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UNREASONABLY RESTRICTIVE VOTER PHOTO IDENTIFICATION REQUIREMENTS ARE UNEQUAL ECONOMIC BARRIERS TO EQUAL ACCESS TO THE RIGHT TO VOTE

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*74 **I. INTRODUCTION**

Voter identification laws have recently multiplied throughout the United States.[1] Prior to 2006, no state made it mandatory to present photo identification in order to vote on Election Day.[2] Currently 10 states have created such a mandate.[3] Overall, 33 states encompassing more than half of the nation's population have some version of voter identification laws.[4] *75 According to research conducted by the Washington Post, voter identification laws suppress minority turnout, causing a gain for the Republican Party.[5] "Strict ID laws mean lower African American, Asian American and multiracial American turnout as well. White turnout is largely unaffected. These laws have a disproportionate effect on minorities, which is exactly what you would expect given that members of racial and ethnic minorities are less likely to have valid photo ID."[6]

The potential negative impact of voter identification requirements presents the issue of whether such laws unconstitutionally burden the fundamental right to vote[7] because they deny equal access to the right to vote. Inflexible identification laws mandate that voters provide state-issued photo identification prior to registering to vote as well at the time of voting.[8] A photo identification requirement is a troublesome tool of voter suppression because it denies equal access to the ballot.[9] The photo identification requirement, without valid justification, disenfranchises thousands of voters.[10]

This article argues that strict voter ID laws are typically unnecessary, unconstitutional, and impose arbitrary burdens on equal access to the right to vote. This article will examine the photo the burdens some states impose through voter ID laws in violation of the United States Constitution's equal protection principle. Part I evaluates voter identification requirements that supposedly combat voter fraud absent any credible evidence that in-person voter fraud is common. Part II evaluates constitutional challenges to voter-identification laws after the Supreme Court's 2013 *Shelby County v. Holder*[11]decision. Part III shares the view that President Trump's election integrity commission was intended to serve as a tool for voter suppression. This article concludes that the Supreme Court's decision in *Crawford v. Marion County Election Board*[12] was wrongly decided because by declaring strict voter ID laws constitutional, it enabled the states to deny *76 low-income minority voters access to the ballot in violation of the rationale of *Harper*,

II. PHOTO VOTER IDENTIFICATION REQUIREMENTS THAT SUPPOSEDLY COMBAT FRAUD IN THE ABSENCE OF ANY CREDIBLE EVIDENCE OF IN-PERSON VOTER FRAUD SHOULD NOT BE TREATED AS VALID.

Unlike the Supreme Court, opponents of photo identification laws believe that such laws, without credible evidence of voter fraud, deny equal access to the voting booth by arbitrarily

infringing upon a voter equal right to vote. In a 2008 decision, *Crawford v. Marion County Election Board*,[13] the Supreme Court faced a facial challenge to an Indiana law requiring voters to present government issued photo identifications in order the vote. The Court wrongly concluded that the requirement was a constitutionally permissible burden on the right to vote as long as the state made such IDs available without a fee. In so doing, the Court failed to recognize that the photo identification requirement placed harmful and unreasonable burdens on the fundamental right to vote. In *Crawford*, the Court naively accepted the state's argument that the photo identification qualification appears to lower voter fraud and not suppress the right to vote. Instead of a lower standard of review, the *Crawford* Court should have applied strict scrutiny to the laws in question because, as Justice Souter's dissent recognized, the state presented no credible evidence that true voter fraud existed in Indiana.[14]This section's main contention is that the, despite the fact that the plaintiffs in *Crawford* brought a facial challenge to the Indiana law, lack of evidence of voter fraud should have caused the Court to presume that the state did not have any legitimate justification to burden the equal access[15] to the fundamental right to vote.

***77** According to Chad Flanders, the right to vote is a right to equal access to the franchise."[16] Under *Crawford*, it is not necessary to demonstrate that voter fraud actually exists in order for a state to enact anti-fraud voter identification laws.[17] To support voting rights for all, the Supreme Court must eliminate photo identification requirements as barriers to voting.[18] By approving voter identification laws without a showing that in-person voter fraud actually occurs, *Crawford* represents a real barrier to equal access to the polls.[19] "Equal access is not an across the board entitlement to have state assistance in all respects, to make sure that voters vote. It is just the right against arbitrary and unjust barriers being put up in the way of voting that prevent access to the ballot."[20]

Advocates of voter identification laws argue that these laws are unquestionably valid tactics that preserve the honesty of election procedures and ensure the trust of voters.[21] Opponents of voter identification laws assert that the primary purpose motivating the adoption of such laws is not to safeguard the authenticity of an election.[22] It is undeniable that such laws represent a partisan tool to disenfranchise poor and minority voters who tend to vote for Democrats.[23]

The appeals court in *Common Cause/Georgia v. Billups*[24] rejected the NAACP's implicit contention that the photo identification statute violated the equal protection principle of equal access because the law was "adopted to gain partisan advantage." Similarly, the Supreme Court rejected the relevance of partisan interests in *Crawford*,[25] holding that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."[26] The appeals court held that the interest of Georgia in detecting and deterring voter fraud is a neutral explanation, supported by ***78** *Crawford*'s rationale.[27]According to the Eleventh Circuit, the district court did not abuse its discretion in holding that Georgia possessed a legitimate interest in avoiding voter fraud even if the suspicion of fraud is based on a mere allegation.[28] However, the burden of requiring photo identification in order to vote is an unnecessary barrier to equal access to the right to vote in the absence of any credible evidence of fraud.[29] Mere speculation that voter fraud is possible in Indiana, Georgia, or elsewhere, without any evidence, should not be considered a proper justification to unreasonably burden voting rights with strict photo identification requirements.

In the aftermath of *Shelby County*, an identifiably partisan political environment has become friendly for the supporters of restrictive voting laws enacted nominally to prevent voter fraud.[30] Judge Richard Posner, author of the Seventh Circuit decision that validated Indiana's

voter ID law which was affirmed by the Supreme Court in *Crawford*, now regrets and rejects his decision.[31] Judge Posner now believes Indiana's requirement that potential voters verify their identity with a photo ID was a mistake because the Indiana law has proven itself a tool of voter suppression and not a means to reduce voter fraud.[32] Writing in *The New Republic* in 2013, Posner maintained that he had not technically repudiated his *Crawford*opinion.[33] However, Posner has recognized that he failed to take into account the *Crawford* decision's negative consequences on the right to vote.[34]Posner implied that he made the wrong decision in *Crawford* because he did not receive adequate information regarding the negative impact of the Indiana law on fundamental voting rights.[35] In Richard Trotter's "Vote of Confidence: *Crawford v. Marion County Election Board*, Voter Identification Laws and the Suppression of a Structural ***79** Right",[36] Trotter asserts *Crawford* is ready to be overturned by the Supreme Court. The developed evidence now demonstrates that *Crawford* voter identification laws won early court approval because of the relative novelty of such laws and lack of attention to their potential effects on suppressing the right to vote of targeted groups.[37] The Supreme Court decided *Crawford* in 2008, holding Indiana's voter ID law constitutional.[38] Liberal Justice John Paul Stevens, who wrote the "lead opinion" in a fractured six-to-three decision, articulated misgivings about the decision in 2016.[39] Stevens--who retired from the Court in 2010--questioned whether he had enough information to avoid rendering what he described as a "fairly unfortunate decision" in *Crawford*.[40]

Judge Posner and Justice Stevens did not agree with the realistic rationale articulated in Justice Souter's dissent in *Crawford* as to why it was both necessary and proper to condemn the Indiana voter ID law based on Supreme Court precedent.[41] As Justice Souter explained in dissent, under relevant Court precedent, the scheme in the Indiana voter photo ID law violated the Equal Protection Clause because it disproportionately affects the poor and the weak.[42] "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status[.]"[43] Under *Harper's* majority rationale, one's economic status is not a relevant factor to voter qualification.[44] Indiana's requirement that individuals without cars make a trip to a motor vehicle registry, or those who fail to do so visit their county seats within ten days of every election, creates an unfair burden disturbingly similar to the direct $1.50 poll tax the Supreme Court struck down in *Harper*.[45] The court distinguished the burden of the Indiana law from Harper by making it clear that if Indiana had constituted a fee for obtaining the required ID, the law would not pass ***80** muster under *Harper*'s, rationale.[46] But, because the voters could obtain identification cards for free, and the only burden associated with obtaining an acceptable ID had to do with traveling to DMV and taking a photo, the burden was not significant.[47] The court also acknowledged that a limited number of people, like the elderly and the poor, will have more difficulty obtaining birth certificate or assembling the required documents to get an approved ID, but it brushed aside those burden because such voters could go to Circuit court and cast provisional ballots.[48]

However, similar to the fee in *Harper*, the Indiana Voter ID Law is illegitimate because it fails to connect with any legitimate state interest, while actually discouraging or preventing poor citizens from exercising the franchise.[49] Thus, as recognized by Justice Souter's dissent, "[t]he Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old."[50] Justice Souter would have appropriately vacated the judgment of the Seventh Circuit and remanded for further proceedings.

hermetically sealed”52 from the real socio-economic and racially-based targeting practiced in the partisan world of American life, they will adopt the rationale contained in Justice Souter's dissent53 and overturn *Crawford's*support for an unnecessary voter photo ID requirement. Justice Elena Kagan said that Supreme Court justices are not “hermetically sealed” from the real world around them.54 The majority's rationale in *Crawford* should be rejected by the Supreme Court because the evidence of voter fraud at the time was scant and the justices were so “hermetically sealed” from political reality that they accepted a very suspect argument that the ID law was necessary to escape voter fraud. The Court's acceptance of Indiana's voter fraud argument is prima facie evidence that the Court did not take into account the reality of voter suppression and ***81** accepted Indiana's voter fraud avoidance argument without the show of any evidence of voter fraud.

Justice Breyer rejected the judgment reached by Justice Stevens and Justice Scalia that the burdens imposed by the Indiana photo ID law to protect the integrity of the voting process are constitutionally permissible because those burdens were insignificant.55 Indiana's photo ID law imposes an unreasonably significant burden on the right to vote because the IDs are neither easily available nor issued free of charge.56 The Indiana photo ID burdens are not insignificant because “an Indiana non-driver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system.”57

Tara A. Jackson asserts, “History shows that the black vote has continuously been suppressed through creative mechanisms designed to circumvent anti-discrimination laws, and accordingly, any mechanism that disproportionately affects black voting power must be met with the utmost suspicion.”58 The Indiana voting identification requirement is racially neutral on its face because it is a more subtle continuation of prior racial voting injustices; it is a modern form of black voter suppression that does not blatantly manifest its racially discriminatory impact or intent.59 However, under the misguided rationale of the *Crawford* Court, “the systematic forces that result in mass black voter suppression remain alive and well”60under strict voter identification requirements. Protecting the fundamental access to the right to vote of minorities is so important that states may not endanger it with creative voter schemes, such as identification requirements.

Identification requirements that disproportionately affect the right of targeted minority voters without any evidence of a legitimate purpose should be per se invalid. Photo ID laws should have been recognized as unconstitutional in *Crawford* because Indiana's interest in preventing voter fraud was outweighed by the burdens the law placed on poor voters. The complete lack of evidence that voter fraud was occurring was not enough to ***82** justify burdening the poorest voters.61 “[R]equiring a voter to show photo identification before casting a regular ballot addresses only one form of voter fraud: in-person voter impersonation. The photo identification requirement leaves untouched the problems of absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana[.]”62 Indiana's interest in preserving the integrity of its election process is not furthered by its strict voter identification law because there is no evidence that in-person voter fraud occurs.63 The Indiana General Assembly that adopted the Voter ID Law never received any evidence of in-person voter impersonation fraud in the State because “the ‘problem’ of voter impersonation is not a real problem at all.”64

III. AN EVALUATION OF SIGNIFICANT CONSTITUTIONAL CHALLENGES TO VOTER-IDENTIFICATION LAWS AFTER THE 2013 *SHELBY COUNTY V. HOLDER DECISION*

Part III evaluates a number of cases that have held particular voter identification laws unlawful under the Constitution. This Part demonstrates how the demise of preclearance regime of the Voting Rights Act in *Shelby County*,65 states began using voter fraud as a pretext to cover up voter suppression through voter identification laws. An outbreak of new voter suppression is due in large part to a response to the Supreme Court ruling in *Shelby County*that unlocked the door to additional restrictive changes without prior approval from the federal government.66 *Shelby County* permitted a number of predominantly Southern states to change their election laws without seeking mandated consent from the Federal government.67 "Not many weeks after *Shelby County*, uninhibited by the mandate and encouraged by a Republican supermajority, North Carolina approved the country's most comprehensive constraints on voting rights."68 ***83** North Carolina also implemented a strict photo ID obligation that arbitrarily excluded student and state worker identifications.69

A progressive federal district court decision implicitly rejected *Crawford's* rationale.70 In *Frank v. Walker*,71 the district court held that a Wisconsin law demanding that voters show identification at the polls was unconstitutional and enjoined its implementation. In her decision, District Court Judge Lynn Adelman, provides a path forward in demonstrating how to protect voters from burdensome photo ID requirements. After thoughtfully distinguishing *Crawford* on the merits, Judge Adelman carefully and implicitly rejected *Crawford*'s, rationale regarding what constitutes an unreasonable burden on the right to vote under the equal protection principle. The Seventh Circuit reversed the injunction, finding the decision inconsistent with *Crawford*'s, rationale.72 I will discuss Judge Adelman's treatment of the plaintiffs' claim that Act 23 violates the Fourteenth Amendment because it places substantial burdens on numerous qualified voters who do not now possess photo IDs, combined with the fact these burdens do support the state interests that Act 23 claims to achieve.73

A. FRANK V. WALKER

1. Facts

In May 2011, the Wisconsin Legislature passed 2011 Wisconsin Act 23 ("Act 23"), commanding Wisconsin residents to present photo identification ("photo ID") in order to vote.74 The plaintiffs claimed that the law violated the Fourteenth Amendment and/or Section 2 of the Voting Rights Act.75

2. Analysis

In *Frank*, the plaintiffs were eligible Wisconsin voters asserting that Act 23's photo ID obligation violated the Fourteenth Amendment because ***84** it inflicted an unjustified burden on their right to vote.76 All burdens, including relatively small ones, have to be justified by relevant and legitimate state interest weighty enough to validate that burden.77

As previously discussed, in *Crawford*, the Supreme Court ruled on a challenge to a photo ID law comparable to the one presented in *Frank*.78 A majority of the Justices in *Crawford* held that the plaintiffs had failed to prove that the Indiana law was invalid without a single opinion articulating the rationale for a majority of the Court.79 Following the *Crawford*'s, majority agreement that Indiana's photo ID requirement was to be analyzed under the *Anderson/Burdick* balancing test, Judge Adelman applied that test in *Frank v. Walker*80 but reached a different result than the Court in *Crawford*.

In a potential game-changer for the fate of the *Crawford* case, Judge Alderman held that *Crawford* is not binding on the issue of state voter photo ID requirements because a majority of the Court could not agree on how to apply the balancing test.81 "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the

holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."82 *Crawford* is not precedential as to the rights of a subgroup of voters since Justice Stevens's opinion, decided on the narrowest ground, did not resolve "whether a law could be invalidated based on the burdens that it places on a subgroup of voters."83 While applying the rule of decision, Judge Adelman revisited the majority opinions in *Anderson* and *Burdick*.84 She concluded that the two cases "require invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters."85

The issue presented in the *Frank* was whether the Act 23 photo identification scheme was invalid for imposing burdens on a subgroup of a ***85** state's voting population that are heavier than the state interests.86 First, while addressing the validity of Act 23, Judge Adelman identified Wisconsin interests is passing Act 23 and concluded that the act was neither a necessary nor proper means of serving those interests.87 Second, after identifying and reviewing the nature of the burdens Act 23 places on the right to vote, Judge Adelman found the law unconstitutional under the Fourteenth Amendment.88 Third, Judge Adelman decided that Wisconsin's interests are not legitimate enough to justify Act 23's burdens.89

Wisconsin contended that Act 23's identification structure helps the following four state interests: "(1) detecting and preventing in-person voter-impersonation fraud; (2) promoting public confidence in the integrity of the electoral process; (3) detecting and deterring 'other types of voter fraud'; and (4) promoting orderly election administration and accurate recordkeeping."90 The argument that Act 23 promoted the identified four legitimate state interests was rejected because Wisconsin simply failed to prove that Act 23 actually assisted in advancing any legitimate state interest remotely relevant to in-person voting fraud.91

i. Detecting and Preventing In-Person Voter-Impersonation Fraud

Wisconsin claimed that Act 23 would deter or prevent voter fraud by making it harder to impersonate a voter even though virtually no voter impersonation occurs in Wisconsin.92 Because no reasonable public official could foresee such a problem in the future, the court held that this particular state interest could not be deemed a reasonable response to that potential problem.93 The evidence presented by Wisconsin at trial failed to provide a single example of proven voter fraud in Wisconsin during modern times.94 Alternatively, the challengers produced evidence to show that the voter-impersonation concern in Wisconsin was an illusion.95 The challengers provided the testimony of Lorraine Minnite, a professor at Rutgers ***86** University and an expert in the analysis of the frequency of voter fraud in modern-day American elections.96 After analyzing elections data in Wisconsin, Professor Minnite identified only one case of voter-impersonation fraud, which did not involve *in-person* voting.97 Rather, it involved a man who applied for and casted his recently-deceased wife's absentee ballot. "Thus, from Minnite's work, it appears that there [was] zero incidents of in-person voter-impersonation fraud in Wisconsin during recent elections."98

Since the evidence at trial indicated that voter fraud laws are vigorously enforced in Wisconsin99 "the absence of such evidence confirms that there is virtually no voter-impersonation fraud in Wisconsin."100 Because Wisconsin had no history of in-person voter fraud or impersonation and such a problem was not reasonably foreseeable, Wisconsin's interest in implementing an identification scheme that burdens the right to vote was insignificant.101 As such, according to Supreme Court precedent, Wisconsin should not have been allowed to burden the right to vote to correct voting risks that are extremely remote and exist only hypothetically.102

ii. Promoting Public Confidence in the Integrity of the Electoral Process

Wisconsin also argued that the photo ID mandate advanced its interest in building trust in the integrity of the electoral process.[103] However, at the hearing, Wisconsin failed to present realistic or practical evidence to sustain the perception that Act 23's photo ID mandate in reality advanced this interest.[104] By comparison, the challengers' expert witnesses, Barry Burden, a professor of political science at the University of Wisconsin-Madison, used the available evidence to conclude that photo ID mandates have no impact on confidence or trust in the electoral process.[105]

***87** Photo ID laws have no impact on confidence or trust in the electoral process because they suppress the public's confidence in the electoral process more than they encourage it.[106] The false pretense involving photo ID legislation generates the false perception that voter-impersonation is widespread and in so doing, unnecessarily and improperly destabilizes the public's confidence in the electoral process.[107] Kevin Kennedy, the director of the Government Accountability Board, in a letter sent to the Speaker of the Wisconsin State Assembly made the following statement: “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 elections.”[108] The photo ID laws also damage confidence in the electoral process by causing the public to believe that the photo ID mandate's goal is to disenfranchise voters by making it more difficult for a targeted subgroup of citizens to vote.[109] Credible evidence shows that photo ID laws make results of elections less diverse and less reflective of the true will of the people.[110] Therefore, evidence supported Judge Adelman's decision that Act 23 failed to advance the state's interest in promoting confidence in the electoral process.[111]

iii. Detecting and Deterring Other Types of Fraud

The District Court also rejected Wisconsin's argument that its photo ID mandate would assist in detecting and deterring other methods of voter fraud.[112] The state failed to rationally link its goal of detecting and deterring other types of voting fraud to its photo ID mandate.[113] Even if the definition of voter fraud includes rare instances of voting by a registered voter who is convicted of a felony or by a non-citizen, Wisconsin failed to rationally demonstrate how the mandate to provide photo ID at the polls can stop these methods of unlawful voting.[114] “No evidence in the record indicate[d] that persons convicted of a felony or non-citizens will be unable to present ***88** qualifying forms of ID.”[115] Wisconsin's contention that the photo ID requirement would assist in stopping illegal double-voting by registered Wisconsin voters who have moved out of the state but who remain on the Wisconsin poll list was also rejected because of a lack of evidence.[116] Because Wisconsin failed to rationally demonstrate how the mandate to provide a photo ID would stop illegal double-voting by former Wisconsin residents, the court concluded that Act 23 failed to serve the state's interest in prohibiting voting fraud other than in-person voter-impersonation fraud.[117]

iv. Promoting Orderly Election Administration and Accurate Recordkeeping

Finally, Wisconsin contended it had an important and legitimate state interest in encouraging systematic election administration and accurate recordkeeping.[118] But Wisconsin's failure to rationally demonstrate how Act 23's photo ID mandate helped in promoting orderly election administration and accurate recordkeeping was fatal because it was unrelated to the state's interest in detecting and preventing voter fraud.[119]Because there is no credible evidence that Act 23's photo ID requirement would assist in either the orderly administration of elections or

accurate recordkeeping, it did not further Wisconsin's interest in detecting and preventing voter fraud.120

v. The Burdens Imposed by Act 23 on Equal Access to the Right to Vote Were Unreasonable Under the Circumstances

While Act 23 affected every Wisconsin resident, the burden it placed on the right to vote disproportionately impacted people without an acceptable photo ID.121 A driver's license is a qualifying ID in all states with voter ID laws.122 The barrier to voting under Act 23 is very low for licensed drivers because all they have to do is present their IDs at the ***89** polls.123 However, many eligible voters do not possess an acceptable photo ID.124 The photo ID requirement creates a unique barrier for those who could obtain a valid photo ID but for Act 23.125 After the photo ID mandate was implemented, a licensed driver obtained the advantage of the right to vote at no additional expense.126 By comparison, an individual who did not need to have a photo ID before the photo ID requirement is not likely to gain any advantage as result of having a photo ID.127 Nonetheless, that individual is obligated to incur the same costs--in terms of the difficulty in acquiring the essential documents as well as taking a trip to the DMV--as the individual who acquired a driver's license.128 "This difference in expected benefits results in Act 23 imposing a unique burden on those who need to obtain an ID exclusively for voting, with the result that these individuals are more likely to be deterred from voting than those who already possess an ID for other reasons."129

After accepting the evidence presented by Leland Beatty, a statistical marketing consultant with extensive experience in business and politics who testified on behalf of the plaintiffs, Judge Adelman discovered about 300,000 registered voters in Wisconsin, nearly nine percent of all registered voters, did not possess a qualifying ID.

The 300,000 number deserves circumstantial treatment because,130 for example, Wisconsin's 2010 gubernatorial and the United States Senatorial elections were determined by 124,638 votes and 105,041 votes respectively.131 Consequently, the total number of registered voters who do not possess a qualifying ID would have been sufficiently large to change the result of those elections.132 A significant number of the 300,000 plus registered voters who did not possess a qualifying photo ID are low-income residents who either do not need a photo ID to conduct their daily affairs or who are not directly affected by other obstacles that prohibit or discourage them from getting a photo ID.133 Matthew Barreto--a professor at the ***90** University of Washington and an expert on voting behavior, survey methods, and statistical analysis--found that less education individuals are likely to earn less.134 Professor Barreto's findings also confirm that a significant amount of voters who do not possess a qualifying ID are low income.135 Since a considerable amount of the 300,000 plus voters who do not possess a qualifying ID are low income, Act 23's burdens have to be weighed in association with them instead of in association with an average middle- or upper-class voter.136 While an average middle- or upper-class voter might have little trouble obtaining an ID, he or she is not in the category of voters who would find it hard to get an acceptable ID under Act 23.137

Judge Adelman identified and explained how the burdens related to getting a qualifying photo ID would unreasonably impact low-income voters. In theory, low-income voters who do not possess an ID are able to get the free state ID card provided by the DMV without any unreasonable burdens.138To get a state ID card, a person usually has to provide: (1) proof of name and date of birth, (2) proof of United States citizenship or legal presence in the United States, (3) proof of identity, and (4) proof of Wisconsin residency.139 Many will have to show a birth certificate to establish name, date of birth, and United States citizenship. The evidence at the *Frank* trial

revealed that a large number of eligible voters who do not possess Act 23-qualifying IDs similarly do not possess birth certificates.140

The basic opportunity to receive a free state ID card without out an undue burden for low-income voters exists in theory only.141 In considering the related supporting documents needed to get a free ID, Judge Adelman evaluated the practical problems from the perspective of a low income voter.142 As with all voters, a typical low-income voter who needs an ID must find an effective way to educate him or herself on the ID requirements.143 However, for those less educated, it will be more difficult ***91** to understand how to acquire a free ID.144 People wanting to get one or more of the mandatory documents to get an ID, for example a birth certificate, have to understand not only the DMV's documentation requirements, but also the obligations of the agency that produces the absent document. This adds a layer of complexity to the process.145 For example, Davis testified at trial that the DMV advised him to secure his birth certificate from Tennessee but because he is a resident of Wisconsin, he did not know how to go about ordering it from Tennessee.146

But understanding what a person needs to do to get an ID is not the end of the process; the individual must then reflect on the time and effort necessary to get a qualified voting ID.147 This effort will includes, at a minimum, one visit to the DMV.148 There are 92 DMV service centers in Wisconsin.149 Only two of these centers are open past 5:00 p.m. and only one is open on the weekends. As a result, it is possible that the individual will have to take time off from work.150 The person is expected to utilize vacation or personal time, if that is an option, or sacrifice the hourly earnings that he or she could have earned during the time it takes to get the ID.151 For example, low-income voter Newcomb did not have the ability to get paid time-off from work to get an ID.152 An individual will also have to find transportation to the DMV.153 An individual who does not possess a driver's license will probably use public transportation or else plan for a different type of transportation.154 For example, Newcomb did not own a car and took a 45-minute bus ride to the DMV. In another situation, Brown paid $3.00 each way to a driver from Medicare to go to the DMV.155 Ellis made a 45-minute walk to the DMV each way because he did not have a car.

***92** Although an individual can get a missing basic document by mail, that will also involve time and effort.156 An individual who has to produce a missing basic document, such as a birth certificate, is also likely to have to pay a fee for the document.157 According to Robert Spindell, a member of the Board of Election Commissioners for the City of Milwaukee, it is very hard for low-income people to pay twenty dollars for a birth certificate.158

The evidence presented at trial demonstrated that even obstacles which appear to be insignificant would be sufficient to deter many ID-less low-income people from voting.159 Professor Burden described “the calculus of voting” since it is the primary framework employed by scholars to examine voter turnout.160 This analysis revealed that very minor increases to the cost of voting may discourage a low-income person from voting because the perceived immediate benefits of voting appear relatively insignificant.161 According to Professor Burden, when voting is considered a costly venture with low immediate benefits, any increase to the cost of voting is predicted to deter some people from voting.162 Factors like weather, day-to-day interruptions, and additional administrative fees of acquiring a government issued ID may discourage a low-income person from voting.163Based on this type of evidence presented during trial, the court concluded that many low-income voters confronted unnecessary and improper burdens linked to getting an ID under Act 23.164 The court found Act 23's burden significant because a voter's low income status impacted his or her ability to get a qualified ID.165 As such, Judge Adelman

concluded that Act 23 will unreasonably discourage a considerable critical component of eligible low income voters from going to the polls to vote.166

93** ***vi. Weighing the Burdens Against the State Interests

Act 23's burdens will discourage or prohibit a substantial and critical mass of the 300,000 plus registered voters who lack an ID from voting.167Although the word “substantial” is not a precise measurement, it is a reasonable one because there is no way to establish exactly how many people will be prohibited or discouraged from voting without interviewing voters without a qualifying ID.168 Judge Adelman's analysis concluded that invalidating Act 23 is needed to eliminate the unjustified burdens placed on a substantial number of qualified low income voters who fail to possess qualifying IDs.169 Judge Adelman gave the plaintiffs the pragmatic remedy of enjoining enforcement of the photo ID requirement under Wisconsin's Act 23.

Judge Adelman's enjoinment of the ID requirement is strongly supported by Supreme Court's rationale in *Harper v. Virginia State Board of Elections*.170Under *Harper's* reasoning, Wisconsin cannot properly demand its residents pay fees for photo voter ID in order to vote because there is no rational or legitimate relationship between one's qualification to vote under the equal protection clause and one's economic status.171 Judge Adelman's extensive record and development of the facts and analysis showed that the burdens associated with ID laws are both heavy and undue under the rationale of *Harper*.

Supreme Court precedent asserts that a state violates a basic equal protection principle when it targets a class of voters because of their race and/or social economic status.172 Late in the nineteenth century, the Justice Harlan's dissent in *Plessy v. Ferguson* warned the majority of the Justices on the Supreme Court that the Constitution does not recognize or accept classes regarding citizens.173 Justice Harlan's words were disregarded then, but now in the twenty-first century, his words should inspire a constitutional duty to protect equal access to the polls for all citizens.174 If the Equal Protection Clause of the Fourteenth Amendment still stands for the principle that states shall not make or enforce any law that would “deny, to any person ***94** within its jurisdiction the equal protection of the laws,” the Court must invalidate Wisconsin's Act 23.175 The Fourteenth Amendment's guarantees prohibit legislations that classify or disadvantage a person's right to vote based on either race or social economic status.176 The Supreme Court has “attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”177 Act 23 fails this straightforward inquiry. First, Act 23 fails to demonstrate a rational relation between the photo voter identification classification adopted and the object of addressing voter fraud due to voter impersonation because that fraud problem did not exist in Wisconsin.178 Second, because Act 23's photo ID requirement places an unreasonable burden on the right to vote that disproportionately harms low-income voters, it failed the equal protection test.179 The Supreme Court should not uphold a legislative classification that denies the fundamental right to vote on the basis of either economic or racial status, like the Wisconsin law that denies voting to those who cannot meet its arbitrary and unnecessary ID requirements.180

3. A Brief Analysis of the Seventh Circuit's Reversal of Frank v. Walker on Appeal

The Seventh Circuit reversed Judge Adelman's injunction against Act 23. Judge Frank H. Easterbrook, the opinion's author, concluded the district court's findings did not justify diverging from *Crawford's* outcome.181 Judge Easterbrook cited *Crawford* for the unremarkable assertion that for most voters, gathering the required documents necessary for photograph identification

does not qualify as a substantial burden on the right to vote.182However, Judge Adelman's analysis of Act 23's impact recognized the reality that for low-income people, mere gathering of the documents constituted a substantial burden on the right to vote for low-income voters. The issue in *Crawford* and in *Frank v. Walker* was never about whether the ***95** state's photo ID law created a substantial and undue burden on the rights of most voters but whether the photo ID requirement placed an undue burden on low-income voters. Unlike in *Crawford*, Judge Adelman countered substantial expert evidence to support the conclusion that a mandatory voter ID requirement under Act 23 constituted a substantial and unreasonable economic burden on low-income voters, a burden that was because of their economic position. Because the evidence before the trial court showed that the cost of acquiring the documents needed for a voter ID under Act 23 in Wisconsin acted as a barrier to low income voters who could not afford those costs, the district court was correct to conclude that Act 23 was invalid under *Harper's* and, to a lesser extent, under *Crawford's* rationales.

The Constitution's Equal Protection Clause demands that a registered, low-income voter in Wisconsin is no more or less qualified because he lives in the inner city, the suburbs, or on a dairy farm.183 The American model of democracy supports the theory of a government of laws to protect people equally.184 “This is at the heart of Lincoln's vision of ‘government of the people, by the people, (and) for the people.”185 The Equal Protection Clause mandates real equal access to voting for all citizens of a state, regardless of race or social economic status.186 The Court should recognize that the principle of equality protects the right to vote of a low-income citizen who is otherwise competent to vote, even if she does not have enough money in her pocket to pay the fees to obtain documents for a photo ID. The equal protection principle demands equal access to voting for all citizens.187 That theory of equality does not allow Wisconsin to reduce a citizen's opportunity to vote because of her low income economic status or any other factor that would systematically burden low-income voters.188

A court invalidating Wisconsin's Act 23 is properly invoking the equal protection principle that Wisconsin's ability to regulate voting is restricted to the power to administer relevant qualifications.189 Money and other resources, similar to race, creed, or color, are not relevant to one's competence to contribute wisely in Wisconsin's electoral process.190 Linking access to the voter's booth to economic resources has customarily ***96** been rejected, as have racial requirements.191 To demand payment of money to acquire an acceptable photo ID to vote, even if the money is not for the ID itself but rather for other documents needed for obtaining the ID, is to make a demand that is not relevant to voting.192 The amount of the financial burden is irrelevant since the requirement to pay a fee for documents in order to cast a ballot to vote is itself a ‘invidious' discrimination in violation of the Equal Protection Clause.193

Judge Easterbrook's analysis of Wisconsin's Act 23194 differs from Justice Douglas's opinion in *Harper* in ways that conflict with the Court's analysis in *Harper*.195 Justice Douglas understood that linking the right to vote to the economic status is invidious discrimination prohibited by the equal protection principle.196 Under *Harper's* rationale, Wisconsin should not be allowed to practice invidious income discrimination by disenfranchising low-income voters because they do not have the ability to pay for a required Act 23 voting ID, even if the requirement is in form of documents needed for obtaining an acceptable ID.197 Wisconsin also engages in invidious discrimination if it makes it harder for a low-income person to vote because they lack economic resources.198 Judge Easterbrook demonstrated a lack of sensitivity to the hardships faced by low-income citizens in Wisconsin to exercise the right to vote.199 Judge Easterbrook suggested all low income citizens had to do to get a qualified voting ID was to

scrounge up both a birth certificate and get in line to take a picture, then go vote like everyone else who is not low income.200 He emphasized that under *Crawford's*reasoning, the "inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph" does not pose a substantial burden on the right to vote.201 However, by following Crawford's reasoning and dismissing the district court's findings, Judge Easterbrook seems not to understand the invidious discrimination suffered ***97** by low-income individuals in light of the extensive record.202Judge Adelman understood that the evidence demonstrated the invidious nature of the burden placed on low income voters seeking to acquire an Act 23 voter ID in order to vote.203

Judge Easterbrook incorrectly asserted that the plaintiffs wanted the Seventh Circuit to treat *Crawford* as a case in which there was no factual record before the Supreme Court.204 However, the plaintiffs argued the extensive record in *Crawford* by the federal district court judge in Indiana simply failed to recognize the invidious nature of the photo ID on the right to vote on low-income voters. Unlike Judge Easterbrook, the District Court concluded that many low income voters are virtually powerless to get photo IDs--because of the difficulty of paying for birth certificates or struggles associated with acquiring documents from public-records departments in other states--and as a result the journey to the county seat following each election to record an affidavit of eligibility to vote demonstrated the substantial burden imposed by Act 23 on low income voters.205 It should not matter how many people were in the low-income category because Act 23's photo ID requirement is at least as invidious as the poll tax struck down in *Harper*206 and it should be held as an unconstitutional violation of the equal protection requirement.

The District Court implicitly demonstrated that the invidious nature and impact of Act 23 is equivalent to the invidious and unconstitutional poll tax in *Harper*. It is indeed unfortunate that Judge Easterbrook ignored both the relevant evidence from the trial court record and instruction from the Supreme Court in *Harper*.207 In *Harper* the Supreme Court said, "[T]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."208 Judge Easterbrook failed to realize that the degree of discrimination is irrelevant under *Crawford's*analysis because the practical reality of tying voting to economic ability creates an inherent 'invidious' discrimination that is prohibited by the Equal Protection Clause.209 Because Act 23 fails to serve ***98** any legitimate purpose, even a modest economic burden on the right to vote should not permitted under a proper equal protection analysis.210

B. NORTH CAROLINA STATE CONFERENCE OF NAACP V. MCCRORY

1. Facts

Following years of preclearance and expanding voting rights, African American registration and voting percentages in North Carolina had come close to equal with white registration and voting percentages by 2013.211 African Americans were preparing to function as a key electoral influence in North Carolina.212 However, one day after the Supreme Court's 2013 decision in *Shelby County v. Holder* removed preclearance requirements, a leader of the Republican party in control of the state legislature declared an intention to adopt an "omnibus" election law.213 Prior to passing the law, the legislature demanded statistics regarding the habit of many voting practices based on race.214 After accepting the race data, the Republican led General Assembly enacted legislation limiting voting and registration in five different ways that all disproportionately burdened African Americans' right to vote.215 North Carolina unsuccessfully defended against the claim that intentional racial discrimination motivated its election law because its weak justifications for the election law changes were simply not credible.216 The

new requirements targeted African Americans with “surgical precision”;217 North Carolina targeted and unreasonably burdened African Americans voters to take away their voting rights.218 North Carolina Republicans denied African Americans and other minority voters an equal opportunity to vote because those voters were practically ready to cast their ballot for a substantial number of Democrats.219 Under the rationale of ***99** *League of United Latin American Citizens v. Perry* (*LULAC*), this targeting and burdening carries the symbols of intentional discrimination.220 After considering this record, the Fourth Circuit decided that the North Carolina General Assembly passed the opposed provisions of the law with prohibited discriminatory intent.221 The Fourth Circuit reversed the judgment of the district court and remanded the case with directions to enjoin the disputed requirements of the law.222

2. Analysis

The evidence demonstrated that immediately after *Shelby County*, the North Carolina General Assembly greatly expanded on its earlier photo ID bill and rushed it through the legislative process. The bill contained the most restrictive voting laws recognized in North Carolina since the passage of the Voting Rights Act of 1965.223 The court held that the district court erred in failing to draw the obvious conclusion that North Carolina's progression of legislative affairs demonstrated discriminatory intent.224 Before the *Shelby County*_decision, North Carolina's SL 2013-381 numbered merely sixteen pages without any of the opposed requirements except for a photo ID requirement.225 The pre-*Shelby County* bill received some bipartisan support as House Democrats joined Republicans in supporting the voter-ID bill.226 In contrast, the *post-Shelby County* bill had grown to fifty-seven pages in length with a new and very stringent photo ID provision.227 Post-*Shelby County*, the modification in the photo ID requirement is noteworthy because “the new ID provision retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans.”228 For example, the removal of public assistance cards as acceptable ID for voting was suspect as racially discriminatory because, given the socioeconomic disparities between ***100** whites and African Americans, members of the latter were more likely than whites to possess the public assistance cards.229

After the General Assembly produced the expanded SL 2013-381, post-*Shelby* General Assembly Democrats who supported the pre-*Shelby County* bill opposed it.230 The three-day passage of the bill by the North Carolina Senate appropriately raised suspicion about North Carolina's voter ID laws since neither the North Carolina legislature nor any other state legislature had ever finalized such restrictive requirements to the right to vote so quickly.231The legislature's suspicious narrative regarding the voter ID law is well deserved when one considers the whole picture.232 For example, the expanded law's proximity to the *Shelby County* decision clearly triggered suspicion.233 After *Shelby County*, North Carolina moved forward with restricted voting mechanisms that it knew would likely not have passed preclearance.234 This alone significantly undermined the claim that the *post-Shelby County*timing was merely to avoid administrative costs.235 Instead, this sequence of events--the General Assembly's eagerness, at the historic moment of the *Shelby County* decision, to rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow-bespoke the legislature's purpose.236 Although this factor, as with the other *Arlington Heights* factors, is not dispositive on its own, it provides another compelling piece of the puzzle of the General Assembly's racial motivation.237

The General Assembly used race data in tandem with the expanded version of SL 2013-381.238 Members of the General Assembly requested and received a breakdown by race of

DMV-issued ID ownership.239 This data revealed that African Americans disproportionately lacked DMV-issued ID.240It also revealed that, unlike white voters, African Americans ***101** did *not* disproportionately use absentee voting.241 Although SL 2013-381 drastically restricted many forms of access to the ballot box, it expressly exempted absentee voting from the photo ID requirement.242 The district court's findings that African Americans disproportionately lacked the photo ID required by SL 2013-381 established adequate disproportionate impact for an *Arlington Heights* analysis.243 The cumulative impact of the challenged provisions of SL 2013-381 creates an extra-heavy burden on African Americans' opportunity to go to the polls. The North Carolina photo ID requirement inevitably increases the steps required to vote while unreasonably slowing and burdening the process.244 The court of appeals followed the test created by *Washington v. Davis* to find both disproportionate impact and a racially discriminatory purpose.

After the right to vote is granted to voters, arbitrary photo identification lines may not be drawn to target racial groups based on economic status because that conflicts with the Equal Protection Clause of the Fourteenth Amendment.245 The North Carolina plaintiffs did not have to prove that the challenged voter ID law stopped African Americans from voting at rates equal to their past percentages.246 The Fourteenth Amendment Equal Protection Clause does not demand this type of burdensome evidence.247 Thus, the district court had erred in granting undue weight to the fact that African American aggregate turnout grew by 1.8 percent in the 2014 midterm election compared with the 2010 midterm election.248 Requiring plaintiffs to prove that the challenged voter ID law stopped African Americans from voting at rates equal to their past percentages exceeds the reach of the disproportionate impact analysis articulated in *Arlington Heights*.249

The undisputed facts regarding the impact of the contested voter ID provisions of SL 2013-381 reveal it did more than simply require a DMV-issued voter ID since African Americans in North Carolina are disproportionately likely be poor and have less access to transportation in ***102** order to acquire an eligible photo ID.250 These socioeconomic disparities meant that African Americans were more likely to lack acceptable photo ID.251 The logical inference from the disparities for many African Americans in North Carolina registration and possessing a qualifying voting is not a simple preference, but an undue burden.252 However, because of these socioeconomic disparities, the steps to register to vote and acquire a DMV voter ID is a mere inconvenience and not an undue burden for many white North Carolinians taking.253

C. OHIO ORGANIZING COLLABORATIVE V. HUSTED

1. Facts

In 2005, the Ohio General Assembly passed House Bill 234 (“H.B. 234”) to remedy problems experienced during the 2004 election. H.B. 234 established “no fault” early voting, and Boards of Elections (“BOEs”) were required to make absentee ballots available no later than thirty-five days before the election.254 Ohio law requires voters to be registered at least thirty days before the election.255 Voters in Ohio had a period during which they could both register and vote on the same day.256 The opportunity to register and vote simultaneously is called “same-day registration” (“SDR”), and the time during which voters were permitted to do so is called “Golden Week.”257

Senate Bill 238 (“S.B. 238”) went into operation in 2014 and changed the first day of early voting by mail, and early in-person (“EIP”), to the day following the end of voter registration.258 In the process, S.B. 238 abolished Golden Week and decreased the number of available EIP voting days.259There were three fewer days for EIP voting in the 2016 general

election than *103 there were in the 2012 general election, which included the Golden Week period.260

2. Analysis

The district court concluded that abolishing Golden Week inflicts a restrained but implicitly illegitimate burden on the right to vote that is beyond minimal.261 Because African Americans utilized Golden Week much more than whites during earlier elections, the abolishing of early voting places intentional discriminatory burdens on African American voters.262 Although the district court admitted it could not calculate how many African Americans would vote during the three days now missing from EIP in future elections, it decided based on the evidence that their right to vote is modestly burdened by S.B. 238's elimination of Golden Week.263

After determining that S.B. 238 placed a modest burden on the African Americans' right to vote, the court applied the criteria articulated in *Anderson/Burdick* to balance that burden alongside the precise interests proposed by Ohio as good reasons for that burden.264 Ohio was obligated to identify particular, not abstract, state interests and describe with details why the particular restrictive burden placed on the African Americans' voting rights was in fact needed.265 Defendants offered four main reasons for S.B. 238's abolition of Golden Week: (1) avoiding voter fraud; (2) decreasing costs; (3) easing administrative burdens; and (4) increasing voter confidence and stopping voter confusion.266 I reject the conclusion that these burdens are modest because this new burden that reduces a person's right to vote by abolishing Golden Week, similar to the redistricting in North Carolina decided in *Hunt v. Cromartie*, "is unexplainable on grounds other than race."267 Although the court recognized that the burden was more than minimal, burdens on the right to vote that can only be explained by race are not properly considered as a mere modesty.268 Moreover, *104 although S.B. 238's abolition of Golden Week is facially neutral with respect to race, a sensitive inquiry will reveal that Golden Week's abolition is truly not reasonably explained on any grounds other than racially profiling of voters.

i. Avoiding Voting Fraud

S.B. 238 can only be explained on the basis of race and thus it should be presumed to be an unconstitutional violation of the equal protection principle under the strict scrutiny analysis.269 The record only includes general opinion evidence that Golden Week expands the opportunity for voter fraud because the credible evidence actually reveals that real incidents involving voter fraud during Golden Week are rare.270 Lack of credible evidence supporting voter fraud during Golden Week can have several implications, one of which is that preventing voter fraud was not a sincere problem, but only a pretext for discrimination. If so, S.B. 238 is fatally flawed because, although preventing voter fraud is a legitimate interest, the justification for S.B. 238 falls shorts because it pretends to prevent a voter fraud problem during Golden Week, for which there is little evidence. The burden is not modest when only a small number of real examples of voter fraud are provided, suggesting disappearance of Golden Week is explainable by race. Restricting the voting rights on the basis of race should never be characterized as modest.271

ii. Decreasing Costs

Decreasing costs is a legitimate state interest.272 However, it is inadequate for Ohio to justify a restriction on voting opportunities for low income voters merely to save money.273 Since abolishing Golden Week is more than a minimal burden on voters, Ohio must prove such expenses are actually more burdensome than protecting the right of targeted low income African Americans to vote.274 Ohio failed to provide any evidence that counties are incapable of coping

with the expenses of supporting Golden *105 Week in the past or are incapable of doing so in the future.275 Any interest in controlling costs is outweighed by the burden the law inflicts on African Americans' right to vote.276

iii. Reducing Administrative Burdens

Ohio's administrative interests do not justify abolishing Golden Week.277 It did not produce enough evidence to show that BOEs lacked the ability to handle the administrative burdens associated with Golden Week or that BOEs lack the self-control to supervise Golden Week if it were reestablished.278

iv. Expanding Voter Confidence and Avoiding Voter Fraud

Ohio also failed to produce adequate evidence to uphold its last justification for S.B. 238--expanding voter confidence and avoiding voter misunderstanding-- referring to only two elections officials with worries that voters are likely to misunderstand deadlines for registration because of Golden Week.279 Simply stated, Ohio failed to produce adequate evidence of concrete voter misunderstanding related to Golden Week to support those worries.280 Plaintiffs produced adequate evidence to prove that a substantial amount of people have benefitted from Golden Week during prior elections; that African Americans benefitted at a greater rate than whites; that substitute methods of voting may not be workable choices for African Americans because of their suspicion about voting by mail, the expense of voting on Election Day, as well as the additional expenses involved in registering and voting at unconnected times; and that African Americans are among those who will suffer the greatest impact by the elimination of Golden Week.281 Unlike the district court, I do not believe the defendants' justifications for S.B. 238 are legitimate282 because the justifications reveal S.B. 238 has created unconstitutional discrimination.

*106 In a legislative reapportionment case,283 the Supreme Court stated, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."284 Ohio's S.B. 238 unconstitutionally discriminates against African Americans because it intentionally arranged election process through the elimination of Golden Week in a way likely to consistently degrade a collection of African American voters' political influence in the Ohio political process. Ohio's S.B. 238 justification strategy reveals that the abolishing of Golden Week was designed to dilute the voting influence of African Americans. The unconstitutional burden in Ohio is more than minimal because Ohio's justifications for abolishing Golden Week fail to outweigh the law's burden of having a voter's influence degraded on the basis of race. The record before the federal trial court contained statistical and anecdotal evidence revealing that over 10,000 voters have used EIP voting in the past; African Americans who have less economic resources use EIP voting substantially more often than white voters; although thousands of people have previously used Golden Week, African Americans appear to have used Golden Week substantially more often than whites in earlier elections in order to reduce the expense of voting.285 The elimination of early voting is a more costly burden for African Americans because African Americans, on average, have considerably less economic resources for day-to-day living than their white counterparts.286 The evidence showed the reduction of EIP voting and the elimination of SDR supports the conclusion that S.B. 238 imposes a disproportionate discriminatory burden on the right to vote of African Americans. Since many African Americans in Ohio often have limited financial resources and less access to childcare and transportation resources,287the restriction on the right to vote is similar to the poll tax struck down in *Harper*288 in 1966.

Like the court, I cannot predict how many African Americans will turn out in future elections in Ohio.289 But unlike the Court, I can reasonably conclude from the evidence presented at the district court that the right to vote of African Americans is severely burdened by S.B. 238's reduction in *107 the EIP voting period and that the elimination of SDR constitutes impermissible intent based on both race and wealth. The district court wrongly concluded after considering the totality of the relevant evidence that that Plaintiffs failed to show a discriminatory purpose.290 However, as this sub-part has argued, the Ohio law had discriminatory purpose because strong circumstantial evidence point to the fact that elimination of Golden Week that seems unexplainable on any other credible grounds other than race.291 It appears the trial court failed to recognize the circumstantial evidence of a discriminatory purpose because the plaintiffs failed to contend the challenged provisions eliminating Golden Week are unexplainable on grounds other than race.292 The Court's rejection of Ohio's justification for abolishing Golden Week is sufficiently relevant circumstantial evidence to demonstrate that the challenged provision abolishing Golden Week is a racially invidious law disproportionately targeting low income African Americans. Thus, because S.B 238's elimination of Golden Week makes it a racially motivated and invidious law, it is subjected to strict scrutiny under the Fourteenth Amendment because it unreasonably links access to voting to one's race and economic status.

IV. PRESIDENT TRUMP'S ELECTION INTEGRITY COMMISSION IS APPROPRIATELY VIEWED BY MANY AS A VOTER SUPPRESSION DIRECTIVE

Mr. Trump established a “voter fraud” commission following his unsupported accusation that 5 million undocumented individuals voted in the 2016 Presidential election.293 The chair of President Donald Trump's Election Integrity Commission, Kris Kobach, wrote a letter to all 50 states demanding they submit voter-roll information to the federal government containing the name, address, date of birth, party affiliation, last four Social Security number digits, and voting history of voting residents for at least the last decade and possibly for every single voter in the state.294 Kobach *108 sent the letter to address an alleged issue of mass voter fraud.295 In reality, the Integrity Commission has no factual basis to support President Trump's claim of massive voter fraud.296 “Academics who have studied the issue for decades say that voter fraud-- particularly of the type that strict in-person voter-identification laws championed by Kobach and others are intended to combat--is vanishingly rare and that voter-ID requirements are a burdensome solution to a practically nonexistent problem.”297 At least one federal judge has ruled that several of Kobach's wished-for ID mandates represent a major denial of a fundamental constitutional right.298 In response to Kobach's letter, Virginia's then governor, Democrat Terry McAuliffe, said he would disregard this request because his state “conducts fair, honest, and democratic elections, and there is no evidence of significant voter fraud in Virginia.”299 Governor McAuliffe further declared, “[t]his entire commission is based on the specious and false notion that there was widespread voter fraud last November. At best this commission was set up as a pretext to validate Donald Trump's alternative election facts, and at worst is a tool to commit large-scale voter suppression.”300 Former U.S. Senator John Danforth (R-Mo.) has argued that Republicans and President Trump do not share a common agenda and the issue of voter suppression should be rejected.301 Republican legislatures throughout America have unreasonably enacted restrictive voter identification laws.302 As stated in a letter to the editor of the Washington Post, “[b]oth Mr. Trump's fraud commission and these ID laws have the same purpose: figure out new ways to suppress minority votes.”303 On January 3, 2018, President Trump revealed that he was ending a provocative panel reviewing unproven

voter fraud that was hindered by many federal lawsuits and encountered opposition from states that denounced the panel as going too far in interfering with the rights of states.[304] Terminating the panel is a loss for ***109** Trump, who created the commission in 2017 to advance his untested contention that he was beaten in the popular vote total by Democrat Hillary Clinton in 2016 only because millions of voters were unlawfully permitted to vote.[305] The commission convened only twice while a sequence of lawsuits attempted to restrict its power. Democrats also alleged that the Commission was arranged to endorse voting limitations viewed as good for the Republican party.[306] White House Press Secretary Sarah Huckabee Sanders made the unsupported declaration that "substantial evidence of voter fraud" existed but attributed the ending of the commission on the lack of cooperation from many states who decided not to deliver the voter information the panel requested as well as the cost of prolonged litigation.[307] The supposedly bipartisan panel, which had been bipartisan in name only, was chaired by Vice President Mike Pence and managed by Kansas Secretary of State Kris Kobach, a Republican who acted against alleged voter fraud in Kansas.[308] During recent months, Pence appeared to have attempted to create some separation between himself and the Commission's endeavors.[309] In her declaration, Ms. Sanders said Trump had authorized an executive order requesting the Department of Homeland Security "to review its initial findings and determine next courses of action."[310] According to Senate Minority Leader Charles E. Schumer (D-N.Y.), "[t]he commission never had anything to do with election integrity .... It was instead a front to suppress the vote, perpetrate dangerous and baseless claims, and was ridiculed from one end of the country to the other."[311]

President Donald Trump has dissolved the Commission he established to support his unsupported theory that American elections are loaded with corruption.[312] Unfortunately, the dissolution of the Commission is not the end of the story even though there is no evidence of ***110** significant voter fraud because "Trump and some others in his party show no signs of dropping their unfounded contentions, for one big reason: They provide a pretext to rationalize voter suppression."[313]

Restrictive voter ID laws are one of the Republican Party's keys to resisting the electoral effects of long-term demographic developments energizing minorities and other voters that typically prefer Democrats.[314] As noted by the Washington Post Editorial Board, "[b]y mid-century, whites are projected to make up less than half the U.S. population, a chilling prospect for Republicans."[315] Trump is confident that his unjustified voter fraud proclamations will motivate his supporters to "Push hard for Voter Identification."[316] On January 4, 2018, following Trump's dismantling of the Commission, he restated the myth that U.S. electoral system is "rigged" against him and his fellow Republican supporters.[317] The majority of leading Republicans appear to have tiptoed around Trump's vitriolic campaign to delegitimize America's electoral process.[318] Trump's fake fears of voting fraud have had a real negative and harmful impact on Republican state officials, candidates, and particularly lawmakers throughout America.[319]Republicans who are inspired by President Trump's exaggeration and embellishments very often make unrelenting demands for additional exclusionary voting laws.[320] When self-serving Republicans seek to exclude voters based on virtually non-existing voting fraud they give undeserved credence to nonsense about corrupt elections.[321] This is a particularly toxic example of how Trump dishonors both the Republican Party and America's commitment to protecting an equal right to vote for all citizens under established equal protection principles.[322]

V. CONCLUSION

This article has argued that the Supreme Court's *Crawford* decision was wrongly decided because it allowed states to use strict photo ID voter ***111** laws to deny low-income minority voters access to the ballot box in violation of the rationale of *Harper*. After reviewing some of the lower court opinions analyzing strict photo ID voter requirements, this paper has shown that *Crawford* was wrongly decided because it conflicts with the Supreme Court's prior decision in *Harper*. The *Harper* opinion insightfully declared that the ability to pay has no rational connection to a citizen's ability to vote. The Supreme Court should reverse *Crawford* because it cannot be reasonably reconciled with the Court's earlier holding in *Harper*. The issue of an unreasonably restrictive photo ID requirement has manifestly evolved into a thinly disguised systemic attempt by partisan Republicans to deny low income African American and other minority voters' equal access to the right to vote. The Court could put an end to the *Crawford* voter photo ID suppression evolution by reversing *Crawford* and thereby giving new life to its well-reasoned decision in *Harper*.

Footnotes

a1

Roberson King Professor, Thurgood Marshall School of Law, Texas Southern University; B.A, J.D., University of Mississippi. I would like to recognize my wife and children for their patience as I worked on this article. I would also like to acknowledge my research assistant, Alfredo Ramos, Juris Doctorate candidate 2018, for his respected research support.

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Zoltan L. Hajnal, Nazita Lajevardi & Lindsay Nielson, *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did The Research.*, WASH. POST (Feb. 15, 2017), https://www.washmgtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.aa07aef4201b.

2

Id.

3

Id.

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Id.

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Id.

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Id.

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Amanda S. Hawkins, *Our Most Precious Right: Evaluating the Court's Voter Identification Review and Its Effect On North Carolina's Franchise*, 94 N.C. L. REV. 208, 210 (2015).

8

Id. (citing N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT.§163-166.13 (2015); TEX. ELEC. CODE ANN. §§63.001, 63.0101 (2012). Texas's photo identification law went into effect in 2013, and

North Carolina's amended photo identification law is set to take effect in January 2016. TEX. ELEC. CODE ANN. § 63.001; N.C. GEN. STAT. §163-166.13.).

9

Id.

10

Id.

11

Shelby Cty. v. Holder, 570 U.S. 529 (2013).

12

Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

13

Id.

14

Hawkins, *supra* note 7, at 211 n.13 (citing *Crawford*, 553 U.S. at 218 (Souter, J., dissenting) ("The State, in fact, shows no discomfort with the District Court's finding that an 'estimated 43,000 individuals' ... lack a qualifying ID.")). At least one scholar has criticized the Court for sidestepping the issue of prevalence of voter fraud; the Court accepted the risk of fraud at face value, rather than independently examining the facts to determine whether fraud truly existed. *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1742 (2008)("Rather than undertake the more difficult task of proving its existence, it is much easier to look at a system's potential for abuse and to point to public opinion that suggests such abuse occurs with great frequency.").

15

Chad Flanders, *Spelling Murkowski: The Next Act, A Reply to Fishkin And Levitt*, 28 ALASKA L. REV. 49, 51 (2011).

16

Id.

17

Hawkins, *supra* note 7, at 211.

18

Flanders, *supra* note 15, at 51.

19

Id.

20

Id.

21

Hawkins, *supra* note 7, at 255.

22

Id. at 256.

23

Id.

24

Common Cause/Georgia v. Billups, 554 F. 3d 1340, 1355 (11th Cir. 2009).

25

Id.

26

Id. (quoting Crawford v. Marion Cry. Election Bd., 553 U.S. 181, 205 (2008)).

27

Id.

28

Id.

29

Contra id.

30

Jesús N. Joslin, Comment, *Navigating the Post-Shelby Landscape: Using Universalism to Augment the Remaining Power of the Voting Rights Act*, 19 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 217, 221 (2017).

31

Mark Rush, *The Current State of Election Law in the United States*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 383, 412 (2017) (citing RICHARD POSNER, REFLECTIONS ON JUDGING 84-85 (2013)).

32

Joslin, *supra* note 30.

33

Rush, *supra* note 31, at 412 (citing Richard Posner, *I Did Not 'Recant' on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id (explaining that the controversial sentence in *Reflections on Judging* had been taken out of context)).

34

Rush, *supra* note 34, at 412.

35

Id.

36

Id. at 412-13 (citing Richard Trotter, *Vote of Confidence*: Crawford v. Marion County Election Board *Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 515 (2013)).

37

Rush, *supra* note 34, at 413 (citing Trotter, *supra* note 39, at 538).

38

Robert Barnes, *Stevens's Second Thoughts On 2008 Photo-ID Ruling*, WASH. POST, May 16, 2016, at A15.

39

Id.

40

Id.

Crawford v. Marion Cty Election Bd., 553 U.S. 181, 236 (Souter, J., dissenting).

42

Id.

43

Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 793 (1983)).

44

Id. (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)).

45

Id. at 236-37.

46

Id. at 197.

47

Id.

48

Id. at 198.

49

Id. at 237.

50

Id.

51

Id.

52

See Barnes, *supra* note 388.

53

Crawford, 553 U.S. at 236-37 (Souter, J., dissenting).

54

Barnes, *supra* note 388.

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Crawford, 553 U.S. at 238 (Breyer, J., dissenting).

56

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57

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