THE NAACP/VOCES CHALLENGE TO THE PHOTO ID REQUIREMENTS OF ACT 23

Presented by:

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Milwaukee Branch of the NAACP, et al. v. Walker et al.,
Dane County Circuit Court Case No. 11CV5492

I. Constitutional and Statutory Guarantees of the Right-to-Vote:

A. U.S. Constitution:

1. Fundamental Preservative Right: Right to vote is recognized in Supreme Court jurisprudence as a fundamental right preservative of all other rights protected by the U.S. Constitution. *Burdick v. Takushi,* 504 U.S. 428 (1992), *Reynolds v. Sims,* 377 U.S. 533 (1964), *Yick Wo v. Hopkins,* 188 U.S. 356 (1886).

2. The right to vote is explicitly protected in the U.S. Constitution by the 14th, 15th, 19th, 24th, and 26th amendments, only such that the franchise cannot be denied or abridged by federal or state requirements which impose discriminatory qualifications to exercise the franchise.

3. 14th Amendment: Post Civil-War amendment (1868)- Sec. 1 provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” (guaranteeing full and whole citizenship to former slaves -- no longer viewed as 3/5 person and overriding *Dred Scott v. Sandford* which denied privileges and immunities of citizenship to African-Americans.

4. 15th Amendment: (1869) provided that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

5. 19th Amendment (1920) guaranteed that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

6. 24th Amendment: (1964) prohibits denial of right to vote for "reason of failure to pay any poll tax or other tax" enforced upon states by *Harper v. Va. Bd. of Elections,* 383 U.S. 663 (1966).

7. Landmark U.S. Constitutional Voting Rights Decisions:

a. *Smith v. Allwright,* 321 U.S. 649 (1944): overturned Democratic Party's use of all-white primaries in Texas and other states as violative of right to vote under the 15th Amendment.

b. *Gomillion v. Lightfoot,* 364 U.S. 339 (1960): outlawed gerrymandering designed to dilute and disenfranchise black voters as violative of the 15th amendment, but not as equal protection violation.

c. *Baker v. Carr,* 369 U.S. 182 (1962): Court strikes down state legislative apportionment scheme for first time under 14th Amendment Equal Protection Clause and unlawful dilution of African-American vote via population of districts, establishing one-man one-vote principle.

d. *Gray v. Sanders,* 372 U.S. 368 (1963): guarantees equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state.

e. *Harper v Virginia Bd. of Elections,* 383 U.S. 663 (1966): prohibits poll tax of $1.50 as invidious discrimination and state "violates the Equal Protection Clause of the 14th Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."

8. State Regulation of Voting: regulation of right to vote for reasons not prohibited under U.S. Constitution (e.g., felon status, voter registration requirements, ballot access) which do not excessively or severely burden a substantial number of voters.

9. Sliding Scale Analysis: *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invaliding deadline for filing candidate petitions of non-major party candidates), *Burdick v. Takushi,* 504 U.S. 428 (1992) (upholding Hawaii prohibition on write-in voting) adopt "sliding scale" or "balancing" approach and analysis for laws representing reasonable electoral regulatory interests which are nonsevere, nondiscriminatory restrictions while strict scrutiny reserved for laws which severely restrict franchise for substantial number of voters.

10. Balancing Approach: Regardless of severity of burden, it must be justified by relevant and legitimate state interests. *Norman v. Reed,* 502 U.S. 279 (1992) (disallowing restriction on party access to Illinois ballot as unjustified by significant state interest).

B. Voting Rights Act of 1965, 42 U.S.C. §§ 1973 et seq.:

1. Purpose: Outlawed discriminatory voting practices such as literacy tests, poll taxes, etc. and designed to provide statutory lynchpin of enforcement of 15th Amendment.

2. Section 2: prohibiting states from imposing any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... to deny or abridge the right of any citizen of the United States to vote on account of race or color."

3. Section 5: requires that U.S. DOJ must "preclear" any attempt by covered southern states to change "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting..." and prove that the change does not have effect of discriminating based on race or color, or in some cases against a language minority group.

4. 1982 Amendments: Congress overturned intent requirement created in *City of Mobile v. Bolden,* and imposes a results test to prove a Section 2 violation under a "totality of the circumstance of the local electoral process," the standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process.

a. Senate 7-Factor Test: to prove a violation, the Senate identified seven factors for courts to apply in determining whether under the totality of circumstances, the challenged practice results in denial of an equal opportunity to participate in the electoral process:

1. the history of official voting-related discrimination in the state or political subdivision;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;

4. the exclusion of members of the minority group from candidate slating processes;

5. the extent to which minority group members bear the effects of discrimination in areas such as education,

employment, and health, which hinder their ability to participate effectively in the political process;

6. the use of overt or subtle racial appeals in political campaigns; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

5. Landmark Voting Rights Act Cases:

a. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) and *Katzenbach v. Morgan,* 384 U.S. 641 (1966): approved Sec. 5 preclearance provisions adopted by Congress as authorized by the 14th and 15th amendments.

b. *City of Mobile v. Bolden*, 446 U.S. 55 (1980): imposing intent requirement that vote dilution challenge to electoral districts must prove that legislature was motivated by racial animus in creating challenged electoral procedure or districts.

c. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986): the first case to apply and construe the 1982 amendments to Sec. 2 of the VRA, the Court upholds the results test adopted by Congress and holds that the "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."

d. *Shaw v Reno*, 509 U.S. 630 (1993): reversing efforts to create majority-minority congressional districts and subjecting “dramatically irregular” congressional district to strict scrutiny in challenge by white voters absent sufficient race-neutral explanations for its borders; district was upheld on remand to district court, but ultimately struck down again in *Shaw v. Hunt,* 517 U.S. 899 (1996), as not warranted under VRA.

e. *Northwest Austin Municipal Utility District No. 1 v Holder,* 557 U.S. 193 (2009): Supreme Court avoids deciding validity of section 5 of Voting Rights Act; *Shelby County v. Holder,* 679 F.3d 848 (D.C. Cir. 2012).

C. Wisconsin Constitution:

1. Article III, Sec. 1: "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."

2. Right to Vote as Fundamental Right:

a. "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 (1910).

b. "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 (1949), quoted in *McNally v. Tollander,* 100 Wis. 2d 490, 501 (1981).

3. *State ex rel. Wood v. Baker,* 38 Wis. 71 (1875): court upholds registry law requiring electors to register and for officials to prepare registry lists, but court requires votes of otherwise qualified electors to be counted despite the failure to be on the registry list.

4. *Dells v. Kennedy,* 49 Wis. 555 (1880): Court distinguishes legislature's authority to pass voter registration and residency law with requirements that may be impractical or impossible for voters to meet, striking down a registration requirement absolutely prohibiting unregistered elector from voting unless voter became qualified after close of registration:

> "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 named in the constitution." *Id.* at 557-558.

5. Wisconsin Rule of Reasonableness: Numerous Wisconsin cases establish principle that unreasonable regulations of the voting process which impose unreasonable burdens upon voters can be the functional equivalent of disenfranchisement:

a. “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 (1922) (quoting *State ex rel. Van Alstine v. Frear,* 142 Wis. 320 (1910); *State ex rel. McGrael v. Phelps,*144 Wis. 1 (1910).

b. *State ex rel. Frederick v. Zimmerman,* 254 Wis. 600, 614: legislative enactments which impair the right to vote are subject to test that the legislation “must be reasonable.”

II. The Burden Upon the Right to Vote Imposed by the Photo ID Requirements of Act 23

A. Scope of Burden: Plaintiffs’ expert Prof. Kenneth Mayer performed an exact computer match of the WisDOT database with the State’s database of registered voters to determine that over 333, 276 voters in the voter database lack either a Wisconsin driver’s license or WisDOT-issued photo ID.

B. Most Stringent Photo ID Law in Nation:

1. Only eight forms of prescribed photo ID are permitted:
   a. Wisconsin driver’s license;
   b. WisDOT photo ID;
   c. U.S. military service ID;
   d. U.S. passport;
   e. U.S. certificate of naturalization;
   f. unexpired WisDOT driving or ID card receipt;
   g. tribal ID; and
   h. unexpired student ID meeting various requirements.

2. Only reasonable form of ID which can be procured for most voters lacking one of eight prescribed forms of ID is a WisDOT photo ID.

3. WisDOT photo ID requires:
   a. proof of residence (e.g., utility bill, bank statement, etc.);
   b. social security card (original, non-laminated);
   c. birth certificate.

4. No Fail-Safe Bailouts: Act 23 contains no fail-safe mechanism for voters who lack a photo ID to vote via affidavit, as in Indiana, which allows voters without photo ID to vote after completing an affidavit that they are

indigent, and Idaho, Alabama, Delaware, Louisiana, Michigan, North Dakota, South Dakota and Texas which permit a voter without photo ID to vote upon execution of an affidavit of identity.

5. Limited Forms of ID: Act 23 prohibits many reasonable and reliable types of photo ID such as:

a. Veterans' Photo IDs from the Department of Veterans Affairs;
b. Employment Photo IDs issued by municipal, state, or federal government, as in Georgia or Kansas;
c. Photo IDs issued by financial institutions, banks, retirement centers, neighborhood associations as in Florida;
d. Driver's licenses issued by any state as in Kansas and Tennessee;
e. Voter registration cards as in Alabama, Georgia, South Carolina, Texas and Virginia;
f. Government-issued medical ID cards as in Florida, Kansas and Rhode Island;
g. Public assistance cards as in Florida and Kansas;
h. Use of social security card to prove identity as in Alabama, Connecticut, Kentucky, Ohio, Rhode Island and Virginia

6. Absentee Voting: Wisconsin requires photo ID for voting, unlike Georgia, Florida, Hawaii, Idaho, Indiana, Louisiana, Michigan, Pennsylvania and Tennessee.

C. The Actual Burdens of Obtaining a Photo ID – Costs and Cumbersome Time-Consuming Trips to Multiple Government Agencies:

1. Costs: Wisconsin birth certificates cost $20; out-of-state may be more; especially for low-income electors the expenditure of $20 is a substantial burden.

Illustrative Evidentiary Examples:

a. Plaintiff Danettea Lane: low-income mother and head of household for four young children on monthly income of $1200 in W-2 benefits and SSI to eldest son, $20 expenditure to obtain birth certificate was significant burden;

b. Plaintiff Johnnie Garland: only source of income is SSDI monthly check of $678 which pays all her rent, food, utilities and other necessities, paid $28 to Michigan for birth certificate in order to get photo ID to vote;

c. Witness Sequoia Cole: sole income is SSDI monthly benefit of $600 incurred burdensome payment of $20 for birth certificate;

d. Plaintiff Carolyn Anderson: sole source of income is monthly disability benefits of $1248 for two of her eight children in which she is head of household;

e. Plaintiff Ricky Lewis: honorably discharged U.S. Marine who now relies solely on monthly veteran's pension of $1021.

2. Cumbersome Time-Consuming Procedures: most voters not aware of requirements and make multiple trips to various government agencies to collect the required documentation, frequently spending dozens of hours just to obtain photo ID. *Harman v. Forssenius,* 380 U.S. 528, 541 (1965) (cumbersome time-consuming procedures such a six month advance registration for waiver of poll tax is unconstitutional burden on right-to-vote); *Lane v. Wilson,* 307 U.S. 268, 275 (1939) (invalidating procedural requirements which handicap exercise of right to vote despite maintaining abstract right to vote).

Illustrative Examples:

a. Plaintiff Danettea Lane made two unsuccessful trips to DMV and left after waiting in line two hours each time; trips to DMV and courthouse consumed approximately ten hours to get her photo ID;

b. Plaintiff Mary McClintock is wheelchair-bound elector who made several paratransit trips to downtown DMV to obtain a photo ID spending approximately 9 hours in process and a total of $32;

c. Affiant Jared Day invested total of 17 hours in 9 different trips to various government offices;

d. Witness Sequoia Cole walked from her west side home to the downtown DMV office, to a medical office for records, to the social security office, the Milwaukee County courthouse and back to the DMV for total of approximately 6 hours;

e. Plaintiff Ricky Lewis, despite producing a Department of Veterans Affairs photo ID and a Milwaukee County photo ID, denied by DMV and then shuttled between DMV and social security offices, and then told by county register of deeds that there was no record of his birth in Milwaukee County; then sent $20 to State Registrar for birth certificate and received birth certificate for a "Tyrone DeBerry" where Tyrone was his middle name and

DeBerry was mother's maiden name; told to file costly civil court action to amend his birth certificate in order to get a photo ID.

III. Measuring and Assessing the State's Legitimate Interest in Combating Fraud

A. Prevention of Fraud: Putative legislative objective of photo ID requirement of Act 23.

B. Defendants made no presentation of any evidence of actual vote fraud in Wisconsin or its imminence in any elections.

C. Mayer Reports and Testimony:

1. No confirmed cases of voter impersonation that would be prevented by photo ID requirement of Act 23;

2. Official investigations: MPD, Task Force convened by Mayor Barrett and State Attorney General's 2008 Task Force on Electoral Integrity;

3. Out of 3 million votes cast, AG filed charges against 20 individuals:
   a. 2 involved double voting by absentee voters who subsequently cast ballots at polls and were subsequently acquitted;
   b. 11 involved ineligible felons voting;
   c. 6 involved false procurement of voter registrants who did not vote;
   d. 1 involved where husband cast absentee ballot for deceased wife.

4. None of AG cases would have been prevented by photo ID requirement.

D. Perceptions of Voter Fraud: CCES survey of 40,000 responding voters showed photo ID has no connection with voter confidence.

E. "Perceptions are malleable . . . [and] protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." *Weinschenk v. Missouri,* 203 S.W.3rd 201, 218, 219 (Mo. 2006), quoted in Order at 17.

IV. Key Legal Issues in the Case:

A. Justiciability:

1. Individual Plaintiffs: Defendants argued that individual plaintiffs lack standing because they have either obtained photo IDs and can now vote, or could if they further pursued it, contrary to *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 than requires photo identification to vote in

person.") and *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966) (ability to pay poll tax did not divest voter of standing to challenge poll tax).

2. Organizational Plaintiffs:

   a. Organizational Standing: where organization incurs diversion of resources, such as where voter registration and GOTV efforts diverted to assist voters obtain photo ID, both NAACP and Voces had organizational standing. *Florida State Conf. of NAACP v. Browning,* 522 F.3d 1153, 1165 (11th Cir. 2008) ("organization has standing to sue in its own behalf if the defendants' illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.");

   b. Associational Standing: where members: i) have standing to sue in own right; ii) interests it seeks to protect are germane to organization's purpose; and iii) neither the claim asserted nor relief requested require participation of individual members in lawsuit. *Hunt v. Washington Apple Adver. Comm'n.,* 432 U.S. 333, 343 (1977).

B. Level of Review:

1. "Heightened" level of scrutiny is appropriate.

2. Defendants characterize photo ID as merely a regulation within the province of legislature requiring judicial deference.

3. Harmonizing federal and state standards: The "reasonableness standard" articulated by various Wisconsin cases is similar to the *Anderson/Burdick* sliding scale approach and balancing in current federal jurisprudence.

4. Circuit Court holding: "court must look not only to see if the law speaks to a legitimate purpose but must go further, as the Wisconsin Supreme Court has done in the past, to consider both the benefits and the burdens of the law." Order at 17.

C. Distinguishing *Crawford v Marion County:*

1. Evidentiary Record: Court found that record in *Crawford* said "virtually nothing" about the difficulties in obtaining photo ID and that plaintiffs' evidentiary showing was "utterly incredible and unreliable." *Crawford,* 555 U.S. at 200-201. Plaintiffs' showing here was "substantial and entirely credible." Order at 19.

2. Fail Safe: *Crawford* held that fail-safe of affidavit of indigency significantly mitigated impact of photo ID law upon elderly and indigent.

3. Claim Rests on Wisconsin, Not U.S. Constitution.

D. Why a Facial Challenge to Act 23 is Appropriate:

1. Facial Challenge appropriate where substantial number of factual applications of photo ID law is unconstitutional. *Washington State Grange v. Washington Republican Party,* 552 U.S. 442, 449 n. 6 (2008).

2. Over 300,000 qualified electors constitute substantial number of voters severely burdened by requirement of Act 23.

3. Unlike *Crawford* where court could not “quantify the magnitude of the burden” on a “small number of voters.”

4. Severity of burdens demonstrated by illustrative cohort of voters in the 33 witnesses and affiants who testified to the costs and time-consuming burdens in obtaining photo ID.