and, in her experience, "students are confused as to whether their normal student ID is acceptable for voting, where to get a voting compliant ID, and hesitant to take the time needed to get another ID when they already have been issued one that works for all of their activities on campus")). It also appears to have cost them money: The GAB was informed in 2011 that the UW system intended to charge student segregated fees for the expense of creating voter ID-compliant student ID cards, leading one GAB staff member to write, "Charging for a voter ID for students? Can someone say poll tax!" PPFOF 423; *see also id.* (Kennedy Dep. at 227:22-23 ("[O]ne of the concerns was that if it cost money to be able to participate in the process, does that constitute a poll tax.").) Further, many college students in general "will not be

able to produce proof of enrollment during the August elections" and, "for elections that are conducted in months outside of the academic calendar, such as the primary elections this August, there is some confusion over whether students who are not currently enrolled will be unable to vote using their student IDs because they are not currently enrolled at the time of the election." PPFOF 424.

Dr. Mayer explains:

> The new registration and voting requirements are likely to have a disproportionate effect on student populations, for three reasons. First, this population is disproportionately young, falling into the age brackets less likely to turn out than older voters, and therefore less likely to overcome barriers to voting. Second, this population is less likely to possess the identification documents required to comply with the photo ID requirements of Act 23. A significant number of students are from out of state and are less likely than other voters to possess a WI license or DOT photo ID. 19.8% of residents of student wards (compared to 7.2% of residents of non-student wards) do not link to the DOT file, indicating that they do not possess a WI driver's license or DOT photo ID. Third, students who wish to use a qualifying college or university ID as their photo ID are required to bring proof of enrollment.

PPFOF 425.

Lines. Provisions that increase wait times will also disproportionately burden young voters because such voters are more likely than older voters to live in Milwaukee or Madison, both of which tend to have long lines and thus are more likely than other cities to see increases in wait times from provisions that affect the speed of voting. The evidence regarding lines in Milwaukee is discussed above. *Id.* In Madison, in high-turnout elections, there have been "lines for early voting that stretch out the front door of Madison City Hall (where the Clerk's Office is located), continue onto the sidewalk, and wrap around the block. At some points, the lines were over two city blocks long." PPFOF 426. In the November 2014 election, the League of Women Voters "received calls from Milwaukee and Madison asking for additional trained SRDs to assist with voter registration." PPFOF 427. Accordingly, the voter ID law, the restrictions on in-

person absentee voting, most of the challenged restrictions on voter registration, the change to the observer rule, and the elimination of straight-ticket voting—the provisions challenged under the 26th Amendment that will increase wait times—impose disproportionate burdens on young voters.

Cumulative Impact. The cumulative impact of these disproportionate burdens is substantial and has a direct impact on the participation of young Wisconsinites in the electoral process. Dr. Burden explains that young voters generally have less well-established voting habits and that, "[a]s a result, disruptions to existing ways to participate in the political process have more significant effects on them." PPFOF 428. Indeed, "the changes to Wisconsin election law between 2011 and 2014 that are challenged by plaintiffs in this litigation will predictably have a disproportionate impact on voting participation by . . . young people." PPFOF 429.

Dr. Mayer's analysis provides forceful empirical evidence of this impact. Analyzing data from Wisconsin's statewide voter registration system ("SVRS"), Dr. Mayer found that "[t]urnout in students wards (. . . defined as wards that include or are nearby colleges and universities, and which have large concentrations of 18-24 year old registrants) dropped significantly between 2010 and 2014," the period when most of the challenge provisions were implemented. PPFOF 430. In particular, Dr. Mayer found that, "[b]etween 2010 and 2014, overall turnout (among voters in the SVRS on the date of each election) declined by 2.5 percentage points. But the decline was not uniform. . . . Turnout among registrants who lived in student wards dropped precipitously, from 72.7% in 2010 to 54.5% in 2014 (a drop of 18.2 percentage points)." PPFOF 431. Using models that allowed him "to estimate the effect of different demographic characteristics on vote probability, conditional upon whether someone voted in the previous

elections," Dr. Mayer also found that residents who reside in students wards and registrants without an ID (a group disproportionately composed of young voters) "were significantly less likely than other registrants to vote in 2014." PPFOF 432; *see also id.* (Mayer Rpt. at 32 (in 2014, "[s]tudent wards are . . . strongly and independently affected . . . , even after controlling for the ward level rate of ID possession"; "[i]n 2010, by contrast, there is . . . no relationship at all between student wards and turnout")). Based on this analysis, Dr. Mayer concluded that the changes to Wisconsin election law since 2011 impose substantial burdens that fall particularly hard on specific groups of voters, including young and student voters. PPFOF 433.

*Third*, the legislature was aware that many of the challenged provisions would negatively impact young voters, yet it did little to remedy this issue. Diane Lowe testified that, based both on her work helping to provide information from GAB to the legislature and from having observed legislative proceedings, virtually all of the concerns raised in an email from a poll worker at UW-Madison had been presented to the legislature—specifically, that depending upon the date of the February elections and the start of the second semester, students may not have been in their residences for the 28 days required by the expanded residency period; that if students "lived with parents or friends for those few [summer] months and had no individual bills or lease, they may not have adequate proof of residence and can no longer use a corroborating witness either"; that there would be "time and costs, especially on campuses, for all the additional re-registering" that will be done; and that there would likely be longer lines due to the voter ID law. PPFOF 434. As discussed above, moreover, while the legislature ultimately included student IDs as a form of ID that could be used for voting, it did so knowing that it was imposing conditions that prevented any student ID then in circulation from being used as voter ID.

*Fourth*, as discussed above, the rationales for the challenged provisions—to the extent rationales have been supplied for particular provisions at all—are weak. *Cf. Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982) ("The absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually considered by the decision makers strongly favor a decision contrary to the one reached.") (quotations omitted).

*Fifth*, the legislature has resisted changes to election law that would make voting easier for students. Since 2011, the GAB has recommended that Wisconsin adopt online voter registration, which, according to Director Kennedy, "would cut down on the number of mistakes that are made when voter registration application forms are filled out . . . . It would increase the accuracy of those lists [and] enable people who expect technology to serve them, meaning people my age and younger who are used to doing things that way." PPFOF 435. Director Kennedy added, "I've had representatives of the University of Wisconsin-Madison tell us that their students probably haven't gotten 10 pieces of mail in their lifetime, and so it's a recognition of just how you do business." PPFOF 436.

Yet, despite the State's insistence that it is ensuring the integrity of the electoral process and confidence in and the accuracy of the elections data when it is enacting legislation that makes it more difficult to vote, *see* PPFOF 437 (Kennedy Dep. at 128:15-17 (stating, with respect to the elimination of the high school SRD requirement, that "the political climate has changed . . . to focus more on getting accurate, complete and not redundant voter registration forms")), the State has not adopted online voter registration, PPFOF 438, which would make it easier to vote. In addition, certain members of the legislature, including Senator Lazich,

criticized the GAB's rule permitting electronic records to be used for voter registration, PPFOF 439—which has been particularly beneficial to young voters. PPFOF 440.

*Sixth*, the Republican majority in the legislature, under which the challenged provisions (with one exception) were enacted, has a strong electoral interest in suppressing the youth vote. In Wisconsin elections for President, U.S. Senate, and Governor between 2004 and 2014, voters age 18-29 were seven percentage points less likely than voters age 65+ to vote for the Republican candidate. PPFOF 441. Perhaps more significantly, there was a clear shift in the preference of young voters over this period. In 2004, 18-29 year olds in Wisconsin were four percentage points *more* likely than those age 65+ to vote Republican in the presidential election in Wisconsin. PPFOF 442. In the 2008 and 2012 presidential elections, however, the younger cohort in Wisconsin was 15 percentage points less likely to vote for the Republican candidate than was the older group. PPFOF 443. The Republican majority therefore had a strong motive for reducing the turnout of young voters.

Considered together, these facts demonstrate that the provisions challenged under the 26th Amendment were intended, at least in part, to suppress the youth vote. *Cf. Arlington Heights*, 429 U.S. at 265 ("*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."). *See generally Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts."). They surely show that the challenged provisions are directly in tension with the 26th Amendment's purpose "not merely to empower voting by our youths but . . . affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions," *Worden*, 61 N.J. at 345, and Congress's "disapprov[al] of . . . treatment . . . that it

[feared] . . . would give youth 'less of a sense of participation in the election system' and 'might well serve to dissuade them from participating in the election,'" *Jolicoeur*, 5 Cal. 3d at 575 (quoting S. Rep. 92-26, 1971 U.S.C.C.A.N. 362). The provisions challenged under the 26th Amendment should therefore be invalid, and the State's motion for summary judgement on the 26th Amendment claims in this case should be denied.

## VI. INTENTIONAL DISCRIMINATION AGAINST DEMOCRATIC VOTERS

The central issue for Plaintiffs' partisan fencing claim is whether the State burdens "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In *Carrington v. Rash*, the Supreme Court held that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S. 89, 93 (1965). Thus, the right to vote "cannot constitutionally be obliterated because of a fear of the political views of a particular group." *Id.*

The Supreme Court has subsequently reaffirmed these principles. As Justice Kennedy explained in *Vieth v. Jubelirer*, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views" and that a State may not "burden[] or penalize[] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). Most recently, the Supreme Court recognized the continuing viability of the reasoning in these cases in *Shapiro v. McManus*, in which it held that a First Amendment challenge to Maryland's congressional districts could not be dismissed as frivolous or insubstantial because it was "based on a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases." *Shapiro v. McManus*, 136 S. Ct. 450, 456

(2015). For the reasons explained below, the laws challenged herein have both the purpose and effect of disproportionately burdening Democratic voters, and for that reason they violate the First and Fourteenth Amendment.

As an initial matter, the Court has already rejected the legal argument the State has reiterated here, *i.e.*, that because these laws do not facially target or expressly deny the voting rights of Democrats, *Carrington* and it progeny do not apply. MTD Order at 10 ("But plaintiffs have alleged that the challenged regulations place undue burdens on Democratic voters in violation of the First and Fourteenth Amendments, and these allegations are not merely conclusory."); *see* Dfs.' Br. at 46. Beyond that, Plaintiffs note that in its motion-to-dismiss order, the Court framed their partisan-fencing claim as, in essence, a species of Anderson-Burdick, and Plaintiffs agree that the evidence supports a finding that these laws unconstitutionally burden Democratic voters. *Id.* ("[w]hether Wisconsin's restrictions have actually burdened Democratic voters, and if so, to what degree, is a question of fact[.]"). However, Plaintiffs' partisan-fencing claim is also a claim that the State purposefully enacted these measures to abridge and deny the voting rights of Democratic voters. As such, the *Arlington Heights* framework for intentional racial discrimination claims applies here. "The task of assessing a jurisdiction's motivation" requires "the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (U.S. 1999) (quoting *Arlington Heights*, 429 U.S. at 266). In any event, the record is replete with evidence of both partisan animus and disparate impact on Democrats.

As this evidence shows, these laws impose disproportionate burdens on young voters, African Americans, and Latinos—all of which vote in higher rates for Democrats than Republicans. PPFOF 444 (Lichtman Rpt. at 19-20, Tables 8 & 9); *id.* at 59 ("African Americans

in Wisconsin vote overwhelmingly for Democratic candidates and Hispanics vote in large measure for Democratic candidates. Thus Republican rely upon the voting strength of whites in Wisconsin."); Dkt. No. 72 at 9 (Burden Rpt.) ("Exit polls for the 2012 presidential election in Wisconsin show that "support for the Democratic ticket was 94% among blacks, 66% among Latinos, and 48% among whites.")). Furthermore, a number of these laws were enacted with the State's knowledge that they would have these disparate impacts. *Faith Action for Cmty. Equity v. Hawaii*, 2015 WL 751134, at *6 (D. Haw. Feb. 23, 2015) ("Foreseeable knowledge of disparate impact can provide some basis for inferring discriminatory intent."). PPFOF 445. And, these laws were enacted against the backdrop of a shifting demographic landscape that disadvantaged Republicans, providing a clear motivation for discriminating against Democrats. *Cox v. City of Dallas*, 2004 WL 370242, at *10 (N.D. Tex. Feb. 24, 2004) (finding that "specific sequence of events leading up to the challenged decision" established prima facie case intentional discrimination"). PPFOF 446 ("It is Republicans in Wisconsin who are disadvantaged by this shift in the relative voting strength of whites and minorities and would therefore benefit from limitations on minority voting, especially African Americans and Hispanics who constitute the largest minority voting blocs in Wisconsin and are well-documented Democratic voters. These features of turnout and voting patterns in Wisconsin help explain the panoply of restrictive voter legislation enacted by the Republican-controlled legislature and the Republican governor after the elections of 2010 in Wisconsin. Given the high degree of electoral competition in Wisconsin, even small changes in the relative turnout of whites and minorities can influence the outcomes of elections."). As explained below, the direct and circumstantial evidence, when construed in the light most favorable to Plaintiffs, shows that

these laws were intended to, and had the effect of, disparately burdening the voting rights of Democrats.[21]

As an initial matter, a number of these laws have expressly targeted key Democratic constituencies, contrary to the State's contention of non-discriminatory purpose and effect. The State has singled out Madison and Milwaukee, in particular. It eliminated Madison's landlord-registration ordinance, which made it more difficult for Madison's renter population to register, a population which is disproportionately comprised of African Americans, Latinos, and students—i.e., Democrats. PPFOF 239, 287-289.

Similarly, in eliminating weekend in-person absentee voting, Republic Senator Glenn Grothman went on the record as saying he wanted to "nip this in the bud" before it spread beyond Madison and Milwaukee, which, again, are heavily Democratic cities. PPFOF 404. Such statements are highly probative of intentional discrimination. *See, e.g., Page v. Virginia State Bd. of Elections*, 2015 WL 3604029, at *7 (E.D. Va. June 5, 2015) (considering "direct evidence of legislative intent, including statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles"). The State's other reductions in the days and times for in-person absentee voting likewise fell harder on Democratic constituencies. PPFOF 142-143.

Beyond express statements of intent such as Senator Grothman's, other facts further demonstrate the partisan animus that underlay these laws. The State has turned a deaf ear to

[21] The State claims that Plaintiffs' partisan fencing claims as to 2011 Wis. Act. 23, 2011 Wis. Act 75, 2011 Wis. Act 227, and 2013 Wis. Act 76 are undermined by the fact that a handful of Democrats voted for these laws. This argument is unavailing. Only two Democratic Assembly members voted for Act 23, Peggy Krusick and Anthony J. Staskunas. Krusick, who was also the sole Democrat to vote for Act 227, was defeated in the primary immediately following this vote. (cite to public sources such as GAB or news report), and Staskunas opted not to run again. (cite to public source). Only a handful voted for Act 75, and only one voted for Act 76. Furthermore, not a single

repeated requests by Milwaukee to allow it open multiple in-person absentee locations, and voted down 2013 Senate Bill 91, which would have allowed municipalities to do just that. PPFOF 153.[22] As Plaintiffs' expert Dr. Lichtman explains, "[t]he failure to deal with electoral issues in Milwaukee is especially significant [with respect to intent] given that voters in Milwaukee County, which includes a substantial share of the state's minority population, have experienced much longer waiting times at the polls than the rest of the state. In addition, African American and Hispanic voters across Wisconsin have experienced much longer waiting times than white voters." PPFOF 202.

Similarly, the State has expressly targeted young and student voters. Both the elimination of high school SRDs and the requirement that colleges certify the citizenship status of students on dorm lists also aimed expressly at, and disproportionately burdened, the ability of young voters to register. PPFOF 279, 394-396. This, again, is further evidence of the State's intent to suppress the vote of another key Democratic constituency.

The burdens imposed by other laws likewise disproportionately impact key Democratic constituencies, and, in many cases, the State was both aware of and failed to respond to repeated requests to ameliorate these burdens, all of which constitutes evidence of intentional discrimination. Reno, 520 U.S. at 487 (disproportionate impact of an action "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions"); Davis, 426 U.S. at 242 (if true, fact "that the law bears more heavily on one race than another" is relevant to determination whether there was "invidious

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Democratic state senator voted for these laws. The scattered votes of a few representatives does not contradict the overwhelming evidence of impermissible partisan animus proffered here.

[22] The State mistakenly claims that Plaintiffs are challenging the failure to enact Senate Bill 91. Dfs.' Br. at 83. The State willfully distorts Plaintiffs' argument. The failure to enact Senate Bill 91 is evidence of the disregard of and intent to discriminate against Milwaukee voters and voters in Wisconsin's largest cities, which, as shown previously, are heavily Democratic.

discriminatory purpose"). For example, and as explained in detail elsewhere, Act 23's voter ID requirement imposed disproportionate burdens African Americans and Latinos, a fact of which the State legislature was aware when it enacted this law. PPFOF 379. Indeed, the legislature rejected amendments designed to alleviate these disparate burdens. PPFOF 380. The voter ID law likewise targeted college students by making student IDs more difficult to use for voting than other types of identification, and the legislature was aware of these difficulties. PPFOF 397. Moreover, college students disproportionately lack a Wisconsin driver's license or photo ID. PPFOF 420, 425.

The State expanded the proof-of-residency requirement and eliminated corroboration despite—or perhaps because of—information presented to it that those measures would impose disparate burdens on key Democratic constituencies and despite evidence presented by GAB officials that these measures were unnecessary. PPFOF 407. The same is true of the 28-day residency requirement. PPFOF 415. In each of these cases, the legislature was apprised of the burdens it was imposing on its citizens, and enacted the laws anyway.

Finally, the elimination of statewide SRDs disproportionately impacted these same constituencies. PPFOF 411. And, the same is true of the law permitting election observers to stand closer to voters, the prohibition on emailing or faxing absentee ballots, the elimination of straight-ticket ballots, and the prohibition on clerks returning miscast absentee ballots to voters. PPFOF 416.

In sum, each and every one of these laws has imposed disparate burdens on core Democratic constituencies, be they African Americans, Latinos, or young or student voters. In most cases, the legislature enacted the measure knowing that it was imposing these burdens. In the case of the State's restrictions on students' abilities to register and to vote, the intent is clear

on the face of the law. And, in the case of reductions to in-person absentee voting, the intent was expressly stated by the bill's sponsor. Based on an extensive review of this and other evidence and the electoral context in which these laws were adopted, Dr. Lichtman came to the following conclusion: "After Republicans achieved unified control of Wisconsin state government in 2011, the majority in the legislature enacted Act 23 and other measures relating to voting and registration with the intent and purpose of achieving partisan advantage[.]" PPFOF 448. Viewing this evidence in the light most favorable to Plaintiffs, the State's challenge to Plaintiffs' partisan fencing claim must be denied.

## VII. RATIONAL-BASIS CHALLENGES

Despite having had virtually identical arguments rejected by this Court in its motion to dismiss, the State has yet to articulate a rational basis for its refusal to accept either out-of-state driver's licenses or certain forms of expired IDs as valid proof of identification to vote.[23] As this Court has already recognized, "Plaintiffs' argument is simple: if the purpose of photo identification is to confirm identity (and not residency, which must be shown by other means), the non-qualified forms of identification work just as well as the qualified forms[.]" MTD Order 8. The evidence confirms that this, indeed, is the purpose of the photo ID law. PPFOF 449 (Kennedy Dep. Tr. 210:21 - 211:12 ("Q. Okay. Let's turn then to the voter identification law. From an election administration standpoint, the purpose of that law is to identify voters but not confirm their residence, is that right? A. One of the purposes of the law is to ensure that the person who's there is the person who's entitled to vote by confirming their identity, yes. Q. The voter identification law doesn't serve any purpose with respect to residency, does it? A. It

[23] It is Plaintiffs' understanding that an administrative rule permitting technical college IDs to be used as identification to vote became effective today. Based on that understanding, Plaintiffs have not addressed this issue. To the extent that this understanding proves incorrect, however, Plaintiffs respectfully request leave to address this issue.

doesn't touch residency, no. I mean it's all about identifying who you are. Q. And you can actually vote with a form of identification that has an address that's different from the address at which you're registered, correct? A. That's right.")). For these reasons, the arbitrary distinctions the State has drawn between the forms of ID that it will accept and those it will not have no basis in rationality or fact.

With respect to out-of-state driver's licenses, the State makes not a rational basis argument, but appeals to hypothetical factual scenarios, scenarios which are contradicted by the record. The State's argument is that since a person must obtain a driver's license after moving to Wisconsin if they want to drive in the state, the number of such voters can be presumed to be small or non-existent and it is therefore permitted to exclude out-of-state licenses as a form of ID for voting. Dfs.' Br. at 58-59. This syllogism does not hold. Driving and voting are very different activities, and a number of Wisconsin's citizens—college students in particular—have an interest in voting that they do not have in driving.

Indeed, the State's premise—that someone showing an out-of-state driver's license as proof of ID can be presumed to be an ineligible voter—is contradicted by the record evidence. The evidence—when viewed in the light most favorable to Plaintiffs—shows that there are thousands of Wisconsin voters who possess out-of-state driver's licenses. In the UW-Madison system, there are 36,034 students from other states, territories, or countries, and another 20,000 students not originally from Wisconsin are enrolled in Wisconsin's private universities. PPFOF 425. For this reason, approximately 20 percent of residents of student wards do not possess a Wisconsin driver's license or DOT photo ID. PPFOF 420. Given these facts, it is hardly rational, not to mention sufficiently tailored under a higher level of scrutiny, for Wisconsin to

assume that none of its eligible voters might need to prove their identity with an out-of-state driver's license.

With respect to the forms of expired IDs that the State will not accept, its argument is hard to follow. As this Court explained in its motion-to-dismiss order, the State "cannot make even this minimal showing [of rationality for permitting some but not all expired IDs to be used to vote] by simply claiming that the legislature had to draw the line somewhere." MTD Order at 9. Now, on summary judgment, the State offers a garbled explanation of why it drew the arbitrary line between some forms of expired IDs that can be used to vote and others that cannot. It lists three types of expired IDs that cannot be used: 1) a driving receipt issued under Wis. Stat. § 343.11; 2) a state ID card receipt issued under Wis. Stat. § 343.50, and 3) an "unexpired [sic] identification card issued by an accredited Wisconsin university of college[.]" Dfs.' Br. at 60-61.

Then, the State states, in somewhat of a non-sequitur, that "U.S. naturalization certificates do not expire, so the legislature could not have included an expired form of them." Dfs.' Br. at 61. Presumably the State here is referring to Wis. Stat. § 5.02(6m)(b), which provides that "[a] certificate of U.S. naturalization that was issued not earlier than 2 years before the date of an election at which it is presented" may be used to vote. The State's effort to justify its refusal to accept this form of ID on the ground that it does not expire merely reinforces the irrationality of excluding those certificates that were issued more than two years before the election as valid forms of ID. If they do not expire, then why, one can reasonably ask, did the State exclude these naturalization certificates from the forms of ID that can be used to vote? The State does not even attempt to answer this puzzling question, and its argument with respect to naturalization certificates must therefore fail.

With respect to the driver's license and state ID cards issued under sections 343.11 and 343.50, the State claims that these are only temporary receipts that are intended to be used for 60 days until permanent cards are issued. However, again, the State offers no response to the pertinent question at issue here, *i.e.*, why or how these cards are insufficient to establish a person's identity for purposes of exercising the franchise.

For college IDs, the law is even more onerous. Even unexpired college IDs are not valid if they expire more than 2 years after the date of issuance, and on top of that the student must also provide proof of enrollment. Wis. Stat. § 5.02(6m)(f). This is simply nonsensical given that the purpose of the voter ID law is to prove identity, not current residence. The State offers no explanation—rational or otherwise—as to how its interests are furthered by excluding even unexpired college IDs, which, again, must also be accompanied by proof of enrollment. For these reasons, the State has failed to articulate a rational basis for refusing to treat any of the above forms of ID as proof of identification.

## CONCLUSION

For the reasons set forth above, the State's Motion for Summary Judgement should be denied.

Dated this 1st day of February, 2016.

Respectfully submitted,

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