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; KEN GANDY; GORDON BENJAMIN; EVELYN BRICKNER, 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; CARLOS CASCOS, in his official capacity as Texas Secretary of State; 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; CARLOS CASCOS, in his official capacity as 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.

CARLOS CASCOS, in his official capacity as 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; CARLOS CASCOS, in his official capacity as 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.

Amici Curiae	**Counsel**
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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 supported the Plaintiffs-Appellees as an *amicus curiae* during the panel proceedings in this case, and 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); *Frank v. Walker*, --- F.3d ----, No. 15-3582, 2016 WL 1426486 (7th Cir. Apr. 12, 2016); *N.C. State Conf. of N.A.A.C.P. v. McCrory*, --- F. Supp. 3d ----, Nos. 1:13CV658, 1:13CV660, 1:13CV861, 2016 WL 1650774 (M.D.N.C. Apr. 25, 2016), *appeal docketed*, No. 16-1474 (4th Cir. Apr. 27, 2016). 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 County Election Board*, 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

Texas's supplemental en banc brief (hereinafter "Appellants' Br.") defends Texas's strict voter ID law by relying heavily upon *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), a case in which the ACLU represents the plaintiffs. To rely on *Frank*, however, is to rely on a foundation of quicksand. 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 misread the plain text of the Voting Rights Act and premised its reasoning on a host of egregious factual errors. 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 possessed by lower-income voters 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. 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 § Trans. 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). The court found that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID"

[1] Under Act 23, the only acceptable IDs are a current or recently expired Wisconsin driver's license or non-driver photo ID, military or veteran 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 50 n.16. 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.

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 I*") (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 I*, 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 II*"). 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.

After the case was returned to the district court, the court dismissed Plaintiffs' outstanding as-applied challenge to Act 23 on behalf of eligible Wisconsin voters facing difficulties obtaining ID, but on a successive appeal, the Seventh Circuit vacated that decision. *See Frank v. Walker*, --- F.3d ----, No. 15-3582, 2016 WL 1426486 (7th Cir. Apr. 12, 2016). The Seventh Circuit's latest decision represents a shift away from *Frank I*: rather than focusing on whether it was impossible for affected individuals to obtain ID, the Court focused on whether affected individuals would be "unable to get a photo ID with *reasonable* effort." *Id.* at *2 (emphasis added). Indeed, the Court said, "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Id.*

ARGUMENT

Texas and their supporting *amici* ask this Court to accept two propositions derived from *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"): 1) voters without ID (and, by extension, minorities) simply "choose" not to get ID or don't feel like voting anyway, because obtaining ID is universally easy, *see* Appellants' Br. at 37, 40, 52; Indiana Br. at 11;[3] Fair Representation Br. at 4;[4] and 2) voter ID

[3] "Indiana Br." refers to the supplemental en banc Brief of the State of Indiana, *et al.*, as *Amici Curiae* in Support of Defendants-Appellants and Supporting Reversal, April 22, 2016.

[4] "Fair Representation Br." refers to the supplemental en banc Brief of the Project on Fair Representation as *Amicus Curiae* in Support of Defendants-Appellants, April 22, 2016.

laws do not "cause" minorities without ID to be unable to vote, *see* Appellants' Br. at 35, 40-41; U.S. Senators Br. at 17-21.[5] Not only are these suggested propositions patently wrong, they are premised on a Seventh Circuit opinion that 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 I*'s errors binding in this Circuit.

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

Texas principally relies on *Frank I* to argue that the racial disparity in ID possession rates does not matter, since obtaining photo ID is supposedly easy for everyone. Thus, Texas suggests, minorities who do not have such IDs simply "choose" not to get them and do not want to vote anyway. *See* Appellants' Br. at 37. Indiana, along with 14 other states including Wisconsin, similarly asks this Court to embrace *Frank I*'s reasoning with respect to the plaintiffs' constitutional claims. *See* Indiana Br. at 10-13.

This Court should not rely on *Frank I* in this manner. The *Frank I* 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

[5] "U.S. Senators Br." refers to the supplemental en banc Brief for Twenty-Seven U.S. Senators and Representatives from Texas as *Amici Curiae* in Support of Appellants and Reversal, April 22, 2016.

have ID is that they don't want to vote; and there was no evidence in the record that voter ID laws suppress turnout. But these assumptions were premised on several egregious factual errors.

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

As a preliminary matter, *Frank I* 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 43-44. Texas's supporting *amici* echo the dismissive suggestion that the total number of people without ID must obviously be small. *See* Indiana Br. at 11; Fair Representation Br. at 23.

This myth that everyone has photo ID, given life by *Frank I* and now perpetuated by Texas, is premised on erroneous assumptions held by many people who have never walked a mile in the shoes of someone without photo ID. For instance, the *Frank I* 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 I*, 768 F.3d at 748. But the *Frank I* 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 "additional [ways] to confirm [] identity."[6]

- According to the State of Wisconsin Department of Revenue, not everyone is required to show photo ID to purchase alcohol, only those who "appear[] to be under the legal drinking age."[7] 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."[8]

- 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.[9]

- According to the U.S. Department of the Treasury, bank customers do not need a photo ID to open a bank account.[10]

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[6] U.S. Transportation Security Administration, *Acceptable IDs: Identity Matters*, http://www.tsa.gov/traveler-information/acceptable-IDs.

[7] Wisconsin Department of Revenue, *Wisconsin Alcohol Beverage and Tobacco Laws for Retailers* (Dec. 2015), at 11, https://www.revenue.wi.gov/pubs/pb302.pdf (citing Wis. Stat. § 125.07(7)).

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

[9] Centers for Disease Control and Prevention, *Public Health Law: Menu of State Prescription Drug Identification Laws*, http://www.cdc.gov/phlp/docs/menu-pdil.pdf. 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 §§ 481.074(a)(5), (n).

[10] 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

- According to the U.S. Department of Justice, gun owners do not need a photo ID to buy a gun.[11]

- 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.[12]

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

More troubling, the *Frank I* panel's opinion 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) ("[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

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Social Security number or employer identification number" is sufficient to open a bank account; the bank may verify the information without photo ID).

[11] 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.").

[12] 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).

not enter federal buildings, and checks they cash are cashed by businesspeople who know them in their communities." (footnotes omitted)).

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,[13] 87, 558; out-of-state photo ID to sign up for FoodShare benefits, Tr. 53-54; a debit card to access 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 small; this Court should likewise reject that contention.

[13] Excerpts from the Wisconsin trial transcript are attached as Exhibit A to this brief.

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

The *Frank I* 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 I*, 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,[14] at 9-15; *see Frank*, 17 F. Supp. 3d at 854-55 (discussing the above testimony); *Frank II*, 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*, 17 F. Supp. 3d at 856 n.15, 860 n.18. One volunteer testified that he was

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

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

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

The *Frank I* 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 I*, 768 F.3d at 749; Appellants' Br. at 37. 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 I*, 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).[15]

As Judge Posner points out, the *Frank I* 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 II*, 773 F.3d at 796-97 (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,[16] unaware that they must now jump through additional hoops just to vote. On this record, it is impossible to conclude, as *Frank I* erroneously does, that people who lack photo IDs can be disregarded because they do not want to vote.[17]

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[15] 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.

[16] *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).

[17] Furthermore, under *Frank I*'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.

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

Lastly, *Frank I* suggested 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 I*, 768 F.3d at 747. But the *Frank I* panel was wrong again. As a preliminary matter, Section 2 does not require plaintiffs to show suppression of overall voter turnout; plaintiffs need only show that minorities have "less opportunity" to participate in the political process, 52 U.S.C. § 10301(b), "*as compared to other voters*." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 558 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also id.* at 551 (affirming finding of Section 2 violation even though plaintiffs "had not established that voter turnout would necessarily be decreased overall," because of unequal opportunities).

But even if that were the proper inquiry, the panel was wrong on the facts. 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 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.

Texas's supporting *amici* invite this Court to make fresh factual findings on this point by citing various studies—all nearly a decade old—that supposedly prove that voter ID laws do not suppress turnout. Fair Representation Br. at 27-30; *see also* Indiana Br. at 23. But these old studies conflated strict and non-strict voter ID laws;[18] were conducted before the *strictest* of voter ID laws—such as Texas's law—had even been enacted or meaningfully implemented;[19] and often relied on self-reported turnout, which is notoriously unreliable.[20]

More recent studies, including one published by the non-partisan Government Accountability Office, point in the opposite direction: strict voter ID laws in particular *do* suppress turnout, particularly among minorities.[21] And while Indiana clings to a 2015 study analyzing the turnout impact of Indiana's voter ID law, *see* Indiana Br. at 23-24, that study focused solely on how many provisional

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[18] *See generally* National Conference of State Legislatures, *Voter Identification Requirements | Voter ID Laws* (updated Apr. 11, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

[19] *See* Indiana Br. at 1-2 (at least five strict voter ID laws enacted after 2008); National Conference of State Legislatures, *Voter ID History* (updated Apr. 18, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx ("Georgia and Indiana pioneered a new, 'strict' form of voter ID . . . first implemented in 2008 . . . . In 2011, 2012 and 2013, the pace of adoption accelerated . . . , and states that had less-strict requirements adopted stricter ones.").

[20] *See* Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes* at 5-6 (University of California, San Diego, Working Paper), http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsSuppressionofMinorityVoters.pdf.

[21] *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; Hajnal, *et al.*, *supra* n.20.

ballots were cast by voters without ID. As the study's author concedes, "this is an imperfect proxy" that "likely[] understate[s] the amount of disfranchisement that occurred because of a photo identification law at an election." Michael J. Pitts, *Empirically Measuring the Impact of Photo ID Over Time and Its Impact on Women*, 48 Ind. L. Rev. 605, 606 (2015) (footnotes omitted). That is because many voters without ID will obviously not bother to cast a meaningless, uncounted provisional ballot when they know they do not have the ID that is required in order to vote.

Frank I'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 I*'S MISINTERPRETATION OF SECTION 2 OF THE VOTING RIGHTS ACT

A. Texas Relies on *Frank I* to Misconstrue the Section 2 Causation Inquiry

Texas then relies on *Frank I* to argue that voter ID laws do not run afoul of Section 2 because they do not "cause" minorities without ID to be unable to vote. *See* Appellants' Br. at 40-44. But this suggestion makes no sense; as the *Frank I* 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."[22] Texas's argument is akin to saying that literacy tests did not "cause" a disproportionate number of African-Americans to be unable to vote in the Jim Crow era, because it was really caused by the education system's failure to teach African-Americans how to read.

As the Supreme Court teaches, the causation inquiry looks at whether the challenged voting restriction "*interacts 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). Indeed, the text of Section 2 explicitly requires an inquiry into the "totality of circumstances." 52 U.S.C. § 10301(b). 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.

[22] Oral Argument at 16:08–16:16, *Frank I*, 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.

B. *Frank I*'s Interpretation of Section 2 Ignores Its Text

Frank I's radical interpretation of Section 2 is contrary to Section 2's plain text in several respects as well.

First, the Seventh Circuit panel erroneously held that Act 23 does not constitute "a 'denial' of anything by Wisconsin, as § 2(a) requires." *Frank I*, 768 F.3d at 753. But the text of Section 2 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).[23] 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 I* 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

[23] *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.

different races equally, *Frank I*, 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 the phrase "less opportunity," as used in the Voting Rights Act, cannot be read to refer *only* to statutes that are *facially discriminatory*, as *Frank I* and Texas's supporting *amici* suggest. *See Frank I*, 768 F.3d at 754 ("It is better to understand § 2(b) as an equal-treatment requirement"); Mountain States Br.[24] at 22. Facially-neutral statutes—for example, literacy tests and other facially "race-neutral" tools of choice employed by the Jim Crow South—have routinely caused 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 v. Celebrezze*, 460 U.S. 780, 801 (1983) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for 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

[24] "Mountain States Br." refers to the supplemental en banc *Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Appellants, April 22, 2016.

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 by the state. *Frank I*, 768 F.3d at 752-53, 755. Texas, too, piggybacks upon this suggestion. *See* Appellants' Br. at 41-44. But "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 403-04 ("[T]he [Voting Rights] Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination. Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent . . . . Thus, 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 I* decision "piles error on top of error." *Frank II*, 773 F.3d at 793 (Posner, J., dissenting). This Court should reject Texas's attempts to rely on *Frank I*, and affirm the decision below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,772 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: May 16, 2016

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