STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2012AP1652

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

Plaintiffs-Respondents,

v.

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

Defendants-Co-Appellants,

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

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

BRIEF OF PLAINTIFFS-RESPONDENTS

HAWKS QUINDEL, S.C.
Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
PO Box 442
Milwaukee, WI 53201-0442
414-271-8650, 414-271-8442 Fax
rsaks@hq-law.com
msumara@hq-law.com
Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Constitution and Statutes

OTHER AUTHORITIES CITED

Other Authorities

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Respondents (Plaintiffs) also request oral argument and agree that publication is warranted because this is a case of substantial and continuing public interest.

STATEMENT OF FACTS

Prior to Act 23, a registered Wisconsin voter exercised the franchise by announcing his/her name and address to two election officials who verified the name with the poll list of registered voters, entered a serial number on the poll list, and initialed a ballot that they handed to the voter. Wis. Stat. §§6.36(2)(a);6.79 (2010). If another qualified voter had reasonable cause to believe that the elector requesting a ballot was not qualified to vote, the requesting elector could be challenged for cause and disqualified by the municipal clerk or board of election commissioners only upon proof beyond a reasonable doubt that the voter was not qualified. Wis. Stat. §§6.325;6.48 (2010).

Act 23 requires that a Wisconsin elector seeking to vote on election day and by absentee ballot must present one of these exclusive forms of photo identification (ID): Wisconsin driver license issued by the Department of Transportation (WisDOT); WisDOT issued photo ID; U.S. military ID; U.S. passport, all four unexpired or expired after the most recent general election; U.S. naturalization certificate issued less than two years before the election; unexpired driving or identification receipt; ID card issued by a federally recognized Indian tribe in Wisconsin; unexpired Wisconsin university or college student ID showing

expiration and issuance dates no more than two years apart. Wis. Stat. §§5.02(6m);6.79(2).R.84 p.2; A-App.102.

Act 23 exempts from the photo ID requirement: electors voting absentee and in the military, living overseas or indefinitely confined to a nursing home or similar residence; electors subject to a confidential listing; and electors presenting a citation or notice of intent to revoke or suspend their driver license within thirty days. Wis. Stat. §§6.79(6),(7); 6.86,6.87.

Applicants for a photo ID must provide satisfactory documentation of name, birth date, identity, residence, citizenship and Social Security number. Wis. Stat. §§343.50(4), 343.14(2)(a),(b),(bm),(er),(f). Only a certified birth certificate is satisfactory proof of name and birth date. Wis.Admin.Code §Trans 102.16(3)(a)1; R.84 p.2-3; A-App. 102-103.

Original Wisconsin birth certificates are maintained by the State Registrar, Department of Health Services (DHS), which authorizes local registrars to issue certified birth certificates for $20. Wis. Stat. §§69.01(25),69.03-.05, 69.21(1)(a)1.,69.22(1)(c); Wis.Admin.Code §DHS 142. 1. If the State Registrar refuses to register or cannot amend a birth certificate, one may petition the circuit court of the birth county for an order establishing the date and place of birth or for an order to amend erroneous information on the birth certificate. Wis. Stat. §§69.12(1);69.14(2)(b)6. The Milwaukee County filing fee is $168; in other counties, $164.50. Wis. Stat. §§814.61(1)(a),814.85(1),814.86(1),(1m); Wis. Cir. Ct. Fee…Tables, Table 1(eff. July 1, 2011) http://www.wicourts.gov/courts/circuit/docs/fees.pdf (last visited Oct. 15, 2012). On court order, the State Registrar

charges $20 to register and $10 to amend a birth certificate. Wis. Stat. §§69.22(5)(a)2;(5)(b). R.84p.3; A-App.103.

Act 23 appears to be the most restrictive voter identification law in the nation, given the limited, prescribed number of photo IDs and the absence of any fail-safe procedure for a qualified voter who lacks the required identification. R.60 Ex.3pp.4-7,9, Ex.5 *passim*,Table 2, Ex.7 p.18-20; R.84pp.3-4; R.90pp.33-37,39,107-108,112-113; R.91p.76; A-App.103-104. In eight states with photo ID laws, a voter without a photo ID can vote absentee with no ID or in person on execution of an affidavit of identity; Indiana voters without a photo ID can vote in-person on executing an affidavit of indigency, or absentee. R.60 Ex.3p.5, Ex.5pp.1,4-6,8,10,13-15, Ex.7p.19; R.84pp.3-4n12; R.90pp.36-37;A-App.103-104.

The exact match statistical method is a reliable, well-recognized method to compare large government databases and was the most dependable method for reasonably and accurately estimating the number of registered Wisconsin voters without a Wisconsin driver license or a WisDOT photo ID. R.84p.9;A-App.109. Reliable factual resources that form the basis for the exact match and adjustments are U.S. Census Bureau Wisconsin population studies, WisDOT records of driver licenses and photo IDs, the Government Accountability Board's (GAB) Statewide Voter Registration System (SVRS) database. R.60 Exs.6,7,9; R.84pp.7,9; R.90p.49;A-App.107,109.

Plaintiffs' expert Prof. Kenneth Mayer and Defendants' expert Prof. M.V. Hood each used the exact match to estimate the number of constitutionally qualified voters with no WisDOT photo ID. On performing the exact match between the SVRS and WisDOT files, Prof. Mayer

estimated that 301,727 (9.3%) of all registered voters lack a WisDOT driver license or photo ID. R.60 Ex.6, Ex.7pp.1-18, Ex.84, Ex.85; R.84pp.7-10; R.90pp.49;A-App.107-110.

A reasonable, reliable and accurate estimate of the number of constitutionally qualified voters in Wisconsin without Act 23 identification is 333,276. This estimate is produced by adding 301,727 registered voters identified via the exact match and 87,747 (9.3%) of unregistered but qualified voters for a subtotal of 389,454. This subtotal is reduced by 56,178 people who possess student, tribal or military photo ID, resulting in 333,276 eligible Wisconsin voters lacking a photo ID. R.60 Ex.6 pp.3-6, Ex.7pp.3,8, Ex.85; R.84pp.11-12; R.90pp.49-50,66, 70,80-90;A-App.111-112.

Non-match describes instances in which a registered voter in the SVRS database does not appear in the WisDOT database. A false non-match occurs when some data discrepancy misidentifies a registered voter who does possess a WisDOT ID. Professor Mayer reasonably sought to identify false non-matches and found that non-match patterns were not random but were more concentrated in certain age groups and locations, who were identified in previous studies as having significantly higher nonpossession rates. R.60,Ex.9; R.90pp.37-40,49-50, 64-68; R.95pp.36-37. This is a reliable indication that the non-match instances are true non-matches, reporting registered voters without ID. R.60Ex.7pp.5-6, Ex.9; R.84 p.11; R.90pp.71-74; A-App.111. This was further corroborated by GAB exact match studies of the two databases in 2008 and 2009 which showed a 9% non-match rate that was virtually the same as Prof. Mayer's. R.60 Ex. 12.

Professor Hood reported that the Georgia photo ID law coincided with 5% reduction in the African-American vote in the 2008 general election, notwithstanding an African-American presidential candidate and a black voter registration increase of 14% in the preceding four years. R.60 Exs.86, 87;R.84p.12;R.90p.81;R.91pp.81-83; R.93p.46,49,55; A-App.112.

Procuring a WisDOT photo ID is a frustrating, complex and time-consuming process for a substantial number of constitutionally eligible voters and can require the expenditure of an amount of money that is significant for indigent voters. R.60 Exs.1,14-30,51,53-55,58-59,62-65,67-71,73; R.84p.14;A.App.114.

Plaintiffs presented evidence from fifteen predominantly low-income voters who had to pay for a birth certificate in order to obtain their WisDOT photo ID, including ten who paid $20 for a Wisconsin birth certificate and five who paid from $15 to $50 for their out-of-state birth certificates. R.60 Exs. 22, 70, 71, 21, 16, 59, 58, 55, 23, 73, 19, 14, 15, 65 & 29. Plaintiffs also presented illustrative evidence from a total of 34 voters who spent many hours spread out over days and weeks travelling to or corresponding with various government offices attempting to procure the statutorily-required documentation to obtain a photo ID in order to vote.R.60 Exs.14-30, 51, 53-55, 58-59, 62-71 & 73.

Ruthelle Frank has regularly voted since 1948 and has never had a driver license or a birth certificate. She presented her baptismal certificate, Social Security card, two proofs of residence and bank records to the Wisconsin Department of Motor Vehicles (DMV) but was refused a photo ID for lack of a certified birth certificate. County and state representatives advised her that her name is wrongly spelled

on the record of her birth and to correct it she may need to petition a circuit court. R.60 Ex.1 Dep.pp.4-9,11-12,15,38-39,47-52 &Dep.Ex.1,2,4,5; R.84p.12;A-App.112.

Ricky Lewis is a registered Wisconsin voter who was honorably discharged from the U.S. Marine Corps. His sole source of income is his monthly $986 veteran's pension. Mr. Lewis presented to DMV his Department of Veterans Affairs photo ID, Milwaukee County photo ID, Marine Corps military service record and a Wisconsin Energies bill. He was denied a photo ID because he did not present a certified birth certificate and a Social Security card. He paid $20 to obtain a certified birth certificate only to be told there was no record of the birth of Ricky Lewis. He received a birth certificate for "Tyrone DeBerry" and was told that he could petition a court to order a corrected certificate. R.60 Ex.23, Dep.pp.5-6,8,13-14 & Aff.; R.84pp. 12-13; A-App.112-13.

Sequoia Cole, a registered Wisconsin voter, has a fixed monthly income of $600. She spent 5½ to 6½ hours walking to and from government and other offices and paid $20 for her birth certificate to obtain the underlying documentation required by DMV to issue her photo ID. R.60 Ex.16, Dep.pp.5-12,14&Aff.; R.84p.13;A-App. 113.

Joel Torres is a registered Wisconsin voter who has voted in previous elections. It took him three trips to DMV over several weeks and an appeal by his mother to the Milwaukee Election Commission for DMV to accept his many documents showing proof of residence and issue his photo ID. R.60 Ex.27, Dep.p.5-12&Aff.; R.84 p.13-14; A-App.113-114.

Plaintiff and registered voter Mary McClintock, who is disabled and wheelchair-bound, made three separate

paratransit trips to DMV in over nine hours to obtain her photo ID to vote. R.60 Ex. 24.

Registered voter and Plaintiff Danettea Lane futilely waited three times at DMV, went to the Milwaukee County Courthouse, paid $20 for her birth certificate, and returned to DMV to procure her photo ID for voting. R.60 Ex. 22.

Tyreese Jackson spent approximately ten hours at DMV, Social Security, and the Milwaukee County Courthouse, paying $20 for his birth certificate, to obtain the requisite documentation for his photo ID. R.60 Ex. 21.

Voter fraud (felon voting, multiple voting and voter impersonation) is a Class I felony, punishable by up to 3½ years imprisonment, a $10,000 fine or both. Wis. Stat. §§12.13;12.60(1)(a);939.50(3)(i). R.60 Ex.3pp,14; R.84p.3; A-App.103.

Since 2004, voter fraud investigations were undertaken by the Milwaukee Police Department, the Mayor of Milwaukee and the Wisconsin Department of Justice, with county prosecutors working through the Attorney General's Election Fraud Task Force. None of these efforts produced prosecutions of voter fraud violations that Act 23 would prevent. R.60 Ex.3pp.11-12,Ex.4; R.84p.12; R.90pp.21-24,26-29,95-96,99-100,103; R.91p.70,72-74; A-App.112.

The Election Fraud Task Force resulted in these cases: six registration misconduct; eleven felons voting; two double voting; and one absentee ballot fraud. The absentee ballot case involved two voters who voted absentee and at the polls, and was the result of poor absentee record keeping by the elections clerk. R.17¶66; R.60 Ex.3p.11, Ex.4; R.90 pp.27,23-24.

Felons can obtain a driver license or photo ID and Act 23 will not prevent felons registering or attempting to vote, as neither ID indicates felon status. Unlawful felon voting is deterred by GAB flagging records in the SVRS file and providing felon lists to local election officials. R.90 pp.26,99-100.

The photo ID requirement will not deter fraudulent double voting or multiple voting. R.60 Ex.3pp.11,12n.3; Ex.90pp.34,101-102; R.91p.70. The accuracy of GAB voter records will reveal post-election whether a person voted in multiple locations. R.90 p.102; R.91pp.71-72. Multiple voting is also deterred because it is a Class I felony punishable by up to 3½ years imprisonment. R.60 Ex.4p.1; R.90p.102.

Poll lists denote whether a voter has voted absentee and prevent double voting at the polls. If the absentee notation is missing from the poll list, showing a photo ID will not deter double voting. R.90p.27.

Five prosecutions following the Election Fraud Task Force were for special registration deputies' procurement of false voter registrants. R.90 p.27-28,103. Photo ID will not deter such fraud; the registration process is safeguarded because one must provide a driver license number or the last four digits of one's Social Security number to register. Wis.Stat. §6.33(1); Wis.Admin.Code §§GAB3.02(4);3.04. R.90p.29; R.91pp.73-74. No persons voted under the false names associated with these prosecutions for fraudulent procurement of registrants. R.17¶67; R.91pp.72-73.

An undocumented immigrant and thereby unqualified voter who registers under a fictitious name would be deterred from voting by the risk of deportation and imprisonment and would neither be detected nor deterred by the photo ID requirement. R.90p.105; R.91p.74-75.

There is virtually no evidence that in-person voter impersonation occurs. It is the least common form of electoral fraud. R.60Ex.3p.10; R.90p.30. In federal prosecutions nationwide for vote fraud between 2000 and 2005 there were no cases of voter impersonation that would have been prevented by photo ID requirements and only nine prosecutions overall. The cost of voter impersonation is so high and the benefits so low that it makes no sense to engage in voter impersonation at the polls. R.60 Ex.3pp.13-14; R.90p.106. None of the cases identified by the Election Fraud Task Force involved any confirmed cases of voter impersonation. R.17¶¶65,68.

The nationwide Cooperative Congressional Election Study (CCES) of over 40,000 respondents during the 2006 congressional midterm election and the 2008 presidential primary elections found no relationship between voters' attitudes about the frequency of election fraud and their likelihood of voting, or voter belief about election fraud and the existence of strict photo ID laws. The CCES concluded that the relative stringency of photo ID laws does not affect voter confidence in the electoral system. R.60Ex.3p.15; R.84pp.17-18; A-App.117-118.

ARGUMENT

Introduction

An estimated 333,276 constitutionally qualified Wisconsin electors lack one of the limited forms of ID prescribed by Act 23. For such voters, a WisDOT photo ID is the only attainable form of ID and requires the expenditure of unreasonable and onerous amounts of time and money, far exceeding the ordinary burdens normally associated with voting. Act 23 may be the most stringent ID requirement in

the nation. It contains no fail-safe and will absolutely disenfranchise every constitutionally qualified elector who cannot obtain the prescribed ID. With respect to its benefits, the law effects no meaningful purpose, as its intended target, voter impersonation, is virtually nonexistent in Wisconsin elections.

Defendants center their case on the argument that federal jurisprudence compels adherence to the legal conclusion that a photo ID law cannot be found unduly burdensome on the exercise of the franchise. However, a three-judge federal panel just struck down Texas' similarly stringent photo ID law finding that, like Act 23, it imposes unwarranted, costly and time-consuming burdens. *Texas v. Holder*, 2012 U.S.Dist.LEXIS 127119 (D.D.C., Aug. 30, 2012).

The Wisconsin Supreme Court has consistently recognized that the fundamental right to vote guaranteed by art. III, §1 of the Wisconsin Constitution cannot be impaired by unreasonable regulations tantamount to a denial of the right to vote. Plaintiffs' evidentiary record established beyond a reasonable doubt that Act 23's photo ID requirement is an unwarranted and constitutionally significant intrusion upon the exercise of the franchise for potentially hundreds of thousands of qualified voters.

I. Wisconsin Jurisprudence Requires Heightened Scrutiny of Act 23

Wisconsin jurisprudence compels heightened scrutiny of Act 23, as the circuit court carefully concluded, because it implicates a fundamental interest: the "inherent… fundamental…sacred" right to vote, guaranteed to qualified citizens by art. III, §1 of the Wisconsin Constitution. *State ex rel. McGrael v. Phelps,* 144 Wis. 1,15-17, 128 N.W. 1041

(1910). The Supreme Court has historically scrutinized restrictions on voting (and other fundamental rights) with a heightened, rigorous analysis to ensure that the fundamental, constitutionally guaranteed right of suffrage is not unreasonably limited in its free exercise. It has never applied non-heightened, deferential scrutiny to a statute which imposes an absolute or unreasonable bar to voting by constitutionally qualified electors, although it has not used the precise term "strict scrutiny." *Dells v. Kennedy*, 49 Wis. 555 (1880); *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 341, 125 N.W.961, 969 (1910); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613-614, 37 N.W.2d 473 (1949) (right to vote not "destroyed or substantially impaired" by reasonable legislation moving the date of elections and establishing primary runoff requirement); *McNally v. Tollander*, 100 Wis.2d 490, 302 N.W.2d 440 (1981) (referendum set aside because procedural irregularities disenfranchised qualified electors).

Defendants argue for a non-heightened level of scrutiny of Act 23 by stretching beyond their reach the import of decisions regarding ballot regulation, voter oaths regarding residency, and other election administration matters that do not directly, severely, or unreasonably intrude upon the fundamental right to vote by impairing voter access. Defendants invoke *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), but *Cothren* implicated the constitutional validity of a non-burdensome statute requiring voters challenged on residency to take an oath affirming 30 days of residency within the town where they vote. Defendants also rely on *State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875), but *Wood* actually held that officials' noncompliance with a statute by omitting a name from the voter registry could not disenfranchise or invalidate the ballots of otherwise qualified voters. And they rely on *State ex rel. Runge v. Anderson*, 100

Wis. 523, 533-534 (1898), which addressed qualifications of *candidates* for the ballot and whether the Legislature can reasonably regulate ballot preparation and "prohibit the double printing of names of candidates." Further, Defendants misconstrue the import of *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 482 (1913), regarding the residency requirement for transient workers. The court carefully scrutinized the residency law and recognized that it imposed a burden on transient workers, but found it properly designed to accomplish the important government objective of preventing "transient sojourners" from controlling election results, overriding the will of permanent residents. *Id.*

In *Dells v. Kennedy*, the Court struck down a registration requirement which prohibited a constitutionally qualified, but unregistered, elector from voting unless the voter became qualified after the close of registration. The Court carefully scrutinized the law, stating that the "sacred right" to vote may not be impaired by regulations to ensure "orderly exercise of the right" which unreasonably burden the constitutionally qualified voter:

> If the mode or method or regulations prescribed by law…deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disenfranchised him….

49 Wis. at 557-558.

The ballot regulation cases cited by Defendants do not relieve any court from reviewing whether a law unreasonably burdens qualified electors and is designed to effect an important government interest regarding the electoral process.

This principle was clearly stated in *State ex rel. Van Alstine v. Frear:*

> These decisions establish the rule that legislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

142 Wis. at 341, 125 N.W. at 969 (addressing validity of the state primary law).

Juxtaposing *Gradinjan v. Boho*, 29 Wis.2d 674, 139 N.W.2d 557 (1966), and *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), provides a window into the Court's approach. In *Ollman*, the Court declined to enforce the statute requiring the clerk's signature on ballots for in-person voters inside the polling place because the statute provided no reasonable basis to necessitate disenfranchising such voters of their fundamental right. 238 Wis. at 578, 300 N.W.183. Conversely, in *Grandinjan*, the election clerk's failure to comply with the statutory requirement to initial *absentee* ballots was enforced because the statute reasonably served the important purpose of deterring fraud which "could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place." 29 Wis.2d at 683-684, 139 N.W.2d 183.

In the instant case, the circuit court correctly applied these principles and carefully scrutinized the photo ID requirement, finding that it would severely burden a significant number of qualified voters but was not reasonably necessitated or designed to deter fraud or otherwise effect an important government interest. Such approach is consistent with the heightened level of scrutiny the Court has employed

for over 150 years in construing laws relating to voting and elections to ensure that they reasonably regulate but do not impose unwarranted severe or widespread burdens on exercise of the franchise.

II. Heightened Scrutiny of Act 23 Is Consistent With Federal Jurisprudence

The test articulated in *Van Alstine* and *Zimmerman* is perfectly consistent with the federal *Anderson/Burdick* sliding scale test by which the degree of judicial scrutiny is predicated on the severity and scope of the restrictions burdening the right to vote. *Anderson v. Celebrezze,* 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). Under *Anderson*/*Burdick,*

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434 (quoting *Anderson,* 460 U.S. at 789). If a regulation places "severe restrictions" on the exercise of the franchise, "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick, Id.* at 434. In contrast, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the [constitutional] rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.*

Defendants erroneously argue that the circuit court rejected the "analytical approach of federal law" and that, for

uniformity, Wisconsin courts must follow federal precedent. While the circuit court's analysis focused on Wisconsin voting rights jurisprudence, its analytical approach was remarkably similar to the *Anderson/Burdick* paradigm, assessing whether the interests and benefits of the law justified its burdens, looking at "both sides of the ledger." R.84p.17,A-App.17. The circuit court assessed and then determined that the scope and degree of the burdens imposed by Act 23 are substantial and, consistent with *Anderson/Burdick,* carefully scrutinized whether the state's legitimate interests in deterrence and prevention of vote fraud necessitate such burdens.

At bottom, however, Defendants' argument is that the circuit court erred by not replicating the *conclusion* reached in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), about Indiana's photo ID law. The circuit court provided three valid reasons why it is not bound by the *Crawford* outcome: *Crawford* was based upon a factual record that did not establish severe or widespread burdens on voters; the Indiana law did not serve as an absolute bar to voting because electors who lacked a photo ID could still vote absentee or by affidavit; and the instant case is based on the Wisconsin, not the federal Constitution. R.84pp.18-19;A-App.118-119.

As discussed *infra*, the circuit court correctly distinguished the factual record in *Crawford, Id.* at 190 & n.8, 199, and contrasted the inflexible stringency of Act 23.

In support of their argument that Wisconsin courts must adhere to federal precedent in voting rights claims brought under the Wisconsin Constitution, Defendants rely on *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, 263 Wis.2d 709, 666 N.W.2d 816. No other Wisconsin case

addresses this issue, and Defendants' reliance on *Wagner* is misplaced. The *Wagner* case did not implicate the rights of voters but involved candidate requirements. Because there is no "fundamental right to be a candidate," barriers to a candidate's ballot access do not demand heightened scrutiny. 2003 WI 103,¶¶78-79. The *Wagner* Court noted generally that similar analysis is often used to review election laws, and equal protection and due process cases, but never stated or intimated (nor has any other Wisconsin court) that the fundamental right to vote explicitly set forth in art. III, §1 is subject to the same interpretation as the implied right to vote under the federal constitution. Further, Defendants ignore that the A*nderson/Burdick* test serves as a single standard to apply to all challenges to restrictive voting laws, whether brought as equal protection and due process challenges or under the fundamental right to vote. *Anderson,* 460 U.S. at 786, n.7.

In numerous contexts, the Wisconsin Supreme Court has construed our state constitution independently of a counterpart provision of the federal constitution, especially where there are textual dissimilarities and where rights are explicit only in the State constitution, as with the right to vote. *See State v. Miller*, 202 Wis.2d 56, 65-66l, 549 N.W.2d 235 (1996) ("freedom of conscience as guaranteed by the Wisconsin Constitution…not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision"); s*ee also State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998) (Wisconsin not U.S. Constitution requires 12-member jury); *State v. Doe*, 78 Wis.2d 161, 171-172, 254 N.W.2d 210 (1977) (broader rights to counsel for criminal defendants).

Even where the Wisconsin Supreme Court has held that provisions of the two Constitutions are "essentially the same," as with equal protection and due process, *see State v.*

West, 2011 WI 83, ¶5 n.2, 336 Wis.2d 578, 800 N.W.2d 929 and *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1998), Defendants disregard the Court's multiple rulings, circumscribing the reach of such a general pronouncement and holding specifically that principles of federalism allow that textually similar federal and state constitutional provisions need not be construed identically in all instances. *State v. Dubose*, 2005 WI 126, ¶¶40-43, 285 Wis.2d 143, 699 N.W.2d 582 (rejecting federal standard regarding out-of-court eyewitness identifications); *see also, State v. Knapp*, 2005 WI 127, ¶60, 285 Wis.2d 86, 700 N.W.2d 899 ("While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.") Nor does *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis.2d 1, 719 N.W.2d 408 (whether a 1993 constitutional amendment on gambling invalidated the State's earlier tribal gaming compacts) or the cases cited above require an analysis whether the *framers* intended strict "uniformity" with the federal constitution.

Defendants cite *Griffin v. Roupas*, 385 F.3 1128, 1131 (7th Cir. 2004), for the proposition that *Anderson/Burdick* requires non-heightened scrutiny of election statutes because of the legislature's unique role. *Griffin* involved a claim by working mothers seeking greater absentee ballot access, but it hardly stands for the proposition that where a statute significantly burdens exercise of the franchise a court is not obligated to scrutinize the asserted interests and whether they warrant intrusions into voting rights. In *Griffin*, the Court considered the history of vote fraud in Illinois and concluded that statutory restrictions were reasonable, finding a "gamey" history of absentee voting. However, the Sixth Circuit

recently applied the same *Anderson/Burdick* test to a similar case involving absentee early voting in Ohio. The Court invalidated a legislative restriction on absentee ballot access after scrutinizing the state's asserted interests and concluding they did not necessitate the voting restriction. *Obama for America v. Husted,* 2012 U.S. App. LEXIS 20821, **17-19 (6th Cir. Oct. 5, 2012).

The *Crawford* outcome, therefore, does not dictate the result in this matter and hardly establishes "non-uniformity" in Wisconsin jurisprudence regarding the fundamental right to vote under art. III, §1. On the contrary, the lead opinion in *Crawford* applied the *Anderson/Burdick* test to the record and concluded that the Indiana law passed muster, particularly in light of its fail-safe absentee-ballot and affidavit of indigency provisions, which are absent from Act 23, and the absence of evidence showing that a substantial number of voters was unreasonably burdened by the law. 553 U.S. at 190 & n.8, 199. This analytical framework, scrutinizing the scope and severity of the burdens and the necessity for such burdens, is the very approach taken by the circuit court and is consistent with the Wisconsin Supreme Court's voting rights jurisprudence.

III. The Burdens Incurred by the Individual Plaintiffs and Witnesses are Sufficiently Substantial and Widespread to Support the Circuit Court's Declaration that Act 23 Is Facially Invalid

Defendants wrongly assert that the result approving the Indiana photo ID law in *Crawford* dictates that the more burdensome Act 23 must be upheld. The circuit court correctly concluded that Plaintiffs' factual record here is "substantial and entirely credible," unlike the *Crawford* trial record which failed to "identify the number of registered

voters lacking the photo ID and said 'virtually nothing' about the difficulties imposed upon indigent voters." R.84 p.19; A-App.119 (citing *Crawford*, 555 U.S. at 200-201). In fact, the circuit court here noted that the federal district court considering the same record as the Supreme Court in *Crawford*, described the plaintiffs factual record as "utterly incredible and unreliable." R.84p.19; A-App.119 (quoting *Indiana Democratic Party v. Rokita*, 458 F. Supp.2d 775, 803 (S.D. Ind.2006)).

In contrast to *Crawford*, the record here established that over 300,000 Wisconsin electors lack an acceptable photo ID. For the vast majority of these electors, the WisDOT photo ID is the only reasonably attainable ID. R.60 Ex.6 pp.4-6. To obtain a photo ID, voters incur constitutionally burdensome monetary costs and expenditures of time to procure a birth certificate and other required underlying documentation. The trial record illustrated that these real burdens were neither speculative nor theoretical.

As the circuit court found, registered voters Ricky Lewis and Ruthelle Frank illustrate the more unreasonable and arbitrary burdens imposed by Act 23. The absence of fail-safe provisions, like the Indiana affidavit of indigency or the Indiana absentee ballot free of any photo ID requirement, will preclude voters like them from exercise their constitutional right to vote. R.84pp.12-13; A-App.112-113. They are likely not unique. While their circumstances underscore the arbitrariness of Act 23, other voters will incur less extreme, but nonetheless substantial burdens, illustrating the disenfranchising impact of Act 23.

Defendants' argument is unavailing that most of Plaintiffs' thirty-four witnesses eventually obtained their photo IDs, so the demonstrated burdens lack constitutional

significance. Absolute disenfranchisement is not a predicate to unconstitutional infringement of the fundamental right to vote. *Rosario v. Rockefeller*, 410 U.S. 752, 766-765 (1973) (we have "never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred...any serious burden or infringement on such constitutionally protected activity is sufficient to establish a constitutional violation"); *Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993) ("intolerable burden" of plaintiff's disclosure of Social Security number as a "condition of his right to vote" unconstitutional).

The circuit court found credible and persuasive the unrebutted evidence about the witnesses' own difficult and costly experiences obtaining a photo ID. R.84 p.12; A-App.112. Defendants' argument that this evidence lacks probative value because it is "anecdotal" is untethered to evidentiary principles, which ascribe no particular meaning to whether evidence is "anecdotal." Courts typically rely upon anecdotal evidence, and even do so to address weighty issues, as long as such narratives satisfy the rules of evidence and especially where they are "probative of a larger problem." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 840 (2000); *see also United States v. Armstrong*, 517 U.S. 456, 481 (1996) ("anecdotal evidence" of "drug counselor's personal observations or…an attorney's practice in two …courts" probative and "'tend[s] to show the existence' of selective prosecution.").

The circuit court also correctly found that "Procuring a DMV Photo ID can require the expenditure of an amount of money that is significant for an eligible voter who is indigent." R. 84p.14; A-App.114. Defendants dispute this finding, claiming that there was no testimony that such costs are beyond the means of voters. In fact, Plaintiff Danettea

Lane and her four young children subsist on $1200 monthly and she bluntly testified that she considers the $20 cost of a birth certificate "a financial hardship." R.60 Ex.22 p.13. Other plaintiffs and witnesses subsist on $600 to $1254 a month. R.60 Exs.14,16,19,21,23. The unique burden of such costs on low-income voters is constitutionally significant, as they are the least likely to possess a driver license or passport and also the least equipped to bear such costs and navigate bureaucracies to procure the underlying documentation for a photo ID. R.60 Ex.3; R.84pp.12-14; A-App.112-114. The constitutional significance of this fact for Missouri voters was highlighted in *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo.2006), where the court found that:

> For the Missourians who live beneath the poverty line, the $15 they must pay in order to obtain their birth certificates and vote is $15 that they must subtract from their meager ability to feed, shelter, and clothe their families. The exercise of fundamental rights cannot be conditioned upon financial expense.

Id. at 214.

The circuit court also correctly found the unrebutted evidence of actual experiences of Plaintiffs and other witnesses is "credible and persuasive" that "procuring a DMV Photo ID can be a frustrating, complex, and time-consuming process." R.84pp.12-13; A-App.113-114. Nonetheless, Defendants claim, without presenting any evidence of their own, that such burdens were non-representative, self-inflicted, and otherwise avoidable and atypical obstacles. Some obstacles are insidious, including unreasonable amounts of time and attendant costs incurred by voters in a carousel of government and other offices trying to produce the documentation required by law. R.60 14-30,51, 53-55,58-59,62-71&73; R.84pp.13-14; A-App.113-114. While

Defendants claim that information on obtaining a photo ID is stated on DMV literature, the required documentation for a photo ID is complex and not easily discernible from the DMV publications and website. R.60 Exs.41-47. In fact, these legal requirements may only be first discovered or understood by face-to-face visits to DMV and government offices. Defendants assume without evidentiary support that: average voters have internet access; the law is not confusing; average voters could review the law and discern what underlying documents they need to get an ID and how to get them; average voters can figure out how to call a local DMV office and talk to a live person; an average voter would expect that a DMV representative would inform them by telephone about wait times.

Defendants misapply the court's limited finding in *Crawford* that, under Indiana law, the inconvenience of gathering documents for the DMV and getting a picture taken for a photo ID did not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 197. The circuit court here correctly concluded that there is an extensive factual record detailing the various burdens of obtaining a photo ID and the burdens are substantially greater than those ordinarily associated with voting.

The circuit court's holding here is consistent with the recent decision of the three-judge panel in *Texas v. Holder*, 2012 U.S.Dist.LEXIS 127119 (D.D.C. Aug. 30, 2012), which determined that, *Crawford* notwithstanding, a state's mandatory fee for a birth certificate and the required travel to obtain a photo ID for voting can be unwarranted, onerous burdens on the right to vote. The Texas case arose under Section 5 of the Voting Rights Act of 1965 and is dissimilar to the instant case in certain respects, particularly regarding the parties' evidentiary burdens and the requirement to show

a retrogressive effect on racial minorities. The ultimate issue, though, is the same: whether the photo ID law imposes unnecessary burdens on voters which prevent exercise of the right to vote. In concluding that the Texas law imposed unlawful burdens on the right to vote for minority voters, the court cited the out-of-pocket cost of birth certificates which were required to obtain a Texas election identification certificate (EIC) (like the WisDOT photo ID) and distinguished the Texas law (SB 14) from the Indiana law upheld in *Crawford* and the Georgia photo ID law (which received VRA preclearance, *see Id.* at *96):

> [T]he burdens associated with obtaining a purportedly "free" voter ID card will be heavier under SB 14 than under either Indiana or Georgia law….EIC applicants will have to present DPS officials with a government-issued form of ID, the cheapest of which, a certified copy of a birth certificate, costs $22….Georgia residents may present a wide range of documents to obtain a voter ID card, including a student ID, paycheck stub, Medicare or Medicaid statement, or certified school transcript….The diverse range of documents accepted by Georgia (24…in all) means that few voters are likely to incur out-of-pocket costs to obtain a voter ID. And although Indiana law…requires voters to present a government-issued document (such as a birth certificate) to obtain a "free" photo ID, in Indiana the "fee for obtaining a copy of one's birth certificate" is significantly lower than in Texas, ranging from $3 to $12, depending on the county. *See Crawford*, 553 U.S. at 198 n.17.

Id. at *47-48.

The *Texas* panel also concluded that *Crawford's* holding is limited and it must assess whether voters in Texas experience "burdens beyond those usually associated with voting" to obtain photo IDs:

> *Crawford* thus cannot be read as holding that a trip to the BMV can never "qualify as a substantial burden on the right to vote." And logically so. After all, would-be voters who must take a day off work to travel to a distant driver's license office have most certainly been exposed to burdens beyond those usually associated with voting. The same is likely true if prospective voters must pay a substantial amount of money to obtain a photo ID or wait in line for hours to get one. In some circumstances these heavy burdens could well discourage citizens from voting at all. And if such burdens fall disproportionately on racial or language minorities, they would have retrogressive effect "with respect to their effective exercise of the electoral franchise."

Id. at *41-42 (citations omitted).

The circuit court's decision is consistent with *Texas v. Holder,* and rests on the long-standing Wisconsin principle that any law which unreasonably burdens exercise of the franchise without sufficient justification is tantamount to a denial of the right to vote and is constitutionally infirm. *State ex rel. van Alstine v. Frear,* 142 Wis. at 341, 125 N.W. 561 (voting laws cannot render franchise "exercise so difficult and inconvenient as to amount to a denial").

IV. Professor Mayer's Estimate of 333,276 Electors Is a Reliable Measure of the Number of Constitutionally Qualified Electors Who Lack a Photo ID

Professor Mayer estimated that 333,276 constitutionally qualified Wisconsin voters lack an Act 23-prescribed photo ID. The circuit court found that is "A reasonable, reliable and accurate estimate of the number of people eligible to vote in Wisconsin who do not have a form of identification that would permit them to vote under Act 23…." R.84 p.11-12; A-App.111-112.

Defendants dispute Prof. Mayer's expert opinion and challenge the circuit court's findings, but utterly fail to satisfy their burden of proving such findings are clearly erroneous. Pursuant to Wis. Stat. §805.17(2), appellate tribunals "will not reverse the factual findings of the circuit court unless they are clearly erroneous." *Rasmussen v. GMC,* 2011 WI 52 ¶ 14, 335 Wis.2d 1, 803 N.W.2d 623. Regarding expert evidence, "[t]he weight and credibility to be given to the opinions of expert witnesses is 'uniquely within the province of the fact finder.'" *Bloomer Housing Ltd. v. City of Bloomer*, 2002 WI App. 252, ¶12, 257 Wis.2d 883, 653 N.W.2d 309 (quoting *Schorer v. Schorer*, 177 Wis.2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993)).

Professor Mayer performed an exact match of the SVRS registered voter files and the WisDOT driver license and photo ID files. R.60 Exs.6,7; R.84p.7; R.90pp.49,63-64; A-App.107. The exact match revealed an estimated 301,727 registrants (9.3% of total registrants) who lacked a license or photo ID (non-matching registrants). R.60 Ex.6p.4, Ex.7pp.3,8,20; R.84 p.11; R.90pp.49-50,66,70; A-App.111. Prof. Mayer then applied the 9.3% nonpossession rate for voter registrants to determine that 87,747 of the 946,172 non-registered but voting eligible persons lack DOT-issued ID. R.60 Ex.6p.4-5,7; R.84p.11; R.90pp.80-90; A-App.111. He estimated the number of all voting eligible persons who might possess alternate forms of Act 23 IDs, including student, tribal, and military IDs, concluding that an estimated 333,276 of voting eligible Wisconsin residents lack an Act 23-prescribed photo ID. R.60 Ex.6 pp.5-6; R.84p.11; R.90pp.80-90; A-App.111.

Prof. Hood and Prof. Mayer employed the identical matching method in comparing the WisDOT and GAB databases, and both reached similar conclusions of the

number of registered voters in the SVRS who lack driver licenses or photo IDs. In his initial trial report, Prof. Hood found 311,690 registered voters (9.6% of all registrants) without a driver license or photo ID, while Prof. Mayer found 301,727. R.60 Ex.7p.3, Ex.84 Table 1. In their supplemental reports based on a revised DOT database, Prof. Hood found 302,082 registrants without a driver license or ID, while Prof. Mayer found 301,727. R.60 Ex.6p.4, Ex.85 Table 1.

Although Prof. Hood and Prof. Mayer both performed an exact match, Prof. Hood performed a final computation after the exact match, excluding from his final non-matched pool of 302,082 registered voters all unmatched persons (107,625 or 102,530) in the SVRS file who registered with a driver license number. R.60 Ex.85pp.2-4. Prof. Mayer rejected this approach because: he sorted the entire WisDOT file by license numbers and found very few nonconforming numbers with fewer digits or other mistakes; and the alternative explanation was more plausible, that there were registered voters whose licenses expired and were not renewed. R.90 pp.23-25.

Defendants argue that the circuit court's findings are flawed because Prof. Mayer did not subtract from the exact match an indeterminate number of false non-matches which may have been caused by spelling, spacing, and punctuation errors, and therefore not the "product of reliable principles and methods," consistent with Wis. Stat. §907.02(1). However, Prof. Mayer's statistical analysis was based upon the exact match method which is a generally accepted tool in the field of social sciences to compare large government databases. R.95pp.25-31. His analysis was predicated upon conservative assumptions, external validation, and an effort to account for potential errors. Prof. Mayer testified that another matching technique, statistical matching, could have been

performed on the databases with algorithms, which may have marginally reduced some false non-matches, but that technique was impractical because it would have required months to complete. Further, the exact match is generally accepted as a dependable method for social scientists to compare large government databases and determine the quantity of interest in this case, the number of registered voters in the SVRS file who lack a license or photo ID. R.95pp.28-30.

In performing the exact match, Prof. Mayer first excluded as non-matches all driver license number matches. He then matched first and last names and dates of birth, but in conservative fashion, did not perform a match based on middle names or middle initials because the formats for those fields differed between the SVRS and WisDOT files and would have overestimated the number of non-matches. R.60 Exs.3,7; R.90pp.63-65. He also sought to determine whether the alternative explanation, that some non-matches were false, could have been caused by inadvertent discrepancies in punctuation and spelling. While there was no way to correct for that error, Prof. Mayer counted those entries most likely susceptible to error and identified 65,331 names with hyphens and internal spaces. He opined that even in the unlikely event the matching process incorrectly identified every name with a hyphen or internal space that would have reduced the number to 235,000 unmatched SVRS records. R.60 Ex.7; R.90 pp.68-69.

To exclude other alternative explanations of non-matches, Prof. Mayer identified all persons with identical common names (e.g., James Jones), approximately 1,000 in the SVRS and 1,300 in the DOT files, and in conservative fashion removed them as if they were matches, although he deemed the numbers statistically insignificant. R.90 p.66-67.

Prof. Mayer could not determine the number of voters in the SVRS file who had a driver license expire within the narrow window going back just to the last general election. R.91 p.26. Such information was not discernible from the WisDOT files, and Prof. Mayer concluded that it was not a statistically significant quantity and some may have simply renewed their licenses. R.91 p.26. This was a reasonable conclusion, especially since the relevant time period would have only gone back to the last general election. Wis.Stat. §5.02(6m)(a).

Prof. Mayer also compared his results with three other studies, each providing external validation of his results. Prof. Mayer's results are consistent with the 2005 study of WisDOT license and ID possession rates by UW-M Prof. John Pawasarat, which had identified significantly higher nonpossession rates for elderly, young adults, and minorities. R.60 Ex.9; *see* R.84p.9;A-App.109. Prof. Mayer calculated the nonpossession rates for young adults aged 18-24 at 11.7%, for persons over 80 at 24.3%, and for Milwaukee County residents (with the largest percentage of minorities in the state) at 12.5%, or 44%. R.90 pp.71-73. The consistency between the Pawasarat study and Prof. Mayer's results further validate Prof. Mayer's findings and are a reliable indication that the non-matches accurately reported voters lacking WisDOT identification.

Prof. Mayer's results were also consistent with the GAB's exact matches of the SVRS and WisDOT databases in 2008 and 2009, pursuant to the Help America Vote Act (HAVA). There, the GAB performed matches of the 777,561 voters who registered between January 1, 2006 and August 5, 2008. Despite GAB's repeated, diligent efforts to contact voters and winnow down the number of false non-matches, and even with the benefit of Social Security number matches,

the GAB produced 70,000 non-matches, establishing roughly the identical non-match percentage as Profs. Mayer and Hood, approximately 9%. R.60,Ex.12; R.90,pp.57-63; R.91, pp.89-90; R94pp.43-44. Finally, Prof. Mayer's results were not inconsistent with the results of the Georgia exact match study, which Prof. Hood relied upon in his studies on the impact of photo ID on 2008 voter turnout in Georgia, identifying a relatively close nonpossession rate in Georgia of 6.04%. R.60Ex.84; R.93p.40; R.95p.32. Even applying the Georgia nonpossession rate of 6.04% to the 3.3 million registered voters in the SVRS files would reveal approximately 200,000 Wisconsin registered voters without a license or photo ID, still a substantial number by any measure.

In his manuscripts and trial reports, Prof. Hood never qualified or questioned the analytical value and reliability of the Georgia exact match method. Defendants failed to offer any evidence, reason, or expert opinion as to why Prof. Mayer's estimate might be off by anything more than an insubstantial fraction. In fact, Prof. Hood only opined that the true number of non-matches was likely less than 9.6%, but he did not contend that the percentage of voters without licenses or IDs is substantially less than the number both he and Prof. Mayer identified in their reports. R.95 pp.20-21,41. The only distinction Prof. Hood identified between the Georgia study and his and Prof. Mayer's Wisconsin exact match was that Georgia had the benefit of Social Security numbers. R.94 pp.42-43. Yet, the GAB's HAVA checks also had the benefit of Social Security numbers and identified a similar 9% nonpossession rate. R.90pp.57-63; R.91pp.89-90; R94 pp.43-44.

Finally, Defendants also contend that Prof. Mayer's findings were flawed because he failed to consider whether

the estimated 333,276 persons who lack an Act 23-prescribed photo ID can get one. However, the circuit court did not rely on Prof. Mayer's expert reports or testimony to determine the severity of voters' burdens. Rather, the circuit court relied upon Prof Mayer's expert reports and testimony to determine the *scope* of the burden, *i.e.*, what number of qualified electors would be burdened by the photo ID requirement because they lacked one. R.95p.32. That factual finding by the circuit court, that an estimated 333,276 persons lack the prescribed photo ID, was based upon reasonable, reliable, and accurate evidence and was not clearly erroneous.

Prof. Mayer's findings were the product of a reasonable, reliable, and accurate estimate of the number of voters without WisDOT photo IDs. He employed reliable principles and methods of social scientific statistical analysis in identifying an important quantity of interest in this case. The circuit court correctly adopted his factual findings, and Defendants have thoroughly failed to satisfy their burden of proving that the court was clearly erroneous in doing so. *See* R.91pp.79-82.

V. This Facial Challenge to Act 23 is Appropriate

Given the thousands of constitutionally qualified voters who are potentially disenfranchised by Act 23, this facial challenge satisfies any policy consideration of judicial restraint because it is based on a solid factual record, discussed *supra*. An as-applied challenge would be insufficient to address the Act's infirmities.

Defendants wrongly assert that *State v. Cole*, 2003 WI 112, ¶30, 264 Wis. 2d 520, 665 N.W.2d 328, dictates that a facial challenge to Act 23 should fail because "the vast majority of the voting eligible population in Wisconsin" possess an Act 23 ID. Intervenors cite *Society Ins. v. LIRC*,

2010 WI 68, ¶26, 326 Wis. 2d 444, 786 N.W.2d 385, for the same proposition. Justice Roggensack has explained that the *Cole* standard originated in *United States v. Salerno*, 481 U.S. 739 (1987), and is merely "descriptive of the end product of a court's reasoning, rather than a test that rigidly sets the analysis that must be undertaken…." *In re Termination of Parental Rights to Diana P.*, 2005 WI 32, ¶67, 279 Wis. 2d 169, 694 N.W.2d 344. The Court clarified that, under the appropriate doctrinal scrutiny, a Court may find a statute constitutionally infirm and is not required by *Cole* to affirm a facial challenge only if a law is unconstitutional in every possible instance:

> Salerno does not set out a methodology under which a court is precluded from holding that a statute is unconstitutional unless the court determines that every possible statutory application is unconstitutional; rather, Salerno is descriptive of a statute that, when examined under the relevant constitutional doctrines, but independent of particular factual applications, states an invalid rule of law.

Id.(citation omitted).

Defendants' crabbed articulation of the *Cole/Salerno* standard ignores that explanation and the Wisconsin decisions construing a facial challenge consistent with the following reinterpretation, which the majority cited approvingly in *Olson v. Town of Cottage Grove*:

> If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application….

2008 WI 51, ¶44 n.9, 309 Wis.2d 365, 749 N.W.2d 211 (citations omitted); *State v. Ninham*, 2011 WI 33, ¶43n.11,

333 Wis.2d 335, 797 N.W.2d 451; *State v. Wood*, 2010 WI 17, ¶13, 323 Wis.2d 321, 780 N.W.2d 63.

Further, federal courts permit facial challenges in many contexts. *See Citizens United v. FEC*, 130 S.Ct. 876, 919 (2010) (campaign finance); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (First Amendment); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *City of Boerne v. Flores*, 521 U.S. 507, 532-535 (1997) (Fourteenth Amendment); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (free speech); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (right to travel); *MDK, Inc. v. Village of Grafton*, 277 F.Supp.2d 943, 947-948 (E.D. Wis. 2003) (facial challenges appropriate in free speech cases because "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas").

In *Citizens United*, the Court upheld a facial challenge to a prohibition on corporate expenditures for express political advocacy and the majority provided three reasons, all directly applicable to this Court's scrutiny of Act 23, why an as-applied approach to the challenged law was inappropriate: the costs and problems attendant to uncertainty regarding to whom the law applies; protracted, piecemeal litigation would stretch beyond the election cycle, chilling the exercise of constitutional rights and causing injured parties to be disinclined to pursue post-election remedies; and, the "primary importance" of the right to the "integrity of the political process." 130 S.Ct. at 895.

Nor does the *Crawford* decision support Defendants' argument, because that Court's reasons for denying a facial challenge to the Indiana Photo ID law are patently absent here. In *Crawford*, the Court declined to entertain a facial challenge because of a flawed record which did not allow the

Court to quantify the number of Indiana electors without acceptable photo ID, had no "concrete evidence of the burden imposed on voters who currently lack photo identification," and from which the Court could not quantify difficulties faced by indigent voters. 533 U.S. at 200-201. Based on the scant record in *Crawford*, notably different from this trial record, the *Crawford* Court stated: "[W]e cannot conclude that the statute imposes 'excessively burdensome requirements' on *any* class of voters." *Id.* at 202 (emphasis added) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

Finally, Intervenors erroneously argue that this claim can be resolved as an as-applied challenge by simply improving WisDOT's "customer service" or permitting certain individuals to vote without photo ID. The burdens potentially faced by hundreds of thousands of qualified electors without Act 23-prescribed photo IDs are not a function of WisDOT's customer service, but derive as a matter of law from the statutory and administrative requirements imposed upon constitutionally qualified voters by Act 23. For example, independent of Act 23, applicants for a photo ID must provide satisfactory documentation of name, birth date, identity, residence, citizenship and Social Security number. Wis. Stat. §§343.50(4), 343.14(2)(a), (b), (bm),(er),(f). Only a certified birth certificate is satisfactory proof of name and birth date, and state statute requires a $20 fee for a birth certificate and more expensive filing fees to amend an erroneous birth certificate. Wis. Stat. §§69.01(25), 69.03-.05,69.21(1)(a)1., 69.22(1)(c);814.61(1)(a), 814.85(1), 814.86(1), (1m); R.84 pp.2-3; A-App. 102-103. *See also, supra*, page 2-3.

The burdens created by this statutory scheme may fall heaviest on those electors, exemplified by Ricky Lewis and Ruthelle Frank, who cannot obtain birth certificates without

great expense, but the complex constellation of burdensome financial, travel, and time-consuming costs is common to all electors, and especially the thousands of low-income, disabled, and elderly voters with no photo ID. Because the photo ID requirement severely burdens such a substantial number of qualified voters, a facial challenge is the only means to resolve the constitutional infirmities of Act 23.

VI. Act 23 Does Not Serve the State's Legitimate Interest in Preventing Voter Fraud

The putative purpose of the photo ID requirement of Act 23 is to prevent voter impersonation fraud at the polls. However, despite unsubstantiated complaints about vote fraud, official local and state investigations in Wisconsin have not identified any widespread vote fraud and no voter impersonation at the polls to justify Act 23's severe burdens on constitutionally qualified voters.

The circuit court received extensive evidence from Professor Mayer regarding the results of official investigations and prosecutions into vote fraud in Wisconsin, and whether the photo ID requirement of Act 23 might prevent or deter election fraud. The Attorney General's Task Force investigated allegations of vote fraud and, out of approximately 3 million votes cast in the 2008 general election, filed charges against 20 individuals, including 11 felons voting, 2 cases of double voting and 1 case of absentee ballot fraud. The absentee ballot case involved two voters who voted absentee and at the polls, which was the result of poor absentee record keeping by the elections clerk. Six cases involved false voter registrations, but did not involve the false registrants attempting to vote. R.17¶66; R.60 Exs.3,4; R.90 pp.27,23-24. Based upon Prof. Mayer's expert reports and testimony, the circuit court reasonably concluded: "Since

2004 voter fraud investigations have been undertaken by the Milwaukee Police Department, by the Mayor of Milwaukee, and by the Wisconsin Department of Justice, working with various county prosecutors working through the Attorney General's Election Fraud Task Force. None of these efforts have produced a prosecution of a voter fraud violation that would have been prevented by the voter ID requirements of Act 23." R.84p.12; A-App.112.

Defendants presented no evidence to support a different factual finding about the relationship between voter fraud in Wisconsin and Act 23. Moreover, Defendants now concede that voter impersonation is the only type of fraud directly preventable by a photo ID requirement. (Defs. Brief p.33.) Nonetheless, Defendants make several erroneous, unsubstantiated arguments to justify the need for a photo ID law to deter vote fraud. First, Defendants argue that the failure to prosecute voter impersonation fraud is not probative of its absence because it is difficult to detect. Defendants provide no evidence to substantiate such a speculative argument or that the circuit court's finding is clearly erroneous. Defendants only invoke a thin passage from the 7th Circuit decision in *Crawford* about voter impersonation, linking the difficulty of detection to "endemic underenforcement" and the absence of severe penalties for such violations, 472 F.3d 949, 953 (7th Cir. 2007), two factors clearly not present in Wisconsin given the large-scale official investigations into possible vote fraud in 2004 and 2008 elections.

Defendants also argue, without evidentiary basis, that even if photo ID cannot deter voter impersonation, it might deter felon voting, noncitizen voting, or double voting in multiple locations. Defendants did not rebut Prof. Mayer's testimony that photo ID would not prevent double voting,

which is easily detectible post-election in the SVRS voter database even without a photo ID requirement. R.91pp.101-102. With respect to illegal votes by felons or noncitizens, a photo ID requirement serves no deterrent and detection function, unlike the current poll book signature requirement of Act 23, which provides excellent forensic evidence identifying the actual person who cast any questioned ballot. Wis.Stat. §6.79(2)(a).

Finally, Defendants argue that the circuit court failed to recognize the state's legitimate interest in preventing vote fraud because the court cited the CCES that voter confidence in the electoral system is not necessarily enhanced by voter ID laws. R.60 Ex.3pp.15-16; R.84,pp.17-18; A-App.117-118. To the contrary, the circuit court properly looked at "both sides of the ledger," *i.e.*, the extent to which the right to vote is burdened by the requirement *and* whether the law serves or advances the legitimate objective of combating vote fraud and enhancing voter confidence. Defendants suggest, however, that no inquiry is required to determine whether the challenged photo ID requirement advances the state's legitimate interest, and cite *Purcell v. Gonzalez*, 549 U.S.1, 4 (2006), for the proposition that photo ID requirements, by definition, advance voter confidence in the electoral process.

Defendants far exaggerate the reach of *Purcell.* In assessing the reasonableness of an election regulation, the inquiry does not terminate by declaring that the state has a legitimate interest in electoral integrity. Rather, the inquiry extends to whether the burden created is a purposeful rather than gratuitous intrusion upon the exercise of the franchise. For example, in *Purcell*, the Supreme Court did not conclude its analysis on identifying the state's legitimate interest in prevention of vote fraud. Although the Court vacated a lower court injunction, the Court's assertion of the state's interest

did not settle the validity of the photo ID requirement at issue. Justice Stevens set forth the lower courts' analytic tasks, which are identical to the circuit court's approach here of looking at "both sides of the ledger":

> At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements.

Id. at 6 (Stevens, J., concurring).

Likewise, even if there is a public belief that photo ID requirements might assuage concerns about the integrity of the electoral process, mere perceptions cannot justify the imposition of unreasonable burdens on exercise of the franchise. The circuit court identified the serious danger of such an approach: "Perceptions are malleable….The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." R.84 p.17; A-App.17 (quoting *Weinschenk,* 203 S.W.3d at 218-219).

Based upon the foregoing, it is clear beyond a reasonable doubt that Act 23 constitutes an unreasonable and onerous burden upon the right to vote under art. III, §1 for potentially hundreds of thousands of constitutionally qualified electors, and that this burden is not narrowly tailored to address or resolve the state's legitimate interest in election integrity.

VII. Intervenors' Claim Based on the Federal Election Clauses Is Waived and Has Been Consistently Rejected by the U.S. Supreme Court

Intervenors claim that Wisconsin's Constitution and courts may not constrain the Legislature on any issue involving federal elections, pursuant to U.S. Const. art. I, § 4 & art. II, § 1. This issue was not raised in the circuit court and is waived on appeal, under long-standing principle. *Nickel v. United States*, 2012 WI 22, ¶21, 339 Wis.2d 48, 810 N.W.2d 450 (quoting *Cappon v. O'Day*. 165 Wis. 486, 490, 162 N.W. 655 (1917) ("One of the rules of well-nigh universal application…is that questions not raised and properly presented for review in the circuit court will not be reviewed on appeal."); *Terpstra v. Soiltest, Inc.*, 63 Wis.2d 585, 593, 218 N.W.2d 129 (1974). In their Petition, Intervenors never referred to the Election Clauses and this Court, in reliance thereof, granted permissive intervention, stating the petition "demonstrates that the proposed intervenors' claim involves the same question of law as the pending appeal." Order dated Oct. 5, 2012.

If this Court decides to address Intervenors' new claim, it should summarily discard it. The U.S. Supreme Court has consistently rejected any notion that the phrase "the Legislature thereof" in the Election Clauses refers exclusively to a state's legislative body and not to the state's entire lawmaking process, or that the Election Clauses constrain state constitutions or courts, or even executive branches, from limiting legislative discretion. The Court first addressed the issue on ruling that Utah's constitutional amendment reserving the right of voters to approve by referendum a congressional reapportionment plan was consistent with art. I, §4 since "the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was

contained within the legislative power." *Davis v. Hildebrant,* 241 U.S. 565, 568 (1916). The Court again rejected the notion, upholding a governor's constitutional veto power over congressional redistricting as a lawmaking function under art. I, §4. *Smiley v. Holm,* 285 U.S. 355 (1932). More recently, the Court held that a federal court must defer to a state court in construing reapportionment disputes "where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe v. Emison*, 507 U.S. 25, 33 (1993) (emphasis in original). This year, a federal appeals court studiously traced the jurisprudence and rejected an identical art. I, §4 challenge to a Florida constitutional amendment which, via citizen initiative, established congressional redistricting standards. *Brown v. Secretary of State of Fla.*, 668 F.3d 1271, 1276-1277,1281 (11th Cir.2012) (Elections Clause refers to "state's entire lawmaking function, and the power of the people to amend their state constitution").

Intervenors cite three cases, but none support their proposition. *Cook v. Gralike,* 531 U.S. 510, 523 (2001), involved whether a state constitutional amendment could require notations on the ballot about congressional candidates' position on term limits. The Court held that the amendment went beyond the state's authority, not because it imposed procedural conditions violating art I, §4, but because it was a means by the state to favor particular federal candidates and an attempt to dictate the outcome of federal elections. *United States Term Limits v. Thornton,* 514 U.S. 779 (1995), was also unrelated to the Election Clauses, merely addressing whether a state could impose term limits on its congresspersons in violation of the Qualifications Clauses, U.S. Const. art. I, §§2-3. Finally, in *Bush v. Palm Beach Cnty. Canvassing Bd.,* 531 U.S. 70, 76 (2001), a case also not involving art. I, §4, the Court simply remanded the

presidential recount issue to the state court and declined to resolve a lack of clarity in the state court's decision regarding the relationship between the Florida constitution and art II, §1. Thus, even the discussion of art II, §1 was *dicta*.

The consequences of the policy urged by Intervenors would be dire and bizarre. Hundreds of state constitutional provisions in Wisconsin and nationwide, which protect voting rights, declare eligibility requirements, protect polling places, or establish standards for absentee ballots, would be unconstitutional under Intervenors' theory. Moreover, whenever a legislature enacted an electoral law that conflicts with the state constitution, the state would end up with different legal rules governing federal and state elections, even when they are on the same ballot. Likewise, as *Growe v. Emison* demonstrated, Congressional redistricting is heavily regulated by state constitutions which typically are the source of requirements about compactness, contiguity, and the preservation of communities of interest. 507 U.S. 25. *See, e.g.*¸Mo.Const., art. II §45; Col.Const., art. V, §44; Hi.Const., art. IV, §9. *See also* David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions,* 37 RUTGERS L.J. 1087 (2006). All such requirements would be rendered unconstitutional for congressional redistricting if Intervenors' theory were accepted.

Intervenors' claim is inconsistent with U.S. Supreme Court precedent and they fail to cite a single case supporting their proposition that the Election Clauses prohibit state constitutions and courts from constraining their own legislatures to ensure that legislative action does not unreasonably burden and disenfranchise voters. This Court should reject their new claim.

CONCLUSION

On the basis of all of the above, the circuit court's decision should be affirmed.

November 5, 2012.

Respectfully submitted,
HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs-Respondents
s/Richard Saks

_____

Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
PO Box 442
Milwaukee, WI 53201-0442
414-271-8650, 414-271-8442 Fax
rsaks@hq-law.com
msumara@hq-law.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,851 words.

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HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs-Respondents
s/Richard Saks

_____

Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
PO Box 442
Milwaukee, WI 53201-0442
414-271-8650, 414-271-8442 Fax
rsaks@hq-law.com
msumara@hq-law.com

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November 5, 2012

HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs-Respondents
s/Richard Saks

_____

Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
PO Box 442
Milwaukee, WI 53201-0442
414-271-8650, 414-271-8442 Fax
rsaks@hq-law.com
msumara@hq-law.com