

No. 14-41127

In the United States Court of Appeals for the Fifth Circuit

MARC VEASEY; JANE HAMILTON; SERGIO DELEON; FLOYD CARRIER; ANNA BURNS; MICHAEL MONTEZ; PENNY POPE; OSCAR ORTIZ; KOBY OZIAS; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JOHN MELLOR-CRUMLEY,
Plaintiffs-Appellees,
TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, Intervenor Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas; TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND; IMANI CLARK,
Intervenor Plaintiffs-Appellees,

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

TEXAS STATE CONFERENCE OF NAACP BRANCHES; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, Plaintiffs-Appellees,

v.

TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

LENARD TAYLOR; EULALIO MENDEZ, JR.; LIONEL ESTRADA; ESTELA GARCIA ESPINOSA; MARGARITO MARTINEZ LARA; MAXIMINA MARTINEZ LARA; LA UNION DEL PUEBLO ENTERO, INCORPORATED, Plaintiffs-Appellees,

v.

STATE OF TEXAS; TEXAS SECRETARY OF STATE; STEVE MCCRAW, in his Official Capacity as Director of the Texas Department of Public Safety, Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Texas, Corpus Christi Division, Nos. 2:13-cv-193, 2:13-cv-263, 2:13-cv-291, and 2:13-cv-348.

**BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF TEXAS IN
SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE**

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amici curiae* provide this supplemental statement of interested persons in order to fully disclose all those with an interest in this brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amici curiae certify that they are 501(c)(3) nonprofit corporations. None of the *amici* has a corporate parent or is owned in whole or in part by any publicly held corporation.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (“ACLU”) is a nationwide, nonpartisan organization of nearly 500,000 members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation’s civil rights laws. The American Civil Liberties Union of Texas is a state affiliate of the national ACLU, with thousands of members across the state.

The ACLU Voting Rights Project has litigated more than 300 voting rights cases since 1965. These include several voting rights cases before this Court in which the ACLU served as party’s counsel or as an *amicus*, including *Young v. Hosemann*, 598 F.3d 184 (5th Cir. 2010), *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999), *Wilson v. Mayor of St. Francisville, La.*, 135 F.3d 996 (5th Cir. 1998), *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989), *Corder v. Kirksey*, 639 F.2d 1191 (5th Cir. 1981), *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), and *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978).

Amici have a significant interest in the outcome of this case and in other cases across the country concerning laws that require voters to present certain forms of photo identification in order to exercise their fundamental right to vote. These laws unreasonably and disproportionately burden low-income, African-American, and Latino voters who do not possess any of the limited forms of photo

ID prescribed by these laws and face difficulties obtaining them—difficulties that most Americans have never had to face to exercise their fundamental right to vote. The ACLU and its affiliates are currently representing plaintiffs challenging similar voter ID laws in Wisconsin and North Carolina. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (petition for writ of certiorari pending), *League of Women Voters of N.C. v. North Carolina*, Nos. 1:13CV658, 1:13CV660, 1:13CV861 (M.D.N.C. 2013) (scheduled for trial this summer). The ACLU and/or its affiliates have also litigated challenges to voter ID laws throughout the country, including in Arkansas, Pennsylvania, Texas, South Carolina, Georgia, and Indiana. *See Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014); *Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Counsel for all parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

In defending its strict voter ID law, the state of Texas relies heavily upon *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), a case in which the ACLU represents the plaintiffs. Citing *Frank*, Texas asks this Court to replace the district court's careful findings and grounded analysis with unsupported speculation and novel legal reasoning. *See, e.g.*, Appellants' Br. at 18, 19, 27, 31, 32, 33, 35, 36. As Judge Posner's devastating critique of the panel decision explains, *see Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc), *Frank* is a controversial decision with which half of the Seventh Circuit's active judges disagreed. The *Frank* panel misapplied the relevant balancing test and misread the plain text of the Voting Rights Act. As plaintiffs' counsel in *Frank*, the ACLU submits this brief to explain why this Court should reject Texas's request to repeat the Seventh Circuit's mistakes and should affirm the decision below.

BACKGROUND

The *Frank* decision, on which Texas heavily relies in this appeal, involved a challenge to Wisconsin's voter ID law. Like Texas, Wisconsin has one of the strictest voter ID laws in the nation. Wisconsin's voter ID law ("Act 23") requires voters to produce one of a few specified forms of photo identification to vote, Wis.

Stat. §§ 6.15(3), 6.79(2), 6.79(3)(b).¹ Many common forms of photo and non-photo identification are unacceptable under Act 23, such as county IDs, employee IDs, utility bills, government benefit checks, and library cards. As in Texas, no exceptions are provided to allow voters who lack ID to vote in person, such as the option to vote with an affidavit of identity. And, as in Texas, voters without a qualifying photo ID can obtain one only if they produce other records—typically including a certified birth certificate. Wis. Admin. Code Transp. § 102.15; ROA.27094-27095.²

Several Wisconsin voters challenged Act 23 as a violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act. 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. In a 90-page decision, the district court permanently enjoined Act 23. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014) (“*Frank I*”). The court found that “approximately 300,000

¹ Under Act 23, the only acceptable IDs are a current or recently expired Wisconsin driver’s license or non-driver photo ID, military ID, or U.S. passport; a tribal ID from a federally recognized American 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 driver’s license or non-driver ID application. Wis. Stat. § 5.02(6m).

² Texas quibbles over whether SB 14 is stricter than Wisconsin’s law, noting that unlike SB 14, Wisconsin’s law also requires photo ID for absentee voting. *See* Appellants’ Br. at 27. But Texas fails to mention that SB 14 rejects two types of photo ID that are acceptable under Wisconsin’s law: student IDs and tribal IDs. When it comes to deciding which state has the strictest voter ID law, Texas and Wisconsin run neck-and-neck.

registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID” under Act 23. *Id.* at 854. The court further found that while some registered voters might obtain acceptable IDs with sufficient (sometimes “tenacious”) efforts, many others could not. *Id.* at 853-62 & n.17. Many witnesses undertook arduous, and often unsuccessful, efforts to obtain ID for themselves, family members, or neighbors. *Id.* The court found that Act 23 was unjustifiable given such heavy burdens, and that “it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes.” *Id.* at 862. The court also reached the “inescapable” conclusion that Act 23 would “disproportionately” burden and disenfranchise African-American and Latino voters in Wisconsin. *Id.* at 862-63, 874. It further 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 878. The state appealed.

On October 6, 2014, a panel of the Seventh Circuit reversed. The panel held that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the Supreme Court upheld Indiana’s less-restrictive voter ID law based on a limited factual record, “requires us to reject a constitutional challenge to Wisconsin’s statute.” *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) (“*Frank II*” or “*Frank*”) (emphasis added). The panel acknowledged that

“Wisconsin’s law differs from Indiana’s law,” and that the evidentiary record in the case differs from the record in *Crawford*. *Frank II*, 768 F.3d at 746. But the panel concluded that none of those differences warranted a different result. With respect to the Section 2 claim, the panel recognized that the district court found “a disparate outcome”—that is, Act 23 disproportionately burdens African Americans and Latinos seeking to exercise the franchise. *Id.* at 753. The panel concluded, however, that this disparate outcome “do[es] not show a ‘denial’ of anything by Wisconsin, as § 2(a) [of the Voting Rights Act] requires; unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter.” *Id.*

Judge Posner immediately and *sua sponte* called a vote for rehearing en banc. The court denied rehearing by an equally divided vote (5-5). *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (“*Frank III*”). In dissent, Judge Posner penned a scathing critique of every aspect of the panel’s opinion, which he called a “serious mistake.” *Id.* at 783 (Posner, J., dissenting). The dissent found this case to be “importantly dissimilar” to *Crawford*, which Judge Posner himself authored on behalf of the Seventh Circuit in 2007. *Id.* at 784. Judge Posner concluded that “the case against a law requiring a photo ID . . . as strict as Wisconsin’s law 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 797. The Supreme

Court subsequently blocked Act 23 from going into effect for the November 2014 election, *see Frank v. Walker*, 135 S. Ct. 7 (2014), and the Seventh Circuit immediately stayed the issuance of a mandate shortly thereafter, *see Order, Frank v. Walker*, Nos. 14-2058, 14-2059 (7th Cir. Oct. 15, 2014), ECF No. 79. Plaintiffs filed a petition for a writ of certiorari on January 7, 2015, which is now pending.

ARGUMENT

Texas asks this Court to accept three propositions from *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (“*Frank II*” or “*Frank*”): 1) voter ID laws do not burden voters, because most already have one, and others supposedly can get one easily, *see* Appellants’ Br. at 18; 2) voter ID laws always legitimately serve the state’s interests in preventing voter fraud, no matter how many voters they disenfranchise, *see id.* at 19; and 3) voter ID laws do not cause minorities without ID to be unable to vote, *see id.* at 31-33. *Frank*, however, is riddled with egregious factual and legal errors. Texas’s reliance upon it is misplaced, and this Court should decline Texas’s invitation to make *Frank*’s errors binding in this Circuit.

I. TEXAS RELIES ON *FRANK* TO ARTIFICIALLY MINIMIZE THE BURDENS OF OBTAINING ID

In attempting to defend SB 14, Texas relies upon *Frank*’s misapplication of the *Anderson-Burdick* framework. Under *Anderson-Burdick*, courts must balance the “character” and “magnitude” of the burdens imposed on voting against “the precise interests put forward by the State as justifications for the burden imposed

by its rule.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190-91 (2008).

In addressing the first step in the *Anderson-Burdick* balancing test, Texas relies upon *Frank* to argue that the burdens imposed by its ID law are insignificant, suggesting that obtaining photo ID is universally easy and asserting that people who do not have such IDs simply choose not to get them. See Appellants’ Br. at 18 (proclaiming that voter ID laws do not “deny or abridge the right to vote for persons who *choose* not to incur these costs” (citing *Frank II*, 768 F.3d at 748) (emphasis added)); *Frank II*, 768 F.3d at 748 (photo ID is available to anyone “willing to scrounge up a birth certificate and stand in line at the office that issues drivers’ licenses”). The *Frank* panel believed that any willing voter can get an ID without difficulty because, in its view: almost everyone has a photo ID already anyway; there was no evidence of voters trying but failing to get ID; the best explanation for why some voters don’t have ID is that they don’t want to vote; and there was no evidence in the record that voter ID laws suppress turnout. These assumptions, however, were premised on several egregious factual errors. This Court should reject Texas’s attempt to leverage the *Frank* decision in this appeal.

A. *Frank* Erroneously Speculated That All Low-Income People Must Have Photo ID

As a preliminary matter, *Frank* suggested that obtaining photo ID must not be difficult because everyone must already have ID anyway. Piggybacking on this false assumption, Texas in turn suggests that any racial disparity in photo ID ownership is insignificant since the total number of people without ID must be tiny. *See* Appellants' Br. at 35-36 (citing *Frank II*, 768 F.3d at 752 n.3).

This myth that everyone has photo ID, given life by *Frank* and now perpetuated by Texas, is premised on several erroneous assumptions. For instance, the *Frank* panel simply could not believe the district court's factual finding that 300,000 registered Wisconsin voters lack ID because "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." *Frank II*, 768 F.3d at 748. But the *Frank* panel was wrong on every count: photo ID is *not* required to do any of these things.

- According to the U.S. Transportation Security Administration ("TSA"), fliers do not need a photo ID to board an airplane, because the TSA has "other ways to confirm [] identity."³
- According to the State of Wisconsin Department of Revenue, not everyone is required to show photo ID to purchase alcohol, only those

³ U.S. Transportation Security Administration, *Acceptable IDs: Identity Matters*, <http://www.tsa.gov/traveler-information/acceptable-ids>.

who “appear[] to be under the legal drinking age.”⁴ Similarly, “Texas state law does not require that a person over 21 provide any identification to purchase alcohol in Texas,” and “[t]here is nothing in the law that declares specific forms of ID as ‘valid’ for an alcohol purchase.”⁵

- According to the Centers for Disease Control and Prevention, patients do not necessarily need a photo ID to pick up a prescription in 35 states, including Wisconsin and Texas.⁶
- According to the U.S. Department of the Treasury, bank customers do not need a photo ID to open a bank account.⁷
- According to the U.S. Department of Justice, gun owners do not need a photo ID to buy a gun.⁸
- During the trial in *Frank* itself, witnesses who lacked acceptable forms of photo ID were all able to enter and testify live in the Eastern District of Wisconsin federal courthouse.⁹

⁴ Wisconsin Department of Revenue, *Wisconsin Alcohol Beverage and Tobacco Laws for Retailers*, at 7, <http://www.dor.state.wi.us/pubs/pb302.pdf> (citing Wis. Stat. § 125.07(7)).

⁵ Texas Alcoholic Beverage Commission, *Age Verification / Checking IDs*, https://www.tabc.state.tx.us/enforcement/age_verification.asp.

⁶ Centers for Disease Control and Prevention, *Law: Requiring Patient Identification Before Dispensing*, http://www.cdc.gov/homeandrecreationalafety/Poisoning/laws/id_req.html. In Texas, identification is only potentially required if the prescription is for a controlled substance, and exceptions are made for patients personally known to the pharmacist or the pharmacist’s employees, and for emergency situations. Tex. Health & Safety Code Ann. §§ 481.074(a)(5), (n).

⁷ U.S. Department 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 number” is sufficient to open a bank account; the bank may verify the information without photo ID).

⁸ U.S. Department 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.”).

⁹ The same appears to have been the case in the Southern District of Texas federal courthouse. See ROA.27092 (identifying nine plaintiffs who lacked SB 14 ID); Veasey-LULAC Appellees’

Accord Frank v. Walker, 773 F.3d 783, 792-93 (7th Cir. 2014) (“*Frank III*”) (Posner, J., dissenting).

More troubling, the *Frank* panel’s attitude reflected an obliviousness to the day-to-day realities facing low-income people, who do not routinely fly on airplanes, open bank accounts, have credit cards, or travel to other states to watch appellate oral arguments. This was clear in both the Wisconsin and the Texas trials. *See, e.g., Frank v. Walker*, 17 F. Supp. 3d 837, 853 (E.D. Wis. 2014) (“*Frank I*”) (“[T]he daily lives of many of these individuals are such that they have not had to obtain a photo ID for purposes such as driving . . .”); ROA.27106 (“Other than for voting, many of the Plaintiffs in this case do not need a photo ID to navigate their lives. They do not drive (many do not own a car), they do not travel (much less by plane), they do not enter federal buildings, and checks they cash are cashed by businesspeople who know them in their communities.”).

To the extent that low-income voters do need *some* forms of ID in their daily lives, Wisconsin’s Act 23 and Texas’s SB 14 arbitrarily exclude such IDs for the purposes of voting. During the Wisconsin trial, for instance, witnesses testified to relying on Medicaid cards to obtain health benefits, Tr. 40-41,¹⁰ 87, 558; out-of-state photo ID to sign up for FoodShare benefits, Tr. 53-54; a debit card to access

Br. at 21 (“Many plaintiffs testified about the prohibitive barriers they faced when attempting to acquire S.B. 14 ID.”).

¹⁰ Excerpts from the Wisconsin trial transcript are attached as Exhibit A to this brief.

Social Security benefits, Tr. 702-03; a Wisconsin QUEST card to obtain monthly benefits, Tr. 854-55; and county IDs for general identification purposes, Tr. 1615. None of these forms of ID are acceptable for voting under Act 23 (or SB 14).

Act 23 and SB 14 represent the first time these witnesses, and others like them, were forced to locate inaccessible documents and contend with unfamiliar bureaucracies just to continue doing something they have done for years: exercising their fundamental right to vote. *See, e.g.*, Tr. 44 (“[A]ll I know is that you had to have an ID to vote. And I didn’t understand that because I had never had to have an ID before.”). The record in both *Frank* and in this case refute any suggestion that the number of people without acceptable forms of voter ID is necessarily small; this Court should likewise reject that contention.

B. *Frank* Erroneously Claimed That No Witnesses Testified About Their Failed Attempts to Obtain ID

The *Frank* panel also minimized the difficulty that low-income voters face in attempting to obtain the necessary ID. The panel asserted that “[s]ix [witnesses] testified that the state would not issue photo IDs because they lack birth certificates, but they did not testify that they had tried to get them, let alone that they had tried but failed.” *Frank II*, 768 F.3d at 746-47. This is demonstrably false. *All six* witnesses testified about their Sisyphean efforts to obtain a valid birth certificate. One plaintiff spent \$180 on a bus trip to Illinois to fix his birth certificate, but failed after multiple tries. Tr. 46-51. Another witness was told to

locate 80-year-old elementary school records. Tr. 401-02. Three witnesses sent birth certificate request forms to their state of birth, but their respective states could not find them. Tr. 37-38, 214-17, 700-05. The last witness made three failed attempts to obtain ID, and died before trial without ever obtaining ID. Wilde Dep., July 30, 2012,¹¹ at 9-15; *see Frank I*, 17 F. Supp. 3d at 854-55 (discussing the above testimony); *Frank III*, 773 F.3d at 796 (Posner, J., dissenting). These were not isolated cases. The district court found that over 20,000 voters without photo ID in Milwaukee County alone lack birth certificates or other underlying documents. *Frank I*, 17 F. Supp. 3d at 856 n.15, 860 n.18. One volunteer testified that he was unable to obtain birth certificates for close to 170 people. Tr. 532. And both elections officials and DMV employees testified that they routinely encountered such voters. Tr. 1161, 1668-69, 1675-76.

Similarly, several witnesses testified at trial in this case about the “varied bureaucratic and economic burdens associated with purchasing a proper birth certificate” in Texas. ROA.27096. This kind of testimony was precisely what the Supreme Court plurality found was lacking in *Crawford*. *See Crawford*, 553 U.S. at 201 (witnesses did “not indicate[] how difficult it would be for them to obtain a

¹¹ An excerpt from Nancy L. Wilde’s deposition transcript (*Frank* Trial Ex. 607) is attached as Exhibit B to this brief.

birth certificate”). This Court should not repeat *Frank*’s mistake of underestimating the burdens of compiling the records needed to obtain photo ID.

C. *Frank* Erroneously Suggested That Voters Without ID Do Not Want to Vote

The *Frank* panel speculated—as Texas asks this Court to do—that people without photo ID have not bothered to obtain one because they do not want to vote anyway. *See Frank II*, 768 F.3d at 749; Appellants’ Br. at 18. To reach this unsupported (and insulting) conclusion, the panel relied on an equally unsupported chain of reasoning. The panel first observed that 78% of eligible Wisconsin voters have registered to vote. *Frank II*, 768 F.3d at 748. The panel then concluded, “if 22% of the eligible population does not perform even the easiest step, registration, it is difficult to infer from the fact that 9% have not acquired photo ID that that step is particularly difficult. A more plausible inference would be that *people who do not plan to vote also do not go out of their way to get a photo ID* that would have no other use to them.” *Id.* at 749 (emphasis added).¹²

As Judge Posner points out, the *Frank* panel’s convoluted argument is illogical on its face. The record at trial showed that 9% of *registered*, and thus presumably motivated, voters lack photo ID and must now face the additional barrier of having to obtain ID in order to vote. *See Frank III*, 773 F.3d at 796-97

¹² Of course, it is odd that the panel here acknowledges that photo ID is of “no other use” for many Wisconsinites, so soon after asserting that everyone needs photo ID to function in their everyday life.

(Posner, J., dissenting). In this case, the court below similarly found that 4.5% of *registered* voters in Texas lack qualifying ID. ROA.27075. These Texans took the affirmative step of registering to vote, and most did so well before the voter ID laws went into effect,¹³ unaware that they must now jump through additional hoops just to vote. On this record, it is impossible to conclude, as *Frank* erroneously does, that people who lack photo IDs can be disregarded because they do not want to vote.¹⁴

D. *Frank* Erroneously Claimed That The Record Was Silent On Whether Voter ID Suppresses Turnout

Lastly, Texas relies on the *Frank* panel’s suggestion that the burden of strict photo voter ID laws is minimal because “[t]he record . . . does not reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting.” *Frank II*, 768 F.3d at 747; *see* Appellants’ Br. at 33. But the *Frank* panel was wrong again. Wisconsin’s *own expert*, who studied Georgia’s voter ID law, conceded that the law suppressed turnout in Georgia to the tune of about 20,000 voters. Tr. 1474-75. He even conceded, “as a matter of [his] professional

¹³ *See generally* Texas Secretary of State, *Turnout and Voter Registration Figures (1970-current)*, <http://www.sos.state.tx.us/elections/historical/70-92.shtml> (over 12 million Texans registered to vote before 2012, when voter ID law went into effect).

¹⁴ Furthermore, under *Frank*’s misguided logic, if a voting restriction affects fewer people than the number of people who choose not to register to vote, then that restriction is immune from challenge. That cannot be the law. It is likely that fewer than 22% of the population would be disenfranchised by the \$1.50 poll tax ruled unconstitutional in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), but that fact would not sustain the poll tax’s constitutionality.

opinion,” that “the Wisconsin voter ID law, if given effect, is likely to suppress voter turnout in the State of Wisconsin.” Tr. 1477. The same expert was employed by Texas, and he again conceded this point before the court below. *See* ROA.27067-27070. 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.¹⁵ *Frank*’s speculation that voter ID laws have no impact on turnout is simply incorrect, and Texas’s reliance on that speculation should be disregarded.

II. TEXAS RELIES ON *FRANK* TO BUTTRESS BASELESS JUSTIFICATIONS FOR VOTER ID

Next, Texas turns to *Frank* to help bolster its attempts to justify SB 14 on the justification end of the *Anderson-Burdick* scale. Texas initially suggests that a state is always allowed to disenfranchise as many voters as it wants to in the name of “preventing voter fraud” and “promoting voter confidence,” regardless of how little evidence there is to support that justification. *See* Appellants’ Br. at 18-19. But perhaps in recognition of just how far a stretch that proposition is, Texas also picks up another justification from *Frank*, arguing that voter ID laws also prevent minors from voting illegally. *See id.* at 19 n.6 (citing *Frank II*, 768 F.3d at 750).

¹⁵ *See* Government Accountability Office, *Elections: Issues Related to State Voter Identification Laws*, Report No. GAO-14-634 (Sept. 2014), <http://www.gao.gov/assets/670/665966.pdf>.

This reliance is again misplaced. Wisconsin presented no evidence of minors attempting to vote; nor has Texas, for that matter. Further, in both Wisconsin and Texas, poll workers are not required to check the voter's age. *See* Wis. Stat. § 6.15(3); Tex. Elec. Code Ann. § 63.001.

This Court should likewise disregard *Frank's* other attempts to construct a state interest that can justify the disenfranchisement of thousands of voters. The panel suggested that Act 23 might “promote[] accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct).” *Frank II*, 768 F.3d at 750. But Act 23 has nothing to do with voting in the correct precinct. In both Wisconsin and Texas, poll workers are not required to match the address on a voter's ID with the voter registration address, *see* Wis. Stat. § 6.79(2)(a); Tr. 867; Tex. Elec. Code Ann. § 63.001, likely because the address listed on a person's ID often does not reflect where the person currently lives. Nor is there any basis for *Frank's* suggestion that voter ID can prevent non-citizens from voting, since state-issued IDs are available to non-citizens in both states. Wis. Admin. Code Transp. § 102.15(3m); ROA.27066. The panel's unconvincing attempts to help Wisconsin find new *ad hoc* reasons to justify voter ID laws only highlight the lack of a legitimate reason to disenfranchise thousands of voters through these laws.

III. TEXAS RELIES ON *FRANK*'S MISINTERPRETATION OF SECTION 2 OF THE VOTING RIGHTS ACT

Texas then relies on *Frank* to defend SB 14 under Section 2 of the Voting Rights Act, arguing that voter ID laws do not run afoul of the statute because they do not “cause” minorities without ID to be unable to vote. *See* Appellants’ Br. at 30-33.

Texas points to two other “causes.” Texas first argues that it is not the voter ID law that “causes” minorities to face difficulties voting, but minority voters’ own laziness, repeating *Frank*’s claim that a person’s lack of ID “reflect[s] a decision not to vote.” *Id.* at 33 (citing *Frank II*, 768 F.3d at 748). As discussed above in Part I.C., that argument is as wrong as it is insulting.

Next, Texas blames the Department of Public Safety (“DPS”), arguing that it is DPS’s byzantine and discretionary documentary requirements, rather than the voter ID law itself, that “causes” impediments to voting. Appellants’ Br. at 33 (asserting that “any disparity caused by needing a birth certificate to get a free voter ID was not caused by SB 14 or the Texas Legislature,” but by DPS). But under that reasoning, it was not literacy tests that “caused” a disproportionate number of African-Americans to be unable to vote before the passage of the Voting Rights Act, but the education system’s failure to teach people how to read.

Nothing in Section 2 requires that a challenged practice be the *sole* cause of disenfranchisement. To the contrary, the Supreme Court has explained that voting

practices are unlawful where they “interact[] with social and historical conditions to *cause* an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added). Under that standard, the question whether Texas’s voter ID law “causes” a discriminatory result under Section 2 is not complicated. Minorities in Texas have long suffered from a history and ongoing pattern of discrimination, and they are significantly more likely to lack photo ID and the documents needed to obtain them. *See* ROA.27028-27034, ROA.27084-27091, ROA.27146-27151. Against that backdrop, there is no question that Texas’s voter ID law causes minority voters to have less access to the political process than their white counterparts. As the *Frank* authoring judge himself acknowledged at oral argument, “It’s not a question of showing causation. If you don’t have a photo ID, you’re not going to be able to vote.”¹⁶

Texas’s extensive reliance on *Frank* for its Section 2 analysis should also be rejected because *Frank*’s radical interpretation of Section 2 misconstrues the standard for liability in several respects.

First, the Seventh Circuit panel erroneously held that Act 23 does not constitute “a ‘denial’ of anything by Wisconsin, as § 2(a) requires.” *Frank II*, 768 F.3d at 753. But that characterization of the law ignores the text of Section 2,

¹⁶ Oral Argument at 16:08-16:16, *Frank II*, 678 F.3d 744 (7th Cir. 2014) (Nos. 14-2058, 14-2059), http://media.ca7.uscourts.gov/sound/2014/rt.14-2058.14-2058_09_12_2014.mp3.

which prohibits not only “denial,” but also “abridgment” of the right to vote. 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).¹⁷ As Justice Thomas has explained, 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, *Frank* erroneously held that minorities do not have “less opportunity,” 52 U.S.C. § 10301(b), to vote if a law on its face treats members of different races equally, *Frank II*, 768 F.3d at 754-55, and stressed that “in Wisconsin everyone has the same opportunity to get a qualifying photo ID,” *id.* at 755. But in no sense can the phrase “less opportunity,” as used in the Voting Rights Act, be read naturally to refer *only* to statutes that are *facially*

¹⁷ *Lane* and *Harman* applied the Fifteenth Amendment, which also prohibits both “deni[al]” and “abridge[ment]” of the right to vote. U.S. Const. amend. XV.

discriminatory. Facially-neutral statutes—for example, literacy tests—can also obviously cause minority voters to have “less opportunity” to vote compared to whites. “[S]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.” *Anderson*, 460 U.S. at 801 (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 blacks to register than whites, . . . § 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. *Frank II*, 768 F.3d at 752-53, 755. 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 § 2 c[an] be established by proof of discriminatory results alone.”); *see* 52 U.S.C. § 10301(a) (using “results in” language). This Court should reject any suggestion by Texas that the Seventh Circuit’s aberrant interpretation of Section 2 should be followed.

CONCLUSION

The *Frank* decision “piles error on top of error.” *Frank III*, 773 F.3d at 793 (Posner, J., dissenting). This Court should reject Texas’s attempts to rely on *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), and affirm the decision below.

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Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,580 words, which is less than half of the type-volume limitation for principal briefs as specified in Fed. R. App. P. 32(a)(7), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 because it was prepared in Microsoft Word using 14-point Times New Roman font, with footnotes in 12-point Times New Roman font.

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity—other than *amici* and their counsel—contributed monetarily to this brief’s preparation or submission.

Dated: March 10, 2015

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