STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP1652

Dane County Circuit Court Case No. 11CV5492

MILWAUKEE BRANCH OF THE NAACP, et al.,
Plaintiffs-Respondents,

v.

SCOTT WALKER, et al.,
Defendants-Appellants-Petitioners.

RESPONSE OF PLAINTIFFS-RESPONDENTS IN OPPOSITION TO DEFENDANTS-APPELLANTS-PETITIONERS' PETITION TO BYPASS COURT OF APPEALS AND MOTION FOR CONSOLIDATION

September 4, 2012

PO Box 442
Milwaukee, WI 53201-0442
414-271-8650
414-271-8442 Fax
rsaks@hq-law.com
msumara@hq-law.com

HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs-Respondents
Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181

TABLE OF CONTENTS

TABLE OF CASES

INTRODUCTION

Plaintiffs-Respondents hereby oppose the Petition to Bypass the Court of Appeals, District II, and the Motion for Consolidation of this appeal with the appeal of *League of Women Voters of Wis. Educ. Network, Inc. v. Walker,* no. 2012AP584 (District IV) and Petitioners' efforts to expedite this appeal hurriedly to allow for implementation of the photo ID requirement of Act 23 at the General Election on November 6th.

ARGUMENT

I. The Petition to Bypass Should Be Denied Because Review by the Court of Appeals is Appropriate to Address the Asserted Substantial Evidentiary Errors by the Circuit Court, to Provide Useful Analysis to This Court and Because Expediting This Appeal Is Contrary to the Public Interest

There being no statutory standard by which to determine the merits of a petition to bypass the Court of Appeals, Petitioners address the various criteria enumerated in Wis. Stat. §809.62(1r) which the Court may consider in granting review. Without question, this matter does present a "novel" question, "the resolution of which will have statewide impact." Wis. Stat. §809.62(1r)(c)2. However, the more immediate consideration is whether intermediate appellate review of this matter is appropriate and would be beneficial. Whether this case eventually will be resolved by this Court because of the very "novel" question of the constitutionality of photo ID certainly does not preclude the benefits of and the propriety of intermediate appellate review, as discussed below.

A. The Court of Appeals Provides a Valuable Error Correcting Role Where, as Here, Petitioners Raise Substantial Fact Questions

This appeal is well within the inherent, error correcting function of the Court of Appeals and should be briefed in and heard by the Court of Appeals. Bypass would not benefit this Court and it should deny the Petition to Bypass for the following reasons.

This Court should deny the Petition because this appeal rests largely on Petitioners' claims of reversible error by the Circuit Court in several substantial evidentiary areas, all regarding expert and lay evidence. Petitioners assert that the Circuit Court erred in its acceptance of and consideration of the expert testimony and expert reports presented at trial and by "accepting the statistical conclusions of Plaintiffs' expert witness." (Petitioners' Motion to Stay Permanent Injunction at 10.) Petitioners also assert that the Circuit Court erred in its consideration of and factual findings regarding "the anecdotal testimony of the individual fact witnesses. " (*Id.*) Petitioners assert that in both of these evidentiary areas, the Circuit Court erred in factually finding that the photo ID requirement of Act 23 rendered the exercise of the franchise more difficult for otherwise qualified voters. (*Id.*) Further, Petitioners challenge the Circuit Court's consideration of and conclusions regarding the legislature's reasons supporting the enactment of Act 23. (*Id.* at 10-11.)

Assessing the Circuit Court's decision-making regarding such evidentiary matters is fundamentally a matter for an error-correcting court and properly within the province of the Court of Appeals. The judiciary has long recognized that the "primary function" of the Court of Appeals "is error correcting." *Cook v. Cook,* 208 Wis. 2d 166, 188, 560 N.W.2d 246, 255 (1997). This Court acknowledged in *Cook,* also, that the Court of Appeals may also perform a second function of "law defining and law development," stating: "[U]nder some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides." *Id.*

In urging that this Court take jurisdiction of this appeal by bypass of the Court of Appeals, Petitioners ignore the inherent function of the Court of Appeals in error correcting and addressing fact questions. Petitioners also ignore the potential value to this Court of the review by intermediate appellate judges of these very issues. Even in cases where this Court exercises *de novo* review over purely questions of law, this Court has noted that it "benefit[s] from the analyses of the circuit court and the court of appeals." *Blum v. 1st Auto & Casualty Ins. Co.,* 2010 WI 78, ¶14, 326 Wis. 2d 729, 738, 786 N.W.2d 78, 83; *Hull v. State Farm Mut. Auto. Ins. Co.,* 222 Wis. 2d 627, 636, 586 N.W.2d 863, 866 (1998).

B. The Section 809.62(1r)(c) Criteria: Appellate Review in This Case Does Not Require New Doctrinal Development, but Involves the Application of Well-Settled Principles to Particular Facts

In further support of their petition, Petitioners also assert that this appeal would more appropriately be before this Court now because it meets the standards for discretionary review by this Court, as articulated in Wis. Stat. §809.62(1r)(c), regarding the need for consistent and harmonized jurisprudence. Petitioners posit that the Circuit Court's injunction is inconsistent with over a century of law regarding election regulation and requires this Court's immediate attention to harmonize the jurisprudence in the protection of electoral integrity. On page 11 of the Petition, Petitioners suggest that the photo ID requirement of Act 23 falls into the category of a "reasonable regulation designed to protect the integrity of elections" which the Supreme Court has always recognized as a proper subject of legislative enactments. However, a regulation that is unreasonable or otherwise imposes burdensome requirements tantamount to a denial of the right to vote is an unconstitutional and invalid enactment. The Circuit Court adhered faithfully to this long-standing jurisprudence, and made sound factual findings that procuring an Act 23-acceptable photo ID is a time-consuming, costly (including for many voters the $20 fee for a Wisconsin birth certificate), constitutionally burdensome requirement that may adversely affect over 300,000 constitutionally qualified electors. Petitioners may disagree with the Circuit Court's factual findings in this

regard and whether the Court correctly characterized the severity and the scope of the burdens created by the photo ID requirement, but they cannot correctly claim that the Circuit Court's theoretical framework was premised upon anything but the relevant precedent of the Wisconsin Supreme Court.

Accordingly, the case law outlined by Petitioners is consistent with the Circuit Court's decision. For example, Petitioners rely on *State ex rel. Cothren v. Lean*, a post-election challenge to the results of a referendum on moving the Iowa County seat. 9 Wis. 279 (1859). *Cothren* involved a procedural deficiency (failure properly to publish the ballot question) and a voting statute which expanded the general, affirming oath that challenged voters took to answer specific questions about the challenged elector's qualifications. 9 Wis. at 283. The vote was rejected only if a challenged voter refused voluntarily to answer verbally the prescribed questions. In approving such an oral examination of challenged electors, the *Cothren* Court merely considered an affirming oath to a challenged voter to be reasonable. 9 Wis. at 283-284.

Petitioners cite voter registry cases, including *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875), for the proposition that the Legislature may protect electoral integrity by procedures that do not severely burden or substantially impair voting rights. The Court in *Wood v. Baker* upheld the residency oath required of an elector whose name was inadvertently omitted from the registered list of voters. While noting the validity of the registry law, the Court held that where the

registry list was improperly created by election officials, the omission of the names of otherwise constitutionally qualified voters from the list could not be used to disenfranchise any elector by not counting his or her vote. *Id.* at 87-88.

Similarly, in *State ex rel. Small v Bosacki,* this Court affirmed an election for Minocqua town clerk on determining that fifteen transient loggers, who had no intent to reside permanently in the jurisdiction, were not permanent residents capable of voting in that jurisdiction. 154 Wis. 475, 143 N.W. 175 (1913).

This Court has distinguished the routine requirements attendant to registration and residency laws from conditions which are unduly burdensome, impractical or otherwise difficult or impossible for certain voters to meet. For example, in a case just five years after *Wood,* the court struck down a registration requirement which absolutely prohibited an otherwise qualified elector from voting unless the voter met the age, residency, or citizenship qualifications in the interim period between the close of registration and the election. *Dells v. Kennedy,* 49 Wis. 555 (1880). The *Dells* court clearly defined the relationship between what it characterized as the "sacred right" to vote and the legislature's prescription of regulations to ensure the "orderly exercise of the right":

> The elector possessing the qualifications prescribed by the constitution is invested with the constitutional right to vote at any election in this state . . . . "[I]t is admitted that the legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply that such regulations are to be subordinate

> to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory."

Id. at 556-557 (quoting *Page v. Allen,* 58 Pa. 338 (Pa. 1868)). The Court in *Dells* was primarily concerned with the fact that certain voters would be disenfranchised due to unique and particular problems that the absolute prohibition imposed:

> By the effect of this law, the elector *may*, and in many cases, *must* and *will*, lose his vote, by being utterly unable to comply with this law by reason of absence, physical disability, or non-age, and an elector can lose his vote without his own default or negligence in these particulars.
>
> This language of the learned counsel is most strikingly suggestive of the very vice of this law which is fatal to its validity. That vice is, that the law disenfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time, perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is to deprive a person of an absolute right without his laches, default, negligence or consent; and in order to exercise and enjoy it, to require him to accomplish an impossibility.
>
> [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.

As in *Wood v. Baker* and *Dells v. Kennedy,* the Supreme Court has consistently applied a standard of reasonableness to scrutinize election regulations to ensure they do not unduly burden or otherwise disenfranchise qualified voters on election day. The Circuit Court here applied this long-standing principle after finding that Act 23 deprived otherwise qualified electors, who for various reasonable and foreseeable reasons might lack an Act 23 acceptable photo ID on election day, an opportunity to prove their identify by alternative means.

Petitioners cite various election administration and procedural challenges to election results, as well as ballot access cases, seeking to analogize the legislature's authority to regulate elections with laws which restrict the individual elector's right to vote. Apart from the voter registry and residency requirements, such cases do not address statutes, such as Act 23, which burden or divest a citizen of the right to vote. Rather, they concern ballot form, ballot access, election dates, and other procedural and administrative formalities. *See Gradinjan*

v. Boho, 29 Wis. 2d. 674, 139 N.W.2d 557 (1966) (absentee ballots must be authenticated by imprint or initials of municipal clerks); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949) (legislative authority to move date of elections for supreme court justice and state superintendent of education governed by reasonableness standard, similar to legislative exercise over primary elections); *State ex rel. Barber v. Circuit Court,* 178 Wis. 468, 190 N.W. 563 (1922) (tracing origins of ballot laws and candidate requirements in dispute over result of judicial election); *State ex rel. van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961 (1910) (validity of a state primary law); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W.1041 (1910) (regulation of results of primary elections and the prescribed methods of vote tabulation); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 533-534 (1898) (ban on "double printing of names of candidates" on the official ballot).

Such ballot access and voting procedures intrude upon the fundamental and preservative voting rights of individual electors only if they frustrate the will of the voter or otherwise restrict the ability to express support for the voters' preferred candidates. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (primary concern is not the rights of candidates to be on the ballot, but the will of electors to associate and express their support for candidates). This Court has often expressed this principle: that the legislature may regulate aspects of the

voting process but ultimately cannot effectively frustrate the exercise of the franchise by qualified electors:

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

State ex rel. van Alstine v. Frear, Id. at 341, 125 N.W. at 969, *quoted by State ex rel. Barber v. Circuit Court*, 178 Wis. 468, 190 N.W. 563 (1922).

Petitioners seek complex and extraordinary procedural relief to resolve what they claim is a doctrinal conflict between the Circuit Court's holding and a century and a half of Supreme Court jurisprudence. However, the issues raised by Petitioners' challenge do not posit a different theoretical framework than that employed by the Circuit Court. That Petitioners raise various fact various questions in this appeal further militates against Supreme Court review, pursuant to the criteria enumerated in Wis. Stat. §809.62(1r)(c)3, in that the reasons for granting review include consideration that "[t]he question presented is not factual in nature. . . ." There being no need to harmonize the Court's voting rights jurisprudence or immediately to resolve Petitioners' fact-based challenges to the Circuit Court's Order, exigent short-circuiting of the regular appellate procedure in this matter is unnecessary and inconsistent with the statutory bases for doing so.

C. Because of the Significant Constitutional Right at Stake and the Harm of Disenfranchisement to a Substantial Number of Constitutionally Qualified Electors It is Contrary to the Public Interest to Rush to Decide This Appeal

Petitioners focus their argument supporting bypass and an expeditious decision from this Court (prior to Plaintiffs-Respondents having filed their brief-in-chief in the Court of Appeals, and contrary to Wis. Stat. §809.60(1)) simply on their assertion of an urgency in implementing the photo ID requirement of Act 10 at the general election on November 6th. With November 6th as their deadline, Petitioners urge that this Court should hastily bypass the Court of Appeals, consolidate the instant case with *League of Women Voters,* 2012AP584 (District IV), and impose the photo ID requirement on the over 300,000 constitutionally qualified and registered voters in Wisconsin whom the Circuit Court found to lack an Act 23 photo ID and on the election officials statewide who must scramble to effectuate the law in less than two months. Asserting publicly that he will give "no quarter" in seeking to reinstate the photo ID requirement of Act 23 at the November 6th election, the Wisconsin Attorney General in the Petition and Motion disregards the effect of his requests on the voting rights of hundreds of thousands of constitutionally qualified voters and the orderly administration of the voting process. *See:* http://www.jsonline.com/news/statepolitics/van-hollen-again-asks-supreme-court-to-take-up-photo-id-law-bn6init-166895996.html.

Imposing the photo ID requirement in such a precipitous fashion will produce confusion and chaos at the polls statewide. In order to promote a voter education program and to train election officials, the Government Accountability Board (GAB) itself postponed implementation of the photo ID requirement of Act 23 from its effective date on June 10, 2011 until the midterm local and primary elections on February 21, 2012. The Circuit Court's injunction preserves the pre-Act 23 *status quo* for all constitutionally qualified Wisconsin electors, as it has existed for 164 years in every one of this State's elections prior to February 21, 2012, and as was also in place for the April and June 2012 elections.

Petitioners urge haste here because, they argue, the State of Wisconsin suffers irreparable injury by the very act of the Circuit Court having enjoined implementation of a statute. In support of this notion, Petitioners rely on a stay issued by Justice Rehnquist and reported in *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345 (1977). In *New Motor Vehicle Bd.* Justice Rehnquist did stay an injunction but he did not rely solely on the mere fact that the state was enjoined from implementing a law. Instead, he delineated some highly particularized forms of irreparable injury that the state would likely incur absent a stay. *Id.* at 1351. In other contexts, the U.S. Supreme Court has held that merely enjoining the government from implementing a legislative enactment is insufficient to show irreparable harm. For example, in denying a stay prohibiting enforcement of a state law regarding computerization of drug prescriptions Justice

Marshall held, "While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury." *Whalen v. Rose,* 423 U.S. 1313, 1317 (1975). Similarly, mere delay here in implementing the photo ID requirement does not constitute irreparable harm requiring this Court to rush to bypass, consolidate and decide this appeal by November 6th.

II. This Appeal Should Proceed in District II and Need Not Be Consolidated with the *League* Appeal in District IV Because the Two Separate Appeals Pose No Danger of Producing Inconsistent or Doctrinally Incompatible Decisions.

The two appeals need not be consolidated prior to completion of their review by District II and District IV of the Court of Appeals. This case and the *League of Women Voters* case followed two separate courses (*League* concluding on summary judgment and this case concluding in a trial) in separate branches of the Dane County Circuit Court, with the parties never seeking consolidation. Each appeal merits careful appellate attention and development and would benefit from briefing, argument and review by both of the Courts of Appeals and by the Supreme Court.

Each appeal presents a distinct constitutional claim of significance and complexity. Because the two cases implicate separate and different constitutional provisions there is no danger that the two Courts of Appeal would produce doctrinally incompatible or irreconcilable decisions. This appeal concerns Act

23's infringement on citizens' explicit right to vote as conferred by article III, section 1. On July 17, 2012, following a trial and thorough briefing, the Dane County Circuit Court, Branch 12, concluded that, despite the presumption of constitutionality, the photo ID requirements of Act 23 "constitute a substantial impairment of the right to vote guaranteed by Article III, Section 1 of the Wisconsin Constitution" and "are inconsistent with, and in violation of Article III, Section 1 of the Wisconsin Constitution." (P-Ap. 120.)

In contrast, the appeal in *League of Women Voters* instead concerns whether the photo ID requirement falls within the enumerated powers conferred to the Legislature by article III, section 2. On March 12, 2012, following summary judgment briefing and argument, the Dane County Circuit Court, Branch 9 declared that the photo ID requirement of Act 23 is outside the express legislative authority to regulate elections of article III, section 2 and thereby presents an unconstitutional "condition for voting at the polls," violating article III, sections 1 and 2. (P-Ap. 124-125, 128.)

Because of the profound significance of the constitutional rights implicated in this appeal and all of the arguments above, this appeal would not benefit from expedited review. It is appropriate that this case follow the normal procedural channels and this Court receive the benefit of thorough intermediate appellate review. Having the benefit of the decision of the Court of Appeals in District II, this Court obviously reserves the authority at a later date to determine

whether it is appropriate to consolidate this matter and the *League* appeal for its final appellate review of the constitutional challenges to Act 23.

CONCLUSION

In consideration of all of the foregoing reasons, Plaintiffs-Respondents respectfully request that this Court deny the Petition to Bypass the Court of Appeals and deny the Motion for Consolidation.

September 4, 2012

Respectfully submitted,
HAWKS QUINDEL, S.C.
Attorneys for Plaintiffs-Respondents

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

By: 

Richard Saks, SBN 1022048
B. Michele Sumara, SBN 1010181