No. 16-3052

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUTHELLE FRANK, et al.,

Cross-Appellants,

v.

SCOTT WALKER, et al.,

Cross-Appellees.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 2:11-cv-01128-LA
The Honorable Lynn S. Adelman, Presiding

PETITION FOR INITIAL HEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3052

Short Caption: Frank v. Walker

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Attorney's Signature: s/ Sean J. Young Date: July 28, 2016

Attorney's Printed Name: Sean J. Young

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Neil A. Steiner Date: July 28, 2016

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Attorney's Signature: s/ M. Laughlin McDonald Date: July 28, 2016

Attorney's Printed Name: M. Laughlin McDonald

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Karyn L. Rotker Date: July 28, 2016

Attorney's Printed Name: Karyn L. Rotker

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Attorney's Signature: s/ Craig G. Falls Date: July 28, 2016

Attorney's Printed Name: Craig G. Falls

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Attorney's Signature: s/ Tristia Bauman Date: July 29, 2016

Attorney's Printed Name: Tristia Bauman

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Attorney's Printed Name: Laurence J. Dupuis

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Attorney's Signature: s/ Dale E. Ho Date: July 28, 2016

Attorney's Printed Name: Dale E. Ho

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Attorney's Signature: s/ Angela M. Liu Date: July 28, 2016

Attorney's Printed Name: Angela M. Liu

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Attorney's Signature: s/ Sophia Lin Lakin Date: July 28, 2016

Attorney's Printed Name: Sophia Lin Lakin

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PETITION FOR INITIAL HEARING *EN BANC*

Pursuant to Fed. R. App. P. 35(b), Plaintiffs-Cross-Appellants file this Petition for Initial Hearing En Banc. In light of intervening authority, Plaintiffs request that the full Court of Appeals for the Seventh Circuit consider overruling a prior panel decision in this case, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) ("*Frank I*"); set forth the proper standard for voting rights challenges under the Fourteenth Amendment and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; and enjoin Wisconsin's strict voter ID law in its entirety.

STATEMENT REQUIRED BY FED. R. APP. P. 35(b)(1)

Initial hearing *en banc* is warranted because the question of whether *Frank I* should be overruled—a question that only the full *en banc* court can answer—is exceptionally important, since the constitutionality and legality of state voter identification laws have a direct impact on our democracy. Since the Supreme Court decided *Crawford v. Marion Cnty. Election Board*, 553 U.S. 181 (2008), nineteen states have enacted increasingly restrictive voter ID laws that burden or disenfranchise millions of voters across the country, especially lower-income and minority voters. Wisconsin has passed one of the strictest voter ID laws in the country, burdening up to 300,000 Wisconsin voters, especially members of racial and ethnic minorities—all on the flimsiest of justifications.

Meanwhile, intervening decisions have made the *Frank I* panel decision an outlier in the national landscape of voting rights caselaw. This is most vividly illustrated by a recent *en banc* decision from the Fifth Circuit, which upheld the district court's and panel's conclusion that Texas's strict voter ID law violated

Section 2 of the Voting Rights Act, and on facts that are remarkably similar to the facts of this case. *See Veasey v. Abbott*, --- F.3d ---, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc). In doing so, the Fifth Circuit did not apply the legal standard espoused by *Frank I*, and instead "adopt[ed] the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 [of the Voting Rights Act] 'results' claims." *Id.* at *17. In stark contrast to *Frank I*'s total deference to Wisconsin's unsubstantiated interests in preventing in-person voter impersonation fraud with a strict voter ID law, 768 F.3d at 749-51, the Fifth Circuit concluded that Texas's unsubstantiated interests could *not* justify the burdens imposed by its own strict voter ID law, *see Veasey*, 2016 WL 3923868, at *31-*33.

Frank I's reasoning, which discounted the burdens that Wisconsin's voter ID law imposed on all vulnerable voters, has also been undermined by recent decisions from the United States Supreme Court, including *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). That decision upheld the facial invalidation of a statute infringing on important constitutional rights, because the abortion statute "erect[ed] a particularly high barrier for poor, rural, or disadvantaged women," *id.* at 2302, and imposed an undue burden on "women for whom the provision is an actual rather than an irrelevant restriction," *id.* at 2320 (citation and internal alteration omitted). Notably, the law was found invalid in large part because the State was unable to substantiate its purported interests with actual evidence. *See id*. at 2309-20.

Furthermore, judicial efficiency and time constraints in light of the

impending November election further support granting an initial *en banc* hearing, as opposed to rehearing *en banc* after a panel decision is issued. Because Plaintiffs' cross-appeal asks this Court to overrule a prior panel decision in this case, it would likely be an inefficient use of judicial resources to go through a hearing of Plaintiffs' cross-appeal before a panel of three judges, which lacks authority to overrule circuit precedent. An initial *en banc* hearing is also of national import because any delay in these proceedings could deprive voters of their ability to vote in the upcoming November 2016 presidential election.

STATEMENT OF THE CASE

This is the third appeal involving Plaintiffs' challenge to 2011 Wisconsin Act 23 (hereinafter "Act 23"), one of the strictest voter ID laws in the country. Act 23 requires eligible Wisconsin voters to provide one of a limited number of forms of photographic identification in order to exercise their fundamental right to vote, most commonly a Wisconsin driver's license or state ID card issued by the Division of Motor Vehicles ("DMV") (hereinafter "ID"). Wis. Stat. §§ 6.79(2), 5.02(6m). After a two-week trial featuring more than 40 fact witnesses and multiple experts, hundreds of exhibits and thousands of pages of testimony, the district court made extensive factual findings which demonstrated: that "a substantial number of the 300,000 plus eligible voters who lack a photo ID are low-income individuals who either do not require a photo ID to navigate their daily lives or who have encountered obstacles that have prevented or deterred them from obtaining a photo

ID," Dkt. #195 at 24;[1] that these burdens would fall disproportionately on racial and ethnic minorities, who are approximately twice as likely to lack ID, *id.* at 62; and that Wisconsin's purported interests in requiring voter ID were not substantiated by actual evidence, *id.* at 11-22. As a result, the district court found that Wisconsin's strict voter ID law violated the Fourteenth Amendment and Section 2 of the Voting Rights Act, and enjoined the law in its entirety.

In the first appeal, *Frank I*, a panel of this Court held that Plaintiffs could not demonstrate that the burdens imposed by Act 23 on the "'vast majority'" of all Wisconsin voters were sufficiently significant and widespread to justify the total invalidation of Act 23 under the *Anderson-Burdick* balancing test, which governs challenges to voting restrictions under the Fourteenth Amendment, or to constitute a violation of the Voting Rights Act. The full Court then split 5-5 on whether to rehear the case *en banc*. *See Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014). Plaintiffs thereafter sought relief in the district court for voters with significant barriers to obtaining voter ID, but the court denied that relief. Dkt. #250. In the second appeal, *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) ("*Frank II*"), a panel of this Court held that *Frank I* did not preclude the district court from providing relief for voters who could not obtain ID with reasonable effort.

Following *Frank II*, and in light of the impending presidential election, the district court issued a preliminary injunction requiring the state to provide,

[1] Unless otherwise stated, "Dkt." refers to the docket entries in the district court proceedings, *Frank v. Walker*, No. 11-cv-1128 (E.D. Wis.).

beginning with the November election, an affidavit that would allow voters who cannot obtain ID with reasonable effort to vote without having to show ID. *See* Dkt. #294. The decision also granted Plaintiffs' motion for leave to file a supplemental complaint to include additional Plaintiffs recently harmed by the law. *See id.*; Dkt. #303.

Defendants appealed that decision, giving rise to a third appeal. *See Frank v. Walker*, No. 16-3003 (7th Cir. 2016). Plaintiffs have filed this cross-appeal in response, and request that this Court accept the case for initial *en banc* review, revisit and overrule *Frank I* and enjoin Act 23's voter ID requirement in its entirety. Accordingly, the district court's decision below should be reversed, and the case remanded with instructions to enter an injunction enjoining Act 23 as a violation of Section 2 of the Voting Rights Act and the U.S. Constitution.

ARGUMENT

As discussed below: (1) *en banc* review is warranted because whether *Frank I* should be overruled is a question of exceptional importance; and (2) an initial *en banc* hearing will conserve judicial resources and is necessary to ensure timely relief for this year's elections.

I. WHETHER *FRANK I* WAS WRONGLY DECIDED IS A MATTER OF EXCEPTIONAL IMPORTANCE

The central question of this cross-appeal is whether this Court's prior panel decision in *Frank I* should be revisited and overruled. This question is a matter of exceptional importance for three reasons: (a) the appropriate legal standards governing the lawfulness of state voter ID laws and other voting restrictions

directly impact citizens' ability to exercise their fundamental right to vote; (b) *Frank I* conflicts with the decisions of other United States Courts of Appeals, including a recent *en banc* decision by the Fifth Circuit; and (c) the reasoning of *Frank I* has been undermined by subsequent decisions of the United States Supreme Court.

A. The Legality of State Voter ID Laws and Other Restrictions On the Right to Vote Directly Affects Our Democracy

The issue of the constitutionality and lawfulness of state voter ID laws is a matter of exceptional and ongoing national importance because such laws have a direct impact on the very lifeblood of our democracy. Since the Supreme Court decided *Crawford v. Marion Cnty. Election Board*, 553 U.S. 181 (2008), nineteen states have enacted increasingly restrictive voter ID laws that burden or disenfranchise millions of voters across the country, especially lower-income and minority voters.[2] Meanwhile, the lawfulness of these voter ID laws has roiled federal and state courts throughout the country over the past decade and continues to do so.[3] There is also ongoing controversy over the proper legal standards

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[2] *See* Voter ID History, National Conference of State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx (last visited July 29, 2016).

[3] *See, e.g., Veasey v. Abbott*, --- F.3d ---, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc) (Texas); *N.C. State Conf. of NAACP v. McCrory*, --- F. Supp. 3d ----, 2016 WL 1650774 (M.D.N.C. Apr. 25, 2016), *rev'd*, No. 16-1468, --- F.3d. --- (4th Cir. July 29, 2016), ECF No. 150 (North Carolina); *Lee v. Virginia State Board of Elections*, --- F.Supp.3d ----, 2016 WL 2946181 (May 19, 2016) (appeal filed with 4th Cir. May 27, 2016) (Virginia); *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014); *Gentges v. Okla. State Election Bd.,* 319 P.3d 674 (Okla. 2014); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013); *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *League of Women Voters of Indiana, Inc. v. Rokita*, 929

governing voting rights claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act, 52 U.S.C § 10301. *See generally* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439 (2015). For these reasons, it is unsurprising that other circuits have granted *en banc* review to consider this vital issue. *See, e.g.*, *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016); *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2012) (granting *en banc* review in Texas and Arizona voter ID cases, respectively). This Court should do the same now.

B. *Frank I* Conflicts With The Decisions of Other United States Courts of Appeals

The question presented by this appeal is also exceptionally important because the panel's decision in *Frank I* conflicts with decisions issued by United States Courts of Appeals of the Fourth, Fifth, and Sixth Circuits. *Frank I* is particularly at odds with a recent *en banc* decision issued by the Fifth Circuit, which upheld the district court's finding that Texas's strict voter ID law violated Section 2 of the Voting Rights Act, *see Veasey v. Abbott*, --- F.3d ---, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc), in at least three ways.

First, the Fifth Circuit declined to accept *Frank I*'s legal standard, *i.e.*, its assertion that Section 2 creates an "equal-treatment" requirement. 768 F.3d at 754. Instead, the Fifth Circuit declared that it was "now adopt[ing] the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 'results' claims," which requires a showing of disparate impact caused by or linked to social

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N.E.2d 758 (Ind. 2010); *In re Request for Advisory Opinion*, 740 N.W.2d 444 (Mich. 2007); *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

and historical conditions that have contributed to discrimination against a protected class. *Veasey*, 2016 WL 3923868, at *17 (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)).[4]

A majority of Fifth Circuit judges recognized the dissonance between the two decisions, including the dissenting judges, who strongly advocated for a wholesale embrace of *Frank I*'s legal standard. *See Veasey*, 2016 WL 3923868, at *65, *69-*71 (Jones, J., dissenting); *id.* at *82-*83 (Elrod, J., dissenting). The concurring judges similarly recognized that *Veasey*'s logic was incompatible with *Frank I*, which they vehemently criticized for "not mention[ing] the applicable clear-error standard of review," "overlook[ing] many of the district court's factual findings," "[q]uestioning other circuits' approaches to vote-denial cases without offering a clear alternative," and "read[ing] Section 2 as only 'an equal-treatment requirement'" that is "puzzling" and "ignores" Section 2's text. *Id.* at *42-*44 (Higginson, J., concurring). These opinions, reflecting the views of a majority of Fifth Circuit judges,[5] recognized the clear conflict between these two decisions.

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[4] Though *Frank I* claimed to "agree with the Sixth Circuit" on this standard, *Frank I*, 768 F.3d at 754-55, the panel in the same breath criticized the Sixth Circuit's test, *see id.* at 755 ("We are skeptical about the second of these steps"), and, as illustrated below, *Frank I*'s actual application of the Section 2 standard bears no resemblance to the way in which other circuits have applied it.

[5] A total of eight Fifth Circuit judges out of the fifteen judges that heard the case *en banc* signed on to one or more of these separate opinions—Judges Jones, Jolly, Smith, Clement, Owen, Elrod, Higginson, and Costa.

Second, in direct contrast to *Frank I*, which accepted the "legislative facts" regarding Wisconsin's interests as conclusive and thus justifying a restrictive voter ID law, 768 F.3d at 749-51, the Fifth Circuit scrutinized Texas's purported interests and upheld the district court's finding that those interests were not sufficiently substantiated by the evidence, *Veasey*, 2016 WL 3923868, at *31-*33. As the Fifth Circuit held, "the articulation of a legitimate interest is not a magic incantation a state can utter to avoid [liability]. Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted." *Id.* at *31; *see also Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing *en banc*) ("If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?"); *cf. N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, --- F.3d. ---, slip op. at 63 (4th Cir. July 29, 2016), ECF No. 150 ("[North Carolina's voter ID law] elevates form over function, creating hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud.").

Although *Veasey*'s discussion was technically limited to the Section 2 context, its reasoning is directly incompatible with *Frank I*'s constitutional holding that courts must automatically accept the State's interest—an incompatibility that the dissenting Fifth Circuit judges also recognized. *See Veasey*, 2016 WL 3923868, at *71 (Jones, J., dissenting) (criticizing majority for failing to adopt State's interest as "legislative fact" (citing *Frank I*, 768 F.3d at 750)).

Third, the Fifth Circuit credited various types of factual findings that the panel in *Frank I* specifically rejected, and determined that these findings compelled the conclusion that Texas's voter ID law violated Section 2. *Contrast, e.g.*, *Frank I*, 768 F.3d at 753 (racially disparate ID ownership does "not show a 'denial' of anything by Wisconsin, as [Section 2] requires"), *with Veasey*, 2016 WL 3923868, at *29 ("district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within this definition" of abridgement of voting rights); *Frank I*, 768 F.3d at 752 n.3 (fact that racial minorities were twice as likely to lack ID and documents needed to obtain it was irrelevant), *with Veasey*, 2016 WL 3923868, at *22, *27 (fact that racial minorities were twice as likely to lack ID supports conclusion that voter ID law "imposes . . . disparate burdens on the right to vote"); *Frank I*, 768 F.3d at 753 (racial disparities in socioeconomic status irrelevant), *with Veasey*, 2016 WL 3923868, at *28-29 (racial disparities in socioeconomic status relevant where they hinder ability to participate in political process).[6]

In particular, *Frank I*'s insistence that the district court should have measured voter ID's impact on the turnout in a small February 2012 primary, disregarding the district court's finding that those without ID are likely to be deterred from voting, 768 F.3d at 747, runs directly contrary to *Veasey*, 2016 WL

[6] *Cf. also N.C. NAACP*, No. 16-1468, slip op. at 55 (4th Cir. July 29, 2016) ("These socioeconomic disparities establish that no mere 'preference' led African Americans to disproportionately . . . lack acceptable ID. . . . Registration and voting tools may be a simple 'preference' for many white North Carolinians, but for many African Americans, they are a necessity.")

3923868, at *29, which declined "to require a showing of lower turnout to prove a Section 2 violation." As the Fifth Circuit explained, "An election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. . . . That does not mean the voters kept away were any less disenfranchised." Indeed, *Frank I*'s turnout discussion also conflicts with a Fourth Circuit decision just issued today. *See N.C. NAACP*, No. 16-1468, slip op. at 53 (4th Cir. July 29, 2016) ("The district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past. No law implicated here—neither the Fourteenth Amendment nor § 2—requires such an onerous showing.").

As the Fifth Circuit's decision helps demonstrate, *Frank I* is "riven with weaknesses," *Frank*, 773 F.3d at 797 (Posner, J., dissenting from denial of rehearing *en banc*), and it is now far afield from the standards embraced by other circuits. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). An *en banc* hearing is necessary to correct this error.

C. Frank I's Reasoning Has Been Undermined by Subsequent Decisions of the United States Supreme Court

Frank I's reasoning has also been undermined by subsequent decisions of the United States Supreme Court in several critical respects. First, the Supreme Court in *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2309-13 (2016), rejected the proposition that a district court is bound by "legislative findings," and it upheld

the district court's reliance on evidence at trial, including expert testimony, to evaluate the extent to which a State's interests are actually furthered by a law that burdens important constitutional rights. This is in stark contrast to *Frank I*, which instead gave conclusive weight to Wisconsin's assertions that its strict photo ID requirement furthered the government's legitimate interests. 768 F.3d at 750-51.

Second, *Whole Woman's Health* undermines *Frank I's* holding relevant to the "burden" side of the equation, concluding that a restriction on the constitutional right to abortion must be invalidated if a "large fraction" of "women for whom the provision is an actual rather than an irrelevant restriction" faces a "substantial obstacle." 136 S. Ct. at 2320 (citation and alterations omitted). Thus, *Frank I* was wrong to discount the district court's findings concerning the significant burdens that Wisconsin's voter ID law imposed on voters without ID, especially lower-income voters. *Compare* Dkt. #195 at 26-37, *with Whole Woman's Health*, 136 S. Ct. at 2302 (the laws "erect a particularly high barrier for poor, rural, or disadvantaged women"). And just as the Supreme Court rejected the principal dissent's argument that the law should be facially upheld because "95% of women of reproductive age" would not be burdened, *id.* at 2349 (Alito, J., dissenting), this Court should reject *Frank I*'s emphasis on the fact that 95.5% of eligible voters either already have ID or the underlying documents necessary to obtain ID, *Frank I*, 768 F.3d at 749. A decision that countenances the disenfranchisement of so many voters is "shocking" and unworkable. *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*).

Third, *Whole Woman's Health* undermines the proposition that only limited relief, rather than full invalidation, is the appropriate remedy when a statute violates important constitutional rights. *See* 136 S. Ct. at 2307 ("Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.").

Lastly, although *Frank I* expressly rejected the method of "dividing percentages" to measure racial impact, 768 F.3d at 752 n.3, the Supreme Court in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), did exactly that. *Fisher* found that the University of Texas's affirmative action program had a "meaningful" impact on increasing racial diversity because Hispanic and African-American enrollment increased by "54 percent and 94 percent, respectively"—an increase from 11% to 16.9% for Hispanics and from 3.5% to 6.8% for African-Americans. *Id.* at 2212.

II. AN INITIAL *EN BANC* HEARING IS WARRANTED

Plaintiffs further request that this Court grant their petition for an initial *en banc* hearing. *See* Fed. R. App. P. 35(a). Because Plaintiffs seek to overrule circuit precedent, it is appropriate for the full court, rather than a three-judge panel, to review the issue. *See, e.g.*, *Helseth v. Burch*, 258 F.3d 867, 869 (8th Cir. 2001) (en banc) (granting petition for initial *en banc* review and overruling circuit precedent); *Chapman v. United Auto Workers Local 2005*, 670 F.3d 677, 678-79 (6th Cir. 2012) (en banc) (same); *Meadows v. Holland*, 831 F.2d 493, 494, 498 (4th Cir. 1987) (en banc) (same), *vacated on other grounds*, 109 S. Ct. 1306. And if this Court concludes *en banc* that *Frank I* was wrongly decided, that also automatically resolves

Defendants' appeal. *See Frank v. Walker*, No. 16-3003 (7th Cir. 2016).[7] An initial *en banc* hearing is also warranted because any delay in these proceedings could deprive voters of their ability to vote in the upcoming November 2016 presidential election.

Finally, although this Court previously denied *en banc* review of the panel's decision in *Frank I*, *see Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014), that decision is not dispositive. As the *en banc* Court of Appeals for the Eighth Circuit has explained in another voting rights case, "That the court previously denied a petition for rehearing en banc is not controlling, because the decision to deny rehearing en banc is a pure exercise of discretion. It is not a ruling on the merits." *Cottier v. City of Martin*, 604 F.3d 553, 556 (8th Cir. 2010) (en banc); *see also Irving v. United States*, 162 F.3d 154, 161 n.7 (1st Cir. 1998) (en banc) ("Denials of suggestions for rehearing en banc are pure exercises of discretion [and are] the functional equivalent of a . . . denial of certiorari by the Supreme Court. Such actions make no statement about the full court's view on the merits of a claim it declines to hear."). Thus, "when the court of appeals declines in its discretion to rehear a case en banc after a panel [decision], the court retains authority to rehear the matter en banc at a subsequent stage of the proceedings." *Cottier*, 604 F.3d at 557. And the mere fact that *Frank I* is technically law of the case because it was issued in this same case also presents no barrier to *en banc* review. *See Boim v. Holy Land Found. For Relief*

[7] As the district court correctly found, even the procedures that were supposed to ameliorate the burdens imposed by Wisconsin's voter ID law after *Frank I* leave many voters unable to obtain ID with reasonable effort. *See* Dkt. ##294, 311.

and Development, 549 F.3d 685, 688 (7th Cir. 2008) (en banc) ("The full court can revisit any ruling by a panel."). If anything, it weighs in favor of *en banc* review. As the *en banc* Court of Appeals for the First Circuit explained in *Irving*:

> The authority to overrule the decision of a prior panel in the same case flows logically from the error-correcting function of the full court. When a court sits en banc, the concern for adhering to a past resolution of an issue in deference to settled expectations, which underpins the doctrines of law of the case and law of the circuit, must give way to the institutional interest in correcting a precedent-setting error of great public import . . . .

162 F.3d at 161. Indeed, it is "the uniform position of the circuits that an en banc court may overrule an erroneous panel opinion filed at an earlier stage of the same case." *Cottier*, 604 F.3d at 557 (citing decisions from the First, Second, Third, Sixth, and Ninth Circuits); *see also, e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 900 (9th Cir. 2010) (en banc) (overruling prior panel decision in voting rights case); *Watkins v. United States Army*, 875 F.2d 699, 704-05 (9th Cir. 1989) (en banc) (reinstating equitable estoppel claim during second appeal, after a panel had dismissed the claim in the first appeal). It would be a "serious mistake" for this Court not to do so here. *Frank*, 773 F.3d at 783 (Posner, J., dissenting from denial of rehearing *en banc*).

CONCLUSION

For the above reasons, this Court should grant Plaintiffs' petition for initial hearing *en banc*.

Dated: July 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I electronically filed the foregoing Petition for Initial Hearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 29, 2016.

/s/ Sean J. Young

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