No. 18-10151

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREATER BIRMINGHAM MINISTRIES, ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GIOVANA AMBROSIO, ELIZABETH WARE, SHAMEKA HARRIS,
Plaintiffs-Appellants,

v.

SECRETARY OF STATE FOR THE STATE OF ALABAMA,
Defendant-Appellee,

On Appeal from the United States District Court for the Northern District of Alabama, No. 2:15-CV-02193-LSC

BRIEF OF THE STATES OF INDIANA, ARKANSAS, COLORADO, IDAHO, KANSAS, LOUISIANA, MICHIGAN, NORTH DAKOTA OKLAHOMA, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel of record states that *amici states* do not have parent corporations, nor have they issued shared or debt securities to the public. The *amici states* are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. The undersigned counsel of record also makes the following disclosure of interested parties, in addition to the individuals and entities listed in Plaintiffs-Appellants' Opening Brief and other briefs because the following individuals have an interest in the outcome of this appeal:

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22. State of South Carolina
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s/Thomas M. Fisher
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AMICI'S STATEMENT OF IDENTITY AND INTEREST

Amici curiae, the States of Indiana, Arkansas, Colorado, Idaho, Kansas, Louisiana, Michigan, North Dakota, Oklahoma, South Carolina, and Texas, file this brief in support of Defendant-Appellee Secretary of State for the State of Alabama 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 (Jan. 5, 2018), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx #Details. These laws vary greatly, with some States requiring photo identification and other States accepting various forms of non-photo identification.

At least eight States (including Alabama) 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* Ala. Code § 17-9-30; 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 (including Alabama's) were enacted after—and in reliance upon—*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which 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 purportedly 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.

The *amici* States also have a compelling interest in maintaining a sensible standard for the application of Section 2 of the Voting Rights Act to right-to-vote abridgement claims. Lower court decisions that would allow succeeding plaintiffs to come forward with new theories about the hypothetical impact of voter ID laws and invite courts to re-weigh competing governmental interests both undermine *Crawford* and stretch Section 2 well beyond its traditional scope. In the process, such decisions create unnecessary legal uncertainty for all voter ID laws. The *amici* States have an interest in ensuring that their election reforms are not undermined absent concrete evidence of racially discriminatory impact or purpose.

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).

Voter ID laws such as Alabama's Photo ID Law 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 Cnty. Election Bd.*, 553 U.S. 181 (2008). In upholding the legitimacy of Alabama's Photo Voter Identification Law, Act No. 2011-673, codified at Ala. Code § 17-9-30 ("Photo ID Law"), the district court relied

heavily on *Crawford* in concluding that "it is so easy to get a photo ID in Alabama, *no one* is prevented from voting." Appendix, Vol. 7 ("7 App.") at 232 (emphasis in original). 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 this court and the Seventh Circuit both recognized in post-*Crawford* decisions, if this is true in Indiana, then it must be true in every other State. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352–54 (11th Cir. 2009) (upholding Georgia's voter ID law); *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (upholding Wisconsin's voter ID law). *Billups* controls, and *Frank* 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* failed to develop a record quantifying any substantial burden on the State's registered voters, so, too, have the plaintiffs here failed to show such a burden on Alabama voters—let alone any disparate impact on minorities. They argue that some voters will be burdened more significantly by the Alabama Photo ID requirement than others, but provide only scant evidence of any such supposed burden. Rather, plaintiffs rely on possession rates of compliant IDs without adequately considering the ease of any citizen to

obtain one. Appellant's Br. 35. 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 Alabama's Photo ID Law is even less burdensome than Indiana's or Wisconsin's.

Section 2 of the Voting Rights Act does not provide a viable alternative to attack State voter ID laws based solely on inferences from data whose relationship to the actual impact of those laws is highly attenuated. For example, 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 claim it is error not to apply the "Senate factors"—which were intended to help courts evaluate claims of vote dilution—to voter ID laws. The "Senate factors," however, are particularly unsuited to vote-abridgement claims, as illustrated by the Sixth, Seventh, and Ninth Circuits' decisions declining to apply them when plaintiffs failed to make a threshold showing of discriminatory result. Rather, under a straightforward application of the text of Section 2, Alabama's Photo ID Law neither disparately affects minority voters nor deprives minority voters (or anyone) of an equal opportunity to participate in the electoral process.

ARGUMENT

I. *Crawford* Declared Voter Photo ID Laws Facially Valid and Controls Here

The Supreme Court affirmed the facial validity of voter photo ID laws a decade ago in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and there is no reason to depart from that holding here. As the district court recognized, *Crawford* confirms Alabama's compelling purpose for the law—to combat voter fraud, increase voter confidence, and modernize elections. 7 App. 228. And because Alabama's law permits voters to use more types of photo ID, provides more convenient ways to obtain acceptable ID, and makes it easier to vote without an ID than the Indiana law upheld in *Crawford*, Alabama's law must perforce be valid.

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

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). 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.

As for 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).

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.

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.

Multiple studies analyzing data collected not long after the implementation of Indiana's voter ID law confirm the *Crawford* Court's conclusion that the law does not impose any "excessively burdensome requirements" on voters. *Crawford*, 553 U.S. at 202 (internal quotation omitted). To the contrary, after Indiana's voter ID law went into effect "[o]verall, voter turnout in Indiana *increased* about two percentage points[.]" Jeffrey Milyo, Inst. of Pub. Policy Report No. 10-2007, *The*

Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis 1 (Nov. 2007) (emphasis added). Most importantly here, "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.

B. This Court properly applied *Crawford* to Georgia's voter ID Law in *Billups*, as did the Seventh Circuit in *Frank*

This court, adhering to Supreme Court precedent in *Crawford*, upheld Georgia's voter photo ID law and held that combating voter fraud and preserving the integrity of the State's election system are "weighty interests" and serve a legitimate purpose. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352–53 (11th Cir. 2009) (citing *Crawford*, 553 U.S. at 192–97). This court also recognized "[t]he ordinary burdens of producing a photo identification to vote, which the Supreme Court described as 'arising from life's vagaries,' do not 'raise any question about the constitutionality of' the Georgia statute."). *Id*. at 1354–55 (quoting *Crawford*, 553 U.S. at 197).

Similarly, the Seventh Circuit demonstrated how to apply *Crawford* to other states in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), where it upheld Wisconsin's voter ID Law. Notably, the court faulted the plaintiffs for failing to provide evidence regarding the number of voters who would be *unable to obtain* photo IDs. It held that the number of registered voters who lack acceptable photo ID on a particular

day carries *no legal significance* under *Crawford*. *Id.* at 748–49. It 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.* And "[t]he insignificant burden imposed by the Georgia [voter ID] statute

is outweighed by the interests in detecting and deterring voter fraud." *Billups*, 554 F.3d at 1354.

C. Alabama's law permits additional types of IDs and provides even more ways for voters to obtain IDs than Indiana or other states

Like the Georgia, Wisconsin and Indiana plaintiffs, the Alabama plaintiffs here have failed to develop a record quantifying any substantial burden on the State's registered voters—let alone any discriminatory impact on minorities. In fact, there is no reason to expect that Alabama's Photo ID law will somehow cause substantial harm to voter participation or disproportionally affect minorities, when nothing of the sort has happened in over ten years of voter ID in Indiana. Accordingly, *Crawford* compels validation of Alabama's Photo ID law, which is less burdensome than Georgia's, Indiana's, or Wisconsin's.

Indeed, as in *Crawford*, Plaintiffs here have failed to show how the Alabama Photo ID law would prevent a significant number of voters from obtaining acceptable ID and voting. Though the individual Plaintiffs did describe their experiences obtaining an ID, the district court read these descriptions to mean "that people who want a photo ID can get one." 7 App. 237. For example, one voter knew about the Secretary's mobile unit and was able to travel for activities, work, and make a 25-30 minute trip for college classes but still claimed she could not get to a registrar's office a mile from her house. ECF No. 236 at ¶¶ 242-251. This same voter

was ultimately able to obtain an ID and register for the 2016 general election, despite registering too late to vote in the 2016 primaries. *Id.*

Several other voters were able to obtain acceptable IDs for voting or other functions despite claims it would cause difficulty. ECF No. 236 at ¶¶ 223-241. In fact, Plaintiffs' expert demonstrated that only 1.67% of registered Alabama voters lacked an acceptable ID. ECF No. 235-1 at 31.

That is likely because several significant aspects of Alabama's Photo ID law make it easy for voters to obtain acceptable ID and thus ameliorate any potential for negative impact. First, Alabama permits many different forms of identification at the polls. While courts have criticized other states such as Texas and North Carolina for not accepting student IDs, military IDs, and government employee IDs, *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 236 (4th Cir. 2016)*; Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (en banc), Alabama permits voters to use any of those forms of ID. Ala. Code § 17-9-30(a) (listing seven specific categories of valid photo IDs including student IDs, military IDs, and government employee IDs).

Next, Alabama provides multiple ways to obtain acceptable ID, minimizing any supposed burdens put forward by Plaintiffs. The Secretary of State may issue valid voter ID cards at no cost. Ala. Code § 17-9-30(f). Voters need only provide specified information, *see* Ala. Code § 17-9-30(j), that can be proved by presenting

documents such as a birth or marriage certificate and something with the voter's name and address on it, such as a utility bill or a pay stub. And if even that is too difficult, the applicant may sign a voter registration form under oath, thereby confirming the voter's identity. ECF No. 236 ¶¶170-172. And if getting to the registrar's office to obtain an ID is too difficult, Secretary Merrill's office mobile unit will come to the voter's home and issue a photo ID. ECF No. 236 ¶¶ 184-193.

Alabama also allows a voter without the required photo ID to cast a regular ballot if two election officials present at the polling place positively identify that person as eligible to vote and sign an affidavit attesting to the voter's identity. Ala. Code § 17-9-30(e). There is no such procedure available in Indiana, Georgia, Wisconsin, or Virginia—yet courts have upheld all of those States' voter ID laws.

When compared with Indiana and other states, then, Alabama's voter ID law is unquestionably easier for voters to satisfy. Hence, if Indiana's law did not impose a substantial burden on voting, Alabama's law cannot either.

D. Federalism requires a presumption of validity and good faith

Plaintiffs seek to escape *Crawford* by asserting an intentional race discrimination theory, but federalism and comity require a presumption of good faith. And in all events, neither the history of nor the burdens imposed by the law suggest any discrimination.

1. As a matter of federalism, it is proper to accord the Alabama Photo ID law a presumption that the legislature acted in good faith and without a discriminatory purpose. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) ("Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality[.]"); *see also* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L. Rev. 1447, 1463 (2010) (noting that judicial "respect for state legislatures rests on the federalism principles that the federal judiciary should not unduly interfere with the state governments[.]").

What is more, the presumptions of validity and legislative good faith should be at their weightiest when the law at issue governs elections—over which states have traditionally had full authority. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting, in the redistricting context, "the presumption of good faith that must be accorded legislative enactments").

While the legal principle that a statute enacted by the people's elected state legislators is presumed to be valid is centuries old, s*ee Twp. of Pine Grove v. Talcott*, 86 U.S. 666, 673 (1873) ("Every doubt is to be resolved in support of the enactment."), it still remains relevant in the modern era. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (noting the "deference than we customarily must pay to the duly enacted and carefully considered decision of a

coequal and representative branch of our Government"); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76 n.23 (1980) (plurality) (noting "[t]he presumption of constitutional validity that underlies the settled mode of reviewing legislation").

With regard to the presumption afforded legislators, courts presume that the people's elected representatives act in good faith and in the best interest of their constituents, and the burden is on the party alleging bad faith to prove up its claim. *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 353 (1918) ("The good faith of such [state] officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.") (internal citation omitted). And a court must accept a legislature's stated purpose as genuine unless there is clear evidence that it is pretextual. *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) ("[T]he Court is normally deferential to a State's articulation of . . . purpose[.]"); *Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (noting a "reluctance to attribute unconstitutional motives to the states, particularly when a plausible . . . purpose for the state's program may be discerned from the face of the statute"); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment) ("[T]he inquiry into the purpose of the legislature . . . should be deferential and limited.").

Here, the Court should afford the presumptions to the Alabama legislature and the challenged law to ensure protection of States' full authority under the Elections

Clause, U.S. Const. art. I, § 4, to enact comprehensive election laws. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

2. The minimal burden imposed by voter ID laws should negate the intentional discrimination argument as well. Plaintiffs urge this Court to consider *only* discriminatory *intent*, Appellants' Br. 33–35, but as the district court correctly observed, Plaintiffs must also show the Photo ID Law has a discriminatory *effect*—that it "actually discriminates on the basis of race"—to prevail on their Fourteenth and Fifteenth Amendment claims. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.") (citing *Fletcher v. Peck*, 6 Cranch 87 (1810)); s*ee also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("The impact of the official action whether it 'bears more heavily on one race than another,' . . . may provide an important starting point." (citation omitted)).

To be sure, *Arlington Heights* outlined other factors that may bear on intentional discrimination, but they do not help Plaintiffs here. For example, "[t]he historical background of the decision[,]" *Arlington Heights*, 429 U.S. at 267, weighs in favor of Alabama, which passed its Photo ID Law in 2011, *i.e.*, after both *Crawford* and *Billups*, both of which cases recognized the significant interests States have in enacting such photo ID laws. Next, Alabama proved documented cases of

voter fraud in that state. ECF No. 236 ¶¶ 3-23, 28-33, 59-104. Third, other elected public officials, including former Secretary of State Jim Bennett and Attorney General Bill Pryor, historically supported voter identification laws in two decades prior to its passage. ECF No. 236 ¶¶ 27-30. Lastly, the Clerk of the Alabama House of Representative and the Secretary of the Alabama Senate both confirmed that there was nothing unusual in the way that the Photo ID Law was passed. ECF No. 236 ¶¶ 114-116.

Much of Plaintiffs' purported evidence, including the change in office hours for issuance of drivers' licenses and the Secretary of State's decision not to promulgate regulations until 2013, *see* ECF No. 112 at ¶¶ 76-81, 119-122, occurred well *after* Alabama passed its Photo ID Law in 2011. It is therefore readily distinguishable from the evidence in *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), which showed that, *before* the North Carolina legislature enacted the law, it requested data "on the use, by race, of a number of voting practices[,]" *id.* at 214, and used this data in "swiftly" enacting legislation "that restricted voting and registration in five different ways, all of which disproportionately affected African Americans." *Id*. at 214, 216.

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Plaintiffs are not the first organization to challenge the constitutionality of voter ID law, (*see Crawford*, *Billups*, and *Frank*), and they are unlikely to be the

last. But such attacks on States' mechanisms for deterring fraud and maintaining public confidence in the electoral system—irrespective of what constitutional grounds are invoked—are nothing more than the same assault on States' authority to enact comprehensive election laws. Notwithstanding the presumption of good faith accorded to states by principles of federalism and comity, the Alabama plaintiffs here have failed to develop a record quantifying any substantial burden on the State's registered voters—let alone any discriminatory impact on minorities.

II. Plaintiffs' VRA Section 2 Claim Must Fail Because the Alabama Photo ID Law Permits the Same Opportunities for Everyone

A. Plaintiffs seek to apply an incorrect test for their VRA Section 2 claim

Under a straightforward application of the text of Section 2, Plaintiffs' Section 2 claim must fail because Alabama's Photo ID Law neither disparately affects minority voters nor deprives minority voters (or anyone) of equal opportunity to participate in the electoral process. Plaintiffs' Section 2 argument essentially urges the court to depart from statutory text and to apply a "discriminatory results" test where it is merely necessary to show some statistical disparity without any evidence of a causal connection between the challenged electoral mechanism and such disparity.

1. To date, the Supreme Court has addressed the Section 2 standard only in the context of vote dilution cases such as those brought in the wake of legislative redistricting. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Abrams v. Johnson*,

521 U.S. 74, 90 (1997) ("Our decision in *[Gingles]* set out the basic framework for establishing a vote dilution claim against at-large, multimember districts[.]"). In that context, the Court invoked the so-called "Senate factors": nine factors listed in the Senate report on amended Section 2 intended to help courts evaluate claims of vote dilution under the results test. S. Rep. No. 97-417, at 28–29 (1982); *see also* Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 Emory L.J. 1, 15–16 (1987). As is fitting for analyzing bespoke legislative districts, the Court stated that the Section 2 inquiry for vote dilution claims is "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)).

This court has also applied the *Gingles* "Senate factors" in multiple Section 2 voter dilution cases. *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1556 (11th Cir. 1984) ("We therefore hold that the amended version of section 2 was intended to apply to the problem of vote dilution that this case presents."); *United States v. Dallas Cty. Comm'n*, 739 F.2d 1529, 1532 (11th Cir. 1984) ("This is a vote dilution case" and "[c]onsequently the factors relevant in considering a vote dilution claim under amended section 2 were relevant in the period after *Bolden* but before the amendment[.]"); *see also Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1237 (11th Cir. 2005) ("the subsection (b) language [of VRA Section 2] reflects

vote-dilution rhetoric from pre-*Bolden* Supreme Court cases.") (emphasis added); *Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994) ("To prevail on a claim of vote dilution under section 2, plaintiffs generally must meet certain threshold requirements that the Supreme Court first identified in *Gingles*.").

2. This case, however, is neither a redistricting case nor a vote dilution case; it is, rather, an *abridgement* case, for which the Senate factors are particularly ill-suited. For example, "the use of overt or subtle racial appeals in political campaigns[,]" *id.* at 45, has no bearing on whether a particular electoral regulation itself prevents minorities from voting. That is likely why the *Frank* court described the Senate Factors as "unhelpful," 768 F.3d at 754, and why the Sixth and Ninth Circuits declined to apply them when plaintiffs failed to make a threshold showing of discriminatory result. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 640 (6th Cir. 2016); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. InterTribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

In *Frank*, the Seventh Circuit first observed that Section 2 imposes not "an equal-outcome command" (which would "sweep[] away almost all registration and voting rules") but "an equal-treatment requirement"—because that "is how it reads." 768 F.3d at 754. Wisconsin's voter ID law posed no problems because "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at

755. There is no Section 2 violation merely because some groups "are less likely to use that opportunity." *Id.* at 753 (emphasis omitted).

Similarly, in *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), that court said that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." *Id.* at 405 (quotation marks and citation omitted). Despite "evidence of Arizona's general history of discrimination against Latinos[,]" that court concluded plaintiffs failed to adduce "evidence that Latinos' ability or inability to obtain or possess identification for voting purposes . . . resulted in Latinos having less opportunity to participate in the political process . . . ." *Id.* at 407.

And while in *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016), the Fourth Circuit found Section 2 liability based on the history of the bill at issue, *id.* at 223, in *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 600 (4th Cir. 2016), it rejected Section 2 liability based on "disparity in the rates at which different groups possess acceptable identification" where such bill-specific history was lacking. *Id.* at 600. *Lee* quoted *McCrory* for the proposition that "'it cannot be that states must forever tip-toe around certain voting provisions' that would have more effect on the voting patterns of one group than another." *Id.* at 601 (quoting *McCrory*, 831 F.3d at 241). The North Carolina law invalidated in

McCrory, the court said, represented disparate opportunity to vote in that it targeted Black voters with "almost surgical precision." 831 F.3d at 214. In contrast, the plaintiffs in *Lee* "simply failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process." *Lee*, 843 F.3d at 600. "[D]isparate inconveniences that voters face" are not the same as "the denial or abridgment of the right to vote" required for an actionable Section 2 claim. *Id*. at 601.

Accordingly, *Lee* upheld Virginia's voter ID law, which (like Alabama) provides a free photo ID without additional documentation and which (like Alabama and multiple other states), permits provisional ballots that may be validated later. As such, "[a] complex § 2 analysis is not necessary to resolve this issue because the plaintiffs have simply failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process." *Id.* at 600.

3. Plaintiffs, however, urge this Court to follow the interpretation adopted by the Fifth Circuit in *Veasey*, which says that plaintiffs need only show rational speculation that the law might potentially impact minorities in some way to make out a Section 2 claim. *Veasey*, 830 F.3d at 302. That standard 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 the ebb and flow of an infinite

array of incidental factors, but also on how much value different judges attribute to indirect evidence of impact. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring) (warning 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.").

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.* If, to make out a Section 2 challenge, plaintiffs need only show that a new regulation makes voting less convenient for the poor, and that minorities are disproportionately poor as a result of historical discrimination, States would be chilled from attempting any modicum of electoral reform.

B. Alabama's Photo ID Law does not violate VRA Section 2

Here, the district court properly concluded that "[m]inorities do not have less opportunity to vote under Alabama's Photo ID law, because everyone has the same opportunity to obtain an ID." 7 App. 247. Again, Alabama's Photo ID Law permits multiple types of acceptable photo IDs (including student IDs, military IDs, and government employee IDs) and permits voters to obtain a photo ID at no cost in

various ways, including by swearing to their identity when the Secretary of State's mobile unit is in town. Ala. Code § 17-9-30(a).

Nor, again, did the Alabama legislature enact the Photo ID Law with discriminatory intent. Multiple courts, including the Supreme Court, have recognized the strong public justifications for voter ID laws, and here Alabama even proved the existence of voter fraud. This court has recognized in the context of a Section 2 voter dilution claim that "[u]nder an intent test, a strong state policy in favor of [the challenged election practice], for reasons other than race, is evidence that the [the challenged election practice] does not have a discriminatory intent." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

In short, the text of Section 2 simply does not support Plaintiffs' argument. The Court should reject that argument in favor 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 v. Takushi*, 504 U.S. 428, 433 (1992). Alabama is playing just such an active role here, but its Photo ID Law gives all voters the same opportunity to obtain photo ID and vote. Accordingly, Plaintiffs' Section 2 claim must fail.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2018, I filed the foregoing document electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System. On the same date, seven copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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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 5,894 words, excluding the parts of the brief exempted by Fed. R. App. 32(7)(f) and 11th Cir. Local R. 32-4; 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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