STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

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 GARLAND, DANETTEA LANE, MARY McCLINTOCK, ALFONSO RODRIGUEZ, JOEL TORRES, and ANTONIO K. WILLIAMS,

Plaintiffs,

v.

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

Defendants.

Case No. 11CV5492
Case Code 30701

PLAINTIFFS' POST-TRIAL BRIEF

May 16, 2012

PO Box 442
Milwaukee, WI 54201-0442
414-271-8650
414-271-8442 Fax

HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs
Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
Jeffrey P. Sweetland, SBN 1001737

TABLE OF CONTENTS

TABLE OF CASES iii

INTRODUCTION 1

ARGUMENT 2

I. The Legal Standard 2

A. This Matter is Justiciable 2

B. The Organizational and Individual Plaintiffs Have Standing 3

II. Act 23 Unreasonably and Onerously Burdens the Right to Vote in Violation of Art. III, Sec. 1 of the Wisconsin Constitution 7

A. Wisconsin Case Law Construing Art. III, Sec. 1 Requires That Statutes Regulating the Voting Process Are Subject to Heightened Scrutiny to Ensure They Do Not Unreasonably Burden the Exercise of the Franchise 7

B. The Wisconsin Constitution Governs the Outcome in this Case and Federal Voting Rights Jurisprudence, Including *Crawford*, Is Consistent With a Conclusion That Act 23 Imposes Unreasonable and Onerous Burdens Tantamount to a Denial of the Right to Vote 10

1. Wisconsin's Reasonableness Test for Scrutinizing Statutes Affecting the Right to Vote is Consistent With the Federal *Anderson/Burdick* Sliding Scale Test. Under Both Standards, the Act 23 Photo ID Requirements Impose the Types of Severe, Widespread, and Unreasonable Burdens Which Compel Heightened Scrutiny 10

2. Crawford Does Not Control the Outcome Here 11

3. Plaintiffs' Facial Challenge to Act 23 Is Appropriate Where a Substantial Number of Its Applications are Unconstitutional 14

C. Professor Mayer's Estimate of 333,276 Electors Is the Only Reliable Measure of the Number of Voting Eligible Persons Whose Right to Vote Is Impermissibly Burdened by the Photo ID Requirements of Act 23 15

1. In Contrast to Prof. Mayer's Diligent Investigation, Dr. Morrison's Erroneous Conclusions Were Predicated Upon His Multiple Failures to Conduct Validity Checks on WisDOT Reports and Data 18

2. Professor Hood's Agnostic Trial Testimony About the Reliability of the SVRS and DOT Match Is Inconsistent with His Published Studies of the Georgia Photo ID Law, His Trial Reports and Prior Testimony 21

3. Prof. Hood's Discredited Analysis of the Impact of Georgia's Photo ID Law on Voter Turnout Is Fundamentally Flawed and Has Marginal Probative Relevance to the Photo ID Requirements of Act 23.....24

D. Plaintiffs Demonstrate Beyond a Reasonable Doubt That the Act 23 Photo ID Requirements Impose Unreasonable and Unwarranted Time-Consuming and Costly Burdens on the Right to Vote for a Substantial Number of Constitutionally Qualified Wisconsin Electors 27

E. Defendants Produced No Evidence Disputing Plaintiffs' Claim That the Act 23 Photo ID Requirements Are Not Narrowly Tailored to Satisfy the State's Legitimate Interest in Preventing Voter Fraud 35

III. The Unreasonable and Onerous Burdens Imposed On Voters by Act 23 Violates Art. I, Sec. 1 of the Wisconsin Constitution.....39

CONCLUSION.....40

TABLE OF CASES

ACLU v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) 4

Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n., 946 S.W.2d 199 (Mo. 1997) 37

Anderson v. Celebrezze, 460 U.S. 780 (1983 11

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 14

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 14

Burdick v. Takushi, 504 U.S. 428 (1992) 11

Charles H. Wesley Educ. Foundation, Inc. v. Cox, 408 F.3d 1349 (11th Cir. 2005) 6

Citizens United v. FEC, 130 S.Ct. 876 (2010) 14

City of Boerne v. Flores, 521 U.S. 507 (1997) 14

Common Cause v. Billups, 554 F.3d 1340 (11th Cir. 2009) 4, 6

Common Cause v. Billups, Case No. CV-0201-HLM (N.D. Ga. Sept. 6, 2007) 25

Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) 10-15

Dells v. Kennedy, 49 Wis. 555 (1880) 8-9

Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011) 4

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) 14

Florida State Conference of NAACP v. Browning, 522 F.3d 1153 (11th Cir. 2008) 6

Fox v. DHSS, 112 Wis. 2d 514, 334 N.W.2d 532 (1983) 3

Greidinger v. Davis, 988 F.2d 1344 (4th Cir. 1993) 27

Harman v. Forssenius, 380 U.S. 528 (1965) 28

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 4

Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333 (1977) 5

In re Termination of Parental Rights to Diana P., 2005 WI 32, 279 Wis. 2d 169,

694 N.W.2d 344 14

Lane v. Wilson, 307 U.S. 268 (1939) 29

Lister v. Board of Regents, 72 Wis. 2d 282, 240 N.W.2d 610 (1976) 2

Loy v. Bunderson, 107 Wis. 2d 400, 320 N.W.2d 175 (1982) 2-3

McConkey v. Van Hollen, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 3-4

McNally v. Tollander, 100 Wis. 2d 490, 302 N.W.2d 440 (1981) 7-8

Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 470 N.W.2d 290 (1991) 2

Milwaukee Dist. Council 48 v. Milwaukee County, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 2-3

NAACP State Conf. v. Cortes, 591 F.Supp.2d 757, 764 (E.D. Pa. 2008) 28

Olson v Town of Cottage Grove, 2008 WI 51, 309 Wis. 2d 365, 749 N.W.2d 211 2-3

Perdue v. Lake, 647 S.E.2d 6 (Ga. 2007) 4

Rosario v. Rockefeller, 410 U.S. 752 (1973) 27

Society Ins. v. LIRC, 2010 WI 68, 326 Wis. 2d 444, 786 N.W.2d 385 14

State v. Doe, 78 Wis.2d 161, 254 N.W.2d 210 (1977) 12

State v. Hansford, 219 Wis. 2d 226, 580 N.W.2d 171 (1998) 12

State v. Miller, 202 Wis.2d 56, 549 N.W.2d 235 (1996) 12

State v. Quintana, 2008 WI 33, 308 Wis.2d 615, 748 N.W.2d 447 39

State ex rel. Barber v. Circuit Court, 178 Wis. 468, 190 N.W. 563 (1922) 8-9

State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 37 N.W.2d 473 (1949) 7, 10

State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041 (1910) 7-9

State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N.W. 561 (1910) 9-11, 27

State ex rel. Wood v. Baker, 38 Wis. 71 (1875 8-9

Sternberg v. Carhart, 530 U.S. 914 (2000) 14

Town of Rhine v. Bizzell, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780.....39

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 14

Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006) 28-29, 36-38

Wisconsin Professional Police Ass'n v. Lightbourn, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807.....39

Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n, 69 Wis. 2d 1, 230 N.W.2d 243 (1975) 6

Zehetner v. Chrysler Fin. Co., 2004 WI App 80, 272 Wis. 2d 628, 679 N.W.2d 919 3

INTRODUCTION

Plaintiffs seek declaratory and injunctive relief from the photo identification (ID) provisions of 2011 Wisconsin Act 23 which violate Art. I, Sec. 1 and Art. III, Sec. 1 of the Wisconsin Constitution.

Plaintiffs Milwaukee Branch of the NAACP and Voces de la Frontera are organizations which represent African-American and Latino voters, respectively, and seek to defend the voting rights of their members and other constitutionally qualified voters who will be unconstitutionally burdened and disenfranchised by the unreasonable and onerous photo ID requirements of Act 23. Plaintiffs are also twelve constitutionally qualified voters, most of whom are members of the two Plaintiff organizations, who have experienced the burdens of Act 23 in attempting to procure photo IDs to exercise their right to vote in upcoming elections.

Following briefing and a hearing, the Court issued a temporary injunction on March 1, 2012. From April 16-19, the Court presided over a bench trial in which Plaintiffs adduced the expert report and testimony of Prof. Kenneth Mayer that over 300,000 constitutionally qualified voters lack an Act 23 prescribed photo ID, and evidence from 33 constitutionally qualified voters of the burdens imposed by Act 23.

Plaintiffs hereby submit this post-trial brief and their Proposed Findings of Facts (Facts) in support of: (1) a declaration that the photo ID requirement of Act 23 contained within §§1-2, 4, 16, 18-19, 45, 47-48, 50, 52-54, 56, 59, 61-64, 66, 68-71, 79, 83-84, 86-93, 95, 101, 103, 144-146, which is the most stringent in the nation, is unconstitutional; and (2) an order permanently enjoining Defendants from implementing and enforcing such provisions of Act 23.

ARGUMENT

I. The Legal Standard

Pursuant to Wis. Stat. §806.04, Wisconsin courts have broad powers to construe and declare the validity of a state statute by issuing an anticipatory or preventative remedy:

> The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed. The purpose is facilitated by authorizing a court to take jurisdiction at a point earlier in time than it would do under ordinary remedial rules and procedures. As such, the Act provides a remedy which is primarily anticipatory or preventative in nature.

Loy v. Bunderson, 107 Wis. 2d 400, 407-408, 415, 320 N.W.2d 175, 180-181, 184 (1982) (quoting *Lister v. Board of Regents*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976)).

Under §806.04(12), courts have a remedial mandate with the concomitant statutory authority to administer their powers liberally over justiciable claims, where a party with "a legally protectable interest" has asserted a ripe claim against an adverse party who has an interest in contesting the issue. *Olson v Town of Cottage Grove*, 2008 WI 51, ¶¶29, 42, 309 Wis. 2d 365, 749 N.W.2d 211 ("The Act is to be liberally construed and administered to achieve a remedial purpose.") (citing *Miller Brands-Milwaukee, Inc. v. Case,* 162 Wis. 2d 684, 694, 470 N.W.2d 290, 294 (1991) and *Loy*, 107 Wis. 2d at 410, 320 N.W.2d at 182); *Milwaukee Dist. Council 48 v. Milwaukee County,* 2001 WI 65, ¶37, 244 Wis. 2d 333, 627 N.W.2d 866.

A. This Matter is Justiciable

There should be no dispute that the present matter exhibits a controversy between adverse parties, in that Plaintiffs claim that the photo ID provisions of Act 23 are unconstitutional and Defendants, who are charged with implementing and enforcing Act 23, deny such invalidity. Likewise, this matter is ripe for this Court's determination, as Defendants have already

implemented the challenged provisions and are prepared to do so in future elections. As the Supreme Court observed in *Milwaukee Dist. Council 48*, "[S]tanding and the ripeness of this controversy are very much related." 2001 WI 65, ¶45. The *Loy* Court explained that ripeness for declaratory relief means that "a dispute may be tried at its inception. . ." and is "as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the *status quo.*" 107 Wis. 2d at 413, 320 N.W.2d at 183 (citation omitted); *Milwaukee Dist. Council 48,* 2001 WI 65, ¶46. In *Olson*, the Court elaborated that "the ripeness required in declaratory judgment actions is different from the ripeness required in other actions," in that "a plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act." 2008 WI 51, ¶43; *Milwaukee Dist. Council 48,* 2001 WI 65 at ¶41.

B. The Organizational and Individual Plaintiffs Have Standing

Plaintiffs' standing should be without doubt, satisfying the requirements recently addressed in *McConkey v. Van Hollen,* 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 (elector challenge to validity of a constitutional amendment submission). The Court clarified that "unlike federal courts, which can only hear 'cases' or 'controversies,' standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." 2010 WI 57, ¶15 (citing *Zehetner v. Chrysler Fin. Co.,* 2004 WI App 80, ¶12, 272 Wis. 2d 628, 679 N.W.2d 919). Standing principles are construed liberally; even "an injury to a trifling interest" suffices. *Id.* (citing *Fox v. DHSS,* 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). Although the *McConkey* Court was uncertain about the nature of the plaintiff's injury, "whether as a matter of judicial policy, or because [he] has at least a trifling interest in his voting rights," the Court concluded that certain factors, also present here, confer standing:

> First, McConkey has competently framed the issues and zealously argued his case. Second, it is likely that if his claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit, raising judicial efficiency concerns. Third, the consequences of our decision are sufficiently clear; a different plaintiff would not enhance our understanding of the issues in this case. Fourth, a detailed analysis of the nature of an injury here might inappropriately require us to prematurely interpret the substance of the amendment. Fifth, as a law development court, we think it prudent that the citizens of Wisconsin have this important issue of constitutional law resolved.

McConkey, 2010 WI 57, ¶¶17-18. Defendants argue that Plaintiffs lack standing pursuant to *Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007), but *McConkey* clearly suggests otherwise. In fact, the rationale and sound judicial policy underpinning the *McConkey* holding is placed in sharp relief by the subsequent litigation required in Georgia, where the trial and appellate courts post-*Perdue* re-litigated the identical issues dismissed earlier on standing grounds. *See, Democratic Party of Georgia v. Perdue,* 707 S.E.2d 67 (Ga. 2011).

Plaintiffs are not aware of any cases which address Wisconsin principles of standing in the context of a voting rights claim under our state constitution; however, Federal courts have frequently addressed the threshold for standing to pursue a voting rights claim. Even under stringent federal criteria, to have standing a voter need not actually be denied the right to vote, but must simply be burdened or treated differently in the exercise of the franchise. For example, a voter's ability to pay a poll tax does not divest the voter of standing to challenge a fee required to cast a ballot. *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668 (1966). Likewise, federal courts confer standing on individual plaintiffs to challenge photo ID requirements irrespective of whether such plaintiffs acquired the requisite ID for voting. *Common Cause v. Billups*, 554 F.3d 1340, 1351-1352 (11th Cir. 2009) ("lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person"); *ACLU v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008).

In the instant case, the individual Plaintiffs have incurred various burdens on their right to vote which confer standing. Plaintiff Ricky Lewis already paid $20 for a birth certificate yet lacks a photo ID and is disenfranchised under Act 23. (Facts 33-34) Other individual Plaintiffs, Carolyn Anderson, Danettea Lane, John Wolfe, Ndidi Brownlee, Johnnie Garland, and Antonio Williams, have paid sums between $15 and $50 to obtain a birth certificate necessary to get a photo ID in order to vote. (Facts 38-39, 41, 56, 63-65, 82, 84) Plaintiff Anthony Fumbanks paid $14 for a driver's license in order to vote. (Facts 54) Other individual Plaintiffs, such as Mary McClintock, Joel Torres, and Jennifer Platt, incurred various transportation and incidental expenses including the burdens of numerous hours traveling to DMV offices and other government agencies solely to procure a photo ID to enable them to vote under Act 23. (Facts 67-69, 73, 78-80) Under even the strictest criteria for conferring standing, these injuries suffice to vest these individual Plaintiffs with standing.

The Milwaukee Branch of the NAACP and Voces de la Frontera both satisfy the criteria for associational and organizational standing. Associational standing of an organization requires that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington Apple Adver. Comm'n* , 432 U.S. 333, 343 (1977). NAACP members Danettea Lane, Anthony Fumbanks, Ricky Lewis, Carolyn Anderson, Ndidi Brownlee, Johnnie M. Garland, and Antonio Williams, and Voces members Joel Torres and Alfonso Rodriguez have incurred injuries burdening the right to vote as a result of the photo ID requirements of Act 23. (Facts 33-34, 38-39, 41, 54, 56, 63-65, 78-80, 82, 126, 131) Other members of the Milwaukee Branch and Voces have had difficulty obtaining and do not have an Act 23 photo ID. (Facts 127, 132) Their

injuries fall plainly within the zones of interest of both organizations, as each organization jealously defends the right to vote, and has historically defended the voting rights of their membership and voters in the respective communities in which they work. (Facts 128, 133; Ex. 91, 101-102) *See also Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n,* 69 Wis. 2d 1, 29, 230 N.W.2d 243, 253 (1975) ("organization devoted to the protection and preservation of the environment has standing to sue in its own name if it alleges facts sufficient to show that a member of the organization would have had standing to bring the action in his own name").

An organization also has standing to sue where it has "suffered a particularized, concrete injury to a legally protected interest (injury in fact)" and "where the injury is traceable to the challenged action" and "it is likely that the injury may be redressed by judicial action (redressability)." *Charles H. Wesley Educ. Foundation, Inc. v. Cox,* 408 F.3d 1349, 1352 (11th Cir. 2005). Both NAACP and Voces have such organizational standing to challenge the photo ID requirements of Act 23, because each is significantly involved in voter registration and get-out-the-vote activities. (Facts 128, 133; Ex. 91-94, 97, 101-102, 105-106) Both organizations have been compelled to divert staff and volunteer resources to educate and assist voters in obtaining photo ID, and if Act 23 is implemented, will be required to further divert significant resources to assist voters in obtaining photo ID so they may vote in future elections, including the 2012 presidential election. (Facts 129-130, 134) *See Florida State Conference of NAACP v. Browning,* 522 F.3d 1153, 1159, 1165 (11th Cir. 2008) ("an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts."); *Common Cause v. Billups, supra,* 554 F.3d at1350 (NAACP had organizational standing where it "is actively involved in

voting activities and would divert resources from its regular activities to educate and assist voters in complying with the statute that requires photo identification").

II. Act 23 Unreasonably and Onerously Burdens the Right to Vote in Violation of Art. III, Sec. 1 of the Wisconsin Constitution

A. Wisconsin Case Law Construing Art. III, Sec. 1 Requires that Statutes Regulating the Voting Process Are Subject to Heightened Scrutiny to Ensure They Do Not Unreasonably Burden the Exercise of the Franchise

The exercise of the franchise by Wisconsin citizens is a most jealously guarded right under our State Constitution. Throughout Wisconsin's history, our courts have emphasized with unmistakable clarity the inviolability of the right to vote. Over a hundred years ago, the Supreme Court held: "Nothing can be clearer under our Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right." *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 15, 128 N.W. 1041 (1910). In rejecting the view that the franchise is a "mere privilege," the Court mixed prose and poetry to call attention to the lofty, protective status of the right to vote:

> It is commonly referred to as a sacred right of the highest character and then again, at times, as a mere privilege, a something of such inferior nature that it may be made "the football of party politics." We subscribe to the former view, placing the right of suffrage upon the high plane of removal from the field of mere legislative material impairment. It has been not inaptly characterized in these lines:
>
> > "A weapon that comes down as still
> > As snowflakes fall upon the sod;
> > But executes a freeman's will,
> > As lightning does the will of God."

Id.

In a challenge to a run-off requirement for Supreme Court justices, the Court later wrote that "no right is more jealously guarded and protected by the departments of government under our constitution, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949), *quoted in McNally v. Tollander*, 100

Wis. 2d 490, 501, 302 N.W.2d 440 (1981). The franchise is often identified as not simply fundamental, but preservative, because without it all other rights could be lost. In *McNally*, the Court explained this function by characterizing the right to vote as "the principal means by which the consent of the governed, the abiding principal [sic] of our form of government, is obtained." *Id.*

The Wisconsin Supreme Court has frequently distinguished the legislature's right to reasonably regulate elections from its enactment of election provisions which unduly burden the exercise of the franchise. A statute regulating the right to vote "must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election." *State ex rel. Wood v. Baker,* 38 Wis. 71, 86 (1875), *see also State ex rel. McGrael v. Phelps, supra,* 114 Wis. at 24-25 ("Regulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees."). Prior to the 1986 amendments to Article III of the Wisconsin Constitution, which explicitly authorized voter registration laws, the Supreme Court had upheld the legislature's right to reasonably require a registry of electors. For example, in *State ex rel. Wood v. Baker,* the Court held that a voter may be "required to furnish prescribed proof of his right" to vote. Such "proof" in *Wood* was a voter's oath regarding residence, in response to a challenge because of omission of the voter's name from the registry of voters. 38 Wis. at 85-86. *See also, State ex rel. Barber v. Circuit Court,* 178 Wis. 468, 190 N.W. 563 (1922). However, the Court distinguished the legislature's authority to pass voter registration and residency laws with other requirements which may be impractical or otherwise impossible for certain voters to meet. In a case just five years after *Wood,* the court struck down a registration requirement which absolutely prohibited a constitutionally qualified, but unregistered, elector from voting unless the voter became qualified after the close of registration. *Dells v. Kennedy,* 49

Wis. 555 (1880). The court was clear that the "sacred right" to vote may not be subverted by regulations to ensure "orderly exercise of the right" which unreasonably burden the voter:

> [A] registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method or regulations prescribed by law for such purpose and to such end, 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 without any pretended cause or reason, or required of an elector qualifications additional to those names in the constitution.

Id. at 557-558.

The *Dells* decision contrasts the legislature's legitimate regulation of the voting process against unreasonable regulations which result in the involuntary disenfranchisement of qualified electors. The Supreme Court has often articulated the rule that legislation which does not merely regulate, but imposes unreasonable burdens upon voters, like Act 23, is the functional equivalent of disenfranchisement:

> 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 either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

State ex rel. Barber v. Circuit Court, 178 Wis. 468, 476, 190 N.W. 563 (1922) (quoting *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 341, 125 N.W. 561 (1910)); *State ex rel. McGrael v. Phelps, supra,* 114 Wis. at 24-25; *State ex rel. Wood v. Baker, supra* 38 Wis. at 86-87. As shown below, Act 23 warrants heightened scrutiny because it is precisely such a law which imposes widespread and significant burdens on the right of many qualified Wisconsin citizens to cast their ballots.

B. The Wisconsin Constitution Governs the Outcome in this Case and Federal Voting Rights Jurisprudence, including *Crawford*, Is Consistent With a Conclusion That Act 23 Imposes Unreasonable and Onerous Burdens Tantamount to a Denial of the Right to Vote

The instant case is brought under the Wisconsin Constitution, and our state courts' interpretation of Art. III, Sec. 1 controls the outcome. No published Wisconsin case compels this Court to apply federal standards to construe our right to vote under Art. III, Sec. 1, or to apply the outcome from any federal case, including *Crawford v. Marion County*, to the instant facts. Moreover, because a substantial number of the applications of Act 23 are demonstrated as unconstitutional, Plaintiffs' instant facial challenge warrants a declaration that the photo ID requirement of Act 23 is unconstitutional and an order to permanently enjoin its implementation.

1. Wisconsin's Reasonableness Test for Scrutinizing Statutes Affecting the Right to Vote is Consistent With the Federal *Anderson/Burdick* Sliding Scale Test. Under Both Standards, the Act 23 Photo ID Requirement Imposes the Types of Severe, Widespread, and Unreasonable Burdens Which Compel Heightened Scrutiny

Under Wisconsin's voting rights jurisprudence, if a legislative enactment substantially impairs the constitutionally guaranteed right to vote it is subject to the test that "must be reasonable." *State ex rel. Frederick v. Zimmerman,* 254 Wis. 600, 614, 37 N.W.2d 473 (1949). Stated differently, the legislature may reasonably regulate aspects of the voting process, including ballot access, but ultimately may not effectively frustrate the exercise of the franchise by qualified electors. *State ex rel. van Alstine v. Frear, supra,* 142 Wis. at 341, 125 N.W. 561 ("election laws may regulate but cannot "render[] its exercise so difficult and inconvenient as to amount to a denial"). The *Van Alstine* formulation is the correct standard under Wisconsin law to evaluate the validity of any statute which imposes restrictions on the exercise of the right to vote.

The *Van Alstine* formulation is consistent with the federal *Anderson/Burdick* sliding scale test which predicates the degree of judicial scrutiny upon the severity and scope of the restrictions which burden the right to vote. *Anderson v. Celebrezze,* 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). The *Anderson/Burdick* test requires an assessment of the burdens, if any, imposed on a plaintiff's constitutionally protected voting rights, followed by an evaluation of the precise interests put forward by the state as justifications for the burdens. 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 First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.*

2. *Crawford* Does Not Control the Outcome Here

Defendants wrongly invoke *Crawford v. Marion County,* 553 *U.S.* 181 (2008), as support for Act 23's validity. Several critical factors distinguish *Crawford* and compel this Court to invalidate the photo ID provisions of Act 23.

First, Plaintiffs' challenge to Act 23 is based exclusively on the explicit guarantee of the right to vote under Art. III, Sec. 1 of the Wisconsin Constitution. While some counterpart provisions of the Wisconsin and federal constitutions are interpreted similarly, the Wisconsin Supreme Court has never held that the right to vote under Art. III, Sec. 1 of the Wisconsin Constitution must be identically construed as the implied right to vote in the federal constitution. On the contrary, in a variety of constitutional contexts, the Wisconsin Supreme Court has construed our state constitutional provisions independently of federal interpretations of counterpart constitutional provisions. This principle holds where there are textual dissimilarities,

and especially where rights are explicit only in the state constitution, as in the case here. *See State v. Miller,* 202 Wis.2d 56, 65-66, 549 N.W.2d 235 (1996) ("freedom of conscience as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision"); *see 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, 171-72, 254 N.W.2d 210 (1977) (broader rights to counsel for criminal defendants).

Second, the Indiana law at issue in *Crawford* is significantly less stringent than Act 23 and affords various fail-safe, alternative voting opportunities for qualified electors who lack a photo ID. (Facts 17, 18) The Indiana law permits low-income voters without a photo ID to cast a provisional ballot which will count if, within ten days, the voter simply executes an affidavit of indigency at the clerk's office. *Id.* at 186 & n.2. (Facts 18) Justice Stevens concluded that this exception significantly mitigates the burden on voters. *Id.* at 199-200. In addition, the Indiana law allows voters to cast an absentee ballot without submitting a photo ID. *Id.* at 185-186. (Facts 17) In the lead opinion, the *Crawford* Court applied the sliding scale *Anderson-Burdick* test to the facts presented and concluded that the Indiana law passed muster, *particularly in light of its fail-safe absentee-ballot provisions. Id.* at 190 & n. 8, 199.

Act 23 does not allow such fail-safe voting methods, and is an important distinction from the Indiana photo ID law. (Facts 2, 4, 16) Constitutionally qualified voters who show up on election day without an Act 23-prescribed photo ID may cast a provisional ballot, but the ballot will not count unless the voter produces an actual Act 23-prescribed photo ID to the municipal clerk by 4 p.m. on the Friday after the election. 2011 Wis. Act 23, §§50, 87-90. (Facts 1, 2, 3) In addition, Act 23 requires most Wisconsin absentee voters to enclose a copy of an Act 23-

prescribed photo ID in the absentee ballot application, except for voters who are in the military, living overseas, subject to a confidential listing, or indefinitely confined. 2011 Wis. Act 23, §§63-83.[1] (Facts 1, 4).

Third, the *Crawford* decision was based on a factual record lacking substantial evidence of the scope and severity of the burdens faced by voters. Noting that "the evidence in the record does not provide us with the number of registered voters without photo identification," the Court accepted the district court's "rough calculation" that less than 1% of voting-age Indiana residents lacked acceptable photo ID. *Id.* at 200, 218. Furthermore, the record did not "provide any concrete evidence of the burden imposed on voters who currently lack photo identification," and said "virtually nothing about the difficulties faced by . . . indigent voters." *Id.* at 201. The *Crawford* Court never concluded that the Indiana photo ID law was *per se* constitutional, or that other states' photo ID laws would not pass muster under the federal constitution. In fact, the Court limited its holding as follows: "on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id.* at 202 (citations omitted). In contrast, Plaintiffs here have quantified severe burdens incurred by a group of voters illustrative of the nearly 10% of voting eligible persons who lack an Act 23 prescribed photo ID.

Based on the above factors, the outcome in *Crawford* does not compel an identical outcome where the Indiana and Wisconsin photo ID laws are dissimilar, the evidentiary records stand in stark contrast, and this Court serves as the sole arbiter of the meaning and application of Art. III, Sec. 1 of the Wisconsin constitution.

---

[11] While the "indefinitely confined" exception may lessen the burden for some elderly and disabled voters, many such voters who have transportation, mobility, and health issues which burden their ability to obtain a WisDOT photo ID do not consider themselves indefinitely confined, and also do not want to run the risk of improperly procuring an absentee ballot. *See, e.g.,* Ex. 24, McClintock Dep. 8-9, 11-12.

3. Plaintiffs' Facial Challenge to Act 23 Is Appropriate Where a Substantial Number of Its Applications are Unconstitutional

Given the great number of adversely affected, constitutionally qualified voters, this facial challenge is appropriate litigation because an as-applied challenge would be insufficient to address the infirmities of Act 23. *Cf. Society Ins. v. LIRC,* 2010 WI 68, ¶27 n.8, 326 Wis.2d 444, 786 N.W.2d 385 (facial challenge proper except "when an as-applied challenge could resolve the case"). Moreover, with a facial challenge, Plaintiffs need not demonstrate that every possible application of the law is unconstitutional, as Justice Roggensack recently affirmed. *In re Termination of Parental Rights to Diana P.*, 2005 WI 32, ¶67, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted) (Neither state nor federal jurisprudence impose a methodology by which the court must determine that every possible statutory application of a statute is unconstitutional.). The U.S. Supreme Court has permitted facial challenges in a wide variety of contexts. *See, e.g., Citizens United v. FEC,* 130 S.Ct. 876, 919 (2010) and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (campaign finance in elections); *Sternberg v. Carhart,* 530 U.S. 914 (2000) (abortion); *City of Boerne v. Flores,* 521 U.S. 507, 532-535 (1997) (sec. 5 of the Fourteenth Amendment); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (free speech); and *Aptheker v. Secretary of State,* 378 U.S. 500 (1964) (right to travel).

Further, federal jurisprudence confirms that this facial challenge is appropriate, where, as here, a substantial number of factual applications of the law would be unconstitutional. *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6 (2008) (facial challenge warrants statute invalidated where "substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep"); *cf. Crawford,* 553

U.S. at 200 (facial challenge inappropriate because Court could not "quantify . . . the magnitude of the burden" on "a small number of voters").

C. Professor Mayer's Estimate of 333,276 Electors Is the Only Reliable Measure of the Number of Voting Eligible Persons Whose Right to Vote Is Impermissibly Burdened by the Photo ID Requirements of Act 23

Three expert witnesses testified at trial, all charged with identifying the same quantity of interest: how many voting eligible residents in Wisconsin lack an Act 23 prescribed photo ID. Of the three, only Plaintiffs' expert, Professor Kenneth Mayer, produced a reliable number. After careful review of data from the GAB and WisDOT, Professor Mayer estimated the quantity of interest as 333,276 constitutionally qualified voters in Wisconsin who would be prohibited from voting because they do not possess one of the Act 23 prescribed photo IDs. (Facts 85)

To determine that 333,276 constitutionally qualified voters in Wisconsin lack an Act 23 ID, Prof. Mayer performed an "exact match" of the GAB's Statewide Voter Registration System (SVRS) voter files and the WisDOT driver license and photo ID files, with specific adjustments. (Facts 86-87; Tr. Apr. 16 P.M. at 49, 63-64; Ex. 6; Ex. 7) Exact match is a well-recognized analytical tool in the field of social science for comparing large databases. In performing his exact match of the databases, Prof. Mayer's first step was to match the driver's license number that voters began providing in 2006 when they registered to vote, pursuant to the Help America Vote Act (HAVA). If a match occurred, Prof. Mayer performed no further effort and considered the files to be a match. He then proceeded to match the remaining records using first name, last name, and date of birth. Prof. Mayer acted conservatively in performing no matching of middle names or middle initials, because the formats for those fields differed between the two files and would have overestimated the number of nonmatches. (Facts 87; Tr. Apr. 16 P.M. at 63-65; Ex. 7 at 3 & n. 1)

Through the exact match, Prof. Mayer produced an estimated 301,727 registrants in the SVRS file who lacked either a Wisconsin driver's license or WisDOT photo ID (nonmatching registrants). This number represented 9.3% of the total registrants. Confirming the validity of this number, Prof. Mayer explained that name discrepancies in databases can cause some nonmatches, but multiple factors confirmed the overall reliability of the number of identified nonmatches in this matching. (Facts 86-89; Ex. 6, 7; Tr. Apr. 16 P.M. at 49, 63-65, 73-74, 80-90; Tr. Apr. 19 at 35) The HAVA checks performed by the Wisconsin GAB from 2008 to 2009, and the Georgia study cited by Prof. Hood identified very similar trends in the license and ID nonpossession rates among voter registrant pools. (Tr. Apr. 19 at 36-37) In addition, two demographic groups – the elderly and Milwaukee County residents – lacked licenses and IDs at higher rates and further validated the results, as they were consistent with previous studies showing that the elderly and minorities have higher nonpossession rates. (Tr. Apr. 19 at 36-38) Prof. Mayer testified that another matching technique called statistical matching could be performed on the databases with algorithms, that may have marginally reduced and accounted for some clerical errors, but such a technique typically requires months to complete and hundreds of hours to perform. (Tr. Apr. 19 at 30) The exact match method is a reliable and well-recognized statistical method to compare large governmental databases and was the most dependable method for reasonably estimating the number of registered voters in the SVRS file who lack DOT driver's licenses and photo IDs. (Tr. Apr. 19 at 28-30)

Although Defendants' expert Prof. Hood and Prof. Mayer performed a similar statistical match of the SVRS and DOT databases, Prof. Hood excluded as nonmatches any voter registrant who possessed a driver's license number. (Ex. 84, Table 2) Prof. Mayer disagreed with this automatic exclusion, because he sorted the DOT database by license number and saw very few

files with incomplete or nonconforming numbers. He also concluded that an alternate explanation was quite plausible, namely, that such registrants no longer possessed a license because it had expired or was not subsequently renewed. (Tr. Apr. 19 at 24-25)

Prof. Mayer was also the only expert to analyze the number of all voting eligible persons lacking any other form of Act 23 prescribed photo ID besides WisDOT driver's licenses and photo IDs. After determining the number of registered voters in the SVRS file without a license or photo ID, Prof. Mayer also analyzed the 946,172 voting eligible persons not in the SVRS database, and conservatively utilized the same 9.3% nonpossession rate as a baseline to determine that 87,747 (9% of 946,172) of such non-registrants lack DOT-issued ID. (Facts 89-90; Ex. 6, 7; Tr. Apr. 16 P.M. at 80-90) Prof. Mayer then estimated the number of all voting eligible persons who might also possess alternate forms of Act 23 prescribed photo IDs, such as student, tribal, and military IDs, ultimately concluding that an estimated 333,276 of voting eligible Wisconsin residents lack any type of Act 23 prescribed photo ID. (Facts 90-91; Ex. 6; Tr. Apr. 16 P.M. at 80-90)

Prior to the WisDOT/SVRS matching, Prof. Mayer did initially attempt to discern from the WisDOT database the number of voting age persons with a driver's license or photo ID. He concluded, after analyzing multiple iterations of the WisDOT database, that the DOT database was flawed because it vastly overstated the number of persons with a driver's license or photo ID by improperly including records of hundreds of thousands of duplicates, decedents and out-of-state migrants. As a result, Prof. Mayer found that the WisDOT database could not be used alone to accurately or reliably measure the frequency of license/ID non-possession for the voting age population in Wisconsin. In determining out-of-state migrants, Prof. Mayer relied upon American Community Survey (ACS) census data which reported that 111,767 Wisconsin

residents migrate from Wisconsin each year. He estimated that 79,019 voting age residents move out of Wisconsin each year, and determined that, at any given time, the WisDOT files include records of approximately 277,000 persons who have moved out of state, but are not identified as such. (Facts 92-93; Ex. 6 at 1-2, Ex. 7 at 2-3, 8-17; Tr. Apr. 16 P.M. at 51-56, 78-79)

Prof. Mayer employed sound social scientific principles and techniques, relied upon by other social scientists. His result – 333,276 – should be adopted by the court as the only reasonable and reliable estimate of the voting eligible persons currently lacking an Act 23 prescribed photo ID.

1. In Contrast to Prof. Mayer's Diligent Investigation, Dr. Morrison's Erroneous Conclusions Were Predicated Upon His Multiple Failures to Conduct Validity Checks on WisDOT Reports and Data.

Unlike Prof. Mayer's probing methodology, Defendants' expert Dr. Peter Morrison failed to question or otherwise validate the accuracy of the DOT's official reports. In doing so, Dr. Morrison accepted without challenge the representations of the DOT database custodians that the driver's license and photo ID files represent a valid record of non-duplicative, living Wisconsin residents.

Prof. Mayer, however, promptly found 215,346 duplicate records with matching license and photo ID numbers, and 314,815 more voting age license and photo ID holders than voting age individuals, confirming his earlier conclusion at the temporary injunction phase that the DOT's official record of voting age license/ID holders exceeds the total voting age population. (Facts 92; Ex. 6 at 1-2, Ex. 7 at 2-3, 8-17; Tr. Apr. 16 P.M. at 51-56, 78-79) Recognizing this impossibility, Prof. Mayer searched for reasonable explanations, discovering that substantial numbers of records of deceased and out-of-state persons remained in the database. His validity checks and sound scientific doubts ultimately prompted the DOT to produce third iteration of the

database with flags denoting deceased, out-of-state, changed names, and a unique customer ID. (Ex. 6 at 1).

In stark contrast, Dr. Morrison blindly accepted the data in the WisDOT files. He failed to consider whether the databases contained duplicate files, assuming that the legal prohibition on simultaneous possession of a driver's license and photo ID automatically precluded the actual existence of a meaningful number of duplicate files. Accordingly, he deleted the unique driver license and photo ID numbers, claiming "I didn't need it . . . I just ignored them." (Tr. Apr. 18 A.M. at 10) In fact, both Prof. Mayer and Prof. Hood relied upon these unique license numbers to identify duplicates. Yet, Dr. Morrison repeated this fundamental error in his analysis of all three iterations of the WisDOT database. (Ex. 40) Dr. Morrison also accepted at face value the representation of the DMV custodian of the database that deceased license and ID holders were promptly removed from the files. In his deposition, Dr. Morrison stated: "I simply took his word for it." (Ex. 37 at 24) Likewise, Dr. Morrison relied on his unfounded supposition that all persons who moved out-of-state were removed from the database. (Tr. Apr. 18 A.M. at 7-8) On cross examination, Dr. Morrison reiterated this unscientific acceptance of the DOT's data: "I don't feel you need to do a validation check on the counts that are published officially by the agency. I take those as being the factual truth." (Tr. Apr. 18 A.M. at 24)

For his initial trial report, Dr. Morrison counted the number of license and ID files in the 2012 database and, like Prof. Mayer, found that the number vastly exceeded the voting age population. However, instead of identifying the source of the error, Dr. Morrison conducted a contorted "backcasting" computation, to adjust the number of licenses and IDs based upon the DMV's 2010 numbers. Backcasting was unnecessary because Dr. Morrison could have easily extrapolated the 2012 voting age population from existing, more reliable 2011 official estimates

of the voting age population. (Tr. Apr. 18 A.M. at 13-14; Ex. 35-36) Compounding his errors, Dr. Morrison failed to conduct a cursory validity check on the accuracy of the DMV's 2010 numbers, which he used as the comparative data for his backcasting computation. This led him to discover for the first time on cross examination that the 2010 DMV numbers that he used exceeded the 2010 voting age population by 128,000. (Tr. Apr. 18 A.M. at 25, 33)

In his analysis reported in his Supplement Trial Report, Dr. Morrison reviewed the third DOT iteration that flagged decedents and out-of-state license holders and projected a final gap of only 17,384 between the number of adult license/ID holders and the voting age population. (Ex. 40) However, this analysis was also flawed for four key reasons.

First, Dr. Morrison again failed to account for 107,673 duplicate records in the DOT database identified by Prof. Mayer (or by Prof. Hood – 109,813 duplicates). (Ex. 84 at 4)

Second, Dr. Morrison clearly did not account for those out-state migrants who still remained unflagged in the DOT's third database iteration. Prof. Mayer reported that this final iteration of the DOT database did flag 89,501 decedents and 111,138 out-state migrants (Ex. 6 at 2). However, Dr. Morrison failed to attribute how many were flagged as out-state migrants, and then added 10,000 out-state migrants within the previous three months. (Tr. Apr. 18 A.M. at 37; Ex. 40) Dr. Morrison assumed that all other out-state migrants turned in their driver's licenses and were duly reported to WisDOT. (Tr. Apr. 18 A.M. at 37) However, census estimates identify nearly 80,000 voting age persons who move out of Wisconsin each year, which, over an 8 year period (the life-span of a driver's license), means approximately 400,000 voting age persons move out-of-state. (Ex. 7 at 15-16) Since the DOT reports that only about 40,000 license and photo ID holders annually move to another state each year, Prof. Mayer concluded that over an 8 year period this would result in an estimated 277,000 DOT license records of persons who

actually moved out-of-state but remained in the DOT database. (Tr. Apr. 19 at 19-20; Ex. 7 at 16)

Third, Dr. Morrison continued to employ his flawed backcasting adjustment based upon the vastly inflated number of licenses and IDs reported in the official 2010 DMV Facts and Figures report. (Ex. 40)

And fourth, Dr. Morrison's outcome determinative approach is apparent from a side-by-side comparison of his three reports. *See* Ex. 40. In his first (April 9th) and third (Supplemental Report) reports, he reported only small gaps between the number of adult license/ID holders and the voting age population, and declined to consider that duplicates and out-state migrants were improperly included in the database as current license/ID holders. (Ex. 40) However, in his Corrected April 9 report, where he reported 110,258 more adult license/ID holders than voting age persons, he stated that "additional adjustments" should be made for duplicates and out-state migrants. (Ex. 40) When the gap closed again to a small number in his third (Supplemental) report, he conveniently disregarded such factors once again.

In sum, Dr. Morrison failed to employ a diligent analytical method to accurately determine the number of Wisconsin voting eligible residents who lack a driver's license or WisDOT photo ID. His failed efforts are partially attributable to the inherent deficiencies in the WisDOT data (which Prof. Mayer identified), but also reflect a thoroughly flawed analytical approach. Rather than correctly questioning and performing validity checks on the WisDOT data, Dr. Morrison deleted important fields, blindly refused to question and validate certain key data, and thereby conducted a cursory and superficial analysis without due respect for the difficulty of his charge. Accordingly, Dr. Morrison's three reports and his trial testimony should

not be credited by the Court as an accurate estimate of the number of voting eligible persons who lack DOT licenses and IDs.

2. Professor Hood's Agnostic Trial Testimony About the Reliability of the SVRS and DOT Match Is Inconsistent with His Published Studies of the Georgia Photo ID Law, His Trial Reports and Prior Testimony

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 file who lack driver's licenses or photo IDs. In his initial trial report, Prof. Hood found 311,690 registered voters, or 9.6% of all registrants, without a driver's license or photo ID, while Prof. Mayer found 301,727. (Ex. 84, Table 1; Ex. 7 at 3) In their supplemental reports based on the DOT database with the additional fields, Prof. Hood found 302,082 registrants without a driver's license or ID, while Prof. Mayer found 301,727. (Ex. 6 at 4; Ex. 85, Table 2)

At trial, however, Prof. Hood questioned the precise reliability of these statistical conclusions, even though his testimony conflicted with his previous reliance on similar statistical matching analyses. Prof. Hood conceded on cross examination that the exact match he employed to produce his trial report was "similar" to the statistical methodology employed by Georgia officials to target an educational campaign to registered voters without driver's licenses and Georgia photo IDs. (Tr. Apr. 18 P.M. at 40, 42-43) In Georgia's exact match of the databases, it identified 6.04% of all registered voters as lacking a driver's license or photo ID. (Ex. 84 at 5 & n. 2; Tr. Apr. 18 P.M. at 39) Prof. Hood relied upon the Georgia exact match data as valid in his manuscripts on the impact of photo ID on 2008 voter turnout in Georgia. (Tr. Apr. 18 P.M. at 40; Tr. Apr. 19 at 32; Ex. 84 at 5) In those manuscripts and his trial reports, Prof. Hood never qualified or questioned the analytical value and reliability of Georgia's exact match of the

databases. In his trial report, Prof. Hood stated that the 9.6% Wisconsin figure was likely "inflated" compared to the 6.04% in the Georgia study, and at his deposition he merely called the 9.6% figure "a little high." (Tr. Apr. 18 P.M. at 41; Ex. 84 at 5) In his trial testimony, Prof. Hood correctly observed – as did Prof. Mayer – that any particular nonmatch could be the result of a name discrepancy rather than a voter in the SVRS file lacking a license or ID, but Prof. Hood further opined only that the true number of nonmatches was likely less than 9.6%. (Tr. Apr. 18 P.M. at 20-21, 41) However, Prof. Hood offered no alternative percentage, and nowhere contends that the percentage of voters without licenses or IDs is substantially less than the percentages both he and Prof. Mayer identified in their reports. While it is a truism that any singular nonmatch could possibly be the result of a name discrepancy, Prof. Hood offered no opinion why the total number of nonmatches that both he and Prof. Mayer identified is unreliable, or why it might be off by anything more than an insubstantial fraction.

The only distinction Prof. Hood identified between the Georgia study and his and Prof. Mayer's exact match was that Georgia had the benefit of Social Security numbers. (Tr. Apr. 18 P.M. at 42-43) Yet, Prof. Hood acknowledged that the GAB HAVA checks in 2008 and 2009 also had the benefit of Social Security numbers and yet identified roughly the same percentage of nonmatches as both he and Prof. Mayer:

Q But there is a governmental agency in the State of Wisconsin that has had Social Security numbers available to itself to conduct the match; isn't that correct?
A Yes.
Q And that's the Government Accountability Board; isn't that correct?
A Yes.
Q In they did what was called the HAVA check; is that correct?
A Yes.
Q And they used Social Security numbers for a match; isn't that right?
A Yes. That was one of the fields that they used as a match.
Q And they went through various stages of matching processes, including the Social Security numbers, including names, first names, last names, dates of birth, and

tried to identify, winnow down the numbers, the numbers of persons in the voter registration pool that didn't make the DOT database, and they wound up with about the same number that you and Professor Mayer wound up with, between 9 and 10 percent; isn't that correct.

A From memory, yes. I don't remember the exact figure. I don't have the report right in front of me.

Q And in your Thousand Words study, nowhere in that study did you dispute or claim that the numbers in the Georgia study were either a little high, a little inflated, or impossible to discern the difference between genuine and nongenuine matches; is that correct?

A That's correct.

(Tr. Apr. 18 P.M. at 43-44)

Professor Hood also performed a final computation after the exact match which Prof. Mayer determined was inappropriate. Prof. Hood excluded 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's license number. (Ex. 85 at 2-4) Prof. Mayer rejected this approach for two reasons: 1) he determined that the unique driver's license numbers in the DOT database were generally accurate (notwithstanding the failure to remove many deceased and migrated license files) and conformed to those in the SVRS file; and 2) the alternative explanation was more plausible, namely, that there were registered voters whose driver's licenses expired and had not subsequently been renewed. (Tr. Apr. 16 P.M. at Tr. 23-25)

Ultimately, the percentage of nonmatches between the databases identified by Profs. Mayer and Hood is consistent with both the GAB's own HAVA checks, and is not far off from even the Georgia study. The results from the exact matching of the two databases reflects a generally reliable estimate of the number of registered voters lacking a driver license or photo ID.

3. Prof. Hood's Discredited Analysis of the Impact of Georgia's Photo ID Law on Voter Turnout Is Fundamentally Flawed and Has Marginal Probative Relevance to the Photo ID Requirement of Act 23

In addition to abandoning reliance on his matching analysis which reliably estimated the number of registered voters lacking a license or photo ID, Professor Hood also opined that his previous writings about Georgia voter turnout and photo ID are relevant to the question whether Wisconsin voters would be less likely to vote under the photo ID requirements of Act 23. (Tr. Apr. 18 P.M. at 49) Prof. Hood's manuscripts about Georgia voter turnout studied a cohort of voters lacking photo ID identified there by the same matching method that he and Prof. Mayer employed here, and he opined that Georgia voter turnout, particularly for black voters, only marginally declined among that cohort. However, Prof. Hood's opinion is flawed for two key reasons.

First, his analysis of the Georgia experience and his opinion of the potential effects of Act 23 fail to account for an important difference in the Georgia and Wisconsin photo ID laws: in Georgia, unlike Wisconsin, voters may cast no-excuse absentee ballots without producing the photo ID which must be presented for in-person voting. O.C.G.A. §§ 21-2-417, 380-381. (Facts 4, 17) Prof. Hood testified that he never identified this distinction:

> Q And nowhere in your expert report or the supplemental report do you address the fact that the photo ID law in Georgia was substantially different because it permitted voters to vote absentee without a voter ID requirement, correct?
> A I don't think I put that in the report.

(Tr. Apr. 18 P.M. at 55) This omission of a key fail-safe voting method in the Georgia photo ID statute replicates the same error that Prof. Hood committed when he testified as an expert for plaintiffs in *Common Cause v. Billups*, Case No. CV-0201-HLM (N.D. Ga. Sept. 6, 2007), causing that court to exclude Prof. Hood's testimony and the "Thousand Words" report because

he "failed to consider whether voters who lacked a Photo ID might be able to use an alternative means of voting, such as voting absentee by mail." (Ex. 86 at 48)

Nevertheless, Prof. Hood's work elsewhere did provide some factual insight into the critical nature of the Georgia fail-safe opportunity for absentee voting. In an article published after the 2008 elections, Prof. Hood wrote:

> In our sample of absentee voters, a third of the African-Americans (30%) compared with about a fifth of white voters (19 %) cited lack of a photo ID as an important reason for voting absentee. Ten out of thirty black respondents in the absentee voting sample, or 30%, indicated that not having proper photo ID was *very important* or *somewhat* important in their decision to vote absentee.

(Ex. 87 at 7 & n. 10) (emphasis in original).

Second, as he himself acknowledged, Prof. Hood's analysis of Georgia turnout focused on black voter turnout in the historic 2008 Presidential election, which represented an unprecedented groundswell in African American participation because of President Barack Obama's historic campaign. In fact, despite seminal voter registration and voter turnout increases nationwide and in Georgia for black voters, the 2008 black voter turnout in Georgia among voters without voter ID still dropped significantly by 5% from the 2004 general election turnout. This depressed turnout occurred even though Georgia voter registration among blacks increased by 14%, from 64% in 2004 to 78% in 2008. For white voters lacking voter ID, voter turnout dropped even more precipitously, from 56% in 2004 to 41% in the 2008 general election when the photo ID requirement was imposed. Apart from the significance of these percentages, in terms of raw numbers of actual voters, the turnout solely among the cohort of voters without photo ID dropped substantially by 24,692 voters, or a drop from 54% to 45%, from 2004 to 2008. (Tr. Apr. 18 P.M. at 46; Ex. 85, Table 3) Even without accounting for the mitigating effect of the photo ID exemption for absentee voting, a significant number of voters without photo ID

were nonetheless deterred and prevented from voting in Georgia's 2008 general election by the state's new photo ID law. Therefore, Georgia's 2008 general election offers no reasonable basis to support Prof. Hood's opinion that the photo ID requirements of Act 23 will have a minimal effect on voter turnout and the right to vote for the hundreds of thousands of constitutionally eligible Wisconsinites who lack an Act 23 prescribed photo ID.

D. Plaintiffs Demonstrate Beyond a Reasonable Doubt That the Act 23 Photo ID Requirements Impose Unreasonable and Unwarranted Costly and Time-Consuming Burdens on the Right to Vote for a Substantial Number of Constitutionally Qualified Wisconsin Electors

The scope of the burden on constitutionally qualified electors created by Act 23 is illustrated by the large number of electors – over 300,000 – who currently lack an Act 23-prescribed photo ID. The severity of that burden is illustrated by the substantial monetary expenses that many electors, especially those who are impoverished, must incur to procure an Act 23-prescribed photo ID, and the unreasonable investments of time many electors incur by planning, traveling, waiting, and dealing with various government agencies to procure the underlying identification documents and the Act 23-prescribed photo ID.

As discussed above, where a voting law unreasonably burdens the exercise of the franchise without sufficient justification, it is tantamount to a denial and is constitutionally infirm. *State ex rel. van Alstine v. Frear, supra,* 142 Wis. at 341, 125 N.W. 561 (voting laws cannot render franchise "exercise so difficult and inconvenient as to amount to a denial"); *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" violates constitution); *NAACP State Conf. v. Cortes*, 591 F.Supp.2d 757, 764 (E.D. Pa. 2008) (at certain point excessive amount of time waiting to vote ceases to be mere inconvenience and "becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise"). Contrary to Defendants' assertion, this case law makes clear that plaintiffs need not demonstrate that the photo ID requirements of Act 23 result in an absolute denial of the right to vote.

Act 23 is the most stringent voter photo ID law in the nation, permitting voting only with one of eight prescribed photo IDs and offering no fail-safe opportunity for a constitutionally qualified elector to vote without such an ID. (Facts 16) For the vast majority of voters lacking an Act 23 prescribed photo ID, the WisDOT photo ID is the only type of photo ID that is reasonably attainable. (Facts 5; Ex. 6 at 4-6) Plaintiffs presented evidence from the brief period that Act 23 was in effect and during a time of almost no electoral activity, of an illustrative cohort of motivated, qualified electors who navigated the post-Act 23 world, attempting to obtain from DMV a photo ID for voting. These voters planned ahead leaving ample time before future elections, traveled many miles, visited various government agencies, and incurred financial expense. The burdens incurred by individual Plaintiffs, affiants, and others like them will undoubtedly be compounded for voters who may attempt to obtain Act 23-prescribed photo ID in the frantic weeks and days leading up to a high-turnout election such as the November 2012 Presidential election. The United States Supreme Court has recognized that such "cumbersome procedures" can unduly burden the right to vote. *Harman v. Forssenius,* 380 U.S. 528, 541 (1965) (six month advance registration to get waiver of poll tax was an unconstitutional burden on the right to vote). In *Harman*, the Court recognized that burdensome, pre-qualifying

regulations which require substantial planning prior to an election can "eliminate from the franchise a substantial number of voters who do not plan so far ahead." *Id.* at 539-40.

The burdens of birth certificates and navigating multiple bureaucracies to obtain a photo ID were not lost on the Missouri Supreme Court in its assessment of the constitutionality of Missouri's photo ID law: "As it will require payment of money and significant advance planning to obtain necessary documentation, the Photo-ID requirement is an 'onerous procedural requirement which effectively handicap[s] exercise of the franchise.'" *Weinschenk v. Missouri,* 203 S.W.3d 201, 215 (Mo. 2006) (quoting *Lane v. Wilson,* 307 U.S. 268, 275 (1939) (invalidating procedural requirements which effectively handicapped exercise of the franchise despite maintaining abstract right to vote)).

For all such voters, and especially for elderly, disabled and low-income voters, the burdens imposed by Act 23 are unreasonable and unnecessary. Notwithstanding the Act's fee exemption for a WisDOT photo ID, voters nonetheless incur monetary costs and unreasonable expenditures of time in many ways, including the costs of birth certificates and the advance planning required to obtain necessary underlying documentation. (*See* Facts 6) Low-income and indigent voters are the least likely to possess a Wisconsin driver's license or U.S. passport and are also the least equipped to bear such costs and navigate the agencies and bureaucracies to procure the underlying documentation required for a WisDOT photo ID. (Facts 5, 35; Ex. 3 at 4) Such low-income voters present situations identical to those in *Weinschenk* 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.

Weinschenk, 203 S.W.3d at 214.

The testimony and affidavits of Plaintiffs and other voters is illustrative that these burdens on constitutionally qualified Wisconsin voters are not speculative or theoretical. Voters generally are not aware of the extensive documentation required by WisDOT and learn upon arrival at a DMV office that obtaining a photo ID requires a certified birth certificate, a Social Security card, and specific proof of residence that they may not possess. (Facts 6) This usually means a trip back home to search for documents, followed by telephone calls and trips to various government offices usually to obtain the Social Security card[2] and birth certificate. Further, birth certificates are not free. Plaintiffs presented testimony from 15 predominantly low-income voters who paid for birth certificates, including ten who paid $20 for a Wisconsin birth certificate[3] and five who paid from $15 to $50 for their out-of-state birth certificates.[4]

The experience of NAACP member, Plaintiff, and registered voter Danettea Lane is instructive. She first went to a DMV office and was denied a photo ID because she lacked a birth certificate. She then went to the Milwaukee County Courthouse where she and her aunt paid $20 for a birth certificate. She made two subsequent, futile return trips to the DMV office, leaving in frustration due to long waiting times. On a third trip, she finally procured her photo ID. Ms. Lane is a low-income mother and head of household for four young children whose $20 payment for a birth certificate and expenditure of time was a substantial and overly burdensome expenditure to exercise the right to vote. (Facts 63-65)

---

[2] Tyreese Jackson, Shirley Eskridge, Sequoia Cole and Ashley Davenport all initially went to DMV offices only to learn that they had to make separate trips to Social Security offices to obtain a Social Security card. (Facts 36, 43-44, 46, 59-60)

[3] Danettea Lane, David Suttles, Clyde Tally, Tyreese Jackson, Sequoia Cole, Joshua Gahan-Lassiter, Shirley Eskridge, Jared Day, Ricky Lewis, and Antonio Williams. (Facts 34, 36, 44, 47, 55, 59, 64-65, 76-77, 82)

[4] Johnnie Garland (Michigan), Carolyn Anderson (Mississippi), Ndidi Brownlee (Mississippi), Jeffery May (Mississippi), and John Wolfe (Virginia/Washington DC). (Facts 39, 41, 56, 66, 84)

Similarly, last November, registered voter Sequoia Cole, whose source of income is a monthly $600 disability benefit, devoted nearly an entire day walking to and from numerous offices to obtain her photo ID: first from her home to the DMV, where she was directed to get her Social Security card, a birth certificate, and medical records proving her identity. She then walked 29 blocks to her doctor's office for copies of medical records that Social Security would require to produce a Social Security card. And later she walked to the Social Security office to get her Social Security card, and from there to the County Courthouse where she paid $20 for her birth certificate. Finally, towards the end of her day, she was able to walk back to DMV and get her photo ID with the newly-acquired documents. (Facts 42-44)

Other low-income voters also felt the sting of financial costs to obtain a photo ID. Plaintiff and registered voter Johnnie Garland subsists on a monthly Social Security check of $678, and paid $28 to the state of Michigan for her birth certificate, a substantial price to pay in order to exercise her right to vote given her limited means. (Facts 56) Plaintiff and constitutionally qualified voter Carolyn Anderson has eight children and subsists on disability benefits for two of her children. In November, Ms. Anderson sent a $17 money order to Mississippi for her birth certificate and, following a corrected application, received it in mid-December when she finally procured her photo ID. (Facts 38-39) Registered voter Ndidi Brownlee, who has no savings and lives check to check, incurred $19.50 in transportation costs and the cost of obtaining her birth certificate from Mississippi. (Facts 41)

For some voters, obtaining a certified birth certificate requires far more than a $20 fee. Plaintiff and registered voter Ricky Lewis is unable to procure an accurate birth certificate without incurring costly litigation expenses to correct the name on his birth certificate. Mr. Lewis is an honorably discharged U.S. Marine who invested approximately 15 hours in his

unsuccessful attempt to obtain his WisDOT photo ID, which he was denied although he produced two forms of photo ID and a formal record of his service in the U.S. Marines. Born in Milwaukee, the Milwaukee County Register of Deeds had no record of his birth, so he sent a $20 money order to the DHS Vital Records Office only to learn from it that the State has no record of his birth as Ricky Lewis. His birth certificate shows his name as Tyrone DeBerry, and his only option to obtain an accurate birth certificate, by which he can then obtain a photo ID for voting, is to commence a civil action in circuit court to correct his birth certificate. (Facts 33-34; *See* Facts 8-11)

Registered voter Ruthelle Frank faces a similar situation. Having only a baptismal certificate and never a birth certificate, she sought a birth certificate so she could get a photo ID for voting. She was advised by the State Vital Records Office that the name on her birth certificate is misspelled and she must commence an action in circuit court to correct it. (*See* Facts 8-11) Ms. Frank is an 84 year-old member of the Brokaw Village Board who has voted in every election since 1948, and correctly maintains that her right to vote should not be contingent upon the payment of fees or costs to obtain a birth certificate. (Facts 30-32)

Ricky Lewis and Ruthelle Frank demonstrate some of the more unreasonable and arbitrary burdens imposed by Act 23, which contains no provision to permit voters like them to exercise their constitutional right to vote.[5] They are likely not unique. While their circumstances underscore the extreme arbitrariness of Act 23, in actuality, scores of thousands of other voters will incur less extreme, but nonetheless substantial burdens, illustrating the disenfranchising impact of Act 23.

[5] In addition to persons like Mr. Lewis and Ms.Frank who cannot obtain correct birth certificates, there almost certainly also are Wisconsin electors who will be unable to procure any certified birth certificate because no official record exists of their birth, including for example, persons birthed at home by lay midwives in remote rural areas.

Some voters also incur additional expenditures of time and transportation costs to get the Social Security cards required by DMV. Jared Day, Christine Peel (Cheryl Edwards), Tyreese Jackson and Plaintiff Danettea Lane went to the Social Security offices and were given a print-out documenting their Social Security number, only to have the print-out rejected by the DMV office which insisted upon the actual Social Security card. (Facts 6, 47-49, 53, 59-60, 64)

Electors also incur sundry other insidious obstacles to getting a photo ID. For many, there are unreasonable amounts of time spent in a carousel of government and other offices trying to produce the correct combination of documentation required by the DMV. For others, there are expenses for replacement driver's licenses and student transcripts, transportation costs, lost wages, and other incidental expenses. For example, registered voters Lyterrell Stokes and Asia Jones both lost wages when they had to take time off of work to obtain their WisDOT photo IDs. (Facts 61, 75) Act 23 also imposes some unique burdens and costs upon drivers who lose or misplace their actual driver's license, and drivers seeking to reinstate their revoked or suspended licenses. Registered voters like Anthony Fumbanks, who lose their driver's license and seek to obtain a photo ID to vote are required to order a duplicate driver's license card and pay the $14, even if the only reason the voter wants the card is to vote. (Facts 54) Voters seeking to renew, duplicate, or reissue their Wisconsin driver's license or state ID card following suspension or revocation of their license must provide both proof of name and date of birth and proof of residency. WIS. ADMIN. CODE SEC. TRANS. §102.15(2)(c). Accordingly, registered voter and Plaintiff Antonio Williams and registered voter Speciall Simmons were required to produce birth certificates after their license and their cards were lost or misplaced. Neither Williams nor Simmons could afford to reinstate their driver's licenses, so they opted to get a WisDOT photo ID, but were compelled to produce birth certificates and Social Security cards. Mr. Williams had

to go to the Milwaukee County Register of Deeds and pay $20 for his birth certificate, a process that consumed seven hours of time and $9 in bus fare, in addition to the fee for the birth certificate. Ms. Simmons had to have a birth certificate mailed from Florida, a process which took two weeks. (Facts 74, 82)

While most voters seeking a WisDOT photo ID are compelled to spend several hours in travel and waiting time, there are also many instances where voters spend far more hours, spread out over days and weeks, traveling to and from DMV offices and other government agencies via public transit, taxis and other forms of paid transportation, or arranging transportation from family or friends. Plaintiff and registered voter Mary McClintock, who is disabled, had to make three separate paratransit trips to Milwaukee's downtown DMV office, and in total spent 9 hours to obtain a photo ID to vote. (Ex. 67-69) Plaintiff and registered voter Joel Torres, unemployed when he tried to obtain his photo ID, made six visits to various government offices over a one month period, and spent $3 to obtain a student transcript as proof of residence, solely to satisfy the heightened proof of residency under Act 23 to obtain his WisDOT photo ID to vote. DMV approved his photo ID application only after he and his mother complained to the City of Milwaukee Election Commission. (Facts 78-80) Registered voter Willie Watson, who is on a fixed income of $683 per month, spent at least four hours arranging transportation for two trips to the DMV. (Facts 81) Constitutionally qualified voter Ashley Davenport spent 6 hours going back and forth to the DMV and Social Security offices, without successfully obtaining her WisDOT photo ID. (Facts 46) Constitutionally qualified voter Kenya Jones paid $9 for bus fare and spent over 8 hours procuring her WisDOT photo ID to vote. (Facts 62) Registered voter Linda Newman, whose monthly SSI benefit of $668 is her sole source of income, paid $4.50 for bus fare and spent 3 hours to procure her photo ID. (Facts 70) Likewise, constitutionally

qualified voters Jerlean Little, Martinez Edwards, and Christine Peel, and registered voters Kristen Green, Brittany Cramer, Malika Peoples and poll worker Priscilla Anderson, all incurred transportation expenses and investments of time wholly disproportionate to the usual and ordinary burdens of voting in attempting to procure a photo ID just so they could vote in upcoming elections. (Facts 37, 40, 45, 51-53, 57-58, 71-72) Some voters, including Priscilla Anderson, Kristen Green, Mary McClintock, Jennifer Platt and John Wolfe, report having arrived at a DMV office after long trips there only to find each had to return another day because the office was closed, opening late or its computers were not working. (Facts 40, 58, 69, 73, 83)

In response to Plaintiffs' evidence from 33 voters, Defendants produced zero evidence to rebut the unassailable facts that obtaining a WisDOT photo ID for many constitutionally qualified voters is a costly, sometimes confusing, frustrating and unreasonably time-consuming process. Defendants failed to demonstrate any quantum of proof that voters seeking a WisDOT photo ID to vote can obtain one without cost or expenditures of unreasonable amounts of time.

The burdens imposed by Act 23 are substantial, unreasonable, and onerous. If implemented, a photo ID requirement to vote will deter and bar from voting thousands of constitutionally qualified electors, and especially those low-income and impoverished voters who lack a form of ID enabling them to vote.

E. Defendants Produced No Evidence Disputing Plaintiffs' Claim That the Act 23 Photo ID Requirements Are Not Narrowly Tailored to Satisfy the State's Legitimate Interest in Preventing Voter Fraud

The putative purpose of the photo ID requirements of Act 23 is to prevent voter impersonation fraud at the polls. However, over recent election cycles, despite unsubstantiated complaints about vote fraud, official local and state investigations 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.

Prof. Mayer's report and trial testimony addressed recent reports, official inquiries, and prosecutions related to vote fraud. Intensive investigations were conducted by the Milwaukee Police Department, by a 2004 Task Force convened by Milwaukee Mayor Tom Barrett, and by the State Attorney General's 2008 Task Force on Electoral Integrity. These investigations identified no confirmed cases of voter impersonation of the type that would be prevented by the photo ID requirement of Act 23. (Facts 95-103) After the 2008 elections, the Attorney General's Task Force investigated allegations of vote fraud and, out of approximately 3 million votes cast, filed charges against 20 individuals. Two cases involved a charge of double voting by electors who voted absentee and then cast ballots in person at the polls. Both of those persons were acquitted. Another case involved miscellaneous absentee voting fraud, where a husband cast an absentee ballot for his deceased wife. He paid a $500 fine. Eleven cases involved voters who were ineligible felons. Six cases involved false voter registrations, but did not involve the false registrants attempting to vote. (Facts 102-103, 105, 108, 114, 117, 122) Prof. Mayer's persuasive and unrebutted testimony ascertained that the photo ID requirement of Act 23 would not have prevented or deterred any of the twenty types of fraud uncovered and prosecuted by the 2008 Task Force. (Facts 94, 104, 106-107, 109-113, 115-116, 118)

The Act 23 photo ID requirements will not prevent voting by ineligible felons, nor will it prevent attempted multiple voting. (Facts 99, 104, 106-107, 109-113) The photo ID requirements might prevent persons who engage in false voter registration from actually voting, but there is no record in any of the investigative task forces of such persons actually attempting to vote. (Facts 101, 117) Impersonation of another elector is the only type of fraud which Act 23's photo ID

requirement can prevent, and that type of unlawful election activity has not been demonstrated. (Facts 119-122)

The circumstances surrounding the State's asserted interest in electoral integrity is remarkably similar to the facts underlying Missouri's photo ID law, where the *Weinschenk* court found that the photo ID requirement was clearly not tailored to combat the actual fraud identified and imposed an undue burden on Missouri voters:

> the only type of voter fraud that the Photo ID requirement prevents is in-person voter impersonation fraud at the polling place. It does not address absentee voting fraud or fraud in registration. . . . The Photo ID requirement could only prevent a particular type of voter fraud that the record does not show is occurring in Missouri, yet it would place a heavy burden on the free exercise of the franchise for many citizens. . . . .

Weinschenk, 203 S.W.3d at 217-218. In short, the issue of whether a voting law is sufficiently narrowly tailored requires the court to examine "what kinds of fraud in voting have been shown to exist and what kinds of fraud in voting the Photo-ID Requirement will ameliorate." *Id.* (citing *Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n.,* 946 S.W.2d 199, 202 (Mo. 1997). Similarly, Act 23 would not prevent the types of fraud demonstrated by state and local investigations – absentee ballot fraud, voter registration fraud, voter intimidation, and voting by felons.

Even if the need for some form of photo ID were substantiated, Act 23 is not narrowly tailored. The eight prescribed Act 23 IDs are unreasonably limited and preclude voting using otherwise reliable photo IDs possessed by many voters, such as: government or private employer IDs; VA IDs; medical or public assistance IDs issued by state or local governments; and other photo IDs issued by local governments and state agencies. *See, e.g.,* Facts 19-29.

Plaintiffs recognize that the State might also have a legitimate interest in addressing perceptions of voter fraud. The Cooperative Congressional Election Study conducted a

nationwide survey of 40,000 respondents during the 2006 and 2008 elections and found little likelihood that perception of vote fraud and ID laws have an appreciable connection to voter turnout:

> ID laws will have little or no effect on the confidence in the electoral system or the belief in the incidence of fraud. Those beliefs, wherever they come from, are not different when a stricter ID law is in place and enforced than when less invasive voter-authentication methods are used. . . . People may think that voter fraud occurs often, but that belief appears disconnected from the likelihood that someone engages with politics and votes.

Ex. 3 at 15-16. (Facts 123-125)

In *Weinschenk,* the court explained the dangers of permitting mere perception of vote fraud to justify severe restrictions on the right to vote:

> While the State does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement. Perceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights. Moreover, the public could believe that the new law has prevented fraud in Missouri elections, whereas the type of fraud that has been shown to exist - fraud in registration and in absentee ballots - is not addressed by the Photo-ID Requirement and may still need resolution. The protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.

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, Sec. 1 for 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.

III. The Unreasonable and Onerous Burdens Imposed on Voters by Act 23 Violate Art. I, Sec. 1 of the Wisconsin Constitution

Act 23 violates Art. I, Sec. 1 by denying the substantive due process rights of Wisconsin voters and by creating a class of electors whose voting rights are severely restricted, without serving, or being narrowly tailored to serve, a compelling state interest. "Substantive due process forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.'" *Town of Rhine v. Bizzell,* 2008 WI 76, ¶28, 311 Wis.2d 1, 751 N.W.2d 780 (citations omitted). The guarantee of equal protection is implicated when statutes provide for different treatment of persons who are "similarly situated." *Wisconsin Professional Police Ass'n v. Lightbourn,* 2001 WI 59, ¶221, 243 Wis.2d 512, 627 N.W.2d 807. Although substantive due process and equal protection may have different implications, "[t]he analysis under both the due process and equal protection clauses is largely the same." *State v. Quintana,* 2008 WI 33, ¶78, 308 Wis.2d 615, 748 N.W.2d 447.

Act 23 unreasonably burdens, abridges, and denies the voting rights of hundreds of thousands of constitutionally qualified electors in the State lacking a prescribed photo ID, in a manner not narrowly drawn or otherwise designed to advance the State's legitimate interest in the prevention of voter fraud. Act 23 also imposes unreasonable and discriminatory restrictions upon the fundamental right of that class of voters lacking Act-23 acceptable photo ID to freely exercise the franchise. Act 23 creates a classification amongst all qualified voters based upon possession of certain types of photo IDs and strips those voters lacking a prescribed ID of their fundamental right to vote without being appropriately tailored to serve the state's legitimate interest in electoral integrity and the prevention of voter fraud. As such, Act 23 violates Art. I, Sec. 1 of the Wisconsin Constitution.

CONCLUSION

For all of the facts and reasons set forth above and in Plaintiffs' Proposed Statement of Facts, Plaintiffs respectfully request that the Court declare the photo ID requirement of Act 23 set forth in §§1-2, 4, 16, 18-19, 45, 47-48, 50, 52-54, 56, 59, 61-64, 66, 68-71, 79, 83-84, 86-93, 95, 101, 103, 144-146, unconstitutional because it unreasonably and onerously burdens the rights guaranteed under Art. I, Sec. 1 and Art. III, Sec. 1 of the Wisconsin Constitution, and thereby order that Defendants are permanently enjoined from implementing and enforcing such sections of Act 23.

Respectfully submitted,

May 16, 2012

HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs

By: 

Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181
Jeffrey P. Sweetland, SBN 1001737

222 East Erie St., Suite 210
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
rsaks@hq-law.com
jsweetland@hq-law.com
msumara@hq-law.com