STATE OF WISCONSIN
COURT OF APPEALS
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-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, THE HONORABLE DAVID T. FLANAGAN PRESIDING, CASE NO. 11-CV-5492

REPLY BRIEF OF DEFENDANTS-APPELLANTS

J.B. VAN HOLLEN
Attorney General

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

MARIA S. LAZAR
Assistant Attorney General
State Bar #1017150

DANIEL P. LENNINGTON
Assistant Attorney General
State Bar #1088694

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
608) 266-8690 (Bellavia)
(608) 266-7477 (Kawski)
(608) 267-3519 (Lazar)
(608) 267-8901 (Lennington)
(608) 267-2223 (fax)
bellaviatc@doj.state.wi.us
kawskicp@doj.state.wi.us
lazarms@doj.state.wi.us
lenningtondp@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

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-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, THE HONORABLE DAVID T. FLANAGAN PRESIDING, CASE NO. 11-CV-5492

REPLY BRIEF OF DEFENDANTS-APPELLANTS

I. WISCONSIN CASE LAW DOES NOT REQUIRE STRICT OR HEIGHTENED SCRUTINY OF THE VOTER IDENTIFICATION REQUIREMENTS.

Plaintiffs argue that the Wisconsin Supreme Court applies strict or heightened scrutiny to laws burdening the right to vote. That is incorrect.

The leading Wisconsin election law decisions mostly pre-date the modern language of strict or heightened scrutiny that has developed since the decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Therefore, to discern whether those decisions have applied something like strict or heightened scrutiny, one must examine to what extent the analysis resembles that used in modern election law cases.

Under the *Anderson/Burdick* analysis used in federal election law cases, strict scrutiny has two characteristics. First, the challenged law must promote a state interest "of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In contrast, under non-strict review, a challenged law may advance a State's "important regulatory interests," even if less than *compelling*. *Id.* Second, when strict scrutiny is applied, the challenged law must be "narrowly drawn" to advance the state interest. *Id.* Conversely, under non-strict review, the "fit" between means and end must be "reasonable" and "nondiscriminatory," but need not be "narrowly drawn." *Id.*

"Heightened scrutiny," as distinguished from strict scrutiny, suggests an intermediate level of review. This presumably means that the importance of the state interest must be more than minimal, but less than compelling, and the fit between means and end must be more than merely reasonable, but less than narrowly tailored.

Under these categories, the analysis in the Wisconsin cases is closer to non-strict review than to strict or heightened scrutiny. The cases discussed at pages 8-10 of Defendants' opening brief consistently applied a test of reasonableness under which procedural regulations designed to protect the integrity and efficiency of elections are upheld as long as they do not extend beyond what is reasonable so as to destroy or substantially impair voting rights. Plaintiffs have not pointed to any Wisconsin case demanding a state interest more compelling than the interest in electoral integrity and efficiency, or requiring that the challenged regulation be narrowly tailored to promote the state's interest. Plaintiffs even concede that the Court reviews "whether a law *unreasonably* burdens qualified electors and is designed to effect an *important* government interest regarding the electoral process." Brief of Plaintiffs-Respondents at 12 (emphasis added). The fact that the Wisconsin cases require regulations to be reasonable, rather than narrowly tailored, and require the state interest to be important, rather than compelling, shows that they do not apply strict or heightened scrutiny.

Plaintiffs' comparison of *Gradinjan v. Boho*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966), with *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), is not to the contrary. Those cases, read together, hold that a statutory requirement that a voter's ballot not be counted if not properly initialed by the appropriate election officials is constitutionally impermissible for in-person voting, but permissible for absentee voting. *See Gradinjan*, 29 Wis. 2d at 562-63; *Ollmann*, 238 Wis. at 578-79. It does not follow, however, that the Court applied strict or heightened scrutiny in either case. The Court said that the fit between the state interest of protecting against electoral fraud and the means of advancing that interest by invalidating a voter's ballot is reasonable in the context of absentee voting, where the dangers of fraud are greater, but unreasonable in the context of in-person voting, where there is less danger of fraud. *See id.*; *see also* Brief of Plaintiffs-Respondents

at 13. In both cases, the test applied was the test of reasonableness.

Also without merit is Plaintiffs' suggestion that the Wisconsin decisions apply a more exacting analysis to election regulations that could completely disqualify a voter or void a ballot than to other regulations that merely restrict a voter's opportunity to vote for a particular candidate or issue.

The outcomes of cases in these two categories may differ because the fit between the state interests and the means of advancing those interests may be more reasonable for less burdensome regulations than it is for more burdensome regulations. Nonetheless, the decisions consistently apply the "test of reasonableness" to both categories of regulations. *See, e.g.*, *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859) (statute allowing inspectors to challenge eligibility of individual voters); *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875) (claim that procedural errors by officials invalidated votes of individuals); *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N.W. 175 (1913) (claim that residency requirement wrongly disenfranchised transient workers); *Gradinjan*, 29 Wis. 2d 674 (statute invalidating absentee ballots unless properly authenticated).

Because Plaintiffs have failed to show that any of the Wisconsin cases required the challenged election regulation to advance a compelling state interest or required that the fit between means and end be narrowly drawn, their contention that the Wisconsin Supreme Court applies strict or heightened scrutiny to laws burdening the right to vote must be rejected.

II. *ANDERSON/BURDICK* APPLIES AND *CRAWFORD* THUS CONTROLS THIS CASE.

Plaintiffs now appear to concede that the Wisconsin standard is consistent with the

Anderson/Burdick standard applied in federal election law cases, including *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). *See* Brief of Plaintiffs-Respondents at 14-15. They nonetheless try to distinguish *Crawford* and insist that, because their claim is under the Wisconsin Constitution, this Court is not required to apply the standards or reach the outcome found in any federal cases. *See* Brief of Plaintiffs-Respondents at 15-18.

If the state and federal standards are consistent, however, then it should not matter whether Plaintiffs' claim is considered under the state or federal charter. Plaintiffs nonetheless emphasize that Wisconsin courts are free to independently interpret the right to vote under the state constitution. *See* Brief of Plaintiffs-Respondents at 16-17. To the extent that the state and federal standards are admittedly the same, this insistence on the dissimilarities between the state and federal constitutions makes little or no sense.

Plaintiffs are also incorrect in suggesting that the analytical framework applied by the circuit court in this case is equivalent to the flexible *Anderson/Burdick* standard applied in *Crawford*. *See* Brief of Plaintiffs-Respondents at 18. To the contrary, the circuit court expressly rejected that approach because "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote, while Crawford was based upon the U.S. Constitution which offers no such guarantee." (R. 84 at 18; A-Ap. 118.) The circuit court did not apply a flexible standard of review, but instead concluded that strict or heightened scrutiny was required because the challenged law implicated the fundamental right to vote (R. 84 at 117; A-Ap. 117) ("Where a statute implicates a fundamental interest, it is the obligation of a court to apply a strict or heightened level of review to the statute to determine if it remains within that range of authority permitted under the constitution[.]").

The circuit court plainly did not apply *Anderson/Burdick*. Therefore, to the extent that Plaintiffs

accept that the Wisconsin standard is equivalent to *Anderson/Burdick*, they tacitly concede that the circuit court analysis was erroneous.

Plaintiffs' acceptance of *Anderson/Burdick* also undermines their attempt to distinguish *Crawford*. According to Plaintiffs and the circuit court, *Crawford* is distinguishable because the Indiana law allowed alternative voting opportunities for voters who lacked the requisite identification and because the factual record in *Crawford* was weaker than the record here. Those distinctions, however, did not control the analysis in *Crawford*.

First, *Crawford* did not hold that the Indiana law was valid because it allowed the alternatives of absentee voting and indigency affidavits. The court mentioned those factors as mitigating the burden imposed by the challenged law, but their existence was not central to the analysis. *Crawford*, 553 U.S. at 199. The heart of the reasoning in *Crawford* was that the burdens alleged were not sufficient to facially invalidate the challenged law because it was clear that the law was valid as applied to the vast majority of eligible voters. *Id*. at 204. The same reasoning applies to Wisconsin's voter identification requirements, without regard to whether Wisconsin allows alternative voting methods for individuals lacking required identification.

Second, the evidentiary record in this case, even if stronger than the record in *Crawford*, still is insufficient to justify facial invalidation of a state law. Even under Plaintiffs' version of the facts, it is undisputed that over 90% of Wisconsin electors possess the required identification and thus are unharmed by the challenged law. Moreover, with regard to the remainder of the population, Plaintiffs have not established the existence of obstacles preventing those persons from obtaining such identification. *See* Section IV, below.

III. PLAINTIFFS' ATTEMPT TO DISTINGUISH THE CASE LAW REGARDING FACIAL CHALLENGES IS UNSUCCESSFUL.[1]

Defendants argued at pages 15-18 of their opening brief that Plaintiffs' facial challenge to Wisconsin's voter identification requirement fails because, as in *Crawford*, the challenged law does not severely burden the vast majority of voters. Plaintiffs' arguments in response are unavailing.

First, Plaintiffs argue that Defendants have wrongly applied the standard from such cases as *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 520, 665 N.W.2d 328, and *United States v. Salerno*, 481 U.S. 739, 745 (1987), under which a successful facial challenge must prove that the challenged law cannot be constitutionally applied under any circumstances.

This argument is a red herring because Defendants did not apply that standard here, but rather applied the approach of *Crawford* and many other federal cases under which a law may be facially invalidated if it imposes substantial burdens on constitutionally protected conduct that are excessive in relation to the law's legitimate sweep. *See* Brief of Defendants-Appellants at 16. Plaintiffs' attack on the *Cole/Salerno* standard is thus beside the point.

Second, Plaintiffs argue that the facial challenge here is appropriate under the reasoning used to approve a facial challenge in *Citizens United v. FEC*, 558 U.S. 310 (2010). *Citizens United*, however, did not abandon the rule that facial challenges are disfavored, but merely found that it had diminished force under the circumstances of that case. *Id.* at 895-96.

[1]For the sake of clarity, Defendants have changed the order of Plaintiffs' arguments and here respond to Section V of the Brief of Plaintiffs-Respondents.

The law at issue in *Citizens United* subjected certain entities to criminal punishment for violating a prohibition on some political speech. *Id.* at 888. In that situation, the court found the availability of an as-applied challenge to the prohibition was insufficient to address the constitutional concerns because speakers would be chilled into not exercising their speech rights, rather than face possible punishment if unsuccessful in as-applied litigation. *Id.* at 895-96.

Wisconsin's voter identification requirement, however, does not create that kind of chilling effect. If a person tries to vote without acceptable identification, the consequence is that the person will not be allowed to vote at that time and will instead be offered an opportunity to cast a provisional ballot. There is no heightened chilling effect of the sort created by the possibility of criminal punishment in *Citizens United* and the rule disfavoring facial challenges thus applies in the voter identification context. That is why the Court applied that rule in *Crawford* and upheld the Indiana law against facial challenge.

IV. THE BURDENS ON INDIVIDUAL PLAINTIFFS AND WITNESSES ARE NEITHER SUBSTANTIAL NOR WIDESPREAD.

Plaintiffs assert that the burdens imposed on voting by Wisconsin's voter identification requirements are so substantial and widespread as to require their facial invalidation. In support, they cite *Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), which held that Texas' voter identification law was not entitled to preclearance under the Voting Rights Act. According to Plaintiffs, *Holder* "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." Brief of Plaintiffs-Respondents at 22. Contrary

to Plaintiffs' suggestion, however, *Holder* does not apply here.

Holder is distinguishable in two important respects. First, in *Holder*, the defender of the law had the burden of proving that it was entitled to preclearance, whereas here and in *Crawford*, the party challenging the law must prove its invalidity beyond a reasonable doubt. *Id.* at *12. Second, the material question in *Holder* was whether the burdens imposed by the law had a discriminatory purpose or a retrogressive effect on the voting rights of a specific subset of minority voters, whereas here and in *Crawford*, the question is whether the broad application of the law to all voters is so burdensome as to require facial invalidation. *Id.* at *12-13. The fact that a voter identification law has not been shown not to have retrogressive effect on a subset of minority voters does not support the much broader inference that the application of such a law to all voters creates severe burdens on voting that are excessive in relation to the law's legitimate purpose. The applicable legal standard here is that of *Crawford*, not *Holder*.

Under the Crawford standard, even unjustified burdens imposed on a few voters are "by no means sufficient" to facially invalidate a state voter ID law. *Crawford*, 553 U.S. at 199-200. The record in this case reflects only burdens specific to the circumstances of a small number of individuals. Plaintiffs concede that this evidence is merely anecdotal, yet maintain that it is "probative of a larger problem." Brief of Plaintiffs-Respondents at 20 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 840 (2000)). Plaintiffs fail, however, to provide any evidence to support an inference that these anecdotes are typical of a bigger problem—much less one so general as to justify facially invalidating a state law. In fact, many of the individual witnesses have obtained acceptable identification and there is no evidence that the others could not do so. (R. 60:Ex. 58, ¶ 4; Ex. 1 (Frank Depo.) at 11-12, 41-43; Ex. 30 at 6-7; Ex. 23 at 9-10; Ex. 64, ¶ 4).

For example, the experiences of individuals like Ricky Lewis and Ruthelle Frank have not been shown to exemplify a larger problem. Plaintiffs claim that the challenged requirements "will preclude voters like them from exercis[ing] their constitutional right to vote," but they have presented no evidence that there are other "voters like them." *See* Brief of Plaintiffs-Respondents at 19. The assertion that Lewis and Frank "are likely not unique" is conclusory and unsupported. *Id.* The record does not establish that either individual's unique circumstances apply to any other voters. Similarly, one witness—Danettea Lane—testified that the cost of a birth certificate is a financial hardship for her, but none of Plaintiffs' other witnesses testified that the $15-$30 cost of a birth certificate was beyond their means. Brief of Plaintiffs-Respondents at 21; R. 60, Ex. 22 at 13. This type of individualized evidence is not enough to facially invalidate Wisconsin's voter identification requirements.

V. PROFESSOR MAYER'S ESTIMATE OF WISCONSIN ELECTORS LACKING IDENTIFICATION IS NOT RELIABLE.

Defendants showed at pages 26-31 of their opening brief that the database matching analysis performed by Plaintiffs' expert witness—Professor Kenneth R. Mayer ("Mayer")—failed to reliably estimate the number of Wisconsin electors who lack acceptable voter identification, because Mayer jumped to the conclusion that virtually all of the non-matches that he found between records in the registered voter ("SVRS") database and the Department of Transportation ("DOT") database represented voters lacking identification, without ruling out the alternative explanation that non-matches could be caused by discrepancies in the way names are recorded in the two databases. Plaintiffs' arguments in response do not overcome the deficiency in Mayer's testimony.

First, Mayer's conclusion that the number of false non-matches caused by name discrepancies would not be statistically significant was flawed because he failed to take into account: (a) the fact that non-matches could be caused by discrepancies in first names, as well as last names; (b) the fact that non-matches could be caused by discrepancies unrelated to the presence of a hyphen or space in a name; and (c) the fact that non-matches could be caused by the way names are entered in either of the two databases. (R. 91 at 17-19).

Second, Plaintiffs' argument that Mayer's estimate is confirmed by independent sources is without merit. The 2005 study by University of Wisconsin-Milwaukee Professor John Pawasarat is not probative here because it dealt with population data ten years out of date, failed to exclude people ineligible to vote from the population examined, and failed to consider how many members of that population possessed an acceptable form of voter identification other than a driver license. (R. 60, Ex. 9). Similarly, the unmatched voter records found in database checks conducted by the Government Accountability Board ("GAB") pursuant to the Help America Vote Act ("HAVA") are not commensurate with the non-matches at issue here because the HAVA check was trying to verify the accuracy of information in the SVRS and thus counted *all* non-matches, including those caused by name discrepancies. (R. 93 at 55, 57-59). And the results of a matching analysis of voter and driver records in Georgia are not relevant here because the Georgia study matched unique social security numbers in voter and driver databases and thus was not plagued by discrepancies in non-uniform fields, such as names. (R. 95 at 36; *see also* R. 60, Ex. 84 at 5, 8).

Most importantly, Plaintiffs quibble with whether the deficiencies in Mayer's methodology can be explained, but miss the basic point. Mayer's conclusions, even were they not flawed, at most show the number of people who have to take some steps to obtain acceptable

identification, but show nothing about the number of people who would be severely burdened by that process.

VI. THE VOTER IDENTIFICATION REQUIREMENTS COMBAT FRAUD AND PROMOTE CONFIDENCE IN ELECTORAL INTEGRITY.

Wisconsin's voter identification requirements serve the compelling interests in preventing and deterring voter fraud and promoting confidence in the integrity of elections. These interests are legitimate and important enough to justify the limited burdens imposed on voters. Plaintiffs incorrectly discount the State's interests.

Plaintiffs argue that the challenged requirements do not serve an interest in combating voter fraud because "official local and state investigations in Wisconsin have not identified any widespread vote fraud and no voter impersonation at the polls[.]" Brief of Plaintiffs-Respondents at 34. The State, however, is not required to prove widespread voter fraud in order to defend the validity of a state law.

Crawford said that there "is no question about the legitimacy or importance" of the interest in deterring voter fraud and that there is "independent significance" in enhancing public confidence in the electoral system. *Crawford*, 553 U.S. at 196-97; *id.* at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *id.* at 204 (finding the state's motives "both neutral and sufficiently strong"); *see also South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at *12 (D.D.C. Oct. 10, 2012). *Crawford* found these interests valid despite the fact that the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194; *see also South Carolina*, 2012 WL 4814094, at *12; *Holder*, 2012 WL 3743676, at *12 (rejecting the argument

"that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence were 'pretext.' A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well.").

Finally, voter identification also furthers a legitimate State interest in enhancing public confidence in the integrity of elections. *Crawford*, 553 U.S. at 197; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Promoting such confidence is a good in itself, which the circuit court inappropriately discounted. (*See* R. 84 at 17-18; A-Ap. 117-18.) As the Wisconsin Supreme Court made clear long ago, "[t]he necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar to need suggestion." *State ex rel. Cothren*, 9 Wis. at 283 (1859).

CONCLUSION

For the reasons stated herein, the decision of the circuit court should be reversed.

Dated this ____ day of December, 2012.

J.B. VAN HOLLEN
Attorney General

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

MARIA S. LAZAR
Assistant Attorney General
State Bar #1017150

DANIEL P. LENNINGTON
Assistant Attorney General
State Bar #1088694

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
608) 266-8690 (Bellavia)
(608) 266-7477 (Kawski)
(608) 267-3519 (Lazar)
(608) 267-8901 (Lennington)
(608) 267-2223 (fax)
bellaviatc@doj.state.wi.us
kawskicp@doj.state.wi.us
lazarms@doj.state.wi.us
lenningtondp@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font, except that the length of this brief is 3,372 words. A Motion for Leave to File Reply Brief Exceeding Statutory Word Limit is being simultaneously filed.

Dated this ____ day of December, 2012.

_____

THOMAS C. BELLAVIA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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.

Dated this _____ day of December, 2012.

_____
THOMAS C. BELLAVIA
Assistant Attorney General

bellaviatc\cases\election cases\naacp\ct app\br\reply\2012 12-07 reply brief - final.docx