No. 14-803

IN THE

Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,

v.

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

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

v.

THOMAS BARLAND, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.2, the Congressional Black Caucus ("CBC") respectfully submits this *amicus curiae* brief in support of Petitioners' request for a *writ* of *certiorari*.[1]

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus curiae are elected members of the United States House of Representatives and United States Senate.[2]

Since its establishment in 1971, the CBC has empowered America's neglected citizens and addressed their legislative concerns. The CBC has consistently been the voice in Congress for people of color and vulnerable communities. It has been committed to utilizing the full constitutional power, statutory authority and financial resources of the federal government to ensure that everyone in the United States has an opportunity to achieve their own version of the American Dream.

The CBC has focused its efforts on supporting social and economic progress, equality and fairness for all

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[1] No counsel for any party authored this brief in whole or in part. No party, or counsel for any party, has made a monetary contribution intended to fund the preparation or submission of this brief. The Congressional Black Caucus has notified the parties of its intent to file this brief, and both Petitioners and Respondents have consented to its filing. Petitioners have filed a blanket consent with the Court, and Respondents' written consent is being transmitted contemporaneously with this brief.

[2] The individual members of the CBC are listed in Appendix 1.

Americans and especially for African Americans and neglected communities. A particular focus of the CBC has been eliminating barriers to equal voting rights. Members of the CBC participated in the historic Selma to Montgomery, Alabama marches, as well as other key efforts that led to the passage of the Voting Rights Act of 1965. The CBC, along with the overwhelming majority of Congress, also actively supported extending the Voting Rights Act at every juncture, including most recently in 2006.

As lawmakers, members of the CBC are committed to ensuring that the Voting Rights Act continues to serve as a robust and meaningful vehicle for protecting access to the voting booth for all Americans. Correspondingly, members of the CBC are committed to ensuring fidelity to the text, history and purpose of the Voting Rights Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ratification of the Fifteenth Amendment in 1870 guaranteed African Americans the constitutional right to vote. In the century that followed, states and localities around the country systematically deprived African Americans of that right. This well-known history of minority voter disenfranchisement necessitated the introduction and passage of the Voting Rights Act in 1965 ("VRA"), 52 U.S.C. § 10301 *et seq*. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308–15 (1966).

When President Johnson signed the VRA into law, he said it would become "one of the most monumental laws in the entire history of American freedom." Remarks in

the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 841 (August 6, 1965). He was right. The VRA is one of Congress's seminal achievements. It is responsible for empowering millions of previously disenfranchised Americans to vote.

Today, fifty years after its passage, the VRA remains vital, as this Court has acknowledged. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) ("[V]oting discrimination still exists; no one doubts that."). The passage of Wisconsin's voter identification law, Act 23, shows why. Extensive record evidence in this case established that Act 23 disproportionately affects African American and Latino voters. The evidence further established that the purported problem Act 23 seeks to address—in-person voter fraud—is non-existent. Without evidence of a single instance of in-person voter impersonation, Act 23 has the potential to disenfranchise *nine percent* of registered Wisconsin voters—as many as 300,000 people. Amplifying expert testimony about the disproportionate impact of Act 23 on African Americans and Latinos, numerous would-be minority voters shared stories of the hurdles they had to overcome to register in Wisconsin. Their testimony highlights the challenges faced by thousands of others.

In the past six years, sixteen other states have passed restrictions similar to Act 23. Additional states appear poised to enact others. As with Act 23, many of these new restrictions are being challenged, or will be challenged, under Section 2 of the VRA.

As lawmakers who participated in the early struggle for equal voting rights, who supported reauthorizing

the VRA in 1982 and 2006, and who maintain a strong institutional interest in ensuring faithful adherence to federal laws, the members of the CBC urge the Court to review the decision of the U.S. Court of Appeals for the Seventh Circuit upholding Act 23 under Section 2 of the VRA. There are two reasons.

First, in light of the Nation's troubled history of minority voter disenfranchisement, the recent proliferation of voter identification laws like Act 23—laws that disproportionately affect the ability of minorities to exercise their most fundamental democratic right—presents an issue of profound national importance.

Second, because of the confusion sown by the Seventh Circuit's anomalous application of Section 2, courts faced with Section 2 challenges to the new voter identification laws, as well as state legislatures considering additional measures, require firm guidance that honors the text, history and purpose of the VRA. More broadly, insofar as the Court's precedents largely focus on how to apply Section 2 to vote dilution claims, review is necessary to clarify how to apply Section 2 to vote denial claims like the one presented here. The need for the Court's guidance is particularly acute now, because in the wake of the Court's decision in *Shelby County*, Section 2 is the only VRA provision that currently guarantees review of laws such as Act 23.

ARGUMENT

I. IN LIGHT OF THE NATION'S TROUBLED HISTORY OF MINORITY VOTER DISENFRANCHISEMENT, THE RECENT PROLIFERATION OF VOTER IDENTIFICATION LAWS LIKE WISCONSIN'S ACT 23 PRESENTS AN ISSUE OF PROFOUND NATIONAL IMPORTANCE.

A. The History of Minority Voter Disenfranchisement.

In 1870, following the abolition of slavery, the states ratified the Fifteenth Amendment to the Constitution. The Fifteenth Amendment provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1. Following ratification of the Fifteenth Amendment, during the period of Reconstruction in the 1870s and 1880s, newly-freed African Americans were elected to state legislatures and both houses of Congress. *See* Eric Foner, *A Short History of Reconstruction*, 151–52 (1990).

These rapid electoral gains were short-lived. By 1894, state legislatures had undone nearly all of the voting rights progress African Americans had made. The devices employed to disenfranchise African Americans included grandfather clauses, property qualifications, poll taxes, literacy tests, understanding tests, "good character" requirements, and laws requiring white citizens to serve as references before African Americans could register to

vote. Barbara Arnwine & Marcia Johnson-Blanco, *Voting Rights at a Crossroads: The Supreme Court Decision in* Shelby *Is the Latest Challenge in the 'Unfinished March' to Full Black Access to the Ballot*, Economic Policy Institute 3–4 (Oct. 25, 2013), *available at* http://www.epi.org/publication/voting-rights-crossroads-supreme-court-decision/. Those African Americans brave enough to seek to register to vote in the face of these obstacles were fired from their jobs, evicted from their homes and violently intimidated. *See* U.S. Commission on Civil Rights, *Voting* 92–97 (1961), *available at* http://www.crmvet.org/docs/ccr_61_voting.pdf. By 1900, almost all African Americans in the South had been disenfranchised. Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 91 (2006).

Perilous, lengthy and costly individual lawsuits were the only means available to challenge state and local impediments to voting. *Katzenbach*, 383 U.S. at 314. These lawsuits netted certain gains, as the Court struck down grandfather clauses, extremely short voter registration periods, white-only primaries, racial gerrymandering and discriminatory use of voting tests. *Guinn v. United States*, 238 U.S. 347, 368 (1915) (grandfather clauses); *Lane v. Wilson*, 307 U.S. 268, 271 (1939) (restricted registration period); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (white primaries); *United States v. Thomas*, 362 U.S. 58, 59 (1960) (per curiam) (voter challenges); *Gomillion v. Lightfoot*, 364 U.S. 339, 347–348 (1960) (race-based gerrymandering); *e.g.*, *Schnell v. Davis*, 336 U.S. 933, 933 (1949) (per curiam) (voting tests). But challenging voting restrictions through individual lawsuits "resembled battling the Hydra," as states and localities ignored or evaded court orders or, after a practice was

invalidated, devised new and creative methods to prevent African Americans from voting. *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting). Every time an African American voter succeeded in the extraordinary effort required to push the boulder up the hill, she found herself back at the bottom facing a new barrier to the voting booth.

"Progress [was] painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process." H.R. REP. NO. 89-439, at 2440–41 (1965). Even into the second half of the twentieth century, the "blight of racial discrimination in voting continued to infect the electoral process in parts of our country." *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting) (quoting *Katzenbach*, 383 U. S. at 308) (quotation marks omitted). For example, registration of eligible African Americans "in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Katzenbach*, 383 U.S. at 314.

Although former Confederate states were among the worst offenders, minority voter intimidation and disenfranchisement were not limited to the South. States and localities throughout the country erected barriers designed to bar African Americans from voting. Sanford Wexler, *An Eyewitness History of the Civil Rights Movement* 197 (1993). Aspiring black voters in the state of Wisconsin, particularly Milwaukee, were not spared. There, too, nonviolent protestors advocating for equal access to the polls were met with violence and intimidation.

Patrick D. Jones, *The Selma of the North: Civil Rights Insurgency in Milwaukee* 150 (2009).

B. The Voting Rights Act of 1965.

On March 7, 1965, 600 men, women, and children gathered to march from Selma to Alabama's capital, Montgomery, to peacefully protest the continued *de facto* disenfranchisement of African American voters. The march ended abruptly on the Edmund Pettus Bridge, where state and local police on horseback brutally attacked the marchers, including one who is now a prominent member of the CBC, beating them with nightsticks, choking them with tear gas and trampling them with horses. Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws that Changed America* 283 (2005).

Eight days after what became known as Bloody Sunday, President Johnson addressed a joint session of Congress calling for a remedy to the injustices the Nation had witnessed: "I speak tonight for the dignity of man and for the destiny of democracy. At times, history and fate meet at a single time, in a single place to shape a turning point in man's unending search for freedom. . . . So it was last week in Selma." Special Message to the Congress: The American Promise, 1 Pub. Papers 281 (March 15, 1965) ("Johnson Special Message"). President Johnson described in great detail the myriad "ingenious" state and local laws that had been employed across the Nation to disenfranchise African Americans despite the guarantee of the Fifteenth Amendment, and concluded "that the only way to pass these barriers [wa]s to show . . . white skin." *Id.*; *see also* H.R. Rep. No. 89-439, at 2439–44 (1965) (explaining historical difficulties in attempts to enforce

Fifteenth Amendment). Arguing that protection of the voting rights of African Americans required immediate federal intervention, President Johnson demanded expansive voting rights legislation. Johnson Special Message 281–87.

Five months after Bloody Sunday, in August 1965, Congress passed the VRA by an overwhelming majority. The ambitions of the VRA were grand: to end nearly a century of systematic disenfranchisement of African Americans. Although discriminatory voting practices persist, the VRA has lived up to its promise. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201 (2009) ("The historic accomplishments of the Voting Rights Act are undeniable."). "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." *Shelby County*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting). In Mississippi, for example, African American registrations jumped from 6.7% in 1965 to 60% by 1968. Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 97 (2006).

It is undeniable that the VRA's accomplishments have inspired hard-won, centuries-delayed public confidence in the legitimacy of the country's electoral system. With the VRA in place, minorities and non-minorities alike can and do have greater faith that election results genuinely reflect the will of the people—*all* of the people.

C. The Persistence of Discrimination Informing the Voting Rights Act Reauthorization of 2006.

On March 7, 2015, members of the CBC will travel to Selma to commemorate the 50th anniversary of Bloody Sunday. Their pilgrimage is not simply one of historical remembrance. It will also serve as a present-day reminder that unnecessary barriers to equal voting rights persist, notwithstanding the VRA's accomplishments.

Two years ago, this Court recognized that "voting discrimination still exists; no one doubts that." *Shelby County*, 133 S. Ct. at 2619. Indeed, before voting to extend the VRA in 2006, Congress studied the current state of the American electoral system and found "flagrant" and "intentional racial discrimination in voting." *Shelby County v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. at 2631–32. Evidence established that in certain places, including Wisconsin, African American voters even continued to face intimidation. *See* Hon. Gwen Moore, Testimony before the Nat'l Comm'n on the Voting Rights Act (July 22, 2005).

"Congress concluded that although the Voting Rights Act had significantly improved African American enfranchisement by removing first-generation barriers to voting, such as a complete block to registration and voting, second-generation barriers [had been] constructed to prevent minority voters from fully participating in the electoral process." *Shelby County,* 133 S. Ct. at 2636 (Ginsburg, J., dissenting). These modern day, "second-generation barriers" may be "more subtle than the visible methods used in 1965," but they have the same effect, "namely a diminishing of the minority community's ability

to fully participate in the electoral process and elect their preferred candidates." H.R. Rep. No. 109-478, at 6 (2006).

D. The Recent Proliferation of New Voting Restrictions, Including Wisconsin's Act 23.

State legislatures began to enact voter identification laws almost immediately after the Court denied a constitutional challenge to Indiana's voter identification law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Since *Crawford*, seventeen states, including Wisconsin, have enacted new voter identification requirements, restricted what qualifies as acceptable identification (non-photo to photo), or restricted what qualifies as an acceptable issuing authority (non-government to, generally, government only). U.S. Gov't Accountability Office, GAO-14-634, Elections: Issues Related to State Voter Identification Laws 16 (2014). Five of these states were previously subject to preclearance under Section 5 of the VRA because of their history of discrimination. For example, Texas—a state in which every single county was subject to preclearance at the time of the *Shelby County* decision—implemented strict voter identification requirements immediately after *Shelby County*. North Carolina, in which forty of 100 counties were previously subject to preclearance, did the same. In addition, within the last year alone, fourteen states either proposed to enact new voter identification laws or imposed new restrictions under existing laws. *See* Wendy Underhill, *Voter Identification Requirements/Voter ID Laws*, Nat'l Conf. of State Legislatures (Oct. 31, 2014).

This sudden flurry of state legislation is no accident of timing. State officials have asserted openly that *Crawford*

cleared the way.[3] *See, e.g.*, Jason Stein, *ACLU Sues State over Photo ID Law*, Milwaukee Journal Sentinel, Dec. 14, 2011 ("[Governor] Walker spokesman Cullen Werwie noted that at least 15 other states have enacted some photo ID requirement and that photo ID has been upheld by the U.S. Supreme Court."); Brent Kendall, *Voter-ID Actions Push Fight Past November*, Wall St. J., Oct. 19, 2014 ("'The U.S. Supreme Court has already ruled that voter ID laws are a legal and sensible way to protect the integrity of elections,' Lauren Bean, a spokeswoman for Texas Attorney General Greg Abbott, said Saturday."); Terrence Stutz, *Texas Senate Passes GOP-Backed Voter ID Bill*, Dallas Morning News, Jan. 26, 2011 ("'I have no concerns about this bill going before the Justice Department,' Senator Troy Fraser said. 'This bill clearly meets the parameters set by the U.S. Supreme Court [for voter ID laws].'"); Dion Lefler, *Ruling Aids Case for Kansas Voter ID Law*, Wichita Eagle, Apr. 29, 2008 ("Tim Huelskamp, R-Fowler and chairman of the Senate Elections and Local Government Committee, said the Supreme Court's action is 'clearly a very helpful decision,' and that it 'really clears the way to pass something in the Legislature.'").

The voluminous record developed in this case establishes that Act 23 and similar laws may erect a "second-generation barrier" to voting. According to extensive expert testimony, nine percent of *registered*

[3] *Crawford* does not, however, immunize voter identification laws from challenges under Section 2 of the VRA. *Crawford* involved a constitutional challenge, not a challenge under Section 2. Section 2 sweeps more broadly than constitutional voting protections because it additionally proscribes voting practices that have a disparate impact on minority voters. *See* Section II, *infra*.

Wisconsin voters—more than 300,000 people—lack qualifying identification under Act 23[4]; a disproportionate share are African American and Latino.[5] *Frank v. Walker*, 17 F. Supp. 3d 837, 854, 872–74 (E.D. Wis.), *rev'd*, 773 F.3d 783 (7th Cir. 2014). Consistent with this expert evidence, the record included, *inter alia*, the testimony of state representative Tamara Grigbsy before the Wisconsin Senate committee that initially considered Act 23:

> Everyone sitting in this room knows what this bill does and knows who it will harm. . . .
>
> To be candid, this bill targets people like me and the constituents I represent. It targets people of color. . . . Among the Wisconsinites without state-issued photo identification and who would be required to obtain under the bill include:

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[4] New laws in other states likewise affect hundreds of thousands of registered voters. *See, e.g.*, *Veasey v. Perry*, No. 13-cv-00193, 2014 WL 5090258, at *21 (S.D. Tex. Oct. 9, 2014) (4.5% of registered Texas voters, more than 600,000 people, without qualifying identification); *Applewhite v. Pennsylvania,* No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014) ("hundreds of thousands" registered Pennsylvania voters without qualifying identification); N.C. State Bd. of Elections, *2013 SBOE-DMV ID Analysis* 1 (Jan. 7, 2013), http://tinyurl.com/q7zxsdc (over 600,000 registered North Carolina voters potentially without qualifying identification); *Weinschenck v. Missouri*, 203 S.W.3d 201, 206 (Mo. 2006) (169,000 registered Missouri voters without qualifying identification).

[5] The same is true in other states that recently passed voter identification laws. *See*, *e.g.*, *Veasey*, 2014 WL 509028, at *49 (finding Texas law disproportionately impacts registered African American and Latino voters); *Applewhite*, 2014 WL 184988, at *56 (finding registered African-American and Latino voters almost twice as likely to lack qualifying identification).

23% of citizens over 65 years old;
17% of white men and women;
55% of African American men;
49% of African American women;
46% of Hispanic men; and
59% of Hispanic women.

Wis. Rep. Tamara D. Grigsby, Testimony before the S. Comm. on Transp. and Elections (Jan. 26, 2011). Further buttressing the expert evidence, the district court heard testimony from numerous witnesses who described their personal experiences under Act 23. *Frank v. Walker*, 17 F. Supp. 3d at 854–58 (recounting witness testimony describing the many obstacles to obtaining qualifying identification); *see also Frank v. Walker*, 773 F.3d at 786 (Posner, J., dissenting from denial of rehearing *en banc*) (there are "a litany of . . . practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID if they need one in order to be able to vote").

One of the witnesses was ninety-three year old Lorene Hutchins. Ms. Hutchins lived through the Civil Rights Movement and had family members who braved furious mobs while trying to exercise their constitutional right to vote in Mississippi in the 1930s. Katherine Clark & Penda D. Hair, *An Unsung Hero in the Voting Rights Battle*, Journal Interactive, March 13, 2014, *available at* http://www.jsonline.com/news/opinion/an-unsung-hero-in-the-voting-rights-battle-b99224264z1-250249231.html; Joyce Jones, *93-Year Old Testifies Against Wisconsin Voter ID Law*, BET Nat'l News, Nov. 13, 2013, *available at* http://www.bet.com/news/national/2013/11/13/93-year-old-testifies-against-wisconsin-voter-id-law.html. Like

many older African Americans, Ms. Hutchins was born in Mississippi at a time when African Americans were not permitted to give birth in white hospitals, so she was never issued a birth certificate. *Id.* For decades, Ms. Hutchins voted in every election and even served as a poll worker. But in 2011, after Act 23 went into effect, Ms. Hutchins could no longer vote because she had no birth certificate. *Id*. She subsequently spent two years fighting to regain her right to vote, incurring significant costs and legal fees along the way. *Id.*

Similarly, 76-year old Bettye Jones was born in Tennessee, also part of the segregated South, and was never issued a birth certificate. Page Garner, *One Mother's Struggle for Voting Rights*, Politico, Dec. 9, 2013, *available at* http://www.politico.com/story/2013/12/one-mothers-struggle-for-voting-rights-100842.html; Judith Browne Dianis, *Bloody Sunday: Then and Now*, Huffington Post, May 7, 2012, *available at* http://www.huffingtonpost.com/judith-browne-dianis/bloody-sunday-then-and-no_b_1324148.html. Ms. Jones, who later lived in Ohio and then Wisconsin, was a civil rights activist who helped organize events in support of voting rights. *Id*. She had voted in every major election since the 1950s. *Id.* In 2011, when Act 23 went into effect, Ms. Jones went to the Department of Motor Vehicles to obtain a free state identification card because she had no driver's license. She learned, however, that she could not obtain the identification card because she had no birth certificate. *Frank v. Walker*, 17 F. Supp. 3d at 858. After four months and more than 50 hours of effort, including multiple communications with the Tennessee Office of Vital Records and numerous trips to the Wisconsin DMV, Ms.

Jones was finally able to secure a discretionary exception[6] to Act 23 that permitted her to vote. *Id.*

Contrary to the Seventh Circuit's assertion that Act 23 promotes confidence in the electoral system, *Frank v. Walker*, 768 F.3d at 750–51, experiences such as those of Ms. Hutchins and Ms. Jones, in fact, undermined it. The actual *evidence* at trial established the belief of Wisconsin voters that "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system," and that "Act 23 is designed to keep certain people from voting" and "to confuse voters." *Frank v. Walker*, 17 F. Supp. 3d at 852. The trial evidence thus supported the district court's conclusion that voter identification laws "undermine the public's confidence in the electoral process as much as they promote it," and "caus[e] members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id.* at 851–52.

The district court also found that "the publicity surrounding photo ID legislation creates the false

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[6] An individual who lacks a birth certificate may apply for an exception through the "MV3002" procedure to prove citizenship, name and date of birth. The individual must request the state of birth to complete a form to certify that there is no birth certificate on file with the state, which is submitted to a DMV supervisor with alternative documentation of the individual's identity. The DMV supervisor then makes a subjective determination of whether the documentation is "strong" enough to warrant an exception. This procedure is not publicized and is enforced arbitrarily. *Frank v. Walker*, 17 F. Supp. 3d at 858 n.17; *see also* Trial Tr. vol. 7, 1877–78, Nov. 14, 2013.

perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process." *Id.* at 851. A letter written to the Wisconsin legislature by Kevin Kennedy, Wisconsin Government Accountability Board Director and General Counsel, supported the district court's conclusion: "Speaking frankly on behalf of our agency and local election officials, absent direct evidence I believe continued unsubstantiated allegations of voter fraud tend to unnecessarily undermine the confidence that voters have in election officials and the results of the election." Letter from Kevin J. Kennedy, Director, Wis. Gov't Accountability Bd. to State Assembly Speaker Jeff Fitzgerald, July 13, 2012; *see also* Trial Tr. vol. 5, 1388–1389, Nov. 8, 2013.

* * *

Act 23 and similar laws were not enacted in a vacuum. A long history of discrimination against minority voters pre-dated them. And as this Court recently acknowledged, such "discrimination still exists." *Shelby County*, 133 S. Ct. at 2619. Minority voters, however, are increasingly unable to rely on the protections of the VRA to block discriminatory voting rules. With Section 5 of the VRA no longer operative, Section 2 is the only bulwark against laws that diminish the ability of minorities to participate in the political process. But as the next section explains, the Seventh Circuit read section 2 so narrowly as to render it a nullity as to claims of vote denial or abridgement. If allowed to stand, the Seventh Circuit's interpretation of Section 2 threatens to take us back to a time when states were free to enact facially-neutral laws that had the effect of denying minorities equal access to the voting booth.

In view of the country's ongoing history of discriminatory voting practices, and given the indisputable centrality of the right to vote to the legitimacy of democratic government, Act 23's voter identification requirements present an issue of profound national importance under Section 2. That issue warrants the Court's careful consideration.

II. THE SEVENTH CIRCUIT'S ANOMALOUS INTERPRETATION OF SECTION 2 REQUIRES THE COURT TO FURNISH TO LOWER COURTS AND STATE LEGISLATURES CLEAR GUIDANCE THAT RESPECTS THE TEXT, HISTORY AND PURPOSE OF THE VRA.

The text, history and purpose of Section 2 establish that it proscribes practices that have a disparate impact on minority voters.

In *Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that, like the protections afforded by the Fourteenth and Fifteenth Amendment, Section 2 prohibited only intentionally discriminatory voting practices. Soon after, in 1982, Congress responded by amending Section 2 to clarify its protections. Restoring the evidentiary standard developed in earlier cases, Congress made clear that Section 2 does not require proof that an electoral law or practice was adopted or maintained with an intent to discriminate. *See, e.g.*, S. REP. NO. 97-417, at 2, 15–16, 27 (1982). Under the 1982 amendments, a violation of Section 2 is established if the "totality of the circumstances of the local electoral process" shows that the challenged standard, practice, or procedure *results* in denying a racial or language minority an equal opportunity to participate in the political process. S. REP. NO. 97-417, at 16 (1982).

The plain language of Section 2 reflects Congress' intent to outlaw voting practices that disproportionately affect minority voters. Congress changed the operative provision, which previously read "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color," to

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color. . . .

52 U.S.C. § 10301(a) (emphasis added). In addition, Congress included an entirely new subsection (b) to explain precisely how to prove a violation under the results test:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision *are not equally open to participation by members of a class of citizens* protected by subsection (a) of this section in that *its members have less opportunity than other members of the electorate to participate in the political process* and to elect representatives of their choice.

52 U.S.C. § 10301(b) (emphasis added).

The Court has repeatedly reinforced that the 1982 amendments mean what they say: Section 2 prohibits laws and practices that have the effect of imposing greater burdens on minority voters. *See, e,g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone."); *id.* at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."); *Chisom v. Roemer*, 501 U.S. 380, 395 (1991) ("Section (a) adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish any violation of the section. Section (b) provides guidance about how the results test is to be applied."); *id.* at 404 ("Congress made clear that a violation of Section 2 c[an] be established by proof of discriminatory results alone.").

It is also significant that, by asking whether minority voters have "*less* opportunity" than white voters "to participate in the political process," Section 2 provides that a plaintiff need not prove that a challenged practice results in a *complete* denial of the right to vote. Rather, consistent with Section 2(a)'s prohibition of practices that result in a "denial *or abridgement*" of the right to vote, all a plaintiff needs to establish is that the challenged practice "result[s] in the denial of *equal access* to any phase of the electoral process for minority group members." S. Rep. No. 97-417, at 30 (1982) (emphasis added); *id.* at 28 ("Section 2 protects the right of minority voters to be free from election practices . . . that deny them the same opportunity to participate in the political process as other

citizens enjoy."). "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process,' than whites, and § 2 would therefore be violated." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.)) (emphasis in original); *see also Holder v. Hall*, 512 U.S. 874, 922–23 (1994) (Thomas, J., concurring in the judgment, joined by Scalia, J.) (emphasizing Section 2 was amended after *Bolden* to cover "all manner of registration requirements" that, by regulating ballot access, produce "discriminatory *results*") (emphasis in original); *id.* at 924 ("A results test is useful to plaintiffs . . . challenging laws that restrict access to the ballot. . . .").

The Seventh Circuit's decision appears to discount the text, history and purpose of Section 2 as applied to vote denial claims. It also appears inconsistent with the Court's prior decisions applying Section 2. The Seventh Circuit asserted that, for vote denial claims, as opposed to vote dilution claims, Section 2 bars only voting practices that expressly deny minorities the right to vote and treat them differently. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (the trial court's findings "do not show a 'denial' of anything by Wisconsin, as Section 2(a) requires"), 753 ("Act 23 does not draw any line by race, and the district judge did not find that blacks or Latinos have less 'opportunity' than whites to get photo IDs."), 754 ("It is better to understand § 2(b) as an equal treatment requirement (which is how it reads) than as an equal outcome command (which is how the district court took it)."), 755 ("plaintiffs would fail [to show a discriminatory burden] because in Wisconsin everyone has the same opportunity to get a qualifying photo ID").

Put differently, for vote denial claims, the Seventh Circuit appears to have reprised the congressionally-overridden holding in *Bolden* and, notwithstanding the clarity of the 1982 amendments and corresponding case law, revived the discriminatory intent requirement. The Seventh Circuit's decision thus sows confusion about how to apply Section 2 to vote denial claims. The confusion is amplified because other lower courts recently have adhered to the text, history and purpose of the Section 2 amendments, as well as the Court's Section 2 precedents, in addressing vote denial claims. *See Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 549–60 (6th Cir. 2014) (applying results test to vote denial claim challenging new restrictions on Ohio's early, in-person voting procedures); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (applying results test to vote denial claim challenging new laws that eliminated same day voter registration and prohibited counting out-of-precinct ballots).

The Seventh Circuit's novel interpretation of Section 2 warrants the Court's close attention. Review is necessary to furnish guidance to the many lower courts that are or will be faced with Section 2 challenges to new voter identification laws that, like Act 23, disproportionately affect minority voters while purporting to address a problem—in-person voter impersonation—that does not exist. Review is also necessary to furnish guidance on Section 2 to state legislatures that might consider similar legislation. More broadly, inasmuch as the Court's Section 2 jurisprudence has focused largely on vote dilution claims, *see, e.g.*, *Gingles,* 478 U.S. 35; *Chisom*, 501 U.S. 380; *Holder*, 512 U.S. 874; *LULAC v. Perry*, 548 U.S. 399 (2006); *Bartlett v. Strickland*, 556 U.S. 1 (2009), review

is necessary to clarify precisely how Section 2 operates as to vote denial claims.

The Court's guidance is especially critical now, because with the decision in *Shelby County*, Section 2 has taken on increased importance. In the absence of a Section 4(a)-Section 5 preclearance regime, Section 2 is the only provision of the VRA that may be readily invoked to test the legality of a law like Act 23.

CONCLUSION

For the foregoing reasons, the members of the CBC respectfully request that the Court grant the petition for a *writ* of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX

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