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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

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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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

¹Plaintiffs-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

²See Wis. Stat. § 6.87(4)(a)-(b).

³Similar 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.*

⁴The 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-App. 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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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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