STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTEA LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,	Appeal No. 2012-AP-1652
Plaintiffs-Respondents,	Dane County Circuit Court No. 11-CV-5492
v.	
SCOTT WALKER, THOMAS BARLAND, GERALD C. NICHOL, MICHAEL BRENNAN, THOMAS CANE, DAVID G. DEININGER and TIMOTHY VOCKE,	
Defendants-Appellants,	
and	
DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,	
Intervenors-Appellants.	

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

REPLY BRIEF OF INTERVENORS-APPELLANTS

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ARGUMENT

I. THE NAACP HAS NOT PRESENTED A VALID FACIAL CHALLENGE

Plaintiffs-Respondents (collectively, "the NAACP") have not presented a valid facial challenge to Wisconsin's voter identification law, 2011 Wisconsin Act 23, for two reasons. ***First***, Plaintiffs' brief confirms that they are attacking the State's ***implementation*** of the law, rather than the text of the law itself. ***Second***, Plaintiffs' brief implicitly admits that the alleged constitutional problems of which they complain do not apply to the vast majority of voters. Thus, although the Voter ID Law might be subject to an appropriate as-applied challenge, the trial court erred in holding the law facially invalid.

A. Plaintiffs' Facial Challenge to Act 23 Is Improper Because the Alleged Constitutional Violations Arise From the Law's Implementation, Rather Than Its Text

The first reason this Court must reject Plaintiffs' facial challenge is because they are not challenging Act 23's text, but rather the practical difficulties that certain people have encountered in obtaining a photo identification card. A "facial constitutional challenge attacks the law itself as drafted by the legislature, claiming the law is void from its beginning to the end." *Soc'y Ins. v. Labor & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 27,

326 Wis. 2d 444, 464-65, 786 N.W.2d 385; *accord In re Gwenevere T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 298-99, 797 N.W.2d 854.

Plaintiffs argue that Act 23 is unconstitutional because obtaining photo identification can be "difficult and costly." NAACP Br. at 20. In particular, Plaintiffs complain that the one-time $20 cost of a birth certificate is an undue burden for some indigent voters, *id.* at 6, 21. Likewise, some voters face special burdens because they do not live near a Division of Motor Vehicles ("DMV") office, *id.* at 6-7; encounter long lines upon arriving at the DMV, *id.* at 7, 21-22; or must make multiple trips because they did not bring the proper paperwork, *id.* at 5-7, 21-22. A few people also experience substantial difficulty obtaining the birth certificate they generally need to obtain a photo identification card due to alleged recordkeeping errors, *id.* at 5-6.

None of these complaints, however, arise from the text of Act 23. Act 23 does not require the State to charge for birth certificates, specify how many DMV offices there will be or how adequately they will be staffed, or identify the documents a person must present to obtain valid identification. Such considerations are wholly collateral

to Act 23's requirement that a person present a valid form of photo identification before voting.

Indeed, Plaintiffs themselves identify the separate laws that impose certain documentary requirements and fees for obtaining a birth certificate. *See id.* at 33 (citing Wis. Stat. §§ 69.21(1)(a)(1); 69.22(1)(c); 343.14(2)(a), (br), (es), (f); 343.50(4); 814.85(1); 814.86(1), (1m)). To the extent Plaintiffs have a valid constitutional claim, it is solely an as-applied challenge, to either the State's implementation of Act 23, or else the myriad ancillary statutes to which Plaintiffs cite governing the issuance of birth certificates and photo identification cards. Thus, this Court should reverse the trial court's conclusion that Act 23 is facially unconstitutional and overturn its injunction.

B. Plaintiffs' Facial Challenge to Act 23 Is Improper Because the Statute Has Numerous Applications That Plaintiffs Do Not Challenge

A separate reason this Court should reject Plaintiffs' facial challenge to Act 23 is because the statute may be applied in a wide variety of circumstances that do not implicate the concerns Plaintiffs raise. The Wisconsin Supreme Court has held that a facial challenge is appropriate only where a law "cannot be constitutionally enforced under any circumstances." *Soc'y Ins.*, 2010 WI 68,

¶ 26, 326 Wis. 2d at 463. Even if a statute might be "unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." *State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601 (1998).

Plaintiffs attempt to challenge this standard based on a concurrence by a single Justice in *In re Diana P.*, 2005 WI 32, ¶ 67, 279 Wis. 2d 169, 694 N.W.2d 344 (Roggensack, J., concurring) (cited by NAACP Br. at 31), without expressly citing or identifying the opinion as a concurrence. To the contrary, Plaintiffs repeatedly and deceptively refer to what "the Court" purportedly declared and held, NAACP Br. at 31, despite the fact that the majority opinion did no such thing, *In re Diana P.*, 2005 WI 32, ¶ 15, 279 Wis. 2d at 178-79.

Act 23 cannot be held facially unconstitutional. Plaintiffs concede that at least 91% of Wisconsin voters have some form of photo identification (this figure apparently does not include U.S. passports). NAACP Br. at 4. They do not argue that requiring such people to present their identification cards when voting is a substantial burden. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality op.).

Of the remaining voters, some unspecified percentage readily can obtain photo identification because they already have, or can afford the $20 to obtain, a copy of their birth certificate; can travel to a DMV office; and will not encounter a multi-hour wait. Thus, although some people face special financial burdens, travel challenges, and administrative inconveniences in obtaining photo identification, Act 23 does not raise such concerns as applied to the vast majority of people, and therefore is facially valid. *Soc'y Ins.*, 2010 WI 68, ¶ 26, 326 Wis. 2d at 463. Indeed, even under the U.S. Supreme Court's more liberal standard for facial challenges, Act 23 is constitutional because, despite the hardships a small percentage of voters face, it has a "plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quotation marks omitted).

II. ACT 23, ON ITS FACE, DOES NOT SUBSTANTIALLY BURDEN THE CONSTITUTIONAL RIGHT TO VOTE

The NAACP's discussion of the pertinent precedents reaffirms that Act 23 does not violate the right to vote under the Wisconsin Constitution. The NAACP does not dispute that, in *State ex rel. Cothren v. Lean*, 9 Wis. 279, 283-84 (1859) (cited in NAACP Br. at 11) (emphasis added), the Wisconsin Supreme Court expressly held, "[I]t is

clearly within [the legislature's] province to require any person offering to vote, to furnish ***such proof as it deems requisite***, that he is a qualified elector." *See also State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338-39, 115 N.W. 823 (1908) (upholding law providing that "votes of persons offering their ballots shall not be received unless they establish their right to vote").

Likewise, in *State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875) (cited by NAACP Br. at 11), the Court reaffirmed that the Legislature may require "all the voters" to provide, at the polling place, "reasonable proof of the[ir] right" to vote. Such a law "imposes no condition precedent to the right [to vote]; it only requires proof that the right exists." *Id.* at 87. The Court explained:

> The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the constitution.

Id.[1] Under *Cothren* and *Wood*, the State may require voters to present photo identification at the polling location to confirm their identity and eligibility to vote.

[1] *Accord State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 575-78 (1867) (holding that a voter "is presumed to

The NAACP quotes at length from *Dells v. Kennedy*, 49 Wis. 555, 556 (1880) (quoted by NAACP Br. at 12), in which the Wisconsin Supreme Court struck down a requirement that voters register in advance of Election Day in order to vote. The fatal defect with the statute, according to the Court, was that it "provides no method, chance or opportunity for [a person] to make proof of his qualifications on the day of election." *Id.* at 558.

In this case, in contrast, a person has the opportunity to satisfy Act 23's requirements on Election Day by presenting his identification to election officials at the polling location. Wis. Stat. § 6.79(2)(a). Furthermore, even if a person fails to present proper identification at the polling location, he is permitted to cast a provisional ballot, *id.* §§ 6.79(2)(d), (3)(b), 6.97(1)-(2), which will be counted if he later shows his identification to the proper local or county official, *id.* §§ 6.97(3)(a)-(c). Thus, Act 23 is fully consistent with *Dells*, 49 Wis. at 556.

Plaintiffs also cite *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15-17, 128 N.W. 1041 (1910) (cited by NAACP Br.

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know the law and must go to the polls prepared to comply with its conditions; and if he does not, and his vote is lost, it may, so far as it is the fault of any one, with justice be said to be his own fault").

at 10-11), for the proposition that this Court should subject Act 23 to "heightened scrutiny." The *McGrael* Court held, however, that although the right to vote is "sacred," it "is yet subject to regulation like all other rights," *id.* at 15. The Court explained that the legislature may impose "reasonable" regulations on the right to vote. *Id.* at 18. "[W]hat is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. . . . [with] all fair doubts being resolved in favor" of the statute. *Id.*

The *McGrael* Court later reiterated that the state Constitution allows the Legislature to adopt a "range of methods" of regulating the right to vote that "is necessarily as broad as the uttermost boundaries of reason." *Id.* There must be a clear "[a]buse of discretion" before "the legislative action can be condemned as usurpation." *Id.* at 19. Rather than heightened scrutiny, *McGrael* counsels firmly in favor of deference to the Legislature. *See also State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613-14, 37 N.W.2d 473 (1949) (cited by NAACP Br. at 11) (reaffirming that the right to vote is "subject to reasonable regulation by the legislature," which may say "how, when, and where . . . ballot[s] shall be cast"); *State ex rel. Small v. Bosacki*,

154 Wis. 475, 478, 143 N.W. 175 (1913) (cited by NAACP Br. at 12) (holding that the Legislature may "prescribe reasonable rules and regulations under which [the right to vote] may be exercised" to "guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies").

Thus, even the precedents upon which the NAACP relies provide strong support for Act 23's photo identification requirement. This Court therefore should defer to the Legislature and overturn the trial court's injunction against the statute.

III. EVEN IF THIS COURT CONCLUDES THAT ACT 23 RAISES CONSTITUTIONAL DIFFICULTIES, A COMPLETE INJUNCTION AGAINST THE LAW IS AN IMPROPERLY OVERBROAD REMEDY.

Even if this Court concludes that requiring voters to obtain photo identification may be a substantial burden on some individuals, facially invalidating Act 23 is an inappropriately overbroad remedy. The NAACP repeatedly recognizes throughout its brief that, in order to violate a person's right to vote under the Wisconsin Constitution, a statute must make the exercise of that right "so difficult and inconvenient as to amount to a denial." NAACP Br. at 13 (quoting *State ex rel. Van Alstine v. Frear*, 142 Wis.

320, 341, 125 N.W. 961 (1910)); *accord id.* at 12 (quoting *Dells*, 49 Wis. at 557-58).

To the extent this Court believes that some form of relief is appropriate, it should be limited only to those for whom Act 23's has made voting "so difficult and inconvenient as to amount to a denial" of the right to vote. This may include requiring the State to:

- provide birth certificates to indigent voters, and allow indigent voters to commence proceedings to modify alleged errors on their birth certificates, free of charge;

- accept alternate proof of identity from indigents born out-of-state, *see* Wis. Admin. Code Trans. § 102.15(3)(b);

- exempt handicapped people who face mobility challenges from Act 23's requirements;

- ensure that DMV offices maintain certain minimum hours or staffing levels, or establish temporary DMV satellite offices in under-served areas, for a "transition" period to allow voters an adequate opportunity to obtain identification; and/or

- notify voters about Act 23's requirements, either through public advertisements, mailed notices to voters, or handouts at libraries, municipal clerks' offices, schools, and other offices eligible to be voter registration facilities under the National Voter Registration Act, 42 U.S.C. § 1973gg-5(a)(2)-(3).

Such measures are well within the Court's equitable discretion, and are the most appropriate means of alleviating the burdens of which Plaintiffs complain without invalidating a formal act of the legislature or

undermining the integrity of the electoral system by nullifying Act 23's identification requirement.

IV. THE PHOTO IDENTIFICATION REQUIREMENT IS VALID UNDER THE U.S. CONSTITUTION'S ELECTIONS CLAUSES

Finally, the U.S. Constitution's Elections Clauses, *see* U.S. Const., art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2, bar Plaintiffs' challenges to Act 23, as applied to federal elections, under the Wisconsin Constitution. The NAACP contends that this issue is waived because the State did not raise it in the circuit court. NAACP Br. at 38. A party may pursue on appeal, however, "an additional argument on issues already raised" below. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983); *see also In re Willa L.*, 2011 WI App. 160, ¶¶ 23-24, 338 Wis. 2d 114, 125, 808 N.W.2d 155. This is especially true where a party asserts a constitutional issue that is related to the arguments raised below. *Sambs v. Brookfield*, 95 Wis. 2d 1, 12, 289 N.W.2d 308 (Wis. Ct. App. 1979), *rev'd on other grounds*, 295 N.W.2d 504 (Wis. 1980).

The NAACP also emphasizes that the term "Legislature," as used in the Elections Clauses, has been interpreted as referring to "the state's entire lawmaking ***process***," NAACP Br. at 38 (emphasis added), rather than just the legislature itself. *See Smiley v. Holm*, 285 U.S. 355, 368

(1932) (holding that a state Governor may veto a state election law); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that state election laws may be enacted via referendum).

Although a State is free to define the legislative process by which it will enact election-related statutes, it cannot place ***substantive*** limits on the scope of the legislature's power to regulate federal elections, which originates in, and is granted directly by, the U.S. Constitution. *See Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see also Smiley*, 285 U.S. at 366 (noting that the Elections Clause delegates to state legislatures the power to enact laws to deter and prevent "fraud and corrupt practices" in federal elections); *see, e.g.*, *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012 (S.D. Ohio 2008) (invaliding a directive regarding ballot access promulgated by the Ohio Secretary of State because, "[a]s to federal offices, the [Elections Clauses] vest exclusive power to establish such [rules] in the state legislature").

The NAACP points out that there are no precedents directly addressing this specific issue. NAACP Br. at 39. This does not change the fact that, when a state legislature act[s] "within the exclusive delegation of power under the Elections Clause[s]," *Cook*, 531 U.S. at

523, any substantive restrictions on the scope of that power must be found in the U.S. Constitution itself, *see, e.g.*, U.S. Const., amend. XIV, § 1 (Due Process and Equal Protection Clauses), not a state constitution.

The NAACP contends that "hundreds" of state constitutional provisions would be rendered unconstitutional if this Court enforces the plain meaning of the Elections Clauses. NAACP Br. at 40. That is not true. At most, such provisions would be inapplicable to federal elections. Since nearly all aspects of such elections are governed by state laws and regulations, rather than directly by State Constitutions, this would have very limited effect. In any event, a state constitution may not impose substantive limits on a power directly conferred by the U.S. Constitution, the NAACP may not rely on the Wisconsin Constitution to challenge Act 23, at least as applied to federal elections.

CONCLUSION

For these reasons, Intervenors respectfully request that this Court REVERSE the judgment of the Dane County Circuit Court and VACATE that court's injunction.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in § 809.19(8)(b)-(c) for a brief produced with a monospaced font. The length of this brief is 13 pages (excluding signature page, *see* § 809.19(8)(c)(1)).

Signed on: Nov. 20, 2012

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

I hereby certify that:

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

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

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

Signed on: Nov. 20, 2012

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