No. 16-3561

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OHIO DEMOCRATIC PARTY, DEMOCRATIC PARTY OF CUYAHOGA COUNTY, MONTGOMERY COUNTY DEMOCRATIC PARTY, JORDAN ISERN, CAROL BIEHLE, AND BRUCE BUTCHER,
Plaintiffs-Appellees,

v.

JON HUSTED, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF OHIO, AND MIKE DEWINE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF OHIO,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Ohio,
No. 2:15-cv-1802

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, KANSAS, MICHIGAN, NEVADA, NORTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici curiae, the States of Indiana, Alabama, Arizona, Arkansas, Kansas, Michigan, Nevada, North Dakota, Tennessee, Texas, Utah, and Wisconsin, file this brief in support of Defendants-Appellants as a matter of right pursuant to Federal Rule of Appellate Procedure 29(a).

The *amici* States are interested in ensuring that States retain their full authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, to "enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote]." *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."). State 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, each State's posture toward in-person early voting, same-day registration,

voter ID, out-of-precinct voting, and preregistration, just to name a few electoral mechanisms, "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.

Furthermore, in the wake of the Supreme Court's invalidation of Section 4(b) of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), individuals and groups challenging electoral laws have begun to focus their claims on Section 2 of the Act, which has not previously been the subject of much doctrinal development outside of redistricting cases. States have an interest in urging courts to avoid arguments that would, in effect, imbue Section 2 claims with the same retrogression analysis that was appropriate only for Section 5 preclearance review cases.

Electoral laws such as Ohio's S.B. 238 represent reasonable, nondiscriminatory exercises of Elections Clause authority that balance election integrity with voter convenience. The *amici* States have an interest in ensuring that such authority is not undermined by judicial decisions that would grant opponents of electoral reform repeated opportunities to attack laws already deemed valid.

SUMMARY OF THE ARGUMENT

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Court upheld Indiana's voter ID law and signaled more broadly that laws regulating electoral mechanics in the name of election integrity are facially valid as long as they are "justified by relevant and legitimate state interests sufficiently weighty to justify [any burden on voters]." *Id.* at 191 (citation and internal quotation marks omitted). In striking down Ohio's S.B. 238 for insufficient evidence of legitimate state interests in view of the "modest" burdens the law imposes, the district court improperly ignored this guidance. For while *Crawford* is most directly relevant to voter ID laws, its rationale applies to electoral 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. Those interests apply with equal force to early voting and same-day registration laws. In such cases, as with voter ID, States are entitled to rely on their common-sense assessment of the proper balance to strike between election integrity and voter access.

Moreover, just as the plaintiffs in *Crawford* were unable to quantify a substantial burden on registered voters, Plaintiffs here speculate that Ohio's reduction of early voting by several days and its elimination of same-day registration will have a disproportionate, "modest" burden on minorities. The

district court agreed based on "somewhat speculative expert evidence," finding that African Americans are more likely to use early voting, have difficulty using alternative methods of voting in part because they are "distrustful of voting by mail," and incur greater costs associated with voting. *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2016 WL 3248030, at *2, *17–*19, *22 (S.D. Ohio May 24, 2016).

The *Crawford* plurality, however, rejected a similar theory that indirect evidence could prove a substantial burden on a particular class of voters and instead required proof of the degree to which the law burdens all voters. *Crawford*, 553 U.S. at 200–204. Plaintiffs' constitutional claims, therefore, must fail both because the State's interests are sufficiently justified and because Plaintiffs have not proved a substantial burden on actual voters.

Section 2 of the Voting Rights Act does not provide a viable alternative basis for this challenge. Plaintiffs should not be able to use Section 2 to invalidate a complex regulatory apparatus that carefully balances access with security by targeting selected electoral mechanisms that may yield a small disproportionate impact. As the Seventh Circuit cautioned in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), it cannot (and should not) be true "that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and

if white turnout on election day is 2% higher, then the [electoral reform] violates § 2." *Id.* at 754.

Plaintiffs' theory would yield at least three types of bizarre consequences. It could mean that electoral regulations are valid in some States but not others, such that States could not look to one another for guidance or even act with certainty that new rules upheld elsewhere would survive the upcoming election cycle. Or it could mean all States *must* offer any means of participation proven to increase minority turnout—such as early voting or same-day registration, which New York and Rhode Island (for example) lack—lest they be deemed discriminatory. Or it could mean that electoral reform must be a one-way ratchet favoring voter convenience over election security, such that any adjustments that may have some negative impact on registration or turnout must be invalid.

Whichever it is, the consequences of Plaintiffs' theory would leave States paralyzed in the exercise of their authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, and their electoral laws in a constant state of flux as "[a] case-by-case approach naturally encourages constant litigation." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring). This Court should reject any approach that permits federal courts to tweak state electoral mechanisms to maintain a benchmark of minority voter participation and, instead, adhere to the Supreme Court's guidance that "[c]ommon sense, as well as constitutional law, compels the conclusion that

government must play an active role in structuring elections[.]" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

ARGUMENT

I. *Crawford* Presents the Most Recent Formulation of the Court's Analytical Framework Toward Challenges to Electoral Laws

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Court reaffirmed that States are permitted substantial leeway in balancing election access with election security and integrity. It held that electoral reform is "justified by relevant and legitimate state interests sufficiently weighty to justify [any burden on voters]." *Id.* at 191 (citation and internal quotation marks omitted). Here, however, the district court improperly gave little weight to Ohio's interests in preventing fraud and increasing voter confidence, and struck down S.B. 238 for creating a "modest" burden.

A. *Crawford* held that compelling state interests in election integrity justify minimal burdens imposed by electoral reform

1. In *Crawford*, Justice Stevens' plurality opinion upheld Indiana's voter ID law by applying 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).

On the state interests side of the scale, the plurality acknowledged the legitimacy of state interests in electoral reform, including "deterring and detecting voter fraud," "improv[ing] and moderniz[ing] election procedures," and "safeguarding voter confidence," which it described as "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process." *Id.* at 191. Indeed, the plurality credited these interests even though "[t]he record contains no evidence of any [voter] fraud actually occurring in Indiana at any time in its history." *Id.* at 194. Ultimately, "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.

On the voter access side of the scale, the plurality said that, without sufficient evidence to "quantify either the magnitude of the burden on [a] narrow class of voters or the portion of the burden imposed on them that is fully justified," it would not look beyond the law's "broad application to all Indiana voters[.]" *Id.* at 200, 202–203. It refused to accept bare assertions that "a small number of voters . . . may experience a special burden," particularly since the record did not identify a single individual who would be prevented from voting. *Id.* at 200–201. With these factors in mind, [t]he 'precise interests' advanced by the State [we]re therefore sufficient to defeat petitioners' facial challenge to [Indiana's voter ID law]." *Id.* at 203 (citation omitted).

2. The Seventh Circuit demonstrated how to apply *Crawford* to facial challenges—constitutional or statutory—to electoral laws in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). In terms of government objectives, the Seventh Circuit observed that the weightiness of state interests in deterring fraud and preserving voter confidence are, post-*Crawford*, now matters of legislative fact—"a proposition about the state of the world, as opposed to a proposition about [particular] litigants or about a single state." *Id.* at 750.

What is more, the Seventh Circuit rejected plaintiffs' attempt to prove burdens on voters indirectly, *i.e.*, by showing how many registered voters supposedly lacked photo ID rather than by showing whether anyone without an ID on a given date would actually be barred from voting. Such indirect proof is insufficient, the court said, because the State had in no way made it "impossible, or even hard" for voters to comply with the law. *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.

With respect to the plaintiffs' Section 2 of the Voting Rights Act ("VRA § 2") claim, the court ruled out any finding of disparate impact on minorities 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 declined to conclude that VRA § 2 could be violated merely because "these groups are less likely to *use* that opportunity." *Id.* at 753. "[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.*

B. Ohio's S.B. 238 is a reasonable, nondiscriminatory exercise of its authority under the Elections Clause

Like the district court in *Frank*, the court below erred in failing to give credence not only to state electoral law interests that *Crawford* has already deemed compelling—namely, preventing voter fraud and increasing voter confidence—but also interests in reducing administrative burdens and other costs. *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2016 WL 3248030, at *19 (S.D. Ohio May 24, 2016). Instead of accepting these interests at face value, the district court improperly determined that they were "minimal, unsupported, or not accomplished by S.B. 238" based on an erroneous "actually necessary" standard that required

Ohio to provide extensive contemporary evidence of fraud or other problems with Ohio's electoral process. *Id.* at *19–*22.

This inquiry cannot be reconciled with *Crawford*, which accepted state interests in modernizing elections, combating voter fraud, and safeguarding voter confidence even without proof that some particular negative incident immediately precipitated adoption of the challenged reforms. *See Crawford*, 553 U.S. at 191–97; *see also id.* at 204 ("The state interests identified as justifications for [Indiana's voter ID law] are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute."); *Frank*, 768 F.3d at 750 (explaining that the *Crawford* plurality took the interest in promoting voter confidence to be "almost self-evidently true").

Here, though *Crawford* requires no such evidence, Ohio showed that, during the additional days of early voting in question, there were two instances of fraud in 2012, six out-of-town student votes in 2008, and incidents where registrants provided false addresses in 2008. *Husted*, 2016 WL 3248030, at *20. The district court below should have found this evidence more than adequate to uphold S.B. 238 rather than faulting Ohio for providing "very limited evidence of voter fraud[.]" *Id.*

On the other side of the scale, the district court failed to acknowledge that Plaintiffs did not quantify any substantial burden on the State's registered voters.

The district court observed only a "modest" burden—which by its own definition is "more than minimal but less than significant"—on African Americans because they disproportionately use early voting, have difficulty using alternative methods of voting in part because they are "distrustful of voting by mail," and incur greater costs associated with voting. *Id.* at *14, *17–*19, *22. This is exactly the sort of indirect evidence that the *Crawford* plurality rejected as insufficient. *Cf. Crawford*, 553 U.S. at 198 ("For most voters who need them, 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, or even represent a significant increase over the usual burdens of voting."); *Frank*, 768 F.3d 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.").

The record in this case thus demonstrates what common sense suggests, *i.e.*, that S.B. 238, with its reduction in early voting days and elimination of same-day registration, "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[.]" *Crawford*, 553 U.S. at 203 (citations and internal quotation marks

omitted). Accordingly, in light of *Crawford*, there is no plausible claim that S.B. 238 is unconstitutionally burdensome.

II. States' Electoral Schemes Should Not Be Vulnerable to VRA § 2 Attack Merely Because They Allow or Disallow Certain Electoral Mechanisms

As the Seventh Circuit observed when rejecting a VRA § 2 challenge to Wisconsin's voter ID law, "*any* procedural step filters out some potential voters." *Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014). Yet such unfortunate and incidental "filtering" in no way "disfranchises" voters "even though states could make things easier by, say, allowing everyone to register or vote from a computer or smartphone without travel or standing in line." *Id.* Plaintiffs' theory in this case, however, would turn every tweak of a State's electoral regulatory scheme into an excuse for federal court re-adjustment. It would effectively chill *all* States from attempting any modicum of electoral reform, much as Section 5 formerly straightjacketed covered jurisdictions in reforming their processes. That is not a proper use of Section 2.

1. In 2013, the Supreme Court declared Section 4(b) of the Voting Rights Act unconstitutional, effectively stripping Section 5 (which required preclearance of retrogressive modifications of electoral laws in covered jurisdictions) of power, but said that "the permanent, nationwide ban on racial discrimination in voting found in § 2" remains. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). Section 2 claims now frequently arise in electoral reform

cases. *See, e.g.*, *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g* en banc *granted*, 815 F.3d 958 (5th Cir. 2016); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *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).

With more frequent use of VRA § 2, it is particularly important for courts to apply the correct standard when adjudicating discrimination claims. For while plaintiffs have so far restricted themselves to challenging *new* electoral reforms, there is nothing in the text of VRA § 2 that prohibits them from contesting *existing* electoral schemes. *See* 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").

As the Court acknowledged in *Storer v. Brown*, 415 U.S. 724, 730 (1974), "as 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." Furthermore, the Supreme Court has repeatedly stated that "[r]etrogression is not the inquiry in § 2 dilution cases." *Holder v. Hall*, 512 U.S. 874, 884 (1994); *see also Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003)

("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard.").

Yet if Plaintiffs have their way, States would have the power only to loosen regulatory requirements in the name of access, not tighten in the name of integrity and security. With their preferred understanding of VRA § 2, Plaintiffs might readily target one or more electoral mechanisms and, by demonstrating a small disproportionate impact, win federal court re-write of an entire regulatory system. The Seventh Circuit has bluntly observed why that approach cannot work: It cannot be "that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the [electoral reform] violates § 2." *Frank*, 768 F.3d at 754 (adding that "it would be implausible to read § 2 as sweeping away almost all registration and voting rules").

To be sure, the Supreme Court has specified that the VRA § 2 inquiry is "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citation omitted). But it is unrealistic to expect States not to observe what other States are doing and emulate reforms that are valid and effective elsewhere.

Plaintiffs' legal theory could potentially yield results where early voting, same-day registration, and other electoral mechanisms 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. 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 208 (Scalia, J., concurring).

2. State laws vary widely with respect to many electoral mechanisms, including those at issue in this case, as described and illustrated below:

Early Voting

In thirty-six States (including two that mail ballots to registered voters), any qualified voter may cast a ballot in-person during a designated period prior to Election Day. *Absentee and Early Voting*, National Conference of State Legislatures (May 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx. No excuse or justification is required. *Id.* The number of days shown in the chart represents actual days of in-person early voting, including Saturdays or Sundays if permitted. In thirteen States, in-person early voting is not available and an excuse is required to request an absentee ballot. *Id.*

Same-Day Registration

Twelve States offer same-day registration (North Dakota does not require registration at all), allowing any qualified resident to go to the polls or an election official's office on Election Day, register to vote, and then cast a ballot. *Same Day Voter Registration*, National Conference of State Legislatures (May 25, 2016), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx. California, Hawaii, and Vermont have enacted same-day registration but have not yet implemented it. *Id.*

Voter ID Laws

A total of thirty-four States have laws requesting or requiring voters to show some form of identification at the polls. Wendy Underhill, *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. Thirty-three of these voter identification laws are in force in 2016. *Id.* West Virginia's law, signed on April 1, 2016, goes into effect in 2018. *Id.* States listed as *requiring* identification mandate that voters without ID take additional steps after Election Day to validate a provisional ballot by verifying their identity. States *requesting* identification offer workarounds that permit election officials to count ballots of voters lacking ID without further action by those voters after

Election Day. The remaining States use other methods to verify the identity of voters. *Id.*

Out-of-Precinct Voting

Twenty States fully or partially count provisional ballots that are cast in an incorrect precinct. *Provisional Ballots*, National Conference of State Legislatures (June 19, 2015), http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx. Twenty-six States reject any ballots cast outside the correct precinct. *Id.* Idaho, Minnesota, New Hampshire, and North Dakota do not issue provisional ballots for out-of-precinct voters. *Id.*

Preregistration

Preregistration allows underage citizens to register so as to be able to cast a ballot right away at 18. Twenty States permit preregistration—ten permit it for citizens as young as 16. *Preregistration for Young Voters*, National Conference of State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx.

State	Voter ID	Early Voting Days	Same-Day Registration	Out-of-Precinct	Pre-registration
Alabama	Requested	**No**	**No**	**No**	**No**
Alaska	Requested	15	**No**	Yes	Yes
Arizona	ID required	23	**No**	**No***	**No**
Arkansas	Requested	13	**No**	Yes	**No**
California	**No**	29	Effective TBD	Yes	Yes
Colorado	Requested	13	Yes	Yes	Yes
Connecticut	Requested	**No**	Yes	**No**	**No**
Delaware	Requested	**No**	**No**	**No**	Yes
Florida	Requested	8	**No**	**No**	Yes
Georgia	Photo required	16	**No**	Yes	Yes
Hawaii	Requested	11	Effective 2018	**No**	Yes
Idaho	Requested	12	Yes	No	**No**
Illinois	**No**	40	Yes	**No**	**No**
Indiana	Photo required	22	**No**	**No**	**No**
Iowa	**No**	34	Yes	**No**	Yes
Kansas	Photo required	20	**No**	Yes	**No**
Kentucky	Requested	**No**	**No**	**No**	**No**
Louisiana	Requested	7	**No**	Federal races	Yes
Maine	**No**	41	Yes	Yes	Yes
Maryland	**No**	8	Yes	Yes	Yes

State	Voter ID	Early Voting Days	Same-Day Registration	Out-of-Precinct	Pre-registration
Massachusetts	**No**	12	**No**	Yes	Yes
Michigan	Requested	**No**	**No**	**No**	**No**
Minnesota	**No**	33	Yes	No	**No**
Mississippi	Photo required	**No**	**No**	**No**	**No**
Missouri	Requested	**No**	**No**	**No**	Yes
Montana	Requested	30	Yes	**No**	**No**
Nebraska	No	30	**No**	**No**	Yes
Nevada	No	14	**No**	**No**	**No**
New Hampshire	Requested	**No**	Yes	No	**No**
New Jersey	**No**	45	**No**	Yes	Yes
New Mexico	**No**	15	**No**	Yes	**No**
New York	**No**	**No**	**No**	Yes	**No**
North Carolina	Requested	10	**No**	**No**	**No**
North Dakota	ID required	15	Open Voting	No	**No**
Ohio	ID required	29	**No**	Yes	**No**
Oklahoma	Requested	3	**No**	**No**	**No**
Oregon	**No**	**No****	**No**	Yes	Yes
Pennsylvania	**No**	**No**	**No**	Yes	**No**
Rhode Island	Requested	**No**	**No**	Federal races	Yes
South Carolina	Requested	**No**	**No**	**No**	**No**

STATE	VOTER ID	EARLY VOTING DAYS	SAME-DAY REGISTRATION	OUT-OF-PRECINCT	PRE-REGISTRATION
SOUTH DAKOTA	Requested	46	**No**	**No**	**No**
TENNESSEE	Photo required	14	**No**	**No**	**No**
TEXAS	Photo required	14	**No**	**No**	Yes
UTAH	Requested	11	**No**	Yes	Yes
VERMONT	**No**	45	Effective 2017	**No**	**No**
VIRGINIA	Photo required	**No**	**No**	**No**	**No**
WASHINGTON	Requested	18	**No**	Yes	**No**
WEST VIRGINIA	Requested	10	**No**	Yes	Yes
WISCONSIN	Photo required	10	Yes	**No**	**No**
WYOMING	**No**	40	Yes	**No**	**No**
TOTALS	**34** (11 required)	**36**	**16**	**20**	**20**

* Even at voting centers the law requires that voters receive only the appropriate precinct-specific ballot.
** Oregon provides 20 days of voting by mail but does not allow in-person voting.

3. A few items illustrate the complications implied by Plaintiffs' theory. If the Court were to hold that Ohio must permit several days of early voting with same-day registration under VRA § 2 because doing away with it yielded a marginal decrease in minority voting, that might imply that States on similar regulatory footing, such as Indiana, must do the same, even though Indiana has never permitted same-day registration. Or perhaps it could mean that any State that experiments with loosening voting rules would be stuck with the results and

could never go back. Perhaps New Jersey might demonstrate that by permitting 16 more days of early voting (45 versus Ohio's 29), it could match the gains of same-day registration. Yet even then, same-day registration might yield even greater minority turnout, and would therefore be required under Plaintiffs' Section 2 theory.

None of these results is particularly sensible or coherent, and it is easy to imagine even more complex hypotheticals making the calculus difficult for Ohio, Indiana, and other States. New York and Rhode Island, for instance, do not offer early voting or same-day registration. The inescapable implication of Plaintiffs' theory is that New York and Rhode Island harbor racial discrimination in voting that is vulnerable to attack under VRA § 2.

Fundamentally, Plaintiffs' theory of the case implies that for each State there exists a benchmark of minority voter participation, and that VRA § 2 permits federal courts to adjust and tweak state electoral mechanisms to maintain that benchmark. But there is no such magic number for each State, and nothing in VRA § 2 impels perpetual election deregulation in pursuit of maximum minority voter participation. As in any arena of permissible regulation, States may experiment with new ways of fostering participation without committing to them forever, and they may adopt new restrictions designed to improve election integrity without violating federal rights. States may do all of this independent of one

another; each new electoral reform does not raise the constitutional or statutory bar for all States.

The Supreme Court has rejected "federal creation of a one-way ratchet" in other contexts. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004). In *Nixon*, the Court explained that the Telecommunications Act of 1996 could not be construed to mean "a State that once chose to provide broad municipal authority could not reverse course" while a neighboring State "starting with a legal system devoid of any authorization for municipal utility operation" could either maintain the status quo or "be free to change its own course by authorizing its municipalities to venture forth." *Id.* Such an interpretation "would often accomplish nothing" because "it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency." *Id.* at 138.

In many contexts Justices have openly doubted similar artificial norms that constrain State authority. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), a case about mandatory life sentences, Justice Scalia remarked that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Id.* at 990 (opinion of Scalia, J., joined by Rehnquist, C.J.); *see also INS v. St. Cyr*,

533 U.S. 289, 340 n.5 (2001) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) ("The Court's position that a permanent repeal of habeas jurisdiction is unthinkable . . . is simply incompatible with its . . . belief that a failure to confer habeas jurisdiction is *not* unthinkable.").

Here, Section 2 of the Voting Rights Act was enacted to combat racial discrimination, not to preclude "retrogression" or to enable federal courts to recalibrate state voting regulations whenever minority participation deviates from some mythical golden mean. And, as the Supreme Court has frequently observed, *all* voters benefit from efforts to protect the integrity and reliability of the electoral process. Accordingly, at the very least, prudential concerns should deter cavalier enforcement of VRA § 2 and favor proper acknowledgment of the maxim that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections[.]" *Burdick*, 504 U.S. at 433.

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 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 4,889 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).

/s/ Thomas M. Fisher
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Dated: July 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, the foregoing document was filed with the Clerk of the Court by using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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