

CASE NO. 2012-AP-1652

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**STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II**

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

Plaintiffs-Respondents,

vs.

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

Defendants-Co-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants.

On appeal from a July 17, 2012 Order and,
Granting Declaratory and Final Judgment Injunctive Rulings,
issued by the Dane County Circuit Court,
Hon. David T. Flanagan presiding, Case No. 2011-CV-5492

**BRIEF OF *AMICUS CURIAE* AARP
SUPPORTING PLAINTIFFS-RESPONDENTS**

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AARP

Amicus Curiae AARP is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP engages in advocacy, including in state and federal courts, supporting these goals. AARP's priorities include securing public policies encouraging electoral participation by eligible voters, including older voters, while preserving the integrity of the electoral process. AARP opposes restrictive voter identification rules that impede and unduly burden voting.

AARP has filed *amicus* briefs challenging “photo ID” voting laws enacted in Missouri, Michigan, Indiana, Minnesota and Pennsylvania. AARP Foundation Litigation attorneys, acting as co-counsel for plaintiffs, have opposed Georgia's and Arizona's photo ID voting laws. If the declaratory judgment and permanent injunction issued by the Dane County Circuit Court against 2011 Wisconsin Act 23 is overturned, AARP believes that the law will undermine AARP policies and principles of electoral democracy in Wisconsin. Such a result will exclude from voting many eligible Wisconsin voters, including disproportionate numbers of older voters, who have faithfully exercised the franchise for many years.

ARGUMENT

INTRODUCTION

Wisconsin has been remarkably consistent in its administration of the franchise. Since adopting constitutional provisions defining voter qualifications, *see* Wis. Const.,

art. III, §1 (1848), Wisconsin has had a tradition of facilitating broad access to the franchise. The 1848 Constitution “granted suffrage to aliens who had resided in the state for one year and ‘declared their intention to become citizens.’”¹ A year later, voters approved a referendum granting access to the ballot to black persons.² And in 1919, Wisconsin became the first state to approve the Nineteenth Amendment to the U.S. Constitution, which in 1920 secured voting rights for women.³

For more than a century and a half, Wisconsin has allocated to its citizens, by virtue of their power to amend the State Constitution, responsibility for determining voter eligibility. *See State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856). It remains true that while “[o]ther states have discarded their earlier constitutions and have framed new ones[,] [t]he Wisconsin [C]onstitution of 1848 is as full of life and vigor today as it was when ratified.”⁴ Constitutional amendments in 1986 confirmed that only specific sorts of “[l]aws may be enacted” in regard to suffrage. Wis. Const., art. II, §2 (1986). The State Legislature’s abandonment of this precedent and this tradition – by passing Act 23, and thus imposing insurmountable barriers to voting without photo ID – should be rejected.

¹ The Immigrant Voting Project and New York University Law Students for Human Rights, The History of Immigrant Voting Rights in Wisconsin, at 1, <http://www.immigrantvoting.org/statehistories/Wisconsinhistory.html> (last visited Sept. 16, 2012). A 1908 constitutional amendment ended “non-citizen voting.” *Id.*

² *See* Henry A. Huber, Citizenship of Wisconsin, Some History of Its Progress, Racine (Wisconsin) Times-Call (June 18, 1929) (hereafter “Huber”), at 2-3, <http://www.wisconsinhistory.org/turningpoints/search.asp?id=986> (last visited Sept. 16, 2012). Republican Lt. Gov. Huber (1925-33) noted it took until *Gillespie v. Palmer*, 20 Wis. 544 (1866) for this amendment’s validity to be recognized. *Id.*

³ *See, e.g.,* Theodora W. Youmans, How Wisconsin Women Won the Ballot, Wisconsin Magazine of History (1921), at 1, 13, www.library.wisc.edu/etext/wireader/WER0124-1.html (last visited Sept. 16, 2012).

⁴ Huber at 2.

I. OLDER VOTERS ARE AN ESPECIALLY LARGE AND ACTIVE SHARE OF THE ELECTORATE WHOSE EXCLUSION FROM VOTING IN SIGNIFICANT NUMBERS UNDER ACT 23 THREATENS GRAVE HARM TO DEMOCRACY IN WISCONSIN.

Older persons constitute a large share of Wisconsin's electorate. Actual older voters represent an even greater portion of those who vote in State elections. Thus, to the extent that Act 23 excludes significant numbers of eligible older voters from exercising the franchise - simply because they cannot meet new requirements to produce a valid photo ID, Act 23 portends a serious, unjustifiable harm to democracy in Wisconsin.⁵

The 2010 Census shows that more than three-quarters of a million Wisconsin residents (777,314) are age 65 or older; of these individuals, 376,818 are 75 or older, and 111,505 are 85 or older.⁶ Nearly one-fifth (18.3%) of the State's voting age population is age 65 or older and nearly one-tenth (8.76%) of that population is 75 or older. *Id.*⁷

⁵ *Amicus* AARP herein generally defines "older" persons as those age 65 or older. There is no uniform definition of "older" persons. The federal Older Americans Act uses age 60 to define "older" persons, and AARP first offers membership at age 50. If anything, an age 65 criterion understates effects on "older" voters. Expanding the definition to include all those age 60+ or 50+ would show greater restriction of voting opportunities for "older" persons.

⁶ See U.S. Census Bureau, 2010 Demographic Profile, Wisconsin, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0400000US5 (search in "topic or table name" for "DP-1" and select "DP-1: General Demographic Characteristics"; next, narrow the search by selecting under "Geographies" the descriptor "State" and then "Wisconsin"; then select "DP-1: Profile of General Demographic and Housing Characteristics: 2010") (last visited Sept. 18, 2012).

⁷ Total 2010 State population was 5,686,986; subtracting the population 0-17 (including three-fifths of the reported population age 15-19) yields a total voting age population of 4,344,474. The share of the State's voting age population age 85 and older is roughly 2.7%. Other Census data, for November 2010, show 4.156 million Wisconsin *citizens* eligible to vote, of whom 760,000 were age 65 or older and 364,000 were age 75+. The latter data yield nearly identical results: those age 65 or older are 17.9% of the eligible voting age population; those age 75 + are 8.67% of eligible voters. U.S. Census Bureau, Voting and Registration in the Election of November 2010, Table 4c. Reported Voting and Registration, by Age, for States: November 2010, (hereafter "Reported Voting and Registration"), www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html (last visited Sept. 18, 2012).

The harm likely to result from Act 23's disqualification of eligible older voters is greatly magnified by the fact that older voters participate in elections at much higher rates than their younger counterparts. In November 2010, 71.6% percent of citizens age 65 or older in Wisconsin voted, while only 51.2 percent of the rest of the electorate cast a ballot.⁸ The most reliable segment of the age 65+ voter cohort is voters age 65-74 (74.2% voted), followed by those age 75+ (68.9%). Voters age 45-64 participated slightly less often (63.5%), while voters age 25-44 and 18-25 did so at significantly lower rates: 46.1% and 23.4%, respectively.⁹

Comparing the composition of *registered voters who actually voted*, by age, also shows enormous age disparities. Wisconsin registered voters age 65+ and age 45-64 cast ballots in 2010 at rates (87.6%, and 84.6%, respectively) exceeding by 18-21 percentage points the corresponding rate for younger (age 18-44) registered voters (66.5%), and by 7-10 points the rate for all registered Wisconsin voters who cast ballots (77.6%).¹⁰

II. ACT 23 WOULD PREVENT VOTING BY MANY ELIGIBLE VOTERS, INCLUDING OLDER VOTERS, WHO LACK PHOTO ID, AND THEREBY IMPOSE SIGNIFICANT AND UNJUSTIFIABLE HARM.

A. Act 23 Would Extinguish Rights of Suffrage for In-Person and Absentee Voters Who Lack Valid Photo ID.

If Act 23 takes effect, many long-time Wisconsin voters, as well as citizens newly eligible to cast a ballot, will face insurmountable obstacles to exercising the franchise.

⁸ *Id.* These percentages are derived from tallies of "Total voted" divided by tallies of "Total Citizen Population."

⁹ *Id.*

¹⁰ *Id.* Calculated by dividing "Total voted" by "Total registered."

Act 23 excludes persons who seek to vote in-person without presenting a valid photo ID. That is, an “elector shall not be permitted to vote” if they fail to present one of several types of photo ID declared to be acceptable. Wis. Stat. §6.79(3)(b). Likewise, they may not vote “if the name appearing on the [photo ID] document presented does not conform to the name on the poll list” *Id.* While a voter without photo ID may cast a provisional ballot, *id.* §§ 6.79(3)(b), 6.97, that ballot will not be counted unless the voter presents an approved form of photo ID on Election Day before the polls close or to “the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election.” *Id.* § 6.97(3)(a)-(c).

Most absentee ballot voters must also produce photo ID. They must do so if they “appl[y] for an absentee ballot . . . at the clerk’s office,” either “in person,” *id.* § 6.86(1)(ar), or through an “agent,” *id.* § 6.86(3)(c), or if they apply by mail, *id.* § 6.87(1). They are also required to produce photo ID with their absentee ballot if they have requested the ballot by means of an electronic application, without photo ID. *Id.* §6.87(4). If they fail to include proof of photo ID with their absentee ballot, it will be treated merely as a provisional ballot. *Id.* § 6.88(3)(a). Finally, Act 23 removes the safeguard - for voters without photo ID, limiting challenges to voter qualifications to those based on proof “beyond a reasonable doubt” that a voter “does not qualify as an elector.” *Id.* § 6.325; *compare id.* § 6.79(3)(b).

Thus, this Court faces a far more serious question than merely “whether the[] [State’s] interests [in photo ID] justify the *minimal burdens* faced by some voters in obtaining proper identification.” Brief of Defendants-Co-Appellants at 5 (emphasis

supplied). Nor must this Court simply consider of whether “[t]he legislature constitutionally may require voters to fulfill *reasonable procedural requirements* . . . in order to vote.” Brief of Intervenors-Co-Appellants at 2 (emphasis supplied). Act 23 would preclude voting altogether by many eligible voters, including a disproportionate share of older voters, and thus, impose burdens that are both substantive and severe.

B. Act 23 Would Eliminate Voting Rights for Many Older Voters Who Do Not Have Photo ID.

Act 23, if sustained, is sure to have a profoundly negative impact on the rights of suffrage of many older voters. First, Act 23 is likely to prevent many older voters from continuing to exercise the franchise because they are especially unlikely, through no fault of their own, to possess the two principal forms of photo ID the law recognizes as acceptable: a driver’s license and a U.S. Passport.¹¹ “An estimated 23 percent of persons age 65 and over do not have a Wisconsin drivers license or [other] photo ID”; most (70%) of these likely-to-be-disqualified State residents are women.¹² At 23%, older persons’ lack of a photo ID is quite disproportional to their share of the population – 13.1% in 2000 – and also to the rate of lack of access among younger groups. For instance, of those age 35-64, just over half as many lack photo ID (an estimated 98,247

¹¹ Wis. Stat. § 5.02(6m) (listing forms of “Identification,” the rest of which rarely apply – *e.g.*, “(c) An unexpired driving receipt” – or which apply only to persons in discrete categories, such as members of “a U.S. uniformed service” (a)(4), or recently naturalized persons (b)); *see id.* §§ 6.15(3) (“Procedure At Polling Place,” requiring “proof of identification”); 5.02(16c) (defining “Proof of identification”).

¹² John Pawasarat, The Driver License Status of the Voting Age Population in Wisconsin, Employment and Training Institute, University of Wisconsin-Milwaukee (June 2005) (hereafter “Pawasarat Study”), at 1, 11, www4.uwm.edu/eti/barriers/DriversLicense.pdf (last visited Sept. 25, 2012).

vs. 177,399), even though they represent twice as large a share (28.5%) of the State's population.¹³

Data on U.S. passport ownership in Wisconsin is hard to come by.¹⁴ But a 2005 University of Wisconsin-Milwaukee study estimates the number of State residents age 65 or older with photo ID other than a driver's license – possibly a passport – to be extremely limited (42,682).¹⁵

In short, the vast majority of older voters without a driver's license or a passport will be disqualified by Act 23 – unless they can manage to get a *new* photo ID.

C. Act 23 Would Eliminate Voting Rights for Many Older Voters Who Will Be Unable to Get a New Photo ID.

Some eligible voters, especially older voters who lack Act 23-compliant photo ID, will be disqualified by inflexible rules governing the State's process for obtaining photo ID. The list of "Acceptable Documents of Proof" for a State ID Card for voting makes clear that for most eligible voters without photo ID, the only way to prove both "Name & Date of Birth" and "Legal Presence" in the United States is through a "certified" copy of

¹³ See Pasawarat Study at 11 (estimates of persons lacking drivers license or other photo ID); U.S. Census Bureau, Profile of General Demographic Characteristics: 2000 (Census 2000 Summary File 1 (SF 1) 100-Percent Data) Data for Wisconsin), <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Sept. 26, 2012).

¹⁴ An estimated 28% of Americans own a passport. U.S. Government Accountability Office, GAO-08-891, State Department: Comprehensive Strategy Needed to Improve Passport Operations (2008), available at www.gao.gov/new.items/d08891.pdf (last visited Sept. 18, 2012).

¹⁵ Pawasarat Study at 11.

their birth certificate.¹⁶ This requirement will exclude voters who do not currently possess an “official” birth certificate and cannot obtain one.

Such older voters include many older Wisconsin residents. In 1940, the birth year of most U.S. citizens now 72, 3.1% of births in Wisconsin were not recorded with a birth certificate. For 1940 and 1950 the corresponding numbers for the nation – *i.e.*, applicable to Wisconsin residents born out-of-state – are 7.5% and 2.2%, respectively.¹⁷ Applying the 1940 figure for Wisconsin to 2010 Census data on the total count of citizens living in Wisconsin age 75 or older yields an estimated 11,284 State residents born in-state with no birth certificate. That estimate is surely an undercount. It ignores the larger count that would result: (a) assuming that some age 75+ eligible Wisconsin voters were born out-of-state (to whom the 7.5% figure applies); and (b) including some eligible Wisconsin voters age 65-74 to whom the 2.2% figure applies, for those born out-of-state, and to whom some lower figure applies to those born in Wisconsin. (And this excludes altogether other “old” voters age 50-64 who never had a birth certificate.) It seems clear that at least

¹⁶ State of Wisconsin Government Accountability Board, Wisconsin State ID Card (ID), Accepted Voter Identification; Voter ID Law, at 2, http://gab.wi.gov/sites/default/files/publication/137/wi_state_id_pdf_78628.pdf (last visited Sept. 8, 2012).

¹⁷ See Sam Shapiro, Development of Birth Registration and Birth Statistics in the United States, 4 Population Studies 86, 97 Fig. 2 (1950); Nat’l Ctr. for Health Statistics, U.S. Dep’t of Health and Human Servs., U.S. Vital Statistics System: Major Activities and Developments, 1950-95 (1997), at 10-11, available at <http://www.cdc.gov/nchs/data/misc/usvss.pdf>; Joseph Schachter & Sam Shapiro, Birth Registration Completeness, United States, 1950, 67 Public Health Reps. 513, 515 tbl.1 (June 1952), all cited and discussed in *Jones v. Deininger*, No. 2:12-CV-185-LA (E.D. Wis. Apr. 23, 2012) (Brief of *Amici Curiae* Supporting Motion for Preliminary Injunction)(lawsuit challenging 2011 Wis. Act 23) (hereafter “Jones Brief”).

15,000 eligible older voters in Wisconsin have no birth certificate.¹⁸ Without it, they simply cannot comply with Act 23.

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court noted the difficulty generally facing eligible older voters born in another state in securing birth records needed to get a new photo ID. *See Crawford*, 553 U.S. at 199 (2008) (noting that “elderly persons born out of state . . . may have difficulty obtaining a birth certificate”). This barrier may be especially severe for older Wisconsin voters of color born in states whose public and private institutions once had blatantly racially discriminatory laws and practices. For specific reasons now obscure, but which generally may be ascribed to so-called “Jim Crow” laws and practices, some older African-American residents born outside of Wisconsin cannot secure a birth certificate.¹⁹

Moreover, otherwise eligible low-income voters, especially older low-income voters, some born in-state and some outside, are certain to be disqualified from securing a photo ID because “obtaining a birth certificate carries with it a financial cost.” *Crawford*, 553 U.S. at 203, n.20. Indeed, even the State of Wisconsin charges fees for a birth certificate, regardless of whether that document is sought to secure photo ID for voting or whether the fee deters eligible voters from participating in elections.

¹⁸ *See* Reported Voting and Registration, *supra*, Note 7 (“Total Citizen Population” age 75+ of 364,000 x 3.1% = 11,284; “Total Citizen Population” age 65-74 of 396,000 x 1% = 3960; 11,284 + 3960 = 16,244).

¹⁹ *See, e.g.*, Complaint at ¶3, *Jones v. Deininger*, No. 2:12-CV-185-LA (E.D. Wis. Feb. 23, 2012) (describing claims of lead plaintiff Bettye Jones, an African-American woman born in rural Tennessee in the 1930s who “never” had a birth certificate prepared).

Still other eligible voters who have changed their name, mostly women at the time of marriage, or persons whose name on their birth certificate is incorrect,²⁰ will be excluded from voting by Act 23 because they cannot show a name on their “proof of identification” that “conform[s] to the name on the poll list,” Wis. State. § 6.79(2)(a), - *i.e.*, that conforms to their current name.

D. Act 23 Disqualifies Eligible Absentee and Provisional Ballot Voters Unable to Secure Photo ID.

The State pointing to supposed options for voters lacking photo ID, yet these are inadequate to mitigate the difficulties of satisfying the photo ID requirement. In particular, voters who cast a provisional ballot can have their vote counted only if they are able to produce – within three days of, Election Day – an Act 23-compliant photo ID. This is far from the remedy endorsed by the Supreme Court as mitigating Indiana’s strict photo ID requirement. *See Crawford*, 553 U.S. at 199 (stating that “if eligible, voters without photo identification may cast provisional ballots *that will ultimately be counted* [so long as they appear] within ten days to execute the required affidavit”)(emphasis supplied). Absentee voters in Wisconsin likewise must produce photo ID, unlike their counterparts in other states. And if they fail to do so, they are also left with the futile option of perfecting a provisional ballot without photo ID.

²⁰ *See, e.g.*, Jones Brief at 6-7 (discussing Ruthelle Frank, age 85, birth certificate misspelled; Ricky Tyrone Lewis, age 58, birth certificate under different name).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* AARP urges the Court to affirm the November 16, 2012 Judgment and Order of the Circuit Court of Dane County.

Respectfully submitted,

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CERTIFICATION OF FILING, COMPLIANCE AND SERVICE

I hereby certify that I have filed this date, November 16, 2012, via overnight mail (Federal Express), an original and ten paper copies of the **Brief of Amicus Curiae AARP Supporting Plaintiffs-Respondents**, each bound with an original or copy of this Certificate, with the Clerk of the Wisconsin Court of Appeals.

I further certify that I have filed this date one paper copy of the **Brief of Amicus Curiae AARP Supporting Plaintiffs- Respondents** with the Circuit Court for Dane County via overnight mail (Federal Express).

I hereby certify Court that the **Brief of Amicus Curiae AARP Supporting Plaintiffs-Respondents** complies with the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for briefs produced with a proportional serif font. The length of the **Brief of Amicus Curiae AARP Supporting Plaintiffs- Respondents** is 2991 words.

I hereby certify that I have served this date three paper copies of the **Brief of Amicus Curiae AARP Supporting Plaintiffs-Respondents** on each of the parties identified below, all by overnight mail (Federal Express). I further certify that all submissions addressed herein are correctly addressed and that postage therefor is prepaid.

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