

No. 14-803

IN THE
Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,

v.

SCOTT WALKER, *et al.*,
Respondents,

-and-

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

v.

THOMAS BARLAND, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF

DALE E. HO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2639
dho@aclu.org

Counsel for Frank, et al.

LISA S. BLATT
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for LULAC, et al.

[Additional Counsel Listed On Signature Page]

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REPLY BRIEF

Wisconsin acknowledges that the petition presents “controversial” questions of “pressing national importance” and “growing prevalence.” Opp. 1, 3, 4. The State further admits that the issues presented here are “virtually certain” to generate recurring petitions unless this Court intervenes now. Opp. 12. The broad national importance of this case is confirmed by the *ten* amicus briefs filed in support of certiorari by national groups representing African Americans, Latinos, women, Millennials, the elderly, people with disabilities, low-income individuals, and federal and state elected and appointed officials.

On the merits, the State rightfully does not defend Act 23 as necessary to protect against in-person voter impersonation fraud. That omission is no accident and confirms that the State’s primary justification for Act 23 is pretextual. The State calls the factual and legal errors identified in the petition “minor” and “nits.” Opp. 19, 20. Judge Posner called it a “serious mistake” to deny review “with the court split evenly [5–5] in so important a case and the panel opinion so riven with weaknesses.” App. 130a, 159a.

Wisconsin urges the Court not to pull back the curtain and expose the inconvenient fact that restrictive voter ID laws like Act 23 burden the voting rights of millions of Americans, disproportionately African Americans and Latinos, without advancing any legitimate state interest. The State’s proposed “wait-and-see approach” (Opp. 10) is self-serving and would virtually guarantee that the Court will not address the questions presented before the November 2016 elections. With the voting rights of millions of Americans at stake in advance of a presidential election, this Court should grant review now.

I. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

1. The validity of restrictive voter ID laws in numerous states is one of the most important questions affecting elections today. Wisconsin does not dispute that:

- Since 2008, 17 states have tested the limits of *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), by enacting increasingly restrictive voter ID laws. Pet. 11–12.
- More states are poised to enact restrictive ID laws or amend existing laws to make them more onerous for voters, especially after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Pet. 12–13.
- In Wisconsin, more than 300,000 registered voters lack qualifying photo ID under Act 23. Pet. 14.
- Nationwide, millions of voters lack qualifying photo ID under voter ID laws in numerous states. *Id.*
- Many voters face substantial or insurmountable obstacles to obtaining qualifying photo ID. Pet. 15.
- Restrictive ID laws disproportionately burden the voting rights of African Americans and Latinos. Pet. 14–15; *see also* Congressional Black Caucus *Amicus* Br. 12–13; NALEO *Amicus* Br. 6–9.
- Wisconsin and other states with restrictive ID laws cannot identify *any* nontrivial incidence of in-person voter impersonation fraud. Pet. 16.
- The unsettled status of restrictive ID laws will continue to cause electoral confusion until this Court intervenes. Pet. 19–20; *see also* League of Women Voters *Amicus* Br. 5–6; Rock the Vote *Amicus* Br. 4–6.

Wisconsin responds that “the overwhelming majority of voters already have qualifying ID” (Opp. 1), by which the State means roughly 90% of its registered voters. What the State thinks about the other 10% is anyone’s guess. “It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state’s registered voters; for the state to take this position is shocking.” App. 179a (Williams, J., dissenting).

2. For three reasons, the “absence of a circuit conflict” (Opp. 2) is no basis to deny review here.

First, certiorari is independently warranted to resolve important questions of federal law. Sup. Ct. R. 10(c); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003) (“we granted certiorari because the questions presented are of national importance”). This Court granted certiorari in *Crawford* based solely on the “importance” of restrictive voter ID laws in only two states. 553 U.S. at 188 (plurality opinion). The stakes are exponentially higher today.

Second, the State’s claim that “[v]oter photo ID laws have been upheld nationally, before and after *Crawford*” (Opp. 6) is misleading at best. Federal district courts in Wisconsin and Texas and state courts in Missouri, Pennsylvania, and Arkansas each struck down their states’ voter ID laws on federal or state grounds. Pet. 11–13. The Seventh Circuit below split evenly (5–5) on a call for rehearing en banc. This is hardly “uniform validation.” Opp. 4.

Third, Wisconsin compares apples to oranges in relying on decisions that upheld far less onerous voter ID laws on vastly inferior evidentiary records. Opp. 6–7. Wisconsin cites Judge Posner’s panel decision in *Crawford*. In dissenting below, however, Judge Posner himself characterized *Crawford* as “importantly

dissimilar” to this case. App. 131a. Judge Williams similarly found the two cases different “[i]n every way.” App. 182a.

The same is true of the other cases cited by Wisconsin. In *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), the Ninth Circuit upheld Arizona’s law that permitted voters to present “*non-photograph-bearing* documents such as utility bills or bank statements.” *Id.* at 404 (emphasis added). In sharp contrast to the record here, the *Gonzalez* plaintiffs “produced no evidence” that Latino voters in Arizona were less likely to possess the necessary identification. *Id.* at 407. Two concurring judges clarified that “the court holds only that the *current record* is insufficient,” and “[a] different record in a future case could produce a different outcome.” *Id.* at 442 (Berzon, Murguia, JJ., concurring).

In *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008), the Tenth Circuit upheld a municipal law that both exempted absentee voters from the ID requirement and permitted in-person voters to use many photo IDs forbidden under Act 23, including “credit or debit cards, insurance cards, union cards, and/or professional association cards.” *Id.* at 1324. And in *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), the Eleventh Circuit denied a challenge to Georgia’s ID law because the plaintiffs were “unable to direct this Court to any admissible and reliable evidence that quantifies the extent and scope of the burden imposed by the Georgia statute.” *Id.* at 1354.

Far from a “consensus” (Opp. 2), jurists throughout the country vigorously disagree about the validity of restrictive voter ID laws, as the 5–5 split below vividly illustrates.

II. THE DECISION BELOW IS WRONG

Wisconsin concedes that the panel made “so-called ‘errors’” about “the prevalence of photo IDs in modern life.” Opp. 20. In pointing out that photo ID is not required to board a plane, buy a beer or gun, or fill a prescription (Pet. 22–23), petitioners are not “picking nits.” Opp. 19. The panel’s false assumptions go to the heart of its decision that Act 23 does not burden a large number of voters. Wisconsin stresses that a person *does* need a drivers’ license to drive and a passport to cross an international border. Opp. 20. But millions of less-privileged Americans do not own cars, much less travel abroad. This case is about *them*.

Wisconsin ignores the panel’s many other material inaccuracies. The State does not dispute that (1) six key voter witnesses *did* testify about their failed attempts to get a birth certificate, Pet. 25; (2) the record *does* reveal that other states’ ID laws depressed turnout, Pet. 26; and (3) Act 23 could *not* help prevent voting by minors or non-citizens or out-of-precinct voting, Pet. 26–27. These errors significantly contributed to the panel’s evaluation of both the burdens and the supposed justifications for Act 23.

On the Equal Protection issue, the State repeats the panel’s assertion that differences between Act 23 and Indiana’s law do not differentiate this case from *Crawford*. Opp. 18 (quoting App. 3a, 4a, 6a). But the State does not dispute that Indiana’s law had safeguards mitigating the burden on elderly, disabled, and indigent voters, whereas Act 23 does not. Pet. 21–22; *see also* Nat’l Council on Independent Living *Amicus* Br. 5–7. Nor does the State dispute that the record here is vastly superior to the record in *Crawford*. Pet. 22–25.

On the Section 2 question, Wisconsin repeats the panel’s holding that Section 2 requires a “denial” of the right to vote (Opp. 19), even though the statute independently prohibits an “abridgement.” 52 U.S.C. § 10301(a). Wisconsin also believes that Section 2 permits any facially “equal-treatment,” regardless of impact. Opp. 19. But facially neutral laws can “result in” “less opportunity” for minorities to vote, 52 U.S.C. § 10301(a)–(b), in violation of Section 2’s “results test,” *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). It is therefore irrelevant that “Act 23 does not draw any line by race.” Opp. 19 (quoting App. 18a). Neither does a poll tax or literacy test. Since ratification of the Fifteenth Amendment in 1870, states have employed facially race-neutral laws to burden and disenfranchise voters of color. This Court has struck down such laws. Howard Civil Rights Clinic *Amicus* Br. 15–19; LatinoJustice *Amicus* Br. 5.

Wisconsin attacks the district court’s decision. Opp. 21–23. The State faults the district court for not trying to quantify the precise number of voters who “will be unconstitutionally burdened because they tried to get ID and were unable to do so.” Opp. 21. But the State ignores extensive evidence that the number of such voters and the burdens they face are substantial. Pet. 24–25. Wisconsin also criticizes the district court’s remedy as overbroad. Opp. 23. We disagree, but this Court on plenary review can address any question about the proper remedy.

III. THERE IS NO VEHICLE PROBLEM

1. This case comes to the Court with an extensive trial record, an exhaustive district court decision, and a pair of diametrically opposed Seventh Circuit opinions by Judges Easterbrook and Posner. Pet. 30. Wisconsin nevertheless urges the Court to deny review and take a “wait-and-see approach” on the theory that a circuit conflict may eventually arise. Opp. 10. That would be a mistake.

This case is the *only* vehicle that guarantees the Court an opportunity to address the constitutional and statutory questions surrounding restrictive voter ID laws *before* the 2016 presidential election. Wisconsin admits that this case is “procedurally far ahead of the cases from Texas and North Carolina.” Opp. 10. In Texas, Fifth Circuit briefing will continue through mid-March, followed by oral argument, a panel decision, and possibly a petition for rehearing. *Id.* North Carolina is even farther behind; trial is not scheduled to begin until July. Opp. 12. There is no guarantee that this Court could consider either case before the end of the October 2015 Term.

Postponing consideration of these issues also would tangibly harm hundreds of thousands of Wisconsinites and millions of other Americans. On issues of profound national importance affecting large numbers of citizens in multiple states, this Court need not wait for issues to percolate, especially when, as here, lower court decisions already reflect significant disagreement. *See, e.g., King v. Burwell*, 135 S. Ct. 475 (2014); *Lawrence v. Texas*, 539 U.S. 558 (2003).

Wisconsin is wrong that the Texas case—which is still being briefed in the Fifth Circuit—is a “superior candidate for review.” Opp. 10. It is irrelevant that

Texas has enforced its law “since November 2013.” *Id.* Whenever possible, courts should resolve challenges to discriminatory election laws *before* states enforce those laws in elections. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Moreover, the record already reflects Act 23’s “impact, if any, on voter turnout.” Opp. 11. Wisconsin’s own expert agreed at trial that Act 23 “is likely to suppress voter turnout in the State of Wisconsin.” Trial Tr. 1477. This conclusion is confirmed by Plaintiffs’ expert, numerous studies concerning other states’ voter ID laws, and a recent report by the Government Accountability Office. Pet. 26.

Certworthiness does not depend on which state’s voter ID law is “stricter.” Opp. 11. In some ways, Texas’s voter ID law, SB 14, is stricter than Act 23: Wisconsin accepts two forms of photo ID that Texas rejects. *See id.* But in other key ways, Act 23 is the stricter law: in Texas, “those over 65 or disabled can vote by mail” without photo ID. *Veasey v. Perry*, No. 13-cv-193, 2014 WL 5090258, at *34 (S.D. Tex. Oct. 9, 2014). Anyway, Act 23 is a prototypical restrictive voter ID law that provides a perfect vehicle to guide lower courts’ review of similar laws. ColorofChange.org *Amicus* Br. 6–9.

The Texas district court’s finding of an “official discriminatory purpose” for SB 14 (Opp. 11) cuts *in favor of* granting the present petition. One would hope that judicial findings of intentional racial discrimination by a state legislature will be rare. This case, by contrast, presents the more common and recurring question whether Act 23 violates Section 2 based on the discriminatory impact on African-American and Latino voters. Even if this Court granted review of Texas’s case, a decision striking down SB 14 as intentionally discriminatory would not

necessarily resolve the critically important questions in this case and prevalent in much of the country.

2. Wisconsin also argues that a prophylactic “saving construction” crafted by the Wisconsin Supreme Court and implemented via an Emergency Rule meaningfully changed the facts of this case after judgment. Opp. 14. Not even close.

In *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014), the state court found that Act 23 imposed a “severe burden on the right to vote” because some voters were required to pay a fee for a birth certificate, which voters need to obtain photo ID from DMV. *Id.* at 266. Rather than strike down Act 23, the court construed an existing DMV regulation that allows a person to petition DMV for an exception to the birth-certificate requirement if the person is “unable to provide” a birth certificate and a birth certificate is “unavailable to the person.” *Id.* at 278 (quoting regulation). Under the court’s “saving construction,” “a person is entitled to petition for an exception to the birth-certificate requirement if the person cannot obtain a birth certificate without paying a fee to a government agency.” App. 197a (district court discussing *NAACP*, 851 N.W.2d at 279).

Here’s the rub: in denying Wisconsin’s request for a stay pending appeal, the district court *already rejected the State’s argument* that the state court’s saving construction materially changed the facts or outcome of this case. App. 195a–199a. The district court’s determination, which Wisconsin’s opposition ignores, is fatal to the State’s vehicle argument.

The district court concluded that “having to pay a fee to obtain a birth certificate is only one of many burdens that a person who needs to obtain an ID

for voting purposes might experience.” App. 199a. Wisconsinites face a “litany of ... practical obstacles,” including time, travel, inaccessible DMV locations with very limited hours, and the need to obtain or correct other required documents. App. 136a (Posner, J., dissenting); *see also* One Wisconsin *Amicus* Br. 2–10. Even assuming the saving construction “eliminates the burden of having to pay a fee to obtain a birth certificate,” the court “could not conclude that the burdens Act 23 places on the right to vote have been lessened to such a degree that the state’s interests are now sufficient to justify them.” App. 199a.

The district court identified other problems with the saving construction. A voter applying for photo ID “must still provide ‘[w]hatever documentation is available which states the person’s name and date of birth,’ and then the [DMV] administrator, in his or her discretion, may accept or reject ‘such extraordinary proof of name and date of birth.’” App. 197a (quoting Wis. Admin. Code § Trans. 102.15(3)(b), (c)). To guide DMV clerks, the Wisconsin Supreme Court offered “this cryptic instruction: ‘the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner.’” *Id.* (quoting *NAACP*, 851 N.W.2d at 279). It is unthinkable that the right to vote could depend on the “constitutionally sufficient” exercise of discretion by a DMV clerk. *See Louisiana v. United States*, 380 U.S. 145, 153 (1965) (voting rights “cannot be obliterated by the use of laws ... which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar”).

“Another problem is that it is not clear how members of the public who need to obtain a free state ID will learn that the DMV now has discretion to issue

IDs to persons who cannot obtain birth certificates without paying fees to government agencies.” App. 198a. Because DMV “does not publicize its exception procedure,” the district court found that “a person who might need an exception is more likely to give up trying to get an ID than to be granted an exception.” *Id.*

The State’s attempt to implement the *NAACP* saving construction makes matters worse. Even if less-educated or non-English-speaking voters without birth certificates knew to look for the Emergency Rule and could find it (both faulty assumptions, LatinoJustice *Amicus* Br. 18–19), it would do them little or no good. The DMV forms and explanatory documents for requesting an exception to the birth-certificate requirement are “complex,” “confusing,” “written at a college level,” “inconsistent with the provisions of the Emergency Rule,” and require applicants to sign “‘under penalty of perjury,’ which raises the cost of a mistake on a misleading form from losing the right to vote to the risk of fines or jail.” Charles Hamilton Houston Inst. *Amicus* Br. 6–7.

* * *

There is too much at stake for too many American voters for this Court to delay reviewing the issues presented. Until this Court intervenes, restrictive voter ID laws such as Act 23 will burden or disenfranchise millions of registered voters—disproportionately African Americans and Latinos—in federal, state, and municipal elections. The Court should decide now whether the Equal Protection Clause and Section 2 prohibit these restrictions on the franchise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DALE E. HO	LISA S. BLATT
SEAN J. YOUNG	<i>Counsel of Record</i>
MATTHEW A. COLES	CHARLES G. CURTIS, JR.
STEVEN R. SHAPIRO	CARL S. NADLER
AMERICAN CIVIL LIBERTIES	R. STANTON JONES
UNION FOUNDATION, INC.	ETHAN J. CORSON
125 Broad Street	ARNOLD & PORTER LLP
18th Floor	555 12th Street NW
New York, NY 10004	Washington, DC 20004
(212) 549-2639	(202) 942-5000
	lisa.blatt@aporter.com
KARYN L. ROTKER	JOHN C. ULIN
LAURENCE J. DUPUIS	MARCO J. MARTEMUCCI
AMERICAN CIVIL LIBERTIES	ARNOLD & PORTER LLP
UNION OF WISCONSIN	44th Floor
FOUNDATION	777 South Figueroa St.
207 East Buffalo Street,	Los Angeles, CA 90017
Suite 325	(213) 243-4000
Milwaukee, WI 53202	R. REEVES ANDERSON
(414) 272-4032	NATHAN D. FOSTER
NEIL A. STEINER	ARNOLD & PORTER LLP
DECHERT LLP	370 Seventeenth Street,
1095 Avenue of the Americas	Suite 4400
New York, NY 10036	Denver, CO 80202
(212) 698-3822	(303) 863-1000
CRAIG G. FALLS	DANIEL OSTROW
DECHERT LLP	ARNOLD & PORTER LLP
1900 K Street NW	399 Park Avenue
Washington, DC 20006	New York, NY 10022
(202) 261-3373	(212) 715-1000

ANGELA M. LIU
DECHERT LLP
77 West Wacker Drive,
Suite 3200
Chicago, IL 60601
(312) 646-5816

TRISTIA BAUMAN
NATIONAL LAW CENTER
ON HOMELESSNESS
& POVERTY
2000 M Street NW
Suite 210
Washington, DC 20036
(202) 347-3124

Counsel for Frank, et al.

FEBRUARY 2015

PENDA D. HAIR
KATHERINE CULLITON-
GONZÁLEZ
LEIGH M. CHAPMAN
ADVANCEMENT PROJECT
1220 L Street NW,
Suite 850
Washington, DC 20005
(202) 728-9557

Counsel for LULAC, et al.