

No. 14-803

IN THE
Supreme Court of the United States

RUTHELLE FRANK, *et al.*,
Petitioners,

v.

SCOTT WALKER, *et al.*,
Respondents,

-and-

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

v.

THOMAS BARLAND, *et al.*,
Respondents.

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

**BRIEF OF COLOROFCHANGE.ORG
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS'
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

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 compared to white voters.

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ColorofChange.org (“ColorofChange”) respectfully submits this brief as *amicus curiae* in support of the Petitioners’ Petition for a Writ of Certiorari to the Seventh Circuit.¹

INTEREST OF AMICUS

Amicus ColorofChange is an organization that since 2005 has advocated for the interests of minority and low-income persons. ColorofChange has over 1,000,000 members nationally, and 12,000 members in Wisconsin. The right to vote, and the conditions that many states have recently imposed on the exercise of that right, are of particular concern to ColorofChange. This case presents the Court with the opportunity to provide clear guidance to the states concerning the scope of identification required of voters when they present themselves at the polls to exercise their franchise.

In this case Petitioners have challenged a Wisconsin law referred to as Act 23, that imposes among the most

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its leadership, and their counsel made a monetary contribution to the brief’s preparation or submission. ColorofChange notified counsel of record for the parties of its intention to file an *amicus* brief at least ten days prior to the due date for this brief, and obtained the parties’ consent to the filing of this *amicus* brief. The parties’ consents have been filed with the Clerk of the Court

onerous identification requirements of the so-called voter ID laws that have swept the country since this Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). ColorofChange is interested in ensuring that laws such as Act 23 are not allowed to unduly and disproportionately limit the ability of minority and low-income voters to vote for candidates of their choice, and as such is interested in helping to establish appropriate limitations on the scope of the voter ID laws.

SUMMARY OF ARGUMENT

For at least the past decade, and in particular since the Court's 2008 decision in *Crawford*, there has been a concerted effort by many states to impose ever more stringent voter identification requirements. It seems that with each passing year, states leapfrog each other to see which can impose the most onerous restrictions. As found by the District Court below, these photo ID requirements have a demonstrably adverse and disproportionate impact on minority and low-income voters.

The Petitioners challenged Wisconsin's law on voter ID, known as Act 23. After a comprehensive trial, the District Court found as a matter of fact that Act 23 has a disproportionately adverse impact on minority and low-income voters in Wisconsin, and makes it far less likely that they would be able to obtain the required voter ID for presentation when they go to the polls. *Frank, et al. v. Walker, et al.*, 17 F.Supp.3d 837, 854 (E.D. Wis.), rev'd, 768 F.3d 744 (7th Cir. 2014). Absent the required identification, Act 23 would deny the right to vote to many otherwise qualified and registered voters. The District Court correctly found Act 23 to be in violation of the Equal Protection Clause

of the Fourteenth Amendment, U.S. Const. amend. XIV, and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

However, the U.S. Court of Appeals for the Seventh Circuit reversed the District Court, and by an equally divided vote, refused to grant rehearing *en banc*. Judge Posner's compelling dissent from that denial of rehearing concludes that Wisconsin went too far, and that many other states have done so as well. This case presents the Court with an opportunity not only to reinstate the District Court's opinion that Act 23 is unconstitutional and violative of the Voting Rights Act, but also to give guidance to the states in the drafting of voter ID laws.

This case differs from *Crawford* in that it presents a detailed and comprehensive evidentiary record to support the factual findings of disproportionate impact on minority and low-income voters, and that Act 23 imposes a disproportionate burden on such voters in obtaining the identification required by the law. In that there is a disproportionately adverse burden in obtaining the required identification, there would *ipso facto* be a similar adverse burden on minority and low-income persons actually voting. In short, Act 23 unconstitutionally (Equal Protection Clause of the Fourteenth Amendment) and unlawfully (Section 2 of the Voting Rights Act) limits the ability of minority and low-income persons in Wisconsin to effectively exercise their right to vote.

This phenomenon of ever more onerous voter ID laws can be demonstrated by examining the chronology of states' enactment of such laws since *Crawford*.

Further, the adverse impact of these laws is demonstrated not just by the evidence presented at

trial in this case, but also, for example, by the evidence presented in other cases in which voter ID laws have recently been challenged. An excellent example of those cases is *Veasey, et al. v. Perry, et al.*, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014). In that case the Texas voter ID law was found as a matter of fact to have a disproportionately adverse impact on minority and low-income voters.

The Wisconsin voter ID law, like nearly all of the voter ID laws enacted in recent years, does not stand up to scrutiny. The justifications advanced by Wisconsin for Act 23 are lacking, and certainly do not outweigh the impact of the law on hundreds of thousands of voters in Wisconsin. The problem of voter fraud is the principle grounds for laws like Act 23, but there is simply little or no evidence of a problem with voter fraud in Wisconsin or, for that matter, in any state in the Union. The purpose and effect of Wisconsin's law, if allowed to become effective, would be to lower the turnout of minority and low-income voters. Act 23 is a solution in search of a problem; in search of a problem that does not exist.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT SHOULD CONSIDER WHETHER THE WISCONSIN LAW CAN WITHSTAND APPROPRIATE CONSTITUTIONAL AND STATUTORY SCRUTINY

In 2008 the Court announced its decision in *Crawford* and, by plurality decision on the record presented, approved an Indiana statute requiring voters to prove their identity when voting. Pursuant

to the Indiana statute, a voter had to produce photo IDs issued by the United States or the state of Indiana as proof of identification. In the absence of producing such a photo ID, a voter could cast a provisional ballot that would be counted if the voter produced the required photo ID by the Monday following the election (i.e., within 6 days of the election) or executed an affidavit indicating the voter is indigent or has a religious objection to being photographed. Although the authoritative value of *Crawford* is questionable because the case generated only a plurality opinion in favor of the statute, many states have, as one might say, taken *Crawford* and run with it. Relying on *Crawford*, many states have enacted laws requiring the production of photo IDs at the polls. At question in this case is Act 23, a law passed by the Wisconsin legislature in 2011 and signed into law that year by that state's governor.

Act 23 is among the most onerous of the voter ID laws. It requires voters to produce one of a limited number of photo IDs when appearing at a polling place to vote, and if the voter fails to produce at least one of those forms of identification, the voter may cast a provisional ballot that will be counted only if the voter produces the required photo ID by the Friday following the election (within 3 days of the election). The Wisconsin statute does not provide the opportunity for the voter to execute an affidavit to obtain an indigent or religious accommodation, or any other accommodation, to the strict photo ID requirement. The result of this statute is to disenfranchise a significant number of minority and low-income voters, even though such voters are registered and meet every other criterion of Wisconsin's eligibility requirements.

A. Wisconsin's Statute is Representative of the Increasing Burden the States are Imposing on Voters To Produce Photo Identification So They May Vote.

Before *Crawford* some states had laws requiring a photo ID to vote. But it was only with *Crawford* that the states began to enact photo ID laws with such restrictive requirements. In rejecting the challenge to the Indiana statute at issue in *Crawford*, the plurality focused on the inadequacy of the evidentiary record of the adverse impact on specified classifications of voters. But as demonstrated below, since 2008 many states have adopted photo ID laws, and have in fact been increasing the strictness of those laws. The effect has been to reduce the number of documents that can be used to prove a voter's identity, and to limit the opportunity to have a provisional ballot counted by providing a photo ID after the polls close or by obtaining an accommodation from the strict photo ID requirement. As a result, it is increasingly difficult for voters, particularly African-American, Latino, and low-income voters, to obtain and present the necessary documentation or obtain an accommodation to have their vote counted without presenting photo ID.

This reduction in the number and variety of approved documents, and increase in burden on voters to obtain and present those documents or obtain an accommodation, are symptomatic of the direction in which the states have been moving since *Crawford*: reducing voters' options and increasing the burden and cost to obtain approved photo IDs. This trend is evident in the following table.

State and Statutory or session law reference	Year Enacted	Photo IDs Accepted	Deadline for presentation of photo ID to count Provisional Ballots / Accommodations to excuse Photo ID
Indiana; Ind. Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1	2005 (Effective 2008)	Any issued by State of Indiana or United States	Monday following election (6 days)/ Indigent or religious objection
Wisconsin Wis. Stat. §§ 5.02(6m), 6.79(2)(a)	2011	Wisconsin Drivers' License; Wisconsin Non-Driver ID; Wisconsin-Based Student ID; US Passport; US Uniformed Service ID; Wisconsin-Based Indian Tribe ID; Certificate of naturalization	Friday following election (3 days) / No accommodation
Texas; Tex. Elec. Code Ann. §§ 63.001 et seq.	2011 (Effective 2013) (Struck Down 2014 in <i>Veasey</i> , appeal pending)	Texas Driver's license; Texas Dept. of Public Safety ID or license to carry concealed handgun; Texas Election ID Certificate; US Military ID; US Passport	6 days / Religious objection or natural disaster

North Carolina S.L. 2013-381	2013 (Effective 2016)	North Carolina driver's license; North Carolina Special ID; US passport; US Military ID; Veteran's ID; Tribal Enrollment Card Driver's license or special ID from another state or territory if issued within 90 days	Day before election canvass (6 days, non-general election; 9 days, general election) / Religious Objection
Virginia VA. Code Ann. § 24.2-643(b)	2013 (effective 2014)	Any ID issued by Virginia or one of its political subdivisions or the United States; Virginia-Based Student ID; Virginia Concealed Carry Permit	3 days / No accommodation

The trend of the photo ID laws is disturbing. The 2005 Indiana statute in *Crawford* requires a photo ID issued by the United States or the state of Indiana as proof of identification, it effectively provides a 6-day cure period, and it identifies accommodations for voters who execute an affidavit indicating they are indigent or have a religious objection to being photographed. The 2011 Texas statute, which was struck down in 2014 in *Veasey*, more narrowly identifies specific photo IDs issued by the United States or the state of Texas, and provides a 6-day cure period for presentation of a photo ID so that the voter's provisional ballot may be counted, and identifies accommodations for religious objection and those affected by a natural disaster, but not the indigent. The 2011

Wisconsin statute in question in this case similarly provides a more narrowly identified, specific photo ID list, a 3-day cure period, but offers no indigent, religious objection or other accommodation. The 2013 North Carolina statute, effective in 2016, and the 2013 Virginia statute, effective in 2014, continue this trend. The North Carolina statute identifies specific photo IDs that must be presented, a 6-day (non-general election) or 9-day (general election) cure period, and only a religious accommodation. The Virginia statute allows presentation of any photo ID issued by the United States or the state of Virginia or any of its political subdivisions, but provides a 3-day cure period and no accommodations at all.

In short, more states are passing strict photo ID statutes, and these statutes are becoming more strict by identifying specific photo IDs to be presented, shorter cure periods, and fewer or no accommodations.

The District Court's factual findings in this case show that the Wisconsin statute would have an unconstitutionally and unlawfully adverse impact on minority and low-income voters. The statutes of other states have also been found unconstitutional or unlawful. As pointed out in the following section, the District Court in *Veasey* reached similar factual conclusions concerning the adverse impact of the Texas voter ID law challenged in that case, a law that is quite similar to Act 23.

The impact of photo ID laws such as Act 23 is not isolated to Wisconsin. As the number and scope of state photo ID have increased and, absent controlling guidance from this Court, will increase in the future, the impact on voting in the United States could reach alarming levels (indeed, if the impact is not already alarming).

B. The Adverse Impact of Voter ID Laws is a Nationwide Phenomenon, as Demonstrated by the Striking Similarity of the Factual Findings in the Challenges to the Voter ID Laws of Wisconsin and Texas.

This case is hardly isolated. It is in fact representative of judicial responses to the states' imposition of novel burdens on the right to vote. To illustrate that this case is no outlier, in *Veasey*, the District Court made similarly harsh findings about the Texas voter ID law.

The findings by the District Judge in *Veasey* with respect to the impact of the Texas voter ID law are quite similar to the findings by the District Judge in the case below. The Texas voter ID law was adopted in 2011 and requires voters to produce photo ID when attempting to vote. After an extensive trial (of similar scope and duration to the trial in this case), the District Court in *Veasey* made extensive findings of fact and conclusions of law. The District Court found that the Texas law had a disproportionately adverse impact on African-American, Latino, and low-income voters.

The Wisconsin and Texas statutes examined in this case and in *Veasey* are quite similar. Act 23 requires the voter to produce one of the following IDs to vote in person or absentee: a current or recently expired Wisconsin drivers' license or non-driver photo ID, a tribal ID, a naturalization certificate issued within the preceding two years, a student ID from a Wisconsin college or university, or an unexpired receipt from an application for a drivers' license or non-driver ID. In all cases, the document must contain the voter's picture. The Texas statute (SB 14, which, like Act 23,

was signed into law in 2011) allows for the following forms of photo ID: a Texas drivers' license, personal ID card, state-issued concealed carry license, U.S. military ID, U.S. citizenship certificate, and U.S. passport. If expired, these documents may have expired no more than sixty days before their presentation at the polling place by the voter. As with the Wisconsin statute, each of the forms of identification allowed under the Texas statute must contain the voter's photo. *Veasey*, 2014 WL 5090258, at *8. Indeed, in discussing several court challenges to state voter ID laws, the District Court in *Veasey* noted that "Wisconsin's voter photo ID law is the most similar to SB 14..." *Veasey*, 2014 WL 5090258, at *39.

The District Court in *Veasey* found as a matter of fact that many of the plaintiffs who testified had no need for a photo ID, other than to vote; they did not drive, they did not travel, they did not enter federal buildings (where photo ID is required), and they do business with people in their communities who know them by sight. *Veasey*, 2014 WL 5090258, at *33. In other words, they had no practical need for a photo ID in their daily lives, and the Texas statute created for the first time a requirement that they have such an ID for the purpose of voting. The Court found that more half a million registered voters did not have the requisite photo ID, as compared with the finding of the District Court in this case that over 300,000 Wisconsinites lacked the necessary photo ID. The Texas Court found that 4.5% of that state's eligible voters were subject to disenfranchisement because of the impact of the photo ID requirement. *Veasey*, 2014 WL 5090258, at *25. The impact of the Wisconsin statute is even greater than that of the Texas statute. Fully 9% – twice the percentage affected by the Texas statute – of registered voters in Wisconsin lack the

necessary photo ID and are thus subject to being denied the franchise. *Frank v. Walker*, 17 F.Supp.3d at 854.

The District Court in *Veasey* found the disproportionate impact on minorities to be statistically significant. Indeed, the Court stated that “[t]o call SB 14’s disproportionate impact on minorities statistically significant would be an understatement.” *Veasey*, 2014 WL 5090258, at *49. The Court found that African-American registered voters were 305% more likely than Anglo registered voters to lack the necessary photo ID. If only voting age citizens are considered, that figure “dropped” to a still-alarming 178%. *Veasey*, 2014 WL 5090258, at *24. By comparison, the District Court in this case found that registered African-American voters were 70% less likely than white registered voters to have a drivers’ license or state-issued ID in 2012, and 40% less likely in 2013. Latinos who were registered to vote were 250% less likely than white registered voters to possess either of these pieces of identification. *Frank v. Walker*, 17 F.Supp.3d at 871.

The Petitioners are challenging a statute that applies only in Wisconsin. However, as the findings by the District Court in *Veasey* show, the facts proved by the record in this case are representative of an increasing nationwide burden on the franchise that courts around the country are now being asked to adjudicate, but without sufficient guidance. The impacts of statutes such as Act 23 have been felt in many states. This fact again shows why the Court should grant a writ of certiorari to provide guidance to the states in the drafting of these laws, so that existing adverse impact on voter classifications protected by the Equal Protection Clause and Section 2 of the

Voting Rights Act will be reduced and, in time, eliminated.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the Court should grant the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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