No. 14-803

In the

Supreme Court of the United States

RUTHELLE FRANK, *et al.*,

Petitioners,

v.

SCOTT WALKER, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRAD D. SCHIMEL
Wisconsin Attorney General

CLAYTON P. KAWSKI*
MARIA S. LAZAR
Assistant Attorneys General

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-7477
kawskicp@doj.state.wi.us
**Counsel of Record*

QUESTIONS PRESENTED

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Court upheld Indiana's voter photo ID law. Here, the Seventh Circuit held that Wisconsin's voter photo ID law differs from Indiana's, but not in ways that matter under the analysis in *Crawford*. The district court found that in Milwaukee County—a proxy for the state—97.6% of whites, 95.5% of blacks, and 94.1% of Latinos possess qualifying IDs or the documents that would permit Wisconsin to issue them. Months after the district court's judgment, the Supreme Court of Wisconsin directed state officials to issue photo IDs without requiring applicants to present documents that must be paid for, and Wisconsin promulgated rules that assist ID applicants who experience hardship in obtaining supporting documents. These post-judgment developments in state law led the Seventh Circuit to conclude that today it is easier in Wisconsin than in Indiana to get the documents necessary to obtain a free photo ID card.

The questions presented are:

1. Is Wisconsin's voter ID law constitutional under the Equal Protection Clause when it is less burdensome than the law upheld in *Crawford*?

2. Is Wisconsin's voter ID law consistent with § 2 of the Voting Rights Act when whites and minorities possess IDs and documents at comparable rates?

LIST OF PARTIES

Petitioners' Rule 14.1(b) Statement is not correct.

In *Frank v. Walker*, Nancy Wilde is listed is a petitioner, but she is deceased.

In *LULAC of Wisconsin v. Nichol*, Petitioners have listed eight respondents when there were only seven defendants-appellees below. The respondents in *LULAC of Wisconsin v. Nichol* should be Gerald C. Nichol, Elsa Lamelas,* Thomas Barland, John Franke,* Harold V. Froehlich,* Kevin J. Kennedy, and Michael Haas.* Asterisks denote parties succeeded under Rule 35.3.

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INTRODUCTION

The Court should deny the petition for a writ of certiorari. This case involves an "eminently reasonable" voting regulation. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring). While voter photo ID laws are controversial, they should not be. In Wisconsin, as elsewhere, the overwhelming majority of voters already have qualifying ID. For those who lack ID, obtaining one and bringing it to the polling place is generally no more of a burden than the process of voting itself. *See id.* at 198 (opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring). This case does not present an appropriate or timely vehicle for the Court to revisit the efficacy of voter photo ID laws, even when Petitioners have presented the wrinkle of a § 2 Voting Rights Act claim.

In 2011, Wisconsin joined the more than 30 states[1] that require voters to show a form of ID at the polls by enacting 2011 Wisconsin Act 23 ("Act 23"). The logic behind laws like Act 23 is straightforward: requiring voters to show photo ID prior to receiving their ballots ensures that they are who they claim to be. Voter ID protects against fraud and bolsters voter confidence in the election process. Act 23 implements the same commonsense measure that this Court upheld in *Crawford*.

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[1]National Conference of State Legislatures, *Voter Identification Requirements*, http://tinyurl.com/ohtqwxc.

There is no circuit conflict about whether voter photo ID laws are constitutional or consistent with § 2. Following *Crawford*, an unbroken string of federal appellate decisions has rejected challenges to voter photo ID laws. In less than eight years, the Seventh Circuit upheld voter photo ID laws in Indiana and Wisconsin. The Eleventh Circuit upheld Georgia's voter photo ID law in 2009, and the Tenth Circuit upheld a city charter's voter photo ID law in 2008. The only circuit other than the Seventh that has addressed a § 2 challenge to a voter photo ID law is the Ninth, which upheld Arizona's law in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *aff'd on unrelated grounds, Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). Numerous state courts of last resort have rejected state-law challenges to voter photo ID laws, including Wisconsin (twice in 2014), Georgia (twice), Indiana, Michigan, and Tennessee. The validity of voter photo ID laws is recognized nationally and has been since even before *Crawford*.

Nor is there any need at this time for the Court to take up these issues in the absence of a circuit conflict. Cases pending in the Fourth and Fifth Circuits will address constitutional and Voting Rights Act challenges to state voter photo ID laws. They will either produce a circuit split—in which case, this Court's review might then be warranted—or they will cement the consensus already developing that these laws are permissible. Texas's case in the Fifth Circuit, in particular, is worth waiting for because that state's law has been in effect during

major election cycles, thus enabling the Court to assess the actual impact of the law and not to rely, as here, upon speculation about its likely future impact.

Wisconsin's case is also a poor candidate for review because key facts changed after the district court's judgment. Three months after judgment, the Supreme Court of Wisconsin held that Wisconsin must issue free photo ID cards for voting "without requiring documents for which a fee continues to be charged by a government agency." *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262, 281 (Wis. 2014). Wisconsin then promulgated administrative rules and implemented policies that assist voters who have difficulty obtaining their birth certificates or other necessary documents. These so-called "burdens" drove the district court's decision, but the facts have changed.

Finally, in addition to arguing that this case is of pressing national importance, Petitioners assert that the Seventh Circuit erred. But this Court's role is not error correction, and the Seventh Circuit's decision is consistent with this Court's precedents.

The Seventh Circuit correctly found that Wisconsin's law is constitutional because it is materially the same as the law that this Court upheld in *Crawford*. On the § 2 claim, the Seventh Circuit correctly focused on the lack of a causal connection between enforcement of Wisconsin's voter ID law and less opportunity for minorities to vote.

REASONS TO DENY THE PETITION

I. There is no circuit conflict and no reason to revisit *Crawford*.

There is no circuit conflict regarding the validity of voter photo ID laws under the Equal Protection Clause or § 2. Post-*Crawford*, the Seventh, Ninth, Tenth, and Eleventh Circuits have all rejected challenges to voter photo ID laws. Importantly, all circuits that have applied § 2 to voter photo ID laws have upheld them. Thus, there is no circuit split to resolve and no reason to reevaluate the reasoning of *Crawford* given uniform validation of voter photo ID laws by the federal appellate courts.

First, the growing prevalence of voter photo ID laws since *Crawford* is not enough to make this case worthy of certiorari. *See* Pet. at 11-14. It is unsurprising that many states have enacted voter photo ID laws after *Crawford* explained their merits.

In *Crawford*, a 6-3 majority of the Court confirmed the value of voter photo ID laws. The lead opinion by Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy) recognized the legitimate state interests in requiring voters to show photo ID, namely: preventing voter fraud, protecting public confidence in the election process, and promoting orderly election administration. *See Crawford*, 553 U.S. at 194-97. A concurring opinion by Justice Scalia (joined by Justices Thomas and Alito) went on to deem voter photo ID "eminently reasonable." *Id.* at 209 (Scalia, J., concurring). No

federal appellate court since *Crawford* has questioned the Court's reasoning regarding the legitimacy of the state interests or the value of voter photo ID laws.

The Seventh Circuit panel rejected Petitioners' and the district court's insufficient efforts to question *Crawford*'s reasoning:

> The district judge heard from one political scientist, whose view may or may not be representative of the profession's. After a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a "fact" that they do not, even if 20 political scientists disagree with the Supreme Court.
>
> Photo ID laws promote confidence, or they don't; there is no way to hold that they could promote public confidence in Indiana (as Crawford concluded) and not in Wisconsin. This means that they are valid in every state—holding constant the burden each voter must bear to get a photo ID—or they are valid in no state. Functionally identical laws cannot be valid in Indiana and invalid in Wisconsin (or the reverse), depending on which political scientist testifies, and whether a district judge's fundamental beliefs (his "priors," a social scientist would say) are more in line with the majority of the Supreme Court or the dissent.

App. 12a-13a. Contrary to Petitioners' argument, after *Crawford* was decided the "jury" is not "still out" about the efficacy of voter photo ID laws. Pet. at 16. The Court should decline Petitioners' invitation to reconsider *Crawford*'s reasoning based upon the opinion of a single political scientist.

Second, the validity of voter photo ID laws is not "unsettled." *See* Pet. at 19-20. Voter photo ID laws have been upheld nationally, before and after *Crawford*.

In federal appellate courts, the unbroken string of rejected voter photo ID challenges is striking:

- In *Crawford*, this Court upheld Indiana's voter photo ID law in 2008. 553 U.S. at 204;
- The Seventh Circuit upheld voter photo ID laws twice—once in *Crawford* in 2007 (under the Equal Protection Clause), *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), and in this case (under the Equal Protection Clause and § 2);
- In *Gonzalez*, the en banc Ninth Circuit applied § 2 and upheld Arizona's voter photo ID law in 2012. *Gonzalez*, 677 F.3d at 405-07;
- In *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008), the Tenth Circuit upheld the City of Albuquerque, New Mexico's voter photo ID law under the Equal Protection Clause; and

- In *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), the Eleventh Circuit upheld Georgia's voter photo ID law under the Equal Protection Clause.

The federal appellate courts have uniformly upheld voter photo ID laws under the Constitution and § 2; there is no reason for this Court to intervene.

State appellate courts of last resort have also regularly upheld voter photo ID laws. The Supreme Court of Wisconsin twice rejected challenges to Act 23 under provisions of the Wisconsin Constitution in 2014.[2] The Supreme Courts of Georgia (twice), Indiana, Michigan, and Tennessee have also rejected challenges to their states' voter photo ID laws.[3] No state appellate court has applied the Equal Protection Clause or § 2 to invalidate a voter ID law.

Finally, Petitioners speculate that this Court will be thrust into a cycle of deciding emergency applications for relief every two years if it does not

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[2]*League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302 (Wis. 2014); *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014).

[3]*Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *In re Request for an Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

take this case. *See* Pet. at 19-20. Petitioners' concerns are unwarranted.

The catalyst behind the recent controversy over the enforcement of voter photo ID laws in Wisconsin and Texas was the timing of federal court decisions either enjoining the law (in Texas) or permitting it to be enforced (in this case) immediately before elections. These circumstances implicated the principles announced in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), regarding confusion resulting from judicial changes in election rules close to an election. Applications for emergency relief came into play in Wisconsin and Texas only because of the timing of decisions by lower federal courts. *See, e.g.*, *Veasey v. Perry*, 135 S. Ct. 9, 10 (2014) (Ginsburg, J., dissenting) ("[I]n *Purcell* and in recent rulings on applications involving voting procedures, this Court declined to upset a State's electoral apparatus close to an election.").

Petitioners' speculation that the application of *Purcell* principles will bombard this Court with emergency applications for relief in 2016 does not provide a basis for certiorari review. This is particularly true when all federal appellate courts since *Crawford* have rejected constitutional challenges to voter photo ID laws, and no circuit has struck down a voter photo ID law under § 2. By the 2016 elections, a circuit conflict may emerge warranting this Court's review, or circuit consensus will continue, militating against review. Now is not the time to take up these issues.

II. There is no pressing need to take up the questions presented at this time, and this case is a poor vehicle for doing so because key facts changed after the district court's judgment.

Wisconsin's case is an untimely and poor vehicle for review because the § 2 issue—even if sufficiently important—is still percolating in other circuits. With no circuit conflict to resolve, the Court should wait to see whether one is created by § 2 voter photo ID cases pending in the Fourth and Fifth Circuits. Additionally, key facts in Wisconsin's case changed after the district court's judgment regarding the documents needed to get a free photo ID card for voting. For these reasons, Wisconsin's case presents a poorly-timed certiorari petition and an awkward factual posture due to post-judgment developments in state law.

A. The § 2 issue is still percolating in other circuits.

Last fall, several § 2 cases made it to this Court on emergency applications for relief. Two of these cases, *Veasey v. Abbott* (5th Cir.) and *League of Women Voters of North Carolina v. North Carolina* (4th Cir.), involve § 2 challenges to voter photo ID laws.[4] The issue of how § 2 applies to voter photo ID

[4] *Husted* from the Sixth Circuit does not address voter photo ID, but it involves claims under § 2. *Ohio State Conference of the N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014). The Sixth Circuit vacated the district court's

laws and other election regulations is still percolating in the Fourth and Fifth Circuits. Wisconsin's case is procedurally far ahead of the cases from Texas and North Carolina. Even if the legal issues are perceived as potentially important enough, the Court should take a wait-and-see approach to determine whether it may be necessary weigh in on § 2 claims due to a circuit conflict.

In *Veasey*, the Fifth Circuit will review a district court decision striking down Texas's voter photo ID law after a trial. The Fifth Circuit entered an order on December 10, 2014, directing that the appeal follow "a regular briefing schedule." Order, ECF #00512864796, *Veasey v. Abbott*, No. 14-41127 (5th Cir. Dec. 10, 2014). The appellants' opening brief was filed on January 29, 2015. ECF #00512917360, *Veasey v. Abbott*, No. 14-41127 (5th Cir. Jan. 29, 2015). Appellees' brief is due March 3.

Texas's case differs from Wisconsin's in ways that make it a superior candidate for review. First, Texas has enforced its voter photo ID law in elections since November 2013, including the November 2014 mid-terms. *See Veasey*, 135 S. Ct. at 9-10; *Veasey v. Abbott*, No. 13-CV-193, 2014 WL 5090258, *47 (S.D. Tex. Oct. 9, 2014). Wisconsin enacted Act 23 in 2011, but it was enforced only for the small-turnout February 2012 primary elections, no federal

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decision and its own opinion. Order, ECF #53-1, *Ohio State Conference of the N.A.A.C.P. v. Husted*, No. 14-3877 (6th Cir. Oct. 1, 2014). *Husted* is procedurally far behind § 2 cases from Wisconsin, Texas, and North Carolina.

elections, and was otherwise enjoined. App. 6a. As the Seventh Circuit aptly noted, "the [district] judge did not make findings about what happened to voter turnout in Wisconsin during the February 2012 primary." *Id.* Texas's case provides the backdrop of over one year of enforcement of a strict voter photo ID law and its impact, if any, on voter turnout. "Actual results are more significant than litigants' predictions. But no such evidence has been offered" in Wisconsin's case. *Id.*

Second, the Texas voter photo ID law imposes "the strictest regime in the country." *Veasey*, 135 S. Ct. at 11 (Ginsburg, J., dissenting). "Texas will not accept several forms of photo ID permitted under the Wisconsin law." *Id.* "Wisconsin's law permits a photo ID from an in-state four-year college and one from a federally recognized Indian Tribe. Texas . . . accepts neither." *Id.* Wisconsin's Act 23 is more like the law upheld in *Crawford* than Texas's much stricter voter photo ID law.

Third, the Texas case includes a district court finding of an official discriminatory purpose. *Veasey*, 2014 WL 5090258, *52-55. This finding puts Texas at risk of being "bailed into" preclearance under § 3(c) of the Voting Rights Act. *Id.*, *58-59. Wisconsin's case involves no allegation of an official discriminatory purpose, leaving § 3 issues for another case.

The pending North Carolina voter photo ID case is also procedurally far behind Wisconsin's case.

League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224 (4th Cir. 2014), involves a § 2 challenge to North Carolina's new voter photo ID law, which will not go into effect until January 1, 2016. North Carolina filed a petition for a writ of certiorari on December 30, 2014, to seek review of a Fourth Circuit decision partially reversing a district court order denying a preliminary injunction. *See* No. 14-780 (U.S.). The Fourth Circuit did not, however, reverse the district court's order upholding North Carolina's "soft rollout" of its voter photo ID law. *League*, 769 F.3d at 236-37.

North Carolina's defense of its voter photo ID law in the face of a § 2 claim is at a very early stage; the case has not even gone to trial. Trial is scheduled for July 2015. Notice of Hearing, ECF #223, *North Carolina State Conference of the NAACP v. McCrory*, Nos. 13-CV-658, 13-CV-660, 13-CV-861 (M.D.N.C. Jan. 2, 2015). There is no Fourth Circuit decision on the merits of North Carolina's voter photo ID law, and the Fourth Circuit's judgment is not final because its mandate has been recalled and stayed pending certiorari. *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6, 6 (2014). Should certiorari be denied, the case will return to the district court to resolve § 2 claims. Another appeal is virtually certain.

In sum, if the Court views the § 2 issues raised recently in pending cases as potentially important, it should wait to see if the circuits split on the proper interpretation and application of the Voting Rights

Act. Unless and until a circuit conflict emerges, there is no legitimate or pressing reason to take up this case or any of the others. Wisconsin's case is not a timely candidate for review given the percolating § 2 issues in other circuits.

B. Key facts changed after the district court's judgment regarding the process to obtain ID.

Wisconsin's case is also a poor vehicle for review because key facts changed after the district court's judgment. Specifically, in July 2014, the Supreme Court of Wisconsin ordered state officials to issue free photo IDs for voting without requiring applicants to show documents that cost money to obtain. In September 2014, Wisconsin promulgated administrative rules after the judgment to simplify the process of obtaining supporting documents and expand the universe of documents that would be deemed acceptable. These post-judgment issues complicate the record on appeal, making Wisconsin's case a bad candidate for this Court's review.

The district court entered judgment in Petitioners' favor on April 29, 2014. App. 104a. The timing of the decision was surprising because two cases challenging Act 23 under the Wisconsin Constitution were awaiting a decision in the Wisconsin Supreme Court. *See NAACP*, 851 N.W.2d at 268 n.7; *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302 (Wis. 2014).

On July 31, 2014, the Wisconsin Supreme Court decided *NAACP* and *League of Women Voters of Wisconsin* in the State's favor. Importantly, in *NAACP*, the Wisconsin Supreme Court recognized an exception procedure in state law for photo ID applicants that substantially altered the ID issuance process that the district court considered at trial. After the Wisconsin Supreme Court entered its decision, photo IDs became much simpler to get in Wisconsin.

The Wisconsin Supreme Court addressed concerns regarding some voters who lack a birth certificate necessary to obtain a free ID card from the Wisconsin Department of Transportation's Division of Motor Vehicles (the "DMV"). *See NAACP*, 851 N.W.2d at 276-78. The court was concerned that some voters may experience a "severe" burden if they are required to pay a fee to obtain the birth certificate needed to obtain a free ID card. *Id.* at 277. To alleviate its concern, the court made what it called a "saving construction" of the Wisconsin Administrative Code provisions regarding the documents that must be shown to the DMV to obtain a free ID card under Wis. Stat. § 343.50(5)(a)3. *Id.* at 278.

The Wisconsin Supreme Court interpreted existing state laws differently than the district court, resulting in a different outcome. The Wisconsin Supreme Court construed Wis. Admin. Code § Trans 102.15(3)(a) and (b) to recognize an exception procedure for photo ID applicants, stating as follows:

In order to harmonize the directive of Wis. Stat. § 343.50(5)(a)3., which says no fees; statutes such as Wis. Stat. § 69.22, which impose payment of fees; and Wis. Admin. Code § Trans 102.15(3)(a), which requires certain documents for which electors may be required to pay fees to government agencies, we construe § Trans 102.15(3)(b). We do so to preserve the constitutionality of § 343.50(5), as follows: One who petitions an administrator pursuant to § Trans 102.15(3)(b) for an exception is constitutionally "unable" to provide those documents and they are constitutionally "unavailable" to the petitioner within our interpretation of § Trans 102.1[5](3)(b), so long as petitioner does not have the documents and would be required to pay a government agency to obtain them.

Stated otherwise, to invoke an administrator's discretion in the issuance of a DOT photo identification card to vote, an elector: (1) makes a written petition to a DMV administrator as directed by Wis. Admin. Code § Trans 102.15(3)(b) set forth above; (2) asserts he or she is "unable" to provide documents required by § Trans 102.15(3)(a) without paying a fee to a government agency to obtain them; (3) asserts those documents are "unavailable" without the payment of such a fee; and (4) asks for an exception to the provision of § Trans 102.15(3)(a) documents

> whereby proof of name and date of birth that have been provided are accepted. § Trans 102.15(3)(b) and (c). Upon receipt of a petition for an exception, the administrator, or his or her designee, shall exercise his or her discretion in a constitutionally sufficient manner.

NAACP, 851 N.W.2d at 278-79.

The Wisconsin Supreme Court held that the DMV must issue free photo ID cards for voting "without requiring documents for which a fee continues to be charged by a government agency." *NAACP*, 851 N.W.2d at 281. The court concluded that following the exception procedure "is not a severe burden on the right to vote." *Id.* at 279. It applied rational basis scrutiny and determined that Act 23 is constitutional in light of the exception procedure. *Id.* at 279-80.

After *NAACP*, in September 2014, the DMV promulgated administrative rules that expanded the documentary options to apply for a free photo ID card for voting. *See* Emergency Rule 1421, Wis. Admin. Reg. 708B, http://tinyurl.com/jvox3l4. The new rules allow the DMV to consider documents like baptismal certificates, hospital birth certificates, delayed birth certificates, census records, early school records, family Bible records, and doctor's records of post-natal care when a certified copy of a birth certificate is deemed unavailable. *Id.* (creating Wis. Admin. Code § Trans 102.15(5m)(b)). DMV's

promulgation of these rules caused the Seventh Circuit panel to conclude that "at the time of trial it was no harder to get supporting documents in Wisconsin than in Indiana, and today it is easier in Wisconsin than in Indiana." App. 6a.

In sum, key facts changed in Wisconsin after the district court's judgment. The trial in the district court took place long before the *NAACP* exception procedure and accompanying administrative rules went into effect. Thus, the facts that the district court relied upon are not the facts on the ground today. Developments after the district court's judgment have simplified the process of obtaining a free photo ID for voting. While the changes benefit Wisconsin voters, they would throw a monkey wrench into resolving the issues presented and make this case a poor candidate for review.

III. The Seventh Circuit's decision was correct, and Petitioners' argument to the contrary forms no basis for certiorari.

Petitioners' second basis for review is that the Seventh Circuit's decision is wrong and "piles error upon error." Pet. at 21. Petitioners rely heavily upon Judge Posner's dissenting opinion excoriating voter photo ID laws. (Judge Posner authored the Seventh Circuit's 2007 *Crawford* decision upholding Indiana's law.) But this Court's role is not error correction. Thus, Petitioners' second basis for review lacks merit.

Petitioners' argument that the Seventh Circuit erred is not only insufficient to warrant this Court's review but incorrect. The Seventh Circuit employed a reasonable and correct interpretation of *Crawford* and § 2.

A few points from the decision are worth emphasizing. Applying *Crawford*, the Seventh Circuit correctly determined that:

- "Wisconsin's law differs from Indiana's, but not in ways that matter under the analysis in *Crawford*." App. 3a;
- The burden of voting in Wisconsin under Act 23 is not "significantly different from the burden in Indiana." App. 4a;
- "[A]t the time of trial it was no harder to get supporting documents in Wisconsin than in Indiana, and today it is easier in Wisconsin than in Indiana." App. 6a;
- "If people who already have copies of their birth certificates do not choose to get free photo IDs, it is not possible to describe the need for a birth certificate as a legal obstacle that disenfranchises them." App. 10a; and
- "[T]he [district] judge did not find that photo ID laws measurably depress turnout in states that have been using them." App. 14a.

Applying § 2, the Seventh Circuit correctly determined that:

- "97.6% of whites, 95.5% of blacks, and 94.1% of Latinos currently possess either qualifying photo IDs or the documents that would permit Wisconsin to issue them." App. 16a;
- The district court's factual findings "document a disparate outcome, [but] they do 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." App. 17a;
- "Section 2(a) forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." App. 18a;
- "Act 23 does not draw any line by race, and the district judge did not find that black or Latinos have less 'opportunity' than whites to get photo IDs. Instead the judge found that, because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate §2." App. 18a; and
- "It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." App. 20a.

Petitioners' quarrels with the Seventh Circuit's decision amount to picking nits. They first point out purported flaws regarding the Seventh Circuit panel's view of when photo ID is required for activities like buying beer, picking up prescriptions, or boarding planes. *See* Pet. at 22-23 (citing Judge

Posner's dissent from the denial of rehearing en banc). The panel's view of these things was of little consequence to its ultimate conclusions.

The so-called "errors" that Petitioners highlight from the Seventh Circuit's decision are focused on one minor aspect of the decision: its second-guessing of the district court's estimate of the number of ID-less registered voters in Wisconsin. *See* App. 7a. Ultimately, however, the Seventh Circuit accepted the district court's 300,000-voter estimate for purposes of the appeal. App. 8a. The so-called "errors" in the Seventh Circuit's opinion regarding which life activities require a photo ID are not germane to the panel's analysis of the correctness of the district court's judgment.

Not surprisingly, Petitioners omit examples where the Seventh Circuit accurately stated the necessity of photo ID in day-to-day life, such as: "[to] enter Canada or any other foreign nation, [to] drive a car (even people who do not own cars need licenses to drive friends' or relatives' cars)." App. 7a; Pet. at 22-23. In any event, the circuit court's apparent internal conflict about the prevalence of photo IDs in modern life does not warrant this Court's review.

It is not this Court's job to referee a debate between the Seventh Circuit panel and Judge Posner. Petitioners place great emphasis on the reasoning in Judge Posner's dissent from the denial of rehearing en banc, but it is the panel's decision that is the law. Judge Posner could not convince five

of his colleagues on the Seventh Circuit that his position is correct and that the panel misapplied *Crawford* and § 2. App. 130a. Additionally, Judge Posner's dissent all but ignored the exception procedure that the Wisconsin Supreme Court recognized in *NAACP* and the administrative rules that Wisconsin promulgated after the district court's judgment to make obtaining a free photo ID easier.

The Seventh Circuit correctly applied the Equal Protection Clause and § 2. Even if the court erred, error correction is not a basis for review.

IV. The district court's decision would not be affirmed.

Lastly, the district court erred, and this Court would not affirm its constitutional and § 2 analyses. The district court also erroneously granted injunctive relief that would require Wisconsin to seek pre-clearance from the Eastern District of Wisconsin of *any* amended voter photo ID law prior to its enforcement. The district court's error-laden decision counsels heavily against granting review.

First, the district court erred in its constitutional analysis. The district court found as a fact that approximately 300,000 voters—9% of all registered in Wisconsin at the time of trial—do not have a photo ID. App. 50a. As the Seventh Circuit pointed out, what the district court did *not* find is that a substantial number of these voters will be unconstitutionally burdened because they tried to get ID and were unable to do so. App. 4a-5a.

Despite failing to quantify the so-called "burdens" on ID-less voters as widespread, the district court held that Act 23 is unconstitutional as to *all* voters, even those who already have ID. App. 68a-69a.

This holding was incorrect under *Crawford* because Act 23 cannot unconstitutionally burden voters who already have ID. *See Crawford*, 553 U.S. at 198 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification.").

Second, the district court's § 2 test is inconsistent with the plain language and meaning of the Voting Rights Act. The district court summarized its understanding of § 2 as follows: "Based on the text [of § 2], I conclude that Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not." App. 83a.

This test is wrong. It eschews the language in § 2 that establishes that a violation occurs only when a new voting practice "results in" the denial or abridgement of minority voting rights. 52 U.S.C. § 10301(a); *see Gonzalez*, 677 F.3d at 405. The district court incorrectly substituted the causation standard of § 2 for a test that is based upon likelihood or correlation.

Finally, the district court erred by requiring Wisconsin to obtain pre-clearance of *any* voter photo ID law prior to its enforcement. App. 102a. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the Court cautioned lower federal courts about the breadth of injunctions holding a state statute unconstitutional. The Court stated that federal courts should "limit the solution to the problem," *id.* at 328, and reminded federal courts that their "constitutional mandate and institutional competence are limited." *Id*. at 329.

The district court ignored *Ayotte*. Its permanent injunction "could not be affirmed," even if it was appropriate to grant judgment to Petitioners. App. 22a. Instead of enjoining only the enforcement of Act 23, the district court required an unprecedented procedure by which Wisconsin must get judicial permission prior to enforcing *any* future voter photo ID law. App. 102a. The district judge effectively pre-judged future voter photo ID laws and signaled to the Wisconsin State Legislature that amending Act 23 would be a lost cause before this district judge. *Id.* ("[G]iven the evidence presented at trial showing that Blacks and Latinos are more likely than whites to lack an ID, it is difficult to see how an amendment to the photo ID requirement could remove its disproportionate racial impact and discriminatory result."). Under the district court's injunction, Wisconsin can essentially never have *any* voter photo ID requirement when minority voters "are more likely than whites to lack an ID." *Id.*

* * *

The Court should deny the petition for a writ of certiorari. There is no need to revisit the validity of voter photo ID laws, which were recently determined by this Court in *Crawford* to pass constitutional muster. *Crawford* has not created confusion. In fact, it has been uniformly applied by the federal appellate courts. There is an unbroken string of federal appellate decisions upholding voter photo ID laws, even under § 2. There is no circuit conflict to resolve and no legitimate reason to revisit *Crawford*.

Assuming the questions presented are important enough, there is no pressing need to address them yet because § 2 voter photo ID cases are percolating in the Fourth and Fifth Circuits. It makes sense to see how § 2 claims are disposed of in pending federal cases since there is no circuit conflict. Likewise, Wisconsin's case is a poor vehicle because key facts changed after judgment. Three months after judgment, the Supreme Court of Wisconsin ordered Wisconsin officials to issue photo IDs to applicants without requiring documents for which there is a fee. Wisconsin also simplified the process for obtaining photo IDs through rulemaking after judgment. These post-judgment state law issues would unnecessarily complicate this Court's review.

Finally, the Seventh Circuit applied the law correctly, and this Court's institutional role is not to review lower court decisions for errors in application. Moreover, the district court erred and would not be affirmed. The Court should deny the petition.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

CLAYTON P. KAWSKI*
MARIA S. LAZAR
Assistant Attorneys General

Counsel for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7477
(608) 267-2223 (Fax)
kawskicp@doj.state.wi.us

**Counsel of Record*

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