No. 14-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a plurality of this Court denied a constitutional challenge to Indiana's voter ID law based on an inadequate evidentiary record. Since *Crawford*, 17 states have enacted increasingly restrictive voter ID laws, many of which impose stricter photo ID requirements than Indiana's law. Wisconsin's Act 23 is one of the strictest voter ID laws in the nation. The law requires all voters to show one of only a few specified forms of photo ID to vote.

After a trial, the district court found that Act 23 substantially burdens the voting rights of hundreds of thousands of registered voters without advancing a legitimate state interest, in violation of the Equal Protection Clause. The court found that these burdens fall disproportionately on African-American and Latino voters, resulting in discrimination in violation of Section 2 of the Voting Rights Act. Nevertheless, a panel of the Seventh Circuit upheld Act 23. The court of appeals denied rehearing en banc by an equally divided vote (5–5).

The questions presented are:

1. Whether a state's voter ID law violates the Equal Protection Clause where, unlike in *Crawford*, the evidentiary record establishes that the law substantially burdens the voting rights of hundreds of thousands of the state's voters, and that the law does not advance a legitimate state interest.

2. Whether a state's voter ID law violates Section 2 of the Voting Rights Act where the law disproportionately burdens and abridges the voting rights of African-American and Latino voters compared to White voters.

RULE 14.1(b) STATEMENT

Petitioners in *Frank v. Walker* are Ruthelle Frank, Carl Ellis, Justin Luft, Dartric Davis, Barbara Oden, Sandra Jashinki, Anthony Sharp, Pamela Dukes, Anthony Judd, Anna Shea, Matthew Dearing, Max Kligman, Samantha Meszaros, Steve Kvasnicka, Sarah Lahti, Domonique Whitehurst, Edward Hogan, Shirley Brown, Nancy Lea Wilde, Eddie Lee Holloway, Jr., Mariannis Ginorio, Frank Ybarra, Sam Bulmer, Rickie Lamont Harmon, and Dewayne Smith.

Petitioners in *LULAC of Wisconsin v. Barland* are the League of United Latin American Citizens (LULAC) of Wisconsin, Cross Lutheran Church, Milwaukee Area Labor Council, AFL-CIO, and Wisconsin League of Young Voters Education Fund.

Respondents in *Frank v. Walker* are Scott Walker, Thomas Barland, Harold Froehlich,* Timothy Vocke, John Franke,* Elsa Lamelas,* Gerald Nichol, Kevin J. Kennedy, Michael Haas,* Mark Gottlieb, Patrick Fernan,* Kristina Boardman, Donald Reincke, Tracy Jo Howard, Sandra Brisco, Barney L. Hall, Donald Genin, Jill Louis Geoffroy, and Patricia A. Nelson. Each respondent is sued in his or her official capacity.

Respondents in *LULAC of Wisconsin v. Barland* are Thomas Barland, Harold Froehlich,* Timothy Vocke, John Franke,* Elsa Lamelas,* Gerald Nichol, Kevin J. Kennedy, and Michael Haas.* Each respondent is sued in his or her official capacity.

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* Pursuant to Rule 35.3, asterisks indicate the names of current public officers who succeeded to office and are not reflected in the decision below.

RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of petitioners' stock or interest.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISION

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 768 F.3d 744 (7th Cir. 2014). App. 1a. The opinion of the district court is reported at 17 F. Supp. 3d 837 (E.D. Wis. 2014). App. 25a.

JURISDICTION

The Seventh Circuit entered judgment on October 6, 2014. Judge Posner *sua sponte* requested a vote for rehearing en banc, which the court denied by a 5–5 vote on October 10, 2014. App. 130a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Wisconsin's voter ID law, part of 2011 Wisconsin Act 23, is reproduced in the Appendix at 212a–224a.

STATEMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1435 (2014) (plurality opinion). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

This case raises issues of profound national importance regarding the constitutional and statutory limits on a state's ability to restrict voting rights by requiring photo identification to vote. Millions of

registered voters, disproportionately African Americans and Latinos, lack a qualifying photo ID needed to vote under laws in Wisconsin and other states. These voters face substantial or insurmountable burdens to obtain a qualifying photo ID. No legitimate state interest justifies these extensive burdens on voting rights. The main proffered rationale for requiring photo IDs—to prevent in-person voter impersonation fraud—is illusory and pretextual. Regardless of the merits, this Court's review is necessary to ensure that states do not unjustifiably deny or abridge voting rights, and to end the electoral turmoil caused by pervasive uncertainty about the validity of voter ID laws.

A. Wisconsin's Act 23

Wisconsin enacted its voter ID law, known as Act 23, on May 25, 2011. Act 23 requires voters to produce one of several specified forms of photo identification to vote in person or, in most cases, absentee. Wis. Stat. §§ 6.15(3), 6.79(2), 6.79(3)(b). The only acceptable IDs are a current or recently expired Wisconsin drivers' license or non-driver photo ID, military ID, or U.S. passport; a tribal ID from a federally recognized Indian tribe in Wisconsin; a naturalization certificate issued within the last two years; a student ID from a Wisconsin college or university (only if it contains the student's signature, an issuance date, an expiration date within two years of issuance, and proof of enrollment); or an unexpired receipt from a drivers' license or non-driver ID application. *Id.* § 5.02(6m). Many common forms of photo and non-photo identification are unacceptable under Act 23, such as VA-issued veteran IDs, county IDs, employee IDs, regular student IDs from University of Wisconsin campuses,

utility bills, government benefit checks, and library cards.

Voters without a qualifying photo ID can obtain one at a DMV office, but only if they produce records—typically including a certified birth certificate—proving citizenship, name, date of birth, identity, and Wisconsin residency. Wis. Admin. Code § Trans. 102.15. If a voter lacks a qualifying ID at the polls, the voter may submit a provisional ballot, but it will not be counted unless the voter returns to the municipal clerk with a qualifying ID within three days after the election. Wis. Stat. § 6.97(3)(a), (b).

Act 23 is among the most restrictive voter ID laws in the nation. Like other voter ID laws, Act 23's ostensible purpose is to combat in-person voter impersonation fraud—that is, when a person appears at the polls and attempts to vote as someone else. App. 36a (district court).

The State has enforced Act 23's ID requirements only once, during the low-turnout primaries in February 2012. *Id.* at 26a n.1. Act 23 has been enjoined under state and federal court orders in every election since.

B. Proceedings Below

1. Plaintiffs filed suit in the Eastern District of Wisconsin to enjoin enforcement of Act 23 under the Equal Protection Clause and Section 2 of the Voting Rights Act.[1] In November 2013, the district court conducted a two-week bench trial at which the parties presented 43 fact witnesses, six expert witnesses, and thousands of pages of documentary evidence.

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[1] *Frank* was filed on December 13, 2011. *LULAC* was filed on February 23, 2012.

In a 90-page decision, the district court permanently enjoined Act 23 under both the Equal Protection Clause and Section 2. App. 25a–126a. The court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID" under Act 23. *Id.* at 50a. The court further found that while many registered voters might obtain qualifying IDs with sufficient (sometimes "tenacious") efforts, many others could not. *Id.* at 48a–67a. Many witnesses undertook arduous, and often unsuccessful, efforts to obtain ID for themselves, family members, or neighbors. *Id.* The court reached the "inescapable" conclusion that Act 23 would "disproportionately" burden and disenfranchise African-American and Latino voters in Wisconsin. *Id.* at 67a–68a, 90a. The court also found that "Act 23's disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result." *Id.* at 100a.

The district court acknowledged the State's interest in "[d]etecting and preventing in-person voter-impersonation fraud." *Id.* at 36a. But the court found that, after two years of litigation and investigations by the State, "[t]he defendants could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." *Id.* at 37a. The court held that "it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future." *Id.* at 36a–37a.

The district court also acknowledged the State's interest in "promoting confidence in the integrity of the electoral process." *Id.* at 43a. But the court found

that "photo ID requirements have no effect on confidence or trust in the electoral process" in Wisconsin. *Id.* at 43a–44a. To the contrary, such laws may "undermine the public's confidence in the electoral process as much as they promote it." *Id.* at 44a. The laws "caus[e] members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id.* at 46a. Wisconsin voters testified that "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system," and that "Act 23 is designed to keep certain people from voting" and "to confuse voters." *Id*. And "the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process." *Id.* at 44a (citing unrebutted testimony of plaintiffs' expert and written statements from Wisconsin's top election official to the state legislature).

2. On July 31, 2014, the Wisconsin Supreme Court lifted the state court injunctions against enforcement of Act 23. *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014). The state supreme court concluded that Act 23 imposed a "severe burden" on voters that other jurisdictions have characterized as a "de facto poll tax." *Id.* ¶¶ 50, 60, 62. To avoid striking down the law, the court adopted a "saving construction" of DMV regulations that supposedly would lessen the burden on voters and eliminate some—but not all—costs to obtain a qualifying ID. *Id.* ¶¶ 69–70.

Based on the state supreme court's "saving construction," the State asked the district court to stay its

permanent injunction pending appeal. Ltr. re: Mot. to Stay (E.D. Wis. Dkt. #210). The State argued that the saving construction "will eliminate the potential financial burden that many voters who lack a birth certificate might experience when obtaining a free ID card from the DMV." App. 195a (district court quoting State's brief in Seventh Circuit). The district court denied the State's request for a stay. App. 179a. The court stated that it had considered similar arguments by the State at trial, and in any event "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." *Id.* at 198a–199a. Even with the saving construction, the court found "it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes." *Id.* at 211a.

3. On September 11, 2014—the day before oral argument in the Seventh Circuit—the State adopted an "Emergency Rule" purporting to implement the state supreme court's "saving construction" of DMV regulations. *See* Wis. Dep't of Transportation, EmR14, http://tinyurl.com/mdrk4aq. The next day, at oral argument, the State asked the Seventh Circuit to immediately stay the district court's permanent injunction based on the one-day-old Emergency Rule. Later that day, the panel issued a one-page order staying the district court's injunction and inviting the State to "enforce the photo ID requirement in this November's elections." App. 189a.

The Seventh Circuit denied rehearing en banc of the stay order "by an equally divided court." App. 130a. Judge Williams—joined by Chief Judge Wood and Judges Posner, Rovner, and Hamilton—issued a dissenting opinion. App. 178a–185a (Williams, J., dissenting).

The dissent concluded that the panel "should not have altered the status quo so soon before [the November] elections. And that is true whatever one's view of the merits of the case." *Id.* at 178a. The dissent also found the panel's view of the merits to be "dead wrong." *Id.* at 181a.

4. On October 9, 2014, this Court granted plaintiffs' emergency application to vacate the Seventh Circuit's stay. *Frank v. Walker*, 135 S. Ct. 7 (2014). The State thus did not enforce Act 23 in the general election four weeks later.

5. On October 6, 2014, while the parties were briefing the stay issue in this Court, the Seventh Circuit panel reversed the district court's decision on the merits. The panel held that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), "requires us to reject a constitutional challenge to Wisconsin's statute." App. 14a. The panel acknowledged that "Wisconsin's law differs from Indiana's law," and that the evidentiary record in this case differs from the record in *Crawford*. *Id.* at 3a. But the panel concluded that none of those differences warranted a different result. With respect to plaintiffs' Section 2 claim, the panel recognized that the district court found "a disparate outcome"—that is, Act 23 imposes a greater burden on African Americans and Latinos seeking to exercise the franchise. *Id.* at 17a. The panel concluded, however, that this disparate outcome "do[es] not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter." *Id.*

Judge Posner *sua sponte* called a vote for rehearing en banc, which the court again denied by an equally divided vote (5–5). App. 130a. In dissent, Judge Posner, joined by Chief Judge Wood and Judges

Rovner, Williams, and Hamilton, penned a scathing critique of every aspect of the panel's opinion, which he called a "serious mistake." App. 130a (Posner, J., dissenting). The dissent found this case to be "importantly dissimilar" to *Crawford* (which Judge Posner authored on behalf of the Seventh Circuit in 2007). *Id.* at 131a.

The dissent explained that the panel did a "disservice" to this Court by extending *Crawford* to a law more onerous than Indiana's and on a vastly different evidentiary record. *Id.* at 132a. Judge Posner pointed to "compelling evidence that voter-impersonation fraud is essentially nonexistent in Wisconsin," and that the State's justification is "a mere fig leaf for efforts to disenfranchise voters." *Id.* at 140a. The dissent chastised the panel for accepting legislative findings devoid of evidentiary support, a practice that "conjures up a fact-free cocoon in which to lodge the federal judiciary." *Id.* at 154a. Judge Posner concluded that "the case against a law requiring a photo ID . . . as strict as Wisconsin's is compelling. The law should be invalidated; at the very least, with the court split evenly in so important a case and the panel opinion so riven with weaknesses," the panel's decision should not stand without further review. *Id.* at 159a.

The panel thereafter stayed the mandate pending this Court's resolution of this petition. App. 128a.

REASONS FOR GRANTING THE PETITION

The right to vote is the foundational element of American democracy. Increasingly restrictive voter ID laws like Wisconsin's Act 23 unjustifiably burden the voting rights of millions of registered voters, particularly African Americans and Latinos. The

validity of such laws is among the most important issues affecting elections today. Certiorari is warranted on this basis alone.

But there is more. In upholding Wisconsin's Act 23, the decision below "piles error on error." App. 149a (Posner, J., dissenting). The Seventh Circuit wrongly concluded that this Court's decision in *Crawford* forecloses an Equal Protection challenge to Act 23, disregarding material differences between the laws at issue and the records in the two cases. And the court of appeals adopted a counter-textual reading of Section 2 of the Voting Rights Act that cannot be reconciled with this Court's decisions and eviscerates the statute's purpose of eliminating racially discriminatory voting practices. The nation profoundly needs this Court's guidance on these issues.

I. THIS CHALLENGE TO WISCONSIN'S VOTER ID LAW RAISES RECURRING QUESTIONS OF FUNDAMENTAL NATIONAL IMPORTANCE

In 2007, this Court granted review in *Crawford* based on the "importance" of a challenge to Indiana's voter ID law. 553 U.S. at 188 (plurality opinion). The stakes are exponentially higher today. Since *Crawford*, 17 more states have enacted increasingly restrictive voter ID laws, many of which are stricter than Indiana's. This trend will continue, particularly now that federal preclearance is no longer an obstacle (not to mention the decision below upholding Wisconsin's law). Voter ID laws burden or disenfranchise millions of registered voters—disproportionately African Americans and Latinos—across the country. Since *Crawford*, lower courts' uncertainty over the validity of voter ID laws has caused confusion on the

eve of elections. It is now exceedingly clear that the main justification for voter ID laws—to prevent in-person voter fraud—is pretextual. Putting the merits aside, this Court's review is desperately needed.

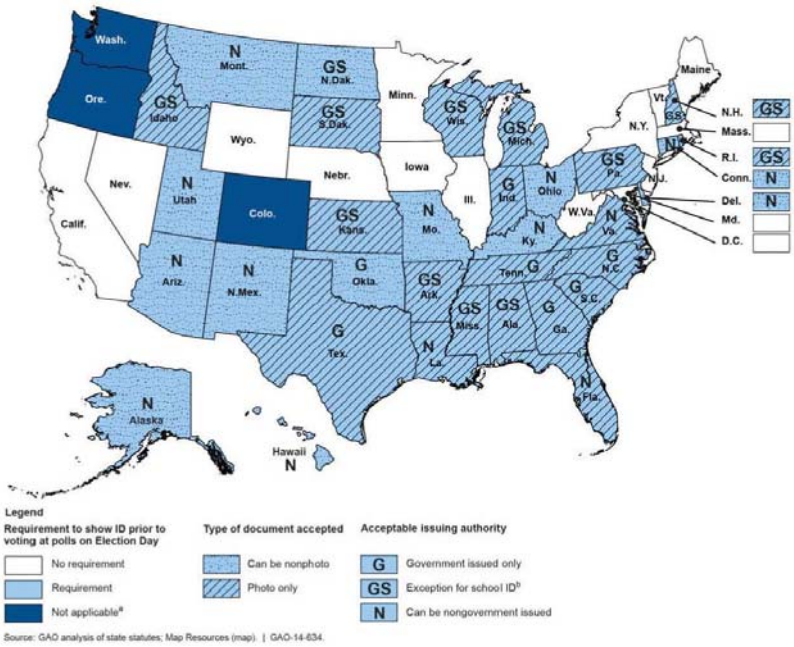
A. Numerous States Have Enacted Increasingly Restrictive Voter ID Laws

When this Court granted certiorari in *Crawford*, only *two* states (Indiana and Georgia) had enacted voter ID laws that required voters to show a photo ID to cast a regular ballot. Those laws had safeguards to protect voters without a qualifying ID. A handful of other states had more permissive laws that allowed voters to show non-photo forms of ID such as utility bills and government benefit checks. This Court nonetheless recognized the "importance" of even a few restrictive voter ID laws and agreed to hear the *Crawford* plaintiffs' challenge to Indiana's law on that basis alone. 553 U.S. at 188 (plurality opinion).

The situation has now intensified. In the six years since *Crawford*, 17 states have tested the limits of *Crawford* by enacting new and increasingly restrictive voter ID laws. In addition to Wisconsin, eight other states have enacted so-called "strict" photo ID requirements without safeguards to ensure that voters lacking a qualifying photo ID can cast a regular ballot: Arkansas, Kansas, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, and Virginia. State courts in Pennsylvania and Arkansas permanently enjoined those two states' strict laws under the state constitutions. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014). The Missouri Supreme Court struck down that state's less restrictive law under the state constitution.

Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006). In all, 32 states now require voters to show some form of ID at the polls. App. 142a (Posner, J., dissenting).

Map of States that Have Enacted Voter ID Requirements as of June 2014



Other states are poised to enact restrictive voter ID laws. The wave of post-*Crawford* laws began soon after the 2010 elections, which resulted in "political turnover in 8 governorships and at least one house in each of 17 state legislatures." Richard Sobel, *The High Cost of 'Free' Photo Voter Identification Cards* 7 (Charles Hamilton Houston Inst. for Race & Justice, Harvard Law School 2014). The November 2014 elections resulted in similar turnover in four more governorships and at least one house in ten more state legislatures, which may open the door for these states to enact restrictive voter ID laws. Nat'l Conf. of State

Legislatures, *StateVote 2014: Election Results, After-Election Analysis*, http://tinyurl.com/k8lw3wz. In 2014 alone, 14 states proposed to enact new voter ID laws or make existing laws more onerous for voters. *See* Nat'l Conf. of State Legislatures, *Voter ID*, http://tinyurl.com/ohtqwxc. More states can be expected to enact similar laws and seek to apply them in the 2016 presidential election.

Shelby County v. Holder, 133 S. Ct. 2612 (2013), further paved the way for states no longer subject to federal preclearance to implement restrictive voter ID laws. Just hours after this Court issued its decision in *Shelby County*, Texas announced that it would enforce its strict photo ID law effective immediately. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. Times, June 25, 2013. Texas enacted its law in 2011, but the Justice Department refused to preclear it, and a three-judge court rejected the State's request for judicial preclearance. *Texas v. Holder*, 888 F. Supp. 2d 113, 115, 117–18, 138 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013). North Carolina likewise enacted a law imposing strict photo ID requirements and other onerous voting restrictions "[i]mmediately after the *Shelby County* decision." *North Carolina v. League of Women Voters of North Carolina*, 135 S. Ct. 6, 6 (2014) (Ginsburg, J., dissenting). Challenges to these states' voter ID laws are ongoing in lower courts. In the meantime, Texas's law took effect for the 2014 election, and North Carolina's law is set to take effect for the 2016 election.

B. Voter ID Laws Burden or Disenfranchise Millions of Voters Who Are Disproportionately African Americans and Latinos

Millions of registered voters across the country do not have a qualifying photo ID needed to vote. In Wisconsin, 9% of registered voters—more than 300,000 people—lack qualifying ID. App. 50a. In Texas, 4.5% of registered voters—more than 600,000 people—lack qualifying ID. *Veasey v. Perry*, No. 13-cv-193, 2014 WL 5090258, at *21 (S.D. Tex. Oct. 9, 2014). In Pennsylvania, "[h]undreds of thousands" of registered voters lacked qualifying ID. *Applewhite*, 2014 WL 184988, at *20. In Missouri, at least 169,000 registered voters lacked qualifying ID. *Weinschenk*, 203 S.W.3d at 206. The North Carolina Board of Elections found that over 600,000 registered voters may lack qualifying ID in that state. N.C. State Bd. of Elections, *2013 SBOE-DMV ID Analysis* 1 (Jan. 7, 2013), http://tinyurl.com/q7zxsdc.

What is more, voter ID laws disproportionately burden the voting rights of African-American and Latino voters, who are more likely than White voters to lack qualifying photo ID. The district court below found that Act 23 "disproportionately impacts Black and Latino voters"; "the conclusion that Blacks and Latinos disproportionately lack IDs is inescapable." App. 90a. African-American and Latino voters are also more likely to lack the underlying documents needed to obtain qualifying ID. *Id.* at 94a. The district court in Texas similarly found: "It is clear from the evidence . . . that [the State's ID law] disproportionately impacts African-American and Hispanic registered voters relative to Anglos in Texas." *Veasey*, 2014 WL 5090258, at *49. And in Pennsylvania, "[r]egistered

minority voters, including African-Americans and Latinos, are almost twice as likely not to have compliant photo ID." *Applewhite*, 2014 WL 184988, at *56.

For many voters who lack a qualifying photo ID, obtaining one is exceedingly difficult or outright impossible. There are "a litany of . . . practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID if they need one to in order to be able to vote." App. 136a (Posner, J., dissenting). The district court described the obstacles facing many voters, such as the need to obtain out-of-state birth certificates, limited DMV office hours that are inaccessible to the working poor and other voters, the bureaucratic hurdle of correcting misspellings on birth certificates, the cost of travel to DMV, and the need to obtain other underlying documents like Social Security cards which *themselves* sometimes require ID. App. 51a–65a. The court also found that African Americans and Latinos face greater obstacles because of the impact of racial discrimination. *Id.* at 97a–100a. Further, a national study found that the expenses to obtain a photo ID from a DMV "typically rang[e] from about $75 to $175." Sobel, *High Cost*, *supra*, at 2. The decision below, however, "does not discuss the cost of obtaining a photo ID. It assumes the cost is negligible. That's an easy assumption for federal judges to make, since we are given photo IDs by court security free of charge. And we have upper-middle-class salaries. Not everyone is so fortunate." App. 149a (Posner, J., dissenting).

C. The Purported Justifications for Voter ID Laws Are Pretexts To Disenfranchise Certain Voters

"The only kind of voter fraud that [a voter ID law] addresses is in-person voter impersonation at polling places." *Crawford*, 553 U.S. at 194 (plurality opinion). In *Crawford*, "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* The plurality nonetheless credited Indiana's "interest in counting only the votes of eligible voters" as a justification for the State's law. *Id.* at 196.

Perhaps in 2008 the jury was still out on how frequently in-person voter impersonation fraud actually occurs. Seven years later, the verdict is in. This type of fraud is "more than a dozen times less likely [to occur] than being struck by lightning." App. 147a (Posner, J., dissenting) (citation and internal quotation marks omitted). It is "[t]he one form of voter fraud known to be too rare to justify limiting voters' ability to vote." *Id.*

In case after case challenging voter ID laws, states have failed to identify *any* nontrivial incidence of in-person voter fraud, despite every incentive to do so. Wisconsin "could not point to a single instance of known voter impersonation occurring in Wisconsin at any time in the recent past." App. 37a (district court). Pennsylvania *stipulated* that it was "not aware of any incidents of in-person voter fraud in Pennsylvania." *Applewhite*, 2014 WL 184988, at *57. Texas, for its part, identified two incidents of such fraud in the past ten years, "a period of time in which 20 million votes were cast." *Veasey*, 2014 WL 5090258, at *6.

Why, then, do states enact restrictive voter ID laws? The answer involves a "troubling blend of race and politics." *LULAC v. Perry*, 548 U.S. 399, 442 (2006). In Judge Posner's words, voter impersonation fraud is "a mere fig leaf for efforts to disenfranchise voters likely to vote for the political party that does not control the state government." App. 140a (Posner, J., dissenting). In Texas, the district court found that the legislature was "motivated, at the very least in part, *because of* and not merely *in spite of* the voter ID law's detrimental effects on the African-American and Hispanic electorate." *Veasey*, 2014 WL 5090258, at *56; *see also Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (Ginsberg, J., dissenting) ("[T]he Texas Legislature and Governor had an evident incentive to 'gain partisan advantage by suppressing' the 'votes of African-Americans and Latinos.'" (quoting district court)).

Wisconsin's use of the voter-fraud pretext to disenfranchise voters of color is unoriginal. The Texas legislature invoked voter fraud to justify laws establishing all-white primaries (1895–1944), literacy restrictions (1905–1970), poll taxes (1902–1966), voter re-registration and purging (1966–1976), and racial gerrymandering (1970–2014). *Veasey*, 2014 WL 5090258, at *2–3 & n.24. Tennessee also invoked voter fraud to justify a one-year durational residency requirement, which this Court invalidated in *Dunn v. Blumstein*, 405 U.S. 330, 345–46 (1972).

The panel below found it irrelevant that in-person voter impersonation fraud "does not happen in Wisconsin," because the panel surmised that Act 23 alternatively "promotes public confidence in the integrity of elections." App. 10a–12a. But the district court found exactly the opposite based on the trial record: Such laws "undermine the public's confidence

in the electoral process as much as they promote it." *Id*. at 44a. The laws "caus[e] members of the public to think that the photo ID requirement is itself disenfranchising voters and making it harder for citizens to vote, thus making results of elections less reflective of the will of the people." *Id.* at 46a. "Act 23 will exacerbate the lack of trust that the Black and Latino communities already have in the system." *Id*. And "the publicity surrounding photo ID legislation creates the false perception that voter-impersonation fraud is widespread, thereby needlessly undermining the public's confidence in the electoral process." *Id.* at 44a. The State, for its part, introduced "no evidence that such laws promote public confidence in the electoral system." App. 153a (Posner, J., dissenting).

Disregarding these findings, the panel held that *Crawford* established an irrefutable presumption that voter ID laws promote public confidence in elections, no matter the contrary evidence. App. 12a–14a. The panel also stated that the Wisconsin legislature believed Act 23 would promote public confidence in elections—which the panel described as "a proposition about the state of the world." *Id.* at 12a. The panel's blanket disregard of the facts cannot stand, lest the federal judiciary wrap itself in "a fact-free cocoon" and deem legislative assumptions to be irrefutable truths. App. 154a (Posner, J., dissenting). "As there is no evidence that voter-impersonation fraud is a problem, how can the fact that a legislature says it's a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?" *Id.*

D. The Unsettled Status of Voter ID Laws Causes Electoral Confusion

The *Crawford* plurality concluded that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire [Indiana] statute." 553 U.S. at 189. *Crawford* thus does not guide lower courts on the validity of state voter ID laws when, as here, plaintiffs develop a comprehensive record regarding both the burdens on voters and the state's proffered justifications. The lack of guidance has created persistent uncertainty. The Seventh Circuit's 5–5 vote for rehearing en banc in this case exemplifies the division among lower-court judges. Judge Easterbrook's panel decision and Judge Posner's dissent from the denial of rehearing en banc sharply disagree about the fundamental questions of how to apply *Crawford* and Section 2 of the Voting Rights Act to evaluate challenges to voter ID laws.

As a result, challenges to voter ID laws are ping-ponging back and forth between state and federal courts, and—within the federal system—between district courts, courts of appeals, and this Court. This wrangling over voter ID laws has caused confusion in elections and will predictably continue to do so.

The November 2014 general election highlights the problem. In Wisconsin and Texas, voter ID laws were on-again-off-again as courts struggled to determine their validity under *Crawford*'s Equal Protection ruling and Section 2. In this case, Wisconsin's Act 23 was enjoined by state courts (until those injunctions were lifted), enjoined by a federal court (until that injunction was stayed), then enjoined again (when the stay was vacated). Texas's voter ID law was blocked by the Justice Department, then unblocked by *Shelby*

County, then enjoined by a district court, until the Fifth Circuit stayed that injunction.

In the end, this Court had to resolve the temporary fate of the laws in Wisconsin and Texas on an emergency basis in a matter of days. The Court blocked Wisconsin's Act 23 but allowed Texas to enforce its voter ID law. *Frank v. Walker*, 135 S. Ct. 7 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014). The Court's stay decisions provide no further guidance regarding the long-term validity of these two restrictive laws and others like them around the country.

Unless the Court acts now, it can and should expect to be put in the same untenable position of refereeing voter ID disputes in the run-up to the November 2016 general election. The lawsuit challenging North Carolina's voter ID law and other post-*Shelby County* voting restrictions is in the pretrial phase (though the State recently filed a petition for certiorari, No. 14-780, seeking review of a Fourth Circuit decision preliminarily enjoining voting restrictions other than voter ID). The district court's judgment permanently enjoining Texas's strict ID law is on appeal. *Veasey v. Perry*, No. 14-41127 (5th Cir.). And every time a new state enacts a restrictive voter ID law, it raises the specter that this Court may be called upon to decide the law's fate—and the ability of thousands of voters to cast a ballot—on the eve of an election.

The sort of confusion surrounding voter ID for the 2014 general elections in Wisconsin and Texas is disruptive and antidemocratic. The Court should grant review now to avoid a repeat performance of last year's electoral uncertainty.

II. THE DECISION BELOW "PILES ERROR ON ERROR" AND CONFLICTS WITH DECISIONS OF THIS COURT

A. The Seventh Circuit Misinterpreted *Crawford*

The Seventh Circuit concluded that "*Crawford* requires us to reject a constitutional challenge to Wisconsin's statute." App. 14a. The panel was demonstrably wrong.

Wisconsin's ID law is "importantly dissimilar" to Indiana's. App. 131a (Posner, J., dissenting). In rejecting the challenge to Indiana's voter ID law, the *Crawford* plurality specifically relied on mitigating provisions in Indiana's law that are absent in Wisconsin's Act 23. For instance, the *Crawford* plurality found that the "severity of [the] burden" was "mitigated" because indigent voters without ID in Indiana could still vote by affidavit. 553 U.S. at 199. In contrast, "Wisconsin has no [such] provision for indigent voters." App. 134a (Posner, J., dissenting).

The *Crawford* plurality found that "the elderly in Indiana are able to vote absentee without presenting photo identification." 553 U.S. at 201. Not so here. Elderly Wisconsin voters have no such option, and even those who vote by absentee ballot "must submit a photocopy of an acceptable ID." App. 3a.

Crawford also noted that "elderly persons who can attest that they were never issued a birth certificate" can present other documents such as Medicaid/Medicare cards or Social Security benefits statements to obtain ID. 553 U.S. at 199 n.18. Again, not so here. Wisconsinites who were never issued a birth certificate do not have such a straightforward option, but are

subjected to a convoluted procedure that *may* result in the issuance of an ID. App. 60a n.17 (district court).

Moreover, the evidentiary "record that has been made in this litigation is entirely different from that made in *Crawford*. In every way." App. 182a (Williams, J., dissenting). The *Crawford* plurality found that "the evidence in the record [did] not provide [the Court] with the number of registered voters without photo identification." 553 U.S. at 200. But here, the district court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of registered voters, lack a qualifying ID." App. 50a.

In response to this finding, the panel below expressed disbelief that so many registered Wisconsin voters could lack a photo ID "in a world in which photo ID is essential to board an airplane, . . . buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal." App. 7a–8a. That premise is wrong at every turn:

- According to the U.S. Transportation Security Administration, travelers do not need a photo ID to board an airplane.[2]
- According to the State of Wisconsin Department of Revenue, only those who "appear[] to be under the legal drinking age" are required to show ID.[3]

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[2] Transportation Security Admin., *Acceptable IDs*, http://www.tsa.gov/traveler-information/acceptable-ids.

[3] Wis. Dep't of Revenue, *Wisconsin Alcohol Beverage and Tobacco Law for Retailers* 7 (Jan. 2012), http://www.dor.state.wi.us/pubs/pb302.pdf (citing Wis. Stat. 125.07(7)).

- According to the Centers for Disease Control and Prevention, patients do not need a photo ID to pick up a prescription in 35 states, including Wisconsin.[4]
- According to the Department of Treasury, bank customers do not need a photo ID to open a bank account.[5]
- According to the Department of Justice, gun owners do not need a photo ID to buy a gun.[6]
- And as this Court is aware, members of the public do not need a photo ID to enter the Supreme Court Building at One First Street.

Accord App. 149a–150a (Posner, J., dissenting).

In short, the panel's many inaccuracies and speculation portray a hypothesized reality that simply does not exist for thousands of less privileged Wisconsinites and conflicts with the facts established during the two-week trial in the district court. Such are the hazards of untested appellate fact-finding.

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[4] Centers for Disease Control and Prevention, *Law: Requiring Patient Identification Before Dispensing*, http://www.cdc.gov/homeandrecreationalsafety/Poisoning/laws/id_req.html.

[5] U.S. Dep't of Treasury, Office of the Comptroller of the Currency, *Answers About Identification*, http://www.helpwithmybank.gov/get-answers/bank-accounts/identification/faq-bank-accounts-identification-02.html (an "identification number" such as "the individual's Social Security number or employer identification" is sufficient to open a bank account; the bank may verify the information without photo ID).

[6] U.S. Dep't of Justice, Office of the Inspector General, *Review of ATF's Project Gunrunner* at 10 (Nov. 2010), http://www.justice.gov/oig/reports/ATF/e1101.pdf ("Individuals who buy guns from an unlicensed private seller in a 'secondary market venue' (such as gun shows, flea markets, and Internet sites) are exempt from the requirements of federal law to show identification . . . .").

The *Crawford* plaintiffs also failed to produce "any concrete evidence of the burden imposed on voters who currently lack photo identification." 553 U.S. at 201. But here, plaintiffs established "a litany of the practical obstacles that many Wisconsinites (particularly members of racial and linguistic minorities) face in obtaining a photo ID." App. 136a (Posner, J., dissenting). Those burdens include the difficulty in obtaining out-of-state birth certificates (especially for African Americans born in the Jim Crow south and Latinos born in Puerto Rico), inaccessible DMV locations with very limited office hours, government bureaucracies that demand photo ID to issue documents needed to obtain photo ID, the need to fix misspellings in birth certificates, lack of accessible information, time and transportation costs, and other hurdles. App. 48a–67a (district court).

The *Crawford* plurality further stressed that the Indiana plaintiffs "had not introduced a single, individual Indiana resident who will be unable to vote as a result of [Indiana's law] . . . or will have his or her right to vote unduly burdened by its requirements." 553 U.S. at 187. But here, "eight persons testified that they want[ed] to vote in the November 4 election but [were] unable to obtain the required identification." App. 135a (Posner, J., dissenting).[7] Numerous other witnesses testified about their repeated, arduous, and often unsuccessful efforts to obtain qualifying photo ID for themselves, family members, neighbors, parishioners, constituents, and other community members. Trial Tr. 153–154, 172–173, 372, 376–377, 397–400,

[7] Since trial, two of those eight witnesses have obtained qualifying ID with the assistance of the ACLU of Wisconsin.

416–417, 431–434, 436, 541–543, 578, 747; App. 51a–53a, 55a, 57a–66a (district court).

The panel below ignored these facts in favor of rose-colored assumptions about the world in which many lower-income voters live. The panel assumed that people without qualifying photo ID must be "unwilling to invest the necessary time," since anyone "willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses" can get ID. App. 8a. The record demonstrates otherwise. Many Wisconsinites are forced to navigate a bureaucratic maze just to obtain a birth certificate. *See* App. 160a–171a (Appendix to Judge Posner's *en banc* dissent, titled "Scrounging for your Birth Certificate in Wisconsin"); App. 60a–61a n.17 (district court describing the "tenacious" efforts by one voter and her family in dealing with multiple states' bureaucracies and making repeated visits to Wisconsin DMV offices). As the *Crawford* plurality warned, "[s]upposition based on extensive Internet research"—or apparently no research at all by the panel below—"is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication." 553 U.S. at 202 n.20.

The panel also misstated the established facts. The decision below states that that six key voter witnesses "did not testify that they had tried to get [a copy of their birth certificate], let alone that they had tried but failed." App. 5a. In fact all six witnesses testified about their failed attempts to get a birth certificate. Trial Tr. 37–38 (testimony of Alice Weddle); *id.* at 46–51 (testimony of Eddie Holloway); *id.* at 214–216 (discussing Shirley Brown); *id.* at 401 (discussing Melvin Robertson); *id.* at 700–705 (testimony of Rose Thompson); App. 60a n.17 (discussing Nancy Wilde);

see also App. 156a–157a (Posner, J., dissenting); *compare Crawford*, 553 U.S. at 201 (witnesses did "not indicate[] how difficult it would be for them to obtain a birth certificate").

The decision below states that "[t]he record also does not reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting." App. 6a. But Wisconsin's own expert, who studied Georgia's voter ID law, conceded that it "[h]ad the effect of suppressing turnout" to the tune of about 20,000 voters in Georgia in 2008, and he agreed "as a matter of [his] professional opinion that the Wisconsin voter ID law . . . is likely to suppress voter turnout in the State of Wisconsin." App. 148a (Posner, J., dissenting); *see also* Trial Tr. 1477. Plaintiffs' expert also opined that Act 23 would suppress voting in Wisconsin based on numerous academic studies finding that "photo voter ID requirements appeared to exert a vote suppression effect along socioeconomic lines." Trial Tr. 1239. Indeed, the non-partisan Government Accountability Office recently released a 206-page report concluding that state voter ID laws suppress voter turnout, disproportionately among minority voters. Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws*, GAO-14-634 (Sept. 2014).

The decision below rests on other flawed assumptions. The panel speculated, without citation, that Act 23 could help prevent voters who "are too young or are not citizens" from voting. App. 11. The State has never made these arguments in defense of Act 23, for good reason. No one has alleged, much less presented evidence, that minors or non-citizens attempt to vote in Wisconsin. In any event, some forms of qualifying ID under Act 23, such as many student IDs, are not

required to show a voter's age. Wis. Stat. § 5.02(6m)(f). And Wisconsin state-issued IDs are available to non-citizens. Wis. Admin. Code § Trans. 102.15(3m).

The panel also opined that Act 23 might help "promote[] accurate recordkeeping (so that people who have moved after the date of registration do not vote in the wrong precinct)." App. 11a. But Act 23 has nothing to do with voting in the correct precinct. Under the law, the address on a voter's ID does not have to match his or her voting address. Trial Tr. 868 (testimony of Executive Director, Wisconsin Government Accountability Board); Wis. Stat. § 6.79(2)(a).

In sum, "*Crawford* dealt with a particular statute and a particular evidentiary record. The statute at issue in this case has different terms and the case challenging it a different record, the terms and the record having been unknown to either [the Seventh Circuit] (affirmed by the Supreme Court in *Crawford*) or the Supreme Court." App. 132a (Posner, J., dissenting). "It is a disservice to a court to apply its precedents to dissimilar circumstances." *Id*.

B. The Seventh Circuit Misinterpreted Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act prohibits a state from imposing a voting practice or procedure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The statute further provides: "A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

The decision below misconstrues Section 2 to prohibit only voting practices that are both facially and intentionally discriminatory and that explicitly deny minorities a right to vote. Section 2's plain text and this Court's decisions squarely refute that reading.

First, the decision below held that Act 23 does not constitute "a 'denial' of anything by Wisconsin, as Section 2(a) requires." App. 17a. To the contrary, the district court found that Act 23 has denied and will continue to deny the right to vote. App. 101a. More fundamentally, Section 2 does not require a "denial." Rather, Section 2 also prohibits any measure that results in an "abridgement" of minority voting rights. 52 U.S.C. § 10301(a). The prohibition on "abridgement" reaches any "onerous procedural requirements which effectively handicap exercise of the franchise by voters of color," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), as well as any "cumbersome procedure[s]" and "material requirement[s]" that "erect[] a real obstacle to voting," *Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965). Section 2 "covers all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls

are open, . . . and other similar aspects of the voting process that might be manipulated." *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring).

Second, the decision below erroneously held that minorities do not have "less opportunity," 52 U.S.C. § 10301(b), to vote if a law facially treats members of different races equally. App. 21a–22a. The panel stressed that "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 22a. But facially neutral statutes can cause minority voters to have "less opportunity" to vote compared to Whites. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Anderson v. Celebrezze*, 460 U.S. 780, 801 (1983) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for African Americans to register than whites, . . . Section 2 would therefore be violated." *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.); *see also Lane*, 307 U.S. at 275 (states may not impose "onerous" voting measures that, while racially neutral on their face, "effectively handicap exercise of the franchise by [minority voters] although the abstract right to vote may remain unrestricted as to race").

Third, the panel repeatedly suggested that Section 2 requires proof of intentional discrimination. App. 17a, 18a, 22a. To the contrary, "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone." *Gingles*, 478 U.S. at 35; *accord Chisom*, 501 U.S. at 404 ("Congress made clear that a violation of Section 2 c[an] be established by proof of discriminatory

results alone."). The panel also stated, incorrectly, that the district court did not "find that differences in economic circumstances are attributable to discrimination by Wisconsin." App. 17a. The district court found that deep-rooted racial "discrimination in areas such as education, employment, and housing" was "the reason Blacks and Latinos are disproportionately likely to lack an ID," and is the "cornerstone from which other socioeconomic disparities flow." *Id.* at 98a. The court also found various other factors showing how Wisconsin's voter ID law interacts with the effects of past or present discrimination and is not merely a product of chance. *Id.* at 96a–100a. The court concluded that the State's proffered interests "do not justify the discriminatory result." *Id.* at 101a.

C. This Case Is an Ideal Vehicle

The evidentiary record in this case is fully developed. The district court conducted an extensive trial. The parties presented dozens of fact and expert witnesses. The court's 90-page opinion contains comprehensive factual findings that address each of the questions unanswered in *Crawford*. The dueling opinions of Judges Easterbrook and Posner, along with the district court's decision, put the relevant constitutional and statutory issues in stark relief with competing narratives. This case thus presents an ideal vehicle to resolve both questions presented.

* * *

Voter ID laws like Wisconsin's Act 23 unjustifiably burden the voting rights of millions of registered voters who are disproportionately African Americans and Latinos. More states are actively considering increasingly restrictive laws. Unless this Court acts

now, the Court likely will continue to be put in the untenable position of refereeing voter ID disputes on an emergency basis on the eve of elections every two years. Given the stakes for so many voters across the country, and the uncertainty among lower courts exemplified by the 5–5 division on the court of appeals below, this Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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