No. 14-41127

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARC VEASEY, *et al.*,

Plaintiffs-Appellees,

v.

GREG ABBOTT, in his Official Capacity as Governor of Texas, *et al.*,

Defendants-Appellants,

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

MOTION OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MICHIGAN, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WISCONSIN FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

Amici Curiae, the States of Indiana, Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nevada, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wisconsin (hereafter, the "Amici States"), hereby seek the Court's leave to appear in this matter as amici curiae in support of Defendants-Appellants and supporting reversal of the decision below.

Federal Rule of Appellate Procedure 29(a) provides that "a state may file an amicus-curiae brief without consent of the parties or leave of court." Accordingly,

the Amici States request that the Court permit them to appear as amici curiae in this matter, as of right, pursuant to Rule 29(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

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-CRUMMEY; 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, CARLOS CASCOS, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; STATE OF TEXAS; STEVE MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, *Defendants-Appellants*,

(*caption continued on inside cover*)

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

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MICHIGAN, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

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(*caption continued*)

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 ESPINOZA; 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*.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

Plaintiffs-Appellees	Former or Present Counsel
• Marc Veasey • Jane Hamilton • Sergio DeLeon • Floyd Carrier • Anna Burns • Michael Montez • Penny Pope • Oscar Ortiz • Koby Ozias • John Mellor-Crumley • League of United Latin American Citizens	• Neil G. Baron • Brazil & Dunn • Joshua James Bone • Kembel Scott Brazil • Campaign Legal Center • Armand Derfner • Chad W. Dunn • J. Gerald Hebert • Luis Roberto Vera, Jr.
• United States of America	• Anna Baldwin • Meredith Bell-Platts • Robert S. Berman • Richard Dellheim • Daniel J. Freeman • Bruce I. Gear • Bradley E. Heard • Jennifer L. Maranzano • Avner Michael Shapiro • John Alert Smith, III • U.S. Department of Justice • Elizabeth S. Westfall

• Mexican American Legislative Caucus, Texas House of Representatives • Texas State Conference of NAACP Branches • Estela Garcia Espinosa • Lionel Estrada • La Union Del Pueblo Entero, Inc. • Margarito Martinez Lara • Maximina Martinez Lara • Eulalio Mendez, Jr. • Sgt. Lenard Taylor	• Vishal Agraharkar • Jennifer Clark • Brennan Center for Justice • Lindsey Beth Cohan • Covich Law Firm LLC • Dechert LLP • Jose Garza • Daniel Gavin Covich • Robert W. Doggett • Law Office of Jose Garza • Lawyers' Committee of Civil Rights Under Law • Kathryn Trenholm Newell • Priscilla Noriega • Myrna Perez • Mark A. Posner • Ezra D. Rosenberg • Amy Lynne Rudd • Texas Rio Grande Legal Aid Inc. • Marinda Van Dalen • Wendy Weiser • Michelle Yeary • Erandi Zamora
• Texas League of Young Voters Education Fund • Imani Clark • Texas Association of Hispanic County Judges and County Commissioners • Hidalgo County	• Leah Aden • Danielle Conley • Kelly Dunbar • Lynn Eisenberg • Tania C. Faransso • Ryan Haygood • Sonya Lebsack • Natasha Korgaonkar • NAACP Legal Defense and Educational Fund, Inc. • Jonathan E. Paikin • Preston Edward Henrichson Rolando L. Rios • Deuel Ross • Richard F. Shordt

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Third-party Defendants	Former or Present Counsel
• Third party legislators • Texas Health and Human Services Commission	• Arthur C. D'Andrea • Office of the Attorney General • John B. Scott
Third-party movants	Former or Present Counsel
• Bipartisan Legal Advisory Group of the United States House of Representatives • Kirk P. Watson • Rodney Ellis • Juan Hinojosa • Jose Rodriguez • Carlos Uresti • Royce West • John Whitmire • Judith Zaffirini	• Bishop London & Dodds • James B. Eccles • Kerry W. Kircher • Alice London • Office of the Attorney General • Office of the General Counsel • U.S. House of Representatives

• Lon Burnam • Yvonne Davis • Jessica Farrar • Helen Giddings • Roland Gutierrez • Borris Miles • Sergio Munoz, Jr. • Ron Reynolds • Chris Turner • Armando Walle	
Interested third parties	Appearing pro se
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Amici Curiae in Support of Defendants-Appellants	Former or Present Counsel
State of Indiana and 14 Other States	• Thomas M. Fisher

s/Thomas M. Fisher
Thomas M. Fisher

Attorney of record for Amicus Curiae State of Indiana, et al.

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici curiae, the States of Indiana, Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nevada, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wisconsin, file this brief in support of Defendants-Appellants as a matter of right pursuant to Federal Rule of Appellate Procedure 29(a).

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*, National Conference of State Legislatures (Apr. 11, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. These laws vary greatly, with some States requiring photo identification and other States accepting various forms of non-photo documentary identification. The States also have a wide array of procedures in place to accommodate voters who are unable to produce the required identification on Election Day. *See id.*

At least eight States (including Texas) require in-person voters to present photo identification and, if they are unable to do so, to cast a provisional ballot that they must take steps to validate after Election Day. *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(6)(m), 6.79(2)(a), (3)(b). Of these laws, five were enacted after—and in reliance upon—the United States

Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the Court upheld Indiana's voter ID law and affirmed the facial validity of such laws.

The *amici* States have a compelling interest in the continued vitality of *Crawford* and the guidance it provides. Lower court decisions that would allow each new plaintiff to come forward with new evidence regarding the supposed impact of a voter ID law and invite the court to re-weigh competing interests both undermine *Crawford* and create uncertainty for States attempting to enforce or enact voter ID laws.

More generally, the *amici* States are interested in ensuring that States retain their full authority under the Elections Clause, U.S. Const. art. I, § 4, 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."). States' discretionary legislative authority over elections is important because 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[.]" The Federalist No. 59, at 379 (Alexander Hamilton) (Modern Library Coll. ed. 2000).

All States have enacted complex election laws that "invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Indeed, "[e]ach provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Despite the inevitable burdens, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

Voter ID laws such as Texas's SB 14 and the Indiana law upheld in *Crawford* represent reasonable, nondiscriminatory exercises of Elections Clause authority that take account of the need to modernize election procedures, just as the Founders envisioned. Federalist No. 59, *supra*, at 379. The *amici* States have an interest in ensuring that such authority is not undermined by judicial decisions that would grant voter ID opponents repeated opportunities to facially attack election laws that have already been deemed valid.

SUMMARY OF THE ARGUMENT

In 2008, the Supreme Court upheld Indiana's voter ID law, which requires citizens voting in person to present government-issued photo identification before casting their ballots. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). In evaluating the constitutionality of Texas's voter ID law, SB 14, the district court in this case made every effort to disregard *Crawford*, finding the Supreme Court decision inapplicable because, in its view, (1) the Indiana and Texas laws are "materially different," (2) this is an as-applied challenge rather than a facial challenge, and (3) there are "substantial differences" in the evidentiary records developed in the two cases. *Veasey v. Perry*, 71 F. Supp. 3d 627, 679 (S.D. Tex. 2014). This was error.

Crawford affirmed the facial validity of voter ID laws generally. It held, as a matter of law, that voter ID laws serve compelling State interests in deterring fraud, maintaining public confidence in the electoral system, and promoting accurate record-keeping. As the Seventh Circuit recognized in its recent decision upholding Wisconsin's voter ID law, if this is true in Indiana, then it must perforce be true in every other State. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). Indeed, the *Frank* decision provides a useful template when it comes to applying *Crawford* to follow-on voter ID challenges in other States.

Moreover, just as the plaintiffs in *Crawford* were unable to come forward with a single individual who would be prevented from voting by the Indiana law, so, too, have the plaintiffs here failed to produce such a person. They argue that some voters will be burdened more significantly by the Texas voter ID law than others, but do not provide any concrete evidence that would quantify that supposed burden. This failure to prove that the statute imposes "excessively burdensome requirements" on any class of voters, *Crawford*, 553 U.S. at 202 (quotation omitted), should prove as fatal to the plaintiffs' constitutional claims in this case as it did in *Crawford*, especially as there are no meaningful differences between the Texas and Indiana laws.

In addition, *Crawford* cannot be distinguished on the basis that it addressed a facial challenge whereas the Texas plaintiffs have brought an as-applied challenge. They have not. An as-applied challenge contends that a law's application to a particular person under particular circumstances deprived that person of a constitutional right, and it seeks relief only on behalf of that person. These plaintiffs, on the other hand, seek wholesale invalidation of the Texas voter ID law on the basis that it impacts some segment of unidentified voters who will incur costs and burdens in complying with the law. This is an operational facial challenge, not an as-applied challenge.

Plaintiffs' theory, if accepted, would yield bizarre consequences, rendering the same law valid in some States but invalid in others depending on how many persons do not, at one given moment in time, have acceptable identification. This, in turn, would leave State voter ID laws in a constant state of flux as "a case-by-case approach naturally encourages constant litigation." *Crawford*, 553 U.S. 209 (Scalia, J., concurring). *Crawford* should compel the same result here that it did in *Frank v. Walker*.

Finally, it is worth observing that the few studies of Indiana voter participation that have been conducted since Indiana adopted its voter ID law in 2005 do not support the theory that such laws suppress turnout among vulnerable groups or voters generally. A November 2007 study showed that overall voter turnout in Indiana *increased* by about two percentage points after the law went into effect. It also found no consistent evidence of lower turnout in counties with higher percentages of minority, poor, elderly, or less-educated populations. A more recent 2015 study of provisional ballot validations estimated from that indirect evidence only a "relatively small" disenfranchising impact on the electorate and observed that voters seem to have adapted quickly to the law, as evidenced by the substantial increase in the number of voters obtaining free photo identification cards and voting absentee. In short, post-implementation data shows no pattern of decline in voter turnout in Indiana nor any evidence of significant

burdens on the electorate as a result of Indiana's voter ID law. There is no reason to think the outcome will be any different in other States that have adopted voter ID laws modeled after Indiana's.

ARGUMENT

I. *Crawford* Declared Voter ID Laws Facially Valid, as Recently Confirmed by the Seventh Circuit

The Supreme Court affirmed the facial validity of voter ID laws eight years ago in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and there is no reason to depart from that holding here. Indeed, because there are no meaningful differences between the Indiana law upheld in *Crawford* and the Texas law challenged here, nothing more than a straightforward application of *Crawford* is necessary to decide Plaintiffs' constitutional claims. Anything more risks creating a conflict with *Crawford* and with *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), which applied *Crawford* to uphold Wisconsin's voter ID law.

A. *Crawford* held compelling state interests justified any minimal burden imposed by Indiana's voter ID law

1. *Crawford* upheld Indiana's voter ID law by a vote of 6 to 3. Justice Stevens authored the lead opinion, which Chief Justice Roberts and Justice Kennedy joined. Justice Scalia wrote a concurring opinion, joined by Justices Thomas and Alito.

Justice Stevens' opinion applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which "weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford*, 553 U.S. at 190 (quoting *Anderson*, 460 U.S. at 789). Justice Scalia's concurring opinion, on the other hand, applied the approach set out in *Burdick v. Takushi*, 504 U.S. 428 (1992), which "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (quoting *Burdick*, 504 U.S. at 433–34). Under *Burdick*, Justice Scalia explained, courts must consider the challenged law and its "reasonably foreseeable effect on *voters generally*." *Id.* at 206. In this regard, Justice Scalia disagreed with Justice Stevens' approach, which gave credit to the possibility that the Indiana law might pose burdens on some individuals (though ultimately holding that the plaintiffs had provided no evidence of such burdens).

2. In applying the *Anderson* balancing test, the *Crawford* plurality 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. The Plurality credited both the need to deter such fraud and the need to safeguard voter confidence, concluding "[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 194–96. "Moreover," said the Court, "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. Finally, the Plurality noted the shortcomings of the record, which identified not a single individual who would be prevented from voting as a result of the voter ID law. *Id.* at 200–01. "The 'precise interests' advanced by the State [we]re therefore sufficient to defeat petitioners' facial challenge" to Indiana's voter ID law. *Id.* at 203.

Notably, even Justice Breyer, in dissent, credited 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). He acknowledged that the Constitution does not guarantee everyone a cost-free

voting process and dissented only because Indiana's law lacked features of an ideal voter ID regulatory scheme that could conceivably burden fewer voters. *See id.* at 237–40.

B. The Seventh Circuit properly applied *Crawford* to uphold Wisconsin's voter ID law

The Seventh Circuit demonstrated how to apply *Crawford* to facial challenges to state voter ID laws in its recent decision upholding the Wisconsin voter ID law in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

1. In *Frank*, The Seventh Circuit first compared Wisconsin's law to Indiana's, concluding that while there are differences in detail between the two laws, "none establishes that the burden of voting in Wisconsin is significantly different from the burden in Indiana." *Id.* at 746.

The court next observed that the plaintiffs in both cases had failed to meet their evidentiary burden. Rejecting the Wisconsin plaintiffs' effort "to treat *Crawford* as a case in which there was no record, so that the Supreme Court had no facts to go on," the court pointedly clarified, "[t]hat's not what happened." *Id.* at 747–48. Indeed, "[a]n extensive record was compiled in *Crawford*," *id.* at 748, yet the Indiana plaintiffs failed to provide any evidence regarding the number of voters in the State who would be *unable to obtain* photo IDs. *Id.* The court observed that "[t]he trial in Wisconsin produced the same inability to quantify." *Id.*

Even more to the point, the court held that the district court's finding that up to 300,000 registered Wisconsin voters lack acceptable photo ID carries *no legal significance* under *Crawford*. *Id.* at 748–49. The court deemed that number "questionable," noting that "the district judge who tried the Indiana case rejected a large estimate as fanciful in a world in which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car, buy a beer," or carry out any number of other everyday life activities. *Id.* at 748. Pondered the court: "Could 9% of Wisconsin's voting population really do *none* of these things?" *Id.*

The court explained that registered voters who lack photo ID could not claim to be "disenfranchised" because the State had in no way made it "impossible, or even hard" for them to get photo ID. *Id.* at 748. "[I]f photo ID is available to people willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time." *Id.* In fact, said the court, many of the district court's findings "support the conclusion that for most eligible voters not having a photo ID is a matter of choice rather than a state-created obstacle." *Id.* at 749.

In terms of government objectives, the Seventh Circuit chastised the district judge for finding "as a fact that the majority of the Supreme Court was wrong" about the benefits of voter ID, including deterring fraud, preserving voter

confidence, and maintaining accurate records. *Id.* at 750. The legitimate purposes behind voter ID laws that the Supreme Court recognized in *Crawford* are now matters of legislative fact—"a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." *Id.* In short, "[p]hoto ID laws promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in Wisconsin. This means they are valid in every state . . . or they are valid in no state." *Id.* Thus, because Wisconsin's law was nearly identical to Indiana's law, *Crawford* "require[d] [the court] to reject a constitutional challenge to Wisconsin's statute." *Id.* at 751.

C. There are no meaningful differences between the Texas and Indiana voter ID laws

Crawford compels the same result in this case. Texas's voter ID law, like Wisconsin's, is substantially similar to Indiana's law. 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.

Indeed, as in *Crawford*, Plaintiffs do not identify a single person who would be prevented from voting by SB 14. Of the fourteen named plaintiffs, nine can vote by mail without a photo ID, three already have an ID that complies with the law, one chose to get a California driver's license instead of a Texas license, and

one testified that he is able to obtain an SB 14-compliant personal ID card. Supp. En Banc Br. for Appellants at 9, 54.

At most, Plaintiffs demonstrated that less than 5% of voters lack an SB 14-compliant ID. *Id.* at 54. Critically, however, they did not establish what percentage of this population also lacks the underlying documents necessary to obtain a compliant ID and cannot vote by mail. *Id.* Indeed, as the district court acknowledged, "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14[.]" *Veasey*, 71 F. Supp. 3d at 686.

Yet the district court dismissed the relevance of *Crawford* on the basis that Indiana's Voter ID law "is materially different from SB 14." *Veasey v. Perry*, 71 F. Supp. 3d 627, 679 (S.D. Tex. 2014). As the table on the following pages demonstrates, however, the two laws are substantially similar.

INDIANA	TEXAS
Voters must show ID issued by the United States or the State of Indiana that bears the voter's name and photograph (Ind. Code § 3-5-2-40.5)	Voters must show any of the following forms of photo ID: Texas driver's license or personal ID card issued by the State; U.S. military ID card; U.S. citizenship certificate; U.S. passport; license to carry a concealed handgun; Election Identification Certificate (EIC) issued by the State (Tex. Elec. Code § 63.0101
ID must bear an expiration date that either has not yet occurred or that occurred after the date of the most recent general election. (Ind. Code § 3-5-2-40.5)	ID must bear an expiration date that is no more than 60 days past. (Tex. Elec. Code § 63.0101)
Non-license photo ID cards are free of charge (Ind. Code § 9-24-16-10(b))	EICs are free of charge (Tex. Transp. Code § 521A.001(b))
Individuals voting by absentee ballot are not required to provide photo ID (Ind. Code § 3-11-10-1.2)	Individuals voting by absentee ballot are not required to provide photo ID (*See* Tex. Elec. Code §§ 82.002(a), 82.003)
Persons with a disability may vote absentee and are therefore exempt from the photo ID requirement (Ind. Code § 3-11-10-24(a))	Persons with a disability are exempt from the photo ID requirement if they provide the voter registrar with documentation of their disability (Tex. Elec. Code § 13.002(i))
Voters age 65 and older may vote absentee and are therefore exempt from the photo ID requirement (Ind. Code §§ 3-5-2-16.5, 3-11-10-24(a))	Voters age 65 and older may vote absentee by mail and are therefore exempt from the photo ID requirement (Tex. Elec. Code § 82.003)
In-person voters who lack the required ID can cast provisional ballots (Ind. Code § 3-11-8-25.1(d))	In-person voters who lack the required ID can cast provisional ballots (Tex. Elec. Code § 63.001(g))

INDIANA [CONT'D]	TEXAS [CONT'D]
Provisional ballots will be counted if the voter provides acceptable photo ID to the circuit court clerk or county election board and executes an affidavit of identity within 10 days of the election (Ind. Code § 3-11.7-5-2.5)	Provisional ballots will be counted if the voter provides acceptable photo ID to the country registrar within 6 days of the election (Tex. Elec. Code § 65.0541)
Voters with a religious objection to being photographed may validate their provisional ballots with an affidavit attesting to their religious objection (Ind. Code § 3-11.7-5-2.5(c))	Voters with a religious objection to being photographed may validate their provisional ballots with an affidavit attesting to their religious objection (Tex. Elec. Code § 65.054(b))

Despite the substantial congruence of the two laws, the district court seized on the few marginal areas in which they differ as a rationale for casting *Crawford* aside. Specifically, the district court concluded that Indiana's law is "more generous to voters," *Veasey*, 71 F. Supp. 3d at 679, because it permits the use of any Indiana state-issued or federal ID and accommodates indigents and individuals living in nursing facilities. *Id.*

As in *Frank*, however, these differences are not meaningful to the *Crawford* analysis. As the Seventh Circuit observed, Wisconsin requires photo ID for both absentee and in-person voters, whereas Indiana only requires it for the latter. *Frank*, 768 F.3d at 746. And while Indiana citizens who vote provisionally have 10 days following the election in which to validate their ballot, provisional voters in Wisconsin have until the Friday following the election. *Id.* The court also

pointed out that Wisconsin's list of acceptable identification omits some documents that Indiana accepts and includes some that Indiana omits. *Id.* The Seventh Circuit correctly concluded, however, that these "differences in detail" did not establish that "the burden of voting in Wisconsin is significantly different from the burden of voting in Indiana." *Id.*

The same is true here. While Texas voters may face some minor hurdles 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 (7th Cir. 2015), whereas Indiana counties charge anywhere from $3 to $12 for a birth certificate. *Crawford*, 553 U.S. at 215 (Souter, J., dissenting).

In all events, the two laws do not differ "in ways that matter under the analysis in *Crawford*." *Frank*, 768 F.3d at 746. The Texas law—like the Indiana and Wisconsin laws—is a neutral, generally applicable election regulation. Considering SB 14's "broad application to all [Texas] voters," *Crawford*, 553 U.S. at 202–03, this Court must conclude that it "imposes only a limited burden on voters' rights . . . [and t]he precise interests advanced by the State are therefore sufficient to defeat [Plaintiffs'] facial challenge[.]" *Id.* (citations and internal quotation marks omitted).

II. Plaintiffs Have Brought a Facial Challenge to SB 14, Not an As-Applied Challenge, So *Crawford* Applies

Crawford left open the possibility that voter ID laws can be challenged on an as-applied basis by voters facing "excessively burdensome requirements." *See Crawford*, 553 U.S. at 202–03. Cognizant of this, Plaintiffs have attempted to cast their challenge as an as-applied challenge rather than a facial attack against SB 14. The district court accepted this characterization and cited this as yet another reason why *Crawford* is inapplicable to Plaintiff's claims. *Veasey*, 71 F. Supp. 3d at 679.

What Plaintiffs have actually brought, however, is a new facial challenge under a different—and unprecedented—legal standard that purports to take account of a statute's operational impact rather than its direct burdens. Such claims are foreclosed by *Crawford*, which established the facial test for Voter ID laws and concluded such laws are constitutional.

1. A facial challenge tests a law's constitutionality based on its text alone—not on its application to particular individuals—and seeks wholesale invalidation of statutes that are found to be incapable of any constitutional applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Hill v. Colorado*, 530 U.S. 703, 733 ("[S]peculation about possible vagueness in hypothetical situations . . . will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications[.]") (citations and internal quotation marks omitted). Accordingly, parties mounting a facial

challenge "must establish that no set of circumstances exists under which the Act would be valid," and the mere possibility that a law might be unconstitutional "under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Salerno*, 481 U.S. at 745.

An as-applied challenge, on the other hand, does not contend that a law is unconstitutional as written, but that its application *to a particular person* under particular circumstances deprived that person of a constitutional right. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411–12 (2006). The critical distinction with a facial challenge is the relief sought, which in an as-applied challenge benefits only the individual before the court, not everyone who might be burdened by the law.

For example, after the Supreme Court upheld the Bipartisan Campaign Finance Reform Act of 2002 (BCRA) against a facial challenge in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), Wisconsin Right to Life brought a subsequent lawsuit alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communication[s]" was unconstitutional as applied to specific radio ads *it* wished to run. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 459–60 (2007). This is identifiable as an as-applied challenge because it sought relief that would apply only to the plaintiffs before the court, not wholesale invalidation of the statute.

Similarly, in the voter ID context, one set of the *Frank* plaintiffs also brought an as-applied challenge to Wisconsin's law, arguing that the law, though facially valid, creates "high hurdles for some persons eligible to vote [and thus] entitles *those particular persons* to relief." *Frank v. Walker*, No. 15-3582, 2016 WL 1426486, at *2 (7th Cir. Apr. 12, 2016) (emphasis added). The court remanded the plaintiffs' as-applied challenge to the district court for further proceedings. *Id.* at *4.

2. In contrast, what Plaintiffs have brought here is an operational facial challenge. An operational challenge seeks wholesale invalidation based on aggregate data purporting to show the operational impact of the statute on various groups defined by plaintiffs.

For example, in *McCleskey v. Kemp*, 481 U.S. 279, 286, 298 (1987), a criminal defendant who was sentenced to death under Georgia's capital punishment law challenged the constitutionality of that law, which the Court had previously held to be facially valid in *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976). McCleskey's claim was an operational challenge, as he argued for total invalidation of the law on the basis that it operated in a discriminatory manner in the aggregate against black capital defendants (such as McCleskey) whose victims were white. *McCleskey*, 481 U.S. at 286–87, 291–92. The Court rejected this approach to proving facial constitutional challenges. *Id.* at 292.

Here, Plaintiffs' theory is based on the general idea that some segments of unidentified voters—segments chosen by Plaintiffs, not singled out by the law—will incur incidental and consequential costs of complying with SB 14. They argue that SB 14 has an overall measurable impact on three groups (which, again, *they* identify, not the law): young persons, low-income persons, and racial and ethnic minorities. Tex. State Conf. of NAACP Branches Br. on the Merits at 40 [hereinafter NAACP Br.]; Answering Br. for the Tex. League of Young Voters Ed. Fund and Imani Clark at 41 [hereinafter TLYVEF Br.]; Veasey-LULAC Appellees' Br. on the Merits at 31–32, 56–57 [hereinafter Veasey Br.]. Plaintiffs claim, among other things, that for some citizens falling within these groups, too many government agencies are involved with providing documents needed to obtain an EIC, the facilities offering the EICs are not easily accessible, and the overall expense of obtaining an EIC is too great. *See* NAACP Br. at 31–32; Veasey Br. at 16–17, 18–19, 20–21; TLYVEF Br. at 39–41.

Critically, the remedy Plaintiffs seek in light of these asserted burdens on the young, the poor, and minorities, is *wholesale* invalidation of the statute. Plaintiffs' Original Complaint at 11, *Veasey v. Perry*, 71 F. Supp. 3d 627 (2014) (No. 2:13-cv-193), ECF No. 1 (seeking "preliminary and permanent injunctions enjoining the Defendants . . . from enforcing or giving any effect to the requirements of SB 14, including enjoining Defendants from conducting any elections utilizing SB 14").

Such a demand for relief reveals that the case, at its core, is a facial attack on a statute under a theory the Supreme Court has not accepted, and indeed that the Court essentially rejected in *Crawford.* *Crawford*, 553 U.S. at 203 ("[P]etitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute."). It is one thing if individual plaintiffs demand only personal relief and can demonstrate facts showing how the Texas voter ID law is unconstitutional in their particular circumstances. It is quite another for them to demand complete invalidation based on the idea that, in general, some young, poor, or minority voters may encounter burdens on the way to obtaining a valid ID.

Plaintiffs' operational-impact legal theory would have bizarre consequences. They propose a constitutional standard under which a voter ID law must be empirically tested against some undefined aggregate threshold of how many voters have compliant identification at some random point. *See* Veasey Br. at 55–56. That standard threatens a chaotic world of endless litigation leaving State election officials, as well as citizens and candidates, constantly uncertain over the laws that can be enforced. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring).

Such an approach is all the more unjustified given that Plaintiffs argue that the real burdens they face arise from a host of ancillary factors unrelated to the voter identification law itself, such as "[d]isparities in education, employment,

housing, and transportation resulting from long and systematic racial discrimination." NAACP Br. at 9. There is no denying such disparities exist, and no missing the tragedy when these factors force anyone to choose between spending money on food or on an identification card. But no legal doctrine holds that an otherwise valid voting regulation becomes unconstitutional when the accumulated unfair burdens of life make voting too difficult for some.

What is more, Plaintiffs' legal theory could potentially yield results where voter ID laws may validly operate in some States but not others, depending not only on how an infinite array of incidental factors, ebbing and flowing from State to State, combine to yield particular snapshot outcomes, but also on how much value different judges might attribute to indirect evidence of impact. *Cf. A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (observing, in the context of abortion regulations, that "constitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces [a] nationally uniform approach."). As Justice Scalia warned in his *Crawford* concurrence, this sort of "individual focused approach" would almost certainly lead to "detailed judicial supervision of the election process[, which] would flout the Constitution's express commitment of the task to the States." *Crawford*, 553 U.S. at 209 (Scalia, J., concurring).

III. Post-Implementation Data Shows No Negative Impact on Voter Turnout as a Result of Indiana's Voter ID Law

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*, at 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 estimates 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 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.

Pitts also observed that, since the passage of voter ID in Indiana, nearly 1.2 million persons have received a free photo identification card from the State and the amount of absentee voting has more than doubled. *Id.* at 615. From this data, Pitts concluded "it is likely that the political market adapts relatively quickly to photo identification laws such that those persons who want to vote either secure a

free photo identification from the state or use the ability to vote absentee by mail to cast a ballot." *Id.*

Recent Indiana voter turnout data bears out the conclusions reached by Milyo and Pitts. There has been no pattern of decline in voter turnout since Indiana's voter ID law took effect in 2005.

YEAR	TURNOUT
2014	30%
2012	58%
2010	41%
2008	62%
2006	40%
2004	58%
2002	39%
2000	56%
1998	44%

Voter Registration and Turnout Statistics, Indiana Election Division, http://www.in.gov/sos/elections/2983.htm.

The data show that, while turnout fluctuates cycle-to-cycle, there is no discernible decline in turnout since 2005, the year voter ID was enacted in Indiana.

Indeed, in presidential election years, turnout peaked in 2008, and in 2012 remained well above turnout in 2000 and 2004.

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.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision and render judgment for the defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 22, 2016, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Metadata Assistant 4 and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because it contains 5,846 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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