No. 14-803

In The

Supreme Court of the United States

RUTHELLE FRANK, *et al*.,

Petitioners,

v.

SCOTT WALKER,
GOVERNOR OF WISCONSIN, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON INDEPENDENT LIVING IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST[1]

The National Council on Independent Living (NCIL) has advocated for civil rights and genuine independent living for people with disabilities for over thirty years. NCIL advances independent living and the rights of people with disabilities. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

There are at least 35 million voting-age people with disabilities in the United States, representing 1 out of 7 voting-age people, and that number is likely to grow with the aging of the population. Lisa Schur et al., *Disability, Voter Turnout and Voting Difficulties in the 2012 Elections*, Rutgers U., http://smlr.rutgers.edu/disability-and-voting-survey-report-2012-elections (visited on February 1, 2015). While voting by persons with disabilities has increased in recent elections, people with disabilities continue to face barriers to exercising their franchise. U.S. Gov't Accountability Office, GAO-09-941, *Voters with Disabilities: Additional Monitoring of Polling Places Could Further Improve Accessibility* (2009). At the same time that some physical obstacles are being

[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel of record represents that this brief was not authored in whole or in part by counsel for any party. Counsel of record timely notified the parties of its intent to file this brief. *Amicus* has borne its own expenses, without support from any party.

overcome, the imposition of voter identification law requirements can have a significant adverse impact on the elderly and people with disabilities, denying or abridging their right to vote.

SUMMARY OF ARGUMENT

The right to vote is fundamental to our system of governance. Stringent voter identification laws like Wisconsin's Act 23 restrict that right, and thus raise issues of great national importance. States across the country have enacted increasingly strict ID laws, making it significantly harder for groups like individuals with disabilities and the elderly to vote. Wisconsin's law is particularly onerous, excluding the safeguards for the indigent and disabled that were present in the Indiana law upheld by this Court in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Furthermore, Petitioners' challenge to the Wisconsin voter ID law raises an additional ground not presented in *Crawford* – namely, application of Section 2 of the Voting Rights Act – a theory not previously addressed by this Court. Finally, this case offers the Court a timely and optimal opportunity to review these important national issues, with a fully developed record arriving at the Court well before any imminent election.

ARGUMENT

THE LEGALITY OF STRINGENT VOTER IDENTIFICATION LAWS IS OF GREAT NATIONAL IMPORTANCE

A. Strict Voter ID Laws Like Wisconsin's Act 23 Abridge the Voting Rights of People With Disabilities

The right to vote is a "fundamental political right, [ ] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Congress has attempted to secure that right for persons with disabilities and for the elderly through a variety of laws, including the Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435 (1984) (codified at 42 U.S.C. §§ 1973ee-1973ee-6) and the Help America Vote Act, Pub. L. No. 107-252 (2002) (codified at 42 U.S.C. §§ 15301-15545). However, stringent state voter identification laws, such as the Wisconsin statute at issue here, imperil the rights of these voters.

A total of 34 states have enacted laws requiring voters to show some form of identification at the polls, most of which are in effect. Nat'l Conf. of State Legislatures, *Voter ID Requirements: Voter ID Laws*, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Variation (visited on February 1, 2015). These laws can be categorized in two ways. First, some laws require a photo ID, while others do not. Second, states differ as to what alternatives might be available for those without the required form of ID.

Of the latter, some states permit voters to cast their votes without the specified identification, *i.e.,* the "non-strict" states. In other states (the "strict states"), voters without the required form of identification may cast a provisional ballot, but they must then take prescribed actions within a short period of time in order for the vote to count. *Id.*

The requirements in strict states frequently pose a significant barrier to voting by the elderly and persons with disabilities because it is difficult for them to satisfy the necessary prerequisites for their vote to count. For example, people with disabilities in Wisconsin have a voting rate 8.2 percent lower than the general population, Schur et al., *Disability, Voter Turnout and Voting Difficulties in the 2012 Elections*; and the district court calculated that 9% of the state's registered voters – more than 300,000 people – lack valid qualifying ID. *Frank v. Walker*, No. 11-CV-01128, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014). For many, issues of mobility make travel to distant DMV offices extremely burdensome. Compounding that, DMV offices in Wisconsin have limited hours of operation making access all the more difficult. *See Frank v. Walker*, 768 F.3d 744, 746 (7th Cir. 2014).

Thus, the Wisconsin statute imposes severe requirements, as do other strict states.

B. The Supreme Court's Decision in *Crawford* Is Not Controlling

In 2008, this Court upheld Indiana's photo identification requirement, one of the first of its kind. *Crawford*, 553 U.S. 181. At that time, only one other state – Georgia – had a similar law. In the seven years since *Crawford*, seventeen states have enacted voter identification laws, eight of which are of the "strict" variety, lacking the safeguards that saved the Indiana statute at issue in *Crawford*.

Wisconsin's Act 23 at issue here is among the nation's strictest ID laws, making it materially different from the Indiana statute upheld in *Crawford*. Of great significance to the *amicus*, the law imposes a far greater burden on the elderly and disabled because, unlike the Indiana statute, it does not permit many of those who cannot obtain the required photo ID to vote by absentee ballot instead. As Judge Posner observed:

> "[In Indiana,] many people who might find it difficult to obtain photo identification can vote absentee and are therefore excused from having to present a photo ID. Wisconsin, in contrast, requires absentee voters to submit a photo ID the first time they request an absentee ballot, and in subsequent elections as well if they change their address or are required to re-register to vote, or if they change their name, as many women still do upon marrying."

Frank v. Walker, 773 F.3d 783, 785 (7th Cir. 2014) (Posner, J., dissenting). Those disabled or elderly voters who *are* permitted to vote by absentee ballot without producing a qualifying ID under the Wisconsin statute, may do so *only* if they are indefinitely confined to their homes or care facilities. *Frank*, No. 11-CV-01128, 2014 WL 1775432, at *844; Wis. Stat. §§ 6.86(2), 6.875 ("In lieu of providing a copy of proof of identification . . . with his or her absentee ballot, the elector [confined to a qualified retirement home or residential care facility] may submit with his or her ballot a statement signed by both deputies that contains the name and address of the elector and verifies that the name and address are correct.").

Thus, many individuals with disabilities who live independently will neither be able to obtain a qualifying ID – because they find it impossible or daunting to appear at a DMV to secure a qualifying ID – nor vote by absentee ballot. The provisions of Act 23 are thus particularly onerous for individuals with disabilities, threatening to further depress voter turnout among an electoral cohort that already faces significant barriers to full political participation. *See* U.S. Gov't Accountability Office, GAO-09-941, *Voters with Disabilities: Additional Monitoring of Polling Places Could Further Improve Accessibility* (2009).

Moreover, under the Wisconsin statute, otherwise eligible voters who lack a qualifying form of identification may cast a provisional ballot that will be counted *only* if they presented a qualifying ID to the municipal clerk within *three* days of the election. Wis.

Stat. §§ 6.97(3)(a), (b). By contrast, the Indiana statute also permitted a voter lacking the required identification to cast a provisional ballot, but there, all the voter had to do to have her vote counted was to execute an affidavit attesting that indigence prevented her from obtaining the required ID. Ind. Code Ann. § 3-11.7-5-2.5(c). In upholding the Indiana law's constitutionality, the Court recognized this alternative as mitigating an otherwise harsh result:

> "The severity of [the] burden [of obtaining a photo ID] is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted[ ] [if] they . . . travel to the circuit court clerk's office within 10 days to execute the required affidavit."

Crawford, 553 U.S. at 199. Wisconsin's law, however, makes no similar accommodation for voters whose indigence prevents them from obtaining a qualifying ID. Act 23 thus places a heavy burden on the indigent and other disadvantaged voters who face difficult barriers to obtaining a qualifying photo ID.

Apart from the material differences in the statutes, the challenge in *Crawford* was based on narrower legal grounds than raised by Petitioners. In *Crawford*, petitioners there relied solely upon their right to equal protection, as applied, under the Fourteenth Amendment. *Crawford,* 553 U.S. 181. Here, Petitioners also invoke their rights under Section 2 of the Voting Rights Act ("VRA"). *See Frank*, 768 F.3d at 753. Under this statute "[a] violation is established if,

based on the totality of the circumstances, it is shown that the political processes leading to . . . election in the State . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process. . . .” 52 U.S.C. §10301(b) (emphasis supplied). This Court has not addressed the application of Section 2 of the VRA in a vote-denial or abridgment context (rather than in a vote dilution context, such as in cases challenging redistricting plans). Yet in the wake of this Court’s decision in *Shelby Cnty., Ala. v. Holder,* 133 S. Ct. 2612 (2013), litigants are increasingly challenging restrictive voter ID laws under Section 2 of the VRA. Courts have wrestled with how to review these claims, applying a test originally fashioned for vote dilution cases to voter ID litigants’ vote denial or abridgment claims. *See, e.g., Frank*, No. 11-CV-01128, 2014 WL at *23 (finding that the court “cannot resolve [voter ID cases] by applying the legal standards developed for vote-dilution cases”); *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258, at *50 (S.D. Tex. Oct. 9, 2014) (determining that the Section 2 “factors were designed with redistricting and vote-dilution in mind . . . [but] multiple courts have expressly found these factors to be relevant to vote denial cases as well”) (citing cases).

Thus, the provisions of the Indiana and Wisconsin statutes and their impacts, and the legal grounds for challenging the respective statutes, are substantively dissimilar, and *Crawford* is not controlling.

C. This Case Offers a Timely and Optimal Opportunity to Determine These Important Issues

The record in this case is robust. The district court decision followed a two-week trial, at which 43 fact witnesses and six expert witnesses testified. The court's 90-page decision makes detailed factual findings that addresses many issues left unanswered by *Crawford*. Moreover, the appellate record also makes this a compelling case for this Court to consider. The competing opinions of Judges Easterbrook and Posner ably frame the various legal arguments; and, twice, the Seventh Circuit itself denied rehearing *en banc* by a 5-5 vote.

Moreover, this case stands in contrast to a number of cases that arrived at this Court on the eve of elections as emergency motions. In *Veasey v. Perry*, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014), the district court enjoined enforcement of the Texas photo ID law. The Fifth Circuit stayed the district court's injunction on October 14, 2014. *Veasey v. Perry*, No. 14-41127, slip op. (5th Cir. Oct. 14, 2014). On October 18, 2014, this Court rejected an emergency appeal. In *North Carolina State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 377 (M.D.N.C. Aug. 8, 2014), the district court denied plaintiff's motion for a preliminary injunction seeking to enjoin enforcement of North Carolina's photo ID law. The Fourth Circuit affirmed the district court, but remanded the case, ruling that certain other provisions of the voting law might violate § 2 of the

VRA. *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). The district court then enjoined enforcement of these provisions – but, on emergency appeal by North Carolina, this Court vacated that injunction on October 8, 2014. *N. Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 6 (2014).

Hearing such challenges on the eve of hotly contested elections necessarily creates confusion in various states as to whether recently-enacted ID laws were in effect, and what requirements a voter needed to satisfy to cast a valid ballot. State legislatures, as well as state and lower federal courts, would undoubtedly benefit from timely guidance from this Court. The granting of a writ of certiorari in this case by the Court would provide an opportunity for such guidance well in advance of the next election.[2]

Thus, the instant case's robust record and timeliness make this case an excellent vehicle for this Court to consider the important issues raised by strict ID laws.

[2] In addition to challenges to voter ID laws in federal courts, state courts have been presented with challenges based upon state laws. *See, e.g., Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014); *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

CONCLUSION

For the reasons stated here and those stated in Petitioners' Brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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