Nos. 19-1257, 19-1258

In the Supreme Court of the United States

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL., *Petitioners*,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

ARIZONA REPUBLICAN PARTY, ET AL., *Petitioners*,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WISCONSIN MAJORITY LEADER FITZGERALD AND SPEAKER VOS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici are the leaders of the two houses of the Wisconsin State Legislature.

Scott Fitzgerald was elected to the Wisconsin State Senate in 1994 and has served continuously as Majority Leader since 2013.

Robin Vos was elected to the Wisconsin State Assembly in 2004 and has served as Speaker since 2013. He is also the President of the National Conference on State Legislatures and Vice Chair of the State Legislative Leaders Foundation.

As leaders of the Wisconsin Legislature, Leader Fitzgerald and Speaker Vos take seriously their responsibilities of enacting laws to promote fair, honest, and accessible elections.

Despite Wisconsin's accessible voting scheme, including no-excuse early absentee voting and same-day registration, the state has been the target of

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[*] Rule 37 statements: All parties filed blanket consents to the filing of this amicus brief. No party's counsel authored any part of this brief, the preparation and submission of which was funded entirely by *amici*.

copious lawsuits seeking to erode ballot security measures that have been repeatedly upheld in court.

The Seventh Circuit's reading of Section 2 of the Voting Rights Act creates a manageable standard for legislators to follow for potential election law changes. The Ninth Circuit's en banc holding below would create great uncertainty and open Wisconsin to further litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since Wisconsin's founding in 1848, the Legislature has carefully crafted its statutes to balance the interests of ballot access and security and fit the unique and changing needs of the state. Wisconsin has successfully complied with federal law due to clear guidance from the courts.

Wisconsin's photo identification requirement for voting, also known as Act 23 or photo-ID, is one critical measure that has balanced access and security. After a ruling from the Eastern District of Wisconsin misinterpreted Section 2 of the Voting Rights Act (VRA) and struck down photo-ID, the Seventh Circuit overruled the district court and provided a clear, manageable standard for state legislatures. The court held Section 2 requires equal access to the voting process, not equal outcomes, and

determining equal access includes looking at the totality of a state's voting scheme.

The circuit split exacerbated by the ruling below puts the Seventh Circuit's clear standards at risk. *Amici* expect that election laws will be the frequent subject of litigation, as they have been in the past. And a de minimis statistical difference standard, like the Ninth Circuit adopted, would create so much uncertainty, the legislature couldn't predict how a court would interpret its laws. We urge this Court to resolve the circuit split and adopt a manageable standard.

ARGUMENT

I. Wisconsin Has Carefully Created An Accessible Voting Scheme With Security Measures And Requires A Reasonable Standard From The Courts To Continue

"Change is a constant in Wisconsin's rules for holding elections." *Luft v. Evers*, 963 F.3d 665, 668 (7th Cir. 2020). Wisconsin is continually trying to find the correct balance between ballot access and security, while retaining the decentralized structure that has been with the state since its founding in 1848. H. Rupert Theobald & Patricia V. Robbins (ed.), *The State of Wisconsin 1979-1980 Blue Book*, pgs. 185-

186 (1980). In fact, much of the organization would be familiar to our earliest voters. *Id*.

Even today, Wisconsin has the most decentralized voting system in the country, which presents unique opportunities and challenges. Maayan Silver, *Election Officials In Closely Divided Wisconsin Take Steps To Secure The Vote*, National Public Radio, (January 25, 2020). There are 1,850 municipal clerks who administer the state's elections. "Directory of Wisconsin Clerks," Wisconsin Elections Commission, https://elections.wi.gov/clerks/directory (last accessed December 3, 2020). Municipalities range in size from the Village of Big Falls, population 59, to Milwaukee, population 595,993. League of Wisconsin Municipalities, *Facts about Wisconsin Municipalities*, available at https://www.lwm-info.org/590/Facts-About-Wisconsin-Municipalities (last accessed December 6, 2020).

Given the great differences of resources between the municipalities, the state created a central agency to help clerks administer elections. The opportune time came in the wake of the Watergate scandal in 1973, when the state removed election administration duties from the Secretary of State and placed them with the bipartisan Wisconsin Elections Board. Anthony J. Gaughan, *The 40-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 Ohio State Law

Journal 791 (2016). The goal was to shift power away from a single politically motivated official to protect election integrity. *Id.* The latest iteration of the Elections Board is the Wisconsin Elections Commission (WEC). WEC is an agency with a chief election official who reports to a six member board consisting of three appointees each from Republican and Democrat leaders. Wis. Stat.§ 15.61. WEC provides guidance on the laws that the clerks implement. *Id.*

Although Wisconsin's election scheme has seen changes, two things have remained constant: (1) decentralized election administration and (2) a legislative commitment to balancing ballot access and security.

Legislators have crafted election laws that, on the whole, make voting accessible. "Wisconsin has lots of rules that make voting easier," compared to "the rules of many other states." *Luft*, 963 F.3d at 672; *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014). ("*Frank I*). Voters must register before they can vote, Wis. Stat. § 6.27, but "[r]egistering to vote is easy in Wisconsin." *Frank I*, 768 F.3d at 748. Voters may register at their clerk's office, by mail, or online using WEC's "MyVote" website. Wis. Stat. §§ 6.28(1), 6.29(2)(a).

Once registered, Wisconsin has no-excuse absentee voting, Wis. Stat. §6.86 (1)(ac). Prior to 1999,

only some voters could cast ballots absentee, but Wisconsin has since adopted an easier process for both election officials and voters. 1999 Wisconsin Act 182; Samara Kalk, *Absent and Accounted For*, The Capital Times (Nov. 28, 1998).

Wisconsin also has in-person absentee voting, informally known as "early voting," enacted in 2006. 2005 Wisconsin Act 451; Wis. Stat. §6.86(1)(b). That same legislation balanced increased early voting opportunities with a more rigorous prohibition on "electioneering," or campaigning too close to a polling location. *Id*. In 2018, the legislature passed a law to limit the period of early voting to two weeks to create equal opportunity for voters from the Village of Big Falls to Milwaukee. Katelyn Ferral, *Wisconsin's extraordinary session: Is absentee voting a fairness issue?* The Capital Times, (Dec. 5, 2018) https://madison.com/ct/news/local/govt-and-politics/wisconsins-extraordinary-session-is-absentee-voting-a-fairness-issue/article_93e38df0-bc71-56b5-a9cd-2cc3dd159883.html (last accessed December 6, 2020).

For voters who want to cast their ballot on Election Day, the state has "generous" same-day voter registration at the polls. *Luft*, 963 F.3d at 676. The state first implemented same-day registration in 1976. Wisconsin Chapter 85, §28 (1975).

Wisconsin has numerous election security measures, many of which were enacted years after those that created greater ballot access. For example, in 2011, the state enacted photo-ID, a crucial security measure. 2011 Wisconsin Act 23. This change came more than two decades after allowing no-excuse absentee voting.

Act 23 also requires a photo-ID for mail-in absentee voting, one of several security measures. Namely, after a proper request is made, the appropriate municipal clerk verifies the name on the absentee ballot request matches the proof of identification submitted by the elector. Wis. Stat. § 6.87. Once verified, the clerk then secures the ballot in an unsealed envelope and submits the materials to the absentee voter *Id*. For an absentee ballot to count, the voter must return a ballot that has been verified by a witness, who adds her name, address, and signature to the certificate envelope. *Id*. The absentee ballot must be returned to the polling place by 8 p.m. on election day. Wis. Stat. § 6.87(6).

This sampling of Wisconsin's laws illustrates how carefully the legislature has balanced easy access to the polls with ballot security to reach a fair compromise. This balance didn't always come from the same bills, as sometimes conditions change and different provisions are needed later.

Legislators try their best to craft laws that will withstand any legal challenge and have been largely successful in recent years because of the clear standards from the Seventh Circuit. As our sometimes patchwork approach to election laws has shown, legislators also need to be free to experiment with increasing access to the ballot without fear they may never be able to implement appropriate security measures due to litigation untethered from understandable guidelines.

II. Wisconsin Needs Clear Guidance to Continue Crafting Election Laws that Meet Federal Requirements

Despite Wisconsin's success in creating a very accessible voting system and crafting bills that comport with federal law, opponents have brought a barrage of unsuccessful challenges under both the Constitution and Section 2 of the VRA. *Frank I*, 768 F.3d 744; *Luft* 963 F.3d 665; *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 589 U. S. ____ (2020); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020).

Because opponents of Wisconsin's election laws will continue to bring challenges in federal court, this section will address why legislators need clear guidance from this Court to understand how to craft laws that comport with Section 2's requirements. The

Seventh Circuit's holding in *Frank I* provides that guidance. The Ninth Circuit's holding below that requires only a de minimis statistical difference in outcome regarding racial disparities to implicate Section 2 would be extremely problematic. This misreading creates two problems: first, the legislature will not know how to craft laws and second, laws that should be upheld might be rejected by the courts.

A. The Seventh Circuit's Reading of Section 2 is Correct and the Ninth Circuit's is Incorrect

Congress enacted the Voting Rights Act of 1965 (VRA) "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA was later amended to remove the requirement that plaintiffs must show discriminatory intent. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Section 2 now provides that no state may "den[y] or [abridge]" any citizen's right to vote based on race or several other characteristics and a violation occurs if given "the totality of the circumstances" the "political process leading…to [the] election" is not "equally open" to a "protected" "class of citizens" and those people have "less opportunity than other members of the

electorate to participate in the political process[.]" 52 U.S.C. §10301.

Frank I held that Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities" or produces a "statistical disparity." 768 F.3d at 752 —53. Instead, the court correctly interpreted Section 2's language that requires considering "the entire voting and registration system," not only the law at issue that makes the election "not equally open" to minorities, or leaves them with "less opportunity" to vote. *Id.* at 753 (emphasis in original). Any other approach to Section 2 "*would dismantle every state's voting apparatus*." *Id.* at 754 (emphasis added).

In contrast, the en banc Ninth Circuit ruling below set a standard that implicates Section 2 where "more than a de minimis number of minority voters" "are disparately affected" by an election policy. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1015 (9th Cir. 2020).

The Ninth Circuit's interpretation is clearly at odds with the text of Section 2. It requires a something more than a mere de minimis impact on minority voters' opportunity to participate in elections, not a substantial impact. As the *Frank I* court noted, reading Section 2 in its totality "does not condemn a voting practice just because it has a

disparate effect on minorities," 768 F.3d at 753. Instead, to show a "denial" of voting rights, the state would need to make participation "*needlessly* hard." *Id*. (emphasis in original). This is the plain reading of the "totality of the circumstances" text.

B. The Ninth Circuit's Holding Causes Two Problems for Wisconsin if Adopted

The Ninth Circuit's holding causes two problems if adopted. First, the legislature won't know how to avoid litigation because there will be no clear guidelines when drafting bills. Second, laws that would remain on the books under the correct interpretation of Section 2 would be struck down.

First, under the Ninth Circuit's holding, the legislature would be unable to avoid litigation. If *any* disparate impact could cause a law to be challenged in the courts, there is no feasible way legislators could craft bills to avoid litigation. How could a legislator know if decreasing early in-person voting by one day would impact minority voters in Milwaukee disproportionately to white non-Hispanic voters in Big Falls? Would committee chairs have to anticipate the expert witnesses a potential plaintiff might call at trial to get their opinion? Legislators use many sources to craft bills, but knowing which expert witness to contact who may be able to predict the

impact of a piece of legislation at a certain point in time is simply not possible.

The second major problem with the Ninth Circuit's holding is that Wisconsin could lose in court when its laws should be upheld. A law like photo-ID could be struck down in 2012, but then meet the Ninth Circuit's standard in 2020. Would the legislature chance passing that law again if it had been struck down only eight years earlier? Would enough minority citizens have obtained photo-ID in the ensuing years to eliminate a statistical disparity? Would expert witnesses produce different evidence from each other so that the fate of legislation hinged on the credibility of one expert over the other in the eyes of a judge? In addition to hindering the legislative process, any bills that become law would almost certainly be litigated in federal court.

C. The Wisconsin Legislature Needs Clear Guidelines Like Those Given by the Seventh Circuit

The Wisconsin legislature cannot do an effective job under the uncertainty of the Ninth Circuit's en banc holding. Whether listening to constituents, expert testimony at committee hearings, or reading studies by nonpartisan service agencies, legislation comes together from a number of different sources. And then there's the legislative process of debate and

amendment, which includes working through both houses and both parties. At none of those steps can legislators predict the exact outcome a bill will have once it becomes law, let alone the exact language of a bill. This is especially true if the bill is subject to the Governor's veto pen. Lawmaking would either grind to a halt or forever be in litigation, neither of which is a good option.

Wisconsin has a unique, decentralized system with more than 1,800 voting districts administering elections. The state has a history of passing laws that balance security and access at different times. If election provisions are viewed in a vacuum, all of Wisconsin's good work creating an accessible yet secure voting scheme could be dismantled.

The *Frank I* holding gives Wisconsin the freedom to experiment with ballot access and security, balancing each when necessary. That holding looks at Wisconsin's entire election scheme, which "has lots of rules that make voting easier." *Luft*, 963 F.3d at 672. If this Court finds that standard to be insufficient, *amici* request some clear standard from the Court regarding Section 2.

CONCLUSION

This Court should reverse the en banc holding below and set clear standards regarding Section 2 of the Voting Rights Act.

Respectfully submitted,

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