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**STATE OF WISCONSIN
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DISTRICT II

10-10-2012

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OF WISCONSIN**

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,

Appeal Number
2012-AP-001652

*Plaintiffs-
Respondents,*

v.

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

Dane County
Circuit Court
11-CV-5492

*Defendants-
Appellants,*

and

DORIS JANIS, JAMES JANIS,
and MATTHEW AUGUSTINE,

*Intervenors-
Co-Appellants.*

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

BRIEF OF INTERVENORS-APPELLANTS

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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 la 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]rocur[ing] 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. 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 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 (Nddi 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 FUNDAMENTAL RIGHT TO VOTE**

Act 23 does not violate the fundamental constitutional right to vote under either Wis. Const. art. III, § 1⁶ 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.").

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 through which an indigent elector may receive a free certified copy of his or her birth certificate.

Second, the district court found that “[p]rocurring 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]rocur[ing] 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 "detering 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, Intervenor 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

By /s/ Joseph Louis Olson
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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).

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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.

Signed on: October 10, 2012

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