

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2012-AP-1652

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MILWAUKEE BRANCH OF THE NAACP, VOCES DE
LA FRONTERA, RICKY T. LEWIS, JENNIFER T.
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MCCLINTOCK, ALFONSO G. RODRIGUEZ, JOEL
TORRES, and ANTONIO K. WILLIAMS,

Plaintiffs-Respondents

v.

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

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, and MATTHEW
AUGUSTINE

Intervenors-Appellants

On Appeal from a July 17, 2012 Order for Judgment and Order
Granting Declaratory and Injunctive Relief,
Issued by the Dane County Circuit Court,
Hon. David Flanagan Presiding, Case No. 2011-CV-5492

BRIEF OF *AMICUS CURIAE*
DISABILITY RIGHTS WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii-iv

INTEREST OF THE AMICUS..... 1

ARGUMENT..... 2

I. The Act 23 Photo ID Requirement Substantially Impairs The Right Of Individuals with Disabilities To Vote In Violation Of Article III Section 1 Of The Wisconsin Constitution, Because Of Increased Burdens Faced By People with Disabilities In Obtaining A Photo ID.....2

II. Act 23’s Exceptions To Photo ID Requirement Are Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.....11

III. Act 23’s Provisional Ballot Provision Is Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors..... 12

CONCLUSION..... 14

SECTION 809.19 CERTIFICATIONS..... 15

TABLE OF AUTHORITIES

Court Filings In This Case

Order, <i>Milwaukee Branch of the NAACP, et al. v. Scott Walker et al.</i> , Dane County Case No. 2011-CV-5492 (July 17, 2012).....	11
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Court Filings In Other Cases

Motion for Preliminary Injunction, <i>Frank v. Walker</i> , Case No. 2:11-cv-01128-LA (E.D. Wis. March 2, 2012).....	5
Deposition of Kevin Kennedy (Feb. 20, 2012)	5, 14

Statutes

Wis. Stat. § 5.02(6m).....	4
Wis. Stat. § 6.86(2).	11
Wis. Stat. § 6.875.....	12
Wis. Stat. § 6.87(4)(b)5.....	12
Wis. Stat. §51.62.....	1
Wis. Stat. § 343.50(5)(a)	5
2011 Wis. Act 23.	5, 11, 12
29 USC §794e	1
42 USC §15041 et. seq.	1
42 USC §§10801 et. seq.	1
IND. CODE § 3-11.7-5-2.5 (2012).....	13
IDAHO CODE § 34-1106(2) (2012)	10
LA. REV. STAT. ANN. § 18:562(A)(2) (2012)	10
MICH. COMP. LAWS § 168.523(1) (2012)	10
N.H. REV. STAT. ANN. § 659:13(I) (2012)	10

S.D. CODIFIED LAWS § 12-18-6.2 (2012). 10

Regulations

49 C.F.R. § 37.131(b) 7

Miscellaneous

American Association of People with Disabilities, *Record Number of People With Disabilities Voted in 2008 Election* (June 29, 2009), http://disabilityrightsmt.org/janda/articles/UploadFile/1248109408_Voting%20Numbers%20Release-DVA%206-28-09.pdf (last visited Nov. 15, 2012). 3, 4

Brennan Center for Justice, *The Challenge of Obtaining Voter Identification*, at 3 (2012) available at http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf (last visited Nov. 19, 2012). 8

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Disability Rights Wisconsin, *Wisconsin Voter Identification Bill: Considerations To Minimize Negative Impact On Voters With Disabilities* (Dec. 2010). 3

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U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates, Disability Characteristics*, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Nov. 15, 2012). 3

Wisconsin Department of Transportation, *DMV Service Centers*, <http://www.dot.state.wi.us/about/locate/dmv/index.htm#textlist> (last visited Nov. 19, 2012). 9

Wisconsin Department of Transportation, *Obtaining An Identification (ID) Card*, <http://www.dot.state.wi.us/drivers/drivers/apply/idcard.htm> (last visited Nov. 19, 2012). 9

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INTEREST OF THE AMICUS

Disability Rights Wisconsin (“DRW”) is a statewide non-profit organization designated by the Governor of the State of Wisconsin to act as the congressionally mandated protection and advocacy agency for Wisconsin citizens with mental illness, developmental disabilities and other physical impairments, pursuant to Wis. Stat. §51.62, 29 USC §794e, 42 USC §15041 et. seq., and 42 USC §§10801 et. seq. Through the pursuit of administrative, legal and other appropriate remedies DRW seeks to address the issues facing people with disabilities in the State of Wisconsin and to ensure the rights of all this state’s citizens with disabilities. DRW is regularly involved in policy and legal advocacy related to identified priority civil rights issues for people with disabilities, including concerns around community integration, inclusion, dignity, equal rights and voting issues.

For the last nine years, DRW has coordinated Wisconsin’s Protection and Advocacy for People with Disabilities Voting Project (PAVA). DRW has direct experience promoting the legal rights of voters and eligible voters with disabilities in Wisconsin. One example of our work has been creation and maintenance of the Wisconsin

Disability Vote Coalition. Our advocacy includes ensuring that people with disabilities have equal access to the polls; education of people with disabilities, service providers and families on voting laws; working with election officials on both the state and local level on issues of access to the polls for people with disabilities; and working one-one-one with clients to resolve individual problems with the voting process. As a result, DRW has educated and spoken to tens of thousands of people with disabilities, families, guardians and service providers and therefore gained a wealth of knowledge about voters with disabilities. DRW's interest in this litigation is motivated by its concern that the photo identification law at the center of this appeal will have a detrimental and chilling effect on the ability of people with disabilities to exercise their constitutional right to vote.

ARGUMENT

- I. **The Act 23 Photo ID Requirement Substantially Impairs The Right Of Individuals with Disabilities To Vote In Violation Of Article III Section 1 Of The Wisconsin Constitution, Because Of Increased Burdens Faced By People with Disabilities In Obtaining A Photo ID**

Approximately 600,000 individuals of voting age in Wisconsin are disabled.¹ Nationally, 14.7 million Americans with disabilities voted in the 2008 General Election, as large a voting bloc as other minority groups who cast ballots in the 2008 election.² Individuals with disabilities have faced both discrimination and physical barriers to the electoral process, including being wrongfully turned away from the polls because an individual with a disability does not “appear” to be eligible to vote, not being able to access the polling site because it is not accessible, and not being able to cast a private and independent ballot. These barriers result in voting rates of 10 to 15 percent below the general voting population.³ While in recent years improvements to the accessibility of voting mandated by HAVA have aided in

¹ The US Census Bureau estimated 576, 703 civilian, non-institutionalized people with a disability in Wisconsin aged 18 or older. U.S. Census Bureau, *2011 American Community Survey 1-Year Estimates, Disability Characteristics*, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Nov. 15, 2012). This figure excludes over 70,000 institutionalized people, more than 60% of whom have a disability.

² Compared to 15.9 million African-Americans and 9.7 million Hispanic voters in 2008. American Association of People with Disabilities, *Record Number of People With Disabilities Voted in 2008 Election* (June 29, 2009), http://disabilityrightsmt.org/janda/articles/UploadFile/1248109408_Voting%20Numbers%20Release-DVA%206-28-09.pdf (last visited Nov. 15, 2012) (hereinafter “*People With Disabilities Voted in 2008 Election*”).

³ Disability Rights Wisconsin, *Wisconsin Voter Identification Bill: Considerations To Minimize Negative Impact On Voters With Disabilities* (Dec. 2010).

narrowing the difference in voting rates among people with disabilities and those without,⁴ these improved voting rates are in danger of being reversed due to Act 23's requirement to provide a photo identification as a condition of voting.

People with disabilities are less likely to possess photo identification, particularly one that meets the narrow criteria of photo identification set forth in Act 23.⁵ The circuit court found that over 330,000 eligible voters in Wisconsin lack an acceptable photo ID for voting. It is likely that the approximately 600,000 people of voting age with disabilities in Wisconsin make up a significant portion of those without an acceptable photo ID in Wisconsin. Indeed, the Government Accountability Board has identified people with disabilities as one group "where there may be a higher concentration of people without the traditional forms of

⁴ Voting rates among people with disabilities increased in 2008 to 7 percent lower than that of people without disabilities. *People With Disabilities Voted in 2008 Election*.

⁵ Acceptable forms of photo ID are limited to a Wisconsin driver's license or DOT-issued state identification card, an identification card issued by a U.S. uniformed service, a U.S. passport, a certificate of naturalization, an unexpired driving receipt or identification card receipt, an unexpired student ID. Wis. Stat. § 5.02(6m).

identification.” See Deposition of Kevin Kennedy, 49:8-14 (Feb. 20, 2012).⁶

Under Act 23, individuals who do not possess an acceptable photo ID for voting are entitled to a free photo ID from a Wisconsin Department of Motor Vehicles (DMV) office. Wis. Stat. § 343.50(5)(a), *as amended by* 2011 Wis. Act 23 § 138. However, for the same reasons that people with disabilities are less likely to already possess a photo ID, obtaining a free ID for voting is a difficult endeavor for many people with disabilities.

First, the photo ID must be obtained in person at a DMV. For the vast majority of individuals, this will require access to transportation to the DMV – access to which is limited for people with disabilities living in Wisconsin. When compared to the general population, people with disabilities are at a significant disadvantage in terms of available, accessible transportation. National Council on Disability, *The Current State of Transportation for People with Disabilities in the United States*, June 13, 2005, at 13 <http://www.ncd.gov/publications/2005/06132005> (last visited

⁶ Filed in support of Plaintiffs’ Motion for Preliminary Injunction, *Frank v. Walker*, Case No. 2:11-cv-01128-LA (March 2, 2012).

Nov. 19, 2012) (hereinafter “*State of Transportation for People With Disabilities*”). More than half a million Americans with disabilities are unable to leave their home due to transportation difficulties. *Id.* at 19. Adults with disabilities are more than twice as likely as those without disabilities to have inadequate transportation (31 percent versus 13 percent).⁷

Further, people with disabilities often require specialized, accessible transportation. While public transportation, where available, must be made accessible for people with disabilities pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA), there are many parts of the state where no public transportation is available, particularly in rural areas. In these places, people with disabilities have few or no transportation options. *State of Transportation for People With Disabilities*, at 13.

Even if public transit options are available, gaps in compliance with civil rights laws often make it difficult for people with disabilities to utilize these public transit systems. *Id.* at 26-36 (identifying failure to announce stops for riders

⁷ Center for Disease Control and Prevention, *CDC Promoting the Health of People with Disabilities*, <http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf> (last visited, Nov. 15, 2012).

with visual impairment, failure to maintain accessible equipment, failure to properly secure riders' mobility devices, and refusal to stop for disabled patrons as persistent problems with compliance). And while the ADA requires that public transit systems offer paratransit service for people who are unable to use a fixed-route service due to disability, *id.* at 47, these services are not without their problems. Paratransit is not an on-demand system. It operates by reservation, which must be done one day before the requested ride. 49 C.F.R. § 37.131(b). The legal requirements concerning timeliness of rides are quite general, resulting in long waits for pick-ups and inability to arrive at a location at a specific time for an appointment. *Id.* at § 37.131(b)(2) (allowing transit entities to negotiate within an hour before or after desired pickup time). In addition, widespread systemic problems with paratransit services have been documented around the country, including inability to schedule next-day trips (as required by the ADA) and problems making reservations, such as long telephone hold times. *State of Transportation for People With Disabilities*, at 56-60, 68-69.

People who live in rural areas are even worse off – 40 percent of those in rural areas have no public transit options,

while 25 percent have only minimal public transit service. *Id.* at 151. At the same time, people living in rural areas likely do not have a DMV office within close proximity. More than 30 percent of Wisconsin's voting age citizens live more than 10 miles from the nearest state ID-issuing office open more than two days per week. Brennan Center for Justice, *The Challenge of Obtaining Voter Identification*, at 3 (2012) *available* *at* http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf (last visited Nov. 19, 2012). More than six percent (256,981) of Wisconsin's voting age citizens are without vehicle access, and of those without vehicle access, 18.4 percent (47,161) live more than 10 miles from the nearest ID-issuing office open more than two days per week. *Id.* at 4.

Where public transit is not available (meaning that no affordable paratransit system is available, either) people with disabilities must pay much higher costs to obtain accessible transportation. For example, in rural parts of northern Wisconsin the cost of private, accessible vehicle transportation is \$12 for pickup and \$1.35 per mile for each trip. Private taxi services often cost \$2.50 to \$3.00 per mile. An individual traveling just 10 miles to a DMV would pay

over \$50 for one round trip via a private, accessible vehicle, and \$50-60 for a taxi.⁸ For people living much farther away from the nearest DMV, these costs could double or triple.

Most DMV offices in Wisconsin are open only a few days per week, or in some counties only one or two days per month, making trip-planning even more difficult. Additionally, not all DMV offices are accessible to people with disabilities. Twelve of Wisconsin's 88 DMV offices advertise "limited" accessibility. See Wisconsin Department of Transportation, *DMV Service Centers*, <http://www.dot.state.wi.us/about/locate/dmv/index.htm#textlist> (last visited Nov. 19, 2012). Six counties in Wisconsin have no DMV office that is fully accessible to people with disabilities: Grant, Marinette, Menominee, Oconto, Shawano, and Waupaca. *Id.*

Finally, in addition to costs incurred simply getting to the DMV, individuals must also pay the cost of underlying documents needed to obtain an ID.⁹ These costs were

⁸ Information provided to DRW by Bob Olsgard, Transportation Coordinator, North Country Independent Living on Nov. 13, 2012.

⁹ Applicants for a photo ID must provide documentation of their name, date of birth, identity, residence, citizenship, and social security number. Wisconsin Department of Transportation, *Obtaining An Identification (ID) Card*, <http://www.dot.state.wi.us/drivers/drivers/apply/idcard.htm>

correctly identified by the circuit court as a substantial burden, and the burden falls even heavier on people with disabilities. Half as many adults with disabilities are employed as those without disabilities (35 percent versus 78 percent), and three times as many adults with disabilities live in poverty with annual household incomes below \$15,000 (26 percent versus 9 percent).¹⁰

The burdens detailed above are substantial and demonstrate that voters with disabilities are more likely to face substantial impairment of voting rights under Act 23. A number of other states with photo ID laws allow voters to attest to their identity with an affidavit if they have no photo ID.¹¹ Wisconsin's Act 23 stands out for its failure to offer such protections to voters with disabilities, leading the circuit court to correctly label it the most restrictive voter identification law in the United States due to the "absence of

(last visited Nov. 19, 2012). Most commonly, individuals seeking a free ID will need to obtain a certified copy of their birth certificate. In Wisconsin, the cost of a certified birth certificate is \$20. Wisconsin Department of Health Services, *Request for a Birth Certificate*, available at <http://www.dhs.wisconsin.gov/vitalrecords/birth.htm> (last visited Nov. 19, 2012).

¹⁰ Center for Disease Control and Prevention, *CDC Promoting the Health of People with Disabilities*, <http://www.cdc.gov/ncbddd/disabilityandhealth/pdf/aboutdhprogram508.pdf> (last accessed, Nov. 15, 2012).

¹¹ See Idaho Code § 34-1106(2) (2012); La. Rev. Stat. Ann. § 18:562(A)(2) (2012); Mich. Comp. Laws § 168.523(1) (2012); N.H. Rev. Stat. Ann. § 659:13(I) (2012); S.D. Codified Laws § 12-18-6.2 (2012).

any fall-back procedure as to a qualified voter who lacks the required identification”. See Order, *Milwaukee Branch of the NAACP, et al. v. Scott Walker et al.*, Dane County Case No. 2011-CV-5492 at 3 (July 17, 2012).

II. Act 23’s Exceptions To Photo ID Requirement Are Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

Act 23’s limited exceptions to the photo ID requirement do little to protect the right to vote of people with disabilities from being substantially impaired. Only military and overseas voters, confidential voters, and permanent absentee voters are exempt from the requirement to show photo ID. 2011 Wis. Act 23, §§ 63-64, 66. Permanent absentee voters are those who certify that they are “indefinitely confined due to age, illness, infirmity or disability.” Wis. Stat. § 6.86(2). Many voters with disabilities, while not “indefinitely confined,” do face difficulties leaving their home or obtaining transportation to a DMV to procure a photo ID.

Voters who reside in qualified nursing homes and qualified community-based residential facilities, retirement homes, residential care apartment complexes, or adult family

homes may vote without showing a photo ID if they vote through a special voting deputy, or if no special voting deputy conducts absentee voting in a care facility, a voter may prove their identity with a signed certification of the manager of the care facility. Wis. Stat. § 6.875; 2011 Wis. Act 23 § 71. While all nursing homes are required to have absentee ballots administered by special voting deputies (SVD), Wis. Stat. at § 6.875, SVDs may or may not be available in other care facilities. This leaves residents of such facilities dependent on facility managers who are not routinely trained in their responsibilities to resident voters to sign off on the absentee ballots. *See id.* at § 6.87(4)(b)5. Should the manager of the facility refuse to certify the ballot, the resident is left with no way to cast a ballot other than obtaining a photo ID.

III. Provisional Ballot Provision Is Insufficient To Prevent Substantial Impairment Of Right To Vote For Disabled Wisconsin Electors.

The availability of casting a provisional ballot does not prevent disabled voters without photo ID from being disenfranchised. Importantly, provisional ballots will be counted only if the photo ID that the voter lacked in the first

place is produced.¹² The same difficulties with transportation and access detailed above will leave voters with disabilities less likely to have the ability to return with the proper identification to have their provisional ballots cast and counted – particularly because the voter is required to obtain transportation, funds, and documentation for the photo ID in a much tighter timeframe.

Although Act 23 moved the deadline for voters to cure a provisional ballot from 4:00 p.m. the day after the election to 4:00 p.m. the Friday after the election, a mere two days additional time may not provide sufficient time for some voters with disabilities to obtain a photo ID and arrange to provide that ID to their municipal clerk. As discussed above, often more than a day is required to line up accessible or paratransit options. The limited availability of transportation may not coincide with the limited hours of the nearest DMV office. Compounding the problem further for many rural voters is that, in addition to irregular DMV hours, a large number of Wisconsin municipal clerks are part time and may not be open regular hours after Election Day until 4pm

¹² By way of contrast, other states allow the use of an affidavit to cure provisional ballots. *See, e.g.*, IND. CODE § 3-11.7-5-2.5 (2012).

Friday.¹³ The substantial burden placed upon voters with disabilities who were required to cast a provisional ballot will likely result in their vote never being counted.

CONCLUSION

For the foregoing reasons, DRW urges this Court to affirm the decision of the Circuit Court.

Dated this 19th day of November 2012.

Respectfully submitted,
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¹³ GAB Executive Director Kevin Kennedy testified to lack of specific standards for clerk hours in Wisconsin's election laws, stating that clerks may limit the number of hours that they are open to cure provisional ballots. Deposition of Kevin Kennedy at 23:5-17.

CERTIFICATION OF COMPLIANCE, FILING, AND SERVICE

I hereby certify that the Brief of Amicus Curiae AARP confirms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c). The length of the Brief of *Amicus Curiae* Disability Rights Wisconsin is 2748 words, Times New Roman, 13 point body text, 11 point for quotes and footnotes.

I hereby certify that I have submitted this date an electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic copy of the Brief of *Amicus Curiae* Disability Rights Wisconsin is identical in content and format to the printed copy of the brief filed on this date. An original and ten copies of the Brief of *Amicus Curiae* Disability Rights Wisconsin, each bound with an original or copy of this Certificate, have been filed with the Court, and three copies of the same submission have been served on each of the parties identified below, all by first class mail, postage prepaid, to the following persons:

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