

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2012AP1652

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**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 BROWNLEE, ANTHONY FUMBANKS, JOHNNIE M.
GARLAND, DANETTA LANE, MARY MCCLINTOCK, ALFONSO G.
RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents

v.

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

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW AUGUSTINE

Intervenors-Co-Appellants.

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

***AMICUS CURIAE* BRIEF
BY INSTITUTE FOR ONE WISCONSIN, INC
IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

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ARGUMENT

Appellants are patronizingly dismissive. They contend that the process of obtaining a state-issued photo ID is a slight inconvenience for Wisconsin voters and that a little planning could alleviate any significant problems. Their position, no doubt, arises out of privilege. Flexible work schedules and access to transportation may make the process of obtaining a state-issued identification less burdensome. For many Wisconsin voters, however, Act 23 conditions the right to vote on a requirement they will have great difficulty meeting, or will fail to meet. For those who have inflexible work hours, and for those who do not have access to a vehicle, the difficulty of obtaining a state-issued ID is manifest. No amount of planning on the part of a voter will change the systemic accessibility issues of the Wisconsin Department of Transportation, Division of Motor Vehicles (“DMV”) service centers. Act 23 effectively transforms the DMV into a gatekeeper of the ballot box and in the process creates an unconstitutional barrier to voter access.

Moreover, the near certain disenfranchisement of Wisconsin voters will be the result of an attempt to fix a problem that does not exist. The Appellants provide no evidence in support of voter fraud that Act 23 would remedy. The same is true for the Appellants’ assertion that Act 23 will restore voter confidence. There is no evidence that Wisconsin voters have lost confidence, and no evidence that the implementation of Act 23 would restore any confidence were it lost. Indeed, the turnout for the November 6, 2012 election

was one of the highest in the nation, indicating that voter confidence in Wisconsin is strong. Wisconsin voters should not be disenfranchised because of unfounded assertions about which the Appellants offer no proof.

I. WISCONSIN DMV SERVICE CENTER INACCESSIBILITY RENDERS ACT 23 UNCONSTITUTIONAL; WISCONSIN'S DMV SERVICE CENTERS ARE ILLEQUIPPED TO ADDRESS ISSUES OF VOTER ACCESS.

The Wisconsin Constitution guarantees its citizens the right to vote. Wis. Const. Art. III, § 1. This right is fundamental; it is “the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained. *See, e.g., McNally v. Tollander*, 100 Wis. 2d 490, 500, 302 N.W.2d 440 (1981); *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880).

The Wisconsin Supreme Court has repeatedly struck election laws that infringe upon this fundamental right. *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W. 2d 473, 479-80 (1949). An election law so infringes when it “render[s] [the] exercise” of the franchise “so difficult and inconvenient as to amount to a denial.” *State ex rel Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 467, 190 N.W. 562 (1922). Similarly, an election law violates the constitutionally protected right when it requires a voter to do something that is “impracticable or impossible, and make[s] his right to

vote depend upon a condition which he is unable to perform.” *Dells*, 49 Wis. at 558.

Wisconsin’s DMV service centers are inaccessible for many eligible electors. As a direct result of the inaccessibility, Act 23 sets forth a prerequisite to voting that is difficult, inconvenient, and impracticable for some Wisconsin voters. For others, it is simply insurmountable.

A. Obtaining a State-Issued ID Is Difficult, Inconvenient, Impracticable, and – For Some – Insurmountable.

At trial numerous witnesses for the Respondents testified as to the difficulties obtaining state-issued photo identification. R.84 at 12-14.

Many of the difficulties addressed at trial by various witnesses are inescapable due to DMV service center inaccessibility. Wisconsin has an inadequate number of DMV service centers; only 92 DMV offices serve the entire state. *See DMV Service Centers*, available at <http://www.dot.wisconsin.gov/about/locate/dmv/> (last visited November 17, 2012). The limited number of DMV service centers is important because many Wisconsin voters are without access to transportation. In Wisconsin, approximately 257,000, or 6.2 percent of voting-age Wisconsin citizens, live in a household without any access to a vehicle. *See Gaskins, Keesha and Sundeep Iyer, The Challenge of Obtaining Voter Identification*, Brennan Center for Justice at the New York University School

of Law, at 4, July 17, 2012, available at: http://www.brennancenter.org/content/resource/the_challenge_of_obtaining_voter_identification (last visited November 17, 2012). Of those individuals without access to a vehicle, nearly 50,000 live more than 10 miles from a DMV service center. *Id.*

Moreover, the DMV services centers are open for limited hours. Indeed, 41 are open just two days each week, seven are open just a few hours for one day each month, and three are open just one day every quarter. Other significant accessibility issues lie with the nature of the hours kept by Wisconsin's DMV service centers. Only one DMV service center in the entire state of Wisconsin is open on a Saturday. No other DMV in the entire state operates in the evenings or on weekends.

**B. Wisconsin's DMV
Inaccessibility Creates A Voter
Access Issue.**

Wisconsin's DMV inaccessibility stands in stark contrast to the accessibility of the Indiana Bureau of Motor Vehicle ("BMV"). *One Wisconsin Now Statements on JFC Voter ID Funds*, May 27, 2011, available at: <http://www.onewisconsinnow.org/press/one-wisconsin-now-statements-on-jfc-voter-id-funds.html> (last visited November 17, 2012). Nearly all of Indiana's 140 BMVs are open five days a week, Wisconsin has only 33 full-time sites; Indiana has 124 that are open on the weekends, Wisconsin has one. *Id.*; *DMV Service Centers*, available at <http://www.dot.wisconsin.gov/about/locate/dmv/> (last

visited November 17, 2012). Wisconsin's DMV accessibility has little in common with Indiana and is more analogous the situation in Texas.

In *Texas v. Holder*, Texas' Voter ID law was ruled unconstitutional based on the inaccessibility of the Texas Department of Public Safety offices and the resulting burden imposed on Texas electors. *Texas v. Holder*, 2012 WL 3743676, *15 (D.D.C., 2012). As was the case in Texas, the Wisconsin DMV's limited hours of operation eliminates for many the option of obtaining a photo ID during non-work hours. *Id.* Poorer citizens are less able to take time off work to reach a DMV service center during its hours of operation. *See id.* at *28. And there is no provision in the law that requires an employer to give an employee any time off to obtain the identification required to vote. *Compare* Wis. Stat. § 6.76(1) (granting voters up to 3 hours off of work to vote). Thus, Act 23 forces poorer citizens to "choose between their wages and their franchise," unconstitutionally denying eligible electors their right to vote. *See Holder*, 2012 WL 3747676, *28.

Finally, the circuit court found that more than 330,000 eligible electors – nearly one in ten – would need to obtain a photo ID to comply with Act 23. *See* R.84 at 11-12. This, too, differs from the situation in Indiana addressed by the U.S. Supreme Court, where the Indiana trial court determined that 99 percent of Indiana's voters possessed photo ID.

These 330,000 eligible electors, combined with the limited DMV hours and locations, will likely result

in a bottleneck for voter access. According to the DMV website, the 92 DMV service centers are open for a combined total of approximately 9000 hours per month. *DMV Service Centers*, available at <http://www.dot.wisconsin.gov/about/locate/dmv/>. If the 330,000 electors attempted to obtain their ID during the one-month period preceding the election, the DMV would need to process on average 37 eligible electors each hour, every day of operation for the entire month. Of course, the number of eligible electors who do not possess a photo ID is not uniformly spread across the state. For example, according to Professor Kenneth Mayer, Waukesha County has 23,623 eligible electors who do not have a state-issued photo ID. R.60, Ex.7 at 7. Waukesha County has two DMV service centers that operate for a combined total of 174 hours each month. To process the 23,623 eligible electors in Waukesha County, Waukesha's service centers would need to process 136 eligible electors every hour of operation, every day for one month.

This systemic inaccessibility helps explain the difficulties faced by witnesses who testified at trial, and reveals that their experiences are far from unique. Contrary to the Appellants' assertions, a little planning on the part of the voter cannot cure this structural defect.

Moreover, Act 23 effectively transforms the DMV into a gatekeeper of the ballot box. The systemic inaccessibility makes the DMV ill-equipped to perform this role. By comparison, Wisconsin's DMV service centers are remarkably less accessible

than the state's polling locations. On Election Day, each of Wisconsin's 1851 municipalities has at least one polling site. *Towns Quick Facts*, Wisconsin Towns Association available at: <http://www.wisctowns.com/about-towns> (last visited November 17, 2012); Wis. Stat. § 5.25(5)(c). In fact, there are 2791 polling location across the state, and each poll is required to be open from 7 a.m. to 8 p.m. Wis. Stat. § 6.78(1m). The 92 DMV service centers constitute less than 4 percent of the number of polling locations in this state. The state and local municipalities have made a concerted effort to ensure Wisconsin voters have access to the polls, establishing approximately 36,000 hours of access to the ballot box on Election Day. It would take the DMV nearly four months to reach the same number of hours of access. The DMV is not equipped to be the gatekeeper of the ballot box, unconstitutionally impeding voter access.

C. Act 23 Will Preclude Qualified Electors From Proving Qualifications On Election Day.

An important component of the constitutionally protected right to vote is that the right attaches to the voter on the day of the election:

[The] Wisconsin constitution vests and warrants the right [to vote] *at the time of election*; and every one having the constitutional qualifications *then* may go to the polls, vested with the franchise, of which no statutory condition

precedent can deprive him,
because the constitution makes
him, by force of his present
qualifications, a qualified voter
at such election.

Dells, 49 Wis. 555 (emphasis in original).

In *Dells v. Kennedy*, the Wisconsin Supreme Court evaluated a law that (1) required Wisconsin voters to pre-register to vote; and, (2) outright prohibited an elector from voting unless the elector was registered or unless the elector became qualified after the close of voter registration. *Id.* The law contained no exceptions. *Id.* In holding the law unconstitutional, the Court concluded that the Wisconsin Constitution requires a registration law to give the elector an opportunity to prove his qualifications *on Election Day*. *Id.*

The DMV service centers hours of operation present an insurmountable problem for Act 23. A review of the DMV website reveals that 33 DMV service centers are closed on Tuesdays. *DMV Service Centers*. Eligible electors who are unable to obtain a photo ID prior to Election Day and live near those service centers may be unable to travel the great distance to reach an open service center, and therefore would be precluded from “mak[ing] proof of their qualifications” on Election Day. Of the remaining service centers, not one is open on a Tuesday after 5:00 p.m., yet the polls are open until 8:00 p.m. An eligible elector who attempts to vote after 5:00 p.m. on Election Day and discovers he or she needs to obtain a photo ID will be unable to vote. Moreover, the task of

assembling the necessary documentation – and navigating government bureaucracies to obtain those documents – in order to apply for a photo ID is likely impossible to complete in one day. Because Act 23 provides no exceptions for a voter who fails to obtain a photo ID prior to Election Day, the limited number and hours of Wisconsin’s DMV service centers will likely deprive eligible electors of their right to vote.

II. ACT 23 WOULD LIKELY INFRINGE ON ELIGIBLE ELECTORS’ RIGHT TO VOTE WITHOUT ANY VALID OR SUBSTANTIATED JUSTIFICATION.

When, as here, a case has been tried to the court, the circuit court’s factual findings and determinations of credibility should not be disturbed and should be upheld by the reviewing court unless they are clearly erroneous. *Noll v. Dimiceli’s Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (1983) (on factual findings); *State v. Denson*, 2011 WI 70, ¶ 73, 335 Wis. 2d 681, 799 N.W.2d 831 (on credibility determinations). Should an appellate court determine that more than one reasonable inference can be drawn from the evidence, the appellate court must accept the inference drawn by the circuit court. *Noll*, 115 Wis. 2d at 644.

**A. Unsupported Allegations of
Voter Fraud Do Not And
Cannot Justify The Likely
Disenfranchisement Of Eligible
Electors**

The court in this case evaluated the evidence presented and found there exists no voter fraud that would be addressed by Act 23. R.84 at 12. At trial, Respondents' expert Kenneth Mayer discussed three in-depth and thorough investigations – by the Milwaukee Police Department, the Mayor of Milwaukee and the Wisconsin Department of Justice – and the conclusions of all three investigations: there have been no cases of in-person voter fraud in Wisconsin. *Id.* The Appellants presented no contrary evidence.

The court also found credible and persuasive the witnesses' testimony about the difficulties of procuring a photo ID from the DMV, concluding the process of obtaining a photo ID can be difficult, expensive, frustrating, complex, and time-consuming. *Id.* at 12-14. At trial, witnesses testified about significant difficulties they encountered while navigating bureaucratic government red tape in their attempts to obtain a photo ID. The circuit court found this testimony credible and accepted it as true.

Appellants rely on the U.S. Supreme Court's conclusion in *Crawford*, wherein the Court upheld Indiana's Voter ID law despite the state providing no evidence of voter fraud that would have been addressed by the law. *Crawford v. Marion County*

Election Bd., 553 U.S. 181, 194-95 (2008). The Court also concluded that there was no credible evidence of any voter disenfranchisement. In effect, then, the Court in *Crawford* balanced theoretical voter fraud against theoretical voter disenfranchisement.

Here, the court was asked to evaluate theoretical claims of voter fraud against the credible and persuasive evidence of the immense difficulties voters faced in meeting the requirements of Act 23. The circuit court concluded that unsupported allegations of voter fraud do not and cannot justify the potential disenfranchisement of eligible electors. The circuit court's findings should not be disturbed.

B. Wisconsin Voter Confidence is High; Act 23 Itself Risks Undermining This Confidence.

In the absence of fraud, Appellants contend that the balance still weighs in favor of Act 23 because the State has a clear and legitimate interest in protecting the integrity of the elections. There is no dispute that the state has the authority to protect the integrity of Wisconsin's elections. And the Court in *Crawford* relied – in part – on this authority to uphold Indiana's Voter ID law, finding a correlation between the Voter ID law and voter confidence and concluding that “the integrity of the electoral process has independent significance, *because it encourages citizen participation in the democratic process.*” *Crawford*, 553 U.S. at 197 (*emphasis added*).

There are two problems with the Appellant's argument. The first is the proven disconnect between a Voter ID law and voter confidence demonstrated by citizen participation. Here, the circuit court found that the Respondents presented convincing evidence of this disconnect, and Appellants offered no evidence to the contrary. R.84 at 17-18. Respondents' expert, Dr. Mayer, presented the findings from a comprehensive study that concluded: (1) there is no relationship between attitudes about the frequency of election fraud and the likelihood of voting; and, (2) there is no relationship between beliefs about election fraud and the existence of strict photo ID laws. R.60, Ex. 3 at 15-16. The circuit court found this study persuasive and Dr. Mayer's testimony on the subject credible.

The circuit court also found persuasive a recent decision by the Missouri Supreme Court that concluded public perception about electoral integrity can be mistaken and manipulated, and therefore should not be used as a justification for voter disenfranchisement. *Id.* (citing *Weinschenk v. Missouri*, 203 S.W.3d 201, 218, 219 (Mo. 2006) (warning against reliance on "tumultuous tides of public misperception" to justify the infringement of a fundamental right).

The second problem with the Appellants' argument is that the assumption that Voter ID laws lead to increased voter participation was made irrelevant by the 2012 November election. Wisconsin voters turned out in record numbers – despite the circuit court's order enjoining Act 23. *See* Gilbert, Craig, *Presidential Turnout of 70% in Wisconsin tops*

2008, Milwaukee Journal Sentinel, available at <http://www.jsonline.com/blogs/news/177649551.html> (last visited November 17, 2012); R.84. If voter participation is an indicator of voter confidence, Wisconsin voters have demonstrated that they are quite confident in the state's electoral process without Act 23.

Moreover, when a significant number of voters are prevented from voting, this undermines the appearance of fairness in an election. *See Tollander*, 100 Wis. 2d at 503, 505 (citation omitted). Ironically, then, without any evidence of fraud, coupled with compelling evidence of Act 23's potential for disenfranchisement, it is Act 23 itself that would damage the integrity of Wisconsin's elections.

CONCLUSION

Appellants' failure to produce *any* evidence of voter fraud does not and cannot outweigh the credible and persuasive evidence of almost certain voter disenfranchisement that would be caused by Act 23. Moreover, claims that Act 23 will protect "election integrity" are ill formed, unsupported by credible evidence, and unnecessary given the record voter turnout in the November 2012 elections.

In addition, the inaccessibility of Wisconsin's DMV service centers creates a significant – and for some, insurmountable – impediment to obtaining a photo ID. The implementation of Act 23 would almost certainly result in the unconstitutional

disenfranchisement of potentially hundreds of thousands of Wisconsin's eligible electors.

For these reasons, the Circuit Court should be affirmed.

Dated this 19th day of November 2012.



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CERTIFICATION OF COMPLIANCE, FILING, AND SERVICE

I hereby certify that the Brief of *Amicus Curiae* Institute for One Wisconsin, Inc., confirms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c). The length of the Brief of *Amicus Curiae* Institute for One Wisconsin, Inc. is 2925 words, Times New Roman, 13 point body text, 11 point for quotes and footnotes.

I hereby certify that I have submitted this date an electronic copy of the Brief of *Amicus Curiae* Institute for One Wisconsin, Inc. in compliance with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic copy of the Brief of *Amicus Curiae* Institute for One Wisconsin, Inc. is identical in content and format to the printed copy of the brief filed on this date.

An original and nine copies of the Brief of *Amicus Curiae* Institute for One Wisconsin, Inc., each bound with an original or copy of this Certificate, have been filed with the Court, and three copies of the same submission have been served on each of the parties identified below, all by overnight mail on this 19th day of November 2012.

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**APPENDIX TO *AMICUS CURIAE* BRIEF
BY INSTITUTE FOR ONE WISCONSIN, INC
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