

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
MILWAUKEE DIVISION**

RUTHELLE FRANT, et al., on behalf of	)	
Themselves and all others similarly situated,	)	
	)	
PLAINTIFFS,	)	
	)	
v.	)	CASE NO. 11-CV-1128
	)	
SCOTT WALKER, in his official capacity as	)	
Governor of the State of Wisconsin, et al.	)	
	)	
DEFENDANTS.	)	

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF  
THE UNITED STATES JUSTICE FOUNDATION, IN SUPPORT OF DEFENDANTS  
AND IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF**

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The United States Justice Foundation (USJF) is a non-profit organization that provides free legal research and assistance for important judicial and legislative issues.

The USJF presents the accompanying *amicus* brief to bring to the court's attention the distinguished differences in the Plaintiff's cited case law and the instant case. The Plaintiffs claim that 2011 Wisconsin Act 23 violates the Equal Protection Clause of the Fourteenth Amendment and constitutes a poll tax. For the reasons delineated within the accompanying *amicus* brief, the cases cited by the Plaintiffs are easily distinguishable and are not relevant to the instant case.

The attorneys who have drafted the accompanying brief have committed a vast amount of time and effort in defending and promoting the separation of powers within State government and in other related constitutional issues. The USJF believes that the accompanying *amicus* brief will aid the court in illuminating the issues and arguments surrounding the pending dispositive

motions. Counsel for Defendants was contacted and gave their approval for the filing of this *amicus* brief.

For all of the aforementioned reasons, the USJF respectfully requests this court to grant this motion and allow the USJF to file the accompanying *amicus* brief.

Dated: November 16, 2012

Most respectfully,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2012, I electronically filed **MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE UNITED STATES JUSTICE FOUNDATION** and all attachments with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Most respectfully,

By /s/ *Lane Fitzgerald*



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## ARGUMENT

### PLAINTIFFS HAVE FAILED TO ESTABLISH ANY OF THE FOUR REQUIREMENTS NECESSARY FOR GRANTING A PRELIMINARY INJUNCTION AND THEIR MOTION SHOULD THEREFORE BE DENIED.

In order for a preliminary injunction to be granted, the movant must establish four things: “(1) a substantial likelihood of ultimate success on the merits; (2) the preliminary injunction is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would inflict on the non-movant; and (4) the preliminary injunction would serve the public interest.” *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1356 (2005). Here Plaintiffs’ request for a preliminary injunction must fail as they are unable to establish any of the four requirements necessary for granting a preliminary injunction.

#### **I. PLAINTIFFS HAVE FAILED TO SHOW A SUBSTANTIAL LIKELIHOOD OF ULTIMATE SUCCESS ON THE MERITS.**

Plaintiffs are unable to show that there is a substantial likelihood of success on the merits because the Wisconsin Voter ID Law does not violate the Equal Protection Clause of the Fourteenth Amendment, and any costs or fees associated with obtaining the necessary documents required for a Wisconsin identification card do not constitute a poll tax under the Twenty-fourth Amendment.

##### **A. Wisconsin’s Voter ID Law Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.**

Plaintiffs are challenging the Wisconsin Voter ID Law, claiming that it violates the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has recognized that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). However, when constitutional challenges are brought against these

regulations, courts must resolve them through a balancing test, by balancing the State's interests that justify any burden against the extent to which the State's interests burden Plaintiffs. *Id.* at 789.

**1. Deterring Voter Fraud and Increasing Public Confidence are Compelling Governmental Interests.**

As identified in the Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction as to Eleven Named Plaintiffs, the State has identified two main interests that justify any burden placed on voters; to deter voter fraud, and to increase public confidence in the electoral process. Pla. Br. at p. 18 (Doc. #33). In *Crawford v. Marion County Election Board*, 553 U.S. 181, the Supreme Court acknowledged that deterring voter fraud and increasing public confidence justified the slight burden imposed on voters by a similar voter ID law in Indiana.

"There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford* at 587. Requiring all voters to present a valid photo ID card prior to voting in order to prevent voter fraud is a legitimate and compelling interest of the State. The photo ID requirement helps insure that only eligible voters are voting, and it helps prevent felons and other ineligible voters from doing so. Requiring proper identification from voters helps to make sure that the democratic system is running smoothly and effectively. Plaintiffs argue that because cases of voter fraud are so rare, and because nobody has been prosecuted for voter fraud in the past thirty years in Wisconsin, that this is not a compelling State interest. Pl. Br. at pp. 18-19 (Doc. #33). However, in *Crawford*, the Court recognized that even though cases of voter fraud were extremely rare in Indiana, deterring voter fraud was still a legitimate state interest. 553 U.S. at 586-7. This severely cripples the Plaintiffs'

argument that prolific prosecutions for voter fraud are a prerequisite for the State to have a compelling interest.

Additionally, increasing public confidence is also a legitimate interest of the State. “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford* at 587. Increasing confidence will help to increase the rate of participation among eligible voters, which, in turn, helps the democratic electoral system run as it was meant. Obtaining maximum participation in elections is most easily achievable when public confidence in the electoral process is high. Public confidence in the electoral system is higher when the public sees that steps are being taken to help ensure proper running of the electoral system.

“[T]he state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Anderson* at 788. Both deterring voter fraud and increasing public confidence are legitimate, compelling, and reasonable State interests that justify the requirement that all voters present a proper identification card before voting.

## **2. Act 23 Does Not Create an Unreasonable Burden on Voters.**

In addition to the State’s interests, the burden placed on Plaintiffs’ rights must also be examined. Plaintiffs argue that the photo ID law imposes severe and unjustified burdens on some voters. Pl. Br. at p. 17 (Doc. #33). This is not the case, and, in fact, Wisconsin’s voter ID law is more similar to the Indiana law upheld in *Crawford* than Plaintiffs allege.

In *Crawford*, voters in Indiana were required to obtain a government issued identification card in order to vote. 553 U.S., at 580. Voters could obtain these identification cards for free from the State by establishing their residence and identity. *Id.* at 581. The Court recognized that the process of gathering the necessary documents and going to the Division of Motor Vehicles

(DMV) to obtain an identification card may be more burdensome to some individuals. *Id.* at 588-589. However, they also ruled that this burden was mitigated by the fact that voters without an ID could file a provisional ballot which would be counted upon the voter completing the necessary steps. *Id.* at 589. The Supreme Court upheld the Indiana Voter ID Law stating, “[w]e cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.” *Id.* at 590.

In Wisconsin, voters can obtain a government issued identification card for free by going to a local DMV. Here, as in Indiana, the fact that some voters may not already possess a valid identification card, and may have to obtain one, does not constitute a severe burden. Neither does the fact that some individuals may need to go through the process of obtaining the standard documents necessary for establishing their residency and identity. Act 23 lists several different forms of identification cards that voters can use to prove their identity at a polling place. If a voter does not have any of the other forms of identification cards, they can go to one of over ninety (90) DMV locations throughout the state, and obtain a free identification card. There is a DMV located in every Wisconsin county, and fifteen counties have two or more locations. In addition, individuals voting in person who do not have the required identification card at the time of voting can file a provisional ballot that will be counted if they can present the necessary ID at the local clerk’s office by the Friday after the election.

**B. Any Fees or Costs Associated with Obtaining the Necessary Documents Required for a Wisconsin Identification Card do not Constitute a Poll Tax.**

Section 1 of the Twenty-Fourth Amendment to the United States Constitution states that “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure

to pay any poll tax or other tax.” Plaintiffs do not argue that the identification cards are themselves a poll tax. Instead, Plaintiffs argue that the poll tax is in the form of fees or costs associated with procuring identification documents necessary for obtaining a Wisconsin Identification Card. However, Plaintiffs’ arguments fail for several reasons.

First, there is no fee or cost for obtaining a Wisconsin Identification Card from the Wisconsin Department of Transportation Division of Motor Vehicles (“DMV”). Wisconsin Statute § 343.50(5)(a)(3) states that an identification card will be provided free of charge, for the purpose of voting, to any U.S. citizen, who on the date of the next election will be at least eighteen (18) years of age.

Secondly, this issue was taken up by the Ninth Circuit Court of Appeals in a substantially similar case; *Gonzalez v. State*, 624 F.3d 1162 (9<sup>th</sup> Cir., 2010). In *Gonzalez v. State*, the plaintiffs argued that Proposition 200, which, in part, enacted a voter ID law, constituted a poll tax under the Twenty-Fourth and Fourteenth Amendments because some voters would have to spend money in order to obtain the necessary documents for the identification card. *Id.* at 1195. The court ruled that requiring voters to “identify themselves at the polling place is not a poll tax,” and does not place a material burden on the voters. *Id.* The court further ruled that possible costs associated with obtaining the required identification was not a poll tax under the Twenty-Fourth Amendment, because it was not a prerequisite for voting, and it was not a burden placed on individuals who refuse to pay a poll tax. *Id.* at 1194-1195. *Gonzalez* was distinguished from *Harman v. Forssenius*, 380 U.S. 528 (1965), on the grounds that in *Harman* voters were forced to pay \$1.50 annually, or file an annual certificate of residence in order to vote. *Id.* at 1195. The Court went on to state that in *Gonzalez*, “[v]oters are not given the choice between paying a poll tax or obtaining identification; all voters are required to present identification at the polling

place.” *Id.* at 1195-1196. The Court ruled that Arizona’s identification requirement did not violate the Twenty-Fourth Amendment. *Id.* at 1196.

Like in *Gonzalez*, Wisconsin’s requirement that voters present identification, which can be in several different forms, does not in any way constitute a poll tax under the Twenty-Fourth Amendment. Presenting identification in order to verify eligibility to vote is not a tax. Identification can be verified through the use of several different identification cards. Additionally, if voters do not have any other acceptable form of identification, they can obtain a free identification card from one of more than ninety (90) DMV locations in the state. Additionally, as in *Gonzalez*, Wisconsin voters are not given a choice of, and cannot get around the identification card requirement by, paying a poll tax. Everyone is required to show an identification card.

The court went on to say that Arizona’s identification requirement was not governed by the decision in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and was not a poll tax under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1196. In *Harper*, the United States Supreme Court held as unconstitutional a law imposing a poll tax on voters. *Harper* at 666. With regards to voting, the State’s interest “[i]s limited to the power to fix qualifications...” and “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” *Id.* at 668. On this point the *Gonzalez* court differentiated the voter ID requirement from *Harper* by stating that

“The requirement that individuals show documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay for them. On the contrary, requiring individuals to show identification falls squarely within the state’s power to fix core voter qualifications. Photo identification addresses the most basic voter criterion: that individuals seeking to cast a ballot are who they purport to be and are in fact eligible to vote. Even [the plaintiffs admit] that this is a valid state interest.”

*Id.* Plaintiffs cite a Georgia case, *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga.

2005), in support of their argument that Wisconsin's voter ID law constitutes a poll tax and violates the Equal Protection Clause of the Fourteenth Amendment. However, in that case Georgia voters who did not have acceptable identification were forced to pay \$20 for an ID card or sign a fee waiver affidavit. *Id.* at 1370. There is little doubt that such a scenario would run afoul of the Equal Protection Clause of the Fourteenth Amendment. That is not the case here. There is no charge for Wisconsin voters to obtain a government issued identification card. Wisconsin's requirement that everyone show proper identification is not in any way invidious or unreasonable. As discussed above, Wisconsin has legitimate state interests that support the implementation of Act 23.

**II. THE PRELIMINARY INJUNCTION IS NOT NECESSARY TO PREVENT IRREPARABLE HARM.**

Irreparable harm has been defined as "injury for which a monetary award cannot be adequate compensation". *Jackson Dairy, Inc. v. HP Hood & Sons*, 596 F.2d 70, 72 (2<sup>nd</sup> Cir. Vt. 1979). Based on this definition, in order to show irreparable harm, Plaintiffs must show that there would be some type of harm to start with. Here Plaintiffs argue that their injury would be the deprivation of their constitutional right to vote, if the preliminary injunction is not granted. Pla. Br. at p. 13 (Doc. 33). This is simply not true. Wisconsin's Voter ID law would not deny Plaintiffs, or any other voters, the right to vote. Under Wisconsin's Voter ID Law, every voter is required to show identification before voting, not just certain people. This requirement is in no way a denial of the right to vote. In fact, by forcing polling places to make sure that each voter is who they say they are, the identification requirement is actually helping protect the right to vote from those individuals who may try to defraud the system. Plaintiffs have failed to show that a preliminary injunction against Wisconsin's Voter ID Law is necessary to prevent any harm, yet alone any irreparable harm.

**III. THE HARM INFLICTED ON THE DEFENDANTS FROM THE GRANTING OF A PRELIMINARY INJUNCTION FAR OUTWEIGHS ANY PERCEIVED INJURY TO THE PLAINTIFFS.**

In *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, the court stated that when the plaintiff's likelihood of winning on the merits is less, then the greater the balance of harms needs to weigh in favor of the plaintiff, and vice versa. 549 F.3d 1079, 1100 (7th Cir. 2008). As elaborated herein above, Plaintiffs' likelihood of winning on the merits is extremely low; the voter ID law does not violate the Equal Protection Clause of the Fourteenth Amendment, and does not constitute a poll tax under the Twenty-Fourth Amendment. This means that the balance of harm must weigh heavily in Plaintiffs' favor. However, when a balancing of the harms is done, it is clear that it does not weigh in Plaintiffs' favor, since Wisconsin's Voter ID Law does not cause any irreparable harm. The Plaintiffs have not established this necessary criterion.

**IV. THE PRELIMINARY INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.**

Plaintiffs cite *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373 (6th Cir., 2008), when arguing that the risk of disenfranchising eligible voters outweighs the risk of voter fraud, and, therefore, a preliminary injunction is necessary. However, this case can be easily distinguished. In *U.S. Students Ass'n Foundation v. Land*, new voters were sent an original voter identification card from the local clerk's office, and, if the card was returned from the post office as nondeliverable, that voter's name was taken off the voting lists and that individual would not be able to vote with a traditional ballot on election days. 546 F.3d 373, 377 (6th Cir., 2008). In Wisconsin, a voter's name is not taken off the voting list for not obtaining an identification card. Wisconsin voters are not required to obtain an identification card provided

by the Wisconsin DMV, and, in fact, can use a number of other forms of identification cards. The fact that there are several forms of identification that can be used by a Wisconsin voter, and the fact that any eligible voter can obtain a free identification card from any of over ninety (90) DMVs located throughout the state, makes the risk of disenfranchising voters negligible at most. Plaintiffs have failed to show how Wisconsin's Voter ID Law disenfranchises voters, and how a preliminary injunction would prevent this.

### **CONCLUSION**

Plaintiffs have failed to establish the four necessary criteria for the granting of a preliminary injunction. Plaintiffs have been unable to show that there is a substantial likelihood of success on the merits. Case law has clearly shown that voter ID laws, nearly identical to 2011 Wisconsin Act 23, do not violate the Equal Protection Clause of the Fourteenth Amendment and do not constitute a poll tax under the Twenty-Fourth Amendment. Additionally, Plaintiffs have neglected to show that Wisconsin's Voter ID Law would cause any irreparable injury, that any possible injury would outweigh the harm of a preliminary injunction, or that a preliminary injunction would serve the public interest. Based on the case law presented, the United States Justice Foundation asks that the court deny Plaintiff's Request for Injunctive Relief.

Dated: November 16, 2012

Most Respectfully,

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v.	)	CASE NO. 11-CV-1128
	)	
SCOTT WALKER, in his official capacity as	)	
Governor of the State of Wisconsin, et al.	)	
	)	
DEFENDANTS.	)	

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**ORDER GRANTING LEAVE TO FILE BRIEF AS AMICUS CURIAE**

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This matter is before this Court on the motion of the United States Justice Foundation for leave to file its brief in Support of Defendants and in opposition to Plaintiffs' Request for Injunctive Relief in the above-captioned action.

Having considered the Motion, IT IS ORDERED that the motion to file a brief amicus curiae is granted; and

IT IS FURTHER ORDERED that the Clerk shall cause the accompanying amicus curiae brief to be filed and entered on the docket of the above captioned matter.

DONE: \_\_\_\_\_

\_\_\_\_\_  
U.S. Magistrate Judge