

Declaration of Kevin J. Kennedy

**Exhibit A**

**STATEMENT OF SCOPE  
PURSUANT TO WIS. STAT. § 227.135  
GOVERNMENT ACCOUNTABILITY BOARD**

**Rule No.:** GAB Ch. 10

**Relating to:** Use of Technical College System Student Identification Cards for Voting

**Rule Type:** Emergency and Permanent

**1. Finding/nature of emergency (Emergency Rule only):**

On November 15, 2011, the Joint Committee for Review of Administrative Rules (“JCRAR”) ordered the Government Accountability Board (“Board” or “G.A.B.”) to promulgate an emergency rule, pursuant to WIS. STAT. §227.26(2)(b), to allow for the use of technical college system student identification cards to meet the photo identification requirements of 2011 Wisconsin Act 23 (“Photo ID Law”), which was enacted on May 25, 2011. The Photo ID Law requires that electors present a photo identification to vote.

The G.A.B. suspended the promulgation process when state and federal courts stayed the implementation of the Photo ID Law pending further judicial review as to its state and federal constitutionality. On March 23, 2015, the United States Supreme Court denied certiorari on the federal challenge to the Photo ID Law. *See* U.S. Supreme Court Order List, No. 14-803, p. 3 (“*Ruthelle Frank, et al v. Walker, Gov. of WI, et al*”), available at [http://www.supremecourt.gov/orders/courtorders/032315zor\\_b97d.pdf](http://www.supremecourt.gov/orders/courtorders/032315zor_b97d.pdf). According to Wisconsin Attorney General, the Honorable Brad Schimel, such denial constituted the last judicial barrier to implementation of the Photo ID Law. *See* GAB, *No Photo ID Required at April Election* (Mar. 23, 2015), available at <http://gab.wi.gov/node/3580>. Plaintiffs in the federal Photo ID Law case filed additional motions that are currently pending, but the G.A.B., at the advice of the Attorney General, takes the position that the Photo ID Law stands and should be implemented for elections occurring after April 7, 2015.

The Board anticipates that at least two school districts will hold special elections on May 19, 2015. The Board anticipates that other special elections are likely this spring, including a potential special election for a state senatorial district. Board staff believes that the Board must promulgate an emergency rule to take effect before the May 19, 2015 special elections, so that the Photo ID Law may be fully and properly implemented for those elections and any other elections soon thereafter.

**2. Detailed description of the objective of the proposed rule:**

The proposed rule implements a November 2011 directive from the Joint Committee for the Review of Administrative Rules (JCRAR). That directive requires the G.A.B. to promulgate an emergency rule specifying that a Wisconsin Technical College System

("WTCS") student identification card may be used as acceptable identification for voting.<sup>1</sup>

**3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:**

**Existing Policy:**

In the Photo ID Law, the Legislature established a voter identification requirement for electors to receive a ballot. The legislation delineates the types of identification that may be used to meet the requirement. WIS. STAT. §5.02 (6m). These types of identification are:

1. An operator's license issued under ch. 343;
2. An identification card issued under s. 343.50;
3. An identification card issued by a U.S. uniformed service;
4. A U.S. passport;
5. A certificate of U.S. naturalization;
6. An unexpired driving receipt under s. 343.11;
7. An unexpired identification card receipt under s. 343.50;
8. An identification card issued by a federally recognized Indian tribe in this state;
9. An unexpired identification card issued by a university or college in this state that is accredited as defined in s. 39.30 (1)(d).

The Photo ID Law will be implemented for the May 19, 2015 special elections and every election thereafter (pending any potential future legislative or judicial activity). Thus, there is no existing guidance or clarification that a WTCS student identification card is an "unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.90(1)[.]" WIS. STAT. §5.02(6m)(f).

**Proposed Policy:**

The proposed rule clarifies that a WTCS student identification card is included in the description of student identification cards that may be used as acceptable identification in order to receive a ballot.

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<sup>1</sup> WIS. STAT. §6.15(2)(bm) provides that electors must provide "proof of identification" to apply to vote. "Identification" is defined to include "[a]n identification card issued by a university or college in this state that is accredited, as defined in s. 39.30(1)(d)[.]" WIS. STAT. §5.02(6m)(f). An accredited college is an "institution accredited by a nationally recognized accrediting agency . . . or, if not so accredited, is a nonprofit institution of higher education whose credits are accepted on transfer by not less than 3 institutions which are so accredited, on the same basis as if transferred from an institution so accredited." WIS. STAT. §39.30(1)(d); *see also* Paragraph 3 of this Statement of Scope.

On November 9, 2011, the Board made a determination that a Wisconsin Technical College System institution is accredited under WIS. STAT. §39.30 (1)(d).<sup>2</sup> Based on that determination, the Board directed G.A.B. staff to include WTCS student identification cards as an acceptable form of identification for voting in its training and educational materials as part of the agency's responsibility to administer the voter identification law pursuant to WIS. STAT. §5.05 (1); *see also* Section 144(1) of 2011 Wisconsin Act 23 (“[T]he government accountability board shall conduct a public informational campaign for the purpose of informing prospective voters of the voter identification requirements of this act.”).

#### **Alternatives:**

The alternative to promulgating this rule is to significantly restrict the number of electors who may use a student identification card in order to receive a ballot and to create potential confusion for clerks and voters regarding acceptable forms of voter identification on Election Day. The Board originally addressed this issue because G.A.B. staff raised a question about legislative intent as it was developing its implementation approach to training local election officials and educating the public on the voter identification requirement. The issue will again be raised and need to be clarified as the May 19, 2015 special elections approach.

#### **4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):**

##### **General Authority**

WIS. STAT. §5.05(1) provides that the G.A.B. has “the responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19.” The G.A.B. may “[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections . . . or ensuring their proper administration.” WIS. STAT. §5.05(1)(f).

The Photo ID Law enacted and amended statutes in chs. 5 and 6. *See* 2011 Wisconsin Act 23. Thus, the G.A.B. has the statutory authority to promulgate the proposed rule to ensure the proper administration of elections.

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<sup>2</sup>In 2011, the Board analyzed the Photo ID Law to determine that an unexpired WTCS student identification card met the statutory definition found in WIS. STAT. §5.02(6m)(f). The Board determined that WTCS institutions are accredited under WIS. STAT. §39.30(1)(d). In making this determination, the Board considered advice from G.A.B. staff regarding the accepted rules of statutory interpretation, starting with the plain language. The Board also considered G.A.B. staff information regarding the legislative history of the applicable statutes. In making its determination, the Board did *not* consider whether permitting the use of WTCS student identification cards was good public policy.

## **Emergency Rule Authority**

The agency is authorized to promulgate the rule as an emergency rule because it was previously directed to do so by the JCRAR pursuant to WIS. STAT. §§227.10 (1), 227.26 (2).

Further, Board staff believes that an emergency rule is necessary to preserve the public peace and welfare<sup>3</sup> by 1) properly implementing the Legislature's enacted policy, and 2) remedying potential public confusion about the status of the Photo ID Law and how voters comply with it. Therefore, an emergency rule is necessary to preserving the public peace and welfare before the May 19, 2015 special elections.

Finally, on November 22, 2011, the G.A.B. submitted a Statement of Scope, substantially similar to this Statement, to the Governor. On December 2, 2011, the Governor approved that Statement. *See* Letter from Gov. Scott Walker to Director Kevin Kennedy (Dec. 2, 2011) (attached hereto as "Exhibit A"). Pursuant to Executive Order #50, Sec. II, Para. 9, an agency must file an approved statement of scope to the "Legislative Reference Bureau within "thirty calendar days of approval if the agency intends to proceed with rulemaking[.]" Given that the G.A.B. did not implement the emergency rule in 2011 due to the court-ordered stays, the Board now must submit a new Statement of Scope to the Governor for approval. This Statement of Scope describes the same objective as did the 2011 Statement, and the Board staff requests the Governor to make a similar approval now.

## **Permanent Rule**

The agency plans to promulgate this rule as both an emergency rule and a permanent rule. This scope statement is submitted in support of both the emergency rule and the permanent rule.

- 5. Estimate of the amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:**

10 hours.

- 6. List with description of all entities that may be affected by the proposed rule:**

WTCS institutions desiring to issue student identification cards acceptable for voting purposes will be affected by this rule. All students at a WTCS institution also will be affected by this rule as well as Wisconsin's 1,852 municipal clerks responsible for

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<sup>3</sup> WIS. STAT. §227.24(1)(a) provides that "[a]n agency may promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under this chapter if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures."

administering elections and approximately 25,000 poll workers who staff voting locations on Election Day. The impact of the rule will be on town, village and city government. The rule does not impact businesses, private economic sectors or public utility ratepayers.

**7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

The 2002 federal Help America Vote Act (HAVA), 42 USC §15301 et seq., contains a provision requiring states to receive identification from individuals who register to vote for the first time, by mail. HAVA §303 (b)(2)(A)(i)(I). That requirement is a voter registration requirement and is a more general requirement than the state identification requirement for receiving a ballot. The federal requirement simply refers to “current and valid photo identification.” The federal requirement does not delineate specific types of photo identification as does the Wisconsin statute.

**8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

The rule will have minimal or no impact on the governmental entities impacted by the rule. Municipal clerks and poll workers will be provided with informational and training materials on the acceptable forms of identification for voting. This rule merely clarifies that WTCS student identification cards are an “unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.90(1)[.]” Wis. STAT. §5.02(6m)(f). The rule will eliminate possible confusion if a voter offers a technical college student identification card when appearing at the polling place to vote. This rule will not have an impact on small businesses.

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March 31, 2015  
Date Submitted