No. 16-393

IN THE
Supreme Court of the United States

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Petitioners,
v.
MARC VEASEY, ET AL.,
Respondents.

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

BRIEF OF INDIANA, ALABAMA, ARKANSAS, KANSAS, LOUISIANA, MICHIGAN, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

Texas has asked the Court to review two important questions related to its enforcement of a voter photo identification law. While the *amici* States agree that certiorari is warranted on both questions, this brief discusses only the need for the Court to address the following question:

Whether Section 2 of the Voting Rights Act prohibits enforcement of a voter ID requirement based solely on a statistical racial disparity in preexisting ID possession and socioeconomic status, without any evidence that the challenged rule has actually prevented anyone from voting.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Arkansas, Kansas, Louisiana, Michigan, Oklahoma, South Carolina, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the petition for certiorari.

This case is principally about Voter ID laws, which represent the reasonable, nondiscriminatory exercise of Elections Clause authority to modernize voting procedures, as the Founders envisioned. *See* The Federalist No. 59, at 379 (Alexander Hamilton) (Modern Library Coll. ed. 2000) (observing that no "election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country"). A total of 34 States have laws requiring or requesting voters to show some form of documentary identification before voting in person. *Voter Identification Requirements/Voter ID Laws*, Nat'l Conf. St. Legislatures (Apr. 11, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. At least eight (including Texas) require in-person voters to present photo identification or, if unable to do so, cast a provisional ballot that must be validated after Election Day if it

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *Amici* States' intention to file this brief at least 10 days prior to the due date of this brief.

is to count. *See* Ga. Code Ann. § 21-2-417; Ind. Code § 3-5-2-40.5; Kan. Stat. Ann. §§ 25-2908, 25-1122; Miss. Code Ann. § 23-15-563; Tenn. Code Ann. § 2-7-112; Tex. Elec. Code § 63.001 *et seq.*; Va. Code Ann. § 24.2-643(B); Wis. Stat. §§ 5.02(6m), 6.79(2)(a), (3)(b). Of these laws, six were enacted after—and in reliance upon—the Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which upheld the facial validity of photo-identification requirements for voters.

The *amici* States have a compelling interest in both the continued vitality of *Crawford* and in securing a sensible standard for applying Section 2 of the Voting Rights Act to right-to-vote abridgement claims. Circuit court decisions that would allow succeeding plaintiffs to come forward with new theories about the hypothetical impact of voter ID laws and invite courts to re-weigh competing governmental interests both undermine *Crawford* and stretch Section 2 well beyond its traditional scope. In the process, such decisions create unnecessary legal uncertainty for all voter ID laws.

More generally, the Voting Rights Act doctrine employed by the Fifth Circuit below may imperil any number of election modernization efforts, which the Court itself encouraged in *Bush v. Gore*. To avoid future electoral disasters, States must be permitted to enact comprehensive election laws to "enforce the fundamental right" to vote by "prevent[ing] . . . fraud

and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

The *amici* States have an interest in ensuring that their election reforms are not undermined absent concrete evidence of racially discriminatory impact or purpose.

SUMMARY OF THE ARGUMENT

Since 2000, three of the Court's decisions have prompted States to enact various election reforms intended to increase voter confidence and ensure accurate tabulation. First, the Court drew national attention to the problem of antiquated and outdated voting procedures in *Bush v. Gore*, 531 U.S. 98, 103 (2000). Next, it upheld Indiana's voter photo-identification law, which represents a significant step toward election modernization and security. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008). Most recently, the Court invalidated Section 4(b) of the Voting Rights Act, freeing many jurisdictions from burdensome preclearance requirements that had previously prevented them from reforming and modernizing their election procedures. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

In many ways, this case represents a culmination of backlash against those decisions by groups opposed to election modernization. In the wake of *Shelby County* in particular, novel claims under Section 2 of the Voting Rights Act have sought to obviate *Crawford* and invite federal courts to re-balance competing interests in electoral security and access originally undertaken by state legislatures.

The Circuits have splintered over how to handle these novel claims. Five Circuits have addressed Section 2 challenges to State voter ID requirements. Three—the Sixth, Seventh, and Ninth—have upheld the voter ID laws, while two—the Fourth and Fifth—have struck them down. These disparate results arise from disagreement as to whether plaintiffs must show actual "denial or abridgement of the right . . . to vote" 52 U.S.C. § 10301(a), or merely snapshot racial disparity in ID possession or access at some random moment in time.

That is, in light of these conflicting decisions, electoral regulations valid in some States may be invalid in others, depending on how many persons could, at a given moment, comply with the law. For example, in this case, the Fifth Circuit said Texas's voter ID law violated Section 2 in part because (according to the State's figures) 5.3% of eligible black voters lacked ID while only 4% of eligible white voters did. *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc). But the Seventh Circuit

found Wisconsin's substantially similar voter ID law did not violate Section 2, even though 4.5% of blacks lacked documents necessary to obtain ID, compared with 2% of whites. *Frank v. Walker*, 768 F.3d 744, 752 (7th Cir. 2014). A snapshot disparity in possession of identification is insufficient, the Seventh Circuit said, because "everyone has the same *opportunity* to get a qualifying photo ID." *Id.* at 755 (emphasis added).

Consequently, as things stand, States cannot look to one another for guidance, or even act with certainty that new rules upheld elsewhere would survive the upcoming election cycle. Review is needed to address whether Section 2 requires plaintiffs to prove actual abridgement of the right to vote, or merely a plausible theory that current conditions might result in such abridgement.

Moreover, Indiana's experience with voter photo identification should prompt substantial skepticism about the Fifth Circuit's "snapshot-one-step-removed" approach to Section 2. In *Crawford*, the parties challenging the Indiana statute pinned their case on dire predictions about minority voter turnout based on estimates of minorities in possession of appropriate identification when the law was enacted. *Crawford*, 553 U.S. at 200–02. Yet studies of voter participation in the wake of Indiana's voter ID law do not support the theory that the statute suppresses minority (or general) voter turnout.

Similar to the theory rejected in *Crawford,* the Fifth Circuit's Section 2 standard turns *not* on actual voter participation, but on a snapshot of ID possession on a given day, which is but one factor that could hypothetically affect voter participation. The Court should not countenance use of this highly speculative, and infinitely expandable, theory of abridgement.

REASONS FOR GRANTING THE PETITION

I. Lower Courts Need Guidance for Addressing the New Wave of VRA Section 2 Challenges to State Voting Regulations

Over the last two decades, three significant decisions have transformed both election regulation and resulting election law doctrine: *Bush v. Gore*, 531 U.S. 98 (2000), which sounded the call for election modernization and reform; *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which established the constitutionality of voter ID laws to ensure electoral integrity; and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which for many states freed election regulation from cumbersome federal oversight under Section 5 of the Voting Rights Act. Opponents of state election reforms have reacted by invoking VRA Section 2—which previously has applied mainly to vote-dilution (*i.e.,* redistricting) claims—to attack regulation of voting mechanics. Lower federal courts have struggled to address these novel claims, resulting in sharp

conflict and inconsistency among the circuits. The Court's guidance is vital to ensure that these new Section 2 claims are adjudicated uniformly and fairly throughout the Nation.

A. *Bush v. Gore* was a catalyst for much-needed procedural modernizations

Shortly after the 2000 Presidential election, Florida officials determined that George W. Bush's margin of victory in certain Florida counties was lower than 0.5%, triggering an automatic recount under state law. *Bush*, 531 U.S. at 101. That recount process drew national attention to the problem of antiquated and ineffective voting procedures: at the time, "an estimated 2% of ballots cast [did] not register a vote for President[.]" *Id.* at 103. When the Court ultimately concluded the recount would violate the Constitution, it did so reluctantly, describing the case as an "unsought responsibility" it was "forced" to undertake. *Id.* at 111. And it suggested states should act quickly to address the problem: "After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting." *Id.* at 104.

The legislative response was swift. Congress quickly passed The Help America Vote Act of 2002, which provided $3 billion to help States eliminate punch-card ballots. 42 U.S.C. § 15301 *et seq.* (2006); Candice Hoke, *Judicial Protection of Popular*

Sovereignty: Redressing Voting Technology, 62 Case W. Res. L. Rev. 997, 1003 (2012). At the state level, Georgia and Maryland passed statutes requiring uniform voting technology across counties. Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711, 1731 (2005). Some of the new electronic voting systems, however, were prone to error and vulnerable to fraud, bringing the issue of election security to the forefront. *Id.* at 1740.

Voter ID laws were just one piece of this total reform effort. In 2005, the bipartisan Commission on Federal Election Reform (also called the Baker-Carter Commission) "released eighty-seven different recommendations" geared at improving state election administration. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 633 (2007). Those recommendations addressed a broad range of voting problems, including technological deficiencies, outdated registration lists, partisan election management, and voter fraud. Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections iv–v (2005), *available at* https://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF. It addressed issues like absentee and early voting, voting centers, and access for disabled voters. *Id.* at 35–36, 39–40.

One of the Baker-Carter recommendations to address voter fraud was that voters be required to

"produce a photo-identification card as a condition to casting a ballot." Overton, *supra*, at 633; *see also* Building Confidence in U.S. Elections, *supra*, at 21. Indiana led the way, passing one of the first voter ID laws in the nation. S.E.A. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

B. *Crawford* confirmed States' compelling interest in safeguarding election integrity as a justification for Voter ID and other election modernization laws

Unsurprisingly, this wave of election modernization prompted a counter-wave of constitutional challenges. One of the first to get the Courts attention was a challenge to Indiana's voter photo identification law, which the Court upheld by a vote of 6 to 3. *Crawford*, 553 U.S. at 204.

In his lead opinion, which Chief Justice Roberts and Justice Kennedy joined, Justice Stevens observed that, while the record contained no evidence of in-person voter fraud occurring in Indiana, historical examples of such fraud exist throughout the Nation. *Id.* at 194–96. In light of the need to deter such fraud and the need to safeguard voter confidence, "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Id.* at 196. Indeed, though neither the 1993 National Voter Registration Act, which required States to use drivers' license applications as voter registrations,

nor HAVA required states to identify voters at the polls, both statutes "indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 193. "Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* at 196.

In terms of the law's supposed burdens, the plurality observed that "[f]or most voters who need [photo identification], the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . ." *Id.* at 198. And while the law might impose a "somewhat heavier burden" on a limited number of persons, the severity of that burden was mitigated by the ability of otherwise eligible voters to cast provisional ballots or, in some circumstances, to vote absentee. *Id.* at 199–200. The minimal burdens of the law were born out by the plaintiffs' failure to identify even a single individual who would be prevented from voting as a result of the voter ID law. *Id.* at 200–01.

Notably, even Justice Breyer, in dissent, credited both the Baker-Carter reporter and Indiana's legitimate need "to prevent fraud, to build confidence

in the voting system, and thereby to maintain the integrity of the voting process." *Id.* at 237 (Breyer, J., dissenting).

There can be no doubt that these same interests apply to support Texas's Voter ID law, both as a matter of constitutional law and statutory law. The interests are national, not local: "there is no way [voter ID laws] could promote public confidence in Indiana (as *Crawford* concluded) and not in [Texas]." *Frank*, 768 F.3d at 750. And the record in this case contains evidence of the very sort of in-person voter fraud that the law was enacted to prevent. Pet. at 2 n.1.

In fact, the interests recognized in *Crawford* justify an array of election modernization efforts, including modifications to rules governing early voting, election-day voter registration, and out-of-precinct voting. Since both *Bush v. Gore* and *Crawford*, states have been experimenting with new rules that both expand opportunities for voter participation and ensure election security, sometimes favoring one interest, and then the other. The legitimacy of calibrating and recalibrating those balances can hardly be open to question in the wake of *Crawford*, yet the decision below and other cases proceed as if every state must prove the significance of these interests in every case. *See, e.g.*, *Veasey*, 830 F.3d at 261 (stating Section 2 requires "an intensely

fact-based and local totality-of-the-circumstances analysis").

C. *Shelby County* foreclosed Section 5 relief, prompting novel Section 2 claims that have divided the Courts of Appeal

In 2013, the Court declared Section 4(b) of the Voting Rights Act unconstitutional, effectively negating the applicability of Section 5's preclearance standards and requirements for covered states. In doing so, the Court reminded everyone that "the permanent, nationwide ban on racial discrimination in voting found in [Section] 2" remains. *Shelby Cnty.*, 133 S. Ct. at 2631; *see also* 52 U.S.C. § 10301(a) (providing broadly that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

Without Section 5 as a barrier, opponents of state election reform have begun a widespread campaign to seek relief under Section 2, both in formerly covered states and elsewhere. *See, e.g.*, *Frank*, 768 F.3d 744 (challenging Wisconsin's voter ID law); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *stayed then vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)

(challenging Ohio's uniform early voting hours); *Lee v. Va. State Bd. of Elections*, No. 3:15CV357-HEH, 2016 WL 2946181 (E.D. Va. May 19, 2016) (challenging Virginia's voter ID law).

What is more, this effort to stymie election modernization has been cheered along by some election law scholars. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2147 (2015) (arguing that "section 2 can be made to function like erstwhile section 5 in the post-*Shelby County* world").

To date, however, the Court has addressed the Section 2 standard only in the context of voter dilution cases brought in the wake of legislative redistricting. In that context, the Court invoked the so-called "Senate factors": nine factors listed in the Senate report on amended Section 2 intended to help courts evaluate claims of vote dilution under the results test. S. Rep. No. 417, 97th Cong., 2d Sess., at 28–29 (1982); *see also* Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 Emory L.J. 1, 15–16 (1987). As is fitting for analyzing bespoke legislative districts, the Court stated that the Section 2 inquiry for vote dilution claims is "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v.*

Gingles, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)).

The *Gingles* "Senate factors," however, are particularly unsuited to vote-abridgement claims. For example, "the use of overt or subtle racial appeals in political campaigns[,]" *id.* at 45, has no bearing on whether a particular electoral regulation itself prevents minorities from voting. That is likely why the *Frank* court described them as "unhelpful," 768 F.3d at 754, and why the Sixth and Ninth Circuits declined to apply them when plaintiffs failed to make a threshold showing of discriminatory result. *Husted*, 2016 WL 4437605 at *15; *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

Accordingly, it is perhaps unsurprising that federal circuit courts disagree on the appropriate test for abridgement claims. The Sixth, Seventh, and Ninth Circuits have held that plaintiffs must show the challenged law actually decreases minority voter participation, while the Fourth and Fifth Circuits require only rational speculation that the law might potentially impact minorities in some way. *See* Pet. at 13–18 (discussing *Husted*, 2016 WL 4437605; *Frank*, 768 F.3d 744; *Gonzalez*, 677 F.3d 383; *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Veasey*, 830 F.3d at 225).

In *Frank*, the Seventh Circuit first noted that Section 2 imposes not "an equal-outcome command" (which would "sweep[] away almost all registration and voting rules") but "an equal-treatment requirement." 768 F.3d at 754. And in a discriminatory effect claim, the proper inquiry is not focused on the challenged statute "in isolation" but rather on the "totality of the circumstances"—in other words, "the entire voting and registration system." *Id.* at 753–54.

Under this analysis, the court went on to find there was no discriminatory effect because "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 755. While the court acknowledged some statistical data suggesting that minorities disproportionately lack photo IDs or find it more difficult to obtain them, *id.* at 752–53, it noted that Section 2 was not violated merely because "these groups are less likely to use that opportunity." *Id.* at 753 (emphasis omitted). "[U]nless Wisconsin makes it needlessly hard to get photo ID," said the court, "it has not denied anything to any voter," particularly where "the district court [did not] find that differences in economic circumstances are attributable to discrimination by Wisconsin." *Id.* Accordingly, the court concluded Wisconsin's law did not violate Section 2 and suggested that Indiana's "[f]unctionally identical" law would as well. *Id.* at 750.

In short, review is warranted in view of how Section 2 has divided lower courts since becoming the weapon of choice for attacking election modernization efforts.

D. The need for clarification of Section 2 will only grow

The split among circuits over the proper Section 2 standard will only grow over time.

First, state election modernization efforts have been, and will continue to be, robust. At least six States enacted voter ID laws similar to Indiana's after—and in reliance upon—the Supreme Court's decision in *Crawford*. *See* Kan. Stat. Ann. §§ 25-1122, 25-2908; Miss. Code Ann. § 23-15-563; Tenn. Code Ann. § 2-7-112; Tex. Elec. Code Ann. § 63.001 *et seq.*; Va. Code Ann. § 24.2-643(B); Wis. Stat. §§ 5.02(6m), 6.79(2)(a), (3)(b). Other states are both adding and subtracting days for early voting, experimenting with election-day registration for all voters and preregistration for underage prospective voters, and standardizing their approaches to the problem of out-of-precinct ballots. *Absentee and Early Voting*, Nat'l Conf. St. Legislatures, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (last updated Oct. 25, 2016); *Pre-registration for Young Voters*, Nat'l Conf. St. Legislatures, http://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-

voters.aspx (last visited Oct. 27, 2016); *Same Day Voter Registration*, Nat'l Conf. St. Legislatures, http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx (last updated Sept. 28, 2016); *Provisional Ballots*, Nat'l Conf. St. Legislatures, http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx (last updated June 19, 2015).

These and all other States are entitled to certainty that their efforts are worthwhile and their laws are legitimate and will not be undone based on a Section 2 challenge that requires no proof of actual voter impact. Supreme Court review in this case would go a long way toward providing that certainty.

Furthermore, nothing in the text of Section 2 restricts challenges to new election statutes as opposed to existing ones. Under the standard employed below, for example, a voting rights group could easily challenge voter registration requirements, in-person voting requirements, and other common place rules merely by showing some indirect evidence that such rules may disproportionally affect minority voters. So, for example, voter registration laws might be called into question simply because on some random date a smaller percentage of the minority voting age population is registered than other groups. Or, perhaps in-person voting requirements could be challenged based on racial disparities in vehicle

ownership. There is no qualitative difference between those sorts of challenges and the one here, predicated as it is not on actual election participation but on snapshot data concerning possession of valid photo identification.

Review is necessary both to guide States as they attempt to avoid future *Bush v. Gore* scenarios by modernizing election procedures, and to guide all parties and courts as they seek to understand the implications of novel Section 2 theories for long-standing election rules.

II. There Is No Reason to Treat Texas's Voter ID Law Differently from Wisconsin's or Indiana's

Just as the Court established a uniform standard for adjudication of constitutional election law claims in *Crawford*, so it should establish a uniform standard for adjudication of statutory claims in this case. The Voting Rights Act was intended to protect fair voting and elections across the Nation. Uniform enforcement standards are necessary to achieve that statutory purpose.

A. Voter ID laws similar to Texas's law have already survived both constitutional and Section 2 scrutiny

Texas's Voter ID law varies little from Wisconsin's and Indiana's, so there is no reason it should offend Section 2 when they do not. For example, both Indiana and Texas require the state to provide free photo identification to anyone who requests it. Ind. Code § 9-24-16-10(b); Tex. Transp. Code Ann. § 521A.001(b). Both create exceptions to the ID requirement for absentee, elderly, and disabled voters. Ind. Code §§ 3-11-10-1.2, -24(a), -5-2-16.5; Tex. Elec. Code Ann. §§ 82.002(a), 82.003, 13.002(i). And both permit in-person voters who lack the required ID to cast provisional ballots and validate them within a certain period time after the election. Ind. Code §§ 3-11-8-25.1(d), -11.7-5-2.5; Tex. Elec. Code Ann. §§ 63.001(g), 65.0541.

While Texas voters may face some minor hurdles (for example, a slightly shorter timeframe in which to provide ID after casting a provisional ballot) that Indiana voters do not, the reverse is also true. For example, Texas voters may obtain copies of their birth certificates free of charge, *Veasey v. Abbott*, 796 F.3d 487, 495 (5th Cir. 2015), *aff'd in part, vacated in part on reh'g*, 839 F.3d 216 (2016) (en banc), whereas Indiana counties charge anywhere from $3 to $12 for a birth certificate. *Crawford*, 553 U.S. at 215 (Souter, J., dissenting).

And like the Wisconsin and Indiana plaintiffs, the Texas plaintiffs here have failed to develop a record quantifying any kind of burden on the State's registered voters. Though both plaintiffs' counsel and Justice Department attorneys scoured the state in search of disfranchised voters, at the time of trial, they could not identify a single person who would be unable to vote because of the ID requirement. Pet. at 5. Even the named plaintiffs were able to vote either by mail or by using appropriate ID—though some chose not to. *Id.*

Like the Indiana and Wisconsin laws, the Indiana and Texas laws do not differ "in ways that matter under the analysis in *Crawford*" because none of the minor differences "establish[] that the burden of voting in Wisconsin is significantly different from the burden in Indiana." *Frank*, 768 F.3d at 746. Such minor differences should not matter under the Section 2 analysis, either, and this Court's review is necessary to clarify the proper standard.

B. Post-implementation data shows no negative impact on voter turnout as a result of Indiana's voter ID law

Nor is there any reason to believe Texas's law would actually have a negative impact on minority participation, as is the presupposition of the one-

step-removed photo ID possession analysis the Fifth Circuit employed. Data collected after the implementation of Indiana's voter ID law confirms the *Crawford* Court's conclusion that the law does not impose any "excessively burdensome requirements" on voters. *Crawford*, 553 U.S. at 202 (quotation omitted).

In a November 2007 study, Jeffrey Milyo of the Truman School of Public Affairs at the University of Missouri reported that "[o]verall, voter turnout in Indiana increased about two percentage points" after Indiana's voter ID law went into effect. Jeffrey Milyo, Inst. of Pub. Policy, Report No. 10-2007, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis* 1 (Nov. 2007) (emphasis added). Furthermore, "there is no consistent evidence that counties that have higher percentages of minority, poor, elderly or less-educated population suffer any reduction in voter turnout relative to other counties." *Id.* at Abstract. Milyo concluded: "The only consistent and frequently significant effect of voter ID that I find is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters." *Id.* at 1.

A more recent study also supports the conclusion that Indiana voters have not been disenfranchised by the law. Professor Michael J. Pitts of the Indiana University Robert H. McKinney School of Law assessed the effects of voter ID in Indiana by

examining the number of provisional ballots cast due to a lack of valid photo identification that were subsequently validated and counted. Michael J. Pitts, *Empirically Measuring the Impact of Photo ID Over Time and Its Impact on Women*, 48 Ind. L. Rev. 605 (2015). From this indirect evidence of how the voter ID law operates, Pitts estimated that "Indiana's photo identification law appears to have a relatively small (in relation to the total number of ballots cast) overall disenfranchising impact on the electorate." *Id.* at 607.

Indeed, at the 2012 general election, only 645 persons in an Indiana electorate of nearly 2.7 million cast a provisional ballot that was not counted because of a problem with voter identification. *Id.* at 612–13. This amounts to a mere 0.024% of the electorate. What is more, Pitts observed that this number "seems to be headed in a downward direction when one compares data from the 2008 general election to the 2012 general election." *Id.* at 607. And "to the extent that Indiana's law serves as a model for other photo identification laws being adopted, this may tend to indicate those other laws will not lead to massive disenfranchisement within those states." *Id.* at 618.

There is no reason to expect that Texas's Voter ID law will somehow cause substantial harm to voter participation, when nothing of the sort has happened in ten years of Voter ID in Indiana. Thus, there is

no reason to permit Section 2 claims to succeed on a mere showing that potential minority voters might, on some random day, be less prepared to exercise the right to vote than others. What matters is actual impact, not hypothesis and speculation based on snapshot data acquired multiple steps removed from the voting booth.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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