STATE OF WISCONSIN
SUPREME COURT

No. 2012AP584

LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION NETWORK, INC., and MELANIE G. RAMEY,

Plaintiffs-Respondents-Petitioners,

vs.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

DOROTHY JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

PLAINTIFFS-RESPONDENTS-PETITIONERS' BRIEF

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ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Do the portions of 2011 Wisconsin Act 23 that require constitutionally qualified and registered voters to display a specified form of government-issued photo identification at the polling place as a prerequisite to voting constitute an impermissible additional qualification to vote in violation of Wis. Const. Article III, §1?

The Court of Appeals answered "no."

2. Do the portions of 2011 Wisconsin Act 23 that require constitutionally qualified and registered voters to display a specified form of government-issued photo identification at the polling place as a prerequisite to voting exceed legislative authority under Wis. Const. Art. III, §2?

The Court of Appeals answered "no."

3. Are the portions of 2011 Wisconsin Act 23 that require constitutionally qualified and registered voters to display a specified form of government-issued photo identification at the polling place as a prerequisite to voting an unreasonable exercise of legislative authority to regulate elections?

The Court of Appeals answered "no."

4. Did the League and Ramey have standing to bring this action challenging the facial constitutionality of the Voter ID provisions?

The Court of Appeals did not answer this question.

STATEMENT OF THE CASE

The League of Women Voters of Wisconsin Education Network, Inc. ("the League") and Melanie Ramey ("Ramey") (together "the League" unless context dictates otherwise) brought this declaratory judgment action seeking to have portions of 2011 Wisconsin Act 23 (the "Voter ID law") declared unconstitutional.

On June 6, 2011, Governor Scott Walker signed 2011 Wisconsin Act 23 ("Act 23") into law. On October 20, 2011, the League and Ramey filed the declaratory judgment action against Governor Walker and the members of the Government Accountability Board in their official capacities ("the Defendants") seeking a declaration that portions of Act 23, referred to herein as the Voter ID law, are unconstitutional in violation of Art. III of the Wisconsin Constitution and an order enjoining the Defendants from enforcing and implementing it (R. 2).

On December 5, 2011, the Defendants moved to dismiss, claiming neither the League nor its President, Ramey, had standing (R. 6). On March 5, 2012, the circuit court denied the Defendants' motion, finding that Ramey and the League had standing on several grounds. (R. 45).

On February 2, 2012, the League moved for summary judgment (R. 30). The Defendants did not file a cross-motion but opposed the motion

(R. 39). On March 12, 2012 the circuit court granted final judgment in the League's favor (R. 47, App-41), declaring the challenged portions of the Voter ID law "unconstitutional to the extent they serve as a condition for voting at the polls," and permanently enjoining the Defendants "from any further implementation or enforcement of those provisions." (R. 47, App-51).

On March 15, 2012, the Defendants sought a stay of the permanent injunction from both the circuit court and the Court of Appeals, and also filed an appeal (R. 48). The circuit court denied the stay on March 30, 2012 (R. 52). On March 28, 2012, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. On April 16, 2012, the Wisconsin Supreme Court denied certification, returning the case to the Court of Appeals. On April 26, 2012, the Court of Appeals denied the State's request for a stay. On July 10, 2012, the Court of Appeals granted permissive intervention to several individual Wisconsin voters.

On May 30, 2013, the Court of Appeals reversed the circuit court's summary judgment granting declaratory and injunctive relief to the League and remanded "for further proceedings consistent with this opinion as may be necessary." *League of Women Voters Education Network,*

Inc. et al. v. Walker et al., 2012AP584-AC, slip op. ¶94 (Ct. App., May 30, 2013) (App-40).

On June 28, 2013, the League filed a Petition for Review with the Court, which it granted on November 20, 2013.

STATEMENT OF FACTS

This facial constitutional challenge to provisions of the Voter ID Law was resolved by summary judgment. Thus, it was decided by the circuit court as a matter of law based on the provisions of the law themselves, which are summarized in Section III below. Relevant facts related to the League's and Ramey's standing to bring this lawsuit will be presented in Section VII of the argument below.

ARGUMENT

I. SUMMARY OF ARGUMENT

Article III of the Wisconsin Constitution guarantees the people's fundamental right of suffrage. It limits the Legislature's authority to enact laws that interfere with that right.

The Wisconsin Supreme Court has long recognized that the right to vote is primary and fundamental and that the right to vote is protected by the Wisconsin Constitution from legislative infringement or interference.

> The right to vote is one ***reserved by the people*** to members of a class and as so reserved, guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege. It is guaranteed both by the Bill of Rights, and the ***exclusive entrustment of voting power*** contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,--constitute ***inhibitions of legislative interference*** by implication, and with quite as much efficiency as would express limitations, as this court has often held…***Thus is given the right to vote a dignity not less than any other of many fundamental rights***.

State ex rel. McGrael v. Phelps, 144 Wis. 1, 14, 128 N.W. 1041 (1910) (emphasis added, internal citations omitted).

Since 1856, the Wisconsin Supreme Court has consistently held that the qualifications for electors found in Wis. Const. Art. III, §1 are exclusive and complete and that the Legislature has neither constitutional nor

plenary authority to add qualifications for voting beyond those found in Article III, § 1.

The Voter ID law violates this constitutional restraint on the legislative power because the law requires constitutionally qualified voters to display to elections officials at the polls, ***as an absolute condition precedent to voting***, one of a very limited number of specified forms of government-issued photo identification. A ***constitutionally qualified*** voter who fails to meet this ***legislatively*** enacted qualification ***loses the right to vote in that election***. The Voter ID law is absolute. It does not allow a constitutionally qualified elector any ability to exercise his or her "present right to vote" in the election if the elector lacks one of the very limited acceptable forms of identification.

In Article III, §2, the Wisconsin Constitution expressly limits the Legislature to only five areas in which it is authorized to enact laws to implement the right of suffrage guaranteed in §1 to qualified electors. The Voter ID law falls within none of those five areas: It does not define residency. Wis. Const. Art. III, §2(1). It does not provide for the registration of electors. §2(2). It does not provide for absentee voting. §2(3). Nor does it exclude from suffrage persons convicted of a felony or

adjudged incompetent. §2(4). And, most certainly, it does not extend the right of suffrage to additional classes. §2(5).

In addition to enacting legislation regulating ***who*** may vote, within those strictly limited areas, the Legislature has the authority to regulate elections: ***how***, ***when*** and ***where*** elections are held and administered. However, the Voter ID law is not an election regulation. It legislatively establishes ***who*** may vote because it bars constitutionally qualified voters from voting if they do not display to election officials at the polls one of the limited acceptable government issued forms of ID. Neither the Wisconsin Constitution nor this Court's decisions over the past 150 years give the Legislature the power, through the guise of an "election regulation," the ability to strip a qualified, registered voter of his right to vote.

If the Voter ID law is characterized as an election regulation, this Court has previously held that an election regulation must be "reasonable" or it is unconstitutional. More specifically, when an election regulation touches on ***who*** may vote, in order to be reasonable, it must both preserve and promote exercise of the right to vote, and cannot impair or destroy that right. The Voter ID law is unreasonable because it fails to preserve and promote exercise of the right to vote, and in fact impairs or destroys that right by summarily prohibiting a voter who fails to display the

required form of identification at the polls from exercising his constitutionally protected franchise, without first giving the voter an opportunity to show that he is a qualified voter.

Finally, should this Court wish to address standing, this brief will demonstrates that Ramey, and therefore also the League, has standing to bring this lawsuit.

II. STANDARD OF REVIEW AND APPLICABLE LEGAL PRINCIPLES FOR A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF A STATUTE

This Court reviews the constitutionality of a statute *de novo*, but benefits from the analysis of the lower courts. *State v. Quintana*, 2008 WI 33, ¶¶11-12, 308 Wis. 2d 615, 748 N.W.2d 447; *State v. Radke*, 2003 WI 7, ¶11, 259 Wis. 2d 13, 657 N.W.2d 66.

"[W]hen a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶69, 284 Wis. 2d 573, 701 N.W.2d 440. Neither "respect for the legislature nor the presumption of constitutionality allows for the absolute judicial acquiescence to the legislature's statutory enactments." *Id.* "Since *Marbury v. Madison*, it has been recognized that it is peculiarly the province of the judiciary to

interpret the constitution and say what the law is." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988).

A party who challenges the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Ferdon*, 2005 WI 125 at ¶68. This standard is not an evidentiary one, but rather an expression of deference to the legislature. "[A] court's degree of certainty about the unconstitutionality results from the persuasive force of legal argument." *Id.* at ¶68, n. 71. Put another way, the reasonable doubt standard "establishes the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute can be set aside." *Id.* at ¶324 *(Roggensack, dissenting)*; *see also Guzman v. St. Francis Hosp., Inc.*, 2001 WI App 21, ¶4, n. 3, 240 Wis. 2d 559, 623 N.W.2d 776.

The Supreme Court is the institution chosen by the people to protect their fundamental rights from being violated by the Legislative and Executive branches of the government. Since the adoption of the Wisconsin Constitution, the Wisconsin Supreme Court has been a bulwark against legislative interference with the right to vote. In this case, the Court must hold the Legislature to the strict limits of its authority as defined in Article III, Sections 1 and 2. This Court must not, under the

guise of deference, create power for the Legislature that the people, through the Wisconsin Constitution, have not granted to it.

III. OVERVIEW OF THE WISCONSIN VOTER ID LAW

2011 Wisconsin Act 23 enacted sweeping changes to state laws regulating voters and voting in Wisconsin. The League challenged the provisions requiring qualified and registered voters to display one of a small number of specified government-issued photo ID's to election officials before they may vote.

Wis. Stat. §6.79(2), as revised by Act 23, requires "each eligible elector" to "present to the officials proof of identification" on election day. Only a small number of specific forms of government-issued photo identification documents are allowable for purposes of voting: a driver's license or receipt therefore, a State identification card or receipt therefore, a military identification card, a United States passport, certain certificates of United States naturalization, an identification card issued by a federally recognized Indian tribe, or certain university and college identification cards. Wis. Stat. §5.02(6m).[1]

The Act provides that "[i]f proof of identification … is not presented

[1] Many other forms of identification such as, for example, photo identification cards that are routinely issued by private and public sector employers are not acceptable under §6.79(2).

by the elector, if the name appearing on the document presented does not conform to the name on the poll list or separate list, or if any photograph appearing on the document does not reasonably resemble the elector, ***the elector shall not be permitted to vote***, except as authorized under sub. (6) or (7), but if the elector is entitled to cast a provisional ballot under s. 6.97, the officials shall offer the opportunity for the elector to vote under s. 6.97." Wis. Stat. §6.79(3)(b) (emphasis added).

The "provisional ballot" procedure under Wis. Stat. §6.79(2) allows the would-be voter who does not display one of the limited forms of acceptable ID, or whose ID is rejected by election officials, to fill out a ballot. Wis. Stat. §6.79(2). The elector must execute on the provisional ballot envelope "a written affirmation stating that the individual is a qualified elector of the ward or election district where he offers to vote and is eligible to vote in the election." Wis. Stat. §6.97(1).

However, a provisional ballot ***may not be counted*** unless the voter presents a required ID at the polling place before it closes or "at the office of the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election." Wis. Stat. §6.97(3)(a)-(c). Thus, the provisional ballot merely documents the voter's intended votes. It has no legal effect as a ballot unless the voter produces the mandated form of ID.

Under both prior and current statutes, a voter's qualifications may be challenged at the polls based on an election official's or another qualified elector's belief that the challenged voter is not qualified to vote. Upon such challenge, the voter could be disqualified from voting only if "the municipal clerk, board of election commissioners or a challenging elector … demonstrates ***beyond a reasonable doubt*** that the person does not qualify as an elector or is not properly registered." Wis. Stat. §6.325 (emphasis added).

That standard does not apply to a registered voter who fails to show the mandated ID**.** Rather, a registered voter who fails to display the required ID is prohibited from voting, regardless of whether or not the voter is constitutionally qualified. Thus, the voter is excluded from voting without proof or even a finding by election officials that the voter lacks the constitutional qualifications to vote.

IV. THE VOTER ID LAW IMPOSES AN ADDITIONAL QUALIFICATION TO VOTE ON WISCONSIN ELECTORS IN VIOLATION OF THE WISCONSIN CONSTITUTION.

A. This Court Held Over 150 Years Ago That The Qualifications To Vote Are Exclusively Established By Article III Of The Wisconsin Constitution And That The Legislature May Not Change, Impair, Add To Or Abridge Them. The Voter ID Law Does Just That.

Article III, §1 of the Wisconsin Constitution states that: [1] "Every United States citizen [2] age 18 or older [3] who is a resident of an election district of this state is a qualified elector of that district." Nothing beyond those three things can be required by the Legislature as a qualification to vote. The Voter ID law effectively adds this phrase at the end of Article III, §1: "and who possesses and displays at the polling place one of a limited number of forms of governmental issued photo identification." This Court has a long history of declaring unconstitutional any law that prevented a voter with the attributes described in Article III, § 1 from voting, on grounds that such laws add a qualification to vote not contained in the Constitution.

The Voter ID law does precisely that. It prevents an otherwise qualified elector who does not possess and display one of the limited acceptable forms of government-issued identification at the polls from voting. This violates Article III, §1 by creating, without constitutional authority, a fourth qualification to vote.

In *State ex rel. Knowlton v. Williams,* 5 Wis. 308 (1856), the Wisconsin Supreme Court established this bedrock principle: ***the legislature may not enact laws adding qualifications for voting beyond those found in Article III of the Wisconsin Constitution***. In *Knowlton* the Supreme Court struck

down a law that imposed a 30-day durational residence requirement on voters, holding that Art. III alone prescribes the qualifications to vote. The Court emphasized that the Legislature had no power to (a) add any other qualifications, or (b) to deprive a person with those qualifications of the right to vote:

> We have no doubt that the qualifications of the voters as fixed by the act are, in respect to residence in the state, quite different from those prescribed in the constitution. The latter instrument is explicit; it provides in express terms that a person who possesses the other qualifications mentioned, and who has resided in the state one year next preceding any election, shall be deemed a qualified elector at such election.
>
> It seems to us clear, that by requiring a residence of thirty days in the town where the elector offers to vote, ***the legislature have added a qualification not contained in the constitution***, and which is repugnant to its provisions. The constitution provides, that if a person possesses certain qualifications, and has resided in the state one year next preceding any election, he shall be deemed a qualified elector at such election; while the act of the legislature in question provides, in effect, that this shall not be sufficient, but that he shall, in addition, have resided for thirty days previous to the time when the election is holden [sic] in the town where he offers his vote.
>
> We have no doubt that the legislature have [sic] the power to provide that a person who has a right to vote under the constitution shall be allowed to exercise this right only in the town where he resides, because this would be only to prescribe the place where a right which he possessed under the constitution shall be exercised, and fixes upon the most convenient place for its exercise. Such a provision does not add to the qualifications which the constitution requires; ***but an act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained***.

Id. (emphasis added).

Beyond any doubt, the Voter ID Law is an act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary.

To avoid the obvious conclusion that the Legislature added a qualification to those found in Article III, §1, the Defendants contend that the Voter ID law is nothing more than a means to determine voter qualifications or a means to determine if a voter is impersonating a different voter.[2] (Brief of Defendants-Appellants, filed in the Court of Appeals, May 12, 2012 ("Def. Ct. App. Brief"), pp. 3, 12, 17.) Those purported justifications do not withstand scrutiny.

The Voter ID law gives election officials no means of determining whether a citizen is qualified to vote. The constitutionally authorized way by which the State determines the qualifications of an elector is through voter registration. *See* Wis. Const. Art. III, §2(2). During that process, the person seeking to vote confirms to the registrar his eligibility to vote by swearing to his U.S. citizenship and that he is at least 18 years of age, and presenting proof that he is a resident of an election district in this state. That is it. Moreover, such proof need not include one of the limited

[2] Efforts nationwide to document cases of voter impersonation have uniformly found such behavior to be "virtually non-existent." See http://articles.washingtonpost.com/2012-08-13/opinions/35490941_1_voter-fraud-voter-id-laws-voter-impersonation (last visited 12/18/13).

acceptable forms of government-issued identification under the Voter ID law.

Registration is allowed even on the election day itself. Wis. Stat. §6.55. When an individual registers on election day at the polling place, he proves his qualifications without having to display one of the limited acceptable forms of government-issued identification described in the Voter ID law. But, because of that law, once that newly registered elector seeks to cast a ballot, even though an election official has just determined that he has met the constitutional requirements that allow him to voter, he still must produce the identification required by the Voter ID law in order to vote. So, obviously, the purpose of the Voter ID law is wholly unrelated to determining qualification to vote and wholly is unrelated to determining if a voter is impersonating a different voter.

The Wisconsin Supreme Court reiterated the *Knowlton* principle, that the Legislature cannot add qualifications for voting to those stated in Article III, §1, in *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875), and *Dells v. Kennedy,* 49 Wis. 555, 6 N.W. 246 (1880). Those decisions further elucidate the legal standards for determining whether a statute relating to voting impermissibly imposes an additional qualification to vote.

Baker addressed whether the votes of electors who were not on the statutorily-required voter registry, due solely to official error in making the registry, should be set aside. The Court held that the votes must be counted, emphasizing that the Constitution vests the right of suffrage on every person who possesses the constitutional qualifications to vote at the time of any given election:

> The constitution vests every person having certain qualifications at the time of any election with the right of suffrage at such election. ***Some of these qualifications rest on time which may ripen, or facts which may accrue, on the very day of election***. So that one may well become vested with the right of franchise pending the election, who was not so vested before, or perhaps entitled to be registered at the time of registry. So one entitled to the franchise may be sick, or absent or imprisoned, or otherwise disabled, at the time of registry. ***But the constitution vests and warrants the right at the time of election***. And every one having the constitutional qualifications then, may go to the polls, vested with the franchise, ***of which no statutory condition precedent can deprive him***.
>
> Because the constitution makes him, by force of his present qualifications, 'a qualified voter at such election,' Art. III, sec. 1. Statutes cannot impair the right, though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election. Then statutes may require proof of the right, consistent with the right itself.

Baker, 38 Wis. at 86 (emphasis added). The Court explained that registration could be utilized as a means of establishing that a citizen possessed the qualifications to vote, but could not be enforced as a qualification to vote:

> And such we understand to be the theory of the ***registry law***…not to abridge or impair the right, but ***to require reasonable proof of the right***. It was undoubtedly competent for the legislature to provide for a previous registry of voters, as one mode of proof of the right; so that ***it should not be a condition precedent to the right itself at the election***, but, failing the proof of registry, ***left other proof open to the voter at the election, consistent with his present right***.

Id. (emphasis added).

Thus, *Baker* emphasized that statutes "regulating" the right to vote may not impose a "condition precedent" that deprives a qualified elector of his present right of suffrage on the day of the election; regulations, to be regulations, must leave "other proof open" at the election for the voter to prove his right to vote. Failing that, the "regulation" becomes a "qualification."

The Voter ID law violates the *Baker* principle because it does not leave "other proof open" to a voter who fails to present the requisite ID that is "consistent with his present right" to vote. Rather, the Voter ID law imposes a "condition precedent to the right itself at the election" which makes the ID requirement a qualification not found in Article III, §1.

Dells reiterated the *Baker* principle. *Dells* involved an 1879 registration law providing that

> no vote shall be received in any general election unless the name of the person offering to vote be on the register … excepting only the case of persons who may have become qualified voters before such election, but after the completion of such register.

Dells, 49 Wis. 555, 6 N.W. 246 (1880).

The Court in *Dells* focused on the provision in the law that "absolutely prohibits any elector from voting at such election unless so registered, or within such exception." *Dells*, 6 N.W. at 246. It held that the law violated Wis. Const. Art. III, §1, which then defined the qualifications of voters "without specifying registration." *Id*. at 248. The Court emphasized that the constitutional qualifications for electors operate as a limitation on the Legislature:

> The elector possessing the qualifications prescribed by the constitution is invested with the constitutional right to vote at any election in this state. These qualifications are explicit, exclusive, and unqualified by any exceptions, provisos or conditions, and the constitution, either directly or by implication, ***confers no authority upon the legislature to change, impair, add to or abridge them in any respect***.

Id. at 246 (emphasis added). Responding to an argument that the law required no elector to lose the right to vote except through his own "negligence or default," the Court stated:

> If this were a correct statement of the ***effect*** of this law, then it might not be obnoxious to objection in the particular, which…renders it unconstitutional and void. By the ***effect*** of this law the elector may, and in many cases must and will, lose his vote, by being utterly unable to comply with this law by reason of absence, physical disability, or non-age, and an elector can lose his vote without his own default or negligence in these particulars.

Id. at 247 (emphasis added). It held that the section of the law that "provides for the *legal effect and consequences* of the registration, or want of registration," was, on its face, "clearly unconstitutional and void." *Id*. at 248.

Although later amendments to Art. III expressly authorized the enactment of laws providing for registration of voters,[3] the principles established in *Dells* and *Baker* remain the law of this state. Consequently, any statute regulating voters or voting must be consistent with the constitutionally qualified voter's right of suffrage "when he claims his right at an election," including by allowing for "other proof" at the election.

The Voter ID law violates the *Baker* principle. It leaves open no other means for the voter to obtain a valid ballot at the polls. A fully-qualified, registered elector who does not fulfill the condition of displaying the requisite ID is irreversibly deprived of his or her right to vote at that election. In turn, the Voter ID law then violates the *Dells* principle by serving to "change, impair, add to or abridge" the qualifications set forth in Article III, §1.

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[3] Notably, following the *Knowlton, Baker* and *Dells* decisions, Article III of the Wisconsin Constitution was amended in 1882 in order to allow for a 30 day residency requirement and for registration. 1881 J.R. 26A; 1882 J.R. 5; L.1882, c. 272; vote Nov. 1882.

B. The Voter ID Requirement Is Not Akin To A Challenge For Cause Procedure.

The Defendants further argued in the Court of Appeals that the Voter ID law is merely means by which election officials may confirm a voter's constitutional qualifications. They relied on *Cothren* and *Baker* as support for this argument. That reliance was misplaced.

Cothren reviewed the constitutionality of an 1857 statute that established a "challenge for cause" procedure. *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859). The 1857 statutes did not require voters to register or otherwise to establish their qualifications before voting, unless the voter was challenged at the polls. Laws of 1857, ch. 85. A citizen wishing to challenge a voter's qualifications could do so by executing an affidavit stating that the voter was not qualified to vote, and the reasons therefore. *Id*. An election official then asked the person offering to vote questions about the challenged qualification(s) to ascertain whether the challenge was valid. *Id*.

In *Cothren*, the Court reaffirmed that the legislature may not add qualifications to vote beyond those required by the Constitution, but held that the "challenge for cause" procedure under review did not impose an additional qualification on electors:

> The grounds of challenge to which the sets of questions are adapted, imply only the qualifications required by the constitution…. This act, therefore, instead of prescribing any qualifications for electors different from those provided for in the constitution, contains only new provisions to enable the inspectors to ascertain whether the person offering to vote possessed the qualifications required by that instrument, and certainly it is competent for the legislature to enact such.

Id. The Court emphasized that the questions posed to the challenged voter were "calculated to draw out from such person the truth as to whether such cause of challenge existed against him or not," and that the grounds for a challenge could implicate "***only the qualifications required by the constitution***; nothing further or different." *Id*. (emphasis added).

Unlike the statute upheld in *Cothren*, the Voter ID law is not part of a statutory procedure for determining a voter's qualifications after a proper "challenge for cause" has been made under oath. Such a challenge procedure exists currently, and through that process a challenged elector may be denied the ability to vote upon a finding beyond a reasonable doubt that the person is not a qualified elector. *See* Wis. Stat. §6.325.

By contrast, the Voter ID law imposes a mandatory prerequisite to voting on all electors who have already established their qualifications to vote via the registration process.[4] A registered voter who fails to display a required form of ID is barred from voting, until and unless the voter

[4] The registration statutes set out procedures for election officials to determine that a registrant is a qualified elector. *See* Wis. Stat. ch. 6, subch. II (§§6.26 et seq.).

timely produces the required ID. But there is no connection between the Voter ID requirement and the voter's constitutional qualifications to vote. A registered voter's failure to display a mandated form of ID does not constitute proof that the voter is not qualified, and does not trigger any inquiry or ultimate finding by election officials as to a voter's qualification to vote. A registered voter who fails to display a mandated form of ID is simply excluded from voting. *See* Wis. Stat. §6.79(3)(b).

Further, unlike the Voter ID requirement, the "proof" required in *Cothren* was consistent with an elector's "present right" to vote. Any qualified voter could immediately comply with the requirement of answering questions regarding his or her qualifications to vote. Thus, the requirements in *Cothren* of answering questions about the voter's qualifications is a process that "left other proof open to the voter at the election, consistent with his present right" of suffrage as it exists on election day, as required by the Court in *Baker*. *Baker*, 38 Wis. at 86.

The Voter ID law fails that test. It does not "leave other proof open to the voter consistent with his present right" to vote as it exists on election day. It absolutely requires a voter to display a specific form of government-issued identification that must be obtained before the election and separate from the process of voter registration.

Thus, the Voter ID law is unconstitutional. For the Court to rule otherwise, it would have to ignore its longstanding precedent and forsake its constitutional role, entrusted to it by the people, as the institution that protects the citizens of this state from legislative interference with their fundamental right to vote.

V. THE VOTER ID LAW EXCEEDS THE SCOPE OF LEGISLATIVE AUTHORITY.

A. Article III, §2 Provides The Extent Of Legislative Authority Relating to Suffrage.

In construing Article III, §2, the Court must examine its "plain meaning in the context used." *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Article III, §2 is part of Article III. Article III contains all of the provisions in the Wisconsin Constitution relating to suffrage, a primary, fundamental and pre-Constitutional right from which the government derives its existence and powers. *See State ex rel. McGrael v. Phelps*, 144 Wis. 1, 14, 128 N.W. 1041 (1910); Wis. Const. Art. I, §1. Article III, §1 recognizes and guarantees the right to vote of all qualified electors, defined as "every U.S. citizens age 18 or older who is a resident of an election district in this state." Article III, §2 thus must be construed in context as part of the constitutional article that guarantees the right to vote of qualified electors.

Article III, §2 is captioned "implementation." It strictly limits the Legislature to only five subject areas in which "laws *may be* enacted" (emphasis added). That is, the section lists the subjects on which the Legislature may pass laws in order to implement the constitutional right of suffrage described in Art. III, §1. The only reasonable construction of this provision is that it prohibits the adoption of a law from restricting the exercise of suffrage by qualified electors, unless the law falls within one of the enumerated subjects:

> **Implementation**. Section 2. Laws may be enacted:
>
> (1) Defining residency.
> (2) Providing for registration of electors.
> (3) Providing for absentee voting.
> (4) Excluding from the right of suffrage persons:
> (a) Convicted of a felony, unless restored to civil rights.
> (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.
> (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

Wis. Const. Art. III, §2.

The Voter ID law, by mandating that every registered voter display a specific form of government-issued identification to election officials at the polls before he or she is allowed to vote, does not fall in any of these categories, and thus is constitutionally unauthorized.

The Voter ID law does not define residency. The required ID need not display the voter's current residence. Wis. Stat. §5.02(16c). Rather, other provisions in the Wisconsin Statutes define the residency requirements for voting. *See* Wis. Stat. §§6.10, 6.34.

The Voter ID law likewise does not provide for registration of voters. The laws providing for registration are found at Wis. Stat. §§6.33, 6.34 and 6.55. Although a citizen registering to vote must present proof of residence, a citizen may register to vote without displaying one of the forms of identification required to vote under the Voter ID law. *See* Wis. Stat. §§5.02(6m), 6.34 (listing acceptable proof of residence to include utility bills, paychecks and property tax bills) & 6.79(2).

Rather, the Voter ID law imposes a requirement that is separate and distinct from the statutory requirements for registration. Under the Voter ID law, a voter who is duly registered and whose name and address appears in the poll books must comply with the separate requirement of displaying a mandated form of ID at the polls before he or she may vote. Likewise, even voters who register at the polls are required to display the mandated ID *after* they have registered and have been placed on the voter rolls, and before they receive a ballot.

The Voter ID Law does not provide for absentee voting.

The Voter ID Law does not exclude from voting persons convicted of a felony or adjudged incompetent. It does, however, create a new class of persons who are excluded from the right of suffrage: registered voters who do not possess one of the limited forms of acceptable government issued identification.

The Legislature has limited constitutional authority to enact laws regarding the right to vote. Clearly, the Voter ID law exceeds the scope of that authority.

B. The Voter ID Law Is Not An Extension of The Registration Process.

As discussed above, the Voter ID provisions are distinct and separate from the statutory provisions providing for voter registration. Furthermore, the Voter ID law cannot be upheld on grounds that it is, implicitly, an extension of the registration process.

Art. III, §2 expressly authorizes the Legislature to enact laws "providing for registration of voters." The Wisconsin Supreme Court has long recognized that registration is a means of establishing a voter's qualifications. *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875). To fulfill this purpose, Wisconsin has long required a voter to state his name and address to election officials so that they may ascertain whether the voter is on the poll list and therefore registered.

As addressed further in Section VI.B., *infra*, contrary to the Court of Appeals' conclusion, the Voter ID requirement cannot be upheld on grounds that it is indistinguishable from the requirement that a voter provide election officials with his name and address to confirm that he is registered. Rather, it exceeds what is necessary for election officials to determine that a voter is registered. It does not follow that if the Legislature, under its authority to enact laws providing for registration of voters, may require a voter to tell his name and address to election officials for the limited purpose of ascertaining that he is registered, then the Legislature therefore must necessarily be authorized to deprive a voter who fails to display governmentally-issued identification at the polls of the right to vote.

The Voter ID law demands that a voter display a particular form of ID to election officials at the polls. The required ID is extrinsic documentation of identity, obtained from a separate government agency in a process ***divorced from any aspect of the voter registration or election procedures***. Without displaying government-issued identification at the polls, the voter is denied the right to vote. This prohibition from voting occurs ***regardless*** of whether the voter is listed as registered voter in the poll book.

The fact that a voter fails to display such proof of identification at the polls does not demonstrate that the voter is not registered. Rather, the listing of the voter's name and address in the poll books establishes that the voter is registered.

C. The Legislature Has No Other Constitutional Authority, Such As Plenary Authority, To Regulate Who May Vote.

The Wisconsin Constitution confers plenary powers on the legislature to enact all laws not forbidden by it. Wis. Const. Art. IV, §1; *Jacobs v. Major*, 139 Wis. 2d 492, 507, 407 N.W.2d 832 (1987). Precisely because of this plenary power, it is unnecessary for the Constitution to grant lawmaking power to the legislature in any specific subject area.

The plenary power granted under Wis. Const. Art. IV, §1 provides no legislative authority to regulate the right of suffrage. If Article IV, §1 were construed to implicitly grant the Legislature additional authority to enact laws relating to suffrage, such a construction would render Article III, §2 superfluous. A basic rule of construction is that "constitutional provisions should be construed to give effect 'to each and every word, clause and sentence' and 'a construction that would result in any portion of a statute being superfluous should be avoided wherever possible.'" *Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, ¶33, 263 Wis. 2d

709, 666 N.W.2d 816. If Art. III, §2 merely granted legislative authority to enact laws related to suffrage without any corresponding restriction or limitation on that authority, the provision would be redundant of the legislature's plenary authority.

Moreover, the Wisconsin Supreme Court has recognized that constitutional provisions that ***recognize fundamental rights*** restrict or limit legislative power, even if the provision contains no express limitation. For example, Art. I, §1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." The Court repeatedly has held that although Art. 1, §1 "contains no reference to laws or express limitations on state action," it is a "broad general restriction of legislative power." *Jacobs v. Major*, 139 Wis. 2d 492, 507, 407 N.W.2d 832 (1987), *citing, inter alia, Pauly v. Keebler*, 175 Wis. 428, 430-31, 185 N.W. 554, 556 (1921); *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 434-35, 87 N.W. 561, 562 (1901). Express language prohibiting Legislative authority to pass laws regarding suffrage is likewise unnecessary in the context of a constitutional provision recognizing a fundamental right to vote.

Article III both recognizes and guarantees a pre-Constitutional fundamental right – the right to vote – *and* defines five specified areas in which "laws may be enacted" in Art. III, §2. Thus, an even stronger basis exists for finding that Art. III, §2 imposes a limitation on legislative authority than for finding that Art. I, §1 is a limitation on legislative authority, as this Court has long held.

Likewise, construing Art. III, §2 as defining and restricting legislative power is consistent with over 150 years of precedent from this Court construing Art. III as limiting legislative authority to enact laws restricting the exercise of suffrage by qualified electors. As held by this Court, until Article III was amended in 1888 to explicitly grant such authority, the Legislature did not have the authority under the Wisconsin Constitution to enact laws requiring pre-election registration by electors or a duration of residency as qualifications to vote. *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880); *State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856). These authorities are discussed further in Section IV.A., *supra*. Such authority to limit the exercise of suffrage was subsequently expressly granted to the Legislature by the people through a constitutional amendment. *See* footnote 3, *supra*.

The Constitution was not amended in 1888 merely to invite the Legislature to enact laws on some particular subjects related to suffrage; it had to be amended to provide the Legislature with the authority it previously lacked to enact laws relating to suffrage; such authority did not exist through its plenary powers. That continues to be the case, 150 years later.

D. The Legislature May Regulate How, When and Where Elections Are Conducted But It May Not, Outside Of The Registration Process, Regulate Who May Vote.

While the Legislature does not have plenary authority to regulate suffrage, it does have plenary authority under Wis. Const. Art. IV, §1 to enact laws providing for and regulating elections: the how, when and where of elections. "[L]egislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial." *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 341, 125 N.W. 961 (1910).

The Voter ID law is not an "election regulation" that falls within the Legislature's authority to regulate elections. It does not merely regulate the election machinery that determines how the right to vote is exercised –

i.e., how, when, and where elections take place. Rather, it regulates "the franchise," i.e., it dictates ***who*** may vote: only those who possess and display at the polling place one of a limited number of specified forms of government-issued identification may receive and cast a ballot. As discussed previously, the only allowable regulation of who may vote is the registration process.

This Court has long differentiated between the Legislature's broad authority to enact laws specifying how, when and where elections are conduct, as compared to its limited authority to regulate who may exercise the right to vote:

> Under our Constitution the right of suffrage is a constitutional right vested in those who possess the qualifications prescribed by the Constitution…. In theory the sovereign political power of the state rests in the people; in practice, however, it is exercised by those individuals within the state who possess the qualifications prescribed by the Constitution, who must proceed in the manner indicated by the Constitution and statutes to exercise it. ***The Constitution having fixed the qualifications, persons falling within the classification thus established may not be deprived of their right by legislative act and the right is protected by the applicable constitutional guaranties. The persons who may exercise the right of suffrage*** and the day of election are ***fixed by the Constitution.*** These provisions are not and were never intended to be self-executing or exclusive of regulation in other respects. By section 1 of article 4 the power of the state to deal with elections except as limited by the Constitution is vested in the senate and assembly to be exercised under the provisions of the Constitution; therefore ***the power to prescribe the manner of conducting elections is clearly within the province of the Legislature.***

State ex rel. La Follette et al. v. Kohler, 200 Wis. 518, 548, 228 N.W. 895 (1930) (emphasis added).

Likewise, *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 472 (1949) affirms that the legislature may enact laws regulating elections. *Id*. at 618-19 (upholding a state statute creating a primary election for the office of justice). But this Court again recognized a distinction between laws regulating *elections* and laws regulating *electors*, i.e., who may vote:

> It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say ***how, when and where*** his ballot shall be cast for a justice of the supreme court.

Zimmerman, 254 Wis. at 613 (emphasis added).

Indeed, even a law regulating "how, when and where" a ballot is cast cannot be upheld if it effectively impairs or destroys a constitutionally qualified voter's right to vote. In *Ollmann v. Kowalewski*, 300 N.W. 183, 238 Wis. 574 (1941), in order to find a statute to be constitutional, this Court construed a statute requiring election inspectors to initial ballots as "directory," not mandatory, to save its constitutionality. As the Court held: "Voting is a constitutional right. Art III, §1, Const., and any statute

that denies a qualified elector the right to vote is unconstitutional and void." *Id*. at 185.

If the Voter ID law did not require the automatic disqualification of voters who do not display a qualifying ID, it might arguably be construed as part of the election machinery -- a "how, when, and where" regulation, within the legislature's authority to administer elections. But the Voter ID law dictates ***who*** may vote by barring any registered voter who fails to display a specified form of ID at the polls from exercising the right to vote. This goes far beyond what is constitutionally permitted as a reasonable election regulation to insure the full and free exercise of the right to vote.

VI. THE VOTER ID LAW DOES NOT STRENGTHEN AND MAKE EFFECTIVE THE RIGHT TO VOTE. IT IMPAIRS AND DESTROYS THE RIGHT TO VOTE.

A. When A Regulation Touches On Who May Vote, It Must Further The Exercise Of Suffrage.

In both *Zimmerman* and *Kohler,* the Wisconsin Supreme Court recognized that the right to vote is not "self–executing." In other words, a citizen cannot exercise his or her right to vote unless the government administers an election. "Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them." *State ex rel. Van Alsteen v. Frear*, 142 Wis. 320, 337, 125 N.W. 961 (1910). Thus, the Court has in the past allowed

"reasonable" regulation of the right to vote, but only what is reasonable, and only what furthers the exercise of the franchise:

> Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. ***Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing them or destroying them***. . . . so far as legislative regulations are reasonable and bear on all persons equally so far as practicable ***in view of the constitutional end sought***, they cannot be rightfully said to contravene any constitutional right.

State ex rel. Runge v. Anderson, 100 Wis. 523, 533-534, 76 N.W. 482 (1898) (emphasis added).

Thus, election regulations, to the extent they touch on ***who*** may vote, are strictly confined to what is "required to insure [the] full and free exercise" of the right to vote. *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246, 247 (1880). More specifically:

> [Elections] r***egulations are to be subordinate to the enjoyment of the right***, the exercise of which is regulated. The right must not be impaired by the regulation. ***It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretence of regulation***, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state is to prove this position.

Dells, 6 N.W. at 247 (emphasis added).

Allowable regulation "does not extend beyond what is reasonable. Regulation which impairs or destroys rather than preserves and promotes,

is within condemnation of constitutional guarantees." *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 17-18, 128 N.W. 1041 (1910). Or, in the *Zimmerman* Court's words, "the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired." *Zimmerman*, 254 Wis. at 613.

In sum, a test of the regulation of the exercise of the right to vote has developed: a regulation is constitutional if it purely regulates, and preserves and promotes the constitutional right to vote; it is unreasonable and unconstitutional if it destroys or impairs that right. Elements of the right to vote may not be "invaded, frittered away or entirely exscinded" under the pretense of regulation. *Dells*, 6 N.W. at 247.

That is precisely what the Voter ID law does. By prohibiting a registered voter who does not display a required form of ID at the polls from voting, it fails both parts of this test: first, it does nothing to preserve and promote the constitutional right to vote. Second, it does exactly what is forbidden under this test: it destroys the right of a qualified elector to cast a ballot. It excludes from voting any registered voter who fails to display a mandated form of ID to election officials at the polls. There is no safety valve: the voter who was robbed of his ID on the way to the polling place, or could not find his ID, cannot vote. The voter who could not

obtain her birth certificate in order to receive one of the accepted forms of ID, or whose name is misprinted on her ID, cannot vote. The voter who does not look enough like the photo on his ID to satisfy an election official that it is his photo and his ID, cannot vote. The law requires election officials to disqualify citizens from voting without regard to whether they possess the constitutional qualifications to vote, simply for the lack of one of the limited number of specified forms of identification.[5]

B. Being Required To State One's Name To The Election Officials Is A Reasonable Regulation; Requiring A Voter To Present One Of Limited Forms Of Acceptable Government Issued ID Is Not.

The Defendants argued in the Court of Appeals (and that Court agreed) that the requirement to present one of the limited forms of acceptable identification cannot be distinguished from the requirement that an elector state his or her name and address prior to receiving a ballot under Wis. Stat. §6.79(2) and is, therefore, a reasonable regulation. (App-23). The conclusion is wrong. Any voter can readily fulfill the requirement of stating his or her name and address to election officials on election day,

[5] The League does not argue that the Voter ID law is unconstitutional because it imposes an unreasonably severe burden on electors that renders voting "so difficult and inconvenient as to amount to a denial." *Frear*, 142 Wis. at 341. While the League believes the law does impose such a burden, that issue is before this Court in another case on a different record. The League raises only a facial constitutional challenge to the law.

consistent with his present right to vote. That is not true about possessing and displaying the right form of photo-identification.

Saying one's name is an act that can be done without abridging or impairing a voter's "present right to vote." It is "proof" that is always available to the voter at the time he appears at the polling place. It does not abridge or infringe the right to vote and is therefore constitutionally reasonable.

On the other hand, requiring a qualified voter to possess and display to election officials a conforming form of photo-identification obtained before the election from an agency of government that has nothing to do with the process of voting, which must be examined by an election official to determine if the photo looks sufficiently like the person offering it, is a far cry from requiring a qualified voter to simply say his name and address. No matter how hard the Defendants may try to twist these facts, the two processes, saying one's name and address and presenting one of a limited number of acceptable photo IDs, are not the same thing.

Finally, the notion that a decision by this Court holding that the Voter ID law is unconstitutional would *per force* compel a finding that the basic requirement of stating one's name and address to election officials so that they may determine that the voter's name is in the poll book is also

unconstitutional, is illogical in the extreme. The two acts, saying one's name and producing a specific form of photo identification, are so wholly distinguishable from one another that to conclude that they are the same borders on nonsense.

VII. RAMEY AND THE LEAGUE HAVE STANDING.

Defendants challenged below Melanie Ramey's and the League's standing to bring this action. The Court of Appeals assumed standing but did not decide the issue, because it determined that the Defendants prevailed on the merits. (App-40, n. 13). This Court may also choose to not address standing, for standing in Wisconsin courts is a matter of judicial policy, not jurisdictional. *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶40, n. 18, 333 Wis. 2d 402, 797 N.W.2d 789; *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶38, n.7, 244 Wis. 2d 333, 627 N.W.2d 866. Yet should this Court wish to review standing, it should find that Ramey, and therefore the League, have standing.[6]

The circuit court considered the Defendants' standing challenges on a motion to dismiss. Thus, the allegations in the complaint are taken as

[6] The State conceded that if Ramey has standing, so does the League. (R. 53, p. 27) *See also Metro. Builders Ass'n. of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶14, n.3, 282 Wis. 2d 458, 466, 698 N.W.2d 301.

true and construed in the plaintiff's favor. *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶18, 275 Wis. 2d 533, 685 N.W.2d 573. Those facts include that Ramey is a Wisconsin taxpayer, the President of the League, and a member of the League (R. 22, ¶7). She is also a qualified Wisconsin voter (R. 53, pp. 16, 30). The State has expended public funds to implement the Voter ID law, Ramey's tax payments have been spent on such implementation, and thus Ramey has suffered a pecuniary loss (R. 22, ¶¶8, 9).

A. The Declaratory Judgment Act Provides Standing.

The Uniform Declaratory Judgment Act, Wis. Stat. §806.04 et seq. ("the Act"), grants courts the power to determine for any person whose rights "are affected by a statute" any question of validity, and to provide a declaration of "rights, status or other legal relations" under the statute. As the Defendants concede, the requirement to show one of the specified ID's before voting "applies to all voters," a group that includes Ramey, and it is a condition that is additional to what was required before the Voter ID law was enacted (R. 53, pp. 16, 30, 50).

The purpose of the Act is "to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties… to enable controversies of a justiciable nature to be brought before the courts for

settlement and determination prior to the time that a wrong has been threatened or committed." *Putnam v. Time Warner Cable of Southeastern Wisconsin*, Ltd., 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626. Wisconsin courts construe standing in declaratory judgment actions liberally, in favor of the complaining party, as declaratory judgment affords relief from an uncertain infringement of a party's rights. *State ex rel. Village of Newburg v. Town of Trenton*, 2009 WI App 139, ¶10, 321 Wis. 2d 424, 773 N.W.2d 500.

Furthermore, as the circuit court recognized, "if the photo ID requirement is unconstitutional, . . . it *ipso facto* constitutes an impermissible injury to all qualified electors (including Ms. Ramey), even if it were to present no burden at all. That is to say, constitutional injury itself confers standing." (App-55). It has long been held that a citizen's right to vote without arbitrary impairment by the state is a legally protected interest that confers standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962). An action to protect a citizen's right to vote is sufficient to establish standing because the plaintiff is asserting a direct and adequate interest in maintaining that right. *Id. See also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351-52 (11th Cir. 2009) (holding that citizens challenging voter

ID law need not lack an ID; analogizing to standing to challenge poll tax); *Harman v. Forssenius*, 380 U.S. 528, 534, n. 6 (1965).[7]

The circuit court correctly found that §806.04 confers standing on Ramey because as a voter in Wisconsin, her rights are "affected" by the Act's requirement that she produce a particular form of identification at the polls as a prerequisite to exercising her constitutional right to vote. It provided a comprehensive analysis, well-supported by the case law, as the foundation for its decision on standing. (App-54). The Court should adopt that analysis in its entirety.

B. Ramey and the League Also Have Standing On Other Grounds.

Ramey has standing as a taxpayer. "Taxpayers' actions have been utilized to contest the validity of a variety of governmental activities accompanied by expenditure of public moneys." *Thompson v. Kenosha County*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974), *citing Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962). Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. This is because it results either in

[7] Even though standing is not jurisdictional in Wisconsin courts, as it is in federal courts, Wisconsin courts have drawn from federal cases on standing as a matter of "sound judicial policy." *See State ex rel. First Nat'l Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 308, n. 5, 290 N.W.2d 321 (1980); *Fox v. DHHS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983).

the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit.

S.D. Realty Co. v. Sewerage Comm., 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961) (internal citations omitted). "The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal" does not defeat standing. *Id.; Thompson*, 64 Wis. 2d at 680. In fact, taxpayer standing would not be defeated "even if the illegal expenditures resulted in a net saving." *Thompson,* 64 Wis. 2d at 680, n. 9, *citing Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 410, 14 N.W.2d 428 (1944).

Finally, as a matter of judicial policy, Ramey and the League should be found to have standing. The Court explained the policy underpinning the law on standing in *McConkey v. Van Hollen*, 2010 WI 57, ¶16, 326 Wis. 2d 1, 783 N.W.2d 855. The same reasons as to why that case merited adjudication are present here, as correctly determined by the circuit court. (App-60).

CONCLUSION

The Court should reverse the judgment of the Court of Appeals and affirm the judgment of the Circuit Court finding the challenged portions of the Voter ID Law to be unconstitutional and enjoining any enforcement of them.

Dated this 20th day of December, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (d) and 809.62(4) for a brief and appendix produced with a proportional serif font. The length for the brief is 10,011 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief and appendix is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 20th day of December, 2013.

/s/ Lester A. Pines .
Lester A. Pines, SBN 1016543

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP584

LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION NETWORK, INC. and MELANIE G. RAMEY,

Plaintiffs-Respondents-Petitioners,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

DOROTHY JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

ON APPEAL FROM A MARCH 12, 2012, DECISION AND ORDER GRANTING SUMMARY DECLARATORY JUDGMENT AND PERMANENT INJUNCTION BY THE DANE COUNTY CIRCUIT COURT HON. RICHARD G. NIESS, PRESIDING CASE NO. 11-CV-4669

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STATE OF WISCONSIN

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BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF THE ISSUES

1. Is the photo identification requirement for voting created by 2011 Wisconsin Act 23 ("Act 23") constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution?

Answer by the circuit court: No.

Answer by the court of appeals: Yes.

2. Do the plaintiffs-respondents-petitioners League of Women Voters of Wisconsin Education Network, Inc. and Melanie G. Ramey[1] have standing to pursue their claims?

Answer by the circuit court: Yes.

Answer by the court of appeals: The court of appeals assumed standing without deciding it.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument has been scheduled for February 25, 2014, and publication is warranted.

[1]Plaintiffs-Respondents-Petitioners will be referred to individually as "the League" and "Ms. Ramey," and collectively as "Plaintiffs." Defendants-Appellants will be referred to as "Defendants." Intervenors-Co-Appellants will be referred to as "Intervenors."

STATEMENT OF THE CASE

I. SUMMARY OF ARGUMENT.

This case involves a facial challenge to the photo identification requirement created by Act 23. The circuit court declared that the requirement violates article III of the Wisconsin Constitution, entered summary judgment in Plaintiffs' favor, and permanently enjoined enforcement of the requirement. The court of appeals reversed.

This case is about the Wisconsin Legislature's authority to regulate elections consistent with the Wisconsin Constitution. It is not about any alleged burden placed upon voters who will have to get photo identification to comply with Act 23. Setting aside the issue of Plaintiffs' standing, there is one question presented: Is Act 23's photo identification requirement constitutional?

The answer to the question hinges upon the language of the Wisconsin Constitution. Article III, sections 1 and 2 of the Wisconsin Constitution govern electors and the electoral process. They describe ways that the Legislature might regulate the process of voting. Article III, section 2 does not restrict the Legislature's authority to enact reasonable laws governing voting procedures regarding how, when, and where ballots may be cast. Nowhere in the language of the Wisconsin Constitution is a limitation placed upon the Legislature's ability to craft requirements that qualified electors prove their identities prior to receiving a ballot. The Legislature has always possessed that power, and voters have always been required to establish their identity to vote. Act 23's photo identification

requirement is merely a recent and authorized exercise of the Legislature's power.

Act 23 does not create an additional qualification for voting. Instead, it creates a reasonable means for voters to prove that they are indeed qualified, registered electors. Act 23 helps voters prove to those administering elections that they are who they claim to be, thus preserving the integrity of the ballot for all voters.

The photo identification requirement created by Act 23 is constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution. This Court should affirm the decision of the court of appeals.

II. BACKGROUND REGARDING ACT 23.

Prior to Act 23, a qualified Wisconsin elector voting in person or by absentee ballot was not required to present an identification document, other than proof of residence in certain circumstances. Instead, voters identified themselves at the polls by stating their name and address. Under Act 23, an elector must present documentary proof of identification to vote in person or by absentee ballot.

Contrary to Plaintiffs' characterization, Act 23 is not limited to a "narrow" set of identification documents. There are nine acceptable forms of photo identification: (1) a Wisconsin driver license; (2) a Wisconsin state identification card; (3) a U.S. military identification card; (4) a U.S. passport; (5) a certificate of U.S. nationalization that was issued not earlier than two years before the date of the election at which it is presented; (6) an unexpired

Wisconsin driver license receipt; (7) an unexpired Wisconsin identification card receipt; (8) an identification card issued by a federally recognized Indian tribe; and (9) an unexpired identification card issued by an accredited college or university in Wisconsin, if it meets certain criteria. Wis. Stat. § 5.02(6m)(a)-(f).

With certain exceptions,[2] Act 23 requires that an elector must present an acceptable form of photo identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph on the identification reasonably resembles the elector.[3] Wis. Stat. § 6.79(2)(a). If an elector does not have acceptable photo identification, the elector may vote by provisional ballot pursuant to Wis. Stat. § 6.97. Wis. Stat. § 6.79(2)(d) and (3)(b). The provisional ballot will be counted if the elector presents acceptable photo identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners by 4 p.m. on the Friday after the election. Wis. Stat. § 6.97(3)(b). If an in-person voter presents photo identification bearing a name that does not conform to the voter's name on the poll list or a photograph that does not reasonably resemble the voter, that person may not vote. *Id.*

To accommodate electors who do not yet possess an acceptable photo identification and to ensure that no elector is charged a fee for voting, the Wisconsin Department of Transportation is

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[2]*See* Wis. Stat. § 6.87(4)(a)-(b).

[3]Similar requirements apply to absentee voters. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.87(1); Wis. Stat. § 6.87(4)(b)1.

required by law to issue an identification card to such electors free of charge, if the elector satisfies all other requirements for obtaining such a card, is a U.S. citizen who will be at least 18 years of age on the date of the next election, and requests that the card be provided without charge for purposes of voting. Wis. Stat. § 343.50(5)(a)3.

III. FACTUAL BACKGROUND.

This case involves purely legal issues. Nonetheless, Ms. Ramey's sworn responses to Defendants' requests to admit are material to standing. Ms. Ramey admitted that she possessed an unexpired Wisconsin driver license as of February 14, 2012. (Supplemental Appendix of Defendants-Appellants at 188, *hereinafter* "Supp-App ___.")

IV. PROCEDURAL POSTURE.

Plaintiffs' Statement of the Case in their principal appellate brief adequately addresses the procedural history.

STANDARDS OF REVIEW

Issue 1: Summary judgment is reviewed *de novo*. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Challenges to the constitutionality of statutes and the interepretation of constituitonal provisions and statutes are reviewed *de novo*. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 21, 332 Wis. 2d 85, 796 N.W.2d 717; *State v. Hamdan*, 2003 WI 113, ¶ 19, 264 Wis. 2d 433, 665 N.W.2d 785.

Issue 2: Whether a party has standing is reviewed *de novo*. *See Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 14, 300 Wis. 2d 290, 731 N.W.2d 240.

ARGUMENT

I. ACT 23 IS CONSTITUTIONAL IN LIGHT OF ARTICLE III, SECTIONS 1 AND 2 OF THE WISCONSIN CONSTITUTION.

Act 23's photo identification requirement is constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution. The court of appeals reversed the circuit court's grant of summary judgment to Plaintiffs, and this Court should affirm the court of appeals.

The Wisconsin Legislature has plenary power to regulate how, when, and where ballots may be cast. Act 23 does not create an additional qualification for voting. It regulates how ballots are cast in Wisconsin elections, and it requires only that a qualified elector verify his or her identity at the poll in a specific way—by showing photo identification.

A. Act 23 is presumed to be constitutional, and it furthers compelling State interests.

Act 23 is presumed to be constitutional, and it furthers compelling State interests. It is not this Court's role to second guess the Legislature's actions in creating a law that governs election administration absent constitutional infirmity.

First, a court must indulge every reasonable presumption necessary to uphold legislation against constitutional challenges. *Wis. Bingo Supply & Equip. Co., Inc. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979). "Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a heavy burden." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citation and internal quotation marks omitted). It is not sufficient for a party to demonstrate "that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." *State v. Smith,* 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. Instead, the presumption can be overcome only if the party establishes "that the statute is unconstitutional beyond a reasonable doubt." *Id.* (quoting *State v. Cole,* 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328).

Second, like other state legislatures, the Wisconsin Legislature possesses plenary power that is limited only by constitutional constraints. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 123, 295 Wis. 2d 1, 719 N.W.2d 408. Determining the type of proof that a qualified elector must furnish to prove his identity to vote, thus protecting the integrity of the ballot for all voters, is quintessentially a legislative policy-making function. *See State ex rel. La Follette v. Kohler*, 200 Wis. 518, 548, 228 N.W. 895 (1930) ("the power to prescribe the manner of conducting elections is clearly within the province of the Legislature[]"); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) ("the legislature has the constitutional power to say how, when and where [a qualified elector's] ballot shall be cast");

State ex rel. McGrael v. Phelps, 144 Wis. 1, 17-18, 128 N.W. 1041 (1910) (regulation of the right to vote is a legitimate "field of legislative activity").

Third, Act 23 reflects a policy choice by the Legislature designed to ensure that qualified electors appearing at the polls to vote are who they claim to be. The United States Supreme Court has repeatedly and consistently recognized the compelling interests in detecting, deterring, and preventing voter fraud, bolstering voter confidence in the integrity of elections, and orderly election administration and recordkeeping. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191-97 (2008) (opinion of Stevens, J.); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989). Act 23's voter photo identification requirement furthers all of these important policy goals.

Finally, the Court should keep firmly in mind that this case involves only a facial challenge. As the court of appeals recognized below, there are "fundamental differences" between facial and as-applied constitutional claims. (Plaintiffs-Respondents-Petitioners' Appendix at App-4, ¶ 7, *hereinafter* "App-__.") In *State v. Wood*, this Court said:

> A party may challenge a law . . . as being *unconstitutional on its face*. Under such a challenge, the challenger must show that the law cannot be enforced "under any circumstances." If a challenger succeeds in a facial attack on a law, the law is void "from its beginning to

> the end." *In contrast, in an as-applied challenge*, we assess the merits of the challenge by considering the facts of the particular case in front of us, "not hypothetical facts in other situations." Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim.

2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (emphasis added and citations omitted).

B. This Court has consistently upheld laws that preserve the integrity of elections, including those relating to confirming that electors are qualified to vote.

Since the middle of the 19th century, this Court has consistently held that the right to vote, although fundamental, is nonetheless subject to reasonable legislative regulation designed to protect the integrity of the electoral process. For example, in the early case of *State ex rel. Cothren v. Lean*, 9 Wis. 254 [*279] (1859), the court rejected a claim that a statute allowing election inspectors to challenge the eligibility of individual voters at the polls was unconstitutional because it prescribed qualifications for electors beyond those provided for in the Constitution. *Id.* at 258 [*283-84]. While that *ultra vires* claim is not identical to the constitutional claim here, nonetheless noteworthy for present purposes is

the court's holding that "it is clearly within [the Legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualif[i]ed elector." *Id.*

Sixteen years later in *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875), the court rejected a claim that procedural errors made by election inspectors in the administration of the state's voter registration law invalidated the votes of individual electors who had voted without awareness of those official errors. Although the court concluded in *Baker* that the individual electors' right to vote could not be impaired by the erroneous official administration of the registration statute, the court's analysis was nonetheless consistent with the principle previously established in *Cothren*. *See id.* at 86-87. The court reasoned that statutes cannot impair the constitutional right to vote, but they can regulate the exercise of that right by requiring reasonable proof of a voter's qualifications. *Id.* at 86. Such proof requirements "are not unreasonable, and are consistent with the present right to vote, as secured by the constitution. The statute imposes no condition precedent to the right; it only requires proof that the right exists." *Id.* at 87. If a voter is denied the opportunity to vote for failing to provide such proof, the court concluded that he is disenfranchised not by the statute, "but by his own voluntary refusal of proof that he is enfranchised by the constitution." *Id.*

The court repeated the essential holding of *Baker* five years later in *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880). The court in *Dells* held invalid the voter registration requirements of chapter 235 of the Laws of 1879 as an

unconstitutional disenfranchisement because it prescribed elector qualifications additional to those found in the Wisconsin Constitution. *Id.* at 556, 560. However, in doing so, the court reiterated that election laws may be sustained "as regulating reasonably the exercise of the constitutional right to vote at an election." *Id.* at 558. The *Dells* court reinforced the holding in *Baker* regarding the fact that a voter may be called upon to prove that he is a qualified elector: ""The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own *voluntary* refusal of proof that he is enfranchised by the constitution."" *Id.* at 559 (quoting *Baker*, 38 Wis. 71) (emphasis provided by the *Dells* court).[4]

The same principles were again applied in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), in which the court rejected a claim that the constitutional right to vote was infringed by a statute providing that a candidate could appear only once on the official ballot in an election, even if the candidate had received the nomination of more than one political party. In upholding the challenged ballot law, the court

[4]*State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338, 115 N.W. 823 (1908), also quoted approvingly the holding of the *Baker* case. *O'Neill*, which involved the presentation of affidavits offered in lieu of registration by voters who were not on the voter registry, observed that the prevention of fraudulent voting is a legitimate aim of regulations governing the administration of elections. *Id.* ("The object of the statute is to prevent fraudulent voting by persons who assume the right, when, in fact, they are not entitled to it.").

once more affirmed the view that the right to vote is properly subject to reasonable regulation:

> Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them. Some interference with freedom of action is permissible and necessarily incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right.

Id. at 533-34. The same passage was quoted in full in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 337, 125 N.W. 961 (1910), in which the court rejected the claim that Wisconsin's primary election law unconstitutionally interfered with the rights of voters to participate in the selection of candidates for public office.

Another claim that the right to vote was unconstitutionally impaired by the state's primary election laws was considered and rejected in *McGrael*. In that decision, the court rejected the view that the right to vote was a mere privilege and instead found that right, as guaranteed by article III, section 1 of the Wisconsin Constitution, to be a fundamental and inherent right of the highest character. *McGrael*, 144 Wis. at 14-15. Nonetheless, the court went on to note that the fundamental right to vote "is yet subject to

regulation like all other rights." *Id.* at 15. The court further explained:

> It has become elementary that constitutional inhibitions of legislative interference with a right, including the right to vote and rights incidental thereto, leaves, yet, a field of legislative activity in respect thereto circumscribed by the police power. That activity appertains to conservation, prevention of abuse and promotion of efficiency. Therefore, as in all other fields of police regulation, it does not extend beyond what is reasonable. Regulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees.

Id. at 17-18. The court then articulated a rationale for assessing the constitutionality of legislation affecting the right to vote:

> It is further elementary that, the extent to which the Legislature may go in the field of police power, is primarily a matter for its judgment. As to the case in hand, the same as others, it could not properly go beyond reasonable regulation. However, what is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. Such review does not have to do with expediency. It only deals with whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubts being resolved in favor of the proper exercise of lawmaking power.

Id. at 18.

In *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 175 (1913), the court, in rejecting a claim that a statute prescribing voter residency requirements violated the voting rights of transient workmen, further elaborated the Legislature's authority to create such laws:

> It is competent for the Legislature to prescribe reasonable rules and regulations for the exercise of the elective franchise. To do so infringes upon no constitutional rights. It is because of the sacredness of the lawful use of the ballot, and of its importance in governmental affairs, that the right as well as the duty is vested in the Legislature to prescribe reasonable rules and regulations under which it may be exercised. Such rules and regulations tend to certainty and stability in government and render it possible to guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies. Their aim is to protect lawful government, not to needlessly harass or disfranchise any one.

Id. at 478-79. Clearly, the court was of the view that reasonable procedural regulations designed to protect the integrity of elections are not constitutionally suspect and do not violate the fundamental right to vote.

In *Frederick*, the court rejected a claim that a statute providing for primary and runoff contests in Wisconsin's spring elections for non-partisan state offices unconstitutionally impaired the voting rights of individual electors. In so holding, the court noted that "[w]hile the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless

subject to reasonable regulation by the legislature." *Frederick*, 254 Wis. at 613 (citations omitted). The court continued:

> It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when and where his ballot shall be cast[.]

Id.

The court repeated this same language from *Frederick* seventeen years later in upholding the constitutionality of a statute providing that absentee ballots could not be counted unless they were properly authenticated by the municipal clerk. *Gradinjan v. Boho*, 29 Wis. 2d 674, 684-85, 139 N.W. 557 (1966) (quoting *Frederick*, 254 Wis. at 613).

In the cases discussed above, this Court has consistently held that the right to vote, although fundamental, is subject to reasonable legislative regulation designed to protect the integrity of the electoral process. The Legislature has the authority to regulate how, when, and where ballots are cast by qualified electors.

C. Act 23 does not create an additional qualification for voting.

Act 23 does not create an additional qualification for voting. Requiring voters to present a form of photo identification prior to voting is not in the nature of a personal, individual characteristic or attribute like a voting qualification, but functions merely as an election

regulation to verify a voter's identity. Such a requirement helps election officials answer the question: "Are you who you say you are?" The requirement also ensures that only registered voters are allowed to vote.

1. Requiring proof of identity is constitutional.

Article III, section 1 of the Wisconsin Constitution includes the only constitutional qualifications for electors in Wisconsin: (1) United States citizenship; (2) age 18 or older; and (3) residency in a state election district. Electors possessing these characteristics are deemed "qualified electors." Wis. Const. art. III, § 1.

Article III, section 2 of the Wisconsin Constitution does not create constitutional qualifications for electors, but instead indicates that the Legislature may enact laws governing certain voting-related topics. Article III, section 2 does not independently restrict voting to certain classes of persons like article III, section 1. Importantly, as discussed at length in Argument section I. D. of this brief, article III, section 2 does not prohibit the Legislature from enacting laws like Act 23 governing the sound administration of elections.

The State may require an elector to prove that he or she is a qualified elector prior to voting at the poll on Election Day. As this Court stated more than 150 years ago:

> The necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar

> to need suggestion. While, therefore, it is incompetent for the legislature to add any new qualifications for an elector, it is clearly within its province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualif[i]ed elector.

Cothren, 9 Wis. at 258 [*283-84]. If there is any single passage from a Wisconsin Supreme Court case that helps resolve the instant appeal, the preceding passage from *Cothren* is it.

Plaintiffs attempt to distinguish *Cothren* on the grounds that the case involved a "challenge for cause" procedure not at issue here and that Act 23 differs from the *Cothren* statute because Act 23 does not leave other proof open to the voter consistent with his or her "present right" to vote. (Plaintiffs-Respondents-Petitioners' Brief at 22-25, *hereinafter* "Pls.' Br. at __.") Plaintiffs' position ignores the fact that, under *Cothren*, the Legislature may "require any person offering to vote, to furnish such proof as it deems requisite" of the voter's qualifications without creating an additional voting qualification. 9 Wis. at 258 [*283-84]. If this were not the case, the Legislature could not require a voter to identify himself or herself to an election official at the poll, which would make administering an election impossible and a registration requirement meaningless. Consistent with establishing one's "present right" to vote is confirming to the election official that one is who they purport to be. Act 23's photo identification requirement furthers that policy goal, consistent with *Cothren*.

Plaintiffs rely upon *Baker* for the proposition that statutes regulating the right to vote may not

impose a "condition precedent" that deprives a qualified elector of the right. (*See* Pls.' Br. at 19.) *Baker* includes two passages that indicate that laws requiring proof of voting qualifications by demonstrating identity are constitutional:

> Statutes cannot impair the right [to vote], though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election. *Then statutes may require proof of the right, consistent with the right itself*. And such we understand to be the theory of the registry law; "to guard against the abuse of the elective franchise, and to preserve the purity of elections;" not to abridge or impair the right, but to require reasonable proof of the right. . . . [The voter registration] requirements are not unreasonable, and are consistent with the present right to vote, as secured by the constitution. *The statute imposes no condition precedent to the right; it only requires proof that the right exists. The voter may assert his right, if he will, by proof that he has it;* may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and *if he be disfranchised*, *it is* not by force of the statute, but *by his own voluntary refusal of proof that he is enfranchised by the constitution.*

Baker, 38 Wis. at 86-87 (emphasis added).

Rather than supporting Plaintiffs' position, the emphasized language from *Baker* confirms that requiring an elector to prove that he is a

qualified elector is permissible and constitutional. The *Baker* court concluded: (1) that the voter registration law *did not* constitute an unlawful "condition precedent" to voting; and (2) that voters may be required by the Legislature to prove that they are qualified electors prior to voting. If voters do not provide the proof that the Legislature has mandated, they are essentially disenfranchising themselves.

Plaintiffs also rely upon *State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856), in support of their argument that Act 23's photo identification requirement is an additional voting qualification. (Pls.' Br. at 14-15.) *Knowlton* struck down a 30-day residency requirement that was not referenced in the language of article III. *Id.* at 315-16. However, in doing so, this Court noted that the Legislature may impose various restrictions on the right to vote, such as by directing voters "to exercise this right only in the town where he resides[.]" *Id.* at 316. This Court emphasized that such a requirement "does not add to the qualifications which the constitution requires[.]" *Id.*

The same can be said of Act 23. Act 23's photo identification requirement is like other voting procedures—including the voter registration requirement and the requirement that a voter announce his name and address at the poll—that regulate under what circumstances voters will receive a ballot. As the court of appeals observed, under Plaintiffs' reading of *Knowlton* and related cases, the requirement in Wis. Stat. § 6.78 that voters be in line by 8 p.m. on Election Day would be an unconstitutional additional qualification on voting because it would have the effect of "disqualifying" from voting an otherwise qualified and registered voter who

arrives at 8:01 p.m. (App-27, ¶ 66.) Plaintiffs' view is not the state of the law.

Finally, Plaintiffs rely upon *Dells* in their principal appellate brief. (*See* Pls.' Br. at 19-21.) The circuit court's decision also relied heavily upon *Dells*. (App-44.) *Dells* did not confront the issue of whether the voter registration law in place then was an additional voting qualification not enumerated in article III. The case's relevance to resolving that question is, therefore, limited. However, *Dells* relies upon and quotes the language cited above from *Baker*. *See Dells*, 49 Wis. at 559. In striking down the registration law, the *Dells* court endorsed reasonable regulations to confirm that electors are qualified: "a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined. . . ." *Dells*, 49 Wis. at 558. Thus, consistent with *Cothren* and the above language from *Baker*, *Dells* supports the proposition that the Legislature has the power to fashion reasonable laws to ascertain voter qualifications without creating new qualifications.

2. Foreign cases confirm that requiring photo identification is not an additional voting qualification.

Wisconsin is not the first state to have its photo identification requirement challenged on the ground that it constitutes an unconstitutional qualification for voting. Following the reasoning of the highest state courts in Indiana, Georgia, and Michigan, this Court should conclude that

Act 23 does not create an additional qualification for voting.

The Indiana Supreme Court's decision in *League of Women Voters of Indiana, Inc. v. Rokita* is instructive. In *Rokita*, the Indiana State and Indianapolis chapters of the League of Women Voters filed an action seeking a declaratory judgment and alleging, in part, that the Indiana Voter ID law violated article 2, section 2 of the Indiana Constitution. 929 N.E.2d 758, 760 (Ind. 2010). Like the instant case, the *Rokita* plaintiffs asserted only a facial constitutional challenge. *Id.*

The first argument asserted by the *Rokita* plaintiffs is virtually identical to Plaintiffs' argument here. The *Rokita* plaintiffs asserted that: "The requirements of the Voter ID Law constitute a 'qualification for voting' in violation of the Indiana Constitution which limits qualifications for voting to those specified in Article 2, Section 2[.]" *Rokita*, 929 N.E.2d at 762 (footnote omitted).

The Indiana Supreme Court quoted the relevant constitutional provisions:

> Section 2.
>
> (a) A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an

> election may vote in that precinct at the election.
>
> . . . .
>
> (c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct.

Id. at 763. Article 2, section 2, subsection (a) of the Indiana Constitution and article III, section 1 of the Wisconsin Constitution are substantially similar. Likewise, article 2, section 2, subsection (c) of the Indiana Constitution and article III, section 2 of the Wisconsin Constitution are similar.

The Indiana Supreme Court evaluated the competing arguments. The State argued that "the Voter ID law is merely a regulation of election procedures designed to ensure fair elections, not an alteration of voter qualifications." *Rokita*, 929 N.E.2d at 765 (internal quotation marks omitted). Further, the requirements of the Voter ID Law "are valid and reasonable means of enforcing the qualifications established in Article 2, Section 2[]" and reflected the legislature's "power to protect the rights of citizens to a fair and reliable electoral system in which their individual votes are not diluted by the fraudulently cast votes of others." *Id.* (internal quotation marks omitted). The plaintiffs argued that "the Voter ID law created prohibited voter qualifications rather than permissible election regulations[.]" *Id.* at 764.

The Indiana Supreme Court held that "the Voter ID Law's requirement that an in-person voter present a government-issued photo identification card containing an expiration date is merely regulatory in nature." *Rokita*, 929 N.E.2d at 767. The court stated:

> The voter qualifications established in Section 2 of Article 2 relate to citizenship, age, and residency. Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity.

Id. The court concluded that "the Indiana Voter ID Law's photo identification card requirements are in the nature of an election regulation and, as such, must satisfy Indiana's requirements of uniformity and reasonableness. But the requirements of the Voter ID Law are not, as the plaintiffs urge, unconstitutional as additional substantive voter qualifications." *Rokita*, 929 N.E.2d at 767.

Like the Indiana Constitution, the Wisconsin Constitution includes three qualifications for voting that are based upon citizenship, age, and residency. *Compare* Wis. Const. art. III, § 1 *with* Ind. Const. art. 2, § 2, sub. (a). Photo identification for purposes of voting does not add to these qualifications. "Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute, but rather functions merely as an election

regulation to verify the voter's identity." *Rokita*, 929 N.E.2d at 767.

Decisions from the Georgia and Michigan Supreme Courts are in accord with *Rokita*. *See Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 72-73 (Ga. 2011); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 448 (Mich. 2007).

D. The principles used to interpret the Wisconsin Constitution confirm that Act 23's voter photo identification requirement is constitutional in light of article III.

The principles used to interpret the Wisconsin Constitution confirm that Act 23's voter photo identification requirement is constitutional in light of article III. In *Dairyland Greyhound Park, Inc. v. Doyle*, this Court outlined principles for interpreting the Wisconsin Constitution, highlighting three "primary sources" to determine a constitutional provision's meaning: "[1] the plain meaning, [2] the constitutional debates and practices of the time, and [3] the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." 295 Wis. 2d 1, ¶ 19 (citations omitted).

In their principal appellate brief here, Plaintiffs conspicuously do not address the second and third *Dairyland Greyhound Park* factors or even cite the case. (Pls.' Brief at 25-36.) One possible explanation for Plaintiffs' omissions as to these two factors is that the court of appeals

observed that "some of [the] materials the League quotes directly undermine its argument[.]" (App-36, ¶ 83; *see also id.* at n. 12.) For the sake of completeness and to aid the Court, Defendants will address the three *Dairyland Greyhound Park* factors and the relevant materials that were filed by Plaintiffs in an appendix to their summary judgment brief in circuit court. (*See* R. 31 (Appendix to Plaintiff's Brief in Support of Motion for Summary Judgment), *filed in* Defendants-Appellants' Supplemental Appendix at Supp-App 112-84, *hereinafter* "Supp-App ___.")

Under *Dairyland Greyhound Park*, this Court's first task is to determine what impact, if any, the meaning of the plain language of article III of the Wisconsin Constitution has on the Legislature's authority to enact a photo identification requirement for voting.

1. The plain language of article III does not prohibit the Legislature from enacting a photo identification requirement for voting.

In discerning the meaning of a constitutional amendment, "[c]ourts should give priority to the plain meaning of the words of [the] provision in the context used." *State ex rel. Kuehne v. Burdette*, 2009 WI App 119, ¶ 9, 320 Wis. 2d 784, 772 N.W.2d 225 (citation and internal quotation marks omitted; brackets in original). Plain meaning analysis is the first of the *Dairyland Greyhound Park* factors. 295 Wis. 2d 1, ¶ 19.

The constitutional language at issue is:

> Section 1. Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.
>
> Section 2. Laws may be enacted:
>
> (1) Defining residency.
>
> (2) Providing for registration of electors.
>
> (3) Providing for absentee voting.
>
> (4) Excluding from the right of suffrage persons:
>
> (a) Convicted of a felony, unless restored to civil rights.
>
> (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.
>
> (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

Wis. Const. art III, § 1 and 2.

The plain meaning of article III does not prohibit the photo identification requirement for voting created by Act 23, either explicitly or implicitly. Article III, section 2 includes words of

permission, not prohibition. The section states that "[l]aws may be enacted[]" and lists topics for such laws. It does not state that laws *may only* be enacted governing the listed topics. It does not state that laws *may not* be enacted regarding a photo identification requirement for voting, or other types of laws governing the sound administration of elections.

Article III, section 2 creates no constitutionally prohibited class of laws. It does not prohibit or forbid any legislative action. It instead outlines possible ways that the Legislature might regulate elections by way of a non-exhaustive list.

Prohibitive constitutional language should be relatively clear. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 44, 326 Wis. 2d 1, 783 N.W.2d 855 ("The general purpose of a constitutional amendment is not an interpretive riddle. . . . A plain reading of the text of the amendment will usually reveal a general, unified purpose."). The point is illustrated by the language at issue in *Dairyland Greyhound Park*.

In *Dairyland Greyhound Park*, this Court reviewed a 1993 amendment to article IV, section 24(1) of the Wisconsin Constitution, which states: "Except as provided in this section, the legislature may not authorize gambling in any form." *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 20 (internal quotation marks omitted).[5] The

[5]The issue in *Dairyland Greyhound Park* was the retroactivity of the prohibition on gaming in article IV, section 24(1)—whether the 1993 amendment to article IV, section 24 affected tribal gaming compacts entered into prior to the 1993 amendment. *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶¶ 1-2, 22-23.

court then observed that clauses 3 through 6 of article IV, section 24 list four exceptions to the broad prohibition on gambling in article IV, section 24(1). *Id.*

Different from the prohibitive language of article IV, section 24(1) of the Wisconsin Constitution (*i.e.*, "Except as provided in this section, the legislature may not authorize gambling in any form."), the plain language of article III, section 2 does not *prohibit* any legislative action. Instead, it states that "[l]aws may be enacted[,]" and then lists potential areas for legislation. There is no express prohibition on legislative authority.

Unlike the federal constitution, which is one of limited, delegated, and enumerated powers, the Wisconsin Constitution grants broad, plenary power to the Legislature. *See* Wis. Const. art. IV, § 1. This Court has explained:

> The framers of the Wisconsin Constitution vested the legislative power of the state in a senate and assembly. The exercise of such power is subject only to the limitation and restraints imposed by the Wisconsin Constitution and the Constitution and laws of the United States.
>
> This court has repeatedly held that the power of the state legislature, unlike that of the federal congress, is plenary in nature, and we again repeat what Mr. Justice Cole stated in *Bushnell v. Beloit* (1860), 10 Wis. *195, *225, and which we previously quoted *in Cutts v.*

> *Department of Public Welfare* (1957), 1 Wis.2d 408, 416, 84 N.W.2d 102, to wit:
>
> > "We suppose it to be a well-settled political principle that the constitution of the state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature, and that it is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States."

State ex rel. McCormack v. Foley, 18 Wis. 2d 274, 277, 118 N.W.2d 211 (1962).

The key language from *McCormack* is that "it is competent for the legislature to exercise all legislative power *not forbidden by the constitution*[.]" *Id.* (emphasis added). Article III, section 2 does not forbid the Legislature from enacting laws. It includes words of permission (*i.e.*, "Laws may be enacted[]"), not words of prohibition or limitation on legislative authority. It cannot stand as a bar to the photo identification requirement for voting created by Act 23.

Even if article III, section 2 could be construed as imposing some implied limitation on legislative power, it would be wrong to conclude that any such limitation could be so broad as to preclude the Legislature from enacting any laws that reasonably regulate voting procedures other than those specifically enumerated in that provision. Such a sweeping limitation on legislative power would implicitly prohibit other laws governing the voting process that are not

challenged here and that cannot reasonably be seen as constitutionally prohibited.

As argued above, this Court has consistently held that the Legislature has the power to impose reasonable regulations designed to protect the integrity of elections, including requirements that a qualified elector identify himself at the polls prior to voting, even requiring identification by affidavit in some cases. *Cothren*, 9 Wis. at 258 [*283-84] ("it is clearly within [the Legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualif[i]ed elector."). Likewise, from at least 1967 through and beyond the time of the 1986 amendment to article III and up to the passage of Act 23, Wis. Stat. § 6.79 required that a qualified elector identify himself at the polls by announcing his full name and address prior to receiving a ballot. *See* Wis. Stat. § 6.79(1), (2) (1967); Wis. Stat. § 6.79(2)(a) (2009-10). It is not plausible that the 1986 amendment to article III, section 2 was intended, *sub silentio*, to sweep away over a century of well-established judicial interpretation of the scope of legislative power over the election process. Accordingly, even if article III, section 2 could be viewed as imposing some implied limitation on legislative power, the requirement that a qualified elector show a form of photo identification would still be valid as just another permissible way to require a qualified elector to identify himself prior to voting.

Furthermore, identification requirements like the photo identification requirement created by Act 23 augment residency requirements, voter registration, *and* the qualifications for electors stated in article III, section 1 of the Wisconsin Constitution. The photo identification

requirement directly supports the voter registration laws by requiring electors to prove that they are in fact the same person who is registered to vote. While the photo identification requirement created by Act 23 is not a law defining residency, providing for registration of voters, or providing for absentee voting *per se*, it nonetheless gives meaning and substance to these requirements by ensuring that only qualified, registered electors vote at the polls on Election Day.

The court of appeals here was attuned to the fact that a photo identification requirement for voting furthers the purposes of the voter registration requirement, which is expressly authorized by article III, section 2, subsection (2). Taking note of a "concession" by Plaintiffs as to legislative authority, the court of appeals explained that Act 23's photo identification requirement "falls within the subsection of Article III allowing the legislature to pass laws providing for a system of registration and, necessarily, give effect to the registration requirement by providing for some means of verifying at the polling place that a person seeking to vote is registered." (App-38, ¶ 87.) Thus, Act 23 is not a registration law, but it gives effect to the voter registration requirement.

In sum, the plain meaning of article III, section 2 of the Wisconsin Constitution does not stand as a prohibition—either expressly or implicitly—on the Legislature's plenary authority to enact laws governing how, when, and where a qualified elector's ballot may be cast. Article III, section 2 contains words of permission, not prohibition. Thus, the photo identification requirement created by Act 23 is a permissible law

governing the sound administration of elections in light of the plain language of article III.

2. The "constitutional debates" and "practices of the time" do not indicate that Act 23 is unconstitutional.

In the circuit court, Plaintiffs asserted that under the second factor of the *Dairyland Greyhound Park* analysis "constitutional debates" and "practices of the time" relating to article III, section 2 supported their argument that this section was "intended to define and constrain the legislature's authority to limit the right to vote only as to the subjects listed." (R. 32 at 16.) Plaintiffs were incorrect because the materials that they submitted in circuit court did not support their hypothesis under the second relevant factor.

First, Plaintiffs described the substance of article III as it existed prior to 1986 and included in an appendix two exhibits, which are copies of prior versions of article III, to illustrate. (R. 32 at 16-17); (Supp-App 113-14 (Wis. Const. art. III (1848))); (Supp-App 115 (Wis. Const. art. III (1983-84)).) While these materials place the current version of article III, section 2 into a historical context, they do not indicate that the 1986 amendment to that section was intended to restrain the Legislature's authority to enact laws governing how, when, and where qualified electors may vote. Nothing about the language in the 1848 and 1983-84 versions of article III demonstrates that the 1986 version of article III restricted the Legislature's authority to create laws governing sound election administration.

Second, Plaintiffs submitted a Legislative Council staff brief dated September 20, 1978, which "analyzes Article III of the Wisconsin Constitution on a section-by-section basis in order to assist the Special Committee [on Constitutional and Statutory Review] in determining which, if any, provisions thereof are obsolete and in need of elimination or amendment." (Supp-App 118.) This document, too, does not further Plaintiffs' argument regarding why the 1986 amendment to article III restricted legislative authority.

The staff brief does not consist of constitutional debates regarding the 1986 amendment to article III, but merely offers suggestions for how the 1978 version of article III could (or should) be amended to reflect the then-current state of the law. It does not address photo identification requirements for voting or whether such requirements are constitutionally infirm in light of article III as it existed in 1978 or under the current version of article III. The staff brief is divorced from the relevant, current language of article III, section 2 that is at issue.

Third, Plaintiffs submitted 1979 Assembly Joint Resolution 54, which was introduced in the Legislature by the Legislative Council on April 18, 1979, and referred to the Committee on Elections. (Supp-App 132.) (The amendment to article III that was ratified in 1986 was first introduced for consideration by this 1979 resolution.) In their summary judgment brief, Plaintiffs quoted a Legislative Council explanatory note regarding the resolution:

> [NOTE:] Article III of the Wisconsin Constitution was adopted at a time when universal suffrage did not exist. In

> 18[4]8, blacks, women and most Indians were not allowed to vote. The original article therefore set forth, and subsequent amendments have kept, detailed provisions on who may or may not vote. Developments in federal and state law have resulted in the divergence of actual practice from the letter of the constitutional article. This revision of article III, therefore, *establishes the general principle of suffrage* for all U.S. citizens 18 years or older who reside in an election district and *allows the legislature to adapt the state's laws* to changes in the federal law and state practice in *providing for the extension and limitation of the right to vote in specified areas.* This revision also retains the right to a secret ballot, with the understanding that this requirement does not prohibit election officials from assisting disabled electors upon request. [Section 6.82, Wis. Stats.]

(R. 32 at 18 (quoting 1979 AJR 54) (emphasis Plaintiffs'; brackets added).) Plaintiffs asserted in the circuit court that this explanatory note signals that the purpose of the 1986 amendment to Article III was to "establish the principle of universal suffrage" and to "permit the legislature to enact laws 'providing for *extension or limitation of the right to vote in specified areas.*'" (*Id.* (emphasis Plaintiffs').)[6]

[6]The court of appeals noted that Plaintiffs acknowledged that one "specified area" for legislative limitations on the right to vote is "the area of creating reasonable methods aimed at identifying registered voters at the polls." (App-36 at n. 12.)

Plaintiffs were and are incorrect. "Universal suffrage," a vague and undefined concept, is reflected neither in the Legislative Council explanatory note nor in the 1986 amendment to article III. The explanatory note indicates that the amendment to article III "establishes the general principle of suffrage[.]" (Supp-App 134.) It does not speak of establishing "universal suffrage." Furthermore, article III, section 1, as amended in 1986, does not indicate that the right of suffrage is "universal," but instead that it is limited to electors possessing three qualifications: (1) United States citizenship; (2) age 18 or older; and (3) residency in a state election district. Wis. Const. art. III, § 1. Such electors are deemed "qualified electors." *Id.*

Additionally, the "extension and limitation of the right to vote in specified areas[]" language from the Legislative Council explanatory note seems to refer only to article III, section 2, subsections 4 and 5, not article III, section 2, subsections 1, 2, and 3. Article III, section 2, subsections 4 and 5 state:

> [Laws may be enacted:]
>
> (4) Excluding from the right of suffrage persons:
>
> (a) Convicted of a felony, unless restored to civil rights.
>
> (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.

(5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

It is subsections 4 and 5 that refer to the Legislature's ability to extend or limit the right to vote to otherwise qualified electors, not subsections 1, 2, and 3. Article III, section 2, subsections 1, 2, and 3 state:

[Laws may be enacted:]

(1) Defining residency.

(2) Providing for registration of electors.

(3) Providing for absentee voting.

Thus, the quoted language from the explanatory note suggests no more than that the 1986 amendment to article III would permit the Legislature to: (1) exclude certain determined classes of people from suffrage on grounds other than the qualifications in article III, section 1 (*i.e.*, article III, section 2, subsection 4); and (2) grant additional classes of people the right to suffrage beyond those classes established by article III, section 1, subject to ratification by the people at a general election (*i.e.*, article III, section 2, subsection 5). The explanatory note does not indicate that article III, section 2, subsections 1 through 5 were intended to *prohibit* the Legislature from enacting certain election laws.

Fourth, Plaintiffs submitted 1985 Assembly Joint Resolution 3, which reflects the Legislature's second consideration of the amendment to

article III after the resolution passed the Legislature in 1983 on first consideration. (Supp-App 138.)[7] The 1985 Assembly Joint Resolution 3 "Explanation of Proposal" states:

> At the general election of 11/4/80, the people of this state ratified (for, 1,210,452; against, 355,024) chapter 299, laws of 1979, ... "to permit persons who own property in a public inland lake protection and rehabilitation district and who are U.S. citizens and are 18 years of age or older to vote at meetings of the district". Subsequently, when the constitutional amendment proposed in 1979 was placed before the 1981 legislature for "2nd consideration" (1981 AJR-84), there was concern that ratification of the constitution change proposed in 1979 might invalidate the limited voting rights granted to absentee lake property owners in November 1980. The 1981 version was never discharged from the assembly committee on elections to which it had been referred.

(Supp-App 138-39 (omissions in original).) Thus, the amendment to article III initially failed to gain the necessary support from two consecutive Legislatures for it to be placed before voters for ratification. The amendment was reintroduced and passed by the Legislature in the 1983 and 1985 terms.

---

[7]Although 1979 Assembly Joint Resolution 54 passed the Legislature on first consideration, it did not pass when it was placed before the Legislature in 1981 for second consideration.

1985 Assembly Joint Resolution 3 includes the same Legislative Council explanatory notes that were discussed above as to 1979 Assembly Joint Resolution 54. (*See* Supp-App 139.) However, additional discussion in the "Explanation of Proposal" prepared by the Legislative Reference Bureau for 1985 Assembly Joint Resolution 3 elaborates upon the purposes of amended article III, section 2, subsections 4 and 5, based upon substantive changes that the 1983 Legislature made to the rejected 1979 amendment proposal:

> The 1983 legislature made 2 substantive changes and one technical change in the legislative council's 1979 proposal:
>
> (1) It rephrased proposed new section 2 (4) (b) of article III to reflect current statute law:
>
> > [Excluding from the right of suffrage persons:] "(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside".
>
> (2) It added sub. (5) to the proposed new text of section 2 of article III to preserve the lake property owners' voting rights:
>
> > [Laws may be enacted:] "(5) Subject to ratification by the people at a general election, extending the

> right of suffrage to additional classes".

(Supp-App 139 (brackets in original).)

From this "Explanation of Proposal" it is evident that article III, section 2, subsections 4 and 5 were intended to: (1) exclude certain determined classes of people from suffrage on grounds other than the qualifications in article III, section 1; and (2) grant additional classes of people the right to suffrage beyond those classes established by article III, section 1, subject to ratification by the people at a general election. These substantive changes to proposed-article III by the 1983 Legislature reflected the then-current law regarding the voting rights of incompetent persons and lake property owners. And, like the 1979 Legislative Council explanatory note, the "Explanation of Proposal" does not indicate that article III, section 2, subsections 1 through 5 were intended to *prohibit* the Legislature from enacting election laws.

Fifth, additional "practices of the time" confirm that article III, section 2 may not be read as establishing the only types of election administration laws that the Legislature may enact. This Court should consider Wis. Stat. § 6.03(2) (1985-86), which excluded persons from voting in an election who had "made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election."

Specifically, article III, section 6 of the 1985 Wisconsin Constitution excluded from suffrage the same persons excluded by Wis. Stat. § 6.03(2) (1985-86). (*See* Supp-App 115.) Article III was then amended in 1986, and

section 6 was repealed and no longer appears in the current version of article III. Nonetheless, Wis. Stat. § 6.03(2) (1987-88) excluded from suffrage those betting on elections, even with no foundation for such a limitation in the language of article III. Wisconsin Stat. § 6.03(2) today prohibits otherwise qualified electors from voting in elections on which they have wagered. Thus, any implication that the statutes in existence contemporaneous with the 1986 amendment to article III regulated *only* topics listed in article III, section 2 is incorrect. On the contrary, Wis. Stat. § 6.03(2) is a statute that excluded and still excludes a class of otherwise qualified electors from suffrage who are not listed in the 1986 amended version of article III, section 2.

Finally, this Court has observed that "[a] court might also find other extrinsic contextual sources helpful in determining what the amendment sought to change or affirm, . . . the title of the joint resolution, the common name for the amendment, . . . and other such sources." *McConkey*, 326 Wis. 2d 1, ¶ 44. The "relating clause" in 1985 Assembly Joint Resolution 3 is another extrinsic contextual source that this Court should consider. (Supp-App 138.) The relating clause in the 1985 joint resolution summarizes the resolution's purposes:

> To amend so as in effect <u>to repeal</u> sections 1 to 6 of article III and section 5 of article XIII; <u>to amend</u> section 1 of article XIII; and <u>to create</u> sections 1, 2 and 3 of article III of the constitution, <u>relating to</u> removing obsolete provisions of the state constitution regarding elections and suffrage so as to revise the article on suffrage without impeding any

> voting rights granted under the constitution or laws of this state (2nd consideration).

(*Id.* (underlining in original).) The relating clause in 1985 Assembly Joint Resolution 3 does not indicate that the 1986 amendment to article III was intended to restrict the Legislature's authority to enact laws governing the sound administration of elections. It indicates that the amendment was meant to update the constitution to reflect the state of the then-current law, without impeding voting rights previously granted under the Wisconsin Constitution and state laws. The relating clause does not indicate that article III, section 2 contains an exclusive list of the types of election laws that may be enacted.

This Court should find that the second *Dairyland Greyhound Park* factor does not support a conclusion that Act 23 is unconstitutional.

3. Plaintiffs' evidence of the "earliest interpretations" of article III does not help determine whether Act 23 is unconstitutional.

The third *Dairyland Greyhound Park* factor to consider is "the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." 295 Wis. 2d 1, ¶ 19 (citations omitted). In the circuit court, Plaintiffs asserted that 1985 Wisconsin Act 304, which was enacted on April 29, 1986, and published on May 6, 1986, constitutes such an "earliest interpretation" of

article III, section 2 that is relevant. (*See* R. 32 at 22-23); (*see also* Supp-App 149-84.)

Plaintiffs seem to be correct that 1985 Wisconsin Act 304 is the "earliest interpretation" of article III, section 2 by the Legislature, as it is the first law passed that relates to voting rights after a statewide vote in April 1986 ratifying the amendment to article III. However, 1985 Wisconsin Act 304 and the changes it made with regard to absentee voting and other laws affecting voters do not appear to be probative of the question whether article III, section 2 restricts the Legislature from enacting the photo identification requirement created by Act 23. The fact that in 1986 the Legislature enacted a voting law governing a topic (absentee voting) that is addressed in article III, section 2, subsection 3 hardly indicates that article III, section 2 forbids the enactment of laws governing proof of identity in ways not specified in article III.

In sum, under the *Dairyland Greyhound Park* factors, this Court cannot reach the conclusion that article III prohibits the photo identification requirement created by Act 23.

E. Act 23's voter photo identification requirement is a reasonable regulation that promotes and preserves the right to vote.

Act 23's voter photo identification requirement is a reasonable regulation that promotes and preserves the right to vote. Plaintiffs assert that a "reasonableness" test has developed from this Court's case law: "a

regulation is constitutional if it purely regulates, and preserves and promotes the constitutional right to vote; it is unreasonable and unconstitutional if it destroys or impairs that right." (Pls.' Br. at 38.) Even if this Court accepts Plaintiffs' test at face value,[8] Act 23 passes it.

First, Act 23's photo identification requirement regulates, preserves, and promotes the right to vote. Showing photo identification to a poll worker confirms a voter's identity. It is a measure that goes one step beyond stating one's name and address to help ensure that one voter cannot impersonate another. Without the photo identification requirement, all that is required for a person to obtain a ballot at the poll is to state a registered voter's name and address and to sign the poll book. A photo identification requirement would help prevent one person from claiming that they are another and obtaining that persons' ballot because it mandates that a poll worker visually confirm that the voter is who they claim to be.

Second, the Legislature "must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure [the] full and free exercise[]" of the right to vote established by our constitution. *Dells*, 49 Wis. at 557. Preserving the "full" exercise of the right to vote includes establishing requirements to ensure that each vote counts on par with all others and is not diluted by potential fraud. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "Manifestly, the right to vote, the secrecy

[8]The court of appeals questioned whether a separate constitutional "reasonableness" test should be applied in a challenge under article III. (App-30, ¶ 71.)

of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations." *Anderson*, 100 Wis. at 533. "Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them." *Id.* at 533-34. Thus, "so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right." *Id.* at 534. Act 23 is consistent with the Legislature's constitutional authority to enact reasonable laws governing how elections are administered so the right to vote has equal value for all voters.

Finally, Act 23's photo identification requirement does not destroy or impair the right to vote. This Court has held that the Legislature may require a voter to "furnish such proof as it deems requisite" that the voter is a qualified elector. *Cothren*, 9 Wis. at 258 [*283-84]. If a voter declines to furnish the required proof, this Court has consistently held that it is not *the regulation* requiring such proof that disenfranchises the voter, but the voter's failure to produce the required proof. *See Baker*, 38 Wis. at 87; *Dells*, 49 Wis. at 559. As the court of appeals observed, accepting Plaintiffs' argument regarding "unreasonableness" would call into question other "indisputably facially valid voting regulations[,]" such as "a requirement to register, a requirement to identify oneself at the polls in at least some fashion, and the general requirement to vote at one's proper polling place, on the limited days and during the limited hours designated for voting." (App-34, ¶ 76.) None of those requirements could be said to destroy or impair

the right to vote, and the photo identification requirement has an equivalent regulatory impact.

II. PLAINTIFFS LACK STANDING.

Finally, Plaintiffs lack standing. Ms. Ramey has a Wisconsin driver license and can vote under Act 23. (Supp-App 188.) She is not "affected by" Act 23's photo identification requirement when she has a qualifying identification and can vote. Wis. Stat. § 806.04(2). This case is akin to *Perdue v. Lake*, where the Georgia Supreme Court held that a voter lacked standing to pursue her claims challenging Georgia's 2006 Photo ID Act because she had photo identification acceptable for voting. 647 S.E.2d 6, 8 (Ga. 2007). Plaintiffs have not identified any voter that would be prevented from voting under Act 23 for want of an ID.

There are no facts in the appellate record upon which to conclude that the League will suffer injury that is caused by Act 23. The League's standing cannot be based upon Ms. Ramey's non-standing. There is not a single piece of evidence in the appellate record that demonstrates why the League has standing. Neither Plaintiffs nor the circuit court pointed to any. The League has no standing to pursue this declaratory judgment action based upon the rights of its members or upon its own purported "injury."

CONCLUSION

For the reasons argued in this brief, this Court should affirm the decision of the court of appeals.

Dated this 17th day of January, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,831 words.

Dated this 17th day of January, 2014.

_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of January, 2014.

_____

CLAYTON P. KAWSKI
Assistant Attorney General

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SUPREME COURT

Case No. 2012-AP-584

LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION NETWORK, INC. and MELANIE G. RAMEY,

Plaintiffs-Respondents-Petitioners,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants.

and

DOROTHY JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

RESPONSE BRIEF OF INTERVENORS-CO-APPELLANTS DOROTHY JANIS, JAMES JANIS, AND MATTHEWS AUGUSTINE

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STATEMENT CONCERNING ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § (Rule) 809.19(1)(c), Intervenors-Co-Appellants Dorothy Janis, James Janis, and Matthew Augustine (collectively, "the Voters") note that this Court has granted oral argument in this case. Consistent with Wis. Stat. § (Rule) 809.22, the Voters respectfully seek the opportunity to participate in oral argument to discuss the substantial issues raised in this brief, address this Court's questions and concerns, and respond to the arguments of Plaintiffs-Respondents-Petitioners League of Women Voters of Wisconsin Education Network, Inc. and Melanie G. Ramey (collectively, "the League"). Many of the issues and authorities upon which the Voters rely differ from those presented by the State.

The Voters further recommend publication of this Court's opinion in this case pursuant to Wis. Stat. § (Rule) 809.23(1)(a)(5), because the constitutionality of photo identification requirements for voters is an issue of "substantial and continuing public interest," and this Court's ruling is likely to have substantial precedential value, both within the State of Wisconsin and in other jurisdictions.

STATEMENT OF THE CASE

Pursuant to Wis. Stat. § (Rule) 809.19(3)(a)(2), the Voters accept the League's explanation of the nature of the case and its procedural status.

I. DISPOSITION BELOW

The Circuit Court for Dane County, Branch 9 (Neiss, J.) granted the League's motion for summary judgment and entered a permanent injunction against 2011 Wisconsin Act 23, which generally requires individuals to present photo identification when attempting to vote. App-42. The court recognized that Act 23 "poses little obstacle at the polls" to "the vast majority of Wisconsin voters," and will only "occasionally" bar people from voting "through no fault of their own," App-49 to -50. It nevertheless held that requiring voters to present identification facially constitutes an "additional statutorily-created qualification[]" beyond those set forth in the Wisconsin Constitution's Qualifications Clause, Wis. Const., art. III, § 1, *see* App-44, that "impermissibly eliminat[es] the right of suffrage altogether for certain constitutionally qualified electors," App-47.

The circuit court further noted that a photo identification requirement is not among the election-related measures that the state Constitution expressly authorizes the legislature to enact. App-45, *citing* Wis. Const., art. III, § 2. It went on to contend that the State's characterization of the voter identification requirement as "an election regulation requirement" rather than "a qualification for voting" was "a distinction without a difference." App-45 n.2.

The court recognized that, in ruling on the League's facial challenge to Act 23, it could not consider the special difficulties that certain people might face in obtaining photo identification due to their individual circumstances. App-49. It nevertheless expressed concern that "some of our friends, neighbors and relatives" might "lack the financial, physical, mental, or emotional resources" purportedly necessary to obtain photo identification. *Id*.

The Court of Appeals, District IV (Blanchard, J.) reversed the Circuit Court's ruling, declaring that "the League fails to carry its heavy burden of overcoming the presumption that the photo identification requirement is, on its face, constitutional." App-3. It began by holding that, under this Court's well-established precedents, Act 23's photo identification requirement is not the type of "categorical bar to certain classes of voters" that violates the Qualifications Clause. App-27. Rather, Act 23 imposes "a voter registration regulation that allows election officials 'to ascertain whether the person offering to vote possesse[s] the qualifications required.'" App-3, App-22, *quoting State ex rel. Cothren v. Lean*, 9 Wis. 279, 283 (1859).

The court emphasized *Cothren*'s holding that "'it is clearly within [the legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite.'" App-24, *quoting Cothren*, 9 Wis. at 283-84 (emphasis omitted). Nothing in *Cothren*, the court noted, suggests that requiring a voter to furnish a certain type of document as proof of her identity or eligibility to vote constituted an "additional qualification." App-25. It further observed that Act 23

could not be held facially unconstitutional under the Qualifications Clause based on the League's allegation that "an unknown number of persons qualified and registered to vote might find it onerous, to greater or lesser degrees, to obtain, retain, bring to the polls, and produce photo identification." App-25 to -26.

The court also noted that Act 23's photo identification requirement was not an unconstitutional "qualification" simply because people who failed to satisfy it would not be permitted to vote. App-27. If that concern were sufficient to render the law invalid, "virtually any requirement placed on voters would be an unconstitutional and impermissible added 'qualification,' . . . . [A]ny such argument was foreclosed by the Wisconsin Supreme Court long ago . . . ." *Id.*

The court went on to reject the League's "additional, implied argument" that Act 23, on its face, is "so burdensome that it effectively denies potential voters their right to vote," noting the absence of supporting evidence in the record. App-3; *see also* App-33 to -34, *citing State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961 (1910). Indeed, the court later noted that "[t]he League does not . . . rely on any evidence, expert or otherwise, establishing the anticipated effects of the requirement on particular persons or groups." App-6.

The Court of Appeals concluded that, because Act 23 neither establishes a new voting qualification nor imposes a facially unreasonable burden on voters, it is well within the legislature's Article III authority to regulate elections. App-3. Specifically, the photo identification requirement "falls within the subsection of Article III allowing the legislature to pass laws providing for a system of

registration and, necessarily, give effect to the registration requirement by providing for some means of verifying at the polling place that a person seeking to vote is registered." App-38. The opinion ends by noting, "Because the state officials prevail on the merits, we . . . do not address the suggestion of intervenors that the circuit court's decision violates federal constitutional law by imposing an unconstitutional limitation on safeguards intended to protect the integrity of federal elections." App-40 n.13.

II. STATEMENT OF FACTS

A. Act 23's Photo Identification Requirement

Act 23 requires a person to show "proof of identification" in order to vote in person at her polling location, Wis. Stat. § 6.79(2)(a), or to request an absentee ballot in person from the clerk's office, *id*. § 6.86(1)(ar). Likewise, a person must include a copy of her photo identification "or an authorized substitute document" when requesting an absentee ballot by mail. *Id*. § 6.87(1). If the elector requests an absentee ballot electronically (*i.e.*, by fax or e-mail), she need not include a copy of her photo identification, *id*. § 6.86(1)(a)(6), (1)(ac), but instead must submit it with the completed absentee ballot, *id*. § 6.87(4)(b)(1), or else it will be treated as a provisional ballot, *id*. § 6.97(2). Similarly, if a person at a polling location does not present proof of identification, she likewise will be permitted to cast only a provisional ballot. *Id*. §§ 6.79(2)(d), (3)(b), 6.97.

"Proof of identification" includes: a drivers' license, identification card from the Wisconsin Department of Transportation ("DOT"), military ID card, or U.S. passport that either has not expired, or expired after the most recent general election; certificate of naturalization from within the last two years; unexpired temporary drivers' license or identification card; tribal ID; or unexpired college ID issued by an accredited Wisconsin university or college (subject to certain restrictions). Wis. Stat. § 5.02(6m)(a)-(f).

The Act contains numerous exceptions to alleviate hardship. A qualified elector who is "indefinitely confined because of age, physical illness[,] or infirmity[,] or is disabled for an indefinite period," may request that absentee ballots be sent to her automatically for every election, and is not required to provide photo identification. Wis. Stat. §§ 6.86(2)(a), 6.87(1), (4)(b)(2). An elector living in a retirement home, community-based residential facility, residential care apartment complex, or adult family home also is exempt from the photo identification requirement for absentee ballots, *id*. §§ 6.87(5), 6.875(6)(c)(1), as are military and overseas voters, *id*. § 6.87(1). Additionally, if an elector already included a copy of her photo identification with a previous request for an absentee ballot in a past election, and has not moved to a different address in the interim, she need not include photo identification with any subsequent requests. *Id* § 6.87(1), (4)(b)(3).

B. Obtaining a Free Photo Identification Card

Wisconsin residents may obtain a *free* photo identification card from DOT that is a permissible form of voter identification under Wis. Stat. § 5.02(6m)(a)(2). To obtain a free card, an applicant must provide satisfactory "proof of name and date of birth,"[1] "proof of identity,"[2] and "proof of citizenship."[3] Wis. Admin. Code Trans. § 102.15(2)(a), (2)(bm)(1). A birth certificate or U.S. passport counts as both "proof of name and date of birth" and "proof of citizenship," *see id*. § 102.15(3)(a)(1)-(2), (3m)(1)-(2), while a social security card qualifies as "proof of identity," *id*. § 102.15(4)(a)(13); *see also id*. § 102.15(5)(a), (bm) (requiring an applicant for an identification card to provide his social security number, if she has

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[1] Proof of name and date of birth includes: a certified birth certificate; U.S. passport; valid, unexpired foreign passport with specified supporting immigration documents; previous Wisconsin drivers' license or identification card; certain federal immigration documents; tribal ID card meeting certain requirements; court order regarding the bearer's adoption, divorce, name change, or gender change; military ID card; or Department of Homeland Security ("DHS") or Transportation Security Administration ("TSA") transportation worker identification card. Wis. Admin. Code Trans. § 102.15(3)(a)(1)-(21).

[2] Proof of identity includes: a valid driver's license or non-driver's photo identification card, either from Wisconsin, another state, or the federal Government; military discharge papers; military dependent identification card; marriage certificate or divorce decree; social security card; DHS/TSA transportation worker identification card; or any other document that may be used as "proof of name and date of birth" (if the applicant did not already use that document to fulfill that requirement). Wis. Admin. Code Trans. § 102.15(4)(a)(2)-(24).

[3] Proof of citizenship includes: a birth certificate, U.S. passport, foreign passport with supporting documentation, certificate of U.S. citizenship or naturalization, DHS/TSA transportation worker identification card, and certain other specified forms for aliens from DHS or the U.S. Department of State. Wis. Admin. Code Trans. § 102.15(3m)(a)(1)-(13).

one). DOT will waive the fee for the identification card if the applicant specifies that she is requesting the card "for purposes of voting." Wis. Stat. § 343.50(5)(a)(3).

If a person is unable to obtain a birth certificate (or some other form of "proof of name and date of birth"), she may seek an exemption from that requirement from the division of motor vehicles. Wis. Admin. Code Trans. § 102.15(3)(b). The applicant must complete a form explaining why she cannot obtain a birth certificate or other "proof of name and date of birth," and provide "[w]hatever documentation is available" confirming her name and birth date. *Id.* § 102.15(3)(b)(1)-(3). The administrator of the department may delegate her authority to approve such waiver requests to any subordinate. *Id.* § 102.15(3)(c).

C. Obtaining a Birth Certificate

A person with a "direct and tangible interest" in a birth certificate – including the subject of the birth certificate, a member of her family, or her attorney – may obtain a certified copy of it from the Wisconsin Division of Public Health or the registrar of the municipality where the birth occurred. Wis. Stat. §§ 69.20(1), 69.21(1)(a)(1), (1)(a)(2)(a), (3); *see also* Wis. Admin. Code DHS § 142.04. Thus, if a person does not possess the identification necessary to obtain a certified copy of her birth certificate, she may have an immediate family member who does possess such identification obtain it on her behalf.

To establish her identity, an applicant seeking a certified copy of a birth certificate must provide either a Wisconsin driver's license, a Wisconsin photo identification card, or two of the following documents:

- government-issued employee identification card with photograph;
- U.S. passport;
- checkbook or bank book;
- major credit card;
- health insurance card;
- recent signed lease;
- recent utility bill; or
- recent traffic ticket.

See Wis. Dep't of Health Servs., Div. of Pub. Health, *Wisconsin Birth Certificate Application*, Form F-05291 (Mar. 2012);[4] Wis. Dep't of Health Servs., *Request for a Birth Certificate*.[5] The applicant also must pay a $20 fee. *Id*.

If a person was born in the State of Wisconsin, but the Division of Public Health does not have a birth certificate on file for her, she may have the State generate a birth certificate for her by filing for late registration of birth. Wis. Stat. § 69.14(2)(a)(1). The person must provide three pieces of documentary evidence — one of which may be a personal affidavit — concerning her name, date, and place of birth. *id*. § 69.14(2)(a)(2)(a)-(b), (2)(a)(3)(a). She also must submit one

[4] *Available at* http://www.dhs.wisconsin.gov/forms/F0/F05291.pdf.

[5] *Available at* http://www.dhs.wisconsin.gov/vitalrecords/birth.htm.

different piece of documentary evidence (not including a personal affidavit) concerning her mother's full maiden name and, if the mother was married, her father's name. *Id*. § 69.14(2)(a)(2)(c)-(d), (2)(a)(3)(b). Any documentary evidence other than affidavits of personal knowledge must be more than 10 years old. *Id*. § 69.14(2)(a)(3)(d).

In the event a person cannot satisfy these requirements, or the Division rejects her application, she may petition the circuit court for her alleged county of birth for an order "establishing a record of the date and place of [her] birth and parentage." *Id*. § 69.14(2)(a)(6). The Division of Public Health must then generate a birth certificate for the person based on that order. *Id*.

D. <u>Provisional Voting Without Photo Identification.</u>

If a qualified elector attempts to vote at a polling location without presenting proper photo identification, she will be permitted to cast a provisional ballot. Wis. Stat. §§ 6.79(2)(d), (3)(b), 6.97(1). Likewise, if a qualified elector requests an absentee ballot by fax or e-mail, and returns that completed ballot without submitting a copy of her photo identification, that vote also will be treated as provisional, *id*. § 6.97(2). A provisional ballot will be counted if the voter either returns to the polling place where she cast it before the close of polls on Election Day to show her photo identification, *id*. § 6.97(3)(a)-(b), or presents her photo identification to the municipal clerk or board of elections by 4 P.M. on the Friday after Election Day, *id*. § 6.97(3)(b)-(c).

E. Plaintiff Melanie G. Ramey Satisfies Wisconsin's Photo Identification Requirements.

Ramey has never alleged that she lacks photo identification, or that Act 23's photo identification requirements will prevent her from voting. *Cf.* Complaint at 3-4. She alleges only that the law requires other people to "travel[] to [a] DMV office" and "spend time waiting there" in order to obtain a free photo identification card to vote. *Id*. at 7. She also complains that DMV personnel are not aggressive enough in affirmatively notifying people that the $28 fee for obtaining an identification card will be waived if the person will use the card for voting. *Id*. at 8. Finally, she maintains that "[o]btaining the necessary underlying documentation" to obtain a free identification card "also requires the payment of fees" and an "investment of time." *Id*. Ramey argues that these burdens render Act 23's photo identification requirement facially unconstitutional under Wis. Const., art. III, §§ 1 and 2. *Id*. at 10.

ARGUMENT

The Court of Appeals properly rejected the League's challenge to Act 23's photo identification requirement under Article III of the Wisconsin Constitution. ***First***, to the extent Act 23 applies to federal elections, invalidating it under the Wisconsin Constitution would raise serious federal constitutional questions. The Wisconsin legislature's power to regulate the manner in which federal elections are conducted stems from the Elections Clauses of the U.S. Constitution, *see* U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2, not the Wisconsin Constitution. *Cook*

v. Gralike, 531 U.S. 510, 523 (2001). The state constitution therefore may not impose substantive limits on the legislature's discretion concerning the conduct of federal elections, including measures intended to protect their integrity and fairness. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *In re Plurality Elections*, 8 A. 881, 881 (R.I. 1887); *Baldwin v. Trowbridge*, 2 Asher C. Hinds, Hinds' Precedents of the U.S. House of Representatives, § 856, at 24 (1907), *available at* http://tinyurl.com/ld2ehav.

Second, Act 23 does not establish a separate new qualification that a person must possess to be deemed a qualified elector, in violation of the Wisconsin Constitution's Qualifications Clause, *see* Wis. Const., art. III, § 1. To the contrary, requiring individuals wishing to vote to present identification is a constitutionally permissible way of allowing election officials to confirm that they are duly qualified voters. *State ex rel. Cothren v. Lean*, 9 Wis. 279, 283 (1859).

Third, the League's interpretation of the Qualifications Clause is squarely contrary to the manner in which virtually every other state court has construed analogous provisions of their respective constitutions, as well as U.S. Supreme Court rulings concerning comparable provisions of the U.S. Constitution.

Finally, the League cannot establish that Act 23 is facially unconstitutional, because the trial court expressly acknowledged that the law "poses little obstacle at the polls" to "the vast majority of Wisconsin voters" — including Ramey herself — and will prevent people from voting "through no fault of their own" only "occasionally." App-49 to -50. If this Court finds that Act 23 imposes an

unreasonable burden and exceeds the legislature's authority under Article III, a much more tailored remedy than complete invalidation would be appropriate.

Because this case involves the propriety of the trial court's interpretation of the Wisconsin Constitution, it presents a pure question of law that this Court reviews *de novo*. *State v. Schaefer*, 2008 WI 25, ¶ 17, 308 Wis. 2d 279, 290, 746 N.W.2d 457, 463 (2008).

I. THE WISCONSIN STATE CONSTITUTION CANNOT LIMIT THE STATE LEGISLATURE'S AUTHORITY UNDER THE U.S. CONSTITUTION TO REGULATE THE CONDUCT OF FEDERAL ELECTIONS.

Whatever the merits of the League's arguments that Act 23 violates the Wisconsin state Constitution, Act 23 remains valid and enforceable as applied to federal elections because a state constitution may not limit a state legislature's power, derived from the U.S. Constitution, to regulate and establish safeguards for such elections. At a minimum, if this Court harbors doubts about Act 23's validity under the Wisconsin Constitution, it should resolve them in favor of upholding the law, to avoid raising serious questions under — and even violating — the U.S. Constitution. *Cf. Kenosha Cty. Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 (Wis. 2006) ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities."). Alternatively, the Federal Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2, present a different basis upon which this Court may affirm the Court of Appeals' ruling, *see, e.g., Pries v. McMillon*,

2010 WI 63, ¶ 42, 326 Wis. 2d 37, 784 N.W.2d 648 (2010) ("We affirm, although on different grounds than the court of appeals."); *cf. State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983) (noting that a party may assert "an additional argument on issues already raised" in the courts below).

A. The U.S. Supreme Court Has Held That State Legislatures' Authority to Regulate the Conduct of Federal Elections Comes from the U.S. Constitution.

The U.S. Constitution expressly grants state legislatures the power to "prescribe[]" the "times, places and manner of holding elections for Senators and Representatives." U.S. Const., art. I, § 4, cl. 1. It likewise provides that "[e]ach State shall appoint" presidential electors (i.e., members of the electoral college) "in such manner as the Legislature thereof may direct." *Id*. art. II, § 1, cl. 2. These "express delegations of power" to state legislatures, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995), grant them the "authority to provide a complete code" for federal elections, including but not limited to laws for the "protection of voters" and the "prevention of fraud and corrupt practices," *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Thus, when a legislature enacts a law that applies to federal elections, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" under these federal constitutional provisions. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000); *see also Cook*, 531 U.S. at 523 ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause"). Indeed, "without this grant[,] no state power on the

subject [i]s possessed." *Newberry v. United States*, 256 U.S. 232, 261 (1921) (White, C.J., dissenting).

A state legislature's power under the U.S. Constitution to regulate federal elections is, of course, subject to various substantive limitations set forth throughout that document, including the Bill of Rights, *Tashjian v. Repub. Party*, 479 U.S. 208, 217 (1986), as well as Congress' constitutional authority to override states' decisions and impose uniform procedures or requirements, *see* U.S. Const., art. I, § 4, cl. 1 (congressional elections); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (presidential elections). Additionally, a state legislature must exercise its power "in accordance with the method which the State has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367, meaning that state laws governing federal elections are subject to gubernatorial veto, *id*. at 368, or even being overruled by popular referendum, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916), to the extent the state constitution includes those contingencies in its legislative process.

Although laws governing federal elections must be enacted through the "legislative process" set forth in the state constitution, *Smiley*, 285 U.S. at 368, that does not suggest that a state constitution may impose substantive restrictions on the content of such statutes. The U.S. Constitution's delegation of power specifically to state legislatures to regulate federal elections "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power," including through "any provision in the state constitution in that regard."

McPherson v. Blacker, 146 U.S. 1, 25 (1892). That is, a state constitution cannot restrict the scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted. *See also* U.S. Const., art. VI, § 2 ("This Constitution . . . shall be the supreme law of the land . . . anything in the Constitution . . . of any State to the contrary notwithstanding."); *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").[6]

Insofar as Act 23 applies to electors presenting to vote for federal office, the Wisconsin legislature enacted that statute pursuant to its power under the U.S. Constitution to regulate the manner in which federal elections are conducted by deterring and preventing "fraud and corrupt practices." *Smiley*, 285 U.S. at 366; *see also Cook*, 531 U.S. at 523; *Bush*, 531 U.S. at 76. The U.S. Supreme Court has recognized that "[t]he State's interest in preserving the integrity of the

[6] The Supreme Court's ruling in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258-59 (2013), reinforces this conclusion. The *Inter Tribal Council* Court correctly observed that, while the Elections Clause delegates authority to state legislatures to determine and regulate the "times, places, and manner" of Congressional elections, U.S. Const., art. I, § 4, cl. 1, other constitutional provisions define the universe of people who are eligible to vote for Members of Congress, *id*. art. I, § 2, and U.S. Senators, *id*. amend. XVII. This holding further bolsters the Voters' main point that, when a state legislature exercises its authority under the U.S. Constitution's Elections Clauses to enact laws governing federal elections, the substantive scope of its discretion is not limited by the state constitution, but rather is subject to challenge only under other provisions of the U.S. Constitution, such as the Bill of Rights and the ***federal*** Qualifications Clauses cited by *Inter Tribal Council*, 133 S. Ct. at 2258-59 (citing U.S. Const., art. I, § 2; *id*. amend. XVII).

electoral process is undoubtedly important" and "is particularly strong with respect to efforts to root out fraud." *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010); *see also Storer v. Brown*, 415 U.S. 724, 726, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest . . . ."). Invalidating Act 23 under the Wisconsin state constitution therefore would, at a minimum, raise serious federal constitutional questions.

B. State Courts Have Upheld State Laws Regulating Federal Elections That Conflicted With Their State Constitutions

Other state courts have upheld and enforced state laws governing the conduct of federal elections under the U.S. Constitution's Elections Clauses, despite the fact that those laws squarely violated state constitutional provisions. In *In re Plurality Elections*, 8 A. 881, 881 (R.I. 1887), for example, the Rhode Island Supreme Court considered whether candidates for presidential elector and the U.S. House of Representatives needed to receive a plurality or a majority of votes in order to win. The Rhode Island Constitution provided that a majority of votes was necessary for a candidate to be declared the winner "in all elections." *Id*. at 882, *quoting* R.I. Const., art. VIII, § 10. State law, however, permitted candidates for federal office to be declared the winner upon receiving only a plurality of votes. *Id.*

The state supreme court concluded that a candidate for presidential elector or Congress needed to receive only a plurality of votes to prevail, even though the Rhode Island Constitution purported to require a majority. *Id*. at 619-20. It held

that R.I. Const., art. VIII, § 10 violated the U.S. Constitution's Elections Clauses and therefore was "of no effect" as applied to congressional and presidential elections. *Id.* The court explained that the state constitutional provision improperly "impose[d] a restraint upon the power of prescribing the manner of holding [federal] elections[,] which is given to the legislature by the Constitution of the United States without restraint." *Id.* at 619. Because state laws regulating federal elections are enacted under the state legislature's power directly under the U.S. Constitution, they are valid and enforceable "regardless of" any contrary provision in a state constitution. *Id.*; *see also PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 747-48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution").

Several state courts also reached the same conclusion regarding laws that permitted absentee voting by members of the military who were away from home on Election Day. The New Hampshire Supreme Court held that the state constitution could pose no obstacle to a state law authorizing absentee voting in elections for Members of Congress and presidential electors, because:

> [t]he authority of the State legislature to prescribe the time, place and manner of holding elections for representatives in Congress, is derived from [the U.S. Constitution's Elections Clause]. Their action on the subject is not an exercise of their general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States . . . . The constitution and laws of this State are entirely foreign to the

> question, except so far as they are referred to and adopted by the Constitution of the United States.

In re Opinion of Justices, 45 N.H. 595, 601 (1864).

The Kentucky Court of Appeals noted that several other courts had upheld similar state laws authorizing absentee voting for military members, at least as applied to elections for federal office, despite state constitutional provisions requiring that all votes be cast in person. *See Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944). The court explained that, since a legislature's power to regulate federal elections stems from the U.S. Constitution's Election Clause, "the limitations and restrictions of the state constitutions (except so far as they may be expressly or by construction adopted by the Federal Constitution, or Congressional legislation) are held not to apply" to elections for federal officers. *Id*. (quotation marks omitted).

C. Congress Has Likewise Concluded That State Constitutions Cannot Constrain State Legislatures' Authority to Impose Substantive Requirements for Federal Elections.

Both the U.S. House of Representatives and the U.S. Senate's Committee on Privileges and Elections also have concluded that state constitutions cannot limit the power to regulate federal elections granted by the U.S. Constitution's Elections Clauses to state legislatures. In 1866, in the election contest *Baldwin v. Trowbridge*, which the U.S. House of Representatives adjudicated according to its exclusive constitutional authority, *see* U.S. Const., art. I, § 5, cl. 1, the House concluded that a state constitution may not limit a state legislature's authority to

regulate the time, place, and manner of federal elections. 2 Asher C. Hinds, Hinds' Precedents of the U.S. House of Representatives, § 856, at 24 (1907), available at http://tinyurl.com/ld2ehav.

The Michigan Constitution contained a provision which the Michigan Supreme Court had construed as requiring people to cast their votes in person in the township or ward in which they resided. *Id.*; *see also People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 145-46 (1865) (Campbell, J.). The Michigan legislature passed a law that was contrary to this provision, allowing a qualified member of the military to vote, "whether at the time of voting he shall be within the limits of this State or not." *Baldwin*, Hinds' Precedents, *supra* § 856, at 24.

After the law's enactment, a congressional election was held. If votes from out-of-state members of the military were counted, candidate Trowbridge would be the winner. *Id.* If such votes were excluded pursuant to the Michigan Constitution, then candidate Baldwin would prevail. *Id.* The House Committee on Elections concluded that the state constitution could not limit the power of the legislature to regulate a federal election, and that the state law requiring that military votes be counted was therefore enforceable, notwithstanding the contrary provision of the Michigan Constitution. *Id.* at 25-26. The House of Representatives, adopting the majority view of the Committee, voted to approve a resolution declaring Trowbridge the winner. *Id.* at 27.

The House reaffirmed this conclusion in 1880 in approving the resolutions proposed by the House Committee on Elections in *In re Holmes, et al.*, 1 Hinds'

Precedents, *supra* § 525, at 672-73, *available at* http://tinyurl.com/mdhqolh. The Committee had stated, "The provisions of the constitution of a State can not take th[e] power" to determine the time of elections for Members of Congress "from the legislature of a State . . . . [T]he time of electing Members of Congress cannot be prescribed by the constitution of a State, as against an act of the legislature . . . ." *Id.* The House's vote reaffirmed the precedent that "[t]he constitution of a State may not control its legislature in fixing under the Federal Constitution, the time of election for Congressmen." *Id.* at 667.

The Senate Committee on Privileges and Elections reached a comparable conclusion in a report concerning potential reforms to the electoral college. S. Rep. No. 43-395 (May 28, 1874). The Committee explained that, by virtue of the U.S. Constitution's grant of authority to state legislatures to regulate the manner in which presidential electors are chosen, U.S. Const., art. II, § 1, cl. 2, "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States." *Id.* at 9. The Committee observed that this power:

> cannot be taken from [state legislatures] ***or modified by their State constitutions*** any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

Id. (emphasis added); *accord McPherson*, 146 U.S. at 34-35.

Thus, as applied to federal elections, Act 23 was a valid exercise of the Wisconsin legislature's authority under the U.S. Constitution's Elections Clauses to protect the integrity of federal elections, and could not violate Wis. Const. art. III, §§ 1-2.

II. ACT 23'S PHOTO IDENTIFICATION REQUIREMENT DOES NOT VIOLATE ARTICLE III OF THE WISCONSIN CONSTITUTION

The League's arguments that Act 23's photo identification requirement constitutes an improper voter qualification, *see* Wis. Const. art. III, § 1, and exceeds the legislature's authority to regulate elections, *see id*. art. III, § 2, also fail on their merits.

A. Act 23's Photo Identification Requirement Does Not Impose an Improper Voter Qualification.

The Wisconsin Constitution's Qualifications Clause provides, "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wis. Const. art. III, § 1. Wisconsin law dutifully provides that any person who possesses those qualifications is an "eligible elector," Wis. Stat. § 6.02(1), which this Court has held is synonymous with "qualified elector," *Washington v. Altoona*, 73 Wis. 2d 250, 255-56, 243 N.W.2d 404, 407 (1976).

State law further declares that a person may be disqualified as an elector only for failure either to possess one of the qualifications specified in the state constitution, or to properly register. Wis. Stat. § 6.325. Crucially, neither Act 23

nor any other provision of Wisconsin law allows a person to be disqualified as an elector for failing to possess or exhibit photo identification; Act 23's photo identification requirement is irrelevant to the question of whether someone is a "qualified elector." To the contrary, Act 23 simply requires electors to exhibit to election officials proof of their identity, and hence eligibility to vote, and is comparable to other procedural requirements that qualified electors must follow in order to exercise their right to vote, such as voting at the correct polling place, *id*. § 6.77(1), or arriving before the polls close, *id*. § 6.78(4).

The heart of the League's argument is that the photo identification requirement is an unconstitutional voter qualification because it imposes "an absolute condition precedent to voting." League Br. at 7. The League elaborates that Act 23 impermissibly establishes a qualification because it "bars constitutionally qualified voters from voting if they do not display to election officials at the polls one of the limited acceptable government issued forms of ID, without alternatives." *Id*. at 8; *see also id*. at 14, 21, 24.

This Court has held, however, that "it is clearly within [the legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualified elector." *State ex rel. Cothren v. Lean*, 9 Wis. 279, 283-84 (1859); *see also Altoona*, 73 Wis. 2d at 260 (distinguishing between a "qualification of an elector" and "legislatively mandated proof that one who seeks to vote is qualified"). The fact that a person who "fail[s] to furnish the proof required by law" is barred from voting does not render that statutory requirement

"a new qualification for a voter." *Cothren*, 9 Wis. at 284; *see, e.g., State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 575-78 (1867) (rejecting a Qualifications Clause challenge to a law that prohibited a person who did not appear on the voter registration list from voting, unless he submitted an affidavit from another voter attesting to his residency). Thus, Act 23's photo identification requirement does not "prescrib[e] any qualifications for electors different from those provided for in the constitution," but rather enables election officials to "ascertain whether the person offering to vote possessed the qualifications required by that instrument." *Cothren*, 9 Wis. at 283.

The constitutionality of Act 23's photo identification requirement is further confirmed by contrasting it with statutes that this Court has invalidated under the Qualification Clause. In *State ex rel. Knowlton v. Williams*, 5 Wis. 308, 315 (1856), this Court held that a law permitting a person to vote in a municipal election only if he had lived in his town for at least 30 days "added a qualification not contained in the constitution, and which is repugnant to its provisions." *See also State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 50 (1881) (holding that a village charter which permitted only electors who had lived in the village for at least 20 days to vote impermissibly "impos[ed] additional qualifications").

The Court explained that such residency requirements, "which deprive[] a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained." *Knowlton*, 5 Wis. at 316. It added, however, that the legislature may impose various requirements and

restrictions on a person's "exercise" of his right to vote, such as by directing him "to exercise this right only in the town where he resides." *Id.* Such a provision, the Court emphasized, "does not add to the qualifications which the constitution requires." *Id.*

Thus, the *Knowlton* Court expressly distinguished between imposing an unconstitutional categorical bar to certain classes of people voting, and requiring electors to follow certain procedures in order to vote. Just as *Knowlton* recognizes that requiring a voter to cast his vote in "the town where he resides" would not violate the Qualifications Clause, *id.*, requiring a voter to show photo identification is likewise permissible.

Several decades later, this Court narrowly held — over a strong dissent — that Wisconsin's voter registration law violated the Qualifications Clause. *See Dells v. Kennedy*, 49 Wis. 555 (1880). The law had prohibited an elector from voting in an election unless he registered by the deadline for that election (unless the person did not become qualified to vote until after that deadline had passed). *Id.* at 556. The Court expressed concern that a person could be barred from voting if, "by reason of absence, physical disability, or non-age," he did not ensure that his name appeared on the registration list by the deadline. *Id.* at 557.

The Court emphasized, however, that the "fatal" constitutional "vice" of the statute was that it "disenfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the

day of election." *Id*. at 558; *see also State ex rel. McGrael v. Phelps*, 144 Wis. 1, 53, 128 N.W. 1041 (1910) (holding that a law cannot "absolutely deprive a constitutional voter of his right to vote because of his own neglect" without "giv[ing] him an opportunity to cast his ballot on proving his qualifications" at the polling place). The Court explained that it had upheld voter registration laws in earlier cases because they had provided a mechanism by which an unregistered person could prove his eligibility to vote on Election Day. *Dells*, 144 Wis. at 558. The Court added that a differently drafted voter registration law would be permissible if it "provid[ed] a reasonable mode by which the constitutional qualifications of an elector may be ascertained and determined," and "regulat[ed] reasonably the exercise of the constitutional right to vote." *Id*.

Under the standard set forth in *Dells*, 14 Wis. at 558, Act 23 does not impose an additional qualification for electors. Unlike the voter registration provision in that case, Act 23 expressly permits — indeed, requires — voters to establish their qualifications to election officials on Election Day by presenting photo identification. Wis. Stat. § 6.79(2)(a). Moreover, the Act even goes one step further than *Dells* by allowing a person who does not have his photo identification with him at the polling place, and therefore is unable to prove his qualifications to election officials, to cast a provisional ballot, *id*. §§ 6.79(2)(d), (3)(b), 6.97(1), which will be counted so long as he provides identification to the election board by the Friday after the election, *id*. § 6.97(3).

Finally, in *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), the statute at issue provided that a ballot was not valid unless each clerk at the polling location where it was cast personally wrote his initials on it. At one polling location, unbeknownst to the voters, a single clerk wrote on each ballot the initials for both of the clerks at that location, rendering the ballots technically invalid. *Id*. at 576, 300 N.W. at 184. This Court held that those ballots should nevertheless be counted, because a voter would have no way of knowing that the clerks had violated the statute, or that there was anything wrong with the ballots. *Id*. at 578, 300 N.W. at 184.

Ollmann further explained that the Qualifications Clause prevents a voter from being denied the opportunity to vote based on the "failure of election inspectors to perform their statutory duty." *Id*. at 579, 300 N.W. at 185; *see also State ex rel. Wood v. Baker*, 38 Wis. 71, 86 (1875) (holding that "[n]onfeasance or malfeasance of public officers," whether "by careless accident or corrupt design," cannot "disenfranchise constitutional voters"). Act 23, in contrast, does not bar a person from voting based on an election official's failure to fulfill any statutory responsibilities. In sum, Act 23's photo identification requirement differs materially from all of the statutes that this Court has held impose unconstitutional "qualifications" for electors, and should be upheld.

B. Act 23 Is Not Unconstitutional Under Article III, § 2 of the Wisconsin Constitution.

The League also asserts that Act 23 is unconstitutional because it is not one of the five types of election-related regulations that the legislature is permitted to enact under Wis. Const. art. III, § 2. League Br. at 7-8, 26, 29. As discussed above in Part I, the true source of the legislature's authority to enact Act 23 – at least as it applies to federal elections — is not the Wisconsin Constitution, but rather the Elections Clauses of the U.S. Constitution. See U.S. Const., art. I, § 4; *id*. cl. 1, art. II, § 1, cl. 2. Thus, the scope of Article III, § 2's grants of legislative power to regulate the conduct of elections and protect against fraud is irrelevant, at least for federal elections.

Even considering the issue exclusively under the Wisconsin Constitution, however, the Court of Appeals correctly concluded that the statute was a valid exercise of the legislature's power under Wis. Const. Art. III, § 2(2), to enact laws "[p]roviding for registration of electors." App-38. Alternatively, the legislature also had power to enact the statute under Article IV, § 1, which provides, "The legislative power shall be vested in a senate and general assembly." This Court has held that Article IV is a source of legislative authority for regulating elections:

> By sec. 1 of art. IV the power of the state to deal with elections except as limited by the constitution is vested in the senate and assembly, to be exercised under the provisions of the constitution; therefore the power to prescribe the manner of conducting elections is clearly within the province of the legislature.

State ex rel. La Follette v. Kohler, 200 Wis. 518, 548, 228 N.W. 895, 906 (1930); *see, e.g.*, *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 323-25, 125 N.W. 961, 962-63 (1910) (recognizing that Wisconsin's Primary Elections Law was enacted pursuant to Article IV, § 1).

The current version of Article III, § 2 was enacted by constitutional amendment in 1986. There is nothing in the amendment's history to suggest that it was intended to be an exclusive list of the legislature's powers relating to elections. Nor is there anything to suggest that the amendment's drafters intended to overrule long-established precedents recognizing the legislature's independent authority under Article IV, § 1 to enact reasonable requirements to protect against fraud and ensure the integrity of elections. *See, e.g.*, *La Follette*, 200 Wis. at 548, 228 N.W. at 906; *Van Alstine*, 142 Wis. at 323-25, 125 N.W. at 962-63. Moreover, as a matter of constitutional interpretation, this amendment should not be read as implicitly repealing any of the legislature's general legislative powers under Article VI, § 1. *Cf. State v. Dairyland Power Coop.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878, 881 (1971) ("Repeals by implication are not favored in the law. The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together."). Thus, Article III, § 2 is not an independent constitutional impediment to Act 23.

III. OTHER JURISDICTIONS' PRECEDENTS CONFIRM THAT ACT 23'S PHOTO IDENTIFICATION REQUIREMENT DOES NOT ESTABLISH A NEW QUALIFICATION FOR VOTING.

Yet another reason the Court of Appeals' ruling should be affirmed is because it is consistent with how states throughout the country, as well as the U.S. Supreme Court, have construed comparable provisions of their state constitutions and the U.S. Constitution. Several courts have rejected Qualifications Clause challenges to photo identification requirements materially identical to the League's. Most recently, the Tennessee Supreme Court rejected the argument that the state's "photo ID requirement constitutes an unlawful qualification on the right to vote." *City of Memphis v. Hargett*, No. M2012-02141-SC-R11-CV, 2013 Tenn. LEXIS 779, at *51 (Tenn. Oct. 17, 2013). It held that the law "cannot be fairly characterized as an additional voting qualification," but rather "is more properly classified as a regulation pertaining to an existing voting qualification," because it is "'merely a mode of ascertaining . . . whether or not a [person] possesses the necessary qualifications of a voter.'" *Id.* at *54, *quoting Trotter v. City of Maryville*, 235 S.W.2d 13, 18-19 (Tenn. 1950).

Likewise, in *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 72 (Ga. 2011), the Georgia Supreme Court held that the state's photo identification law established a "reasonable procedure for verifying that the individual appearing to vote in person is actually the same person who registered to vote," and did not constitute an impermissible additional qualification.

The Indiana Supreme Court reached the same conclusion, stating:

> [The] requirement that an in-person voter present a government-issued photo identification card containing an expiration date is merely regulatory in nature. The voter qualifications established in [the Indiana Constitution] relate to citizenship, age, and residency. Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity.

League of Women Voters of Indiana v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010).[7]

More broadly, virtually every other state court in the country has held that the Qualifications Clause in its state constitution does not prohibit the legislature from imposing requirements to ascertain or verify voters' identities. The Iowa Supreme Court for example, has declared, "[T]he legislature, while it must leave the constitutional qualifications [for voting] intact, and cannot add new ones, may, nevertheless, prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications." *Edmonds v. Banbury*, 28 Iowa 267, 272 (1869); *see also Lane v. Mitchell*, 133 N.W. 381, 382 (Iowa 1911). Likewise, the Delaware Chancery Court has explained, "When we speak of the

[7] *See also Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2008 U.S. Dist. LEXIS 84817, at *12 (S.D. Ind. Oct. 21, 2008) (rejecting Qualifications Clause challenge to Indiana's photo identification requirement, because it is a generally applicable, nondiscriminatory voting regulation that protects the electoral process against fraudulent voting); *Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 843 (S.D. Ind. 2006) (holding that the Indiana Qualifications Clause is not violated "every time the General Assembly enacts a new voting regulation," because "the Legislature has power to determine what regulations shall be complied with by a qualified voter in order that his ballot may be counted") (quotation marks omitted); *In re Request for Advisory Opinion Regarding the Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 447 (Mich. 2007) (concluding that Michigan's photo identification statute is "facially constitutional").

qualifications of a voter, we mean to refer to those things which must exist as going to make of him a voter, as conferring on him the absolute right to be placed among the class of persons which the law creates and calls voters." *McComb v. Robelen*, 116 A. 745, 747 (Del. Ch. 1922). Laws which simply require people to provide "evidenc[e]" that they are qualified to vote are "an entirely different thing." *Id.*; *see also Brennan v. Black*, 104 A.2d 777, 786 (Del. 1954) (distinguishing between a "qualification" for voting and a requirement concerning "evidence of qualification").

According to the Massachusetts Supreme Judicial Court, "While the Legislature cannot change in any particular the qualifications required to enable one to vote, it may make reasonable rules and regulations for ascertaining those who possess such qualifications." *In re Opinion of Justices*, 143 N.E. 142, 144 (Mass. 1924). Under Kansas Supreme Court precedent, requiring people to provide "proof" so that election officials may "ascertain who and who are not entitled to vote" is "not in any true sense imposing an additional qualification." *State v. Butts*, 2 P. 618, 619 (Kan. 1884). Thus, it is broadly recognized that, under state constitutions' Qualifications Clauses, there is an important distinction between laws that "add to the constitutional qualifications of voters" and those that "merely prescribe a procedure by which frauds may be prevented and mistakes

avoided on election day." *Duprey v. Anderson*, 518 P.2d 807, 808-09 (Colo. 1974).[8]

The U.S. Constitution also contains Qualifications Clauses establishing citizenship, residency, and age requirements for candidates for the U.S. House of Representatives and U.S. Senate. U.S. Const. art. I, § 2, cl. 2; *id*. art. I, § 3, cl. 3. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995), the Court explained that these Qualifications Clauses prohibit states from "exclud[ing] classes of candidates from federal office," or from "favor[ing] or disfavor[ing] a class of candidates." The Court elaborated that the Clauses bar "property, educational, or professional qualifications," *id*. at 811-12; "term limits, loyalty oath requirements, and restrictions on those convicted of felonies," *id*. at 799 (citations omitted); and "qualification[s] of wealth, of birth, of religious faith, or of civil profession," *id*. at 808 (quotation marks omitted).

The Qualifications Clauses do not, however, prevent state legislatures from establishing "procedural regulations" and "safeguards" to govern the conduct of federal elections, *id*. at 832, 834, as the U.S. Constitution's Elections Clauses expressly permit them to do, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2; *see supra* Part I. Notwithstanding the Qualifications Clauses, states may adopt

[8] *See also People ex rel. Martin v. Worswick*, 75 P. 663, 665 (Cal. 1904) ("[R]easonable method[s] of identifying qualified voters" do not constitute unconstitutional new "qualifications [for] voters."); *Franklin v. Harper*, 55 S.E.2d 221, 229 (Ga. 1949) ("Though the Constitution of this State guarantees the right of suffrage to those who meet its qualifications . . . the legislature has the right to prescribe reasonable regulations as to how these qualifications shall be determined.").

"'generally applicable and evenhanded restrictions'" that "'protect the integrity and reliability of the electoral process itself,'" *U.S. Term Limits*, 514 U.S. at 834, *quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); "'seek[] to assure that elections are operated equitably and efficiently,'" *id.*, *quoting Burdick v. Takushi*, 504 U.S. 428, 433 (1992); and "'guard against irregularity,'" *id*., *quoting Roudebush v. Hartke*, 405 U.S. 15, 25 (1972). The Court went on to reiterate that provisions which "regulate[] election *procedures* . . . [do] not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position" or public office. *Id*. (emphasis in original). It concluded by emphasizing that a measure enacted to "protect[] the integrity and regularity of the election process" does not violate "the constitutional prohibition against the imposition of additional qualifications for service in Congress." *Id.* at 835.

The Supreme Court's reasoning is highly instructive in applying the Wisconsin Constitution's Qualifications Clause to this case. Viewed through the lens of *U.S. Term Limits*, 514 U.S. 779, Act 23's photo identification requirement is a permissible election procedure intended to ensure the integrity of the election, not a measure excluding any pre-existing or discernible "class" of people from voting based on some personal characteristic. Although people who do not possess valid photo identification are permitted only to cast provisional ballots, that does not render them a cognizable "class" being excluded from voting, any more than people who show up to vote after the polls close, see Wis. Stat.

§ 6.78(4), or who did not register by the statutory deadline, *id*. § 6.28(1), constitute such a class. Thus, the Court of Appeals' ruling rejecting the League's Qualifications Clause challenge is consistent with caselaw from across the country, including U.S. Supreme Court precedent, construing comparable state and federal constitutional provisions.

IV. EVEN IF ACT 23 MIGHT BE UNCONSTITUTIONAL AS APPLIED TO CERTAIN VOTERS, IT IS FACIALLY VALID, AND A PERMANENT INJUNCTION AGAINST ANY ENFORCEMENT OF THE STATUTE WOULD BE AN INAPPROPRIATELY OVERBROAD REMEDY.

As the Court of Appeals noted, one of the League's implicit arguments is that Act 23 "imposes a restriction that is on its face so burdensome that it effectively denies potential voters their right to vote, and is therefore constitutionally 'unreasonable.'" App-2. This argument patently fails as a facial challenge.

"[A] facial constitutional challenge attacks the law itself as drafted by the legislature, claiming the law is void from its beginning to the end and that it cannot be constitutionally enforced under any circumstances." *Soc'y Ins. v. Labor & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 463, 786 N.W.2d 385, 395 (2010); *see also State v. Ruesch*, 214 Wis. 2d 548, 556, 571 N.W.2d 898, 902 (1997) (holding that a person bringing a facial challenge to a statute "must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional").

The trial court held that Act 23 violated the Wisconsin Constitution's Qualifications Clause because it "den[ies] the right of suffrage" by "cancel[ing] or substantially burdening" that right. App-48. The Court went on to expressly recognize, however, that "Act 23 poses little obstacle at the polls" to "the vast majority of Wisconsin voters," who possess or can readily obtain photo identification and therefore can "comply with Act 23." App-40 to -50. Thus, the court's own findings demonstrate that Act 23 neither "cancel[s]" nor "substantially burden[s]" the right to vote for the "vast majority" of Wisconsin citizens, who either already possess photo identification, or have the "financial, physical, mental, [and] emotional resources" to obtain free photo identification from the DOT. App-49 to -50; *see also* Wis. Stat. § 343.50(5)(a)(3). The trial court therefore erred in holding Act 23 facially unconstitutional, and the Court of Appeals properly reversed its ruling.

It is, of course, entirely possible that, in some future case, an elector's individualized constellation of personal circumstance may render Act 23's photo identification requirement so unreasonable that it "destroys the right of a qualified elector to cast a ballot." League Br. at 38. The plaintiffs in this case, however, did not bring an as-applied challenge. *Cf. State v. Trochinski*, 2002 WI 56, ¶ 34, 253 Wis. 2d 38, 65, 644 N.W.2d 891, 904 (2002) (noting that the plaintiff "is not challenging the statute as applied to this specific set of circumstances," but rather "assert[ing] a facial challenge"). Indeed, Plaintiff Ramey could not raise such a

claim, because she does not contend that she lacks photo identification, or that Act 23 will prevent her from voting in any election.

In any event, even if a statute is "unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." *State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601, 607 n.13 (1998) (quotation marks omitted); *accord Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365, 388 n.9, 749 N.W.2d 211, 222 n.9 (2008). The Court of Appeals therefore properly reversed the trial court's decision to completely enjoin enforcement of Act 23, which the trial court had based on the possibility that the law might be unconstitutional if applied to "some of our friends, neighbors and relatives," due to their personal circumstances. R.47 at 6-7.

To the extent this Court believes that some form of relief is nevertheless appropriate, it should be limited only to those for whom Act 23 has "destroy[ed] or impair[ed]" the right to vote. League Br. at 38. This may include requiring the State to:

- provide birth certificates to indigent voters, and allow indigent voters to commence proceedings to modify alleged errors on their birth certificates, free of charge;
- accept alternate proof of identity from indigents born out-of-state, *see* Wis. Admin. Code Trans. § 102.15(3)(b);
- exempt handicapped people who face mobility challenges from Act 23's requirements;

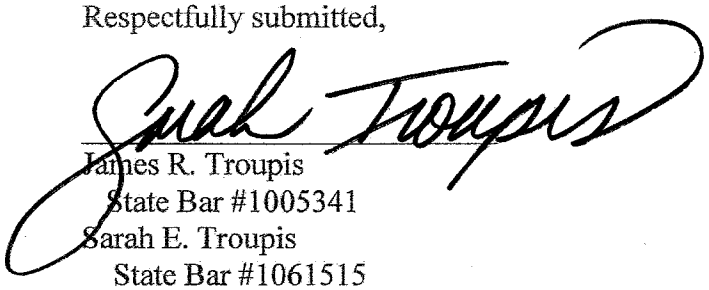
- allowing only those individuals for whom obtaining photo identification is an unreasonable and unconstitutional burden to cast binding votes without exhibiting such identification;
- ensure that DMV offices maintain certain minimum hours or staffing levels, or establish temporary DMV satellite offices in under-served areas, for a "transition" period to allow voters an adequate opportunity to obtain identification; and/or
- notify voters about Act 23's requirements, either through public advertisements, mailed notices, or handouts at libraries, municipal clerks' offices, schools, and other voter registration facilities under the National Voter Registration Act, 42 U.S.C. § 1973gg-5(a)(2)-(3).

In short, to the extent there is any validity to the League's "implied" argument that Act 23 "imposes a restriction that is on its face so burdensome that it effectively denies potential voters their right to vote," App-2, the appropriate remedy would be a measure far less drastic than complete invalidation of the statute.

CONCLUSION

For these reasons, Intervenors-Co-Appellants respectfully request that this Court AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,



Dated January 17, 2014

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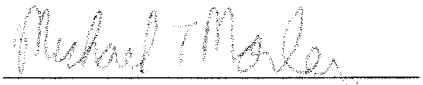

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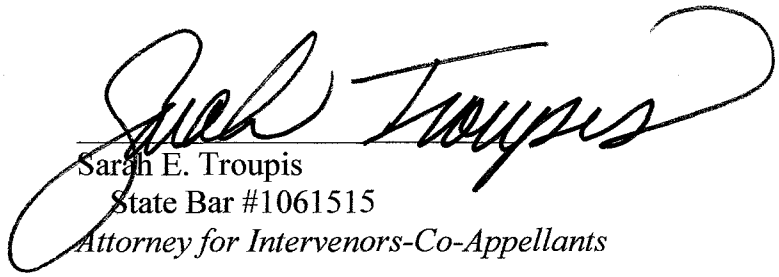
FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in § 809.19(8)(b), (d) for a brief produced with a proportional serif font. The length of this brief is 9,657 words.

Signed on January 17, 2014



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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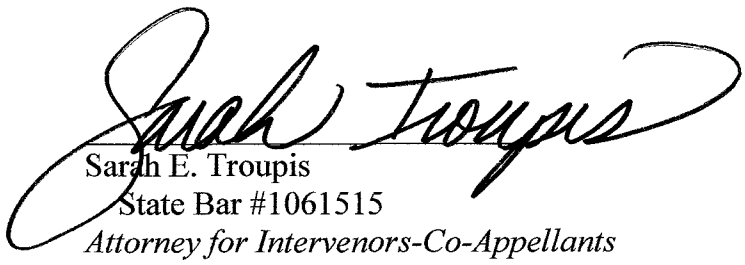

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STATE OF WISCONSIN
SUPREME COURT

No. 2012AP584

LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION NETWORK, INC., and MELANIE G. RAMEY,

Plaintiffs-Respondents-Petitioners,

vs.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

DOROTHY JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

PLAINTIFFS-RESPONDENTS-PETITIONERS' REPLY BRIEF

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Dated: February 6, 2014

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I. THE VOTER ID LAW HAS THE EFFECT OF DETERMINING WHICH QUALIFIED ELECTORS MAY VOTE. THUS, IT IS NOT A LAW THAT FALLS WITHIN THE LEGISLATURE'S PLENARY AUTHORITY TO ENACT REASONABLE ELECTION REGULATIONS.

A. Because The Legislature Has Limited Constitutional Authority to Regulate "Who" Votes, Defendants Want The Court To Believe That The Voter ID Law Only Regulates "How" Votes Are Cast.

Defendants do not attempt to rebut the League's argument that the Legislature may not add a qualification to vote, and concede that if the Voter ID law does so, it is unconstitutional. They explicitly concede that the Voter ID law is neither a registration regulation nor a law to implement the right of suffrage as allowed under Article III, sec. 2. Brief of Defendants-Appellants ("Def. Br.") p. 32.

Much of the Defendants' brief is devoted to a discussion of the uncontroverted proposition that the Legislature has plenary authority to enact reasonable election regulations about "when, where and how" elections are conducted. Defendants contend that the law regulates "how ballots are cast" and argue that the Voter ID law is a "reasonable" regulation, no different than a law dictating the form of the ballot or polling hours. Def. Br. pp. 7-16.

Defendants do this because the Wisconsin Supreme Court, for over 150 years, has enforced these basic principles:

- the Legislature has a limited plenary authority to regulate ***when, where and how*** elections are conducted but does not have the plenary authority to determine ***who*** may vote, and;

- a regulation of when, where and how elections are conducted, if it also touches on who may vote, must not impair or destroy the right to vote.

Undoubtedly, the Voter ID law determines who may vote. And, even if one were to accept the fanciful notion that the law merely regulates "how" votes are cast, the law is unconstitutional because it impairs the right of qualified electors to vote:

> [Election] regulations are to be subordinate to the enjoyment of the right [to vote],. . . . **The right must not be impaired by the regulation. It must be regulation purely, not destruction**. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretense of regulation . . .

Dells v. Kennedy, 49 Wis. 555, 6 N.W. 246, 247 (1880) (emphasis added).

B. The Voter ID Law Is Unconstitutional Whether It Regulates "Who" May Vote Or "How" Votes Are Cast.

Because Defendants claim that the Voter ID law is nothing more than a regulation within the Legislature's power to impose, the Court must undertake a twofold analysis. First, it must determine if the Voter ID law regulates who may vote or merely regulates "how" elections must be carried out. If the Court concludes, as the League contends, that the law regulates who may vote, i.e., if it has the legal effect of prescribing which

qualified electors are permitted to vote, it must be found unconstitutional because the Legislature had no power to enact it.

If the Court determines that the law regulates "how" elections must be carried out, the Court may not simply presume out of deference to the Legislature that the law is reasonable. Rather, as demonstrated by this Court's 150 years of jurisprudence safeguarding the right to vote from legislative infringement, the Court must determine whether the law has the effect of impairing or destroying the present right to vote held by qualified electors. Any election regulation which "impairs or destroys rather than preserves and promotes [the right to vote], is within condemnation of constitutional guarantees." *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 17-18, 128 N.W. 1041 (1910).

C. The Voter ID Law Regulates Who May Vote.

The Voter ID law is a direct regulation of who may vote, not how votes are cast. It expressly provides that a would-be elector who lacks a requisite ID "***shall not be permitted to vote***." Wis. Stat. §6.79(3)(b). Its manifest effect is to disqualify electors from voting, without regard for their constitutional qualifications. Thus, it is unconstitutional.

1. Qualified Voters Who Do Not Have One Of The Limited Forms Of Acceptable Identification Are Disqualified From Voting.

In support of their argument that the Voter ID law merely regulates "how" votes are cast, the Defendants contend that the law merely requires proof of qualifications, and that voters who do not present the requisite ID "voluntarily" disenfranchise themselves. They rely on cases upholding laws requiring electors to present proof of their qualifications as electors at the polls.

Those cases are inapposite because, unlike the Voter ID law, the regulations in them required a form of proof that was fully within the voter's control and consistent with the voter's present right to vote. By contrast, the Voter ID law imposes a precondition to vote that is not within the voter's control on the day of the election and is incompatible with the voter's present right to vote. As such, it cannot be defended as merely requiring "proof of qualifications." Rather, it imposes a qualification to vote that exceeds those required by the Wisconsin Constitution.

2. Possession Of The ID Is Treated As A "Personal Characteristic" And A Precondition To Voting.

The Defendants argue that "requiring voters to present a form of photo identification prior to voting is not in the nature of a personal, individual characteristic or attributed like a voting qualification . . ." Def.

Br. p. 16. That is precisely the problem: the possession of an ID is indeed not a "personal characteristic," like the constitutional qualifications of age or residence. But possession of the ID is *treated* as a personal characteristic: if a voter lacks the requisite ID, the voter cannot vote. In the words of the statute, a voter without a conforming ID "***shall not be permitted to vote***," without regard to his or her constitutional qualifications. Wis. Stat. §6.79(3)(b).

The Legislature may not, under the guise of "proof of qualifications," enact a law imposing a condition precedent on voters that deprives a qualified elector of the present right of suffrage at the polls. *See Wood v. Baker*, 38 Wis. 71, 86 (1875). The Voter ID law leaves open no "other proof" consistent with the voter's present right to vote.[1] Consequently, it is unconstitutional.

D. This Court's Prior Decisions Demonstrate That The Legislature Lacks Authority To Prescribe Who May Vote.

The longstanding principle that the Legislature's plenary authority does not extend to controlling who may vote is articulated in this Court's

[1] The League stands on the arguments made in its initial brief that the Legislature may only enact such "proof of qualifications" as part of a registration law. Defendants concede that the Voter ID law is not a registration law but stands as a distinct and separate precondition to vote. Defendants did not respond to the League's argument that the law imposes an unconstitutional qualification to vote because it leaves no other proof open to a voter who fails to present the requisite ID, consistent with his present right to vote. Thus, Defendants have conceded this crucial point.

historical decisions striking down registration laws and other laws that restricted voting by qualified electors.

In one of its earliest decisions defining the scope of legislative authority to interfere with voting, this Court, in voiding a law allowing only voters who had resided in the election district for at least 30 days to vote, distinguished between a law restricting ***who*** may vote from one regulating ***where*** one must vote:

> We have no doubt that the legislature have the power to provide that a person who has a right to vote under the constitution shall be allowed to exercise this right only in the town where he resides, because this would be only to prescribe the place where a right which he possessed under the constitution shall be exercised, and fixes upon the most convenient place for its exercise. Such a provision does not add to the qualifications which the constitution requires; **but an act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained.**

State ex rel. Knowlton v. Williams, 5 Wis. 308 (1856) (emphasis added). A better description of the constitutional deficiency of the Voter ID law could not be written.

Likewise, in *Dells,* 49 Wis. 555, 6 N.W. 246 (1880), the Court struck down a registration law focusing on the provision in the law that "absolutely prohibits any elector from voting at such election unless so registered, or within such exception." *Dells*, 6 N.W. at 246. The "exception" under the law allowed citizens who were not registered to

vote only if they "become qualified voters before such election, but after the completion of such register." *Id*. at 246. Notably, the Court struck down only the section of the registration law that "provides for the ***legal effect and consequences*** of the registration, or want of registration," that is, that prohibited a non-registered citizen from voting. *Id*. Thus, the Court focused explicitly on the facial effect of the registration law in disenfranchising qualified electors who were "unable to comply" with its prerequisites.

Moreover, the Court rejected the argument that no voter would lose the right to vote except through his own "negligence or default," stating:

> By the effect of this law the elector may, and in many cases must and will, lose his vote, by being ***utterly unable to comply with this law by reason of absence, physical disability, or non-age***, and . . . without his own default or negligence.

Id. (emphasis added). In this case, likewise, this Court must reject the Defendants' suggestion that the Voter ID law will disenfranchise no voter except through his own default or negligence.

These cases, which established the fundamental limits of the Legislature's "plenary authority" to regulate elections, do not authorize the Legislature to enact laws that have the "legal effect and consequences" of depriving qualified citizens of the right to vote.

In 1882, the voters ratified amendments to the Constitution expressly granting authority to the Legislature to enact laws (1) providing for the registration of electors in incorporated cities and villages and (2) requiring an elector to reside in the election district for up to thirty days before the elector could vote in that district. The purpose of those changes was not merely to give the Legislature some suggestions as to laws it might enact. Rather, the amendments granted express authority to the Legislature to enact exactly the types of laws regulating who may vote that this Court had previously found to be outside the Legislature's plenary authority.

II. THE 1986 AMENDMENTS THAT REVISED WIS. CONST. ARTICLE III, SECTION 2 DID NOT GRANT THE LEGISLATURE PLENARY AUTHORITY TO REGULATE WHO MAY VOTE.

A. The Practices At The Time Of The 1986 Amendments To Article III, §2 And The Earliest Interpretations Of Those Amendments Do Not Assist In Determining The Meaning Of The Amendments.

The League asserts that Article III, §2 of the Wisconsin Constitution, by its plain meaning, sets forth the limited subjects on which the Legislature may enact laws regarding who may vote.

Defendants chide the League for not discussing evidence regarding the practices at the time of the 1986 amendments to Article III and the

earliest interpretations of those amendments. They devote a significant portion of their brief arguing that the evidence on those *Dairyland*[2] factors does not inform the Court on the question before it. Def. Br. at 33-41. The League agrees.

However, it is also true that neither the practices at the time of the 1986 amendments nor the earliest interpretations of them suggest that the amendments were, as the Defendants suggest, intended to remove all constitutional restrictions on legislative authority to regulate the right to vote. Nor does that evidence call into question the plain meaning of Article III, §2 as a limitation on legislative power.

B. Defendants' Construction Of Wis. Const. Art. III, §2 Renders It Superfluous.

In addition to arguing that the Legislature possesses virtually unlimited "plenary authority" to regulate elections regardless of the impact on the right of qualified electors to cast a ballot, Defendants argue that Article III, §2 imposes no restriction whatsoever on the legislature to regulate who may vote. Rather, under Defendants' formulation, Article III, §2 merely provides examples of how the Legislature might restrict voting by qualified electors if it should wish to do so, or as the Defendants

[2] *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408

put it, it "outlines possible ways that the Legislature might regulate elections by way of a non-exhaustive list." Def. Br. pp. 26-32.

However, if the Constitution, which grants broad plenary authority to its Legislature including, in Defendants' view, plenary authority to regulate the right to vote, it would be superfluous for the Constitution to "outline possible ways" for the Legislature to exercise that authority.

In fact, Article III, §2 limits the areas in which the Legislature has the authority to regulate who may vote. Requiring ID as an absolute condition precedent to voting is not among them.

III. DECISIONS FROM OTHER JURISDICTIONS UPHOLDING OTHER STATES' VOTER ID LAWS DO NOT SUPPORT THE CONSTITUTIONALITY OF WISCONSIN'S VOTER ID LAW.

Other states have enacted voter ID laws, some of which were challenged as violating a state's constitution. Some of those laws were upheld.

But the Wisconsin Constitution is interpreted independent of other states' constitutions. Article III has been the subject of interpretation for over 150 years, establishing a unique body of Wisconsin jurisprudence. In light of that, this Court's statement in *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567, 785 (1855) is particularly apt:

> The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs – let us construe, and stand by ours.

Id. at 135, *quoting Bashford*, 4 Wis. at 785.

Furthermore, in virtually every case from other jurisdictions cited by Defendants, both the statutory provisions *and* the state constitutional provisions were fundamentally different from Wisconsin's Voter ID law and constitutional provisions. None of the other state constitutions contain a provision similar to Wis. Const. Art. III, §2. *See*, *e.g.*, *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758, 760 (Ind. 2010).[3]

Should the Court consider other states' decisions, it will find that the vast majority of their voter ID laws do ***not*** make the requirement of displaying ID a mandatory prerequisite to the exercise of the right to vote.[4] Rather, they employ various mechanisms to preserve the right to vote of an elector who fails to display an ID.

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[3] The United States Supreme Court expressly relied on Indiana's provisional ballot procedure in upholding the Voter ID law against an Equal Protection challenge, holding that "the severity of that burden [on the right to vote] is, of course, mitigated by the fact that, if eligible, ***voters without photo identification may cast provisional ballots that will ultimately be counted***." *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 (2008) (emphasis added).

[4]The state Voter ID laws are compiled by the National Conference of State Legislatures on its website at http://www.ncsl.org/legislatures-elections/elections/ voter-id-state-requirements.aspx. This Court may take judicial notice of the laws of sister states. Wis. Stat. §902.02(1).

Commonly, such laws provide that a voter without ID who affirms his or her qualifications to vote in an affidavit – a form of proof "open to the voter at the election, consistent with his present right," *Baker*, 38 Wis. at 86 – may vote, unless it is proven that the voter is unqualified. *See* Connecticut Code §9-261; Delaware Code Tit. 15, §4937; Idaho Statutes §34-1106(2), 34-1113, 34-1114; Kentucky Statutes §§117.227, .245; Michigan Compiled Laws §§168.523, .729; North Dakota Code §16.1-05-07; South Dakota Code §§12-18-6.1 & 6.2; Code of Virginia §24.2-643(B).

Some voter ID laws provide that a voter who lacks an ID may cast a ballot by providing information to election officials such as a residential address or birth date, also forms of proof that are consistent with the voter's "present right" to vote. *See* Hawaii Code §11-136; Louisiana Rev. Stat. §18:562. Others permit a voter without ID to cast a provisional ballot, which is counted unless the canvas board finds evidence that the ballot was not cast by a qualified voter. *See* Florida Code §§101.043, .048; Montana Code §§13-13-114, 13-15-107; Rhode Island §17-19-24.

Thus, the vast majority of other states' voter ID laws do ***not,*** as Wisconsin's Voter ID law does, disqualify from voting an elector who lacks a requisite ID.

IV. INTERVENORS' CLAIM BASED ON THE U.S. CONSTITUTION IS WAIVED AND LACKS MERIT.

Intevenors claim that if the Voter ID law is prohibited under the Wisconsin Constitution, then the Wisconsin Constitution violates the U.S. Constitution. But,

> It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court.

In re Ambac Assur. Corp., 2012 WI 22, ¶22, 339 Wis. 2d 48, 810 N.W.2d 450. Intervenors presented this novel argument for the first time in the Court of Appeals.

The Court of Appeals granted permissive intervention to Intervenors because the original parties would not be prejudiced as "the proposed intervenors' claim is largely identical to that of the appellants." July 10, 2012 Order. It did not allow intervention to enable them to raise a federal constitutional claim that was never presented to the circuit court. This Court should deem Intervenors' federal constitutional argument waived and decline to address it.

If the Court chooses to consider Intervenors' argument, it should reject it. Intervenors claim that this Court should uphold the

constitutionality of the Voter ID law under the Wisconsin Constitution "in order to avoid raising serious questions under – and even violating – the U.S. Constitution." Response Brief of Intervenors-Co-Appellants ("Int. Br.") p. 13.

They cite the U.S. Constitution's Elections Clause, which provides that "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing [sic] Senators." U.S. Const. Art. I, §4. The Elections Clause thus delegates authority to states to enact regulations establishing the "times, places and manner" of holding federal elections. *See Cook v. Gralike*, 531 U.S. 510, 522-23 (2001).

Intervenors turn this delegation of authority to the states on its head, arguing that the Elections Clause *prohibits* the people of a state from restricting, through their state constitution, "the scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted." Int. Br., p. 16.

This contention is meritless and unsupported by the cases cited by Intervenors. They cite not a single case which has held that a state

constitutional provision protecting the right of suffrage from legislative infringement violates the Elections Clause. No such case exists.

The U.S. Constitution reserves to the states the power to fix voter qualifications, requiring only that states establish the same voter qualifications for elections for federal office as for state and local office. *Oregon v. Mitchell,* 400 U.S. 112, 124-25 (1970); *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995); U.S. Const. Art. I, §2 & Amend. 17. Congress retains the authority to enact voter qualifications for elections for federal office. *See Mitchell*, 400 U.S. at 123. No claim is made that Wis. Const. Art. III conflicts with any federal law establishing voter qualifications.

No case supports the Intervenors' proposition that the Elections Clause prohibits state constitutional provisions relating to election matters. To the contrary, cases they cite reject Election Clause challenges to state constitutional provisions allowing state election legislation to be vetoed by the governor or rejected in a popular referendum. *See*, *e.g.*, *Smiley v. Holm*, 285 U.S. 355 (1932); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

Intervenors also cite *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), which stemmed from a recount of a federal presidential

election. *Bush* does not advance their argument. The Supreme Court briefly discussed U.S. Const. Art. I, §4, but remanded the case to state court without resolving any federal constitutional issue. *Id.* at 78. It did not hold that state constitutional protections of the right to vote are invalid.

Finally, Intervenors do not identify how or why they believe the Wisconsin constitutional provisions protecting the right to vote conflict with the federal Elections Clause. Rather, they vaguely assert that "invalidating [the Voter ID law] under the Wisconsin state constitution therefore would, at a minimum, raise serious federal constitutional questions." *Id*. at 50. If such questions exist, it is past time to raise them. The Court will not address insufficiently developed arguments, particularly those involving constitutional issues. *See In re Interest of Baby Girl K*, 113 Wis. 2d 429, 448, 335 N.W. 2d 846 (1983).

V. PLAINTIFFS HAVE STANDING.

The Defendants argue that because Ramey possessed a Wisconsin driver license as of February 14, 2012, she lacks standing. Noting that "[t]he inability of a voter to pay a poll tax . . . is not required to challenge a statute that imposes a tax on voting," citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), the Eleventh Circuit found that:

> Requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing.…[T]he lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person.

Common Cause/Georgia v. Billups, 554 F.3d 1340, 1351-52 (11th Cir.), *cert. denied*, 556 U.S.1282 (2009).

The Tennessee Supreme Court recently agreed. *City of Memphis v. Hargrett*, 414 S.W.3d 88, 99-100 (Tenn. 2013) (claim that voter ID requirement impermissibly adds a voting qualification is injury sufficient to confer standing); *see also Common Cause of Colo. v. Buescher,* 750 F.Supp.2d 1259, 1271 (D. Colo. 2010). This Court should likewise agree.

In addition to derivative standing through Ramey, its member, the League has independent standing. For nearly 100 years, the League has advocated for protection of Wisconsin's guarantee of the fundamental right to vote. It has opposed Voter ID since its introduction, including by devoting resources to attending public meetings and encouraging members to oppose it. (Supp-App 103, R. 22) Use of organizational resources to oppose or respond to the effect of a law has been found to provide organizational standing in challenges to that law. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd,* 553 U.S. 181 (2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir.

2009).[5] Furthermore, sister League of Women Voters organizations have repeatedly been found to have standing to bring lawsuits challenging state laws affecting voters. *See, e.g., League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008); *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994). The League should likewise be found to have standing to challenge Wisconsin's Voter ID law.

VI. CONCLUSION.

The Court should declare the challenged portions of 2011 Act 23 to be facially unconstitutional and void, and enjoin any enforcement of them.

Dated this 6th day of February, 2014.

Respectfully submitted,

CULLEN WESTON PINES & BACH LLP

/s/ Lester A. Pines .
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[5] Another organization was recently found to have Article III standing to challenge the Voter ID Law on these grounds. *League of United Latin American Citizens of Wisconsin v. Deininger,* 2013 WL 5230795 (E. D. Wis., Sept. 17, 2013).

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (d) and 809.62(4) for a brief and appendix produced with a proportional serif font. The length for the brief is 3,987 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief and appendix is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 6th day of February, 2014.

/s/ Lester A. Pines .
Lester A. Pines, SBN 1016543

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2012-AP-1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE

Intervenors-Appellants

On Appeal from a July 17, 2012 Order for Judgment and Order Granting Declaratory and Injunctive Relief,
Issued by the Dane County Circuit Court,
Hon. David Flanagan Presiding, Case No. 2011-CV-5492

BRIEF OF *AMICUS CURIAE* DISABILITY RIGHTS WISCONSIN

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INTEREST OF THE AMICUS

Disability Rights Wisconsin ("DRW") is a statewide non-profit organization designated by the Governor of the State of Wisconsin to act as the congressionally mandated protection and advocacy agency for Wisconsin citizens with mental illness, developmental disabilities and other physical impairments, pursuant to Wis. Stat. §51.62, 29 USC §794e, 42 USC §15041 et. seq., and 42 USC §§10801 et. seq. Through the pursuit of administrative, legal and other appropriate remedies DRW seeks to address the issues facing people with disabilities in the State of Wisconsin and to ensure the rights of all this state's citizens with disabilities. DRW is regularly involved in policy and legal advocacy related to identified priority civil rights issues for people with disabilities, including concerns around community integration, inclusion, dignity, equal rights and voting issues.

For the last nine years, DRW has coordinated Wisconsin's Protection and Advocacy for People with Disabilities Voting Project (PAVA). DRW has direct experience promoting the legal rights of voters and eligible voters with disabilities in Wisconsin. One example of our work has been creation and maintenance of the Wisconsin

Disability Vote Coalition. Our advocacy includes ensuring that people with disabilities have equal access to the polls; education of people with disabilities, service providers and families on voting laws; working with election officials on both the state and local level on issues of access to the polls for people with disabilities; and working one-one-one with clients to resolve individual problems with the voting process. As a result, DRW has educated and spoken to tens of thousands of people with disabilities, families, guardians and service providers and therefore gained a wealth of knowledge about voters with disabilities. DRW's interest in this litigation is motivated by its concern that the photo identification law at the center of this appeal will have a detrimental and chilling effect on the ability of people with disabilities to exercise their constitutional right to vote.

ARGUMENT

IV. The Act 23 Photo ID Requirement Substantially Impairs The Right Of Individuals with Disabilities To Vote In Violation Of Article III Section 1 Of The Wisconsin Constitution, Because Of Increased Burdens Faced By People with Disabilities In Obtaining A Photo ID

Approximately 600,000 individuals of voting age in Wisconsin are disabled.[1] Nationally, 15.6 million Americans with disabilities voted in the 2012 General Election, as large a voting bloc as other minority groups who cast ballots in the 2012 election.[2] Individuals with disabilities have faced both discrimination and physical barriers to the electoral process, including being wrongfully turned away from the polls because an individual with a disability does not "appear" to be eligible to vote, not being able to access the polling site because it is not accessible, and not being able to cast a private and independent ballot. These barriers result in voting rates for people with disabilities in Wisconsin at 8.2 percent below the general voting population.[3] While in recent years improvements to the accessibility of voting mandated by

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[1] The US Census Bureau estimated 576, 703 civilian, non-institutionalized people with a disability in Wisconsin aged 18 or older. U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates, Disability Characteristics*, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Nov. 15, 2012). This figure excludes over 70,000 institutionalized people, more than 60% of whom have a disability.

[2] Compared to 17.8 million African-Americans and 11.2 million Hispanic voters in 2013. *Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections* (July 2013), by the Research Alliance for Accessible Voting, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CDIQFjAB&url=http%3A%2F%2Fsmlr.rutgers.edu%2Fdisability-and-voting-survey-report-2012-elections&ei=ttagUqSCJaLlyAGNh4CgDA&usg=AFQjCNHp3hNwDVMLPxlqFS_7hRr7wCEg4Q.).

[3] *Id.*

HAVA have aided in narrowing the difference in voting rates among people with disabilities and those without,[4] these improved voting rates are in danger of being reversed due to Act 23's requirement to provide a photo identification as a condition of voting.

People with disabilities are less likely to possess photo identification, particularly one that meets the narrow criteria of photo identification set forth in Act 23.[5] The circuit court found that over 330,000 eligible voters in Wisconsin lack an acceptable photo ID for voting. It is likely that the approximately 600,000 people of voting age with disabilities in Wisconsin make up a significant portion of those without an acceptable photo ID in Wisconsin. Indeed, the Government Accountability Board has identified people with disabilities as one group "where there may be a higher concentration of people without the traditional forms of

[4] *Fact Sheet: People With Disabilities Voted in 2008 Election*, by the Research Alliance for Accessible Voting, http://smlr.rutgers.edu/2008-fact-sheet.

[5] Acceptable forms of photo ID are limited to a Wisconsin driver's license or DOT-issued state identification card, an identification card issued by a U.S. uniformed service, a U.S. passport, a certificate of naturalization, an unexpired driving receipt or identification card receipt, an unexpired student ID. Wis. Stat. § 5.02(6m).

identification." *See* Deposition of Kevin Kennedy, 49:8-14 (Feb. 20, 2012).[6]

Under Act 23, individuals who do not possess an acceptable photo ID for voting are entitled to a free photo ID from a Wisconsin Department of Motor Vehicles (DMV) office. Wis. Stat. § 343.50(5)(a), *as amended by* 2011 Wis. Act 23 § 138. However, for the same reasons that people with disabilities are less likely to already possess a photo ID, obtaining a free ID for voting is a difficult endeavor for many people with disabilities.

First, the photo ID must be obtained in person at a DMV. For the vast majority of individuals, this will require access to transportation to the DMV – access to which is limited for people with disabilities living in Wisconsin. When compared to the general population, people with disabilities are at a significant disadvantage in terms of available, accessible transportation. National Council on Disability, *The Current State of Transportation for People with Disabilities in the United States*, June 13, 2005, at 13 http://www.ncd.gov/publications/2005/06132005 (last visited

[6] Filed in support of Plaintiffs' Motion for Preliminary Injunction, *Frank v. Walker*, Case No. 2:11-cv-01128-LA (March 2, 2012).

Nov. 19, 2012) (hereinafter "*State of Transportation for People With Disabilities*"). More than half a million Americans with disabilities are unable to leave their home due to transportation difficulties. *Id.* at 19. Adults with disabilities are more than twice as likely as those without disabilities to have inadequate transportation (31 percent versus 13 percent).[7]

Further, people with disabilities often require specialized, accessible transportation. While public transportation, where available, must be made accessible for people with disabilities pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA), there are many parts of the state where no public transportation is available, particularly in rural areas. In these places, people with disabilities have few or no transportation options. *State of Transportation for People With Disabilities*, at 13.

Even if public transit options are available, gaps in compliance with civil rights laws often make it difficult for people with disabilities to utilize these public transit systems. *Id.* at 26-36 (identifying failure to announce stops for riders

[7] Center for Disease Control and Prevention, *CDC Promoting the Health of People with Disabilities*, http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf (last visited, Nov. 15, 2012).

with visual impairment, failure to maintain accessible equipment, failure to properly secure riders' mobility devices, and refusal to stop for disabled patrons as persistent problems with compliance). And while the ADA requires that public transit systems offer paratransit service for people who are unable to use a fixed-route service due to disability, *id.* at 47, these services are not without their problems. Paratransit is not an on-demand system. It operates by reservation, which must be done one day before the requested ride. 49 C.F.R. § 37.131(b). The legal requirements concerning timeliness of rides are quite general, resulting in long waits for pick-ups and inability to arrive at a location at a specific time for an appointment. *Id.* at § 37.131(b)(2) (allowing transit entities to negotiate within an hour before or after desired pickup time). In addition, widespread systemic problems with paratransit services have been documented around the country, including inability to schedule next-day trips (as required by the ADA) and problems making reservations, such as long telephone hold times. *State of Transportation for People With Disabilities*, at 56-60, 68-69.

People who live in rural areas are even worse off – 40 percent of those in rural areas have no public transit options,

while 25 percent have only minimal public transit service. *Id.* at 151. At the same time, people living in rural areas likely do not have a DMV office within close proximity. More than 30 percent of Wisconsin's voting age citizens live more than 10 miles from the nearest state ID-issuing office open more than two days per week. Brennan Center for Justice, *The Challenge of Obtaining Voter Identification*, at 3 (2012) *available at* http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf (last visited Nov. 19, 2012). More than six percent (256,981) of Wisconsin's voting age citizens are without vehicle access, and of those without vehicle access, 18.4 percent (47,161) live more than 10 miles from the nearest ID-issuing office open more than two days per week. *Id.* at 4.

Where public transit is not available (meaning that no affordable paratransit system is available, either) people with disabilities must pay much higher costs to obtain accessible transportation. For example, in rural parts of northern Wisconsin the cost of private, accessible vehicle transportation is $12 for pickup and $1.35 per mile for each trip. Private taxi services often cost $2.50 to $3.00 per mile. An individual traveling just 10 miles to a DMV would pay

over $50 for one round trip via a private, accessible vehicle, and $50-60 for a taxi.[8] For people living much farther away from the nearest DMV, these costs could double or triple.

Most DMV offices in Wisconsin are open only a few days per week, or in some counties only one or two days per month, making trip-planning even more difficult. Additionally, not all DMV offices are accessible to people with disabilities. Twelve of Wisconsin's 88 DMV offices advertise "limited" accessibility. *See* Wisconsin Department of Transportation, *DMV Service Centers*, http://www.dot.state.wi.us/about/locate/dmv/index.htm#textlist (last visited Nov. 19, 2012). Six counties in Wisconsin have no DMV office that is fully accessible to people with disabilities: Grant, Marinette, Menominee, Oconto, Shawano, and Waupaca. *Id.*

Finally, in addition to costs incurred simply getting to the DMV, individuals must also pay the cost of underlying documents needed to obtain an ID.[9] These costs were

[8] Information provided to DRW by Bob Olsgard, Transportation Coordinator, North Country Independent Living on Nov. 13, 2012.

[9] Applicants for a photo ID must provide documentation of their name, date of birth, identity, residence, citizenship, and social security number. Wisconsin Department of Transportation, *Obtaining An Identification (ID) Card*, http://www.dot.state.wi.us/drivers/drivers/apply/idcard.htm

correctly identified by the circuit court as a substantial burden, and the burden falls even heavier on people with disabilities. Half as many adults with disabilities are employed as those without disabilities (35 percent versus 78 percent), and three times as many adults with disabilities live in poverty with annual household incomes below $15,000 (26 percent versus 9 percent).[10]

The burdens detailed above are substantial and demonstrate that voters with disabilities are more likely to face substantial impairment of voting rights under Act 23. A number of other states with photo ID laws allow voters to attest to their identity with an affidavit if they have no photo ID.[11] Wisconsin's Act 23 stands out for its failure to offer such protections to voters with disabilities, leading the circuit court to correctly label it the most restrictive voter identification law in the United States due to the "absence of

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(last visited Nov. 19, 2012). Most commonly, individuals seeking a free ID will need to obtain a certified copy of their birth certificate. In Wisconsin, the cost of a certified birth certificate is $20. Wisconsin Department of Health Services, *Request for a Birth Certificate*, available at http://www.dhs.wisconsin.gov/vitalrecords/birth.htm (last visited Nov. 19, 2012).

[10] Center for Disease Control and Prevention, *CDC Promoting the Health of People with Disabilities*, http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf (last accessed, Nov. 15, 2012).

[11] *See* Idaho Code § 34-1106(2) (2012); La. Rev. Stat. Ann. § 18:562(A)(2) (2012); Mich. Comp. Laws § 168.523(1) (2012); N.H. Rev. Stat. Ann. § 659:13(I) (2012); S.D. Codified Laws § 12-18-6.2 (2012).

any fall-back procedure as to a qualified voter who lacks the required identification". *See* Order, *Milwaukee Branch of the NAACP, et al. v. Scott Walker et al.*, Dane County Case No. 2011-CV-5492 at 3 (July 17, 2012).

V. Act 23's Exceptions To Photo ID Requirement Are Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

Act 23's limited exceptions to the photo ID requirement do little to protect the right to vote of people with disabilities from being substantially impaired. Only military and overseas voters, confidential voters, and permanent absentee voters are exempt from the requirement to show photo ID. 2011 Wis. Act 23, §§ 63-64, 66. Permanent absentee voters are those who certify that they are "indefinitely confined due to age, illness, infirmity or disability." Wis. Stat. § 6.86(2). Many voters with disabilities, while not "indefinitely confined," do face difficulties leaving their home or obtaining transportation to a DMV to procure a photo ID.

Voters who reside in qualified nursing homes and qualified community-based residential facilities, retirement homes, residential care apartment complexes, or adult family

homes may vote without showing a photo ID if they vote through a special voting deputy, or if no special voting deputy conducts absentee voting in a care facility, a voter may prove their identity with a signed certification of the manager of the care facility. Wis. Stat. § 6.875; 2011 Wis. Act 23 § 71. While all nursing homes are required to have absentee ballots administered by special voting deputies (SVD), Wis. Stat. at § 6.875, SVDs may or may not be available in other care facilities. This leaves residents of such facilities dependent on facility managers who are not routinely trained in their responsibilities to resident voters to sign off on the absentee ballots. *See id.* at § 6.87(4)(b)5. Should the manager of the facility refuse to certify the ballot, the resident is left with no way to cast a ballot other than obtaining a photo ID.

VI. Provisional Ballot Provision Is Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

The availability of casting a provisional ballot does not prevent disabled voters without photo ID from being disenfranchised. Importantly, provisional ballots will be counted only if the photo ID that the voter lacked in the first

place is produced.[12] The same difficulties with transportation and access detailed above will leave voters with disabilities less likely to have the ability to return with the proper identification to have their provisional ballots cast and counted – particularly because the voter is required to obtain transportation, funds, and documentation for the photo ID in a much tighter timeframe.

Although Act 23 moved the deadline for voters to cure a provisional ballot from 4:00 p.m. the day after the election to 4:00 p.m. the Friday after the election, a mere two days additional time may not provide sufficient time for some voters with disabilities to obtain a photo ID and arrange to provide that ID to their municipal clerk. As discussed above, often more than a day is required to line up accessible or paratransit options. The limited availability of transportation may not coincide with the limited hours of the nearest DMV office. Compounding the problem further for many rural voters is that, in addition to irregular DMV hours, a large number of Wisconsin municipal clerks are part time and may not be open regular hours after Election Day until 4pm

[12] By way of contrast, other states allow the use of an affidavit to cure provisional ballots. *See, e.g.*, IND. CODE § 3-11.7-5-2.5 (2012).

Friday.[13] The substantial burden placed upon voters with disabilities who were required to cast a provisional ballot will likely result in their vote never being counted.

CONCLUSION

For the foregoing reasons, DRW urges this Court to affirm the decision of the Circuit Court.

Dated this 10th day of December 2013.

Respectfully submitted,
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[13] GAB Executive Director Kevin Kennedy testified to lack of specific standards for clerk hours in Wisconsin's election laws, stating that clerks may limit the number of hours that they are open to cure provisional ballots. Deposition of Kevin Kennedy at 23:5-17.

CERTIFICATION OF COMPLIANCE, FILING, AND SERVICE

I hereby certify that the Brief of *Amicus Curiae* DRW conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c). The length of this Brief is 2712 words, Times New Roman, 13 point body text, 11 point for quotes and footnotes.

I hereby certify that I have submitted this date an electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin is identical in content and format to the printed copy of the brief filed on this date. An original and ten copies of the Brief of *Amicus Curiae* Disability Rights Wisconsin, each bound with an original or copy of this Certificate, have been filed with the Court, and a copy of the same submission have been served on each of the parties identified below, all by first class mail, postage prepaid, to the following persons:

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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Case No. 2012AP1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, AND ANTONIO K. WILLIAMS,

Plaintiffs-Respondents,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, AND TIMOTHY VOCKE,

Defendants-Appellants.

ON APPEAL FROM A JULY 17, 2012,
FINAL JUDGMENT
OF THE DANE COUNTY CIRCUIT COURT,
HON. DAVID T. FLANAGAN, PRESIDING
CASE NO. 11-CV-5492

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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COURT OF APPEALS

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Case No. 2012AP1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, AND ANTONIO K. WILLIAMS,

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BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF THE ISSUE

Do the photographic identification for voting requirements of 2011 Wisconsin Act 23 ("Act 23") facially violate the right to vote guaranteed by Wis. Const. art. III, § 1?

Answer by the circuit court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested. This appeal involves important questions of constitutional law and a significant trial court record. Oral argument will allow counsel to address any specific questions and concerns of the Court.

Publication of this Court's decision is requested because the challenged statutory requirements are of public importance and because resolution of the validity of those requirements will provide needed guidance on important issues of Wisconsin constitutional law.

STATEMENT OF THE CASE

This case involves a constitutional challenge to the portions of Act 23 that require each eligible Wisconsin elector who attempts to vote to verify his or her identity by presenting an acceptable form of photographic identification to election officials. Plaintiffs-Respondents are two private, non-profit organizations and twelve individuals. Defendants-Appellants are the Governor of the State of Wisconsin and the individual members of Wisconsin's Government Accountability Board ("GAB").[1] The circuit court declared that Act 23's identification requirements violate the right to vote guaranteed by Wis. Const. art. III, § 1 and permanently

[1]Plaintiffs-Respondents will be referred to collectively as Plaintiffs. Defendants-Appellants will be referred to collectively as Defendants.

enjoined all implementation and enforcement of those requirements.

I. STATUTORY BACKGROUND

Prior to Act 23, Wisconsin electors were not required to present identification when voting, other than proof of residence in certain circumstances. Instead, voters identified themselves by stating their name. Under Act 23, an elector must present proof of identification to vote in person or by absentee ballot. Proof of identification is defined as identification that contains the name and a photograph of the individual to whom the identification was issued, which name must conform to the name on the individual's voter registration form. Wis. Stat. § 5.02(16c). Act 23 specifies nine forms of acceptable photo identification, including a Wisconsin driver license or state photographic identification card ("state ID") issued by the Wisconsin Department of Transportation ("DOT"). Wis. Stat. § 5.02(6m).

Act 23 requires, with certain exceptions,[2] that an elector wishing to vote must present an acceptable form of identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that the photograph on the identification reasonably resembles the elector. Wis. Stat. § 6.79(2)(a).[3] If an elector does not have acceptable identification, the elector may vote by provisional ballot pursuant to Wis. Stat. § 6.97. Wis. Stat. § 6.79(2)(d) and (3)(b). The provisional ballot will be counted if the elector presents acceptable identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners by 4 p.m. on the Friday after the election. Wis. Stat. § 6.97(3)(b). If an in-person voter presents identification bearing a name that does not

[2] *See* Wis. Stat. § 6.87(4)(a)-(b).

[3] Similar requirements apply to absentee voters. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.87(1); Wis. Stat. § 6.87(4)(b)1.

conform to the voter's name on the poll list or a photograph that does not reasonably resemble the voter, the person may not vote. Wis. Stat. § 6.79(3)(b).

To accommodate electors who do not possess acceptable identification and to ensure that no elector is charged a fee for voting, Act 23 requires DOT to issue an identification card free of charge to an elector who satisfies all requirements for obtaining such a card, is a U.S. citizen who will be at least 18 years of age on the date of the next election, and requests that the card be provided without charge for purposes of voting. Wis. Stat. § 343.50(5)(a)3.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on December 16, 2011 (R. 2). On March 6, 2012, the circuit court preliminarily enjoined Act 23's photo identification requirements (R. 31). On March 15, 2012, Defendants filed a petition for leave to appeal the preliminary injunction order. On March 28, 2012, this Court certified the petition to the Wisconsin Supreme Court (R. 45). On April 16, 2012, the Supreme Court refused the certification and, on April 25, 2012, this Court denied the petition for leave to appeal (R. 55, 64).

In the circuit court, a bench trial took place on April 16 through 19, 2012, April 30, 2012, and May 4, 2012, after which the parties submitted written argument (R. 80-83, 89-97). On July 17, 2012, the circuit court issued an Order for Judgment and Judgment Granting Declaratory and Injunctive Relief which held that Act 23's photo identification requirements are invalid under Wis. Const. art. III, § 1 and permanently enjoined those requirements (R. 84; A-Ap. 101-20). Defendants filed a notice of appeal on July 23, 2012 (R. 85).

STANDARD OF REVIEW

The constitutionality of a statutory provision is a question of law that is reviewed *de novo* on appeal. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. Trial court findings of fact will be affirmed unless they are clearly erroneous. Wis. Stat. § 805.17(2). In reviewing questions of constitutional fact, the appellate court first reviews the circuit court's findings of fact under the clearly erroneous standard and then reviews the constitutional impact of those findings under a *de novo* standard. *See State v. Hajicek*, 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 620 N.W.2d 781.

ARGUMENT

I. THE VOTER IDENTIFICATION REQUIREMENTS DO NOT IMPOSE AN UNDUE BURDEN ON VOTING RIGHTS UNDER WIS. CONST. ART. III, § 1.

The State of Wisconsin has a clear and legitimate interest in protecting the integrity of elections, safeguarding the voting rights of all voters, and establishing public confidence in election results. The issue before the Court is whether these interests justify the minimal burdens faced by some voters in obtaining proper identification. The circuit court considered two kinds of evidence: (1) expert statistical evidence about the number of eligible electors in Wisconsin who currently do not possess either a Wisconsin driver license or a state ID; and (2) anecdotal testimony from 34 individual witnesses about their personal experiences in applying for a driver license or a state ID. On the basis of those two categories of evidence, the circuit court concluded that the voter identification requirements of Act 23, on their face, substantially impair the right to vote, in violation of Wis. Const. art. III, § 1.

The circuit court, however, inferred far more from the evidence than was logically justified. Regarding the statistical evidence, the court too easily accepted the opinion of Plaintiffs' expert witness that approximately 333,000 eligible Wisconsin voters lack an acceptable form of identification and provided only a conclusory rejection of contravening expert testimony demonstrating that the available data did not support that opinion. More significantly, the court wrongly inferred from a small number of questionable anecdotes that the process of obtaining a driver license or state ID is so burdensome as to substantially impair the right to vote. The reliance on that anecdotal evidence was misplaced. The circuit court ignored the fact that the individual witnesses did not present a representative sampling of the burdens that Wisconsinites typically face in obtaining a driver license or state ID, but rather, were recruited and hand-picked for the purpose of supporting the Plaintiffs' position in this litigation. The court also ignored the fact that almost all of the individual witnesses were shown to actually possess a Wisconsin driver license or state ID and there was no showing that the remaining handful were unable to obtain acceptable identification.

Furthermore, the circuit court overlooked the fact that many of the individual witnesses could easily have avoided many of the burdens they alleged, if they had taken such simple steps as looking up in advance what documentation must be presented at offices of DOT's Division of Motor Vehicles ("DMV"), checking the hours when those offices are open, asking about times when the offices are especially busy, or choosing reasonable methods of transportation to those offices. In addition, the court overlooked the fact that a number of the individual witnesses admitted that they had sought a driver license or state ID for reasons other than voting and thus would have encountered the same "burdens" even without any voter identification requirements. In sum, the circuit court too readily accepted Plaintiffs' exaggerated claims about the burdens involved in simply obtaining a driver license or state ID card.

It will be shown below that the circuit court's decision in this case is incorrect for six reasons. First, the court erred as a matter of law by holding that the voter identification requirements are subject to strict scrutiny. Second, the court erred by holding that the right to vote should be treated differently under the Wisconsin Constitution than it is treated under the federal constitution. Third, the court erred by facially invalidating the voter identification requirements as to all voters in spite of the undisputed evidence that those requirements do not burden the vast majority of voters. Fourth, the Court erred both in accepting the statistical conclusions of Plaintiffs' expert witness and in finding those statistics sufficient to establish a severe burden on the right to vote. Fifth, the court erred in finding the anecdotal testimony of the individual fact witnesses sufficient to establish a severe burden on the right to vote. Finally, the court erroneously failed to recognize that the voter identification requirements are reasonably calculated to advance the State's compelling interests in preventing electoral fraud and promoting voter confidence in the integrity of elections.

A. Under both Wisconsin and federal case law, reasonable, non-discriminatory regulation of voting procedures is not subject to strict scrutiny unless it severely burdens the right to vote.

1. Wisconsin case law.

Plaintiffs claim that Wisconsin's voter ID requirements impose an unconstitutional burden on voting under Wis. Const. art. III, § 1 which states: "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." The circuit court held that, under that provision, any statute seeking to regulate the right to vote is subject to heightened scrutiny (R. 84 at 17; A-Ap. 117). Contrary

to that conclusion, however, the Wisconsin Supreme Court has never held that heightened scrutiny applies to all voting regulations, but, rather, has consistently applied a more flexible approach that permits reasonable regulations that impose minimal burdens.

In *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), the Court rejected a claim that a statute allowing eligibility challenges at the polls was unconstitutional because it prescribed qualifications for electors beyond those provided in the constitution. *Id.* at 283-84. The Supreme Court did not subject the law to the type of strict scrutiny employed by the circuit court in this case, but held that "it is clearly within [the Legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualif[i]ed elector." *Id.*

In *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875) (Ryan, C.J.), the Court rejected a claim that procedural errors made by election officials invalidated the votes of individuals who had not made the errors. While the Court concluded that the right to vote could not be impaired by erroneous official actions, it also held that the Legislature can regulate voting by requiring reasonable proof of a voter's qualifications. *Id.* at 86-87. Such proof requirements "are not unreasonable, and are consistent with the present right to vote, as secured by the constitution. The statute imposes no condition precedent to the right; it only requires proof that the right exists." *Id.* at 87. If a voter is denied the opportunity to vote for failing to provide such proof, he is disenfranchised not by the statute, "but by his own voluntary refusal of proof that he is enfranchised by the constitution." *Id.*

The same principles were followed in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), which held that the right to vote was not infringed by a statute providing that a candidate nominated by more than one political party could appear only once on the ballot. In upholding the challenged law, the Court noted that the right to vote "cannot be secured without legislative

regulations" and held that, as long as such regulations "are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought," they do not contravene any constitutional right, but "strengthen and make effective the constitutional guaranties[.]" *Id.* at 533-34; *see also State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 337, 125 N.W. 961 (1910) (primary election law did not unconstitutionally interfere with the right to participate in selection of candidates for public office).

In *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910), the Court again recognized that the right to vote, although fundamental, "is yet subject to regulation like all other rights." *Id.* at 15. The Court explained that legislation that preserves and promotes voting rights by preventing abuse and promoting efficiency is constitutional as long as it does not extend beyond what is reasonable, so as to impair or destroy those rights. *Id.* at 17-18. The key question is "whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubts being resolved in favor of the proper exercise of lawmaking power." *Id.* at 18.

In *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 175 (1913), the Court, in rejecting a claim that a statute prescribing voter residency requirements violated the voting rights of transient workmen, reasoned that "to prescribe reasonable rules and regulations for the exercise of the elective franchise . . . infringes upon no constitutional rights." *Id.* at 478. The aim of such regulations, the Court noted, "is to protect lawful government, not to needlessly harass or disfranchise any one." *Id.* at 479.

Clearly, reasonable procedural regulations designed to protect the integrity of elections are not constitutionally suspect and do not violate the fundamental right to vote.

Since these early cases, this reasonableness test has been consistently applied. In *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949), the court rejected a claim that voting rights were impaired by a statute governing non-partisan primary and runoff contests, noting that although "the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired[,] . . . the legislature has the constitutional power to say how, when, and where his ballot shall be cast[.]" *Id.* at 613

The Court repeated the same language in upholding the constitutionality of a statute providing that absentee ballots could not be counted unless they were properly authenticated by the municipal clerk. *Gradinjan v. Boho*, 29 Wis. 2d 674, 684-85, 139 N.W.2d 557 (1966).

All these cases held that the right to vote, although fundamental, is subject to reasonable regulation designed to protect the integrity of elections. None of them held that all regulations affecting voting rights are constitutionally suspect or automatically subject to heightened scrutiny. Unless a regulation so severely burdens the right to vote as to destroy or substantially impair it, the regulation is subject to a test of reasonableness in light of its legitimate purpose. *McGrael*, 144 Wis. at 18.

Dells v. Kennedy, 49 Wis. 555, 6 N.W. 381, 6 N.W. 246 (1880), cited by the circuit court, is not to the contrary. In that case, the Court invalidated the 1879 voter registration statute because it prohibited an elector from voting if he failed to register prior to the election. *Id.* at 556. *Dells*, however, did not hold that *every* law requiring proof of qualifications unconstitutionally burdens voting rights. The fatal flaw in the 1879 law was that an otherwise qualified elector, "without his own default or negligence," could lose his vote "by being utterly unable to comply with this law by reason of absence, physical disability, or non-age[.]" *Id.* at 557.

Dells did not hold that a statute is automatically void if it prohibits even a single elector from voting. Such a reading would be inconsistent with the other decisions discussed above and no published Wisconsin appellate decisions apply *Dells* in that way. Moreover, a reading of *Dells* as voiding any statute that prevents even a single elector from voting conflicts with the modern distinction between facial and as-applied challenges. *See* Section I.C., below. For all these reasons, the circuit court's reliance on *Dells* is misplaced and the flexible approach represented by the preponderance of Wisconsin Supreme Court precedent should be applied.

2. Federal case law.

The flexible approach to election laws under the Wisconsin Constitution is consistent with federal constitutional analysis. The U.S. Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction[,]" but this right "is not absolute[.]" *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "[T]he States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Id.* This power applies "not only as to times and places, but in relation to . . . prevention of fraud and corrupt practices" so as to "enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Indeed, states are compelled to take "an active role in structuring elections," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and "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." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974).

Because voting is a fundamental right, state regulations are not entitled to unlimited deference. It does not follow, however, that every inconvenience in voting is unconstitutional or that heightened scrutiny applies to

every claimed burden. Rather, given states' responsibility to protect electoral integrity, the Court recognizes that all "[e]lection laws will invariably impose some burden upon individual voters[]" and concludes that such a burden does not automatically compel strict scrutiny. *Burdick*, 504 U.S. at 433. Indeed, a contrary rule would impermissibly "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. Thus, "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Id*. at 441 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Storer*, 415 U.S. at 730).

The deference given a state election law is determined by weighing "the character and magnitude of the asserted injury" against "the precise interests" the state is seeking to serve. *Burdick*, 504 U.S. at 434 (citation and internal quotation marks omitted). A regulation deserves strict scrutiny only when it places "severe burdens on plaintiffs' rights[.]" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Such a regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). When the burden is not severe, however, the review is "less exacting," *Timmons*, 520 U.S. at 358, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Burdick*, 504 U.S. at 434 (citation and internal quotation marks omitted).

The Seventh Circuit has recognized that strict scrutiny is "especially inappropriate" when reviewing a voter identification law because, in such cases, "the right to vote is on both sides of the ledger." *Crawford v. Marion County Election Board*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). This reflects the fact that "'[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free

exercise of the franchise.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)). Voter identification requirements are meant to prevent dilution of legal votes by illegal voters. A flexible and deferential standard acknowledges that state legislatures are better equipped than courts to draw the delicate balance between encouraging all eligible voters to cast ballots and discouraging ineligible voters from trying to do so. *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) ("[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry."), *cert. denied*, 544 U.S. 923 (2005).

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the U.S. Supreme Court applied this flexible standard in upholding the constitutionality of Indiana's voter identification requirements. *Id.* at 191-97. The Court balanced the burden those requirements imposed on voters against the state's interests in deterring and detecting voter fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of elections. *Id.* The Court concluded that the burdens were "amply justified" by those state interests. *Id.* at 204. The approach taken in *Crawford* is entirely consistent with the Wisconsin Supreme Court's approach to voting rights cases and thus is applicable here.

B. The right to vote should be treated the same under the Wisconsin and federal constitutions.

The circuit court rejected the balanced, flexible approach taken in *Crawford* because "this case is founded upon the Wisconsin Constitution which expressly

guarantees the right to vote, while Crawford was based upon the U.S. Constitution which offers no such guarantee." (R. 84 at 18; A-Ap. 118). This distinction overstates the difference between the two constitutions.

In construing the Wisconsin Constitution, courts are directed to examine the plain meaning of the text, the constitutional debates and practices of the time when the provision was framed, and the earliest legislative interpretations of the provision, to determine the intended meaning. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408. The circuit court decision, however, contains no such analysis to support the conclusion that the framers of the Wisconsin Constitution intended to restrict legislative power to enact procedural regulations promoting electoral integrity more than such power is restricted under the federal constitution. The mere fact that the voting provisions in the Wisconsin Constitution include language not found in the federal constitution, without more, is not probative of the specific meaning of the state provisions.

In rejecting the analytical approach of federal law, the circuit court also departed from established precedent. Despite linguistic differences, the Wisconsin Supreme Court construes the due process and equal protection clauses of the Wisconsin Constitution as substantially equivalent to their federal counterparts. *See State v. West*, 2011 WI 83, ¶ 5 n.2, 336 Wis. 2d 578, 800 N.W.2d 929; *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989). While the claim at issue does not directly rely on due process and equal protection, the analysis of voting rights is generally conducted in terms similar to the due process and equal protection analyses. *See Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, ¶ 76, 263 Wis. 2d 709, 666 N.W.2d 816 (citing *Anderson*, 460 U.S. at 786-87) (observing that state election laws affecting the rights of voters "often raise issues related to the First Amendment, due process, and equal protection under the law[]" and recognizing that "[t]he analysis for all these types of cases is essentially the same."). It

follows that the Wisconsin and federal constitutions should be viewed as providing substantially equivalent levels of protection to voting rights. The circuit court, however, departed from this precedent and introduced a novel element of non-uniformity into the state and federal approaches.

For these reasons, the right to vote under Wis. Const. art. III, § 1 should be treated in the same way the right to vote is treated under the federal constitution and federal court decisions, including *Crawford*.

C. Facial challenges are disfavored and cannot succeed where the challenged law does not severely burden the vast majority of voters.

The only issue before the Court in this appeal is the *facial* constitutionality of Wisconsin's voter identification requirements. Facial challenges to legislation are disfavored. *See Wash. State. Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). First, "[c]laims of facial invalidity often rest on speculation[,]" and consequently "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id*. Second, facial claims are contrary to "the fundamental principal of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450 (citations and internal quotation marks omitted). Third, facial challenges "threaten to short circuit the democratic process" by broadly invalidating majoritarian laws in a way that "frustrates the intent of the elected representatives of the people." *Id.* at 451 (citations and internal quotation marks omitted). All of these concerns are implicated here.

Under the usual approach to facial challenges, a challenger must show that the law is void from its beginning to its end and cannot be constitutionally enforced under any circumstances. *Wood*, 323 Wis. 2d 321, ¶ 13; *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) ("The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]"). The challenger "must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional." *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 520, 665 N.W.2d 328; *see also Salerno*, 481 U.S. at 745. If "there is at least one interpretation and application of a statute that is constitutional, that statute is constitutional on its face." *In re Gwenevere T.*, 2011 WI 30, ¶ 48 n.16, 333 Wis. 2d 273, 797 N.W.2d 854. For this reason, "[i]t is very difficult to prevail upon a facial challenge to a statute or ordinance." *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 74 n.4, 311 Wis. 2d 1, 751 N.W.2d 780 (Abrahamson, C.J., concurring); *see also Salerno*, 481 U.S. at 745 ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount[.]").

The United States Supreme Court sometimes takes a modified approach to facial challenges when the challenged statute allegedly burdens constitutionally protected conduct, such as free speech. In such contexts, a challenged law is not required to be invalid in all applications, but will be strictly scrutinized if there is evidence that it imposes burdens on a substantial amount of constitutionally protected conduct that are severe enough and widespread enough to be excessive in relation to the law's legitimate purpose. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at 450 n.6 (citing cases); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 411-12 (1992) (White, J., concurring).

A similar approach was taken to voting rights in *Crawford*. As here, the *Crawford* plaintiffs alleged that voter identification requirements—as generally applied to all voters—impose an unconstitutional burden on the right to vote. 553 U.S. at 187. The only real difference is that the claims in *Crawford* were brought under the Fourteenth Amendment to the United States Constitution, while the claim here is brought under the Wisconsin Constitution. *See id.*

Crawford noted that because the plaintiffs sought to invalidate the law in all its applications, they bore a heavy burden of persuasion that required a showing that the broad application of the voter identification law to all voters imposed burdens on the right to vote that were severe enough and widespread enough—when considered in relation to the law's legitimate sweep—to justify the strong medicine of facial invalidation. *Id.* at 199-200, 202-03. Because the challenge was a facial one, the Court did not analyze the burdens on particular voters or groups, but rather "consider[ed] only the statute's *broad application to all Indiana voters*[.]" *Id.* at 202-03 (emphasis added).

The Court thus examined the evidentiary record and concluded that it was insufficient to establish that the burdens alleged by the plaintiffs were sufficiently heavy or widespread to invalidate the entire statute. *Id*. at 200-03. The Court acknowledged that "a somewhat heavier burden may be placed on a limited number of persons[]" who because of economic or other personal reasons may find it especially difficult to acquire a birth certificate or other documentation that may be needed to obtain acceptable voter identification. *Id*. at 199. Nonetheless, the Court reasoned that "even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation." *Id.* at 199-200 (footnote omitted). In other words, even if there is evidence of a potentially significant burden on the voting rights of particular individuals, that does not

warrant *facial* invalidation of the challenged law. Only if the broad application of the law to all voters imposes overall burdens that are severe enough to be substantially excessive in relation to the state's interests can facial invalidation be appropriate. *See id.* at 202-03.

Crawford concluded that the evidentiary record failed to establish burdens sufficient to invalidate the entire statute. *Id*. at 200-03. *Crawford* thus upheld the Indiana law against facial challenge, concluding that "[t]he application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" *Id.* at 204 (quoting *Anderson*, 460 U.S. at 788 n.9).

Plaintiffs' facial challenge to Wisconsin's voter identification requirements fails for the same reasons that similar claims failed in *Crawford*. As in that case, the evidence here is insufficient to show that the voter identification requirements impose burdens on voting rights severe and widespread enough to justify the conclusion that the State should be enjoined from requiring *any* voters to verify their identity at the polls. On the contrary, as shown below, the evidence in this case establishes that Wisconsin's voter identification requirements are valid *at least* as applied to the vast majority of the voting eligible population that already possesses a Wisconsin driver license, state ID, or one of the other statutorily acceptable forms of voter identification. Moreover, there is no evidence that the small minority of electors who do not yet have an acceptable form of identification cannot obtain it or face any severe obstacles to doing so. Because Wisconsin's voter identification requirements, like Indiana's, can be constitutionally applied to the vast majority of voters, they are facially valid under the *Crawford* analysis.

D. The anecdotal testimony of the individual witnesses fails to establish a severe and widespread burden on the right to vote.

For the reasons noted above, the circuit court erred in failing to follow *Crawford* and failing to examine whether the evidence Plaintiffs submitted was sufficient to establish beyond a reasonable doubt that the application of Wisconsin's voter identification requirement to all eligible voters imposes burdens on voting rights that are severe enough and widespread enough to warrant facial invalidation. When that examination is made, it is clear that Plaintiffs failed to carry their heavy burden.

Plaintiffs submitted two kinds of evidence. The first type of evidence consisted of affidavits and depositions from 34 individual witnesses whose voting rights allegedly have been burdened by the voter identification requirements (R. 60: Exs. 14-30, 51, 53-55, 58-59, 62-71, 73).[4] In relying on this evidence, however, Plaintiffs overlook the fact that such individualized burdens, even if factually established, provide no basis for *facially* invalidating the voter identification requirements. *Crawford* implicitly left the door open for some *as-applied* claims when it recognized that voter identification requirements would place special burdens on some individual voters. *Crawford*, 553 U.S. at 199-200. No such as-applied claims, however, are before this Court. With regard to a facial claim like the one that *is* before the Court, *Crawford* found that even unjustified burdens imposed on a few voters were "by no means sufficient" to facially invalidate a state voter ID law. *See id.*

[4]The second type of evidence submitted by Plaintiffs was expert testimony about the number of electors in the state who lack a Wisconsin driver license, a Wisconsin state ID, or one of the other forms of acceptable voter identification. That evidence, which also is insufficient to carry Plaintiffs' burden of proof, is discussed in section I.E., below.

Stated differently, the evidence regarding the individual witnesses—to the extent it is offered to show the burden upon people who must obtain voter identification—is merely anecdotal. A series of anecdotes about a small number of selected individuals does not rise to the level of showing that the voter identification requirements—as generally applied to all voters—impose a severe enough burden on voting rights to justify the extraordinary remedy of facially invalidating a state law. In addition, even out of this small number of individuals, it was undisputed that all but five had successfully obtained acceptable identification by the time of trial and there was no evidence that the remaining five could not do so (R. 60: Ex. 58 at ¶ 4, Ex. 1 (Frank Depo.) at 11-12, 41-43, Ex. 30 at 6-7, Ex. 23 at 9-10; Ex. 64 at ¶ 4).

Furthermore, the deposition transcripts show that many of the individual witnesses were recruited outside DMV offices and asked to sign affidavits (R. 60: Ex. 19 at 9, Ex. 16 at 16, Ex. 22 at 17-18, Ex. 14 at 12, Ex. 18 at 13, Ex. 15 at 7-8). It is reasonable to infer that these individuals were selected to participate in this case not because they typify the burdens encountered in obtaining a license or state ID from DOT, but rather because they were illustrative of those who were *most* burdened. Such hand-picked witnesses cannot be considered a representative sampling of all electors and Plaintiffs conceded as much at trial (R. 91 at 164). The circuit court nonetheless believed that these individuals illustrate the kinds of problems a significant percentage of Wisconsinites will face in obtaining voter identification (*see* R. 84 at 12-14, 19; A-Ap. 112-14, 119). The record, however, contains no concrete or quantitative evidence to support the contention that these anecdotes are illustrative of burdens sufficiently widespread and severe to justify facial invalidation of a state law.

The burdens alleged by these witnesses fall into three categories. The first category includes burdens imposed by the general time and effort involved in obtaining an acceptable form of identification. Notably,

most of the witnesses complained about the practical burden of transportation costs and time involved in obtaining identification. In addition, two witnesses described the specific burden of having to acquire a social security card in order to obtain acceptable identification (*See* R. 60: Exs. 58 at ¶ 4, 71 at ¶ 4). Another witness indicated that DOT refused to issue him a photo ID because he failed to supply sufficient documentation of his residence (*See* R. 60: Ex. 27 at 7).

This category of burdens does not constitute a severe burden on the right to vote. *Crawford* expressly found that "the inconvenience of making a trip to the [bureau of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." Similarly, *Crawford* found that "[b]urdens . . . arising from life's vagaries," such as losing or forgetting one's ID or undergoing an ordinary change in one's physical appearance, "are neither so serious nor so frequent as to raise any question about the constitutionality of [Indiana's voter ID law.]" *Id.* at 197. The first category of burdens described by the individual witnesses, therefore, does not establish a severe or widespread burden on the right to vote.

Furthermore, many of these alleged burdens were actually avoidable with a modicum of planning and effort. Some of the witnesses complained of making multiple trips to a DMV office, but none had called ahead or checked online to find out what documentation to bring. Danettea Lane, for example, first went to DMV without asking what documentation to bring and without taking any identification (R. 60: Ex. 22 at 17). She went to DMV two other times and left because she felt the line was too long (R. 60: Ex. 22 at 9-10). There is no evidence that she asked when slower times might be. On Lane's final trip to DMV, which could have been her only trip if she had planned ahead, she successfully obtained her ID in 20 minutes (R. 60: Ex. 22 at 10). Similarly, Kristen Green

went to DMV when the office was closed without having checked the business hours in advance (R. 60: Ex. 20 at 8). Other witnesses similarly failed to do proper planning (R. 60: Ex. 23 at 9-10, Ex. 24 at 6-7, Ex. 17 at 9, Ex. 21 at 9, Ex. 27 at 11).

In contrast, Speciall Simmons called ahead, took the necessary documentation to DMV, and successfully obtained her ID in one trip without incurring any special burden (R. 60: Ex. 26 at 5-8). None of the other individual witnesses indicated why they could not have undertaken a similar amount of planning.

Those individuals who complained about the length of the lines at DMV did not testify that they made any effort to find out when wait times are typically shorter (R. 60: Ex. 20 at 8, Ex. 22). Nor did they testify that the waiting time at DMV was disproportionate to waiting times typically encountered in other governmental or institutional settings. A statewide law of substantial importance cannot be found unconstitutional just because DMV offices are sometimes busy and individuals do not always think ahead.

Moreover, some of the individuals complaining about travel costs could have avoided the costs they incurred or were not really as burdened as they claimed. One witness paid for three trips to DMV, even though she lives within a half mile of the office (R. 60: Ex. 20 at 6). Another says he was charged $15 by his brother for a ride to the DMV, but his wife owns a car and he was able to obtain a ride without cost on a second occasion (R. 60: Ex. 28 at 6, 11). Jennifer Platt, a school teacher, indicated in her affidavit that she would have to miss work to go to DMV to get her license (R. 60: Ex. 25 (Platt Aff.) at ¶ 6). At her deposition, however, Platt testified that she was able to go during her Christmas vacation (R. 60: Ex. 25 at 13). Some of the individuals who complained about the cost of transportation to DMV nonetheless testified in their depositions that they have discretionary income for

such items as cigarettes and alcohol (R. 60: Ex. 19 at 18, Ex. 18 at 13, Ex. 22 at 13, Ex. 28 at 11).

In addition, some witnesses testified that they sought an ID for purposes other than voting. One individual said she needed a photo ID for her daughter to be released to her from a hospital and that voting was not a part of her purpose in obtaining the ID (R. 60: Ex. 14, at 8-9). Another testified that his decision to obtain a state ID was prompted by finding out that he needed one for cashing checks (R. 60: Ex. 23 at 10-11). Other witnesses likewise testified that they used their state IDs primarily for cashing checks and for other purposes unrelated to voting (R. 60: Ex. 22 at 7, Ex. 28 at 10). Moreover, at least five of the witnesses obtained a driver license, rather than a state ID, which shows that voting was not their primary purpose (R. 60: Ex. 18 at 6, Ex. 22 at 12, Ex. 25 at 7, Ex. 26 at 8-9, Ex. 29 at 8, 10-11). Because these people acted for reasons other than voting, any burdens they incurred would have occurred even without the voter identification requirements.

The second category of alleged burdens includes the financial burden involved in having to pay a fee to obtain documents other than voter identification—such as a birth certificate—that may be needed to obtain acceptable voter identification. Seventeen of the witnesses state that they have had to pay (or would have to pay) for a birth certificate in order to obtain an acceptable license or ID from DOT (*See* R. 60: Exs. 1, 15-16, 21-23, 25, 29, 55, 58-59, 65-66, 68, 70-71, 73). This category also does not burden the right to vote enough to support a facial challenge.

Wisconsin's voter identification provisions do not require anyone to pay a fee in order to vote. Any eligible elector can obtain a free photo ID from DOT by informing the agency that a free ID is needed for the purpose of voting. Wis. Stat. § 343.50(5)(a)3. In *Crawford*, similarly, Indiana provided free voter ID cards and the court noted that this saved the law from any claim that it

imposed an unconstitutional fee on voting. *See Crawford*, 553 U.S. at 198. Moreover, *Crawford* acknowledged that "Indiana, like most States, charges a fee for obtaining a copy of one's birth certificate." *Crawford*, 553 U.S. at 198 n.17. That fact, however, did not prevent the Court from upholding the facial constitutionality of the law. The mere fact that some voters have to pay for a birth certificate in order to obtain identification thus is not enough to facially invalidate voter identification requirements.

Furthermore, among those witnesses who testified that they do not have a birth certificate, some had obtained one in the past but had lost it or simply neglected to bring it to DMV. Platt stated in her affidavit that she could not get her license because she did not have her birth certificate and that she would have to order it from California (R. 60: Ex. 25 (Platt Aff.) at ¶¶ 3, 5). At her deposition, however, Platt testified that she actually had her birth certificate in a box at home and was able to use it to obtain her license (R. 60: Ex. 25 at 12). Moreover, none of the individuals who testified that they had to spend $15 to $30 for a birth certificate testified that this expense was beyond their means.

The third category of burdens consists of more specific problems experienced by small numbers of individuals in specialized circumstances. For example, two witnesses claim that they face the financial burden of having to file a court petition to correct errors on their birth certificates before DOT will issue them an acceptable ID (*See* R. 60: Exs. 1, 23). Neither witness, however, has actually shown that such a burden would be incurred.

Ruthelle Frank testified that it was her understanding that her maiden name is misspelled on her birth certificate and that it could cost up to $200 to have the name corrected (R. 60: Ex. 1 (Frank Depo.) at 9-10, 16). She acknowledged, however, that the correction would not necessarily cost that much and testified that she

did not undertake to find out the actual cost (R. 60: Ex. 1 (Frank Depo.) at 9-10). Frank has never obtained a copy of her birth certificate, nor has she submitted it to DOT so they could determine whether it is satisfactory for purposes of obtaining a state ID (R. 60: Ex. 1 (Frank Depo.) at 20-22, 25). Accordingly, she does not know whether DOT would require her birth certificate to be corrected before issuing her an ID (R. 60: Ex. 1 (Frank Depo.) at 42). Moreover, Frank made it clear that she is not interested in getting her birth certificate if it is going to cost *any* money and does not intend to pursue the matter further or pay any fees or costs to obtain a photo ID (R. 60: Ex. 1 (Frank Depo.) at 11-12, 25, 52).

Similarly, Ricky Lewis testified that state employees have told him that his birth certificate bears his middle name and his mother's maiden name and that he could file a court petition to have the name on the certificate corrected (R. 60: Ex. 23 (Lewis Aff.) at ¶ 7). But there is no evidence that Lewis has presented his unamended birth certificate to DOT and been denied a state ID or that he has otherwise taken steps to establish the necessity of having his birth certificate amended for voter identification purposes (R. 60: Ex. 23). Moreover, even if an amendment should be necessary, Plaintiffs have not established that the requisite steps would be impossible or severely burdensome. On the contrary, similar to Frank, Lewis simply asserts that he has no intention to incur any costs in order to obtain an acceptable voter ID. (R. 60: Ex 23 (Lewis Aff.) at ¶ 9).

For all of the above reasons, the circuit court erred as a matter of law when it found the anecdotal testimony of the individual witnesses to be sufficient to establish a severe burden on the right to vote.

E. The testimony of Plaintiffs' expert fails to establish a severe and widespread burden on the right to vote because it is not based on sufficient data and is not the product of reliable principles and methods.

In addition to the anecdotal evidence of the individual witnesses, Plaintiffs also submitted expert testimony by University of Wisconsin-Madison Political Science Professor Kenneth R. Mayer ("Mayer"), who presented statistical analysis that tried to estimate the number of electors in the state who lack a Wisconsin driver license, a Wisconsin state ID, or one of the other forms of acceptable voter identification. Mayer's estimate of that number, however, was not based on sufficient data and was not the product of reliable principles and methods. Most importantly, there was no quantitative, non-anecdotal evidence that electors who currently lack acceptable identification—whatever their actual number may be—are incapable of obtaining such identification. For these reasons, Plaintiffs' expert evidence—like the anecdotal evidence discussed above—fails to establish a severe and widespread burden on the right to vote.

Mayer used computerized procedures to match last names, first names, and birthdates of individuals in the Statewide Voter Registration System ("SVRS") database against corresponding fields in a driver license and state ID database supplied by the DOT (R. 60: Ex. 3 at 1; R. 90 at 49-50, 61, 65). Mayer found 301,727 unmatched SVRS records which he took to be an accurate estimate of the number of registered voters who lack either a Wisconsin driver license or state ID (R. 60: Ex. 3 at 2; R. 91 at 10-11). Mayer also estimated the number of electors who are not registered to vote and who lack a license or state ID, as well as the number he felt were likely to possess one of the other acceptable forms of voter ID, such as a qualifying student ID, a tribal ID, or a

U.S. military ID (R. 90 at 80-90; R. 91 at 91). Taking all those considerations into account, Mayer estimated 333,276 electors in Wisconsin do not possess any of the forms of acceptable voter ID (R. 90 at 85-90; R. 91 at 91).

Mayer's estimate, however, is not reasonably supported by the data because he unjustifiably extrapolated from the results of the matching process without adequately considering or ruling out alternative explanations for the unmatched records (R. 60: Ex. 3 at 2; R. 91 at 10-11). University of Georgia Political Scientist M.V. (Trey) Hood, III ("Hood"), who was an expert witness for the Defendants, also performed matching analyses of the SVRS and DOT databases (R. 60: Ex. 84 at 6). Both Hood and Mayer testified that their matching procedures were comparable and that one of Hood's analyses was equivalent to Mayer's analysis (R. 93 at 18-19; R. 95 at 23). Hood found 302,082 records in the SVRS without a match in the DOT database, which was very close to Mayer's parallel finding (R. 93 at 15-16).

Unlike Mayer, however, Hood did not leap to the conclusion that there are over 300,000 registered voters who lack a driver license or state ID. Instead, he recognized that any difference between the two databases in any of the fields would result in a non-match (R. 93 at 13). Hood logically inferred that a non-matched record could stem from either of two causes: (1) the presence of a registrant in the SVRS who does not have a record in the DOT database—*i.e.,* a true non-match; or (2) a discrepancy in the way data for a single individual is recorded in the two databases—*i.e.,* a "false" non-match (R. 93 at 19).

Hood further testified that, in his professional opinion, it is not possible, based on the available data, to accurately estimate how many non-matches were caused by a data discrepancy and how many by the presence of a voter lacking a license or state ID (R. 93 at 20, 22). Hood thus concluded that the number of unmatched records is *not* itself an accurate estimate of the number of registered

voters lacking a license or ID. Rather, in his opinion, the actual number of registered voters without a license or ID is lower than the number of unmatched records (R. 93 at 21; R. 60: Ex. 84 at 8). In sum, Hood concluded that the available data were sufficient to support a reliable opinion only about the number of unmatched records and the possible alternative explanations, but were not sufficient to support a reliable opinion about the number of voters lacking a driver license or state ID.

In contrast, Mayer concluded that the number of unmatched records is itself an accurate estimate of the number of voters lacking a license or state ID. He acknowledged that "[i]t is likely that some of the unmatched records are the result of minor differences in last name spelling between the two data files[,]" but nonetheless opined that there are not likely to be a significant number of non-matches caused by such discrepancies (R. 60: Ex. 3 at 4). Mayer's opinion on this point, however, is unreliable because he failed to account for the multiple ways in which any discrepancy in the recording of data in any of the pertinent fields would cause a false non-match (*see* R. 60: Ex. 3 at 4; R. 91 at 17-19, 24-25; R. 60: Ex. 84 at 8).

Hood thus acknowledged the objective limitations of the available data and offered a measured, scientific opinion consistent with those limitations, whereas Mayer leaped beyond those limitations to an unfounded conclusion. Mayer's opinion that there are over 300,000 registered voters who lack a driver license or state ID thus cannot be considered a reliable estimate and does not support facial invalidation of Wisconsin's voter identification requirements.

According to the circuit court, Defendants' criticisms of Mayer's analysis "focused upon peripheral, relatively insignificant aspects of the work." (R. 84 at 9; A-Ap. 109). That conclusory statement is incorrect. The central criticism was that the statistical data used by both Mayer and Hood are insufficient to distinguish "true" and

"false" non-matches and, therefore, provide no basis for accurately estimating the number of registered voters who lack a driver license or state ID—which is the central statistical issue in this case. Contrary to the circuit court's assertion, that criticism directly undermines the Plaintiffs' central statistical conclusion and thus is not peripheral or insignificant.

The circuit court also erred in finding that Hood did not adequately explain or justify his conclusion that the available data were insufficient to accurately determine the number of "true" non-matches (R. 84 at 10). Under Wis. Stat. § 907.02(1) and *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Plaintiffs had the burden of laying a proper foundation for the admission of Mayer's expert testimony. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999). In assessing such a foundation, one of the factors to be considered by a court is "[w]hether the expert has adequately accounted for obvious alternative explanations[]" and has ruled out other possible causes. Fed. R. Evid. 702 Advisory Committee's Notes (2000 amends.). Plaintiffs thus had the burden of ruling out the possibility that the non-matches found between the two databases were caused by data discrepancies, rather than by "true" non-matches. For the reasons discussed above, Plaintiffs failed to carry that burden. Contrary to the circuit court's suggestion, it was not the Defendants' burden to somehow conclusively prove that the non-matches were "false," rather than "true."

In addition to failing to rule out the alternative explanation of "false" non-matches, Plaintiffs also did not account for the fact that an indeterminate number of the "true" non-matches could be people who can vote using as identification a driver license or state ID that has expired since the most recent general election. Wis. Stat. § 5.02(6m)(a). Mayer admitted that there are people who possess such recently-expired documents and are not included in the DOT database, but nonetheless possess valid voter identification, and further admitted that he did

not attempt to determine the number of such people (R. 91 at 62-63). The circuit court found that "[i]t is reasonable to assume that the number of such people is statistically negligible[,]" (R. 84 at 11; A-Ap. 111), but the court did not offer any explanation or cite any evidence to support that assumption. Absent such evidence, it is clear that Mayer undercounted the number of people in Wisconsin who possess acceptable voter identification. In this regard, too, Mayer's statistical analysis was not the product of reliable principles and methods.

Finally, the most serious problem with Mayer's statistical analysis is that it fails to consider the fact that people who lack acceptable voter identification have the ability to obtain it. In particular, they may obtain a free state ID from DOT pursuant to Wis. Stat. § 343.50. Mayer admitted that he did not conduct any quantitative analysis of the burdens that people lacking a driver license or state ID might face in attempting to obtain such identification, nor did he offer any opinion on the scope of any such burdens (R. 91 at 64). At most, Mayer's testimony established only that there exists some number of electors who do not currently possess acceptable identification and who would, therefore, have to take steps to obtain it in order to be able to vote in compliance with Act 23.

The mere fact that people must take affirmative steps to obtain voter identification, however, "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford,* 553 U.S. at 198. Such a burden potentially exists only if people who lack acceptable identification *also* face some special difficulties in *acquiring* it. *See id.* at 199. Mayer's statistical analysis contains no data about the existence or scale of any obstacles that would prevent potential voters from obtaining acceptable identification. Absent such data, Mayer's opinion about the number of people who do not currently have a driver license or state ID is not probative of the material issue of whether Wisconsin's voter

identification requirements impose a severe burden on voting rights.

F. The voter identification requirements serve the State's compelling interests in preventing electoral fraud and promoting voter confidence in the integrity of elections.

For all of the reasons above, Wisconsin's voter identification requirements have not been shown to impose a sufficiently severe burden on voting rights to support a facial challenge. All that remains under the flexible balancing analysis is to consider whether the state interests promoted by voter identification are sufficiently legitimate and important to justify the limited burdens imposed. *Crawford* and subsequent cases answer that question in the affirmative.

Crawford plainly recognized the legitimacy and importance of the state's interests in deterring and detecting voter fraud, promoting orderly election administration and accurate recordkeeping, and safeguarding public confidence in the integrity of elections. *Crawford*, 553 U.S. at 191-97. The Court did not require the state to present evidence to justify those interests, but rather said:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 196. Likewise, the Court readily acknowledged the independent importance of the state's interest in promoting public confidence in electoral integrity. *Id.*

at 197. Other post-*Crawford* decisions have recognized the same state interests. *See, e.g.*, *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 75 (Ga. 2011); *League of Women Voters of Indiana v. Rokita*, 929 N.E.2d 758, 767-69 (Ind. 2010); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353-54 (11th Cir. 2009). Similarly, the Wisconsin Supreme Court has consistently recognized the state's legitimate and important interest in providing reasonable rules and regulations for how ballots may be cast, including requirements of proof that an individual voter is qualified to vote, in order to protect the purity of elections, prevent abuse, and promote efficiency. *See* Section I.A.1., above.

The circuit court nonetheless found that the state interest in preventing fraud does not justify voter identification requirements because there is no evidence of recent instances of voter impersonation fraud in Wisconsin (*see* R. 84 at 17-18; A-Ap. 117-18). That argument fails for several reasons. First, the argument was rejected in *Crawford* and *Common Cause/Georgia*. *See Crawford*, 553 U.S. at 191-97; *Common Cause/Georgia*, 554 F.3d at 1353-54. In particular, the Seventh Circuit decision in *Crawford* pointed out that, without effective voter identification procedures, voter impersonation fraud is very difficult to detect. *Crawford*, 472 F.3d at 953-54. The absence of prosecutions for that type of fraud, therefore, does not compel the conclusion that such fraud does not occur, but is equally consistent with the possibility that it occurs but goes undetected. Absent additional probative evidence, the infrequency of prosecutions is insufficient to carry Plaintiffs' burden of proving beyond a reasonable doubt that the voter identification requirements are unconstitutional.

Moreover, even if voter impersonation could be proved to be rare in Wisconsin at present, history shows such fraud to be a real and significant danger. As James Madison noted, men are not angels and sound government must be structured in light of that realistic understanding

(*The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961). Elections provide the means to acquire political power and history teaches that some people are willing to violate the law for such ends. The U.S. Supreme Court recognized this danger and held that states have a legitimate and important interest in addressing it by imposing reasonable voter identification requirements to combat electoral fraud. *Crawford*, 553 U.S. at 195 (noting that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists"); *see also* Tracy Campbell, *Deliver the Vote: A History of Election Fraud, an American Political Tradition-1742-2004* (Carroll & Graf 2006). States need not wait until after they have been robbed before locking the door. They may address potential problems preemptively, and need not wait until they mature into a full-fledged crisis:

> Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986).

Second, it is not true that voter identification requirements can have a beneficial effect only in relation to the type of fraud in which a would-be voter tries to impersonate another individual on the registration roll. While it may be true that such impersonation is the only conduct directly prevented by a voter identification requirement, it does not follow that such a requirement will not deter other illegal activity. Suppose, for example, that a non-citizen or felon casts an unlawful ballot, or that a registered voter unlawfully votes in multiple jurisdictions. In each such case, if the wrongdoer is accused, he may defend himself by claiming that the illegal vote was cast by some other person who falsely used his name. With a voter identification requirement,

however, the would-be wrongdoer will know that he must conclusively identify himself when voting and that prospect is likely to deter misconduct. Contrary to the circuit court's suggestion, therefore, a voter identification requirement can deter forms of illegal voting other than voter impersonation.

Finally, the circuit court also suggested that voter identification requirements do not promote public confidence in elections, citing evidence of no reported increase in voter confidence in states with such requirements (*see* R. 84 at 17-18; A-Ap. 117-18). That suggestion, however, has been rejected by the U.S. Supreme Court, which has held that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 549 U.S. at 4. The circuit court's view on this subject is thus contrary to the view of the U.S. Supreme Court.

In our democratic system of governance, promoting public confidence in elections is an important good in its own right, without regard to whether the level of voter confidence can be correlated with the most recent turnout statistics. Where there is evidence of an erosion of public confidence in elections, a state should not be required to postpone remedial action until voters have permanently given up on the voting process. Moreover, apart from any measurable increase in turnout, voter identification requirements advance the state's legitimate and important interest in promoting a healthy respect for democratic institutions.

CONCLUSION

For the reasons stated herein, the decision of the circuit court should be reversed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,288 words.

Dated this _____ day of August, 2012.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of August, 2012.

_____
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

MILWAUKEE BRANCH OF THE NAACP VOICES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

Appeal Number
2012-AP-001652

Dane County
Circuit Court
11-CV-5492

On Appeal from the Judgment of the Circuit Court for Dane County, the Honorable David T. Flanagan, Presiding

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STATEMENT OF THE ISSUE

Does Wisconsin's statutory requirement that voters present a valid form of photo identification before voting, *see* 2011 Wisconsin Act 23, constitute a substantial impairment of the right to vote under Wis. Const., art. III, § 1?

Decided by the trial court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Intervenors-Appellants respectfully suggest that oral argument is appropriate under Wis. Stat. § 809.22, because they have presented substantial legal questions, supported by extensive authority. Intervenors-Appellants would appreciate the opportunity to answer any questions or address any potential concerns the Court might have regarding this issue of obvious and widespread public importance.

Intervenors-Appellants respectfully suggest that publication is appropriate under Wis. Stat. § 809.23(1)(a)(5), because the constitutionality of photo identification requirements for voters is an issue of "substantial and continuing public interest."

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The central question in this case is whether a Wisconsin law requiring voters to present photo identification in order to vote is facially constitutional. *See* 2011 Wisconsin Act 23 (hereafter, "Act 23").

The circuit court entered a permanent injunction against the photo identification law, holding that it "constitute[s] a substantial impairment of the right to vote" guaranteed by Wis. Const. art. III, § 1. Its ruling contravenes the Wisconsin Supreme Court's express holding that laws requiring individuals to demonstrate to election officials their entitlement to vote does not violate the fundamental constitutional right to vote. *State ex rel. Wood v. Baker*, 38 Wis. 71, 86 (1875). The legislature constitutionally may require voters to fulfill reasonable procedural requirements, such as presenting valid photo identification, in order to vote. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041, 1046 (1910); *Gradinjan v. Bajo*, 29 Wis. 2d 674, 677, 139 N.W.2d 557, 558 (1966).

The trial court's ruling also runs afoul of U.S. Constitution's Elections Clauses, *see* U.S. Const., art. I, § 4, cl. 1; art. II, § 1, cl. 2, which are the source of

the Wisconsin legislature's power to impose identification requirements in federal elections.

II. PROCEDURAL HISTORY AND DISPOSITION

The Plaintiffs in this case are the Milwaukee branch of the NAACP, Voces de le Frontera, and a dozen voters. *See* R.2 at 4-14, ¶¶ 4-21. On December 16, 2011, they sued Governor Scott Walker and the members of the Government Accountability Board, arguing that Act 23 violates the right to vote under Wis. Const. art. I, § 1 and art. III, § 1; the equal protection guarantees of the Wisconsin Constitution; and the Qualifications Clause, Wis. Const., art. III, §§ 1-2.

The next month, Plaintiffs moved for a Temporary Injunction to block enforcement of Act 23. R.3. The trial court granted the injunction on March 6, 2012, R.31, revised its order a few days later, R.37, and denied Defendants' motion to stay the injunction, R.39. The Court of Appeals likewise declined a stay, R.41, and both the Court of Appeals and state Supreme Court denied Defendants' Petition for Leave to Appeal, R.55, R.64.

Following a bench trial on April 16 – 19 and May 4, *see* R.49, R.56-58, R.69, the trial court entered a permanent injunction barring enforcement of Act 23. R.84.

The court held that both the organizational and voter plaintiffs had standing to maintain this case. *Id.* at 4-6. After reviewing the expert testimony, it found that approximately 9.3% of registered voters in Wisconsin lacked a valid form of photo identification under Act 23. *Id.* at 11. It further found that "[t]he evidence of specific individuals who have experienced difficulty and expense obtaining a drivers license or a DMV photo is credible and persuasive." *Id.* at 12. Based in substantial part on the personal experiences of five individuals discussed in the opinion, *id.* at 12-14, the court stated that "[p]rocuring a DMV Photo ID can easily be a frustrating, complex and time-consuming process," and can "require the expenditure of an amount of money that is significant for an eligible voter who is indigent." *Id.* at 14.

The court then went on to hold that, because Act 23 "implicates a fundamental interest," it is subject to "strict or [a] heightened level of review." *Id.* at 17. It held that Act 23 is unconstitutional under this analysis, because the act imposed a "substantial" impairment of the right to vote, while yielding "little" benefits in terms of deterring voter fraud or increasing public confidence in the electoral process. *Id.* The court concluded, "Given the sacred, fundamental interest at issue, it is clear that

Act 23 . . . is not sufficiently narrow to avoid needless and significant impairment of the right to vote." *Id.* at 18.

The trial court recognized that the U.S. Supreme Court came to the opposite conclusion in *Crawford v. Marion County Election Board*, 553 U.S. 181, 197 (2008). It held that *Crawford* "has very little application to th[is] dispute," however, because the Wisconsin Constitution expressly guarantees the right to vote, while the U.S. Constitution "offers no such guarantee." *Id.* Furthermore, the Indiana law at issue in *Crawford* was purportedly "less rigid" than Act 23. *Id.* Additionally, the plaintiffs here introduced more evidence of the actual impact of the photo identification statute than did the plaintiffs in *Crawford.* Finally, state constitutions may be construed as providing greater protection for individual liberty than the U.S. Constitution. *Id.* at 18.

The court concluded by declaring that Act 23 violates the right to vote set forth in Wis. Const. art. III, § 1.

III. STATEMENT OF FACTS

A. General Photo Identification Requirements for Voting

In order to vote, an eligible elector must follow certain statutory procedures. "Each elector," for example, must "register . . . before voting in any election." Wis. Stat. § 6.27. If voting in person, he must travel to "the polling place for his or her residence" designated by election officials, *id.* § 6.77(1), and be in line by the time the polls close, *id.* § 6.78(4).

Upon arrival, the elector must "state his full name and address and present to the officials proof of identification." *Id.* § 6.79(2)(a). An election official will confirm that the name on the voter's identification card appears in the poll book, and that the photograph on it "reasonably resembles the elector." *Id.* After signing the poll book, the elector is permitted to vote. *Id.* If a person does not present proof of identification, he may cast a provisional ballot. *Id.* §§ 6.79(2)(d), (3)(b), 6.97.

Permissible forms of identification include:

- any of the following if they have not expired, or expired after the most recent general election:
  - operators license (*i.e.*, drivers' license);

- non-drivers' license identification card from the Wisconsin Department of Transportation ("DOT");
- military identification card; or
- U.S. passport;

- certificate of naturalization from within the past two years;
- *temporary ID* — unexpired driving receipt or identification card receipt (*i.e.*, temporary license or identification card issued while an application for a permanent card is being processed, *see* Wis. Stat. §§ 343.11(3), 343.50(1)(c));
- *tribal ID* — identification card issued by a federally recognized Indian tribe in Wisconsin; and
- *student ID* — unexpired identification card issued by an accredited Wisconsin university or college, if it contains the date of issuance and the bearer's signature, it is valid for two years or less, and the bearer is still a student at that school.

Wis. Stat. § 5.02(6m)(a)-(f).

B. Photo Identification Requirements for Absentee Ballots.

Wisconsin is a "no excuse" absentee voting state, meaning that any "qualified elector who for any reason is unable or unwilling" to vote in person may cast an absentee ballot. Wis. Stat. § 6.85(1). To obtain an absentee ballot in person from the clerk's office, a qualified elector must present photo identification. *Id.* § 6.86(1)(ar). Likewise, if the applicant submits his request for an absentee ballot by mail, he must include a copy of his photo identification "or an authorized

substitute document," *id.* § 6.87(1). If the elector submits his request for an absentee ballot electronically (*i.e.*, by fax or e-mail), he need not include a copy of his photo identification, *id.* § 6.86(1)(a)(6), (1)(ac), but instead must include it with his completed absentee ballot, *id.* § 6.87(4)(b)(1), or else it will be treated as a provisional ballot, *id.* § 6.97(2).

A qualified elector who is "indefinitely confined because of age, physical illness[,] or infirmity[,] or is disabled for an indefinite period," may request that absentee ballots be sent to him automatically for every election, and is not required to provide photo identification. *Id.* §§ 6.86(2)(a), 6.87(1), (4)(b)(2). Electors living in retirement homes, community-based residential facilities, residential care apartment complexes, and adult family homes also are exempt from the photo identification requirement for absentee ballots, *id.* §§ 6.87(5), 6.875(6)(c)(1), as are military and overseas voters, *id.* § 6.87(1). Additionally, if an elector already included a copy of his photo identification with a previous request for an absentee ballot in a past election, and has not moved to a different address in the interim, he need not include photo identification with any subsequent requests. *Id* § 6.87(1), (4)(b)(3).

C. Obtaining a Free Photo Identification Card

Wisconsin residents may obtain a free photo identification card from DOT that is a permissible form of voter identification under Wis. Stat. § 5.02(6m)(a)(2). To obtain a free card, an applicant must provide satisfactory "proof of name and date of birth,"[1] "proof of identity,"[2]

---

[1] Proof of name and date of birth includes:

- certified birth certificate;
- U.S. passport;
- valid, unexpired foreign passport with specified supporting immigration documents;
- previous Wisconsin operator's license or identification card;
- federal immigration documentation (including a permanent resident alien registration receipt card; parolee or refugee arrival-departure record and other specified supporting documents; certificate of naturalization; certificate of U.S. citizenship; temporary resident card; or employment authorization card);
- approved tribal identification card, issued in Wisconsin by a federally recognized tribe, which contains the bearer's photograph and signature;
- court order concerning the bearer's adoption, divorce, name change, or gender change;
- military identification card; or
- Department of Homeland Security ("DHS") or Transportation Security Administration ("TSA") transportation worker identification card.

Wis. Admin. Code Trans. § 102.15(3)(a)(1)-(21).

[2] Proof of identity includes:

- a valid driver's license or non-driver's photo identification card, either from Wisconsin, another state, or the federal Government;

and "proof of citizenship."[3] Wis. Admin. Code Trans. § 102.15(2)(a), (2)(bm)(1). A birth certificate (or U.S. passport) counts as both "proof of name and date of birth" and "proof of citizenship," *see id.* § 102.15(3)(a)(1)-(2), (3m)(1)-(2), while a social security card qualifies as "proof of identity," *id.* § 102.15(4)(a)(13); *see also id.* § 102.15(5)(a), (bm) (requiring an applicant for an identification card to provide his social security number, if he has one). DOT will waive the fee for the identification card if the applicant specifies that he is requesting the card "for purposes of voting." Wis. Stat. § 343.50(5)(a)(3).

- military discharge papers;
- military dependent identification card;
- marriage certificate or divorce decree;
- social security card;
- DHS/TSA transportation worker identification card; or
- any other document that may be used as "proof of date of birth" (if the applicant did not already use that document to fulfill that requirement).

Id. § 102.15(4)(a)(2)-(24).

[3] Proof of citizenship includes a birth certificate, U.S. passport, foreign passport with supporting documentation, certificate of U.S. citizenship or naturalization, DHS/TSA transportation worker identification card, and certain other specified forms for aliens from DHS or the U.S. Department of State. *Id.* § 102.15(3m)(a)(1)-(13).

If a person is unable to obtain a birth certificate (or some other form of "proof of name and date of birth"), he may seek an exemption from that requirement from the division of motor vehicles. Wis. Admin. Code Trans. § 102.15(3)(b). The applicant must complete a form explaining why he cannot obtain a birth certificate or other "proof of name and date of birth," and provide "[w]hatever documentation is available" confirming his name and birth date. *Id.* § 102.15(3)(b)(1)-(3). The administrator of the department may delegate his authority to approve such waiver requests to any subordinate. *Id.* § 102.15(3)(c).

D. <u>Obtaining a Birth Certificate</u>

A person with a "direct and tangible interest" in a birth certificate – including the subject of the birth certificate, a member of his family, or his attorney – may obtain a certified copy of it from the Wisconsin Division of Public Health or the registrar of the municipality where the birth occurred. Wis. Stat. §§ 69.20(1), 69.21(1)(a)(1), (1)(a)(2)(a), (3); *see also* Wis. Admin. Code DHS § 142.04. Thus, if a person does not possess the identification necessary to obtain a certified copy of his birth certificate, he may have an immediate family member who does possess such identification obtain it on his behalf.

To establish his identity, an applicant for a certified copy of a birth certificate must provide either a Wisconsin driver's license, a Wisconsin photo identification card, or two of the following documents:

- government-issued employee identification card with photograph;
- U.S. passport;
- checkbook or bank book;
- major credit card;
- health insurance card;
- recent signed lease;
- recent utility bill; or
- recent traffic ticket.

See Wis. Dep't of Health Servs., Div. of Pub. Health, Wisconsin Birth Certificate Application, Form F-05291 (Mar. 2012);[4] Wis. Dep't of Health Servs., *Request for a Birth Certificate*.[5] The applicant also must pay a $20 fee. *Id.*

If a person was born in the State of Wisconsin, but the Division of Public Health does not have a birth certificate on file for him, he may have the State generate a birth certificate for him by filing for late registration

[4] *Available at* http://www.dhs.wisconsin.gov/forms/F0/F05291.pdf.

[5] *Available at* http://www.dhs.wisconsin.gov/vitalrecords/birth.htm.

of birth. Wis. Stat. § 69.14(2)(a)(1). The person must provide three pieces of documentary evidence — one of which may be an affidavit — concerning his name, date, and place of birth. *id.* § 69.14(2)(a)(2)(a)-(b), (2)(a)(3)(a). He also must submit one different piece of documentary evidence (not including a personal affidavit) concerning his mother's full maiden name and, if the mother was married, his father's name. *Id.* § 69.14(2)(a)(2)(c)-(d), (2)(a)(3)(b). Any documentary evidence other than affidavits of personal knowledge must be more than 10 years old. *Id.* § 69.14(2)(a)(3)(d).

In the event a person cannot satisfy these requirements, or the Division rejects his application, he may petition the circuit court for his alleged county of birth for an order "establishing a record of the date and place of [his] birth and parentage." *Id.* § 69.14(2)(a)(6). The Division of Public Health must then generate a birth certificate for the person based on that order. *Id.*

E. Casting a Provisional Ballot Without Photo Identification.

If a qualified elector attempts to vote at a polling location without presenting proper photo identification, he will be permitted to cast a provisional ballot. Wis. Stat. §§ 6.79(2)(d), (3)(b), 6.97(1). Likewise, if a qualified

elector requests an absentee ballot by fax or e-mail, and returns that completed ballot without submitting a copy of his photo identification, *id.* § 6.97(2), that vote also will be treated as provisional. A provisional ballot will be counted if the voter either returns to the polling place where he cast it before the close of polls on Election Day to show his photo identification, *id.* § 6.97(3)(a)-(b), or presents his photo identification to the municipal clerk or board of elections by 4 P.M. on the Friday after Election Day, *id.* § 6.97(3)(b)-(c).

F. The Voter Plaintiffs.

As of the date the Complaint was filed, at least six of the 12 voter Plaintiffs possessed the identification required to vote. Most of those individuals nevertheless alleged that Act 23 is unconstitutional because they were required to pay $20 for a certified copy of their birth certificate, and incur the inconvenience of traveling, typically on several occasions, to a state motor vehicle office to obtain photo identification. R.2 at 9-12, ¶¶ 14, 16, 18, 21 (Ndidi Brownlee, Johnnie M. Garland, Danettea Lane, and Antonio K. Williams). Others complained that they had been required to pay for replacement identification cards, since they had lost their still-valid

cards. *Id.* ¶¶ 15, 17 (Mary J. McClintock and Anthony Fumbanks).

It appears that, as of December 2011, no more than six of the Plaintiffs actually lacked valid photo identification. Carolyn Anderson had requested a birth certificate by mail and was waiting to receive it in order to obtain a photo identification card. *Id.* ¶ 13. Two others had been planning on requesting birth certificates by mail, as well. *Id.* ¶¶ 11-12 (Jennifer Platt and John Wolfe). The allegations concerning Joel Torres, and the reason for his inability to obtain proper identification, are vague at best. *Id.* ¶ 20.

Thus, only two Plaintiffs faced any specific hurdle beyond obtaining a birth certificate by mail and traveling to the motor vehicle office to obtain an identification card. Ricky T. Lewis alleged that he could not obtain a copy of his birth certificate because the name on the government's record for him is "Tyrone DeBerry." *Id.* ¶ 10. Alfonso Rodriguez alleged that he lost his still-valid WisDOT photo identification card and could not pay the $16 fee for obtaining a replacement. *Id.* ¶ 19.

ARGUMENT

The trial court's decision to declare Act 23, Wisconsin's photo identification requirement, facially unconstitutional and permanently enjoin its enforcement violates numerous well-established tenets of state constitutional law, and also conflicts with the U.S. Constitution.

First, the court erred in holding that Act 23 violates the fundamental constitutional right to vote under Wis. Const., Art. III, § 1, because the legislature may establish reasonable election-related regulations, and more specifically require voters to establish their entitlement to vote to election officials. Furthermore, except in rare and isolated circumstances, Act 23's requirements are not "so difficult and inconvenient as to amount to a denial" of the right to vote." *State ex rel. Barber v. Circuit Court for Marathon Cnty.*, 178 Wis. 468, 476, 190 N.W. 563, 566 (1922).

Second, even if Act 23 imposes a substantial burden on the right to vote for certain individuals, entering a facial injunction against the act as a whole is an overbroad and inappropriate remedy.

Third, to the extent the trial court's judgment applies to federal elections, it raises serious federal

constitutional questions. The authority of the Wisconsin legislature to regulate the manner in which federal elections are conducted stems directly from the Elections Clauses of the U.S. Constitution, *see* U.S. Const., art. I, § 4, cl. 1; art. II, § 1, cl. 2, not the Wisconsin Constitution. *Cook v. Gralike*, 531 U.S. 510, 523 (2001). A state constitution therefore may not impose substantive limitations on the procedures and safeguards that a state legislature may implement to protect the integrity of federal elections. U.S. Const., art. VI, § 2; *Reynolds v. Sims*, 377 U.S. 533, 584 (1964); *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Finally, the trial court's judgment should not be affirmed on alternative grounds. Plaintiffs' Equal Protection and Qualifications Clause claims are meritless.

Because this case involves the propriety of the trial court's interpretation of the Wisconsin Constitution, it presents a pure question of law that this Court reviews *de novo*. *State v. Schaefer*, 2008 WI 25, ¶ 17, 308 Wis. 2d 279, 290, 746 N.W.2d 457, 463. Although the district court's factual findings generally are reviewed for clear error, this court reviews "constitutional facts . . . de novo, without deference to the conclusion of the circuit court." *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615,

647, 579 N.W.2d 698, 713 (1998); *see also State v. Santiago*, 206 Wis. 2d 3, 17, 556 N.W.2d 687, 692 (1996).

I. THE TRIAL COURT ERRED IN CONCLUDING THAT ACT 23 VIOLATES THE FUNDAMNETAL RIGHT TO VOTE

Act 23 does not violate the fundamental constitutional right to vote under either Wis. Const. art. III, § 1[6] or Wis. Const., art. I, § 1.[7]

The Wisconsin Supreme Court has held, "While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473, 479-80 (1949) (citations omitted); *see also State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041, 1046 (1910) ("Giving to the right to use the elective franchise its proper significance, it is yet subject to regulation like all other rights.").

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[6] "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wis. Const., art. III, § 1.

[7] "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const., art. I, § 1.

The legislature may not "destroy[] or substantially impair" the right to vote, but it has "the constitutional power to say how, when, and where [a] ballot shall be cast," *Zimmerman*, 254 Wis. at 613, 37 N.W.2d at 479-80, and more broadly to uphold the integrity of the election, prevent abuse, and promote efficiency, *McGrael*, 144 Wis. at 18, 128 N.W. at 1047. In particular, a requirement that voters present "proof of the[ir] right to vote" to election officials does not "impair[]" their constitutional right to vote. *State ex rel. Wood v. Baker*, 38 Wis. 71, 86 (1875).

Courts must be highly deferential to legislative determinations in reviewing election-related statutes and requirements under the Wisconsin Constitution. The Wisconsin Supreme Court has held, specifically in the context of elections, that a "law cannot be held to be invalid because unreasonable unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the point of practical destruction a right safeguarded by the constitution." *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 571, 228 N.W. 895, 914 (1930). Elsewhere, the court reiterated that the legislature's discretion to impose election regulations is "as broad as the uttermost boundaries of reason," and "all fair doubts [must] be[]

resolved in favor of" an election law. *McGrael*, 144 Wis. at 18, 128 N.W. at 1047.

Wisconsin courts repeatedly have affirmed the constitutionality of election statutes, even where they resulted in certain people not being permitted to vote or their votes not being counted. *See, e.g.*, *Gradinjan v. Bajo*, 29 Wis. 2d 674, 677, 139 N.W.2d 557, 558 (1966) (affirming the constitutionality of a law that prohibited absentee ballots that lacked the municipal clerk's name or initials from being counted, because it helped prevent "fraud" and protected "the sanctity of the ballot"); *State ex rel. Knowlton v. Williams*, 5 Wis. 308, 316 (1856) (holding that the legislature may require a person to vote "only in the town where he resides" and prohibit him from voting in any other place).

In determining whether "mandatory" election laws — which electors must follow in order to be allowed to vote — violate the right to vote, the Wisconsin Supreme Court focuses primarily on whether the voter was in a position to know whether the statute was being violated, and to comply with the statute. If a failure to fulfill a statutory requirement is attributable primarily to election officials, rather than the voter, then the Wisconsin Constitution typically requires that the voter be permitted

to vote. "As a general rule, a voter is not to be deprived of his constitutional right of suffrage through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes on him." *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 195 N.W. 707 (1923) (holding that, even though state law required individuals to appear on the voter registration list in order to vote, individuals who had been excluded from the list due exclusively to the error of election officials were constitutionally entitled to vote); *see also Baker*, 38 Wis. at 86 (holding that voters may not be deprived of their right to vote because of "[n]onfeasance or malfeasance of public officers"); *Ollman v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941) (holding that individuals whose ballots, without their knowledge, had been initiated by a single polling place official, rather than both officials as required by law, were constitutionally entitled to have their votes counted, despite the statutory violation that was attributable to election officials).

Wisconsin courts also assess whether the statute at issue "render[s] [the] exercise" of the franchise "so difficult and inconvenient as to amount to a denial." *State ex rel. Barber v. Circuit Court for Marathon Cnty.*,

178 Wis. 468, 476, 190 N.W. 563, 566 (1922); *accord State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 341, 125 N.W. 961, 969 (1910). An election law is invalid under this standard if it "require[s] of [an elector] what is impracticable or impossible, and make[s] his right to vote depend upon a condition which he is unable to perform." *Dells v. Kennedy*, 49 Wis. 555, 558 (1880).

Applying these standards, Act 23 does not violate the fundamental right to vote protected by the Wisconsin Constitution. The law requires only that voters present "proof of the[ir] right to vote" to election officials, *Baker*, 38 Wis. at 86, and is a reasonable means of safeguarding the integrity of the election, *McGrael*, 144 Wis. at 18, 128 N.W. at 1047.

Furthermore, an individual who does not obtain valid identification in advance of the election cannot reasonably blame election officials for that failure. *Cf. Symmonds*, 182 Wis. 114, 195 N.W. 707; *Ollman*, 238 Wis. 574, 300 N.W. 183; *Baker*, 38 Wis. at 86.

> The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the constitution.

Baker, 38 Wis. at 87.

Finally, except in rare instances, the requirements for obtaining valid photo identification are not "so difficult and inconvenient as to amount to a denial" of the right to vote. *Barber*, 178 Wis. at 476, 190 N.W. at 566 (1922); *see also Dells*, 49 Wis. at 558. As the trial court found, approximately 91% of the population already has a valid form of photo identification. *See* R.84 at 11-12. Crucially, the court did not make any findings concerning what percentage of individuals without photo identification can readily obtain one (because they either already possess a birth certificate, or readily can obtain a birth certificate by mail).

The trial court nevertheless held that the "cost" and "difficulty" of "obtaining the documents necessary to apply for a DMV Photo ID is a significant burden" that violates the fundamental right to vote. *Id.* at 19. ***First***, regarding cost, any eligible voter without a valid form of identification is entitled to receive a free photo identification card from WisDOT. Wis. Stat. § 343.50(5)(a)(3). A person who is "unable" to obtain a birth certificate – whether due to indigency, or because the State does not have a record of his birth – may petition WisDOT for a waiver of the birth certificate requirement for obtaining a photo identification card.

Wis. Admin. Code Trans. § 102.15(3)(b). A person for whom the State lacks a birth certificate also may petition the Division of Public Health to create one. *See* Wis. Stat. § 69.14(2)(a).

Even assuming that some subset of the approximately 9% of the Wisconsin electorate who lacks valid photo identification is too poor to obtain it, the most narrowly tailored response – *i.e.*, the one that interferes least with the duly enacted laws of the State – would be to order the State to establish a procedure though which an indigent elector may receive a free certified copy of his or her birth certificate.

Second, the district court found that "[p]rocuring a DMV Photo ID ***can easily be*** a frustrating, complex and time-consuming experience," R.84 at 14 (emphasis added). The "inconvenience" that sometimes is associated with calling WisDOT (or consulting its website) or any of the Plaintiff organizations to find out the requirements for obtaining a photo identification card, and then traveling to a WisDOT facility to obtain the card, do not make it "impracticable or impossible" to obtain valid identification, *Dells*, 49 Wis. at 558, and therefore do not "amount to a denial" of the right to vote," *Barber*, 178 Wis. at 476, 190 N.W. at 566.

Furthermore, Wisconsin courts generally "interpret provisions of the Wisconsin Constitution consistent with the Supreme Court's interpretation of parallel provisions of the federal constitution." *State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis. 2d 335, 360, 797 N.W.2d 451, 465; *accord State v. Arias*, 2008 WI 84, ¶ 19, 311 Wis. 2d 358, 370-71, 752 N.W.2d 748, 754. The U.S. Supreme Court has recognized, "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion County Election Board*, 553 U.S. 181, 197 (2008).

As the everyday hassles of assembling the necessary paperwork, traveling to government offices, and waiting in line do not violate the right to vote as protected by the Due Process Clause of the Fifth and Fourteenth Amendments, *see* U.S. Const., amend. V, XIV; *see also Smith v. Allwright*, 321 U.S. 649, 661-62 (1944) (holding that "the right to vote" is "a right secured by the Constitution"), it is unlikely that they violate the right to vote as protected by the state constitution, either.

Thus, the trial court erred in holding that Act 23 constitutes a denial of the fundamental right to vote under Wis. Const., art. III, § 1 (or Wis. Const., art. I, § 1).

II. THE TRIAL COURT ERRED BY HOLDING THAT, EVEN THOUGH THE PHOTO IDENTIFICATION REQUIREMENT WILL NOT IMPEDE THE VAST MAJORITY OF WISCONSIN ELECTORS FROM VOTING, IT IS FACIALLY UNCONSTITUTIONAL.

Another fatal flaw with the trial court's ruling in this case is that it ignores the Wisconsin Supreme Court's well-established requirements for determining whether a statute is facially constitutional. "[A] facial constitutional challenge attacks the law itself as drafted by the legislature, claiming the law is void from its beginning to the end and that it cannot be constitutionally enforced under any circumstances." *Soc'y Ins. v. Labor & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 463, 786 N.W.2d 385, 395; *see also State v. Ruesch*, 214 Wis. 2d 548, 556, 571 N.W.2d 898, 902 (1997) (holding that a person bringing a facial challenge to a statute "must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional").

The trial court held that Act 23 violates the fundamental right to vote under Wis. Const., art. III, § 1 because "[p]rocuring a DMV Photo ID can easily be a

frustrating, complex and time-consuming experience," R.84 at 14, and "[t]he cost and the difficulty of obtaining documents necessary to apply for a DMV Photo ID is a significant burden upon the opportunity of Wisconsin citizens to vote," *id.* at 19. The court further pointed out that five "specific individuals . . . experienced difficulty and expense obtaining a drivers license or a DMV photo [identification card]." *Id.* at 14.

The Court also recognized, however, that approximately 91% of Wisconsin voters already possess valid photo identification. *Id.* at 11-12. Furthermore, some unspecified fraction of individuals who lack valid photo identification readily can obtain it, either because they already possess a birth certificate or can order one by mail. Thus, requiring individuals to display valid photo identification before voting will not impose any burden on the overwhelming majority of voters.

Likewise, the fact that dealing with WisDOT sometimes can be "frustrating, complex and time-consuming experience," R.84 at 14, does not mean that it is facially unconstitutional to require voters to do so. Nothing in Act 23 itself requires WisDOT to be frustrating, complex, or time consuming. Any deficiencies in WisDOT's customer service lie with WisDOT's particular ***application*** of the

photo identification requirement, and is not a grounds for holding that the law is facially invalid.

It is, of course, entirely possible that a particular elector's individualized constellation of personal circumstance may render Act 23's photo identification requirement so unreasonable that it "significant[ly] burden[s]" his right to vote. R.84 at 19. The plaintiffs in this case, however, did not bring an as-applied challenge. *Cf. State v. Trochinski*, 2002 WI 56, ¶ 34, 253 Wis. 2d 38, 65, 644 N.W.2d 891, 904 (noting that the plaintiff "is not challenging the statute as applied to this specific set of circumstances," but rather "assert[ing] a facial challenge"). The personalized circumstances of individuals such as Plaintiff Lewis do not provide a basis for striking down the statute as a whole.

In any event, even if a statute is "unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." *State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601, 607 n.13 (1998) (quotation marks omitted); *accord Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365, 388 n.9, 749 N.W.2d 211, 222 n.9. The trial court therefore erred in completely enjoining enforcement of Act 23.

III. THE U.S. CONSTITUTION PROVIDES AN INDEPENDENT SOURCE OF AUTHORITY, NOT SUBJECT TO THE SUBSTANTIVE CONSTRAINTS OF THE WISCONSIN CONSTITUTION, FOR THE LEGISLATURE TO IMPOSE IDENTIFICATION REQUIREMENTS IN FEDERAL ELECTIONS.

If this Court has any doubts concerning whether Act 23 is consistent with Wis. Const. art. III, § 1, it should construe the Wisconsin Constitution as permitting the enactment of Act 23, in order to avoid raising serious questions under — and even violating — the U.S. Constitution. *Cf. Kenosha Cty. Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 544, 716 N.W.2d 845, 852 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities.").

The U.S. Constitution expressly grants state legislatures the power to "prescribe[]" the "times, places and manner of holding elections for Senators and Representatives." U.S. Const., art. I, § 4, cl. 1. It likewise provides that "[e]ach State shall appoint" presidential electors (*i.e.*, members of the electoral college) "in such manner as the Legislature thereof may direct." *Id.* art. II, § 1, cl. 2. These "express delegations of power" to state legislatures, *U.S. Term Limits*, 514 U.S. at 804, grant them the "authority to provide a complete code" for federal elections, including

but not limited to laws for the "protection of voters" and the "prevention of fraud and corrupt practices," *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Thus, when a legislature enacts a law that applies to federal elections, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" under these federal constitutional provisions. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000); *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause").

A state legislature's power under the U.S. Constitution to regulate elections for federal office is, of course, subject to various substantive limitations set forth throughout that document, including the Bill of Rights, *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Tashjian v. Repub. Party*, 479 U.S. 208, 217 (1986), as well as Congress' constitutional authority to override states' decisions and impose uniform procedures or requirements for federal elections, *see* U.S. Const., art. I, § 4, cl. 1 (congressional elections); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (presidential elections); *see, e.g.*, *Foster v. Love*, 522 U.S. 67, 70 (1997). Additionally, a state

legislature must exercise its power "in accordance with the method which the State has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367, meaning that state laws governing federal elections are subject to gubernatorial veto, *id.* at 368, or even being overruled by popular referendum, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916), to the extent the state constitution includes those contingencies in its legislative process.

Although laws governing federal elections must be enacted through the "legislative process" set forth in the state constitution, *Smiley*, 285 U.S. at 368, that does not suggest that a state constitution may impose ***substantive*** restrictions on the ***content*** of such statutes. To the contrary, a state constitution cannot restrict the scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted. U.S. Const., art. VI, § 2 ("This Constitution . . . shall be the supreme law of the land . . . anything in the Constitution . . . of any State to the contrary notwithstanding."); *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

Insofar as Act 23 applies to electors presenting to vote for federal office, the Wisconsin legislature enacted that statute pursuant to its power under the U.S. Constitution to regulate the manner in which federal elections are conducted, and to deter and prevent "fraud and corrupt practices" in such elections, *Smiley*, 285 U.S. at 366; *see also Cook*, 531 U.S. at 523; *Bush*, 531 U.S. at 76, and not Article III (or even Article IV) of the Wisconsin Constitution. The U.S. Supreme Court has recognized that "[t]he State's interest in preserving the integrity of the electoral process is undoubtedly important" and "is particularly strong with respect to efforts to root out fraud." *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010); *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 process."). Invalidating that act under the Wisconsin state constitution therefore would, at a minimum, raise serious federal constitutional questions.

This Court should conclude that the legislature's exercise of its authority under the U.S. Constitution's Elections Clauses to protect the integrity of federal

elections by requiring voters to present identification did not — and could not — violate Wis. Const. art. III, § 1 or any other provision of the state constitution.

IV. THERE ARE NO ALTERANTE GROUNDS FOR UPHOLDING THE DISTRICT COURT'S JUDGMENT

Although a trial court's judgment may be affirmed on any grounds fairly presented in the record, *see Doe v. GMAC*, 2001 WI App. 199, ¶ 7, 247 Wis. 2d 564, 569, 635 N.W.2d 7, 10, no such alternate grounds exist here.

A. ACT 23 DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES OF THE WISCONSIN CONSTITUTION

Without citing any particular provision in their Complaint, Plaintiffs allege that that Act 23 violates the Wisconsin Constitution's equal protection guarantees, because it discriminates between eligible electors who possess valid identification, and those who do not. R.2 at 30, ¶ 73 (Count III). "In an equal protection claim, unless government action involves classifications based on a suspect class, such as race or alienage, or invidious classifications that arbitrarily deprive a class of persons of a fundamental right, the rational basis test applies." *Riccitelli v. Broekhuizen*, 227 Wis. 2d 100, 119, 595 N.W.2d 392, 401 (1999).

As discussed above in Part I, Act 23's photo identification requirement does not infringe the fundamental right to vote. And the distinction it draws – between people who possess valid photo identification and those who lack it – does not involve a suspect classification. Thus, the rational basis test governs. The legislature reasonably could have believed that requiring voters to present photo identification would further a variety of important state interests, such as "deterring and detecting voter fraud," "moderniz[ing] election procedures," and "safeguarding voter confidence." *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 191 (2008). Thus, Plaintiffs' Equal Protection claims fails.

B. ACT 23 DOES NOT CREATE AN INVALID ADDITIONAL QUALIFICATION FOR VOTERS IN VIOLATION OF WIS. CONST. ART. III, § 1.

Plaintiffs also cannot prevail on their claim that Act 23 constitutes an additional "qualification" to vote in violation of the Wisconsin Constitution's Qualifications Clause, Wis. Const., Art. III, § 1. *Cf.* R.2 at 31, ¶¶ 74-76 (Count IV). The Qualifications Clause provides, "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wis. Const. art. III, § 1. Wisconsin law dutifully provides that any person who possesses those

qualifications is an "eligible elector," Wis. Stat. § 6.02(1), which the Wisconsin Supreme Court has held means the same thing as "qualified elector," *Washington v. Altoona*, 73 Wis. 2d 250, 255-56, 243 N.W.2d 404, 407 (1976).

State law further states that a person may be disqualified as an elector only if he fails to possess one of the constitutional qualifications, or he is not properly registered. Wis. Stat. § 6.325. Crucially, neither Act 23 nor any other provision of Wisconsin law allows a person to be disqualified as an elector for failing to possess photo identification; Act 23's photo identification requirement is irrelevant to the question of whether someone is a "qualified elector." To the contrary, Act 23 simply requires electors to exhibit proof of their eligibility to vote to election officials, and is comparable to other procedural requirements that qualified electors must follow in order to exercise their right to vote, such as registering to vote, Wis. Stat. § 6.27, voting at the correct polling place, *id.* § 6.77(1), and arriving before the polls close, *id.* § 6.78(4).

Indeed, for over a century and a half, the Wisconsin Supreme Court has recognized that reasonable election-related regulations, such as Act 23's photo identification

requirement, do not constitute improper additional qualifications in violation of the Qualifications Clause, even if a person who fails to satisfy such requirements is "disentitled" from voting. *Byrne v. State*, 12 Wis. 519, 524 (1860); *see, e.g.*, *State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 575-78 (1867) (rejecting a Qualifications Clause challenge to a law that prohibited a person who did not appear on the voter registration list from voting, unless he submitted an affidavit from another voter attesting to his residency).[8]

In *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), the plaintiff argued that a statute allowing voters to be challenged at polling places and questioned about their eligibility violated the Qualifications Clause. Rejecting this claim, the Court held that, "instead of prescribing any qualifications for electors different from those provided for in the constitution," the statute simply enabled election officials to "ascertain whether the person

[8] *See also State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338-39, 115 N.W. 823, 825 (1908) (invalidating votes of people who neither appeared on the registration list nor provided proof of their qualifications at the polling place); *State ex rel. Bancroft v. Stumpf*, 23 Wis. 630, 632 (1869) (same); *State ex rel. Wannemaker v. Alder*, 87 Wis. 554, 561-62 (1894) (invalidating votes of village citizens that were cast at a polling place outside the village).

offering to vote possessed the qualifications required by that instrument." *Id.* at 283.

It continued:

> The necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar to need suggestion. While, therefore, it is incompetent for the legislature to add any new qualifications for an elector, it is clearly within its province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualified elector.

Id. at 283-84; *accord Altoona*, 73 Wis. 2d at 259, 243 N.W.2d at 409 (distinguishing between a "qualification of an elector" and "legislatively mandated proof that one who seeks to vote is qualified").

The fact that a person's vote must be rejected if he "fail[s] to furnish the proof required by law" does not render that evidentiary requirement "a new qualification for a voter." *Cothren*, 9 Wis. at 284. "If the vote of any elector is rejected under [the law], it will not be because it makes any new qualification, but only because he refuses to furnish the proof it requires." *Id.*; *see also State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875) (reaffirming that a statute requiring a voter to provide "proof of [his] right" to vote does not "abridge or impair" that right, because "if [the voter] be disfranchised, it is not by

force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the constitution").

Such identification-related laws are legitimate means of "prevent[ing] fraudulent voting by persons who assume the right when in fact they are not entitled to it." *Trask*, 135 Wis. at 338, 115 N.W. at 825. Those statutes "infringe[] upon no constitutional rights," but rather "render it possible to guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies." *State ex rel. Small v. Bosacki*, 154 Wis. 475, 478, 143 N.W. 175, 176 (1913); *see also State ex rel. Melms v. Young*, 172 Wis. 197, 199, 178 N.W. 481, 482 (1920) ("The elective franchise may be regulated to prevent corruption and to secure to the elector an honest and orderly exercise of the right to cast his ballot."). Indeed, those measures help protect the constitutional rights of all electors, because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Thus, Act 23 is a reasonable way of confirming the identity of eligible electors, rather than an unconstitutional additional "qualification" for electors.

C. Act 23 Is Not Unconstitutional Under Article III, § 2.

Finally, Act 23 cannot be invalidated on the grounds that it does not fall within any of the categories of statutes specified in Wis. Const. Art. III, § 2, which expressly permits the legislature to pass certain types of election-related laws. *Cf*. R.2 at 31, ¶¶ 74-76 (other argument contained within Count IV). As discussed above in Part III, the true source of the legislature's authority to enact Act 23 – at least as it applied to federal elections — is not the Wisconsin Constitution, but rather the Elections Clauses of the U.S. Constitution. *See* U.S. Const., art. I, § 4, cl. 1, art. II, § 1, cl. 2. Thus, the scope of Article III, § 2's grants of legislative power to regulate the conduct of elections and protect against fraud is irrelevant, at least for federal elections.

Even considering the issue exclusively under the Wisconsin Constitution, however, the legislature had the power to enact Act 23 under Article IV, § 1, which provides, "The legislative power shall be vested in a senate and general assembly." The Wisconsin Supreme Court has held that Article IV is a source of legislative authority for regulating elections:

> By sec. 1 of art. IV the power of the state to deal with elections except as limited by the

> constitution is vested in the senate and assembly, to be exercised under the provisions of the constitution; therefore the power to prescribe the manner of conducting elections is clearly within the province of the legislature.

State ex rel. La Follette v. Kohler, 200 Wis. 518, 548, 228 N.W. 895, 906 (1930); *see, e.g.*, *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 323-25, 125 N.W. 961, 962-63 (1910) (recognizing that Wisconsin's Primary Elections Law was enacted pursuant to Article IV, § 1).

The current version of Article III, § 2 was enacted by constitutional amendment in 1986. There is nothing in the amendment's history to suggest that it was intended to be an exclusive list of the legislature's powers relating to elections. Nor is there anything to suggest that the amendment's drafters intended that it overrule long-established Wisconsin Supreme Court caselaw recognizing the legislature's independent authority under Article IV, § 1 to enact reasonable requirements to protect against fraud and ensure the integrity of elections. *See, e.g.*, *La Follette*, 200 Wis. at 548, 228 N.W. at 906; *Van Alstine*, 142 Wis. at 323-25, 125 N.W. at 962-63. Moreover, as a matter of constitutional interpretation, this amendment should not be read as implicitly repealing any of the legislature's general legislative powers under Article VI, § 1. *Cf. State v. Dairyland Power Coop.*, 52 Wis. 2d 45,

51, 187 N.W.2d 878, 881 (1971) ("Repeals by implication are not favored in the law. The earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together."). Thus, Article III, § 2 is not an independent constitutional impediment to Act 23.

Thus, the district court's judgment cannot be affirmed on the basis of the other theories Plaintiffs raised below.

CONCLUSION

For these reasons, Intervenors respectfully request that this Court REVERSE the judgment of the Dane County Circuit Court and VACATE that court's injunction.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in § 809.19(8)(b)-(c) for a brief produced with a monospaced font. The length of this brief is 41 pages (excluding signature page, *see* § 809.19(8)(c)(1)).

Signed on: May 29, 2012

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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Signed on: October 10, 2012

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2012AP1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY McCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER and TIMOTHY VOCKE,

Defendants-Co-Appellants,

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

ON APPEAL FROM A JULY 17, 2012 FINAL JUDGMENT
OF THE DANE COUNTY CIRCUIT COURT
HON. DAVID T. FLANAGAN, PRESIDING
CASE NO. 11-CV-5492

BRIEF OF PLAINTIFFS-RESPONDENTS

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Respondents (Plaintiffs) also request oral argument and agree that publication is warranted because this is a case of substantial and continuing public interest.

STATEMENT OF FACTS

Prior to Act 23, a registered Wisconsin voter exercised the franchise by announcing his/her name and address to two election officials who verified the name with the poll list of registered voters, entered a serial number on the poll list, and initialed a ballot that they handed to the voter. Wis. Stat. §§6.36(2)(a);6.79 (2010). If another qualified voter had reasonable cause to believe that the elector requesting a ballot was not qualified to vote, the requesting elector could be challenged for cause and disqualified by the municipal clerk or board of election commissioners only upon proof beyond a reasonable doubt that the voter was not qualified. Wis. Stat. §§6.325;6.48 (2010).

Act 23 requires that a Wisconsin elector seeking to vote on election day and by absentee ballot must present one of these exclusive forms of photo identification (ID): Wisconsin driver license issued by the Department of Transportation (WisDOT); WisDOT issued photo ID; U.S. military ID; U.S. passport, all four unexpired or expired after the most recent general election; U.S. naturalization certificate issued less than two years before the election; unexpired driving or identification receipt; ID card issued by a federally recognized Indian tribe in Wisconsin; unexpired Wisconsin university or college student ID showing

expiration and issuance dates no more than two years apart. Wis. Stat. §§5.02(6m);6.79(2).R.84 p.2; A-App.102.

Act 23 exempts from the photo ID requirement: electors voting absentee and in the military, living overseas or indefinitely confined to a nursing home or similar residence; electors subject to a confidential listing; and electors presenting a citation or notice of intent to revoke or suspend their driver license within thirty days. Wis. Stat. §§6.79(6),(7); 6.86,6.87.

Applicants for a photo ID must provide satisfactory documentation of name, birth date, identity, residence, citizenship and Social Security number. Wis. Stat. §§343.50(4), 343.14(2)(a),(b),(bm),(er),(f). Only a certified birth certificate is satisfactory proof of name and birth date. Wis.Admin.Code §Trans 102.16(3)(a)1; R.84 p.2-3; A-App. 102-103.

Original Wisconsin birth certificates are maintained by the State Registrar, Department of Health Services (DHS), which authorizes local registrars to issue certified birth certificates for $20. Wis. Stat. §§69.01(25),69.03-.05, 69.21(1)(a)1.,69.22(1)(c); Wis.Admin.Code §DHS 142. 1. If the State Registrar refuses to register or cannot amend a birth certificate, one may petition the circuit court of the birth county for an order establishing the date and place of birth or for an order to amend erroneous information on the birth certificate. Wis. Stat. §§69.12(1);69.14(2)(b)6. The Milwaukee County filing fee is $168; in other counties, $164.50. Wis. Stat. §§814.61(1)(a),814.85(1),814.86(1),(1m); Wis. Cir. Ct. Fee…Tables, Table 1(eff. July 1, 2011) http://www.wicourts.gov/courts/circuit/docs/fees.pdf (last visited Oct. 15, 2012). On court order, the State Registrar

charges $20 to register and $10 to amend a birth certificate. Wis. Stat. §§69.22(5)(a)2;(5)(b). R.84p.3; A-App.103.

Act 23 appears to be the most restrictive voter identification law in the nation, given the limited, prescribed number of photo IDs and the absence of any fail-safe procedure for a qualified voter who lacks the required identification. R.60 Ex.3pp.4-7,9, Ex.5 *passim*,Table 2, Ex.7 p.18-20; R.84pp.3-4; R.90pp.33-37,39,107-108,112-113; R.91p.76; A-App.103-104. In eight states with photo ID laws, a voter without a photo ID can vote absentee with no ID or in person on execution of an affidavit of identity; Indiana voters without a photo ID can vote in-person on executing an affidavit of indigency, or absentee. R.60 Ex.3p.5, Ex.5pp.1,4-6,8,10,13-15, Ex.7p.19; R.84pp.3-4n12; R.90pp.36-37;A-App.103-104.

The exact match statistical method is a reliable, well-recognized method to compare large government databases and was the most dependable method for reasonably and accurately estimating the number of registered Wisconsin voters without a Wisconsin driver license or a WisDOT photo ID. R.84p.9;A-App.109. Reliable factual resources that form the basis for the exact match and adjustments are U.S. Census Bureau Wisconsin population studies, WisDOT records of driver licenses and photo IDs, the Government Accountability Board's (GAB) Statewide Voter Registration System (SVRS) database. R.60 Exs.6,7,9; R.84pp.7,9; R.90p.49;A-App.107,109.

Plaintiffs' expert Prof. Kenneth Mayer and Defendants' expert Prof. M.V. Hood each used the exact match to estimate the number of constitutionally qualified voters with no WisDOT photo ID. On performing the exact match between the SVRS and WisDOT files, Prof. Mayer

estimated that 301,727 (9.3%) of all registered voters lack a WisDOT driver license or photo ID. R.60 Ex.6, Ex.7pp.1-18, Ex.84, Ex.85; R.84pp.7-10; R.90pp.49;A-App.107-110.

A reasonable, reliable and accurate estimate of the number of constitutionally qualified voters in Wisconsin without Act 23 identification is 333,276. This estimate is produced by adding 301,727 registered voters identified via the exact match and 87,747 (9.3%) of unregistered but qualified voters for a subtotal of 389,454. This subtotal is reduced by 56,178 people who possess student, tribal or military photo ID, resulting in 333,276 eligible Wisconsin voters lacking a photo ID. R.60 Ex.6 pp.3-6, Ex.7pp.3,8, Ex.85; R.84pp.11-12; R.90pp.49-50,66, 70,80-90;A-App.111-112.

Non-match describes instances in which a registered voter in the SVRS database does not appear in the WisDOT database. A false non-match occurs when some data discrepancy misidentifies a registered voter who does possess a WisDOT ID. Professor Mayer reasonably sought to identify false non-matches and found that non-match patterns were not random but were more concentrated in certain age groups and locations, who were identified in previous studies as having significantly higher nonpossession rates. R.60,Ex.9; R.90pp.37-40,49-50, 64-68; R.95pp.36-37. This is a reliable indication that the non-match instances are true non-matches, reporting registered voters without ID. R.60Ex.7pp.5-6, Ex.9; R.84 p.11; R.90pp.71-74; A-App.111. This was further corroborated by GAB exact match studies of the two databases in 2008 and 2009 which showed a 9% non-match rate that was virtually the same as Prof. Mayer's. R.60 Ex. 12.

Professor Hood reported that the Georgia photo ID law coincided with 5% reduction in the African-American vote in the 2008 general election, notwithstanding an African-American presidential candidate and a black voter registration increase of 14% in the preceding four years. R.60 Exs.86, 87;R.84p.12;R.90p.81;R.91pp.81-83; R.93p.46,49,55; A-App.112.

Procuring a WisDOT photo ID is a frustrating, complex and time-consuming process for a substantial number of constitutionally eligible voters and can require the expenditure of an amount of money that is significant for indigent voters. R.60 Exs.1,14-30,51,53-55,58-59,62-65,67-71,73; R.84p.14;A.App.114.

Plaintiffs presented evidence from fifteen predominantly low-income voters who had to pay for a birth certificate in order to obtain their WisDOT photo ID, including ten who paid $20 for a Wisconsin birth certificate and five who paid from $15 to $50 for their out-of-state birth certificates. R.60 Exs. 22, 70, 71, 21, 16, 59, 58, 55, 23, 73, 19, 14, 15, 65 & 29. Plaintiffs also presented illustrative evidence from a total of 34 voters who spent many hours spread out over days and weeks travelling to or corresponding with various government offices attempting to procure the statutorily-required documentation to obtain a photo ID in order to vote.R.60 Exs.14-30, 51, 53-55, 58-59, 62-71 & 73.

Ruthelle Frank has regularly voted since 1948 and has never had a driver license or a birth certificate. She presented her baptismal certificate, Social Security card, two proofs of residence and bank records to the Wisconsin Department of Motor Vehicles (DMV) but was refused a photo ID for lack of a certified birth certificate. County and state representatives advised her that her name is wrongly spelled

on the record of her birth and to correct it she may need to petition a circuit court. R.60 Ex.1 Dep.pp.4-9,11-12,15,38-39,47-52 &Dep.Ex.1,2,4,5; R.84p.12;A-App.112.

Ricky Lewis is a registered Wisconsin voter who was honorably discharged from the U.S. Marine Corps. His sole source of income is his monthly $986 veteran's pension. Mr. Lewis presented to DMV his Department of Veterans Affairs photo ID, Milwaukee County photo ID, Marine Corps military service record and a Wisconsin Energies bill. He was denied a photo ID because he did not present a certified birth certificate and a Social Security card. He paid $20 to obtain a certified birth certificate only to be told there was no record of the birth of Ricky Lewis. He received a birth certificate for "Tyrone DeBerry" and was told that he could petition a court to order a corrected certificate. R.60 Ex.23, Dep.pp.5-6,8,13-14 & Aff.; R.84pp. 12-13; A-App.112-13.

Sequoia Cole, a registered Wisconsin voter, has a fixed monthly income of $600. She spent 5½ to 6½ hours walking to and from government and other offices and paid $20 for her birth certificate to obtain the underlying documentation required by DMV to issue her photo ID. R.60 Ex.16, Dep.pp.5-12,14&Aff.; R.84p.13;A-App. 113.

Joel Torres is a registered Wisconsin voter who has voted in previous elections. It took him three trips to DMV over several weeks and an appeal by his mother to the Milwaukee Election Commission for DMV to accept his many documents showing proof of residence and issue his photo ID. R.60 Ex.27, Dep.p.5-12&Aff.; R.84 p.13-14; A-App.113-114.

Plaintiff and registered voter Mary McClintock, who is disabled and wheelchair-bound, made three separate

paratransit trips to DMV in over nine hours to obtain her photo ID to vote. R.60 Ex. 24.

Registered voter and Plaintiff Danettea Lane futilely waited three times at DMV, went to the Milwaukee County Courthouse, paid $20 for her birth certificate, and returned to DMV to procure her photo ID for voting. R.60 Ex. 22.

Tyreese Jackson spent approximately ten hours at DMV, Social Security, and the Milwaukee County Courthouse, paying $20 for his birth certificate, to obtain the requisite documentation for his photo ID. R.60 Ex. 21.

Voter fraud (felon voting, multiple voting and voter impersonation) is a Class I felony, punishable by up to 3½ years imprisonment, a $10,000 fine or both. Wis. Stat. §§12.13;12.60(1)(a);939.50(3)(i). R.60 Ex.3pp,14; R.84p.3; A-App.103.

Since 2004, voter fraud investigations were undertaken by the Milwaukee Police Department, the Mayor of Milwaukee and the Wisconsin Department of Justice, with county prosecutors working through the Attorney General's Election Fraud Task Force. None of these efforts produced prosecutions of voter fraud violations that Act 23 would prevent. R.60 Ex.3pp.11-12,Ex.4; R.84p.12; R.90pp.21-24,26-29,95-96,99-100,103; R.91p.70,72-74; A-App.112.

The Election Fraud Task Force resulted in these cases: six registration misconduct; eleven felons voting; two double voting; and one absentee ballot fraud. The absentee ballot case involved two voters who voted absentee and at the polls, and was the result of poor absentee record keeping by the elections clerk. R.17¶66; R.60 Ex.3p.11, Ex.4; R.90 pp.27,23-24.

Felons can obtain a driver license or photo ID and Act 23 will not prevent felons registering or attempting to vote, as neither ID indicates felon status. Unlawful felon voting is deterred by GAB flagging records in the SVRS file and providing felon lists to local election officials. R.90 pp.26,99-100.

The photo ID requirement will not deter fraudulent double voting or multiple voting. R.60 Ex.3pp.11,12n.3; Ex.90pp.34,101-102; R.91p.70. The accuracy of GAB voter records will reveal post-election whether a person voted in multiple locations. R.90 p.102; R.91pp.71-72. Multiple voting is also deterred because it is a Class I felony punishable by up to 3½ years imprisonment. R.60 Ex.4p.1; R.90p.102.

Poll lists denote whether a voter has voted absentee and prevent double voting at the polls. If the absentee notation is missing from the poll list, showing a photo ID will not deter double voting. R.90p.27.

Five prosecutions following the Election Fraud Task Force were for special registration deputies' procurement of false voter registrants. R.90 p.27-28,103. Photo ID will not deter such fraud; the registration process is safeguarded because one must provide a driver license number or the last four digits of one's Social Security number to register. Wis.Stat. §6.33(1); Wis.Admin.Code §§GAB3.02(4);3.04. R.90p.29; R.91pp.73-74. No persons voted under the false names associated with these prosecutions for fraudulent procurement of registrants. R.17¶67; R.91pp.72-73.

An undocumented immigrant and thereby unqualified voter who registers under a fictitious name would be deterred from voting by the risk of deportation and imprisonment and would neither be detected nor deterred by the photo ID requirement. R.90p.105; R.91p.74-75.

There is virtually no evidence that in-person voter impersonation occurs. It is the least common form of electoral fraud. R.60Ex.3p.10; R.90p.30. In federal prosecutions nationwide for vote fraud between 2000 and 2005 there were no cases of voter impersonation that would have been prevented by photo ID requirements and only nine prosecutions overall. The cost of voter impersonation is so high and the benefits so low that it makes no sense to engage in voter impersonation at the polls. R.60 Ex.3pp.13-14; R.90p.106. None of the cases identified by the Election Fraud Task Force involved any confirmed cases of voter impersonation. R.17¶¶65,68.

The nationwide Cooperative Congressional Election Study (CCES) of over 40,000 respondents during the 2006 congressional midterm election and the 2008 presidential primary elections found no relationship between voters' attitudes about the frequency of election fraud and their likelihood of voting, or voter belief about election fraud and the existence of strict photo ID laws. The CCES concluded that the relative stringency of photo ID laws does not affect voter confidence in the electoral system. R.60Ex.3p.15; R.84pp.17-18; A-App.117-118.

ARGUMENT

Introduction

An estimated 333,276 constitutionally qualified Wisconsin electors lack one of the limited forms of ID prescribed by Act 23. For such voters, a WisDOT photo ID is the only attainable form of ID and requires the expenditure of unreasonable and onerous amounts of time and money, far exceeding the ordinary burdens normally associated with voting. Act 23 may be the most stringent ID requirement in

the nation. It contains no fail-safe and will absolutely disenfranchise every constitutionally qualified elector who cannot obtain the prescribed ID. With respect to its benefits, the law effects no meaningful purpose, as its intended target, voter impersonation, is virtually nonexistent in Wisconsin elections.

Defendants center their case on the argument that federal jurisprudence compels adherence to the legal conclusion that a photo ID law cannot be found unduly burdensome on the exercise of the franchise. However, a three-judge federal panel just struck down Texas' similarly stringent photo ID law finding that, like Act 23, it imposes unwarranted, costly and time-consuming burdens. *Texas v. Holder*, 2012 U.S.Dist.LEXIS 127119 (D.D.C., Aug. 30, 2012).

The Wisconsin Supreme Court has consistently recognized that the fundamental right to vote guaranteed by art. III, §1 of the Wisconsin Constitution cannot be impaired by unreasonable regulations tantamount to a denial of the right to vote. Plaintiffs' evidentiary record established beyond a reasonable doubt that Act 23's photo ID requirement is an unwarranted and constitutionally significant intrusion upon the exercise of the franchise for potentially hundreds of thousands of qualified voters.

I. Wisconsin Jurisprudence Requires Heightened Scrutiny of Act 23

Wisconsin jurisprudence compels heightened scrutiny of Act 23, as the circuit court carefully concluded, because it implicates a fundamental interest: the "inherent… fundamental…sacred" right to vote, guaranteed to qualified citizens by art. III, §1 of the Wisconsin Constitution. *State ex rel. McGrael v. Phelps,* 144 Wis. 1,15-17, 128 N.W. 1041

(1910). The Supreme Court has historically scrutinized restrictions on voting (and other fundamental rights) with a heightened, rigorous analysis to ensure that the fundamental, constitutionally guaranteed right of suffrage is not unreasonably limited in its free exercise. It has never applied non-heightened, deferential scrutiny to a statute which imposes an absolute or unreasonable bar to voting by constitutionally qualified electors, although it has not used the precise term "strict scrutiny." *Dells v. Kennedy*, 49 Wis. 555 (1880); *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 341, 125 N.W.961, 969 (1910); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613-614, 37 N.W.2d 473 (1949) (right to vote not "destroyed or substantially impaired" by reasonable legislation moving the date of elections and establishing primary runoff requirement); *McNally v. Tollander*, 100 Wis.2d 490, 302 N.W.2d 440 (1981) (referendum set aside because procedural irregularities disenfranchised qualified electors).

Defendants argue for a non-heightened level of scrutiny of Act 23 by stretching beyond their reach the import of decisions regarding ballot regulation, voter oaths regarding residency, and other election administration matters that do not directly, severely, or unreasonably intrude upon the fundamental right to vote by impairing voter access. Defendants invoke *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), but *Cothren* implicated the constitutional validity of a non-burdensome statute requiring voters challenged on residency to take an oath affirming 30 days of residency within the town where they vote. Defendants also rely on *State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875), but *Wood* actually held that officials' noncompliance with a statute by omitting a name from the voter registry could not disenfranchise or invalidate the ballots of otherwise qualified voters. And they rely on *State ex rel. Runge v. Anderson*, 100

Wis. 523, 533-534 (1898), which addressed qualifications of *candidates* for the ballot and whether the Legislature can reasonably regulate ballot preparation and "prohibit the double printing of names of candidates." Further, Defendants misconstrue the import of *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 482 (1913), regarding the residency requirement for transient workers. The court carefully scrutinized the residency law and recognized that it imposed a burden on transient workers, but found it properly designed to accomplish the important government objective of preventing "transient sojourners" from controlling election results, overriding the will of permanent residents. *Id.*

In *Dells v. Kennedy*, the Court struck down a registration requirement which prohibited a constitutionally qualified, but unregistered, elector from voting unless the voter became qualified after the close of registration. The Court carefully scrutinized the law, stating that the "sacred right" to vote may not be impaired by regulations to ensure "orderly exercise of the right" which unreasonably burden the constitutionally qualified voter:

> If the mode or method or regulations prescribed by law…deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disenfranchised him….

49 Wis. at 557-558.

The ballot regulation cases cited by Defendants do not relieve any court from reviewing whether a law unreasonably burdens qualified electors and is designed to effect an important government interest regarding the electoral process.

This principle was clearly stated in *State ex rel. Van Alstine v. Frear:*

> These decisions establish the rule that legislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

142 Wis. at 341, 125 N.W. at 969 (addressing validity of the state primary law).

Juxtaposing *Gradinjan v. Boho*, 29 Wis.2d 674, 139 N.W.2d 557 (1966), and *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), provides a window into the Court's approach. In *Ollman*, the Court declined to enforce the statute requiring the clerk's signature on ballots for in-person voters inside the polling place because the statute provided no reasonable basis to necessitate disenfranchising such voters of their fundamental right. 238 Wis. at 578, 300 N.W.183. Conversely, in *Grandinjan*, the election clerk's failure to comply with the statutory requirement to initial *absentee* ballots was enforced because the statute reasonably served the important purpose of deterring fraud which "could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place." 29 Wis.2d at 683-684, 139 N.W.2d 183.

In the instant case, the circuit court correctly applied these principles and carefully scrutinized the photo ID requirement, finding that it would severely burden a significant number of qualified voters but was not reasonably necessitated or designed to deter fraud or otherwise effect an important government interest. Such approach is consistent with the heightened level of scrutiny the Court has employed

for over 150 years in construing laws relating to voting and elections to ensure that they reasonably regulate but do not impose unwarranted severe or widespread burdens on exercise of the franchise.

II. Heightened Scrutiny of Act 23 Is Consistent With Federal Jurisprudence

The test articulated in *Van Alstine* and *Zimmerman* is perfectly consistent with the federal *Anderson/Burdick* sliding scale test by which the degree of judicial scrutiny is predicated on the severity and scope of the restrictions burdening the right to vote. *Anderson v. Celebrezze,* 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). Under *Anderson*/*Burdick,*

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 789). If a regulation places "severe restrictions" on the exercise of the franchise, "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick, Id.* at 434. In contrast, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the [constitutional] rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.*

Defendants erroneously argue that the circuit court rejected the "analytical approach of federal law" and that, for

uniformity, Wisconsin courts must follow federal precedent. While the circuit court's analysis focused on Wisconsin voting rights jurisprudence, its analytical approach was remarkably similar to the *Anderson/Burdick* paradigm, assessing whether the interests and benefits of the law justified its burdens, looking at "both sides of the ledger." R.84p.17,A-App.17. The circuit court assessed and then determined that the scope and degree of the burdens imposed by Act 23 are substantial and, consistent with *Anderson/Burdick,* carefully scrutinized whether the state's legitimate interests in deterrence and prevention of vote fraud necessitate such burdens.

At bottom, however, Defendants' argument is that the circuit court erred by not replicating the *conclusion* reached in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), about Indiana's photo ID law. The circuit court provided three valid reasons why it is not bound by the *Crawford* outcome: *Crawford* was based upon a factual record that did not establish severe or widespread burdens on voters; the Indiana law did not serve as an absolute bar to voting because electors who lacked a photo ID could still vote absentee or by affidavit; and the instant case is based on the Wisconsin, not the federal Constitution. R.84pp.18-19;A-App.118-119.

As discussed *infra*, the circuit court correctly distinguished the factual record in *Crawford, Id.* at 190 & n.8, 199, and contrasted the inflexible stringency of Act 23.

In support of their argument that Wisconsin courts must adhere to federal precedent in voting rights claims brought under the Wisconsin Constitution, Defendants rely on *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, 263 Wis.2d 709, 666 N.W.2d 816. No other Wisconsin case

addresses this issue, and Defendants' reliance on *Wagner* is misplaced. The *Wagner* case did not implicate the rights of voters but involved candidate requirements. Because there is no "fundamental right to be a candidate," barriers to a candidate's ballot access do not demand heightened scrutiny. 2003 WI 103,¶¶78-79. The *Wagner* Court noted generally that similar analysis is often used to review election laws, and equal protection and due process cases, but never stated or intimated (nor has any other Wisconsin court) that the fundamental right to vote explicitly set forth in art. III, §1 is subject to the same interpretation as the implied right to vote under the federal constitution. Further, Defendants ignore that the A*nderson/Burdick* test serves as a single standard to apply to all challenges to restrictive voting laws, whether brought as equal protection and due process challenges or under the fundamental right to vote. *Anderson,* 460 U.S. at 786, n.7.

In numerous contexts, the Wisconsin Supreme Court has construed our state constitution independently of a counterpart provision of the federal constitution, especially where there are textual dissimilarities and where rights are explicit only in the State constitution, as with the right to vote. *See State v. Miller*, 202 Wis.2d 56, 65-66l, 549 N.W.2d 235 (1996) ("freedom of conscience as guaranteed by the Wisconsin Constitution…not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision"); s*ee also State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998) (Wisconsin not U.S. Constitution requires 12-member jury); *State v. Doe*, 78 Wis.2d 161, 171-172, 254 N.W.2d 210 (1977) (broader rights to counsel for criminal defendants).

Even where the Wisconsin Supreme Court has held that provisions of the two Constitutions are "essentially the same," as with equal protection and due process, *see State v.*

West, 2011 WI 83, ¶5 n.2, 336 Wis.2d 578, 800 N.W.2d 929 and *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1998), Defendants disregard the Court's multiple rulings, circumscribing the reach of such a general pronouncement and holding specifically that principles of federalism allow that textually similar federal and state constitutional provisions need not be construed identically in all instances. *State v. Dubose*, 2005 WI 126, ¶¶40-43, 285 Wis.2d 143, 699 N.W.2d 582 (rejecting federal standard regarding out-of-court eyewitness identifications); *see also, State v. Knapp*, 2005 WI 127, ¶60, 285 Wis.2d 86, 700 N.W.2d 899 ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.") Nor does *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis.2d 1, 719 N.W.2d 408 (whether a 1993 constitutional amendment on gambling invalidated the State's earlier tribal gaming compacts) or the cases cited above require an analysis whether the *framers* intended strict "uniformity" with the federal constitution.

Defendants cite *Griffin v. Roupas*, 385 F.3 1128, 1131 (7th Cir. 2004), for the proposition that *Anderson/Burdick* requires non-heightened scrutiny of election statutes because of the legislature's unique role. *Griffin* involved a claim by working mothers seeking greater absentee ballot access, but it hardly stands for the proposition that where a statute significantly burdens exercise of the franchise a court is not obligated to scrutinize the asserted interests and whether they warrant intrusions into voting rights. In *Griffin*, the Court considered the history of vote fraud in Illinois and concluded that statutory restrictions were reasonable, finding a "gamey" history of absentee voting. However, the Sixth Circuit

recently applied the same *Anderson/Burdick* test to a similar case involving absentee early voting in Ohio. The Court invalidated a legislative restriction on absentee ballot access after scrutinizing the state's asserted interests and concluding they did not necessitate the voting restriction. *Obama for America v. Husted,* 2012 U.S. App. LEXIS 20821, **17-19 (6th Cir. Oct. 5, 2012).

The *Crawford* outcome, therefore, does not dictate the result in this matter and hardly establishes "non-uniformity" in Wisconsin jurisprudence regarding the fundamental right to vote under art. III, §1. On the contrary, the lead opinion in *Crawford* applied the *Anderson/Burdick* test to the record and concluded that the Indiana law passed muster, particularly in light of its fail-safe absentee-ballot and affidavit of indigency provisions, which are absent from Act 23, and the absence of evidence showing that a substantial number of voters was unreasonably burdened by the law. 553 U.S. at 190 & n.8, 199. This analytical framework, scrutinizing the scope and severity of the burdens and the necessity for such burdens, is the very approach taken by the circuit court and is consistent with the Wisconsin Supreme Court's voting rights jurisprudence.

III. The Burdens Incurred by the Individual Plaintiffs and Witnesses are Sufficiently Substantial and Widespread to Support the Circuit Court's Declaration that Act 23 Is Facially Invalid

Defendants wrongly assert that the result approving the Indiana photo ID law in *Crawford* dictates that the more burdensome Act 23 must be upheld. The circuit court correctly concluded that Plaintiffs' factual record here is "substantial and entirely credible," unlike the *Crawford* trial record which failed to "identify the number of registered

voters lacking the photo ID and said 'virtually nothing' about the difficulties imposed upon indigent voters." R.84 p.19; A-App.119 (citing *Crawford*, 555 U.S. at 200-201). In fact, the circuit court here noted that the federal district court considering the same record as the Supreme Court in *Crawford*, described the plaintiffs factual record as "utterly incredible and unreliable." R.84p.19; A-App.119 (quoting *Indiana Democratic Party v. Rokita*, 458 F. Supp.2d 775, 803 (S.D. Ind.2006)).

In contrast to *Crawford*, the record here established that over 300,000 Wisconsin electors lack an acceptable photo ID. For the vast majority of these electors, the WisDOT photo ID is the only reasonably attainable ID. R.60 Ex.6 pp.4-6. To obtain a photo ID, voters incur constitutionally burdensome monetary costs and expenditures of time to procure a birth certificate and other required underlying documentation. The trial record illustrated that these real burdens were neither speculative nor theoretical.

As the circuit court found, registered voters Ricky Lewis and Ruthelle Frank illustrate the more unreasonable and arbitrary burdens imposed by Act 23. The absence of fail-safe provisions, like the Indiana affidavit of indigency or the Indiana absentee ballot free of any photo ID requirement, will preclude voters like them from exercise their constitutional right to vote. R.84pp.12-13; A-App.112-113. They are likely not unique. While their circumstances underscore the arbitrariness of Act 23, other voters will incur less extreme, but nonetheless substantial burdens, illustrating the disenfranchising impact of Act 23.

Defendants' argument is unavailing that most of Plaintiffs' thirty-four witnesses eventually obtained their photo IDs, so the demonstrated burdens lack constitutional

significance. Absolute disenfranchisement is not a predicate to unconstitutional infringement of the fundamental right to vote. *Rosario v. Rockefeller*, 410 U.S. 752, 766-765 (1973) (we have "never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred...any serious burden or infringement on such constitutionally protected activity is sufficient to establish a constitutional violation"); *Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993) ("intolerable burden" of plaintiff's disclosure of Social Security number as a "condition of his right to vote" unconstitutional).

The circuit court found credible and persuasive the unrebutted evidence about the witnesses' own difficult and costly experiences obtaining a photo ID. R.84 p.12; A-App.112. Defendants' argument that this evidence lacks probative value because it is "anecdotal" is untethered to evidentiary principles, which ascribe no particular meaning to whether evidence is "anecdotal." Courts typically rely upon anecdotal evidence, and even do so to address weighty issues, as long as such narratives satisfy the rules of evidence and especially where they are "probative of a larger problem." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 840 (2000); *see also United States v. Armstrong*, 517 U.S. 456, 481 (1996) ("anecdotal evidence" of "drug counselor's personal observations or…an attorney's practice in two …courts" probative and "'tend[s] to show the existence' of selective prosecution.").

The circuit court also correctly found that "Procuring a DMV Photo ID can require the expenditure of an amount of money that is significant for an eligible voter who is indigent." R. 84p.14; A-App.114. Defendants dispute this finding, claiming that there was no testimony that such costs are beyond the means of voters. In fact, Plaintiff Danettea

Lane and her four young children subsist on $1200 monthly and she bluntly testified that she considers the $20 cost of a birth certificate "a financial hardship." R.60 Ex.22 p.13. Other plaintiffs and witnesses subsist on $600 to $1254 a month. R.60 Exs.14,16,19,21,23. The unique burden of such costs on low-income voters is constitutionally significant, as they are the least likely to possess a driver license or passport and also the least equipped to bear such costs and navigate bureaucracies to procure the underlying documentation for a photo ID. R.60 Ex.3; R.84pp.12-14; A-App.112-114. The constitutional significance of this fact for Missouri voters was highlighted in *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo.2006), where the court found that:

> For the Missourians who live beneath the poverty line, the $15 they must pay in order to obtain their birth certificates and vote is $15 that they must subtract from their meager ability to feed, shelter, and clothe their families. The exercise of fundamental rights cannot be conditioned upon financial expense.

Id. at 214.

The circuit court also correctly found the unrebutted evidence of actual experiences of Plaintiffs and other witnesses is "credible and persuasive" that "procuring a DMV Photo ID can be a frustrating, complex, and time-consuming process." R.84pp.12-13; A-App.113-114. Nonetheless, Defendants claim, without presenting any evidence of their own, that such burdens were non-representative, self-inflicted, and otherwise avoidable and atypical obstacles. Some obstacles are insidious, including unreasonable amounts of time and attendant costs incurred by voters in a carousel of government and other offices trying to produce the documentation required by law. R.60 14-30,51, 53-55,58-59,62-71&73; R.84pp.13-14; A-App.113-114. While

Defendants claim that information on obtaining a photo ID is stated on DMV literature, the required documentation for a photo ID is complex and not easily discernible from the DMV publications and website. R.60 Exs.41-47. In fact, these legal requirements may only be first discovered or understood by face-to-face visits to DMV and government offices. Defendants assume without evidentiary support that: average voters have internet access; the law is not confusing; average voters could review the law and discern what underlying documents they need to get an ID and how to get them; average voters can figure out how to call a local DMV office and talk to a live person; an average voter would expect that a DMV representative would inform them by telephone about wait times.

Defendants misapply the court's limited finding in *Crawford* that, under Indiana law, the inconvenience of gathering documents for the DMV and getting a picture taken for a photo ID did not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 197. The circuit court here correctly concluded that there is an extensive factual record detailing the various burdens of obtaining a photo ID and the burdens are substantially greater than those ordinarily associated with voting.

The circuit court's holding here is consistent with the recent decision of the three-judge panel in *Texas v. Holder*, 2012 U.S.Dist.LEXIS 127119 (D.D.C. Aug. 30, 2012), which determined that, *Crawford* notwithstanding, a state's mandatory fee for a birth certificate and the required travel to obtain a photo ID for voting can be unwarranted, onerous burdens on the right to vote. The Texas case arose under Section 5 of the Voting Rights Act of 1965 and is dissimilar to the instant case in certain respects, particularly regarding the parties' evidentiary burdens and the requirement to show

a retrogressive effect on racial minorities. The ultimate issue, though, is the same: whether the photo ID law imposes unnecessary burdens on voters which prevent exercise of the right to vote. In concluding that the Texas law imposed unlawful burdens on the right to vote for minority voters, the court cited the out-of-pocket cost of birth certificates which were required to obtain a Texas election identification certificate (EIC) (like the WisDOT photo ID) and distinguished the Texas law (SB 14) from the Indiana law upheld in *Crawford* and the Georgia photo ID law (which received VRA preclearance, *see Id.* at *96):

> [T]he burdens associated with obtaining a purportedly "free" voter ID card will be heavier under SB 14 than under either Indiana or Georgia law….EIC applicants will have to present DPS officials with a government-issued form of ID, the cheapest of which, a certified copy of a birth certificate, costs $22….Georgia residents may present a wide range of documents to obtain a voter ID card, including a student ID, paycheck stub, Medicare or Medicaid statement, or certified school transcript….The diverse range of documents accepted by Georgia (24…in all) means that few voters are likely to incur out-of-pocket costs to obtain a voter ID. And although Indiana law…requires voters to present a government-issued document (such as a birth certificate) to obtain a "free" photo ID, in Indiana the "fee for obtaining a copy of one's birth certificate" is significantly lower than in Texas, ranging from $3 to $12, depending on the county. *See Crawford*, 553 U.S. at 198 n.17.

Id. at *47-48.

The *Texas* panel also concluded that *Crawford's* holding is limited and it must assess whether voters in Texas experience "burdens beyond those usually associated with voting" to obtain photo IDs:

> *Crawford* thus cannot be read as holding that a trip to the BMV can never "qualify as a substantial burden on the right to vote." And logically so. After all, would-be voters who must take a day off work to travel to a distant driver's license office have most certainly been exposed to burdens beyond those usually associated with voting. The same is likely true if prospective voters must pay a substantial amount of money to obtain a photo ID or wait in line for hours to get one. In some circumstances these heavy burdens could well discourage citizens from voting at all. And if such burdens fall disproportionately on racial or language minorities, they would have retrogressive effect "with respect to their effective exercise of the electoral franchise."

Id. at *41-42 (citations omitted).

The circuit court's decision is consistent with *Texas v. Holder,* and rests on the long-standing Wisconsin principle that any law which unreasonably burdens exercise of the franchise without sufficient justification is tantamount to a denial of the right to vote and is constitutionally infirm. *State ex rel. van Alstine v. Frear,* 142 Wis. at 341, 125 N.W. 561 (voting laws cannot render franchise "exercise so difficult and inconvenient as to amount to a denial").

IV. Professor Mayer's Estimate of 333,276 Electors Is a Reliable Measure of the Number of Constitutionally Qualified Electors Who Lack a Photo ID

Professor Mayer estimated that 333,276 constitutionally qualified Wisconsin voters lack an Act 23-prescribed photo ID. The circuit court found that is "A reasonable, reliable and accurate estimate of the number of people eligible to vote in Wisconsin who do not have a form of identification that would permit them to vote under Act 23…." R.84 p.11-12; A-App.111-112.

Defendants dispute Prof. Mayer's expert opinion and challenge the circuit court's findings, but utterly fail to satisfy their burden of proving such findings are clearly erroneous. Pursuant to Wis. Stat. §805.17(2), appellate tribunals "will not reverse the factual findings of the circuit court unless they are clearly erroneous." *Rasmussen v. GMC,* 2011 WI 52 ¶ 14, 335 Wis.2d 1, 803 N.W.2d 623. Regarding expert evidence, "[t]he weight and credibility to be given to the opinions of expert witnesses is 'uniquely within the province of the fact finder.'" *Bloomer Housing Ltd. v. City of Bloomer*, 2002 WI App. 252, ¶12, 257 Wis.2d 883, 653 N.W.2d 309 (quoting *Schorer v. Schorer*, 177 Wis.2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993)).

Professor Mayer performed an exact match of the SVRS registered voter files and the WisDOT driver license and photo ID files. R.60 Exs.6,7; R.84p.7; R.90pp.49,63-64; A-App.107. The exact match revealed an estimated 301,727 registrants (9.3% of total registrants) who lacked a license or photo ID (non-matching registrants). R.60 Ex.6p.4, Ex.7pp.3,8,20; R.84 p.11; R.90pp.49-50,66,70; A-App.111. Prof. Mayer then applied the 9.3% nonpossession rate for voter registrants to determine that 87,747 of the 946,172 non-registered but voting eligible persons lack DOT-issued ID. R.60 Ex.6p.4-5,7; R.84p.11; R.90pp.80-90; A-App.111. He estimated the number of all voting eligible persons who might possess alternate forms of Act 23 IDs, including student, tribal, and military IDs, concluding that an estimated 333,276 of voting eligible Wisconsin residents lack an Act 23-prescribed photo ID. R.60 Ex.6 pp.5-6; R.84p.11; R.90pp.80-90; A-App.111.

Prof. Hood and Prof. Mayer employed the identical matching method in comparing the WisDOT and GAB databases, and both reached similar conclusions of the

number of registered voters in the SVRS who lack driver licenses or photo IDs. In his initial trial report, Prof. Hood found 311,690 registered voters (9.6% of all registrants) without a driver license or photo ID, while Prof. Mayer found 301,727. R.60 Ex.7p.3, Ex.84 Table 1. In their supplemental reports based on a revised DOT database, Prof. Hood found 302,082 registrants without a driver license or ID, while Prof. Mayer found 301,727. R.60 Ex.6p.4, Ex.85 Table 1.

Although Prof. Hood and Prof. Mayer both performed an exact match, Prof. Hood performed a final computation after the exact match, excluding from his final non-matched pool of 302,082 registered voters all unmatched persons (107,625 or 102,530) in the SVRS file who registered with a driver license number. R.60 Ex.85pp.2-4. Prof. Mayer rejected this approach because: he sorted the entire WisDOT file by license numbers and found very few nonconforming numbers with fewer digits or other mistakes; and the alternative explanation was more plausible, that there were registered voters whose licenses expired and were not renewed. R.90 pp.23-25.

Defendants argue that the circuit court's findings are flawed because Prof. Mayer did not subtract from the exact match an indeterminate number of false non-matches which may have been caused by spelling, spacing, and punctuation errors, and therefore not the "product of reliable principles and methods," consistent with Wis. Stat. §907.02(1). However, Prof. Mayer's statistical analysis was based upon the exact match method which is a generally accepted tool in the field of social sciences to compare large government databases. R.95pp.25-31. His analysis was predicated upon conservative assumptions, external validation, and an effort to account for potential errors. Prof. Mayer testified that another matching technique, statistical matching, could have been

performed on the databases with algorithms, which may have marginally reduced some false non-matches, but that technique was impractical because it would have required months to complete. Further, the exact match is generally accepted as a dependable method for social scientists to compare large government databases and determine the quantity of interest in this case, the number of registered voters in the SVRS file who lack a license or photo ID. R.95pp.28-30.

In performing the exact match, Prof. Mayer first excluded as non-matches all driver license number matches. He then matched first and last names and dates of birth, but in conservative fashion, did not perform a match based on middle names or middle initials because the formats for those fields differed between the SVRS and WisDOT files and would have overestimated the number of non-matches. R.60 Exs.3,7; R.90pp.63-65. He also sought to determine whether the alternative explanation, that some non-matches were false, could have been caused by inadvertent discrepancies in punctuation and spelling. While there was no way to correct for that error, Prof. Mayer counted those entries most likely susceptible to error and identified 65,331 names with hyphens and internal spaces. He opined that even in the unlikely event the matching process incorrectly identified every name with a hyphen or internal space that would have reduced the number to 235,000 unmatched SVRS records. R.60 Ex.7; R.90 pp.68-69.

To exclude other alternative explanations of non-matches, Prof. Mayer identified all persons with identical common names (e.g., James Jones), approximately 1,000 in the SVRS and 1,300 in the DOT files, and in conservative fashion removed them as if they were matches, although he deemed the numbers statistically insignificant. R.90 p.66-67.

Prof. Mayer could not determine the number of voters in the SVRS file who had a driver license expire within the narrow window going back just to the last general election. R.91 p.26. Such information was not discernible from the WisDOT files, and Prof. Mayer concluded that it was not a statistically significant quantity and some may have simply renewed their licenses. R.91 p.26. This was a reasonable conclusion, especially since the relevant time period would have only gone back to the last general election. Wis.Stat. §5.02(6m)(a).

Prof. Mayer also compared his results with three other studies, each providing external validation of his results. Prof. Mayer's results are consistent with the 2005 study of WisDOT license and ID possession rates by UW-M Prof. John Pawasarat, which had identified significantly higher nonpossession rates for elderly, young adults, and minorities. R.60 Ex.9; *see* R.84p.9;A-App.109. Prof. Mayer calculated the nonpossession rates for young adults aged 18-24 at 11.7%, for persons over 80 at 24.3%, and for Milwaukee County residents (with the largest percentage of minorities in the state) at 12.5%, or 44%. R.90 pp.71-73. The consistency between the Pawasarat study and Prof. Mayer's results further validate Prof. Mayer's findings and are a reliable indication that the non-matches accurately reported voters lacking WisDOT identification.

Prof. Mayer's results were also consistent with the GAB's exact matches of the SVRS and WisDOT databases in 2008 and 2009, pursuant to the Help America Vote Act (HAVA). There, the GAB performed matches of the 777,561 voters who registered between January 1, 2006 and August 5, 2008. Despite GAB's repeated, diligent efforts to contact voters and winnow down the number of false non-matches, and even with the benefit of Social Security number matches,

the GAB produced 70,000 non-matches, establishing roughly the identical non-match percentage as Profs. Mayer and Hood, approximately 9%. R.60,Ex.12; R.90,pp.57-63; R.91, pp.89-90; R94pp.43-44. Finally, Prof. Mayer's results were not inconsistent with the results of the Georgia exact match study, which Prof. Hood relied upon in his studies on the impact of photo ID on 2008 voter turnout in Georgia, identifying a relatively close nonpossession rate in Georgia of 6.04%. R.60Ex.84; R.93p.40; R.95p.32. Even applying the Georgia nonpossession rate of 6.04% to the 3.3 million registered voters in the SVRS files would reveal approximately 200,000 Wisconsin registered voters without a license or photo ID, still a substantial number by any measure.

In his manuscripts and trial reports, Prof. Hood never qualified or questioned the analytical value and reliability of the Georgia exact match method. Defendants failed to offer any evidence, reason, or expert opinion as to why Prof. Mayer's estimate might be off by anything more than an insubstantial fraction. In fact, Prof. Hood only opined that the true number of non-matches was likely less than 9.6%, but he did not contend that the percentage of voters without licenses or IDs is substantially less than the number both he and Prof. Mayer identified in their reports. R.95 pp.20-21,41. The only distinction Prof. Hood identified between the Georgia study and his and Prof. Mayer's Wisconsin exact match was that Georgia had the benefit of Social Security numbers. R.94 pp.42-43. Yet, the GAB's HAVA checks also had the benefit of Social Security numbers and identified a similar 9% nonpossession rate. R.90pp.57-63; R.91pp.89-90; R94 pp.43-44.

Finally, Defendants also contend that Prof. Mayer's findings were flawed because he failed to consider whether

the estimated 333,276 persons who lack an Act 23-prescribed photo ID can get one. However, the circuit court did not rely on Prof. Mayer's expert reports or testimony to determine the severity of voters' burdens. Rather, the circuit court relied upon Prof Mayer's expert reports and testimony to determine the *scope* of the burden, *i.e.*, what number of qualified electors would be burdened by the photo ID requirement because they lacked one. R.95p.32. That factual finding by the circuit court, that an estimated 333,276 persons lack the prescribed photo ID, was based upon reasonable, reliable, and accurate evidence and was not clearly erroneous.

Prof. Mayer's findings were the product of a reasonable, reliable, and accurate estimate of the number of voters without WisDOT photo IDs. He employed reliable principles and methods of social scientific statistical analysis in identifying an important quantity of interest in this case. The circuit court correctly adopted his factual findings, and Defendants have thoroughly failed to satisfy their burden of proving that the court was clearly erroneous in doing so. *See* R.91pp.79-82.

V. This Facial Challenge to Act 23 is Appropriate

Given the thousands of constitutionally qualified voters who are potentially disenfranchised by Act 23, this facial challenge satisfies any policy consideration of judicial restraint because it is based on a solid factual record, discussed *supra*. An as-applied challenge would be insufficient to address the Act's infirmities.

Defendants wrongly assert that *State v. Cole*, 2003 WI 112, ¶30, 264 Wis. 2d 520, 665 N.W.2d 328, dictates that a facial challenge to Act 23 should fail because "the vast majority of the voting eligible population in Wisconsin" possess an Act 23 ID. Intervenors cite *Society Ins. v. LIRC*,

2010 WI 68, ¶26, 326 Wis. 2d 444, 786 N.W.2d 385, for the same proposition. Justice Roggensack has explained that the *Cole* standard originated in *United States v. Salerno*, 481 U.S. 739 (1987), and is merely "descriptive of the end product of a court's reasoning, rather than a test that rigidly sets the analysis that must be undertaken…." *In re Termination of Parental Rights to Diana P.*, 2005 WI 32, ¶67, 279 Wis. 2d 169, 694 N.W.2d 344. The Court clarified that, under the appropriate doctrinal scrutiny, a Court may find a statute constitutionally infirm and is not required by *Cole* to affirm a facial challenge only if a law is unconstitutional in every possible instance:

> Salerno does not set out a methodology under which a court is precluded from holding that a statute is unconstitutional unless the court determines that every possible statutory application is unconstitutional; rather, Salerno is descriptive of a statute that, when examined under the relevant constitutional doctrines, but independent of particular factual applications, states an invalid rule of law.

Id.(citation omitted).

Defendants' crabbed articulation of the *Cole/Salerno* standard ignores that explanation and the Wisconsin decisions construing a facial challenge consistent with the following reinterpretation, which the majority cited approvingly in *Olson v. Town of Cottage Grove*:

> If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application….

2008 WI 51, ¶44 n.9, 309 Wis.2d 365, 749 N.W.2d 211 (citations omitted); *State v. Ninham*, 2011 WI 33, ¶43n.11,

333 Wis.2d 335, 797 N.W.2d 451; *State v. Wood*, 2010 WI 17, ¶13, 323 Wis.2d 321, 780 N.W.2d 63.

Further, federal courts permit facial challenges in many contexts. *See Citizens United v. FEC*, 130 S.Ct. 876, 919 (2010) (campaign finance); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (First Amendment); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *City of Boerne v. Flores*, 521 U.S. 507, 532-535 (1997) (Fourteenth Amendment); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (free speech); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel); *MDK, Inc. v. Village of Grafton*, 277 F.Supp.2d 943, 947-948 (E.D. Wis. 2003) (facial challenges appropriate in free speech cases because "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas").

In *Citizens United*, the Court upheld a facial challenge to a prohibition on corporate expenditures for express political advocacy and the majority provided three reasons, all directly applicable to this Court's scrutiny of Act 23, why an as-applied approach to the challenged law was inappropriate: the costs and problems attendant to uncertainty regarding to whom the law applies; protracted, piecemeal litigation would stretch beyond the election cycle, chilling the exercise of constitutional rights and causing injured parties to be disinclined to pursue post-election remedies; and, the "primary importance" of the right to the "integrity of the political process." 130 S.Ct. at 895.

Nor does the *Crawford* decision support Defendants' argument, because that Court's reasons for denying a facial challenge to the Indiana Photo ID law are patently absent here. In *Crawford*, the Court declined to entertain a facial challenge because of a flawed record which did not allow the

Court to quantify the number of Indiana electors without acceptable photo ID, had no "concrete evidence of the burden imposed on voters who currently lack photo identification," and from which the Court could not quantify difficulties faced by indigent voters. 533 U.S. at 200-201. Based on the scant record in *Crawford*, notably different from this trial record, the *Crawford* Court stated: "[W]e cannot conclude that the statute imposes 'excessively burdensome requirements' on *any* class of voters." *Id.* at 202 (emphasis added) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

Finally, Intervenors erroneously argue that this claim can be resolved as an as-applied challenge by simply improving WisDOT's "customer service" or permitting certain individuals to vote without photo ID. The burdens potentially faced by hundreds of thousands of qualified electors without Act 23-prescribed photo IDs are not a function of WisDOT's customer service, but derive as a matter of law from the statutory and administrative requirements imposed upon constitutionally qualified voters by Act 23. For example, independent of Act 23, applicants for a photo ID must provide satisfactory documentation of name, birth date, identity, residence, citizenship and Social Security number. Wis. Stat. §§343.50(4), 343.14(2)(a), (b), (bm),(er),(f). Only a certified birth certificate is satisfactory proof of name and birth date, and state statute requires a $20 fee for a birth certificate and more expensive filing fees to amend an erroneous birth certificate. Wis. Stat. §§69.01(25), 69.03-.05,69.21(1)(a)1., 69.22(1)(c);814.61(1)(a), 814.85(1), 814.86(1), (1m); R.84 pp.2-3; A-App. 102-103. *See also, supra*, page 2-3.

The burdens created by this statutory scheme may fall heaviest on those electors, exemplified by Ricky Lewis and Ruthelle Frank, who cannot obtain birth certificates without

great expense, but the complex constellation of burdensome financial, travel, and time-consuming costs is common to all electors, and especially the thousands of low-income, disabled, and elderly voters with no photo ID. Because the photo ID requirement severely burdens such a substantial number of qualified voters, a facial challenge is the only means to resolve the constitutional infirmities of Act 23.

VI. Act 23 Does Not Serve the State's Legitimate Interest in Preventing Voter Fraud

The putative purpose of the photo ID requirement of Act 23 is to prevent voter impersonation fraud at the polls. However, despite unsubstantiated complaints about vote fraud, official local and state investigations in Wisconsin have not identified any widespread vote fraud and no voter impersonation at the polls to justify Act 23's severe burdens on constitutionally qualified voters.

The circuit court received extensive evidence from Professor Mayer regarding the results of official investigations and prosecutions into vote fraud in Wisconsin, and whether the photo ID requirement of Act 23 might prevent or deter election fraud. The Attorney General's Task Force investigated allegations of vote fraud and, out of approximately 3 million votes cast in the 2008 general election, filed charges against 20 individuals, including 11 felons voting, 2 cases of double voting and 1 case of absentee ballot fraud. The absentee ballot case involved two voters who voted absentee and at the polls, which was the result of poor absentee record keeping by the elections clerk. Six cases involved false voter registrations, but did not involve the false registrants attempting to vote. R.17¶66; R.60 Exs.3,4; R.90 pp.27,23-24. Based upon Prof. Mayer's expert reports and testimony, the circuit court reasonably concluded: "Since

2004 voter fraud investigations have been undertaken by the Milwaukee Police Department, by the Mayor of Milwaukee, and by the Wisconsin Department of Justice, working with various county prosecutors working through the Attorney General's Election Fraud Task Force. None of these efforts have produced a prosecution of a voter fraud violation that would have been prevented by the voter ID requirements of Act 23." R.84p.12; A-App.112.

Defendants presented no evidence to support a different factual finding about the relationship between voter fraud in Wisconsin and Act 23. Moreover, Defendants now concede that voter impersonation is the only type of fraud directly preventable by a photo ID requirement. (Defs. Brief p.33.) Nonetheless, Defendants make several erroneous, unsubstantiated arguments to justify the need for a photo ID law to deter vote fraud. First, Defendants argue that the failure to prosecute voter impersonation fraud is not probative of its absence because it is difficult to detect. Defendants provide no evidence to substantiate such a speculative argument or that the circuit court's finding is clearly erroneous. Defendants only invoke a thin passage from the 7th Circuit decision in *Crawford* about voter impersonation, linking the difficulty of detection to "endemic underenforcement" and the absence of severe penalties for such violations, 472 F.3d 949, 953 (7th Cir. 2007), two factors clearly not present in Wisconsin given the large-scale official investigations into possible vote fraud in 2004 and 2008 elections.

Defendants also argue, without evidentiary basis, that even if photo ID cannot deter voter impersonation, it might deter felon voting, noncitizen voting, or double voting in multiple locations. Defendants did not rebut Prof. Mayer's testimony that photo ID would not prevent double voting,

which is easily detectible post-election in the SVRS voter database even without a photo ID requirement. R.91pp.101-102. With respect to illegal votes by felons or noncitizens, a photo ID requirement serves no deterrent and detection function, unlike the current poll book signature requirement of Act 23, which provides excellent forensic evidence identifying the actual person who cast any questioned ballot. Wis.Stat. §6.79(2)(a).

Finally, Defendants argue that the circuit court failed to recognize the state's legitimate interest in preventing vote fraud because the court cited the CCES that voter confidence in the electoral system is not necessarily enhanced by voter ID laws. R.60 Ex.3pp.15-16; R.84,pp.17-18; A-App.117-118. To the contrary, the circuit court properly looked at "both sides of the ledger," *i.e.*, the extent to which the right to vote is burdened by the requirement *and* whether the law serves or advances the legitimate objective of combating vote fraud and enhancing voter confidence. Defendants suggest, however, that no inquiry is required to determine whether the challenged photo ID requirement advances the state's legitimate interest, and cite *Purcell v. Gonzalez*, 549 U.S.1, 4 (2006), for the proposition that photo ID requirements, by definition, advance voter confidence in the electoral process.

Defendants far exaggerate the reach of *Purcell.* In assessing the reasonableness of an election regulation, the inquiry does not terminate by declaring that the state has a legitimate interest in electoral integrity. Rather, the inquiry extends to whether the burden created is a purposeful rather than gratuitous intrusion upon the exercise of the franchise. For example, in *Purcell*, the Supreme Court did not conclude its analysis on identifying the state's legitimate interest in prevention of vote fraud. Although the Court vacated a lower court injunction, the Court's assertion of the state's interest

did not settle the validity of the photo ID requirement at issue. Justice Stevens set forth the lower courts' analytic tasks, which are identical to the circuit court's approach here of looking at "both sides of the ledger":

> At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements.

Id. at 6 (Stevens, J., concurring).

Likewise, even if there is a public belief that photo ID requirements might assuage concerns about the integrity of the electoral process, mere perceptions cannot justify the imposition of unreasonable burdens on exercise of the franchise. The circuit court identified the serious danger of such an approach: "Perceptions are malleable….The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." R.84 p.17; A-App.17 (quoting *Weinschenk,* 203 S.W.3d at 218-219).

Based upon the foregoing, it is clear beyond a reasonable doubt that Act 23 constitutes an unreasonable and onerous burden upon the right to vote under art. III, §1 for potentially hundreds of thousands of constitutionally qualified electors, and that this burden is not narrowly tailored to address or resolve the state's legitimate interest in election integrity.

VII. Intervenors' Claim Based on the Federal Election Clauses Is Waived and Has Been Consistently Rejected by the U.S. Supreme Court

Intervenors claim that Wisconsin's Constitution and courts may not constrain the Legislature on any issue involving federal elections, pursuant to U.S. Const. art. I, § 4 & art. II, § 1. This issue was not raised in the circuit court and is waived on appeal, under long-standing principle. *Nickel v. United States*, 2012 WI 22, ¶21, 339 Wis.2d 48, 810 N.W.2d 450 (quoting *Cappon v. O'Day*. 165 Wis. 486, 490, 162 N.W. 655 (1917) ("One of the rules of well-nigh universal application…is that questions not raised and properly presented for review in the circuit court will not be reviewed on appeal."); *Terpstra v. Soiltest, Inc.*, 63 Wis.2d 585, 593, 218 N.W.2d 129 (1974). In their Petition, Intervenors never referred to the Election Clauses and this Court, in reliance thereof, granted permissive intervention, stating the petition "demonstrates that the proposed intervenors' claim involves the same question of law as the pending appeal." Order dated Oct. 5, 2012.

If this Court decides to address Intervenors' new claim, it should summarily discard it. The U.S. Supreme Court has consistently rejected any notion that the phrase "the Legislature thereof" in the Election Clauses refers exclusively to a state's legislative body and not to the state's entire lawmaking process, or that the Election Clauses constrain state constitutions or courts, or even executive branches, from limiting legislative discretion. The Court first addressed the issue on ruling that Utah's constitutional amendment reserving the right of voters to approve by referendum a congressional reapportionment plan was consistent with art. I, §4 since "the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was

contained within the legislative power." *Davis v. Hildebrant,* 241 U.S. 565, 568 (1916). The Court again rejected the notion, upholding a governor's constitutional veto power over congressional redistricting as a lawmaking function under art. I, §4. *Smiley v. Holm,* 285 U.S. 355 (1932). More recently, the Court held that a federal court must defer to a state court in construing reapportionment disputes "where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe v. Emison*, 507 U.S. 25, 33 (1993) (emphasis in original). This year, a federal appeals court studiously traced the jurisprudence and rejected an identical art. I, §4 challenge to a Florida constitutional amendment which, via citizen initiative, established congressional redistricting standards. *Brown v. Secretary of State of Fla.*, 668 F.3d 1271, 1276-1277,1281 (11th Cir.2012) (Elections Clause refers to "state's entire lawmaking function, and the power of the people to amend their state constitution").

Intervenors cite three cases, but none support their proposition. *Cook v. Gralike,* 531 U.S. 510, 523 (2001), involved whether a state constitutional amendment could require notations on the ballot about congressional candidates' position on term limits. The Court held that the amendment went beyond the state's authority, not because it imposed procedural conditions violating art I, §4, but because it was a means by the state to favor particular federal candidates and an attempt to dictate the outcome of federal elections. *United States Term Limits v. Thornton,* 514 U.S. 779 (1995), was also unrelated to the Election Clauses, merely addressing whether a state could impose term limits on its congresspersons in violation of the Qualifications Clauses, U.S. Const. art. I, §§2-3. Finally, in *Bush v. Palm Beach Cnty. Canvassing Bd.,* 531 U.S. 70, 76 (2001), a case also not involving art. I, §4, the Court simply remanded the

presidential recount issue to the state court and declined to resolve a lack of clarity in the state court's decision regarding the relationship between the Florida constitution and art II, §1. Thus, even the discussion of art II, §1 was *dicta*.

The consequences of the policy urged by Intervenors would be dire and bizarre. Hundreds of state constitutional provisions in Wisconsin and nationwide, which protect voting rights, declare eligibility requirements, protect polling places, or establish standards for absentee ballots, would be unconstitutional under Intervenors' theory. Moreover, whenever a legislature enacted an electoral law that conflicts with the state constitution, the state would end up with different legal rules governing federal and state elections, even when they are on the same ballot. Likewise, as *Growe v. Emison* demonstrated, Congressional redistricting is heavily regulated by state constitutions which typically are the source of requirements about compactness, contiguity, and the preservation of communities of interest. 507 U.S. 25. *See, e.g.*¸Mo.Const., art. II §45; Col.Const., art. V, §44; Hi.Const., art. IV, §9. *See also* David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions,* 37 RUTGERS L.J. 1087 (2006). All such requirements would be rendered unconstitutional for congressional redistricting if Intervenors' theory were accepted.

Intervenors' claim is inconsistent with U.S. Supreme Court precedent and they fail to cite a single case supporting their proposition that the Election Clauses prohibit state constitutions and courts from constraining their own legislatures to ensure that legislative action does not unreasonably burden and disenfranchise voters. This Court should reject their new claim.

CONCLUSION

On the basis of all of the above, the circuit court's decision should be affirmed.

November 5, 2012.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,851 words.

November 5, 2012.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,	Appeal No. 2012-AP-1652
Plaintiffs-Respondents,	Dane County Circuit Court No. 11-CV-5492
v.	
SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER and TIMOTHY VOCKE,	
Defendants-Appellants,	
and	
DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,	
Intervenors-Appellants.	

On Appeal from the Judgment of the Circuit Court for Dane County, the Honorable David T. Flanagan, Presiding

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ARGUMENT

I. THE NAACP HAS NOT PRESENTED A VALID FACIAL CHALLENGE

Plaintiffs-Respondents (collectively, "the NAACP") have not presented a valid facial challenge to Wisconsin's voter identification law, 2011 Wisconsin Act 23, for two reasons. ***First***, Plaintiffs' brief confirms that they are attacking the State's ***implementation*** of the law, rather than the text of the law itself. ***Second***, Plaintiffs' brief implicitly admits that the alleged constitutional problems of which they complain do not apply to the vast majority of voters. Thus, although the Voter ID Law might be subject to an appropriate as-applied challenge, the trial court erred in holding the law facially invalid.

A. Plaintiffs' Facial Challenge to Act 23 Is Improper Because the Alleged Constitutional Violations Arise From the Law's Implementation, Rather Than Its Text

The first reason this Court must reject Plaintiffs' facial challenge is because they are not challenging Act 23's text, but rather the practical difficulties that certain people have encountered in obtaining a photo identification card. A "facial constitutional challenge attacks the law itself as drafted by the legislature, claiming the law is void from its beginning to the end." *Soc'y Ins. v. Labor & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 27,

326 Wis. 2d 444, 464-65, 786 N.W.2d 385; *accord In re Gwenevere T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 298-99, 797 N.W.2d 854.

Plaintiffs argue that Act 23 is unconstitutional because obtaining photo identification can be "difficult and costly." NAACP Br. at 20. In particular, Plaintiffs complain that the one-time $20 cost of a birth certificate is an undue burden for some indigent voters, *id.* at 6, 21. Likewise, some voters face special burdens because they do not live near a Division of Motor Vehicles ("DMV") office, *id.* at 6-7; encounter long lines upon arriving at the DMV, *id.* at 7, 21-22; or must make multiple trips because they did not bring the proper paperwork, *id.* at 5-7, 21-22. A few people also experience substantial difficulty obtaining the birth certificate they generally need to obtain a photo identification card due to alleged recordkeeping errors, *id.* at 5-6.

None of these complaints, however, arise from the text of Act 23. Act 23 does not require the State to charge for birth certificates, specify how many DMV offices there will be or how adequately they will be staffed, or identify the documents a person must present to obtain valid identification. Such considerations are wholly collateral

to Act 23's requirement that a person present a valid form of photo identification before voting.

Indeed, Plaintiffs themselves identify the separate laws that impose certain documentary requirements and fees for obtaining a birth certificate. *See id.* at 33 (citing Wis. Stat. §§ 69.21(1)(a)(1); 69.22(1)(c); 343.14(2)(a), (br), (es), (f); 343.50(4); 814.85(1); 814.86(1), (1m)). To the extent Plaintiffs have a valid constitutional claim, it is solely an as-applied challenge, to either the State's implementation of Act 23, or else the myriad ancillary statutes to which Plaintiffs cite governing the issuance of birth certificates and photo identification cards. Thus, this Court should reverse the trial court's conclusion that Act 23 is facially unconstitutional and overturn its injunction.

B. Plaintiffs' Facial Challenge to Act 23 Is Improper Because the Statute Has Numerous Applications That Plaintiffs Do Not Challenge

A separate reason this Court should reject Plaintiffs' facial challenge to Act 23 is because the statute may be applied in a wide variety of circumstances that do not implicate the concerns Plaintiffs raise. The Wisconsin Supreme Court has held that a facial challenge is appropriate only where a law "cannot be constitutionally enforced under any circumstances." *Soc'y Ins.*, 2010 WI 68,

¶ 26, 326 Wis. 2d at 463. Even if a statute might be "unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." *State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601 (1998).

Plaintiffs attempt to challenge this standard based on a concurrence by a single Justice in *In re Diana P.*, 2005 WI 32, ¶ 67, 279 Wis. 2d 169, 694 N.W.2d 344 (Roggensack, J., concurring) (cited by NAACP Br. at 31), without expressly citing or identifying the opinion as a concurrence. To the contrary, Plaintiffs repeatedly and deceptively refer to what "the Court" purportedly declared and held, NAACP Br. at 31, despite the fact that the majority opinion did no such thing, *In re Diana P.*, 2005 WI 32, ¶ 15, 279 Wis. 2d at 178-79.

Act 23 cannot be held facially unconstitutional. Plaintiffs concede that at least 91% of Wisconsin voters have some form of photo identification (this figure apparently does not include U.S. passports). NAACP Br. at 4. They do not argue that requiring such people to present their identification cards when voting is a substantial burden. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.).

Of the remaining voters, some unspecified percentage readily can obtain photo identification because they already have, or can afford the $20 to obtain, a copy of their birth certificate; can travel to a DMV office; and will not encounter a multi-hour wait. Thus, although some people face special financial burdens, travel challenges, and administrative inconveniences in obtaining photo identification, Act 23 does not raise such concerns as applied to the vast majority of people, and therefore is facially valid. *Soc'y Ins.*, 2010 WI 68, ¶ 26, 326 Wis. 2d at 463. Indeed, even under the U.S. Supreme Court's more liberal standard for facial challenges, Act 23 is constitutional because, despite the hardships a small percentage of voters face, it has a "plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quotation marks omitted).

II. ACT 23, ON ITS FACE, DOES NOT SUBSTANTIALLY BURDEN THE CONSTITUTIONAL RIGHT TO VOTE

The NAACP's discussion of the pertinent precedents reaffirms that Act 23 does not violate the right to vote under the Wisconsin Constitution. The NAACP does not dispute that, in *State ex rel. Cothren v. Lean*, 9 Wis. 279, 283-84 (1859) (cited in NAACP Br. at 11) (emphasis added), the Wisconsin Supreme Court expressly held, "[I]t is

clearly within [the legislature's] province to require any person offering to vote, to furnish ***such proof as it deems requisite***, that he is a qualified elector." *See also State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338-39, 115 N.W. 823 (1908) (upholding law providing that "votes of persons offering their ballots shall not be received unless they establish their right to vote").

Likewise, in *State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875) (cited by NAACP Br. at 11), the Court reaffirmed that the Legislature may require "all the voters" to provide, at the polling place, "reasonable proof of the[ir] right" to vote. Such a law "imposes no condition precedent to the right [to vote]; it only requires proof that the right exists." *Id.* at 87. The Court explained:

> The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the constitution.

Id.[1] Under *Cothren* and *Wood*, the State may require voters to present photo identification at the polling location to confirm their identity and eligibility to vote.

[1] *Accord State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 575-78 (1867) (holding that a voter "is presumed to

The NAACP quotes at length from *Dells v. Kennedy*, 49 Wis. 555, 556 (1880) (quoted by NAACP Br. at 12), in which the Wisconsin Supreme Court struck down a requirement that voters register in advance of Election Day in order to vote. The fatal defect with the statute, according to the Court, was that it "provides no method, chance or opportunity for [a person] to make proof of his qualifications on the day of election." *Id.* at 558.

In this case, in contrast, a person has the opportunity to satisfy Act 23's requirements on Election Day by presenting his identification to election officials at the polling location. Wis. Stat. § 6.79(2)(a). Furthermore, even if a person fails to present proper identification at the polling location, he is permitted to cast a provisional ballot, *id.* §§ 6.79(2)(d), (3)(b), 6.97(1)-(2), which will be counted if he later shows his identification to the proper local or county official, *id.* §§ 6.97(3)(a)-(c). Thus, Act 23 is fully consistent with *Dells*, 49 Wis. at 556.

Plaintiffs also cite *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15-17, 128 N.W. 1041 (1910) (cited by NAACP Br.

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know the law and must go to the polls prepared to comply with its conditions; and if he does not, and his vote is lost, it may, so far as it is the fault of any one, with justice be said to be his own fault").

at 10-11), for the proposition that this Court should subject Act 23 to "heightened scrutiny." The *McGrael* Court held, however, that although the right to vote is "sacred," it "is yet subject to regulation like all other rights," *id.* at 15. The Court explained that the legislature may impose "reasonable" regulations on the right to vote. *Id.* at 18. "[W]hat is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. . . . [with] all fair doubts being resolved in favor" of the statute. *Id.*

The *McGrael* Court later reiterated that the state Constitution allows the Legislature to adopt a "range of methods" of regulating the right to vote that "is necessarily as broad as the uttermost boundaries of reason." *Id.* There must be a clear "[a]buse of discretion" before "the legislative action can be condemned as usurpation." *Id.* at 19. Rather than heightened scrutiny, *McGrael* counsels firmly in favor of deference to the Legislature. *See also State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613-14, 37 N.W.2d 473 (1949) (cited by NAACP Br. at 11) (reaffirming that the right to vote is "subject to reasonable regulation by the legislature," which may say "how, when, and where . . . ballot[s] shall be cast"); *State ex rel. Small v. Bosacki*,

154 Wis. 475, 478, 143 N.W. 175 (1913) (cited by NAACP Br. at 12) (holding that the Legislature may "prescribe reasonable rules and regulations under which [the right to vote] may be exercised" to "guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies").

Thus, even the precedents upon which the NAACP relies provide strong support for Act 23's photo identification requirement. This Court therefore should defer to the Legislature and overturn the trial court's injunction against the statute.

III. EVEN IF THIS COURT CONCLUDES THAT ACT 23 RAISES CONSTITUTIONAL DIFFICULTIES, A COMPLETE INJUNCTION AGAINST THE LAW IS AN IMPROPERLY OVERBROAD REMEDY.

Even if this Court concludes that requiring voters to obtain photo identification may be a substantial burden on some individuals, facially invalidating Act 23 is an inappropriately overbroad remedy. The NAACP repeatedly recognizes throughout its brief that, in order to violate a person's right to vote under the Wisconsin Constitution, a statute must make the exercise of that right "so difficult and inconvenient as to amount to a denial." NAACP Br. at 13 (quoting *State ex rel. Van Alstine v. Frear*, 142 Wis.

320, 341, 125 N.W. 961 (1910)); *accord id.* at 12 (quoting *Dells*, 49 Wis. at 557-58).

To the extent this Court believes that some form of relief is appropriate, it should be limited only to those for whom Act 23's has made voting "so difficult and inconvenient as to amount to a denial" of the right to vote. This may include requiring the State to:

- provide birth certificates to indigent voters, and allow indigent voters to commence proceedings to modify alleged errors on their birth certificates, free of charge;

- accept alternate proof of identity from indigents born out-of-state, *see* Wis. Admin. Code Trans. § 102.15(3)(b);

- exempt handicapped people who face mobility challenges from Act 23's requirements;

- ensure that DMV offices maintain certain minimum hours or staffing levels, or establish temporary DMV satellite offices in under-served areas, for a "transition" period to allow voters an adequate opportunity to obtain identification; and/or

- notify voters about Act 23's requirements, either through public advertisements, mailed notices to voters, or handouts at libraries, municipal clerks' offices, schools, and other offices eligible to be voter registration facilities under the National Voter Registration Act, 42 U.S.C. § 1973gg-5(a)(2)-(3).

Such measures are well within the Court's equitable discretion, and are the most appropriate means of alleviating the burdens of which Plaintiffs complain without invalidating a formal act of the legislature or

undermining the integrity of the electoral system by nullifying Act 23's identification requirement.

IV. THE PHOTO IDENTIFICATION REQUIREMENT IS VALID UNDER THE U.S. CONSTITUTION'S ELECTIONS CLAUSES

Finally, the U.S. Constitution's Elections Clauses, *see* U.S. Const., art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2, bar Plaintiffs' challenges to Act 23, as applied to federal elections, under the Wisconsin Constitution. The NAACP contends that this issue is waived because the State did not raise it in the circuit court. NAACP Br. at 38. A party may pursue on appeal, however, "an additional argument on issues already raised" below. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983); *see also In re Willa L.*, 2011 WI App. 160, ¶¶ 23-24, 338 Wis. 2d 114, 125, 808 N.W.2d 155. This is especially true where a party asserts a constitutional issue that is related to the arguments raised below. *Sambs v. Brookfield*, 95 Wis. 2d 1, 12, 289 N.W.2d 308 (Wis. Ct. App. 1979), *rev'd on other grounds*, 295 N.W.2d 504 (Wis. 1980).

The NAACP also emphasizes that the term "Legislature," as used in the Elections Clauses, has been interpreted as referring to "the state's entire lawmaking ***process***," NAACP Br. at 38 (emphasis added), rather than just the legislature itself. *See Smiley v. Holm*, 285 U.S. 355, 368

(1932) (holding that a state Governor may veto a state election law); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that state election laws may be enacted via referendum).

Although a State is free to define the legislative process by which it will enact election-related statutes, it cannot place ***substantive*** limits on the scope of the legislature's power to regulate federal elections, which originates in, and is granted directly by, the U.S. Constitution. *See Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see also Smiley*, 285 U.S. at 366 (noting that the Elections Clause delegates to state legislatures the power to enact laws to deter and prevent "fraud and corrupt practices" in federal elections); *see, e.g.*, *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008) (invaliding a directive regarding ballot access promulgated by the Ohio Secretary of State because, "[a]s to federal offices, the [Elections Clauses] vest exclusive power to establish such [rules] in the state legislature").

The NAACP points out that there are no precedents directly addressing this specific issue. NAACP Br. at 39. This does not change the fact that, when a state legislature act[s] "within the exclusive delegation of power under the Elections Clause[s]," *Cook*, 531 U.S. at

523, any substantive restrictions on the scope of that power must be found in the U.S. Constitution itself, *see, e.g.*, U.S. Const., amend. XIV, § 1 (Due Process and Equal Protection Clauses), not a state constitution.

The NAACP contends that "hundreds" of state constitutional provisions would be rendered unconstitutional if this Court enforces the plain meaning of the Elections Clauses. NAACP Br. at 40. That is not true. At most, such provisions would be inapplicable to federal elections. Since nearly all aspects of such elections are governed by state laws and regulations, rather than directly by State Constitutions, this would have very limited effect. In any event, a state constitution may not impose substantive limits on a power directly conferred by the U.S. Constitution, the NAACP may not rely on the Wisconsin Constitution to challenge Act 23, at least as applied to federal elections.

CONCLUSION

For these reasons, Intervenors respectfully request that this Court REVERSE the judgment of the Dane County Circuit Court and VACATE that court's injunction.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in § 809.19(8)(b)-(c) for a brief produced with a monospaced font. The length of this brief is 13 pages (excluding signature page, *see* § 809.19(8)(c)(1)).

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2012AP1652

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Plaintiffs-Respondents,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, AND TIMOTHY VOCKE,

Defendants-Appellants,

DORIS JANIS, JAMES JANIS, AND MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

ON APPEAL FROM A JULY 17, 2012, FINAL JUDGMENT OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DAVID T. FLANAGAN PRESIDING, CASE NO. 11-CV-5492

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DISTRICT II

Case No. 2012AP1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, AND ANTONIO K. WILLIAMS,

Plaintiffs-Respondents,

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, AND TIMOTHY VOCKE,

Defendants-Appellants,

DORIS JANIS, JAMES JANIS, AND MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

ON APPEAL FROM A JULY 17, 2012, FINAL JUDGMENT OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DAVID T. FLANAGAN PRESIDING, CASE NO. 11-CV-5492

REPLY BRIEF OF DEFENDANTS-APPELLANTS

I. WISCONSIN CASE LAW DOES NOT REQUIRE STRICT OR HEIGHTENED SCRUTINY OF THE VOTER IDENTIFICATION REQUIREMENTS.

Plaintiffs argue that the Wisconsin Supreme Court applies strict or heightened scrutiny to laws burdening the right to vote. That is incorrect.

The leading Wisconsin election law decisions mostly pre-date the modern language of strict or heightened scrutiny that has developed since the decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Therefore, to discern whether those decisions have applied something like strict or heightened scrutiny, one must examine to what extent the analysis resembles that used in modern election law cases.

Under the *Anderson/Burdick* analysis used in federal election law cases, strict scrutiny has two characteristics. First, the challenged law must promote a state interest "of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In contrast, under non-strict review, a challenged law may advance a State's "important regulatory interests," even if less than *compelling*. *Id.* Second, when strict scrutiny is applied, the challenged law must be "narrowly drawn" to advance the state interest. *Id.* Conversely, under non-strict review, the "fit" between means and end must be "reasonable" and "nondiscriminatory," but need not be "narrowly drawn." *Id.*

"Heightened scrutiny," as distinguished from strict scrutiny, suggests an intermediate level of review. This presumably means that the importance of the state interest must be more than minimal, but less than compelling, and the fit between means and end must be more than merely reasonable, but less than narrowly tailored.

Under these categories, the analysis in the Wisconsin cases is closer to non-strict review than to strict or heightened scrutiny. The cases discussed at pages 8-10 of Defendants' opening brief consistently applied a test of reasonableness under which procedural regulations designed to protect the integrity and efficiency of elections are upheld as long as they do not extend beyond what is reasonable so as to destroy or substantially impair voting rights. Plaintiffs have not pointed to any Wisconsin case demanding a state interest more compelling than the interest in electoral integrity and efficiency, or requiring that the challenged regulation be narrowly tailored to promote the state's interest. Plaintiffs even concede that the Court reviews "whether a law *unreasonably* burdens qualified electors and is designed to effect an *important* government interest regarding the electoral process." Brief of Plaintiffs-Respondents at 12 (emphasis added). The fact that the Wisconsin cases require regulations to be reasonable, rather than narrowly tailored, and require the state interest to be important, rather than compelling, shows that they do not apply strict or heightened scrutiny.

Plaintiffs' comparison of *Gradinjan v. Boho*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966), with *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), is not to the contrary. Those cases, read together, hold that a statutory requirement that a voter's ballot not be counted if not properly initialed by the appropriate election officials is constitutionally impermissible for in-person voting, but permissible for absentee voting. *See Gradinjan*, 29 Wis. 2d at 562-63; *Ollmann*, 238 Wis. at 578-79. It does not follow, however, that the Court applied strict or heightened scrutiny in either case. The Court said that the fit between the state interest of protecting against electoral fraud and the means of advancing that interest by invalidating a voter's ballot is reasonable in the context of absentee voting, where the dangers of fraud are greater, but unreasonable in the context of in-person voting, where there is less danger of fraud. *See id.*; *see also* Brief of Plaintiffs-Respondents

at 13. In both cases, the test applied was the test of reasonableness.

Also without merit is Plaintiffs' suggestion that the Wisconsin decisions apply a more exacting analysis to election regulations that could completely disqualify a voter or void a ballot than to other regulations that merely restrict a voter's opportunity to vote for a particular candidate or issue.

The outcomes of cases in these two categories may differ because the fit between the state interests and the means of advancing those interests may be more reasonable for less burdensome regulations than it is for more burdensome regulations. Nonetheless, the decisions consistently apply the "test of reasonableness" to both categories of regulations. *See, e.g.*, *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859) (statute allowing inspectors to challenge eligibility of individual voters); *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875) (claim that procedural errors by officials invalidated votes of individuals); *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 175 (1913) (claim that residency requirement wrongly disenfranchised transient workers); *Gradinjan*, 29 Wis. 2d 674 (statute invalidating absentee ballots unless properly authenticated).

Because Plaintiffs have failed to show that any of the Wisconsin cases required the challenged election regulation to advance a compelling state interest or required that the fit between means and end be narrowly drawn, their contention that the Wisconsin Supreme Court applies strict or heightened scrutiny to laws burdening the right to vote must be rejected.

II. *ANDERSON/BURDICK* APPLIES AND *CRAWFORD* THUS CONTROLS THIS CASE.

Plaintiffs now appear to concede that the Wisconsin standard is consistent with the

Anderson/Burdick standard applied in federal election law cases, including *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). *See* Brief of Plaintiffs-Respondents at 14-15. They nonetheless try to distinguish *Crawford* and insist that, because their claim is under the Wisconsin Constitution, this Court is not required to apply the standards or reach the outcome found in any federal cases. *See* Brief of Plaintiffs-Respondents at 15-18.

If the state and federal standards are consistent, however, then it should not matter whether Plaintiffs' claim is considered under the state or federal charter. Plaintiffs nonetheless emphasize that Wisconsin courts are free to independently interpret the right to vote under the state constitution. *See* Brief of Plaintiffs-Respondents at 16-17. To the extent that the state and federal standards are admittedly the same, this insistence on the dissimilarities between the state and federal constitutions makes little or no sense.

Plaintiffs are also incorrect in suggesting that the analytical framework applied by the circuit court in this case is equivalent to the flexible *Anderson/Burdick* standard applied in *Crawford*. *See* Brief of Plaintiffs-Respondents at 18. To the contrary, the circuit court expressly rejected that approach because "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote, while Crawford was based upon the U.S. Constitution which offers no such guarantee." (R. 84 at 18; A-Ap. 118.) The circuit court did not apply a flexible standard of review, but instead concluded that strict or heightened scrutiny was required because the challenged law implicated the fundamental right to vote (R. 84 at 117; A-Ap. 117) ("Where a statute implicates a fundamental interest, it is the obligation of a court to apply a strict or heightened level of review to the statute to determine if it remains within that range of authority permitted under the constitution[.]").

The circuit court plainly did not apply *Anderson/Burdick*. Therefore, to the extent that Plaintiffs

accept that the Wisconsin standard is equivalent to *Anderson/Burdick*, they tacitly concede that the circuit court analysis was erroneous.

Plaintiffs' acceptance of *Anderson/Burdick* also undermines their attempt to distinguish *Crawford*. According to Plaintiffs and the circuit court, *Crawford* is distinguishable because the Indiana law allowed alternative voting opportunities for voters who lacked the requisite identification and because the factual record in *Crawford* was weaker than the record here. Those distinctions, however, did not control the analysis in *Crawford*.

First, *Crawford* did not hold that the Indiana law was valid because it allowed the alternatives of absentee voting and indigency affidavits. The court mentioned those factors as mitigating the burden imposed by the challenged law, but their existence was not central to the analysis. *Crawford*, 553 U.S. at 199. The heart of the reasoning in *Crawford* was that the burdens alleged were not sufficient to facially invalidate the challenged law because it was clear that the law was valid as applied to the vast majority of eligible voters. *Id*. at 204. The same reasoning applies to Wisconsin's voter identification requirements, without regard to whether Wisconsin allows alternative voting methods for individuals lacking required identification.

Second, the evidentiary record in this case, even if stronger than the record in *Crawford*, still is insufficient to justify facial invalidation of a state law. Even under Plaintiffs' version of the facts, it is undisputed that over 90% of Wisconsin electors possess the required identification and thus are unharmed by the challenged law. Moreover, with regard to the remainder of the population, Plaintiffs have not established the existence of obstacles preventing those persons from obtaining such identification. *See* Section IV, below.

III. PLAINTIFFS' ATTEMPT TO DISTINGUISH THE CASE LAW REGARDING FACIAL CHALLENGES IS UNSUCCESSFUL.[1]

Defendants argued at pages 15-18 of their opening brief that Plaintiffs' facial challenge to Wisconsin's voter identification requirement fails because, as in *Crawford*, the challenged law does not severely burden the vast majority of voters. Plaintiffs' arguments in response are unavailing.

First, Plaintiffs argue that Defendants have wrongly applied the standard from such cases as *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 520, 665 N.W.2d 328, and *United States v. Salerno*, 481 U.S. 739, 745 (1987), under which a successful facial challenge must prove that the challenged law cannot be constitutionally applied under any circumstances.

This argument is a red herring because Defendants did not apply that standard here, but rather applied the approach of *Crawford* and many other federal cases under which a law may be facially invalidated if it imposes substantial burdens on constitutionally protected conduct that are excessive in relation to the law's legitimate sweep. *See* Brief of Defendants-Appellants at 16. Plaintiffs' attack on the *Cole/Salerno* standard is thus beside the point.

Second, Plaintiffs argue that the facial challenge here is appropriate under the reasoning used to approve a facial challenge in *Citizens United v. FEC*, 558 U.S. 310 (2010). *Citizens United*, however, did not abandon the rule that facial challenges are disfavored, but merely found that it had diminished force under the circumstances of that case. *Id.* at 895-96.

[1]For the sake of clarity, Defendants have changed the order of Plaintiffs' arguments and here respond to Section V of the Brief of Plaintiffs-Respondents.

The law at issue in *Citizens United* subjected certain entities to criminal punishment for violating a prohibition on some political speech. *Id.* at 888. In that situation, the court found the availability of an as-applied challenge to the prohibition was insufficient to address the constitutional concerns because speakers would be chilled into not exercising their speech rights, rather than face possible punishment if unsuccessful in as-applied litigation. *Id.* at 895-96.

Wisconsin's voter identification requirement, however, does not create that kind of chilling effect. If a person tries to vote without acceptable identification, the consequence is that the person will not be allowed to vote at that time and will instead be offered an opportunity to cast a provisional ballot. There is no heightened chilling effect of the sort created by the possibility of criminal punishment in *Citizens United* and the rule disfavoring facial challenges thus applies in the voter identification context. That is why the Court applied that rule in *Crawford* and upheld the Indiana law against facial challenge.

IV. THE BURDENS ON INDIVIDUAL PLAINTIFFS AND WITNESSES ARE NEITHER SUBSTANTIAL NOR WIDESPREAD.

Plaintiffs assert that the burdens imposed on voting by Wisconsin's voter identification requirements are so substantial and widespread as to require their facial invalidation. In support, they cite *Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), which held that Texas' voter identification law was not entitled to preclearance under the Voting Rights Act. According to Plaintiffs, *Holder* "determined that, Crawford notwithstanding, a state's "mandatory fee for a birth certificate and the required travel to obtain a photo ID for voting can be unwarranted, onerous burdens on the right to vote." Brief of Plaintiffs-Respondents at 22. Contrary

to Plaintiffs' suggestion, however, *Holder* does not apply here.

Holder is distinguishable in two important respects. First, in *Holder*, the defender of the law had the burden of proving that it was entitled to preclearance, whereas here and in *Crawford*, the party challenging the law must prove its invalidity beyond a reasonable doubt. *Id.* at *12. Second, the material question in *Holder* was whether the burdens imposed by the law had a discriminatory purpose or a retrogressive effect on the voting rights of a specific subset of minority voters, whereas here and in *Crawford*, the question is whether the broad application of the law to all voters is so burdensome as to require facial invalidation. *Id.* at *12-13. The fact that a voter identification law has not been shown not to have retrogressive effect on a subset of minority voters does not support the much broader inference that the application of such a law to all voters creates severe burdens on voting that are excessive in relation to the law's legitimate purpose. The applicable legal standard here is that of *Crawford*, not *Holder*.

Under the Crawford standard, even unjustified burdens imposed on a few voters are "by no means sufficient" to facially invalidate a state voter ID law. *Crawford*, 553 U.S. at 199-200. The record in this case reflects only burdens specific to the circumstances of a small number of individuals. Plaintiffs concede that this evidence is merely anecdotal, yet maintain that it is "probative of a larger problem." Brief of Plaintiffs-Respondents at 20 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 840 (2000)). Plaintiffs fail, however, to provide any evidence to support an inference that these anecdotes are typical of a bigger problem—much less one so general as to justify facially invalidating a state law. In fact, many of the individual witnesses have obtained acceptable identification and there is no evidence that the others could not do so. (R. 60:Ex. 58, ¶ 4; Ex. 1 (Frank Depo.) at 11-12, 41-43; Ex. 30 at 6-7; Ex. 23 at 9-10; Ex. 64, ¶ 4).

For example, the experiences of individuals like Ricky Lewis and Ruthelle Frank have not been shown to exemplify a larger problem. Plaintiffs claim that the challenged requirements "will preclude voters like them from exercis[ing] their constitutional right to vote," but they have presented no evidence that there are other "voters like them." *See* Brief of Plaintiffs-Respondents at 19. The assertion that Lewis and Frank "are likely not unique" is conclusory and unsupported. *Id.* The record does not establish that either individual's unique circumstances apply to any other voters. Similarly, one witness—Danettea Lane—testified that the cost of a birth certificate is a financial hardship for her, but none of Plaintiffs' other witnesses testified that the $15-$30 cost of a birth certificate was beyond their means. Brief of Plaintiffs-Respondents at 21; R. 60, Ex. 22 at 13. This type of individualized evidence is not enough to facially invalidate Wisconsin's voter identification requirements.

V. PROFESSOR MAYER'S ESTIMATE OF WISCONSIN ELECTORS LACKING IDENTIFICATION IS NOT RELIABLE.

Defendants showed at pages 26-31 of their opening brief that the database matching analysis performed by Plaintiffs' expert witness—Professor Kenneth R. Mayer ("Mayer")—failed to reliably estimate the number of Wisconsin electors who lack acceptable voter identification, because Mayer jumped to the conclusion that virtually all of the non-matches that he found between records in the registered voter ("SVRS") database and the Department of Transportation ("DOT") database represented voters lacking identification, without ruling out the alternative explanation that non-matches could be caused by discrepancies in the way names are recorded in the two databases. Plaintiffs' arguments in response do not overcome the deficiency in Mayer's testimony.

First, Mayer's conclusion that the number of false non-matches caused by name discrepancies would not be statistically significant was flawed because he failed to take into account: (a) the fact that non-matches could be caused by discrepancies in first names, as well as last names; (b) the fact that non-matches could be caused by discrepancies unrelated to the presence of a hyphen or space in a name; and (c) the fact that non-matches could be caused by the way names are entered in either of the two databases. (R. 91 at 17-19).

Second, Plaintiffs' argument that Mayer's estimate is confirmed by independent sources is without merit. The 2005 study by University of Wisconsin-Milwaukee Professor John Pawasarat is not probative here because it dealt with population data ten years out of date, failed to exclude people ineligible to vote from the population examined, and failed to consider how many members of that population possessed an acceptable form of voter identification other than a driver license. (R. 60, Ex. 9). Similarly, the unmatched voter records found in database checks conducted by the Government Accountability Board ("GAB") pursuant to the Help America Vote Act ("HAVA") are not commensurate with the non-matches at issue here because the HAVA check was trying to verify the accuracy of information in the SVRS and thus counted *all* non-matches, including those caused by name discrepancies. (R. 93 at 55, 57-59). And the results of a matching analysis of voter and driver records in Georgia are not relevant here because the Georgia study matched unique social security numbers in voter and driver databases and thus was not plagued by discrepancies in non-uniform fields, such as names. (R. 95 at 36; *see also* R. 60, Ex. 84 at 5, 8).

Most importantly, Plaintiffs quibble with whether the deficiencies in Mayer's methodology can be explained, but miss the basic point. Mayer's conclusions, even were they not flawed, at most show the number of people who have to take some steps to obtain acceptable

identification, but show nothing about the number of people who would be severely burdened by that process.

VI. THE VOTER IDENTIFICATION REQUIREMENTS COMBAT FRAUD AND PROMOTE CONFIDENCE IN ELECTORAL INTEGRITY.

Wisconsin's voter identification requirements serve the compelling interests in preventing and deterring voter fraud and promoting confidence in the integrity of elections. These interests are legitimate and important enough to justify the limited burdens imposed on voters. Plaintiffs incorrectly discount the State's interests.

Plaintiffs argue that the challenged requirements do not serve an interest in combating voter fraud because "official local and state investigations in Wisconsin have not identified any widespread vote fraud and no voter impersonation at the polls[.]" Brief of Plaintiffs-Respondents at 34. The State, however, is not required to prove widespread voter fraud in order to defend the validity of a state law.

Crawford said that there "is no question about the legitimacy or importance" of the interest in deterring voter fraud and that there is "independent significance" in enhancing public confidence in the electoral system. *Crawford*, 553 U.S. at 196-97; *id.* at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *id.* at 204 (finding the state's motives "both neutral and sufficiently strong"); *see also South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at *12 (D.D.C. Oct. 10, 2012). *Crawford* found these interests valid despite the fact that the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194; *see also South Carolina*, 2012 WL 4814094, at *12; *Holder*, 2012 WL 3743676, at *12 (rejecting the argument

"that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence were 'pretext.' A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well.").

Finally, voter identification also furthers a legitimate State interest in enhancing public confidence in the integrity of elections. *Crawford*, 553 U.S. at 197; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Promoting such confidence is a good in itself, which the circuit court inappropriately discounted. (*See* R. 84 at 17-18; A-Ap. 117-18.) As the Wisconsin Supreme Court made clear long ago, "[t]he necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar to need suggestion." *State ex rel. Cothren*, 9 Wis. at 283 (1859).

CONCLUSION

For the reasons stated herein, the decision of the circuit court should be reversed.

Dated this ____ day of December, 2012.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font, except that the length of this brief is 3,372 words. A Motion for Leave to File Reply Brief Exceeding Statutory Word Limit is being simultaneously filed.

Dated this ____ day of December, 2012.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of December, 2012.

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CASE NO. 2012-AP-1652

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II

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BRIEF OF *AMICUS CURIAE* AARP SUPPORTING PLAINTIFFS-RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AARP

Amicus Curiae AARP is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP engages in advocacy, including in state and federal courts, supporting these goals. AARP's priorities include securing public policies encouraging electoral participation by eligible voters, including older voters, while preserving the integrity of the electoral process. AARP opposes restrictive voter identification rules that impede and unduly burden voting.

AARP has filed *amicus* briefs challenging "photo ID" voting laws enacted in Missouri, Michigan, Indiana, Minnesota and Pennsylvania. AARP Foundation Litigation attorneys, acting as co-counsel for plaintiffs, have opposed Georgia's and Arizona's photo ID voting laws. If the declaratory judgment and permanent injunction issued by the Dane County Circuit Court against 2011 Wisconsin Act 23 is overturned, AARP believes that the law will undermine AARP policies and principles of electoral democracy in Wisconsin. Such a result will exclude from voting many eligible Wisconsin voters, including disproportionate numbers of older voters, who have faithfully exercised the franchise for many years.

ARGUMENT

INTRODUCTION

Wisconsin has been remarkably consistent in its administration of the franchise. Since adopting constitutional provisions defining voter qualifications, *see* Wis. Const.,

art. III, §1 (1848), Wisconsin has had a tradition of facilitating broad access to the franchise. The 1848 Constitution "granted suffrage to aliens who had resided in the state for one year and 'declared their intention to become citizens.'"[1] A year later, voters approved a referendum granting access to the ballot to black persons.[2] And in 1919, Wisconsin became the first state to approve the Nineteenth Amendment to the U.S. Constitution, which in 1920 secured voting rights for women.[3]

For more than a century and a half, Wisconsin has allocated to its citizens, by virtue of their power to amend the State Constitution, responsibility for determining voter eligibility. *See State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856). It remains true that while "[o]ther states have discarded their earlier constitutions and have framed new ones[,] [t]he Wisconsin [C]onstitution of 1848 is as full of life and vigor today as it was when ratified."[4] Constitutional amendments in 1986 confirmed that only specific sorts of "[l]aws may be enacted" in regard to suffrage. Wis. Const., *art. II, §2* (1986). The State Legislature's abandonment of this precedent and this tradition – by passing Act 23, and thus imposing insurmountable barriers to voting without photo ID – should be rejected.

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[1] The Immigrant Voting Project and New York University Law Students for Human Rights, The History of Immigrant Voting Rights in Wisconsin, at 1, http://www.immigrantvoting.org/statehistories/Wisconsinhistory.html (last visited Sept. 16, 2012). A 1908 constitutional amendment ended "non-citizen voting." *Id.*

[2] *See* Henry A. Huber, Citizenship of Wisconsin, Some History of Its Progress, Racine (Wisconsin) Times-Call (June 18, 1929) (hereafter "Huber"), at 2-3, http://www.wisconsinhistory.org/turningpoints/search.asp?id=986 (last visited Sept. 16, 2012). Republican Lt. Gov. Huber (1925-33) noted it took until *Gillespie v. Palmer*, 20 Wis. 544 (1866) for this amendment's validity to be recognized. *Id.*

[3] *See, e.g.*, Theodora W. Youmans, How Wisconsin Women Won the Ballot, Wisconsin Magazine of History (1921), at 1, 13, www.library.wisc.edu/etext/wireader/WER0124-1.html (last visited Sept. 16, 2012).

[4] Huber at 2.

I. OLDER VOTERS ARE AN ESPECIALLY LARGE AND ACTIVE SHARE OF THE ELECTORATE WHOSE EXCLUSION FROM VOTING IN SIGNFICANT NUMBERS UNDER ACT 23 THREATENS GRAVE HARM TO DEMOCRACY IN WISCONSIN.

Older persons constitute a large share of Wisconsin's electorate. Actual older voters represent an even greater portion of those who vote in State elections. Thus, to the extent that Act 23 excludes significant numbers of eligible older voters from exercising the franchise - simply because they cannot meet new requirements to produce a valid photo ID, Act 23portends a serious, unjustifiable harm to democracy in Wisconsin.[5]

The 2010 Census shows that more than three-quarters of a million Wisconsin residents (777,314) are age 65 or older; of these individuals, 376,818 are 75 or older, and 111,505 are 85 or older.[6] Nearly one-fifth (18.3%) of the State's voting age population is age 65 or older and nearly one-tenth (8.76%) of that population is 75 or older. *Id.*[7]

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[5] *Amicus* AARP herein generally defines "older" persons as those age 65 or older. There is no uniform definition of "older" persons. The federal Older Americans Act uses age 60 to define "older" persons, and AARP first offers membership at age 50. If anything, an age 65 criterion understates effects on "older" voters. Expanding the definition to include all those age 60+ or 50+ would show greater restriction of voting opportunities for "older" persons.

[6] *See* U.S. Census Bureau, 2010 Demographic Profile, Wisconsin, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0400000US5 (search in "topic or table name" for "DP-1" and select "DP-1: General Demographic Characteristics"; next, narrow the search by selecting under "Geographies" the descriptor "State" and then "Wisconsin"; then select "DP-1: Profile of General Demographic and Housing Characteristics: 2010") (last visited Sept. 18, 2012).

[7] Total 2010 State population was 5,686.986; subtracting the population 0-17 (including three-fifths of the reported population age 15-19) yields a total voting age population of 4,344,474. The share of the State's voting age population age 85 and older is roughly 2.7%. Other Census data, for November 2010, show 4.156 million Wisconsin *citizens* eligible to vote, of whom 760,000 were age 65 or older and 364,000 were age 75+. The latter data yield nearly identical results: those age 65 or older are 17.9% of the eligible voting age population; those age 75 + are 8.67% of eligible voters. U.S. Census Bureau, Voting and Registration in the Election of November 2010, Table 4c. Reported Voting and Registration, by Age, for States: November 2010, (hereafter "Reported Voting and Registration"), www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited Sept. 18, 2012).

The harm likely to result from Act 23's disqualification of eligible older voters is greatly magnified by the fact that older voters participate in elections at much higher rates than their younger counterparts. In November 2010, 71.6% percent of citizens age 65 or older in Wisconsin voted, while only 51.2 percent of the rest of the electorate cast a ballot.[8] The most reliable segment of the age 65+ voter cohort is voters age 65-74 (74.2% voted), followed by those age 75+ (68.9%). Voters age 45-64 participated slightly less often (63.5%), while voters age 25-44 and 18-25 did so at significantly lower rates: 46.1% and 23.4%, respectively.[9]

Comparing the composition of *registered voters who actually voted*, by age, also shows enormous age disparities. Wisconsin registered voters age 65+ and age 45-64 cast ballots in 2010 at rates (87.6%, and 84.6%, respectively) exceeding by 18-21 percentage points the corresponding rate for younger (age 18-44) registered voters (66.5%), and by 7-10 points the rate for all registered Wisconsin voters who cast ballots (77.6%).[10]

II. ACT 23 WOULD PREVENT VOTING BY MANY ELIGIBLE VOTERS, INCLUDING OLDER VOTERS, WHO LACK PHOTO ID, AND THEREBY IMPOSE SIGNFICANT AND UNJUSTIFIABLE HARM.

A. Act 23 Would Extinguish Rights of Suffrage for In-Person and Absentee Voters Who Lack Valid Photo ID.

If Act 23 takes effect, many long-time Wisconsin voters, as well as citizens newly eligible to cast a ballot, will face insurmountable obstacles to exercising the franchise.

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[8] *Id.* These percentages are derived from tallies of "Total voted" divided by tallies of "Total Citizen Population."

[9] *Id.*

[10] *Id.* Calculated by dividing "Total voted" by "Total registered."

Act 23 excludes persons who seek to vote in-person without presenting a valid photo ID. That is, an "elector shall not be permitted to vote" if they fail to present one of several types of photo ID declared to be acceptable. Wis. Stat. §6.79(3)(b). Likewise, they may not vote "if the name appearing on the [photo ID] document presented does not conform to the name on the poll list . . . ." *Id.* While a voter without photo ID may cast a provisional ballot, *id.* §§ 6.79(3)(b), 6.97, that ballot will not be counted unless the voter presents an approved form of photo ID on Election Day before the polls close or to "the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election." *Id.* § 6.97(3)(a)-(c).

Most absentee ballot voters must also produce photo ID. They must do so if they "appl[y] for an absentee ballot . . . at the clerk's office," either "in person," *id.* § 6.86(1)(ar), or through an "agent," *id.* § 6.86(3)(c), or if they apply by mail, *id.* § 6.87(1). They are also required to produce photo ID with their absentee ballot if they have requested the ballot by means of an electronic application, without photo ID. *Id.* §6.87(4). If they fail to include proof of photo ID with their absentee ballot, it will be treated merely as a provisional ballot. *Id.* § 6.88(3)(a). Finally, Act 23 removes the safeguard - for voters without photo ID, limiting challenges to voter qualifications to those based on proof "beyond a reasonable doubt" that a voter "does not qualify as an elector." *Id.* § 6.325; *compare id.* § 6.79(3)(b).

Thus, this Court faces a far more serious question than merely "whether the[] [State's] interests [in photo ID] justify the *minimal burdens* faced by some voters in obtaining proper identification." Brief of Defendants-Co-Appellants at 5 (emphasis

supplied). Nor must this Court simply consider of whether "[t]he legislature constitutionally may require voters to fulfill *reasonable procedural requirements* . . . in order to vote." Brief of Intervenors-Co-Appellants at 2 (emphasis supplied). Act 23 would preclude voting altogether by many eligible voters, including a disproportionate share of older voters, and thus, impose burdens that are both substantive and severe.

B. Act 23 Would Eliminate Voting Rights for Many Older Voters Who Do Not Have Photo ID.

Act 23, if sustained, is sure to have a profoundly negative impact on the rights of suffrage of many older voters. First, Act 23 is likely to prevent many older voters from continuing to exercise the franchise because they are especially unlikely, through no fault of their own, to possess the two principal forms of photo ID the law recognizes as acceptable: a driver's license and a U.S. Passport.[11] "An estimated 23 percent of persons age 65 and over do not have a Wisconsin drivers license or [other] photo ID"; most (70%) of these likely-to-be-disqualified State residents are women.[12] At 23%, older persons' lack of a photo ID is quite disproportional to their share of the population – 13.1% in 2000 – and also to the rate of lack of access among younger groups. For instance, of those age 35-64, just over half as many lack photo ID (an estimated 98,247

[11] Wis. Stat. § 5.02(6m) (listing forms of "Identification," the rest of which rarely apply – *e.g.*, "(c) An unexpired driving receipt" – or which apply only to persons in discrete categories, such as members of "a U.S. uniformed service" (a)(4), or recently naturalized persons (b)); *see id*. §§ 6.15(3) ("Procedure At Polling Place," requiring "proof of identification"); 5.02(16c) (defining "Proof of identification").

[12] John Pawasarat, The Driver License Status of the Voting Age Population in Wisconsin, Employment and Training Institute, University of Wisconsin-Milwaukee (June 2005) (hereafter "Pawasarat Study"), at 1, 11, www4.uwm.edu/eti/barriers/DriversLicense.pdf (last visited Sept. 25, 2012).

vs. 177,399), even though they represent twice as large a share (28.5%) of the State's population.[13]

Data on U.S. passport ownership in Wisconsin is hard to come by.[14] But a 2005 University of Wisconsin-Milwaukee study estimates the number of State residents age 65 or older with photo ID other than a driver's license – possibly a passport – to be extremely limited (42,682).[15]

In short, the vast majority of older voters without a driver's license or a passport will be disqualified by Act 23 – unless they can manage to get a *new* photo ID.

C. Act 23 Would Eliminate Voting Rights for Many Older Voters Who Will Be Unable to Get a New Photo ID.

Some eligible voters, especially older voters who lack Act 23-compliant photo ID, will be disqualified by inflexible rules governing the State's process for obtaining photo ID. The list of "Acceptable Documents of Proof" for a State ID Card for voting makes clear that for most eligible voters without photo ID, the only way to prove both "Name & Date of Birth" and "Legal Presence" in the United States is through a "certified" copy of

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[13] *See* Pasawarat Study at 11 (estimates of persons lacking drivers license or other photo ID); U.S. Census Bureau, Profile of General Demographic Characteristics: 2000 (Census 2000 Summary File 1 (SF 1) 100-Percent Data) Data for Wisconsin), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Sept. 26, 2012).

[14] An estimated 28% of Americans own a passport. U.S. Government Accountability Office, GAO-08-891, State Department: Comprehensive Strategy Needed to Improve Passport Operations (2008), *available at* www.gao.gov new.items/d08891.pdf (last visited Sept. 18, 2012).

[15] Pawasarat Study at 11.

their birth certificate.[16] This requirement will exclude voters who do not currently possess an "official" birth certificate and cannot obtain one.

Such older voters include many older Wisconsin residents. In 1940, the birth year of most U.S. citizens now 72, 3.1% of births in Wisconsin were not recorded with a birth certificate. For 1940 and 1950 the corresponding numbers for the nation – *i.e.*, applicable to Wisconsin residents born out-of-state – are 7.5% and 2.2%, respectively.[17] Applying the 1940 figure for Wisconsin to 2010 Census data on the total count of citizens living in Wisconsin age 75 or older yields an estimated 11,284 State residents born in-state with no birth certificate. That estimate is surely an undercount. It ignores the larger count that would result: (a) assuming that some age 75+ eligible Wisconsin voters were born out-of state (to whom the 7.5% figure applies); and (b) including some eligible Wisconsin voters age 65-74 to whom the 2.2% figure applies, for those born out-of-state, and to whom some lower figure applies to those born in Wisconsin. (And this excludes altogether other "old" voters age 50-64 who never had a birth certificate.) It seems clear that at least

[16] State of Wisconsin Government Accountability Board, Wisconsin State ID Card (ID), Accepted Voter Identification; Voter ID Law, at 2, http://gab.wi.gov/sites/default/files/publication/137/wi_state_id_pdf_78628.pdf (last visited Sept. 8, 2012).

[17] *See* Sam Shapiro, Development of Birth Registration and Birth Statistics in the United States, 4 Population Studies 86, 97 Fig. 2 (1950); Nat'l Ctr. for Health Statistics, U.S. Dep't of Health and Human Servs., U.S. Vital Statistics System: Major Activities and Developments, 1950-95 (1997), at 10-11, *available at* http://www.cdc.gov/nchs/data/misc/usvss.pdf; Joseph Schachter & Sam Shapiro, Birth Registration Completeness, United States, 1950, 67 Public Health Reps. 513, 515 tbl.1 (June 1952), all cited and discussed in *Jones v. Deininger*, No. 2:12-CV-185-LA (E.D. Wis. Apr. 23, 2012) (Brief of *Amici Curiae* Supporting Motion for Preliminary Injunction)(lawsuit challenging 2011 Wis. Act 23) (hereafter "Jones Brief").

15,000 eligible older voters in Wisconsin have no birth certificate.[18] Without it, they simply cannot comply with Act 23.

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court noted the difficulty generally facing eligible older voters born in another state in securing birth records needed to get a new photo ID. *See Crawford*, 553 U.S. at 199 (2008) (noting that "elderly persons born out of state . . . may have difficulty obtaining a birth certificate"). This barrier may be especially severe for older Wisconsin voters of color born in states whose public and private institutions once had blatantly racially discriminatory laws and practices. For specific reasons now obscure, but which generally may be ascribed to so-called "Jim Crow" laws and practices, some older African-American residents born outside of Wisconsin cannot secure a birth certificate.[19]

Moreover, otherwise eligible low-income voters, especially older low-income voters, some born in-state and some outside, are certain to be disqualified from securing a photo ID because "obtaining a birth certificate carries with it a financial cost." *Crawford*, 553 U.S. at 203, n.20. Indeed, even the State of Wisconsin charges fees for a birth certificate, regardless of whether that document is sought to secure photo ID for voting or whether the fee deters eligible voters from participating in elections.

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[18] *See* Reported Voting and Registration, *supra*, Note 7 ("Total Citizen Population" age 75+ of 364,000 x 3.1% = 11,284; "Total Citizen Population" age 65-74 of 396,000 x 1% = 3960; 11,284 + 3960 =16,244).

[19] *See, e.g.,* Complaint at ¶3, *Jones v. Deininger,* No. 2:12-CV-185-LA (E.D. Wis. Feb. 23, 2012) (describing claims of lead plaintiff Bettye Jones, an African-American woman born in rural Tennessee in the 1930s who "never" had a birth certificate prepared).

Still other eligible voters who have changed their name, mostly women at the time of marriage, or persons whose name on their birth certificate is incorrect,[20] will be excluded from voting by Act 23 because they cannot show a name on their "proof of identification" that "conform[s] to the name on the poll list," Wis. State. § 6.79(2)(a), - *i.e.*, that conforms to their current name.

D. Act 23 Disqualifies Eligible Absentee and Provisional Ballot Voters Unable to Secure Photo ID.

The State pointing to supposed options for voters lacking photo ID, yet these are inadequate to mitigate the difficulties of satisfying the photo ID requirement. In particular, voters who cast a provisional ballot can have their vote counted only if they are able to produce – within three days of, Election Day – an Act 23-compliant photo ID. This is far from the remedy endorsed by the Supreme Court as mitigating Indiana's strict photo ID requirement. *See Crawford*, 553 U.S. at 199 (stating that "if eligible, voters without photo identification may cast provisional ballots *that will ultimately be counted* [so long as they appear] within ten days to execute the required affidavit")(emphasis supplied). Absentee voters in Wisconsin likewise must produce photo ID, unlike their counterparts in other states. And if they fail to do so, they are also left with the futile option of perfecting a provisional ballot without photo ID.

[20] *See, e.g.*, Jones Brief at 6-7 (discussing Ruthelle Frank, age 85, birth certificate misspelled; Ricky Tyrone Lewis, age 58, birth certificate under different name).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* AARP urges the Court to affirm the November 16, 2012 Judgment and Order of the Circuit Court of Dane County.

Respectfully submitted,

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CERTIFICATION OF FILING, COMPLIANCE AND SERVICE

I hereby certify that I have filed this date, November 16, 2012, via overnight mail (Federal Express), an original and ten paper copies of the **Brief of *Amicus Curiae* AARP Supporting Plaintiffs-Respondents**, each bound with an original or copy of this Certificate, with the Clerk of the Wisconsin Court of Appeals.

I further certify that I have filed this date one paper copy of the **Brief of *Amicus Curiae* AARP Supporting Plaintiffs- Respondents** with the Circuit Court for Dane County via overnight mail (Federal Express).

I hereby certify Court that the **Brief of *Amicus Curiae* AARP Supporting Plaintiffs-Respondents** complies with the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for briefs produced with a proportional serif font. The length of the **Brief of *Amicus Curiae* AARP Supporting Plaintiffs- Respondents** is 2991 words.

I hereby certify that I have served this date three paper copies of the **Brief of *Amicus Curiae* AARP Supporting Plaintiffs-Respondents** on each of the parties identified below, all by overnight mail (Federal Express). I further certify that all submissions addressed herein are correctly addressed and that postage therefor is prepaid.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2012-AP-1652

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE

Intervenors-Appellants

On Appeal from a July 17, 2012 Order for Judgment and Order Granting Declaratory and Injunctive Relief, Issued by the Dane County Circuit Court, Hon. David Flanagan Presiding, Case No. 2011-CV-5492

BRIEF OF *AMICUS CURIAE* DISABILITY RIGHTS WISCONSIN

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INTEREST OF THE AMICUS

Disability Rights Wisconsin ("DRW") is a statewide non-profit organization designated by the Governor of the State of Wisconsin to act as the congressionally mandated protection and advocacy agency for Wisconsin citizens with mental illness, developmental disabilities and other physical impairments, pursuant to Wis. Stat. §51.62, 29 USC §794e, 42 USC §15041 et. seq., and 42 USC §§10801 et. seq. Through the pursuit of administrative, legal and other appropriate remedies DRW seeks to address the issues facing people with disabilities in the State of Wisconsin and to ensure the rights of all this state's citizens with disabilities. DRW is regularly involved in policy and legal advocacy related to identified priority civil rights issues for people with disabilities, including concerns around community integration, inclusion, dignity, equal rights and voting issues.

For the last nine years, DRW has coordinated Wisconsin's Protection and Advocacy for People with Disabilities Voting Project (PAVA). DRW has direct experience promoting the legal rights of voters and eligible voters with disabilities in Wisconsin. One example of our work has been creation and maintenance of the Wisconsin

Disability Vote Coalition. Our advocacy includes ensuring that people with disabilities have equal access to the polls; education of people with disabilities, service providers and families on voting laws; working with election officials on both the state and local level on issues of access to the polls for people with disabilities; and working one-one-one with clients to resolve individual problems with the voting process. As a result, DRW has educated and spoken to tens of thousands of people with disabilities, families, guardians and service providers and therefore gained a wealth of knowledge about voters with disabilities. DRW's interest in this litigation is motivated by its concern that the photo identification law at the center of this appeal will have a detrimental and chilling effect on the ability of people with disabilities to exercise their constitutional right to vote.

ARGUMENT

I. The Act 23 Photo ID Requirement Substantially Impairs The Right Of Individuals with Disabilities To Vote In Violation Of Article III Section 1 Of The Wisconsin Constitution, Because Of Increased Burdens Faced By People with Disabilities In Obtaining A Photo ID

Approximately 600,000 individuals of voting age in Wisconsin are disabled.[1] Nationally, 14.7 million Americans with disabilities voted in the 2008 General Election, as large a voting bloc as other minority groups who cast ballots in the 2008 election.[2] Individuals with disabilities have faced both discrimination and physical barriers to the electoral process, including being wrongfully turned away from the polls because an individual with a disability does not "appear" to be eligible to vote, not being able to access the polling site because it is not accessible, and not being able to cast a private and independent ballot. These barriers result in voting rates of 10 to 15 percent below the general voting population.[3] While in recent years improvements to the accessibility of voting mandated by HAVA have aided in

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[1] The US Census Bureau estimated 576, 703 civilian, non-institutionalized people with a disability in Wisconsin aged 18 or older. U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates, Disability Characteristics*, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Nov. 15, 2012). This figure excludes over 70,000 institutionalized people, more than 60% of whom have a disability.

[2] Compared to 15.9 million African-Americans and 9.7 million Hispanic voters in 2008. American Association of People with Disabilities, *Record Number of People With Disabilities Voted in 2008 Election* (June 29, 2009), http://disabilityrightsmt.org/janda/articles/UploadFile/1248109408_Voting%20Numbers%20Release-DVA%206-28-09.pdf (last visited Nov. 15, 2012) (hereinafter "*People With Disabilities Voted in 2008 Election*").

[3] Disability Rights Wisconsin, *Wisconsin Voter Identification Bill: Considerations To Minimize Negative Impact On Voters With Disabilities* (Dec. 2010).

narrowing the difference in voting rates among people with disabilities and those without,[4] these improved voting rates are in danger of being reversed due to Act 23's requirement to provide a photo identification as a condition of voting.

People with disabilities are less likely to possess photo identification, particularly one that meets the narrow criteria of photo identification set forth in Act 23.[5] The circuit court found that over 330,000 eligible voters in Wisconsin lack an acceptable photo ID for voting. It is likely that the approximately 600,000 people of voting age with disabilities in Wisconsin make up a significant portion of those without an acceptable photo ID in Wisconsin. Indeed, the Government Accountability Board has identified people with disabilities as one group "where there may be a higher concentration of people without the traditional forms of

[4] Voting rates among people with disabilities increased in 2008 to 7 percent lower than that of people without disabilities. *People With Disabilities Voted in 2008 Election*.

[5] Acceptable forms of photo ID are limited to a Wisconsin driver's license or DOT-issued state identification card, an identification card issued by a U.S. uniformed service, a U.S. passport, a certificate of naturalization, an unexpired driving receipt or identification card receipt, an unexpired student ID. Wis. Stat. § 5.02(6m).

identification." *See* Deposition of Kevin Kennedy, 49:8-14 (Feb. 20, 2012).[6]

Under Act 23, individuals who do not possess an acceptable photo ID for voting are entitled to a free photo ID from a Wisconsin Department of Motor Vehicles (DMV) office. Wis. Stat. § 343.50(5)(a), *as amended by* 2011 Wis. Act 23 § 138. However, for the same reasons that people with disabilities are less likely to already possess a photo ID, obtaining a free ID for voting is a difficult endeavor for many people with disabilities.

First, the photo ID must be obtained in person at a DMV. For the vast majority of individuals, this will require access to transportation to the DMV – access to which is limited for people with disabilities living in Wisconsin. When compared to the general population, people with disabilities are at a significant disadvantage in terms of available, accessible transportation. National Council on Disability, *The Current State of Transportation for People with Disabilities in the United States*, June 13, 2005, at 13 http://www.ncd.gov/publications/2005/06132005 (last visited

[6] Filed in support of Plaintiffs' Motion for Preliminary Injunction, *Frank v. Walker,* Case No. 2:11-cv-01128-LA (March 2, 2012).

Nov. 19, 2012) (hereinafter "*State of Transportation for People With Disabilities*"). More than half a million Americans with disabilities are unable to leave their home due to transportation difficulties. *Id.* at 19. Adults with disabilities are more than twice as likely as those without disabilities to have inadequate transportation (31 percent versus 13 percent).[7]

Further, people with disabilities often require specialized, accessible transportation. While public transportation, where available, must be made accessible for people with disabilities pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA), there are many parts of the state where no public transportation is available, particularly in rural areas. In these places, people with disabilities have few or no transportation options. *State of Transportation for People With Disabilities*, at 13.

Even if public transit options are available, gaps in compliance with civil rights laws often make it difficult for people with disabilities to utilize these public transit systems. *Id.* at 26-36 (identifying failure to announce stops for riders

[7] Center for Disease Control and Prevention, *CDC Promoting the Health of People with Disabilities*, http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf (last visited, Nov. 15, 2012).

with visual impairment, failure to maintain accessible equipment, failure to properly secure riders' mobility devices, and refusal to stop for disabled patrons as persistent problems with compliance). And while the ADA requires that public transit systems offer paratransit service for people who are unable to use a fixed-route service due to disability, *id.* at 47, these services are not without their problems. Paratransit is not an on-demand system. It operates by reservation, which must be done one day before the requested ride. 49 C.F.R. § 37.131(b). The legal requirements concerning timeliness of rides are quite general, resulting in long waits for pick-ups and inability to arrive at a location at a specific time for an appointment. *Id.* at § 37.131(b)(2) (allowing transit entities to negotiate within an hour before or after desired pickup time). In addition, widespread systemic problems with paratransit services have been documented around the country, including inability to schedule next-day trips (as required by the ADA) and problems making reservations, such as long telephone hold times. *State of Transportation for People With Disabilities*, at 56-60, 68-69.

People who live in rural areas are even worse off – 40 percent of those in rural areas have no public transit options,

while 25 percent have only minimal public transit service. *Id.* at 151. At the same time, people living in rural areas likely do not have a DMV office within close proximity. More than 30 percent of Wisconsin's voting age citizens live more than 10 miles from the nearest state ID-issuing office open more than two days per week. Brennan Center for Justice, *The Challenge of Obtaining Voter Identification*, at 3 (2012) *available at* http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf (last visited Nov. 19, 2012). More than six percent (256,981) of Wisconsin's voting age citizens are without vehicle access, and of those without vehicle access, 18.4 percent (47,161) live more than 10 miles from the nearest ID-issuing office open more than two days per week. *Id.* at 4.

Where public transit is not available (meaning that no affordable paratransit system is available, either) people with disabilities must pay much higher costs to obtain accessible transportation. For example, in rural parts of northern Wisconsin the cost of private, accessible vehicle transportation is $12 for pickup and $1.35 per mile for each trip. Private taxi services often cost $2.50 to $3.00 per mile. An individual traveling just 10 miles to a DMV would pay

over $50 for one round trip via a private, accessible vehicle, and $50-60 for a taxi.[8] For people living much farther away from the nearest DMV, these costs could double or triple.

Most DMV offices in Wisconsin are open only a few days per week, or in some counties only one or two days per month, making trip-planning even more difficult. Additionally, not all DMV offices are accessible to people with disabilities. Twelve of Wisconsin's 88 DMV offices advertise "limited" accessibility. *See* Wisconsin Department of Transportation, *DMV Service Centers*, http://www.dot.state.wi.us/about/locate/dmv/index.htm#textlist (last visited Nov. 19, 2012). Six counties in Wisconsin have no DMV office that is fully accessible to people with disabilities: Grant, Marinette, Menominee, Oconto, Shawano, and Waupaca. *Id.*

Finally, in addition to costs incurred simply getting to the DMV, individuals must also pay the cost of underlying documents needed to obtain an ID.[9] These costs were

[8] Information provided to DRW by Bob Olsgard, Transportation Coordinator, North Country Independent Living on Nov. 13, 2012.

[9] Applicants for a photo ID must provide documentation of their name, date of birth, identity, residence, citizenship, and social security number. Wisconsin Department of Transportation, *Obtaining An Identification (ID) Card*, http://www.dot.state.wi.us/drivers/drivers/apply/idcard.htm

correctly identified by the circuit court as a substantial burden, and the burden falls even heavier on people with disabilities. Half as many adults with disabilities are employed as those without disabilities (35 percent versus 78 percent), and three times as many adults with disabilities live in poverty with annual household incomes below $15,000 (26 percent versus 9 percent).[10]

The burdens detailed above are substantial and demonstrate that voters with disabilities are more likely to face substantial impairment of voting rights under Act 23. A number of other states with photo ID laws allow voters to attest to their identity with an affidavit if they have no photo ID.[11] Wisconsin's Act 23 stands out for its failure to offer such protections to voters with disabilities, leading the circuit court to correctly label it the most restrictive voter identification law in the United States due to the "absence of

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(last visited Nov. 19, 2012). Most commonly, individuals seeking a free ID will need to obtain a certified copy of their birth certificate. In Wisconsin, the cost of a certified birth certificate is $20. Wisconsin Department of Health Services, *Request for a Birth Certificate*, available at http://www.dhs.wisconsin.gov/vitalrecords/birth.htm (last visited Nov. 19, 2012).

[10] Center for Disease Control and Prevention*, CDC Promoting the Health of People with Disabilities*, http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf (last accessed, Nov. 15, 2012).

[11] *See* Idaho Code § 34-1106(2) (2012); La. Rev. Stat. Ann. § 18:562(A)(2) (2012); Mich. Comp. Laws § 168.523(1) (2012); N.H. Rev. Stat. Ann. § 659:13(I) (2012); S.D. Codified Laws § 12-18-6.2 (2012).

any fall-back procedure as to a qualified voter who lacks the required identification". *See* Order, *Milwaukee Branch of the NAACP, et al. v. Scott Walker et al.*, Dane County Case No. 2011-CV-5492 at 3 (July 17, 2012).

II. Act 23's Exceptions To Photo ID Requirement Are Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

Act 23's limited exceptions to the photo ID requirement do little to protect the right to vote of people with disabilities from being substantially impaired. Only military and overseas voters, confidential voters, and permanent absentee voters are exempt from the requirement to show photo ID. 2011 Wis. Act 23, §§ 63-64, 66. Permanent absentee voters are those who certify that they are "indefinitely confined due to age, illness, infirmity or disability." Wis. Stat. § 6.86(2). Many voters with disabilities, while not "indefinitely confined," do face difficulties leaving their home or obtaining transportation to a DMV to procure a photo ID.

Voters who reside in qualified nursing homes and qualified community-based residential facilities, retirement homes, residential care apartment complexes, or adult family

homes may vote without showing a photo ID if they vote through a special voting deputy, or if no special voting deputy conducts absentee voting in a care facility, a voter may prove their identity with a signed certification of the manager of the care facility. Wis. Stat. § 6.875; 2011 Wis. Act 23 § 71. While all nursing homes are required to have absentee ballots administered by special voting deputies (SVD), Wis. Stat. at § 6.875, SVDs may or may not be available in other care facilities. This leaves residents of such facilities dependent on facility managers who are not routinely trained in their responsibilities to resident voters to sign off on the absentee ballots. *See id.* at § 6.87(4)(b)5. Should the manager of the facility refuse to certify the ballot, the resident is left with no way to cast a ballot other than obtaining a photo ID.

III. Provisional Ballot Provision Is Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

The availability of casting a provisional ballot does not prevent disabled voters without photo ID from being disenfranchised. Importantly, provisional ballots will be counted only if the photo ID that the voter lacked in the first

place is produced.[12] The same difficulties with transportation and access detailed above will leave voters with disabilities less likely to have the ability to return with the proper identification to have their provisional ballots cast and counted – particularly because the voter is required to obtain transportation, funds, and documentation for the photo ID in a much tighter timeframe.

Although Act 23 moved the deadline for voters to cure a provisional ballot from 4:00 p.m. the day after the election to 4:00 p.m. the Friday after the election, a mere two days additional time may not provide sufficient time for some voters with disabilities to obtain a photo ID and arrange to provide that ID to their municipal clerk. As discussed above, often more than a day is required to line up accessible or paratransit options. The limited availability of transportation may not coincide with the limited hours of the nearest DMV office. Compounding the problem further for many rural voters is that, in addition to irregular DMV hours, a large number of Wisconsin municipal clerks are part time and may not be open regular hours after Election Day until 4pm

[12] By way of contrast, other states allow the use of an affidavit to cure provisional ballots. *See, e.g.,* IND. CODE § 3-11.7-5-2.5 (2012).

Friday.[13] The substantial burden placed upon voters with disabilities who were required to cast a provisional ballot will likely result in their vote never being counted.

CONCLUSION

For the foregoing reasons, DRW urges this Court to affirm the decision of the Circuit Court.

Dated this 19th day of November 2012.

Respectfully submitted,
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[13] GAB Executive Director Kevin Kennedy testified to lack of specific standards for clerk hours in Wisconsin's election laws, stating that clerks may limit the number of hours that they are open to cure provisional ballots. Deposition of Kevin Kennedy at 23:5-17.

CERTIFICATION OF COMPLIANCE, FILING, AND SERVICE

I hereby certify that the Brief of Amicus Curiae AARP confirms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c). The length of the Brief of *Amicus Curiae* Disability Rights Wisconsin is 2748 words, Times New Roman, 13 point body text, 11 point for quotes and footnotes.

I hereby certify that I have submitted this date an electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin is identical in content and format to the printed copy of the brief filed on this date. An original and ten copies of the Brief of *Amicus Curiae* Disability Rights Wisconsin, each bound with an original or copy of this Certificate, have been filed with the Court, and three copies of the same submission have been served on each of the parties identified below, all by first class mail, postage prepaid, to the following persons:

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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2012AP1652

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Plaintiffs-Respondents

v.

SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE

Intervenors-Co-Appellants.

ON APPEAL FROM JULY 17, 2012 FINAL JUDGMENT
OF THE DANE COUNTY CIRCUIT COURT
HON. DVAID T. FLANAGAN, PRESIDEING
CASE NO. 11-CV-5492

AMICUS CURIAE BRIEF
BY INSTITUTE FOR ONE WISCONSIN, INC
IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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ARGUMENT

Appellants are patronizingly dismissive. They contend that the process of obtaining a state-issued photo ID is a slight inconvenience for Wisconsin voters and that a little planning could alleviate any significant problems. Their position, no doubt, arises out of privilege. Flexible work schedules and access to transportation may make the process of obtaining a state-issued identification less burdensome. For many Wisconsin voters, however, Act 23 conditions the right to vote on a requirement they will have great difficulty meeting, or will fail to meet. For those who have inflexible work hours, and for those who do not have access to a vehicle, the difficulty of obtaining a state-issue ID is manifest. No amount of planning on the part of a voter will change the systemic accessibility issues of the Wisconsin Department of Transportation, Division of Motor Vehicles ("DMV") service centers. Act 23 effectively transforms the DMV into a gatekeeper of the ballot box and in the process creates an unconstitutional barrier to voter access.

Moreover, the near certain disenfranchisement of Wisconsin voters will be the result of an attempt to fix a problem that does not exist. The Appellants provide no evidence in support of voter fraud that Act 23 would remedy. The same is true for the Appellants' assertion that Act 23 will restore voter confidence. There is no evidence that Wisconsin voters have lost confidence, and no evidence that the implementation of Act 23 would restore any confidence were it lost. Indeed, the turnout for the November 6, 2012 election

was one of the highest in the nation, indicating that voter confidence in Wisconsin is strong. Wisconsin voters should not be disenfranchised because of unfounded assertions about which the Appellants offer no proof.

I. WISCONSIN DMV SERVICE CENTER INACCESSIBILITY RENDERS ACT 23 UNCONSTITUTIONAL; WISCONSIN'S DMV SERVICE CENTERS ARE ILLEQUIPPED TO ADDRESS ISSUES OF VOTER ACCESS.

The Wisconsin Constitution guarantees its citizens the right to vote. Wis. Const. Art. III, § 1. This right is fundamental; it is "the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained. *See*, *e.g.*, *McNally v. Tollander*, 100 Wis. 2d 490, 500, 302 N.W.2d 440 (1981); *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880).

The Wisconsin Supreme Court has repeatedly struck election laws that infringe upon this fundamental right. *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W. 2d 473, 479-80 (1949). An election law so infringes when it "render[s] [the] exercise" of the franchise "so difficult and inconvenient as to amount to a denial." *State ex rel Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 467, 190 N.W. 562 (1922). Similarly, an election law violates the constitutionally protected right when it requires a voter to do something that is "impracticable or impossible, and make[s] his right to

vote depend upon a condition which he is unable to perform." *Dells*, 49 Wis. at 558.

Wisconsin's DMV service centers are inaccessible for many eligible electors. As a direct result of the inaccessibility, Act 23 sets forth a prerequisite to voting that is difficult, inconvenient, and impracticable for some Wisconsin voters. For others, it is simply insurmountable.

A. Obtaining a State-Issued ID Is Difficult, Inconvenient, Impracticable, and – For Some – Insurmountable.

At trial numerous witnesses for the Respondents testified as to the difficulties obtaining state-issued photo identification. R.84 at 12-14.

Many of the difficulties addressed at trial by various witnesses are inescapable due to DMV service center inaccessibility. Wisconsin has an inadequate number of DMV service centers; only 92 DMV offices serve the entire state. *See DMV Service Centers*, available at http://www.dot.wisconsin.gov/about/locate/dmv/ (last visited November 17, 2012). The limited number of DMV service centers is important because many Wisconsin voters are without access to transportation. In Wisconsin, approximately 257,000, or 6.2 percent of voting-age Wisconsin citizens, live in a household without any access to a vehicle. *See* Gaskins, Keesha and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice at the New York University School

of Law, at 4, July 17, 2012, available at: http://www.brennancenter.org/ content/resource/ the_challenge_of_ obtaining_voter_ identification (last visited November 17, 2012). Of those individuals without access to a vehicle, nearly 50,000 live more than 10 miles from a DMV service center. *Id.*

Moreover, the DMV services centers are open for limited hours. Indeed, 41 are open just two days each week, seven are open just a few hours for one day each month, and three are open just one day every quarter. Other significant accessibility issues lie with the nature of the hours kept by Wisconsin's DMV service centers. Only one DMV service center in the entire state of Wisconsin is open on a Saturday. No other DMV in the entire state operates in the evenings or on weekends.

B. Wisconsin's DMV Inaccessibility Creates A Voter Access Issue.

Wisconsin's DMV inaccessibility stands in stark contrast to the accessibility of the Indiana Bureau of Motor Vehicle ("BMV"). *One Wisconsin Now Statements on JFC Voter ID Funds*, May 27, 2011, available at: http://www.onewisconsinnow.org/ press/one-wisconsin-now-statements-on-jfc-voter-id-funds.html (last visited November 17, 2012). Nearly all of Indiana's 140 BMVs are open five days a week, Wisconsin has only 33 full-time sites; Indiana has 124 that are open on the weekends, Wisconsin has one. *Id.*; *DMV Service Centers*, available at http://www.dot.wisconsin.gov/ about/locate/dmv/ (last

visited November 17, 2012). Wisconsin's DMV accessibility has little in common with Indiana and is more analogous the situation in Texas.

In *Texas v. Holder*, Texas' Voter ID law was ruled unconstitutional based on the inaccessibility of the Texas Department of Public Safety offices and the resulting burden imposed on Texas electors. *Texas v. Holder*, 2012 WL 3743676, *15 (D.D.C., 2012). As was the case in Texas, the Wisconsin DMV's limited hours of operation eliminates for many the option of obtaining a photo ID during non-work hours. *Id.* Poorer citizens are less able to take time off work to reach a DMV service center during its hours of operation. *See id.* at *28. And there is no provision in the law that requires an employer to give an employee any time off to obtain the identification required to vote. *Compare* Wis. Stat. § 6.76(1) (granting voters up to 3 hours off of work to vote). Thus, Act 23 forces poorer citizens to "choose between their wages and their franchise," unconstitutionally denying eligible electors their right to vote. *See Holder*, 2012 WL 3747676, *28.

Finally, the circuit court found that more than 330,000 eligible electors – nearly one in ten – would need to obtain a photo ID to comply with Act 23. *See* R.84 at 11-12. This, too, differs from the situation in Indiana addressed by the U.S. Supreme Court, where the Indiana trial court determined that 99 percent of Indiana's voters possessed photo ID.

These 330,000 eligible electors, combined with the limited DMV hours and locations, will likely result

in a bottleneck for voter access. According to the DMV website, the 92 DMV service centers are open for a combined total of approximately 9000 hours per month. *DMV Service Centers*, available at http://www.dot.wisconsin.gov/about/locate/dmv/. If the 330,000 electors attempted to obtain their ID during the one-month period preceding the election, the DMV would need to process on average 37 eligible electors each hour, every day of operation for the entire month. Of course, the number of eligible electors who do not possess a photo ID is not uniformly spread across the state. For example, according to Professor Kenneth Mayer, Waukesha County has 23,623 eligible electors who do not have a state-issued photo ID. R.60, Ex.7 at 7. Waukesha County has two DMV service centers that operate for a combined total of 174 hours each month. To process the 23,623 eligible electors in Waukesha County, Waukesha's service centers would need to process *136* eligible electors every hour of operation, every day for one month.

This systemic inaccessibility helps explain the difficulties faced by witnesses who testified at trial, and reveals that their experiences are far from unique. Contrary to the Appellants' assertions, a little planning on the part of the voter cannot cure this structural defect.

Moreover, Act 23 effectively transforms the DMV into a gatekeeper of the ballot box. The systemic inaccessibility makes the DMV ill-equipped to perform this role. By comparison, Wisconsin's DMV service centers are remarkably less accessible

than the state's polling locations. On Election Day, each of Wisconsin's 1851 municipalities has at least one polling site. *Towns Quick Facts*, Wisconsin Towns Association available at: http://www.wisctowns.com/about-towns (last visited November 17, 2012); Wis. Stat. § 5.25(5)(c). In fact, there are 2791 polling location across the state, and each poll is required to be open from 7 a.m. to 8 p.m. Wis. Stat. § 6.78(1m). The 92 DMV service centers constitute less than 4 percent of the number of polling locations in this state. The state and local municipalities have made a concerted effort to ensure Wisconsin voters have access to the polls, establishing approximately 36,000 hours of access to the ballot box on Election Day. It would take the DMV nearly four months to reach the same number of hours of access. The DMV is not equipped to be the gatekeeper of the ballot box, unconstitutionally impeding voter access.

C. Act 23 Will Preclude Qualified Electors From Proving Qualifications On Election Day.

An important component of the constitutionally protected right to vote is that the right attaches to the voter on the day of the election:

> [The] Wisconsin constitution vests and warrants the right [to vote] *at the time of election*; and every one having the constitutional qualifications *then* may go to the polls, vested with the franchise, of which no statutory condition

> precedent can deprive him, because the constitution makes him, by force of his present qualifications, a qualified voter at such election.

Dells, 49 Wis. 555 (emphasis in original).

In *Dells v. Kennedy*, the Wisconsin Supreme Court evaluated a law that (1) required Wisconsin voters to pre-register to vote; and, (2) outright prohibited an elector from voting unless the elector was registered or unless the elector became qualified after the close of voter registration. *Id.* The law contained no exceptions. *Id.* In holding the law unconstitutional, the Court concluded that the Wisconsin Constitution requires a registration law to give the elector an opportunity to prove his qualifications *on Election Day*. *Id.*

The DMV service centers hours of operation present an insurmountable problem for Act 23. A review of the DMV website reveals that 33 DMV service centers are closed on Tuesdays. *DMV Service Centers*. Eligible electors who are unable to obtain a photo ID prior to Election Day and live near those service centers may be unable to travel the great distance to reach an open service center, and therefore would be precluded from "mak[ing] proof of their qualifications" on Election Day. Of the remaining service centers, not one is open on a Tuesday after 5:00 p.m., yet the polls are open until 8:00 p.m. An eligible elector who attempts to vote after 5:00 p.m. on Election Day and discovers he or she needs to obtain a photo ID will be unable to vote. Moreover, the task of

assembling the necessary documentation – and navigating government bureaucracies to obtain those documents – in order to apply for a photo ID is likely impossible to complete in one day. Because Act 23 provides no exceptions for a voter who fails to obtain a photo ID prior to Election Day, the limited number and hours of Wisconsin's DMV service centers will likely deprive eligible electors of their right to vote.

II. ACT 23 WOULD LIKELY INFRINGE ON ELIGIBLE ELECTORS' RIGHT TO VOTE WITHOUT ANY VALID OR SUBSTANTIATED JUSTIFICATION.

When, as here, a case has been tried to the court, the circuit court's factual findings and determinations of credibility should not be disturbed and should be upheld by the reviewing court unless they are clearly erroneous. *Noll v. Dimiceli's Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (1983) (on factual findings); *State v. Denson*, 2011 WI 70, ¶ 73, 335 Wis. 2d 681, 799 N.W.2d 831 (on credibility determinations). Should an appellate court determine that more than one reasonable inference can be drawn from the evidence, the appellate court must accept the inference drawn by the circuit court. *Noll*, 115 Wis. 2d at 644.

A. Unsupported Allegations of Voter Fraud Do Not And Cannot Justify The Likely Disenfranchisement Of Eligible Electors

The court in this case evaluated the evidence presented and found there exists no voter fraud that would be addressed by Act 23. R.84 at 12. At trial, Respondents' expert Kenneth Mayer discussed three in-depth and thorough investigations – by the Milwaukee Police Department, the Mayor of Milwaukee and the Wisconsin Department of Justice – and the conclusions of all three investigations: there have been no cases of in-person voter fraud in Wisconsin. *Id.* The Appellants presented no contrary evidence.

The court also found credible and persuasive the witnesses' testimony about the difficulties of procuring a photo ID from the DMV, concluding the process of obtaining a photo ID can be difficult, expensive, frustrating, complex, and time-consuming. *Id.* at 12-14. At trial, witnesses testified about significant difficulties they encountered while navigating bureaucratic government red tape in their attempts to obtain a photo ID. The circuit court found this testimony credible and accepted it as true.

Appellants rely on the U.S. Supreme Court's conclusion in *Crawford*, wherein the Court upheld Indiana's Voter ID law despite the state providing no evidence of voter fraud that would have been addressed by the law. *Crawford v. Marion County*

Election Bd., 553 U.S. 181, 194-95 (2008). The Court also concluded that there was no credible evidence of any voter disenfranchisement. In effect, then, the Court in *Crawford* balanced theoretical voter fraud against theoretical voter disenfranchisement.

Here, the court was asked to evaluate theoretical claims of voter fraud against the credible and persuasive evidence of the immense difficulties voters faced in meeting the requirements of Act 23. The circuit court concluded that unsupported allegations of voter fraud do not and cannot justify the potential disenfranchisement of eligible electors. The circuit court's findings should not be disturbed.

B. Wisconsin Voter Confidence is High; Act 23 Itself Risks Undermining This Confidence.

In the absence of fraud, Appellants contend that the balance still weighs in favor of Act 23 because the State has a clear and legitimate interest in protecting the integrity of the elections. There is no dispute that the state has the authority to protect the integrity of Wisconsin's elections. And the Court in *Crawford* relied – in part – on this authority to uphold Indiana's Voter ID law, finding a correlation between the Voter ID law and voter confidence and concluding that "the integrity of the electoral process has independent significance, *because it encourages citizen participation in the democratic process*." *Crawford*, 553 U.S. at 197 (*emphasis added*).

There are two problems with the Appellant's argument. The first is the proven disconnect between a Voter ID law and voter confidence demonstrated by citizen participation. Here, the circuit court found that the Respondents presented convincing evidence of this disconnect, and Appellants offered no evidence to the contrary. R.84 at 17-18. Respondents' expert, Dr. Mayer, presented the findings from a comprehensive study that concluded: (1) there is no relationship between attitudes about the frequency of election fraud and the likelihood of voting; and, (2) there is no relationship between beliefs about election fraud and the existence of strict photo ID laws. R.60, Ex. 3 at 15-16. The circuit court found this study persuasive and Dr. Mayer's testimony on the subject credible.

The circuit court also found persuasive a recent decision by the Missouri Supreme Court that concluded public perception about electoral integrity can be mistaken and manipulated, and therefore should not be used as a justification for voter disenfranchisement. *Id.* (*citing Weinscchenk v. Missouri*, 203 S.W.3d 201, 218, 219 (Mo. 2006) (warning against reliance on "tumultuous tides of public misperception" to justify the infringement of a fundamental right).

The second problem with the Appellants' argument is that the assumption that Voter ID laws lead to increased voter participation was made irrelevant by the 2012 November election. Wisconsin voters turned out in record numbers – despite the circuit court's order enjoining Act 23. *See* Gilbert, Craig, *Presidential Turnout of 70% in Wisconsin tops*

2008, Milwaukee Journal Sentinel, available at http://www.jsonline.com/blogs/news/ 177649551.html (last visited November 17, 2012); R.84. If voter participation is an indicator of voter confidence, Wisconsin voters have demonstrated that they are quite confident in the state's electoral process without Act 23.

Moreover, when a significant number of voters are prevented from voting, this undermines the appearance of fairness in an election. *See Tollander*, 100 Wis. 2d at 503, 505 (citation omitted). Ironically, then, without any evidence of fraud, coupled with compelling evidence of Act 23's potential for disenfranchisement, it is Act 23 itself that would damage the integrity of Wisconsin's elections.

CONCLUSION

Appellants' failure to produce *any* evidence of voter fraud does not and cannot outweigh the credible and persuasive evidence of almost certain voter disenfranchisement that would be caused by Act 23. Moreover, claims that Act 23 will protect "election integrity" are ill formed, unsupported by credible evidence, and unnecessary given the record voter turnout in the November 2012 elections.

In addition, the inaccessibility of Wisconsin's DMV service centers creates a significant – and for some, insurmountable – impediment to obtaining a photo ID. The implementation of Act 23 would almost certainly result in the unconstitutional

disenfranchisement of potentially hundreds of thousands of Wisconsin's eligible electors.

For these reasons, the Circuit Court should be affirmed.

Dated this 19th day of November 2012.

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APPENDIX TO *AMICUS CURIAE* BRIEF BY INSTITUTE FOR ONE WISCONSIN, INC IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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