Nos. 16-1468(L), 16-1469, 16-1474, 16-1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Plaintiffs-Appellants,

JOHN DOE 1, *et al.*,
Plaintiffs,

v.

PATRICK L. MCCRORY, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF NORTH CAROLINA, *et al.*,
Defendants-Appellees.

(*caption continued on inside cover*)

On Appeal from the United States District Court for the
Middle District of North Carolina,
Nos. 1:13CV658, 1:13CV660, 1:13CV861

BRIEF OF THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, KANSAS, MICHIGAN, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND SUPPORTING AFFIRMANCE

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LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs,

CHARLES M. GRAY, *et al.*,
Intervenors/Plaintiffs,

LOUIS M. DUKE, *et al.*,
Intervenors/Plaintiffs-Appellants,

v.

STATE OF NORTH CAROLINA, *et al.*,
Defendants-Appellees.

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,
Plaintiffs-Appellants,

LOUIS M. DUKE, *et al.*,
Intervenors/Plaintiffs,

v.

STATE OF NORTH CAROLINA, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STATE OF NORTH CAROLINA, *et al.*,
Defendants-Appellees,

CHRISTINA KELLEY GALLEGOS-MERRILL, *et al.*,
Intervenors/Defendants.

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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici curiae, the States of Indiana, Alabama, Arizona, Arkansas, Georgia, Kansas, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wisconsin, file this brief in support of Defendants-Appellees 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. 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. These laws vary greatly, with some States requiring photo identification and other States accepting various forms of non-photo identification. 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.*

Almost a decade ago, the Supreme Court upheld Indiana's law requiring government-issued photo identification at the polls and affirmed the facial validity of such laws in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Indiana and at least seven other States impose relatively strict requirements: in-person voters must present photo identification but, if unable to do so, may cast a provisional ballot to be validated after Election Day. *See* Ga. Code Ann. § 21-2-

417; Ind. Code §§ 3-5-2-40.5, 3-11-8-25.1; 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. Ann. §§ 5.02(6)(m), 6.79(2)(a), (3)(b). Voter ID laws affording voters even more leeway—including North Carolina's allowance of a reasonable impediment exception without requiring future validation—must perforce be facially valid as well.

The *amici* States have a compelling interest in the continued vitality of *Crawford*, the guidance it provides, and its universal application not only to constitutional claims but also claims relying on the Voting Rights Act. Allowing each new plaintiff to present new indirect evidence regarding the supposed impact of a voter ID law—not to mention re-argue the weightiness of government interests justifying the law—undermines *Crawford* and creates regulatory uncertainty.

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, 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 voter ID, early voting, same-day registration, 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.

Electoral laws such as North Carolina's House Bill 589 and the Indiana voter ID law upheld in *Crawford* 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 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 Cnty. Election Bd.*, 553 U.S. 181 (2008). In upholding the legitimacy of North Carolina's House Bill 589, as amended by House Bill 836, the district court relied heavily on *Crawford* to conclude that the law's electoral reforms, including a voter ID requirement, "promote the integrity and reliability of the electoral process while increasing public confidence in North Carolina's electoral system . . . [, which] are legitimate and consistent interests." *N.C. State Conference of NAACP v. McCrory*, Nos. 1:13CV658, 1:13CV660, 1:13CV861, slip op. at 410 (M.D.N.C. Apr. 25, 2016). The district court's decision should be affirmed.

Crawford confirmed 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 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 North Carolina voter ID requirement 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 (citation omitted), should prove as fatal to the plaintiffs' claims in this case as it did in *Crawford*, especially as North Carolina's voter ID law, which permits a reasonable impediment exception, is significantly less burdensome than Indiana's or Wisconsin's.

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 even 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" negative impact on turnout and observed that

voters seem to have adapted quickly to the law. 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.

Section 2 of the Voting Rights Act does not provide a viable alternative avenue of attack via challenging States' electoral schemes based on the absence or presence and scope of certain electoral mechanisms. Plaintiffs should not be able 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*, 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." *Frank*, 768 F.3d 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, 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* Declared Voter ID Laws Facially Valid

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 North Carolina's

law affords voters lacking identification at the polls even more ways to cast a counted ballot than the Indiana law upheld in *Crawford*, nothing more than a straightforward application of *Crawford* is necessary to decide Plaintiffs' constitutional and Voting Rights Act 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 that 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 plurality, "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 199–201. 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 (citation omitted).

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 law 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—constitutional or statutory—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.* "[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 plaintiffs' Section 2 of the Voting Rights Act ("VRA § 2") claim, the court rejected 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.*

2. 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, *Crawford* "require[d the court] to reject a constitutional challenge to Wisconsin's statute." *Id.* at 751.

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

Post-implementation data confirms the *Crawford* Court's conclusion that the law does not impose any "excessively burdensome requirements" on Indiana voters. *Crawford*, 553 U.S. at 202 (citation 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" even 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 actual 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.

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 equal to or above turnout in 2000 and 2004.

D. North Carolina's law provides even more work-arounds for voters lacking ID than Indiana's or Wisconsin's

Like the Wisconsin and Indiana plaintiffs, the North Carolina plaintiffs here have failed to develop a record quantifying any substantial burden on the State's registered voters. In fact, there is no reason to expect that North Carolina'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. Accordingly, *Crawford* compels validation of North Carolina's voter ID law, which is significantly less burdensome than Indiana's or Wisconsin's. *N.C. State Conference of NAACP v. McCrory*, Nos. 1:13CV658, 1:13CV660, 1:13CV861, slip op. at 433–34 (M.D.N.C. Apr. 25, 2016).

Indeed, as in *Crawford*, Plaintiffs do not identify a single person who would be prevented from voting by House Bill 589. At most, Plaintiffs demonstrated that fewer than 3.5% of registered North Carolina voters lack a House Bill 589-compliant ID. *Id.* at 85. Plaintiffs could point only to two sisters who sought a

free ID but were unable to obtain one due to name and date-of-birth mismatches caused by birth certificates filed decades after they were born. *Id.* at 76–77, 329. Even then, "[n]othing . . . indicates that [they] would have difficulty voting under [North Carolina's] reasonable impediment exception." *Id.* at 77.

If the *Crawford* Court upheld Indiana's voter ID law that provided only limited exceptions, such as for indigency or religious objection to being photographed, then North Carolina's voter ID law that permits a broad reasonable impediment exception must perforce pass muster as well. North Carolina voters need only declare on a form that they "suffer from a reasonable impediment that prevents [them] from obtaining acceptable photo identification" and check a template box indicating "Lack of transportation"; "Lack of birth certificate or other documents needed to obtain photo ID"; "Work schedule"; "Lost or stolen photo ID"; "Disability or illness"; "Family responsibilities"; "Photo ID applied for but not received"; "State or federal law prohibits . . . listing [the] impediment"; and/or "other reasonable impediment" followed by a line where the voter can explain the impediment. *Id.* at 98–99. Voters must also present alternative documentary identification, but the allowed categories—HAVA document, registration card, or last four digits of social security number and date of birth—are expansive. *Id.* at 99.

House Bill 589 therefore "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). North Carolina's voter ID law even fulfills Justice Breyer's ideal voter ID regulatory scheme that minimizes any "disproportionate burden upon [] eligible voters," in particular by eliminating the need for a post-election trip to the clerk's office to validate a provisional ballot. *Id.* at 237–39 (Breyer, J., dissenting). Accordingly, there is no plausible claim that North Carolina's voter ID law 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 in *Frank*, "*any* procedural step filters out some potential voters." 768 F.3d at 749. 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 of power, but said that "the permanent, nationwide ban on racial discrimination in voting found in [Section] 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. For instance, at least five States enacted voter ID laws similar to Indiana's after—and in reliance upon—the Supreme Court's decision in *Crawford*. Those States are entitled to certainty that their laws are legitimate.

Plaintiffs' legal theory could potentially yield results where voter ID laws 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. *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[; o]nly 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 208 (Scalia, J., concurring).

2. State laws vary widely with respect to the five main electoral mechanisms at issue in this case, as described and illustrated below:

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.*

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

Thirteen 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.*

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**

STATE	VOTER ID	EARLY VOTING DAYS	SAME-DAY REGISTRATION	OUT-OF-PRECINCT	PRE-REGISTRATION
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
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	Photo required	15	Open Voting	No	**No**

STATE	VOTER ID	EARLY VOTING DAYS	SAME-DAY REGISTRATION	OUT-OF-PRECINCT	PRE-REGISTRATION
OHIO	ID required	29	Yes	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**
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**	**17**	**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 North Carolina must permit 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 Indiana might demonstrate that by permitting 12 more days of early voting (22 versus North Carolina's 10), it could match the gains of same-day registration. Yet even then, same-day registration would presumably still prompt 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 North Carolina, Indiana, and other States. New York and Rhode Island, for instance, do not offer early voting. 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 that case 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 "regression" 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 affirm the district court's decision and render judgment for the defendants.

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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 6,390 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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Dated: June 16, 2016

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on June 16, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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