No. 19-1257 & No. 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 Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

As part of its mission to defend fundamental rights, the Center works to protect election integrity and prevent the dilution of legal votes by illegal ballots. To that end, the Center recently litigated *Cook County Republican Party v. Pritzker*, 1:20-cv-04676 (N.D.Ill.), a challenge to vote-by-mail and ballot-harvesting in "a state as notorious for election fraud as Illinois." *See Nader v. Keith*, 385 F.3d 729, 733 (7th Cir. 2004).

SUMMARY OF ARGUMENT & INTRODUCTION

The law should make it easy to vote and hard to cheat.

That was the line the 45th Governor of Wisconsin, Scott Walker, used time and again when explaining his approach to election administration, including his support for a photo ID requirement. In two short phrases — easy to vote, hard to cheat — he encapsulated a view that the vast majority of Americans would agree on.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. Both Petitioners and Respondents submitted letters granting blanket consent for *amicus* briefs in support of either party.

It was that goal that led him to make a voter ID law a central plank of his 2010 election platform.[2] After his victory, the Wisconsin Legislature adopted that proposal in 2011, and he signed it into law as Act 23 of his tenure. The law made Wisconsin one of 34 states to require some form of voter ID, and one of 18 to require photo ID.[3]

Wisconsin, unlike some other states, has a long history of embracing African-Americans in its electoral process. And since Wisconsin enacted photo ID, the state's participation by African-Americans and other minorities in its electoral processes has continued to be strong.

Nevertheless, Act 23 was subject to prolonged litigation, as the law was volleyed like a ping-pong ball between the Eastern and Western Districts of Wisconsin and the U.S. Court of Appeals for the Seventh Circuit, leaving election administrators and voters in a constantly confused lurch.

Much of the reason for this confusion was because of the lack of clear precedent for lower-court judges to guide their interpretation of Section 2 of the Voting Rights Act. Despite a clear ruling from this Court upholding voter ID just a few terms earlier, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008),

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[2] Dave Umhoefer, "Sign legislation requiring photo ID to vote," Politifact (July 4, 2011), available at https://www.politifact.com/wisconsin/promises/walk-o-meter/promise/586/sign-legislation-requiring-photo-id-to-vote/.

[3] "Voter identification laws by state," Ballotpedia, available at https://ballotpedia.org/Voter_identification_laws_by_state.

the Act survived by the narrowest of margins through constant court battles.

Wisconsin's saga with Act 23 shows the need for this Court to clarify its Section 2 jurisprudence by setting a clear rule that binds lower court judges so that state executives and legislators can act with confidence when they update election administration codes.

ARGUMENT

I. Wisconsin historically has embraced African-Americans and other minorities in the political process.

Even before Wisconsin became a state, the African-American cook for early Milwaukeean Solomon Juneau participated in the city's first municipal election, in 1835.[4]

When the state was admitted to the union in 1848, "[t]he Wisconsin constitution allowed black citizens to vote, provided that the idea was 'submitted to the vote of the people at a general election, and approved by a majority of all the votes cast at such election.' When in 1849 Wisconsin residents voted on that question, African American voting rights were approved 5,265 to 4,075."[5] After a local canvassing board denied African-

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[4] Isador S. Horwitz, "Early Milwaukeeans Active in Negro's Enfranchisement," Milw. J. (Feb. 12, 1922), available at https://www.wisconsinhistory.org/Records/Newspaper/BA10277.

[5] Wis. Historical Society, "The Wisconsin Supreme Court reaffirms black voting rights, 1866," available at https://www.wisconsinhistory.org/turningpoints/search.asp?id=1377.

Americans their access to the polls, the Wisconsin Supreme Court upheld their right to cast a vote. *Gillespie v. Palmer*, 20 Wis. 544 (1866). A few years later, Wisconsin was one of the first states to ratify the Fifteenth Amendment barring discrimination against voters based on race; the Legislature approved the motion 102 to 29.[6] Thus began a long and proud tradition of African-American participation in Wisconsin politics.

In the century and a half since its founding, the badger state has been led by statewide African-American constitutional officers, an African-American member of Congress, and numerous African-American legislators and local elected officials.[7] Wisconsin's first African-American legislator, a Republican, was elected in 1906.[8]

Wisconsin also has a consistent record of African-American participation at the polls, as evidenced by its most recent statewide elections. In fact, in the 2018 race for governor, with voter ID in effect, exit polling shows that African-American turnout as a percentage of the electorate *exceeded* the African-American percentage of the voting-age population. In other words, the *Atlantic* reports, "black voters significantly outperformed white voters."[9] Census data demonstrate the

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[6] Horwitz, *supra* note 3.

[7] Secretary of State Vel Phillips, 1979-1983; Wisconsin Supreme Court Justice Louis Butler, 2004-2008; Lt. Governor Mandela Barnes, 2019-present; State Superintendent of Public Instruction Carolyn Stanford Taylor, 2019-present; Congresswoman Gwen Moore, WI-4, 2005-present.

[8] "Lucian H. Palmer," Wis. Historical Society, available at https://www.wisconsinhistory.org/Records/Image/IM34888.

[9] Vann R. Newkirk II, "Did Minority Voters Dethrone Scott Walker?," The Atlantic (Nov. 14, 2018), available at

same was true in the 2012 election. *Frank v. Walker*, 768 F.3d 744, 753-54 (7th Cir. 2014) (in the 2012 election, African-American voters were registered to vote and voted in higher percentages than non-Hispanic white voters).

And in the most recent race for president, early news reports indicate that African-American and Hispanic voters turned out in record numbers. *See* Kenya Evelyn, "How young, Black voters lifted Biden's bid for the White House," The Guardian (Nov. 6, 2020) (reporting from Milwaukee)[10]; Shaun Gallagher, "Early reports show Wisconsin's Latino vote flipped state blue," WTMJ-4 (Nov. 7, 2020).[11]

In fact, Wisconsin's record of high voter participation is not limited to her minority populations. Among all fifty states, Wisconsin is consistently one of the top five for voter turnout among eligible adults.[12] Unofficial re-

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https://www.theatlantic.com/politics/archive/2018/11/black-and-latino-turnout-helped-defeat-scott-walker/575818/ ("The CNN exit poll of the state gubernatorial race calculates that black voters composed about 9 percent of the electorate, and Latino voters about 4 percent. According to the Census Bureau, black people only make up about 6 percent of the voting-age population in the state, and Hispanic people about 5 percent—although Hispanics compose a smaller percentage of registered voters, about 4 percent.").

[10] Available at https://www.theguardian.com/us-news/2020/nov/05/black-voters-wisconsin-joe-biden.

[11] Available at https://www.tmj4.com/news/election-2020/early-reports-show-wisconsins-latino-vote-flipped-state-blue.

[12] 2018: 61.4%, 3rd in the nation
2016: 69.5%, 5th in the nation
2014: 56.8%, 2nd in the nation
2012: 65.8%, 2nd in the nation

turns from the most recent presidential election indicate turnout among voting-age adults in Wisconsin was 72.67 percent, a full ten points higher than the national average of 62 percent.[13]

From the state's pioneering days thru to the present, Wisconsin has welcomed all of her citizens in the public square, as evidenced by the strong showing of African-American participation in her elections. It is a record of which any state could be proud.

II. Despite this history and recent record of strong minority turnout, Wisconsin's Act 23 was subjected to a long and bitter battle based on Section 2.

After Act 23 was signed into law, Wisconsin faced an onslaught of legal challenges. Three of them relate to the federal statute at the center of this case: Section 2 of the Voting Rights Act. *Frank v. Walker*, No. 11-CV-01128 (E.D. Wis.); *LULAC v. Deininger*, No. 12-C-0185 (E.D. Wis.) (eventually consolidated with *Frank*); *One Wis. Inst., Inc. v. Nichol*, No. 15-cv-324-jdp (W.D. Wis. 2016) (also eventually consolidated with *Frank*).

The District Court in *Frank*, evaluating the Section 2 claim after trial, set aside the nine factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and instead

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"Voter Turnout," FairVote, available at https://www.fairvote.org/voter_turnout#voter_turnout_101.

[13] Chris Mertes, "State voter turnout not quite a record," Sun Prairie Star (Nov. 10, 2020), available at https://www.hngnews.com/sun_prairie_star/news/article_34cbed16-bc9d-5d1f-958d-b4878e246241.html.

crafted its own definition of a "voting practice" that violates the law: "Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not." *Frank v. Walker*, 17 F. Supp. 3d 837, 870 (E.D. Wis. 2014). Based on the expert testimony of three plaintiffs' witnesses at trial, stating that a greater percentage of minorities lacked photo ID compared to whites, the Court issued a permanent injunction against the law. *Id*. at 880. Four months later, the District Court denied the State's request for a stay pending appeal. *Id*. at 900.

The Seventh Circuit acted expeditiously to hear an appeal, and stayed the District Court's order mere weeks before the November 2014 gubernatorial election. *Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014). A judge called for reconsideration of the stay *en banc*, which the Court declined on a tied 5-5 vote, with a dissent from Judge Williams. *Frank v. Walker*, 769 F.3d 494, 500 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*).

The Seventh Circuit panel hearing the appeal on the merits fully reversed the District Court.[14] Evaluating the Section 2 claim, the Court held that "in Wisconsin

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[14] The Seventh Circuit's reversal was hardly the only criticism directed at the District Court's first substantive opinion. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶40 n.9, 357 Wis. 2d 469, 490, 851 N.W.2d 262, 272 ("The district court's reasoning stands the *Anderson/Burdick* analysis on its head."); *N.C. State Conf. of the NAACP v. McCrory,* 997 F.Supp. 2d 322, 364 n.50 (M.D.N.C. 2014).

everyone has the same opportunity to get a qualifying photo ID." *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014). To read Section 2 as the District Court did would "sweep[] away almost all registration and voting rules. It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Id*. at 754.

Judge Posner proactively suggested *en banc* review, which was again denied by an equally divided vote. *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014). Judge Posner, for the five who would have taken the case, in 26 pages of opinion never discussed the Voting Rights Act in any detail. Instead, he discussed the different approaches of conservative vs. liberal states, concluding: "If photo ID laws increase minority voting, liberals should rejoice in the laws and conservatives deplore them. Yet it is conservatives who support them and liberals who oppose them. Unless conservatives and liberals are masochists, promoting laws that hurt them, these laws must suppress minority voting and the question then becomes whether there are offsetting social benefits . . ." *Id.* at 797 (Posner, J., dissenting from rehearing *en banc*).

This Court denied a petition for certiorari. *Frank v. Walker*, 575 U.S. 913, 135 S. Ct. 1551 (2015).

Yet that still did not end the saga, as the case was remanded back to the District Court. There it drags on still, including multiple additional trips to the Seventh Circuit. The second round centered on whether the District Court could issue a preliminary injunction re-

quiring the state to create an affidavit option for persons who could not obtain documents necessary to secure a photo ID. *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2015); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016); *Frank v. Walker*, 196 F. Supp. 3d 893 (E.D. Wis. 2016); *Frank v. Walker*, No. 11-C-1128, 2016 U.S. Dist. LEXIS 102245 (E.D. Wis. July 29, 2016).

The Seventh Circuit, granting a stay pending appeal, said the District Court "issued an injunction that permits any registered voter to declare by affidavit that reasonable effort would not produce a photo ID — even if the voter has never tried to secure one, and even if by objective standards the effort needed would be reasonable (and would succeed)." *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 U.S. App. LEXIS 14917, at *3 (7th Cir. Aug. 10, 2016). "The injunction adds that state officials are forbidden to dispute or question any reason the registered voter gives." *Id.* at *4. The Seventh Circuit denied a request for initial hearing *en banc* on this round of *Frank*, which was consolidated with a separate voter ID challenge coming up from the Western District of Wisconsin. *Frank v. Walker*, 835 F.3d 649, 651 (7th Cir. 2016) (*per curiam*). *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). There, the Seventh Circuit noted that the Eastern and Western Districts of Wisconsin reached different conclusions in the separate cases challenging voter ID, where the Eastern District mandated the affidavit procedure while the Western District declined to order the affidavit process, but instead required reform to the state's ID petition process. *Frank*, 835 F.3d at 651.

The third round of litigation, still fought out with the same set of plaintiffs, though now consolidated with *One Wisconsin Now* from the Western District, continued on. In fact, the most recent iteration was decided just in June of 2020. *Luft v. Evers*, 963 F.3d 665, 668 (7th Cir. 2020). There the Seventh Circuit considered "more than a dozen of the provisions [of Wisconsin election law], each contested under a number of theories," *id*. at 670, including ongoing arguments about whether college student IDs qualify as voter ID. *Id.* at 677. There again the District Court had continued its incorrect approach to Section 2, using the two-part test for analyzing those claims adopted by the Fourth and Sixth Circuits, not the one set by the Seventh. *Id*. at 672.

The Seventh Circuit, again reversing the district court, pointed out that "[m]any of plaintiffs' arguments, and some of the district court's rulings, suppose that §2 forbids any change in state law that makes voting harder for any identifiable group. *Frank I* rejected that line of argument. 768 F.3d at 752-53. The Voting Rights Act does contain an anti-retrogression rule, but it is in §5(b), 52 U.S.C. §10304(b). Section 5 of the Act has never applied to Wisconsin. Section 2 must not be read as equivalent to §5(b)." *Id*. at 673.

Judge Easterbrook's opinion also offers an important reminder that alongside Wisconsin's efforts to protect ballot integrity are a number of laws that increase voting access: "Wisconsin has lots of rules that make voting easier," including easy absentee ballot access, large windows for in-person voting, time-off to vote, funding assistance to transport voters to the polls,

easy pre-election registration, and same-day registration. *Id.* at 672. "These rules make voting easier than do the rules of many other states. We observed in *Frank I* (citing a report by the Census Bureau) that the net effect of Wisconsin's rules had been a higher turnout rate than other states for voters of all races." *Id.* Wisconsin's goal remains the same: to make it easy to vote and hard to cheat.

Incidentally, the *Frank* cases still live on today before the District Court and remain a subject of active litigation, nearly a decade after Act 23 became law. *Luft v. Evers*, No. 11-cv-1128-jdp, 2020 U.S. Dist. LEXIS 152174, at *12 (E.D. Wis. Aug. 20, 2020).

III. Wisconsin's experience illustrates the need for a clear, easy-to-apply rule from this Court.

This Court must provide a clear, bright-line rule to guide legislators in crafting election laws and to cabin the discretion of judges hearing Section 2 claims. The Court's current jurisprudence is leading to confusion and inconsistency among the lower courts. As the *Frank* saga illustrates, the Seventh Circuit was deeply riven, twice dividing 5 to 5 on whether to hear the case *en banc*. And the district courts were similarly split, reaching conflicting conclusions not only with the Seventh Circuit's panel but with one another.

This sort of confusion is the consequence of a jurisprudence that functions as a "grand balancing test in which unweighted factors mysteriously are weighed." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135-36 (2020) (Roberts, C.J., concurring) (quoting *Marrs v. Motorola, Inc.*, 577 F. 3d 783, 788 (7th Cir.

2009)). "Under such tests, 'equality of treatment is impossible to achieve; predictability is destroyed; [and] judicial arbitrariness is facilitated. . . " *Id.* (quoting A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

Currently, some judges are reading the case law as authorizing an "'I know it when I see it test,' which is no test at all." *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320, 1327 (Fed. Cir. 2020) (quoting *Bell Supply Co., LLC v. United States*, 348 F. Supp. 3d 1281, 1295 (Ct. Int'l Trade 2018)). As Judge Easterbrook's repeated opinions for the Seventh Circuit accurately attest, many judges follow the precedent to a conclusion unmoored from the text of Section 2.

This case offers the opportunity provide a new, clear rule, based on the text of the statute, that allows the political branches to craft lawful election administration procedures. If the rule of law is a law of rules, then this Court must set forth a real rule to guide policymakers and the lower courts.

Such a rule can honor the statute's textual command to consider "the totality of circumstances" while first focusing on Section 2(a)'s command that the state law must actually "deny" or "abridge" the right to vote. 52 U.S.C. § 10301. *See Frank*, 768 F.3d at 753 ("Although these findings document a disparate outcome, they do not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter.").

"The reasons for drawing a bright line . . . are obvious and familiar. Bright lines provide clear notice . . . Such

clear rules are easy, cheap, and administrable — laudable qualities in the context of a vast and intricate program [like Medicaid]. . .” *Wos v. E.M.A.*, 568 U.S. 627, 653 (2013) (Roberts, C.J., dissenting). Election administration is also a vast and intricate machine, executed on election day by armies of volunteer poll workers, many overseen by municipal clerks who are not full-time focused on election issues, some of whom work part-time. These workers and clerks perform their essential service in neighborhood precincts and wards, which funnel up vote tallies and legal issues through succeeding levels of municipal, county, and state administration. For them, for the policymakers who shape the laws they administer, and ultimately for the voters themselves who need confidence in their elections, this Court should craft a clear rule.

CONCLUSION

Wisconsin is a state with high voter turnout, both before and after it adopted voter ID. This proud tradition of participation embraces the state’s minority communities, who have higher registration and turnout than white voters in some elections (including after the adoption of voter ID). Despite this, judges still strike down the state’s election laws under Section 2 using a non-textual approach that puts legitimate laws on hold through years of costly, protracted litigation, before ultimate vindication on appeal.

This Court should adopt a clear, bright-line rule based on the text of Section 2(a): states may not deny or abridge the right to vote by denying an equal opportunity to cast a ballot to any voter.

Respectfully submitted,

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