

**MINNESOTA & WISCONSIN HEARING
OF THE
NATIONAL COMMISSION ON VOTING RIGHTS**

Testimony submitted by:
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on Behalf of
**ACLU of Wisconsin and
Legal Committee of Wisconsin Election Protection**
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Thank you for the opportunity to submit this statement for the *National Commission on Voting Rights Hearing* to address proposed changes to the Voting Rights Act in light of the Supreme Court's decision in *Shelby County v. Holder*.

The ACLU of Wisconsin has long been involved in advocacy for civil rights and civil liberties, including voting rights. We have worked with local and state elections officials to improve the electoral process. We have advocated for laws protecting and expanding voting rights, including laws to re-enfranchise felons who are on probation, parole or extended supervision. We have litigated on voting rights issues. We have more than 6200 members and are part of a nationwide network of 53 affiliates working daily in courts, Congress, state legislatures, and communities across the country to defend and preserve the civil rights and liberties guaranteed to all those in the United States by our Constitution and laws. In addition, for a decade we have been core members of the legal committee of the Wisconsin Election Protection coalition, a non-partisan organization dedicated to protecting voting rights. I submit this testimony on behalf of both the ACLU of Wisconsin and the Legal Committee of the Wisconsin Election Protection coalition.

Although Wisconsin was not subject to Section 5 of the Voting Rights Act, our experience shows, unfortunately, numerous and continuing efforts to suppress voting rights, and especially the rights of minority voters in our state. We therefore submit this testimony and related documents in support of the modernization of the Voting Rights Act.

I. Background of Racial Inequities in Wisconsin

A. Pervasive Segregation and Racial Disparities

Any assessment of the race-related impacts of various election laws in Wisconsin must reckon with the numerous, profound and systemic patterns of racial segregation and

discrimination statewide, and especially in Milwaukee where about 70% of the entire state's African-American population and 40% of its Latino population reside.¹

Milwaukee ranks the worst out of the 102 largest metro areas in Black/white segregation and the 9th worst in Hispanic/white segregation. African-American suburbanization in the Milwaukee metro area is the lowest among even the most segregated metropolitan areas in the U.S.² A map attached to these comments – created by the Southeastern Wisconsin Regional Planning Commission (SEWRPC) - emphasizes the nature and extent of segregation in the region in 2010.³

Contemporary segregation can be traced in large part to the area's ugly history of housing discrimination, including the construction of segregated public housing in the 1940s and 1950s, zoning practices excluding minorities from communities and neighborhoods in the region, and the lack of regional affordable housing. And housing discrimination persists. For example, more than 98% of home purchase loans in Milwaukee suburbs in the 1990's went to white applicants. The disparity in black and white mortgage denials was greater in Milwaukee than in any metropolitan area in the country, a disparity which a study replicated and found to persist in the 2000s.⁴ Discrimination is so rampant that *affluent* minorities face higher loan denial rates than *lower-income* whites.⁵ Federal court decisions and filings also confirm the ongoing persistence of housing discrimination.⁶

¹ See, e.g., Wisconsin Dept. of Health Services data showing that as of 2008 more than 69% of Wisconsin's African-Americans and almost 40% of its Latinos lived in Milwaukee County. (<http://www.dhs.wisconsin.gov/health/minorityhealth/mhpop/africanameripop2009.htm>, <http://www.dhs.wisconsin.gov/health/minorityhealth/mhpop/hispaniclatinopop.htm>).

² Prof. Marc V. Levine, "Racial Disparities, Socioeconomic Status, and Racialized Politics in Milwaukee and Wisconsin: an Analysis of Senate Factors Five and Six of the Voting Rights Act," Expert Report Submitted on Behalf of the Plaintiffs in *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wis., Oct. 18, 2013) (Attachment A) at 7 and *generally* at 5-11.

³ SEWRPC, *A Regional Housing Plan for Southeastern Wisconsin: 2035* (March 2013) at 378 (Attachment B). SEWRPC is the federally mandated Metropolitan Planning Organization (MPO) for seven counties in Southeastern Wisconsin. Within this seven-county region, Milwaukee County has 47% of the region's total population, 63% of its Latino population, and 86% of its African-American population. Three of SEWRPC's counties – Ozaukee, Washington and Waukesha – are more than 90% white non-Hispanic, and four counties – those three and Walworth – are only 1% African-American. US Census, Profile of General Population and Housing Characteristics: 2010 (Data set DP1) (calculated based on data for White non-Hispanic alone, Black non-Hispanic alone, Hispanic or Latino of any race).

⁴ Levine at 9.

⁵ *Id.* at 9-10.

⁶ See, e.g., *United States v. City of New Berlin*, No. 11-CV-608 (E.D. Wis., filed April 19, 2012), (complaint alleging intentional race discrimination and discriminatory effect based on Milwaukee suburb's strenuous efforts to block affordable housing, and consent decree, at <http://www.justice.gov/crt/about/hce/documents/newberlincomp.pdf>, <http://www.justice.gov/crt/about/hce/documents/newberlinsettle.pdf>) and Levine at 10 ("The racial underpinnings of much of the [New Berlin] opposition was indicated by, among other things, a sign left

The extreme residential segregation that plagues Milwaukee is the cornerstone from which other socioeconomic disparities flow. For example, it keeps largely Black and Latino populations in central Milwaukee from accessing suburban labor markets, where most recent job growth has occurred. And extreme racial disparities persist in employment. Overall Black male employment rates in Milwaukee are abysmal. There is a 32.4% Black/white male and a 20.4% Black/white female employment gap, the worst out of 40 metro areas in the country. Hispanic/white male and Hispanic/white female employment disparities rank near the lowest third of 38 metro areas. Black business ownership ranks 48th out of 50, and Latino business ownership is the lowest of 36 metro areas.⁷ Segregation also severely restricts minority access to suburban jobs, and, combined with the lack of public transit, exacerbates the employment crisis.⁸

Hiring discrimination also persists. For example, a widely known study of the Milwaukee labor market from the early 2000s sent pairs of Black and white testers, with identical qualifications other than race and whether they had prison records, to apply for certain jobs. White applicants were called back for interviews more than twice as frequently as Black candidates, and white applicants *with criminal records* were called back at a higher rate than Black applicants *without* criminal records.⁹ Court decisions confirm the persistence of discriminatory employment practices.¹⁰

facing [the mayor's] home, calling the mayor a 'nigger lover.' Opponents of the development, knowing that Mayor Chiovatero had been adopted as a child, even took the step of sending someone to check public records to see if he had any 'African-American blood.'"); *State Financial Bank et al v. South Milwaukee*, No. 00-C-1530, ECF Nos. 363 (3/25/09), 508 (7/29/09) (opinion denying summary judgment for Milwaukee suburb opposing affordable housing and verdict for plaintiffs finding race discrimination; see also Tom Tolan, "South Milwaukee, developer settle apartment bias issue," *Milwaukee Journal-Sentinel* (June 27, 2011) at <http://www.jsonline.com/news/milwaukee/124622573.html> ("The long-running South Milwaukee dispute once saw the city attempting to raze the Lake Bluff Apartments complex, which includes affordable housing. About one-third of the complex's residents have been minorities. The city's population was 1% black by the 2000 census. In July 2009, a federal jury found that razing the property would have a disproportionate effect on minority and disabled residents and would be in violation of the federal Fair Housing Act")

⁷ Levine at 15-20.

⁸ Levine at 21; see also, e.g., Lydia Mulvaney, "Report underlines Milwaukee area's jobs issue: Transportation - Lack of bus routes to work in suburbs remains a problem, study says," *Milwaukee Journal-Sentinel* (Dec. 28, 2013) ("Milwaukee is the most segregated metro area in the country, with the smallest percentage of African-Americans living in suburbs," said UWM economist Joel Rast, who wrote the report on jobs lost because of transit funding cuts. 'The unemployment rate is particularly high among African-Americans, and they desperately need jobs more so than any other group. They're also least likely to be located close to those jobs,' he said.") (<http://www.jsonline.com/news/milwaukee/report-underlines-milwaukee-areas-jobs-issue-transportation-b99171514z1-237843351.html>).

⁹ Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* 108 (2003): 937-975 (https://www.princeton.edu/~pager/pager_ajs.pdf).

¹⁰ See, e.g., *Kimble v. Wis. Dep't of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010) (state agency discriminated against supervisor on basis of race and gender); *Davis v. Wis. Dep't of*

Thus it is unsurprising that the median household income for Milwaukee’s African-Americans is 42% that of whites, ranking 39th out of the 40 largest metropolitan areas, and Latino median household income is 56% of that of whites, ranking 27th out of the 36 largest metropolitan areas. The African-American poverty rate in Milwaukee and statewide is 39%, the Latino poverty rate is 30%, while the white poverty rate is 8%, creating the largest disparity in the country for African-Americans and 30th out of 36 for Latinos.¹¹

Similarly, persistent and profound racial disparities in education are a legacy of historical discrimination and segregation.¹² Wisconsin has the nation’s lowest test scores for Black eighth-graders and the worst racial disparities on those tests.¹³ The Black-white test score gap in Milwaukee is second-highest, and the Latino/white gap is 14th highest, of the 100 largest metro areas. Concentrated poverty helps explain the achievement gap, and African-American and Latino students are far more likely than whites to attend schools with concentrated poverty.¹⁴

B. Racially Charged Campaigns

There have been frequent racial appeals in Wisconsin political campaigns for decades.¹⁵ The history of overt racial appeals stretches back to smearing Milwaukee’s mayor during his campaign in the 1950s and the relative success of the segregationist Wallace presidential campaign in the 1960s. As overt appeals to race became less acceptable, political campaigns sought to achieve the same impact with coded language about issues like crime, welfare, busing, and cutting taxes. While not every voter who favors these positions is a “racist,” the use of coded language around such issues often functions as a “dog whistle” for negative racial attitudes. For example, in the 1970s, a Nazi ran as the “white people’s candidate” for Milwaukee mayor, emphasizing “runaway crime,” “unsafe streets,” “welfare handouts,” “forced busing,” and

Corrections, 445 F.3d 971 (7th Cir. 2006) (evidence sufficient to support jury verdict of intentional racial discrimination by state agency).

¹¹ Levine at 12-13.

¹² See, e.g., *Armstrong v. O’Connell*, 451 F. Supp. 817 (E.D.Wis. 1978) (defendants intentionally segregated Black students); *Amos v. Bd. of Sch. Directors*, 408 F. Supp. 765, 818 (E.D. Wis. 1976) (“[S]chool authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing” segregation in the Milwaukee public schools); Levine at 8 (Milwaukee has nation’s second most segregated schools for African-Americans and 8th most segregated schools for Latinos.)

¹³ Lydia Mulvany, “Black students near bottom in nation on benchmark math, reading test,” *Milwaukee Journal-Sentinel* (Nov. 8, 2013), citing National Assessment of Education Progress report card. (<http://www.jsonline.com/news/education/states-black-students-rank-lowest-in-reading-math-scores-b99136626z1-230903121.html>).

¹⁴ Levine at 14-15.

¹⁵ For citations to information in this paragraph see Levine at 29-36; see also Declaration of Barry Burden, submitted in *Jones v. Deininger*, No. 2:12-cv-00185 (E.D. Wis., Oct. 23, 2013) at 12-13 (Attachment C).

“integrated jungles.” A subsequent study found only a “thin line” separating such extremist statements from mainstream politics in Milwaukee. During the 1980s, gubernatorial candidates debating welfare reform traded accusations of wanting to make Wisconsin like Mississippi. In 1989, a Milwaukee aldermanic candidate was attacked for allegedly wanting to open white areas of his district to minorities, and in 1996 an African-American incumbent Milwaukee judge was linked to a “Black militant.”¹⁶ In 2000 a Milwaukee mayoral candidate opposed light rail because “urban criminals could use the trains to prey on suburbanites.” In 2006 an attorney general candidate ran ads emphasizing his plan to “deal with illegal immigrants who commit crimes” while a gubernatorial campaign referenced “illegal aliens stream[ing] in” to take spots in Wisconsin’s university system.

The most notorious recent example of racial appeals was a 2008 campaign ad against Wisconsin’s only African-American Supreme Court Justice, Louis Butler, which played on racial stereotypes in a “reprise of the 1988 Willie Horton gambit.”¹⁷ The ad portrays images of Justice Butler alongside a convicted rapist whom Justice Butler had represented during his days as a public defender and used menacing music and racial images to suggest that as an African-American jurist Butler would choose to let violent criminals go free. The ad concludes with the question “Can Wisconsin families feel safe with Louis Butler on the Supreme Court?”¹⁸ After the ad ran, Butler’s chambers were flooded with angry and racist calls, such as one from a person who said she didn’t know there was a Black Supreme Court Justice and that that was “disgusting.”¹⁹ Butler became the first Wisconsin Supreme Court incumbent to be defeated since 1967, which left the Court exclusively white.

In recent years, there also have been repeated, racially-charged allegations related to “voter fraud” in Wisconsin. As early as 2001, an article from a conservative think tank referred to unsubstantiated “voter irregularities” in “urban areas.” Shortly before the 2004 elections, a Milwaukee talk radio host raised the specter of “wetback[s] and every other non-citizen out there voting.”²⁰ Investigations of alleged voter fraud by federal, state and local elections officials after

¹⁶ See also, *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 935 F.Supp. 1419, 1433 (E.D.Wis. 1996) (court found the campaign appeared to have involved racial appeals.)

¹⁷ The “Willie Horton gambit” refers to an ad that used the actions of a Black criminal to attack presidential candidate Michael Dukakis. Its creator, Lee Atwater, admitted it was an attempt to appeal to racial fears without using overt racial language. Levine at 29.

¹⁸ The ad is viewable at the following link, beginning at 2:12 (following ads from other states): http://www.youtube.com/watch?v=4Du_WEHjMMw

¹⁹ Affidavit of Nancy Marcus, submitted in *Frank v. Walker* (Apr. 7, 2012) (Attachment D).

²⁰ Levine at 36-37; see also Declaration of Gwendolynne Moore, filed in *Frank v. Walker* (June 28, 2012) at ¶14 (“In 2001, I opposed a bill, authored by then-Rep. Scott Walker, that would have required voters to present a photo ID to vote. I told the Legislature that the bill would serve as a barrier to voting in poor, minority communities like those in Milwaukee and Racine. I was very concerned that the bill introduced would disfranchise people of color, and made my concerns known to the state legislature and the public. At that time, the bill was not passed, but this was the first time, to my recollection, that the

the 2004 elections focused almost exclusively on urban, African-American voters.²¹ In 2006, specific, large notices were placed in Milwaukee – and only Milwaukee – polling places warning about penalties for “voter fraud,” and there was a substantial police presence at Milwaukee polling sites.²² In 2008, the state Attorney General formed a voter fraud task force only in Milwaukee, while a political operative in Wisconsin sought people “willing to volunteer . . . at inner city . . . polling places” to intimidate voters and try to catch supposed voter fraud, and concerns were also raised about inappropriate law enforcement involvement at polling places.²³ Before the 2010 and 2012 general elections, dozens of billboards were placed primarily in Milwaukee’s Black and Latino neighborhoods warning people about “voter fraud” in a clearly intimidating manner.²⁴ During the 2012 recall and general elections repeated concerns also were raised about voter intimidation, particularly at urban voting locations.²⁵ Moreover, after the

Legislature began discussing voter ID. Thus, more than a decade ago, legislators were told about the potential racial impact of voter ID laws.”)

(<http://moritzlaw.osu.edu/electionlaw/litigation/documents/DeclarationofGwendolynneMoore.pdf>).

²¹ Levine at 37; *see also, e.g.*, Eric Lipton & Ian Urbina, “In 5-Year Effort, Scant Evidence of Voter Fraud,” *N.Y. Times* (Apr. 12, 2007) (“Of the hundreds of people initially suspected of violations in Milwaukee, 14 - most black, poor, Democratic and first-time voters - ever faced federal charges.”) (<http://www.nytimes.com/2007/04/12/washington/12fraud.html>); Daniel Bice, “Biskupic did pursue voter fraud – futilely,” *Milwaukee Journal-Sentinel* (Apr. 12, 2007) (“A Milwaukee lawyer who represented three of the defendants said she was baffled by the fraud cases, noting there were few, if any, filed after other elections. ‘I definitely cannot say that this was any intent to suppress the black vote,’ said Nancy Joseph, a federal public defender. ‘But I can say this: The state of Wisconsin is a predominantly white state. It was curious to me that the alleged voter fraud investigations were done in the city of Milwaukee with Milwaukee residents.’ . . .”) (<http://www.jsonline.com/news/wisconsin/29358809.html>).

²² Legal Committee of Milwaukee Election Protection, “2006 Election Review: Report from Non-Partisan Observers of Voting in the General Election in the City of Milwaukee on November 7, 2006” (“EP 2006”) (Attachment E) at 6, 15 (*note that all EP Report citations are to the number printed at the bottom of the page, not to the page of the PDF*). Until approximately 2011, Election Protection in Wisconsin operated primarily in Milwaukee. Since then, it has had a statewide presence in Wisconsin.

²³ Levine at 37-38; Legal Committee of Milwaukee Election Protection, “2008 Election Review: Report from Non-Partisan Observers of Voting in the General Election in the City of Milwaukee on November 4, 2008” (“EP 2008”) (Attachment F) at 18 (“uniformed law enforcement officials showed up at some polling sites, apparently not in response to any complaint and in violation of instructions they had been given to wear plain clothes. There are also indications that law enforcement officials focused on central city polling locations for particular scrutiny while excluding all suburbs from any monitoring.”); *id.* at 22.

²⁴ Levine at 38-39.

²⁵ Legal Coordinating Committee of Election Protection and Lawyers Committee for Civil Rights Under Law, “2012 Recall Election Report: Report from Non-Partisan Observers of Voting in the Recall Election in the State of Wisconsin on June 5, 2012” (“EP Recall”) (Attachment G) at 16-17 (for example, in largely minority city of Racine, observers were photographing voters at the polls, disrupting polling places by yelling and having ineligible persons try to challenge voters); Legal Coordinating Committee of Wisconsin Election Protection, League of Women Voters Education Network, and My Right, My Vote, “2012 Election Report: Report from Non-Partisan Observers of Voting in the November 6, 2012 General

November 2012 election certain elected officials claimed that “widespread fraud” had occurred, and asserted that the election outcome might have been different had there not been a “surprise . . . turnout especially in urban areas.”²⁶

II. Electoral Issues that Adversely Affect Minority Voters

A. VRA Redistricting Violation

In 2012, a federal court ruled that the state of Wisconsin violated Section 2 of the Voting Rights Act by “cracking” Milwaukee’s Latino community into two assembly districts. *Baldus v. Members of Wisconsin Government Accountability Bd.*, 849 F.Supp.2d 840, 855 (E.D.Wis. 2012) (“[T]he Latino group is sufficiently large and geographically compact to create a majority-minority district . . . [,] Latinos in Milwaukee are politically cohesive in their voting behavior [and] voting is racially polarized, such that the majority group can block the Latino candidate from winning. . . . The parties do not dispute that Milwaukee’s Latino community bears the socioeconomic effects of historic discrimination in employment, education, health, and other areas, and that its depressed socioeconomic status hinders its ability to participate in the electoral process on an equal basis with other members of the electorate.”)

B. Inadequate Language Access

Limited English Proficient (LEP) citizen populations, especially Latinos, are increasing. For years Wisconsin Election Protection expressed concerns about inadequate language access, especially in Milwaukee, including translated materials and bilingual poll workers. As early as 2004, EP noted that “[n]on-English speaking citizens seeking to vote had a difficult time” due to lack of translated materials, lack of bilingual poll workers, and lack of clarity among poll workers as to whether non-English speaking voters were allowed to have assistance.²⁷ Similar concerns were raised in 2006.²⁸ While there was some limited improvement in 2008, the lack of adequate bilingual staffing and lack of adequate distribution of bilingual materials continued.²⁹ By 2010, there was more staffing and materials for Spanish-speaking voters in Milwaukee, but

Election” (“EP 2012”) (Attachment H) at 25-27 (reported issues included ejection of a suburban state representative from a city of Milwaukee polling place for interfering with voting, ejection of a partisan from Racine polling place after yelling at poll workers (incorrectly) about purported obligation to request voter ID, an observer in the city of Milwaukee wrongly insisting a voter needed two documents to register and an observer wrongly claiming a Milwaukee African-American woman had already voted).

²⁶ EP 2012 at 28; Michael Shear & Jennifer Steinhauer, “Ryan sees urban vote as reason G.O.P. lost,” *N.Y. Times* (Nov. 13, 2012) (<http://www.nytimes.com/2012/11/14/us/politics/ryan-sees-urban-vote-as-reason-gop-lost.html>).

²⁷ Legal Committee of Milwaukee Election Protection, “2004 Election Review: Report from Non-Partisan Observers of Voting in the General Election in the City of Milwaukee on November 2, 2004” (“EP 2004”) (Attachment I) at 8.

²⁸ EP 2006 at 2, 6, 15.

²⁹ EP 2008 at 7.

not for Hmong-speaking voters.³⁰ In 2011, the U.S. Department of Justice required Milwaukee to provide Spanish-language ballots and materials.³¹ Nevertheless, many of the materials produced by state elections officials for statewide voter use remain unavailable in any language other than English.³² Further, although there are more than 100,000 limited English proficient voters in Wisconsin who live outside Milwaukee, no other county or municipal elections officials provide bilingual staffing, materials or assistance systemically or at all, leading some voters to end up relying on family members – including young children - to translate for them at the polls.³³

C. Criminal Disfranchisement

In Wisconsin, individuals with past felony convictions, who are on probation, parole or extended supervision are not eligible to vote until they have completed their sentences. Wis. Stats. §§ 6.03(1)(b), 304.078. As a result, about 62,000 Wisconsin citizens who are disproportionately – and overwhelmingly - persons of color, are barred from voting.³⁴ “Wisconsin has the highest black male incarceration rate of any state in the nation (12.8 percent) The 11.6 percentage point gap separating the rates of black and white males['] incarceration in Wisconsin (12.8 percent to 1.2 percent) is, by a large margin, the widest racial incarceration gap in the country.”³⁵ Consequently, while, while African-Americans comprise 5 percent of Wisconsin’s voting age population, they make up 39 percent of the population disfranchised due to felony convictions. One in nine African-Americans in Wisconsin is disfranchised by these laws, while only 1 in 50 white voters is.³⁶ “Wisconsin also leads the nation in incarceration of Native American men, with 7.6% of working age men (or 1 in 13) in state prisons and local jails

³⁰ Legal Committee of Milwaukee Election Protection, “2010 Election Review: Report from Non-Partisan Observers of Voting in the General Election in the City of Milwaukee on November 2, 2010” (“EP 2010”) (Attachment J) at 5.

³¹ See, e.g., Georgia Pabst, “Feds order Milwaukee to provide ballots, voting rules in Spanish,” Milwaukee Journal-Sentinel (Oct. 12, 2011) (<http://www.jsonline.com/news/milwaukee/feds-order-milwaukee-to-provide-voting-rules-in-spanish-131641728.html>).

³² Memo from GAB Elections Division Administrator to Municipal Clerks (Aug. 31, 2012) at http://gab.wi.gov/sites/default/files/memo/20/memo_clerk_memo_posting_spanish_docs_v_pdf_11115.pdf (only 20 forms translated into Spanish; GAB has many more than 20 forms - <http://gab.wi.gov/forms>).

³³ Ben Jones, “Non-English speaking residents face voting challenges,” *Green Bay Press-Gazette* (Sept. 4, 2012) (<http://www.greenbaypressgazette.com/article/20120904/GPG010403/309040107/Non-English-speaking-residents-face-voting-challenges>); see also Burden Decl. at 5.

³⁴ “Unlock the Vote Wisconsin!” *American Civil Liberties Union of Wisconsin Foundation* (Aug. 2012) at 2 (Attachment K); see also Burden Decl. at 10.

³⁵ Levine at 21.

³⁶ Unlock the Vote at 3. A Wisconsin state court was prepared to allow two persons, charged with voting while felons, to assert a VRA defense – that in light of the profound racial disparities in Wisconsin’s criminal justice system the underlying convictions were “on account of race.” *State v. Henderson and Maclin*, Nos. 10-CF-1101, 10-CF-1950 (Milw. Co. Circ. Ct. Decision and Order of Nov. 29, 2010) (<http://www.wisconsinappeals.net/wp-content/uploads/2010/12/whenderson-trial-court-order-11.29.10.pdf>). The case was settled when the voters pled to other misdemeanor charges.

in 2010, compared to 3.1% (or 1 in 32) nationally.”³⁷ These restrictions therefore have the clear effect of denying and diluting minority voting rights. Moreover, so much publicity has been given to fraud allegations of improper felon voting that many *eligible* voters – who have only been convicted of misdemeanors, or who have been convicted of felonies but released from supervision – are also confused about their ability to vote, which may lead them to forego voting altogether.³⁸

D. Voter ID

In 2011, Wisconsin passed Act 23, requiring voters to show one of a limited number of forms of photo identification in order to vote in person, and in many cases even to vote absentee by mail. The ACLU of Wisconsin and others filed suit in federal court alleging VRA Section 2 and constitutional violations. *Frank et al. v. Walker et al.*, No. 2:11-cv-01128 (E.D. WI). A trial on the case was held in November, 2013, and we await the Court’s decision.³⁹

The evidence in the trial, however, made clear that Act 23 has a profound and racially disparate effect on voters. The evidence indicates that hundreds of thousands of Wisconsin voters lack ID,⁴⁰ and prior to passing this law, it was made explicitly clear to state officials that research confirmed racial disparities in ID possession, and thus the consequent likely racial effects of Act 23.⁴¹ The law nevertheless passed. As a result, in Milwaukee County alone – where the vast majority of the state’s entire African-American population and a substantial plurality of its Latino population resides – 13.2% of eligible African-American voters and 14.9% of eligible Latino voters lacked accepted ID, compared to 7.3% of eligible white voters.⁴² Among registered

³⁷ John Pawasarat and Lois M. Quinn, “Wisconsin’s Mass Incarceration of African American Males: Workforce Challenges for 2013,” *Employment and Training Institute* (Univ. of Wisconsin-Milwaukee 2013) at 2 (<http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf>).

³⁸ EP Recall at 15.

³⁹ Many of the documents filed in this case are posted at: <http://moritzlaw.osu.edu/electionlaw/litigation/Frank.v.Walker.php> Filings in *Jones v. Deininger*, 2:12-cv-00185 (E.D.Wis.) a Section 2 VRA challenge tried jointly with *Frank*, are at: <http://moritzlaw.osu.edu/electionlaw/litigation/Deininger.php>

⁴⁰ See, e.g., *NAACP v. Walker*, No. 11-cv-5492, Permanent Injunction (Dane Co. Circ. Ct., July 17, 2012) at 7-12 (finding that about 333,000 eligible Wisconsin voters lack photo ID) (<http://moritzlaw.osu.edu/electionlaw/litigation/documents/PermanentInjunction.pdf>); Leland Beatty, Declaration submitted in *Jones v. Deininger* (Nov. 4, 2013) at 3 (about 295,000 registered voters lack ID) (<http://moritzlaw.osu.edu/electionlaw/litigation/documents/JonesExh1DecLelandBetty1.pdf>).

⁴¹ See, e.g., Prof. Barry Burden, et al., “Research on voter identification laws,” *Memorandum to Kevin Kennedy, Wisconsin Government Accountability Board* (Univ. of Wisconsin - Madison Dept. of Political Science and LaFollette School of Public Affairs, Jan. 4, 2011) at 2 (http://gab.wi.gov/sites/default/files/story/uw_voter_id_memo_pdf_15200.pdf).

⁴² Prof. Matt A. Barreto, 00“Rates of Possession of Accepted Photo Identification, among Different Subgroups in the Eligible Voter Population, Milwaukee County, Wisconsin,” Expert Report Submitted on Behalf of the Plaintiffs in *Frank v. Walker* (Apr. 23, 2012) (Attachment L) at 18-19, 34.

voters, 15.3% of registered African-American voters and 11.3% of registered Latino voters lack accepted forms of ID, compared to 6.0% of registered white voters.⁴³ An analysis of statewide data shows similar disparities.⁴⁴ Further, eligible African-American voters are about twice as likely, and eligible Latino voters nearly three times as likely, to lack acceptable ID *and* one or more of the documents required to obtain ID as eligible white voters.⁴⁵

Moreover, the earliest legislative efforts to enact voter ID - in 2001 - occurred at about the same time claims of “voter fraud” in “urban areas” were being raised. Racial overtones related to voter fraud permeated public discourse at the time of the years-long effort to enact voter ID in Wisconsin. *Supra* at 4-6. It tapped into a rich polemical vein that has for decades been laced with racial appeals used to frighten certain portions of the electorate into believing their votes will be “stolen”⁴⁶ by people from “urban areas” and “wetbacks,” and culminated in Act 23’s enactment just a few years after unprecedented Black turnout in Wisconsin helped elect the nation’s first Black president.⁴⁷

E. Restrictions and Burdens for Proof of Residence

Starting in the mid-1970s, voters who were required to register were allowed to prove their residence by, among other methods, having another eligible voter “corroborate” where they lived.⁴⁸ *See* 1975 Senate Bill 234, § 28 (creating § 6.55(2)(b)). This, and other methods to facilitate registration and voting, were enacted because:

The legislature finds that the vote is the single most critical act in our democratic system of government; that voter registration was not intended to and should not prevent voting; that registration should simply be a remedy against fraud and its burden should be placed upon administrators, not the electorate. The legislature further finds that it is extremely

⁴³ Barreto at 19-20.

⁴⁴ Beatty at 3.

⁴⁵ Barreto at 23.

⁴⁶ *See, e.g.*, “Will the November Election Be a Fair Election?” *Shepherd Express* (Oct. 23, 2008) (“We occasionally will get complaints regarding *stolen votes*, when someone will say their name (at the polling place) and the poll worker will say, ‘You already voted,’” [Milwaukee County Assistant District Attorney] Landgraf said. “That happens. Our experience has been that we are best advised to look into that. We would contact people who might be one or two names above or below that name. They frequently will confirm that they have voted, but their name does not have a number after it in the poll book.”) (emphasis added) (<http://expressmilwaukee.com/mobile/articles/articleView/id:4202>).

⁴⁷ Burden Decl. at 3. A recent national study showed that support for voter ID law correlates with racial resentment and increases as racial resentment increases. Levine at 40 (notes 135, 136).

⁴⁸ Until 2006, voters in municipalities with fewer than 5000 residents did not have to register to vote. Because white voters were far more likely to live in these small communities, the result of this disparate policy was that prior to 2006, 98% of Wisconsin’s African-American voters and 91% of its Latino voters, but only 68% of its white voters, lived in municipalities that required them to register to vote. Burden Decl. at 4-5. Requiring voter registration diminishes voter turnout. *Id.* at 2-3, 5.

difficult for workers to find time to visit a registration office that is open only during working hours; that transportation costs to remote locations impede registration; and that the act of personal registration is a major cause of limited electoral participation. Therefore, pursuant to the policy of this state and nation to ensure all people the right to vote, the legislature finds it imperative to expand voter registration procedures.

Id. at § 1. Corroboration was particularly important for poor, marginalized and transient voters, who may not have had one of the limited number of permissible registration documents, as well as for women – especially older married women – in households where all bills were in the name of the spouse or an adult child.⁴⁹

In 2011, however, the Wisconsin legislature repealed corroboration, 2011 Wis. Act 23, §§17, 18, 40, thereby making it more difficult for these voters to register and vote.⁵⁰ That burden may have been somewhat mitigated by the fact that, other than first-time voters who registered by mail, any voter may register 20 or more days before an election by submitting the voter registration form to their municipal clerk. The data is entered into the statewide voter registration system and a confirmation postcard sent to verify the voter's address. Wis. Stat. § 6.32(4).

However, bills currently before the Wisconsin legislature would completely eliminate voters' ability to register without providing one of a limited number of documents, and thus impose even more hurdles to voter registration for voters living in non-traditional situations – many of whom move frequently and thus also often have to re-register. Wisconsin Senate Bill 459 and Assembly Bill 603 would require each and every voter to provide documentary proof of residence each time the voter registers (or moves within the municipality or state and re-registers). It will pose significant barriers, especially for the low income, disproportionately minority voters who live in marginal circumstances (*e.g.*, doubled up in someone else's house, unsheltered homeless voters, and others) and thus normally lack bank statements, utility bills or other documents with their addresses in their own names. Combined with the previously-enacted bar on use of corroborators, imposing this requirement will completely prevent certain voters from registering to vote and thus from voting. Moreover, this requirement will impose a substantial burden on voter registration drives conducted by trained volunteers, as those registrars will be required to obtain and submit documents to prove the voter's residence –

⁴⁹ See, *e.g.*, Remarks by Kevin Kennedy, Director and General Counsel, GAB (Jan. 26, 2011) at 8 (http://gab.wi.gov/sites/default/files/publication/65/kennedy_senate_committee_testimony_1_26_11_pdf_12141.pdf); Steven Verburg, "Little known change to voting law could cause major headaches on Election Day," *Wisconsin State Journal* (Oct. 22, 2012) (corroboration used by homeless persons, people who move in with relatives due to economic conditions, and others) (http://host.madison.com/wsj/news/local/govt-and-politics/elections/little-known-change-to-voting-law-could-cause-major-headache/article_15fd3002-1a21-11e2-bf4b-0019bb2963f4.html).

⁵⁰ See, *e.g.*, EP Recall at 6-7 (voters unable to register and thus unable to vote included an 18 year old living with his parents, and a woman, all of whose bills were in her husband's name other than a private hospital bill that was not allowable as proof of residence); EP 2012 at 14-15 (examples of those unable to register and vote included Native Americans in one community, a homeless voter living with a relative, a young man living with his mother, and a woman receiving all correspondence at a P.O. Box).

restricting voter registration drives which are also common in urban communities, as well as raising privacy concerns. As the legislature recognized in 1975, making it harder to register hurts voters – who, we believe, are also more likely to be minority voters.⁵¹

F. Restrictions on Early Voting

In Wisconsin, “early” voting is a form of absentee voting that takes place in person at municipal clerks’ offices. Until 2011, early in-person absentee voting was permitted for three weeks lasting until the day before Election Day, and included three weekends. In 2011, the legislature restricted early voting to a two week period with only one weekend, ending the Friday before Election Day. 2011 Wis. Act 23, § 57 (amending Wis. Stat. § 6.86(1)(b)). These restrictions had the effect of precluding the kinds of “Souls to the Polls” voting drives often conducted by African-American churches the weekend before election day, as well as other early voting efforts.⁵²

That, however, may not have been enough for the legislature. During the recall and general elections in 2012, many communities – especially larger urban centers – allowed early voting in the evenings and on weekends. Bills currently before the legislature, Senate Bill 324 and Assembly Bill 54, would completely prohibit all weekend voting (thereby eliminating *any* “Souls to the Polls” campaigns), as well as any voting after 6 pm. Voters in smaller municipalities, who are far more likely to be white, would be permitted to make appointments to vote at any time during a weekday. This proposal – animated by hostility to Milwaukee and Madison – was clearly targeted at urban, disproportionately minority, voters.⁵³ The Assembly has already passed AB 54, and while the fate of its companion bill, Senate Bill 324, is unclear we are extremely concerned about the likely racially disparate effects of this bill if it passes.

⁵¹ Election Protection has long advocated for easier – not more burdensome – voter registration. *See, e.g.*, EP 2008 at 21 (“Registering our citizens to vote should be an ongoing government responsibility, not one that falls exclusively on the agencies administering elections or registration drives by community groups. Such legislation could build on federal Motor Voter law using the division of motor vehicles, public assistance and unemployment offices, disability agencies, probation and parole departments, schools and licensing offices to maximize use our public agencies for voter registration.”)

⁵² *See, e.g.*, Michael C. Herron and Daniel A. Smith, “Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355,” *Election Law Journal* Vol. 11, No. 3, 2012 (finding that “Democratic, African American, Hispanic, younger, and first-time voters were disproportionately likely to vote early in 2008 and in particular on weekends, including the final Sunday of early voting.”) (<http://s3.documentcloud.org/documents/370392/souls-to-the-polls-paper.pdf>).

⁵³ *See, e.g.*, Reid Wilson, “Wisconsin Republicans move to cut early voting hours,” *Washington Post* (Nov. 15, 2013) (<http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/15/wisconsin-republicans-move-to-cut-early-voting-hours/>) (proposed early voting restrictions are an effort to end weekend voting in Milwaukee and Madison; these are by far the state’s two largest urban areas). In contrast, Election Protection has advocated for expanded early voting, including early voting at more locations in urban areas, to meet the demand. *See, e.g.*, EP 2008 at 16, 20 (recommending replacing in-person absentee voting with early voting at multiple sites within municipalities, to meet voter demand and reduce Election Day pressures).

Conclusion

We thank the Lawyers' Committee for Civil Rights under Law for holding this important hearing to address the Voting Rights Act following the *Shelby County* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes through Section 5 must continue. Therefore, it is crucial that Congress work together to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen.

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