STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

LEAGUE OF WOMEN VOTERS
OF WISCONSIN EDUCATION
NETWORK, INC. and
MELANIE G. RAMEY.

Plaintiffs,

v. Case No. 11 CV 4669

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

Defendants.

DECISION AND ORDER DENYING DEFENSE MOTIONS TO DISMISS

STATEMENT OF THE CASE

Plaintiffs League of Women Voters of Wisconsin Education Network, Inc. ("League of Women Voters") and Melanie G. Ramey sue defendants Governor Scott Walker and individual members of the Government Accountability Board ("GAB")[1] in their official capacities, for a declaration under § 806.04, Stats., that portions of 11 Wisconsin Act 23 relating to photo ID requirements violate the Wisconsin Constitution, Article III, Sections 1 and 2.[2] As a preliminary matter, Governor Walker and the GAB move to dismiss the Amended Complaint on grounds that the League of Women Voters and Ms. Ramey lack standing to bring their claims. Governor Walker

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[1] Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, David G. Deininger, and Timothy Vocke.

[2] They also seek injunctive relief, see Amended Complaint ¶ 1, and prayer for relief, ¶ B.

further seeks dismissal of the case against him contending that he was improperly joined as a defendant because the Amended Complaint fails to state a claim for which relief may be granted against him in his official capacity. These arguments were fully briefed and subsequently argued on January 19, 2012, following which the court held the motions in abeyance pending further consideration of the merits of plaintiffs' claims.[3] Defendants' motions are now DENIED for the following reasons.

ANALYSIS AND DECISION

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

Governor Walker and the GAB argue that plaintiffs are barred from suing them because Act 23 does not harm them sufficiently to permit them to maintain this lawsuit. They are wrong. Regardless of the analysis one applies — and there are many in the case law — plaintiffs surely have standing to bring this action. In what follows, the court focuses on Ms. Ramey's standing because the parties agree that if she has standing in this lawsuit, so does the League of Women Voters.[4]

A. Uniform Declaratory Judgments Act, § 806.04, Stats.: At the outset, it should be noted that Plaintiffs League of Women Voters and Ms. Ramey sue for a declaratory judgment under § 806.04, Stats., which, as pertinent to the issue of standing, provides:

> (1) Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree, except that finality for purposes of filing an appeal as of right shall be determined in accordance with s. 808.03(1).
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> (2) Power to construe, etc. *Any person* … *whose rights*, status or other legal relations *are affected by a statute* … *may have determined any question of construction or validity arising under the … statute,* … *and obtain a declaration of rights, status or other legal relations thereunder*. …
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> …
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> (5) Enumeration not exclusive. The enumeration in subs. (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in sub. (1) in any proceeding where declaratory relief is sought, in which a judgment or

[3] At the time of the hearing, plaintiffs' action was proceeding on the original Complaint. After the hearing, an Amended Complaint was filed, to which a new motion to dismiss was addressed on the same grounds. Because the Amended Complaint added new allegations pertinent to the motion, additional briefing was permitted by the court, which has now been completed.

[4] *See also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977)

> decree will terminate the controversy or remove an uncertainty.
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> …
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> (12) Construction. This section is declared to be remedial; *its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.*
>
> (13) Words construed. *The word "person"* wherever used in this section, *shall be construed to mean any person … or other corporation of any character whatsoever.*
>
> …

(Italics and underlining added.)

On its face, the broad mandate of § 806.04 would appear to confer standing on Ms. Ramey. Liberally construed, as § 806.04 (12) expressly requires to further its remedial purpose, the rule permits *any* person whose "rights … are affected by a statute" to sue for declaratory judgment. Ms. Ramey contends that, as a voter and taxpayer in Wisconsin, her rights are "affected" by Act 23's requirement that she produce a particular form of government sanctioned photo identification at the polls as a prerequisite to exercising her constitutional right to vote. Whether or not Ms. Ramey now has, or can obtain, such photo identification is beside the point, at least according to plaintiffs, because the requirement "affects" – indeed, burdens – Ms. Ramey's fundamental right to vote by imposing an additional impediment to its exercise not specified in the Wisconsin Constitution. In this, she is surely correct. While the burden of carrying and producing a photo ID may be "trifling" in her particular situation, § 806.04, on its face, requires nothing more.[5] Furthermore, if the photo ID requirement is unconstitutional, as plaintiffs contend, it *ipso facto* constitutes an impermissible injury to all qualified electors (including Ms. Ramey), even if it were to present no burden at all. That is to say, constitutional injury itself confers standing.

B. Declaratory Judgment Standing in Constitutional Challenges: Case law that has developed around the concept of standing as an element of justiciability in declaratory judgment actions *specifically* in constitutional challenges further supports this court's holding that Ms. Ramey may bring this lawsuit. Two recent cases from our Supreme Court are particularly supportive of Ms. Ramey on this point – *Olson v. Town of Cottage Grove*, 309 Wis. 2d 365 (2008) and *McConkey v. Van Hollen*, 326 Wis. 2d 1 (2010).

Olson involved a declaratory judgment action asserting the unconstitutionality of a municipal ordinance which Olson claimed would have adversely affected him were he to submit a petition for rezoning. The trial court dismissed on ripeness grounds, holding that Olson had demonstrated no immediate impact from the ordinance because he had not submitted a new rezoning petition,

[5] Nor does general standing doctrine in Wisconsin, as we shall see below.

only potential future impact that was too contingent to trigger the availability of declaratory relief. 309 Wis. 2d at 376. Our Supreme Court disagreed, affirming the Court of Appeals' reversal of the trial court. Justice Prosser (writing for the majority) stated the following regarding the Uniform Declaratory Judgment Act, § 806.04:

> A court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment. This is so because the purpose of the Act is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties. *Putnam,* 255 Wis.2d 447, ¶ 43, 649 N.W.2d 626 (citing Wis. Stat. § 806.04(12); *Lister v. Bd. of Regents of Univ. of Wis. Sys.,* 72 Wis.2d 282, 307, 240 N.W.2d 610 (1976)). "The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Lister,* 72 Wis.2d at 307, 240 N.W.2d 610. Therefore, before one may seek declaratory relief pursuant to the Act, he must demonstrate that his cause of action is properly before the court-namely, that it is justiciable. *Loy,* 107 Wis.2d at 409-10, 320 N.W.2d 175.
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> ¶ 29 The leading Wisconsin case on declaratory judgments is *Loy,* which emphasized that a declaratory judgment is fitting when a controversy is justiciable. *Id.* at 410, 320 N.W.2d 175. A controversy is justiciable when the following four factors are present:
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> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
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> *380 (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy-that is to say, a legally protectible interest.
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> (4) The issue involved in the controversy must be ripe for judicial determination.
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> *Id.* (citing *Declaratory Judgments, supra,* at 26-57). "If all four factors are satisfied, the controversy is 'justiciable,' and it is proper for a court to entertain an action for declaratory judgment." *Miller* **219 *Brands-Milwaukee, Inc. v. Case,* 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991).
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> …

309 Wis. 2d at 379-380. Justice Prosser continued:

> The Act is to be liberally construed and administered to achieve a remedial purpose. Wis. Stat. § 806.04(12). The Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Id.* We have stated that "[t]he preferred view appears to be that declaratory relief is appropriate wherever it will serve a useful purpose." *Lister,* 72 Wis.2d at 307, 240 N.W.2d 610. Here, Olson's suit will serve the useful purpose of settling the uncertainty that Town landowners face with regard to whether they must first comply with the ordinance to obtain final plat approval and, subsequently, rezoning approval. Olson's declaratory

> suit was an effort to avoid subjecting himself to financial loss due to compliance with an ordinance he believed the Town had no legal or constitutional authority to impose.
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> ¶ 43 We have previously commented on the legal question of ripeness in the declaratory judgment context. By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions. *Putnam,* 255 Wis.2d 447, ¶ 44, 649 N.W.2d 626 (citing *387 *Milwaukee Dist. Council 48,* 244 Wis.2d 333, ¶ 41, 627 N.W.2d 866). In *State ex rel. Lynch v. Conta,* this court analyzed a declaratory judgment involving a forfeiture statute. *Lynch,* 71 Wis.2d at 674, 239 N.W.2d 313. It declared that potential defendants "may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution." *Id.* (citations omitted).8 Thus, a plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act. *Milwaukee Dist. Council 48,* 244 Wis.2d 333, ¶ 41, 627 N.W.2d 866. What is required is that the facts be sufficiently developed to allow a conclusive adjudication. *Id.; Lynch,* 71 Wis.2d at 674, 239 N.W.2d 313 (citing *Declaratory Judgments, supra,* at 56). As we stated in *Miller Brands-Milwaukee,* "the facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." 162 Wis.2d at 694, 470 N.W.2d 290 (citing *Loy,* 107 Wis.2d at 412, 414, 320 N.W.2d 175). The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment. *Miller Brands-Milwaukee,* 162 Wis.2d at 694-95, 470 N.W.2d 290 (citing *Loy,* 107 Wis.2d at 412, 320 N.W.2d 175).

309 Wis. 2d at 386-387.

Olson bears on our analysis in several ways. Most importantly, it essentially eliminates the requirement that a plaintiff suffer an actual injury before bringing a declaratory judgment action under § 806.04. How else can we interpret Justice Prosser's statement, "[t]hus, a plaintiff seeking declaratory judgment **need not actually suffer an injury** before availing himself of the Act"? Why else would he quote, with approval, longstanding doctrine from *Lister* that

> "[t]he underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination **prior to the time that a wrong has been threatened or committed.**" ?

(Boldface added in both quotations).

That the *Olson* court was addressing *ripeness* rather than *standing* is of no moment, because if actual or threatened injury is an invariable prerequisite to standing in declaratory judgment actions, there would never be a need for the Supreme Court to address injury as a requirement for ripeness — it would already exist as an element of standing. However, it is significant that the *Olson* trial court,

Court of Appeals, and Supreme Court had no quarrel with plaintiff's standing, although Mr. Olson could demonstrate no actual injury, or even any threatened injury beyond the hypothetical. And in the end, while some of the justices disagreed over the standard for appellate review, 309 Wis. 2d at 403-409, a unanimous Supreme Court held that Olson's constitutional challenge to the zoning ordinance was justiciable under § 806.04, a holding that presupposes standing.

Olson holds that declaratory relief is appropriate wherever it will serve a useful purpose, again citing *Lister.* 309 Wis.2d at 386. Without question, declaratory relief on the constitutionality of photo identification requirements in Act 23 serves a useful, indeed profound, purpose. Until that issue is decided by the Supreme Court, the validity of elections subject to the photo ID requirements is unsettled.

Worded differently, the rights of qualified electors will remain uncertain and insecure in the absence of declaratory relief on Act 23's constitutionality in the Supreme Court. As the *Olson* court emphasized, the stated purpose for § 806.04 is to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. *Id.*

Although *Olson* cautions that the facts must be sufficiently developed to avoid courts entangling themselves in abstract disagreements, 309 Wis. 2d at 387, the only facts involved in Ms. Ramey's declaratory judgment action are the enactment and wording of Act 23, and the existence of Article III, Sections 1 and 2 of the Wisconsin Constitution. In other words, this action involves a purely legal challenge, where the factual development so concerning to *Olson* is largely a non-factor. Moreover, there is nothing abstract about the disagreements concerning the constitutionality of Act 23.

Finally, supporting a liberal view of standing in this case, plaintiff Ramey's complaint presents a facial constitutional challenge to Act 23, not an "as-applied" challenge. That is, she seeks a declaration that the statute is unconstitutional on its face because it *always* operates unconstitutionally, not just when applied to her. *Olson* points out that a facial challenge to an unconstitutional law is justiciable at the moment the law is enacted because it challenges the very enactment of the law and its application to all citizens within its purview — here, all qualified electors under Article III, Sections 1 and 2. 309 Wis. 2d at 388-389, n. 9. Worded differently, the injury inheres in the enactment which, if plaintiffs are correct, is an affront to the Constitution and an impermissible burden imposed on all qualified electors.

The bottom line is that if Mr. Olson's case was justiciable, so too is Ms. Ramey's.

In another declaratory judgment action addressing a constitutional challenge, *McConkey v. Van Hollen,* 326 Wis. 2d 1 (2011), the Supreme Court unanimously found that the plaintiff had standing to pursue the action even though the Court was unable to articulate an actual injury suffered by the plaintiff. Instead the Supreme Court, per Justice Gableman, approached the standing issue from a different angle:

> ¶ 16 Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision. *See Moedern v. McGinnis,* 70 Wis.2d 1056, 1064, 236 N.W.2d 240 (1975) ("[T]he gist of the requirements relating to standing ... is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions."); *In re Carl F.S.,* 2001 WI App 97, ¶ 5, 242 Wis.2d 605, 626 N.W.2d 330 (2001) ("The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision and that people who are directly concerned and are truly adverse will genuinely present opposing petitions to the court.").
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> ¶ 17 We sympathize with the argument that all voters are harmed by an amendment invalidly submitted to the people. Still, it is difficult to determine the *13 precise nature of the injury here, and we are troubled by the broad general voter standing articulated by the circuit court. However, whether as a matter of judicial policy, or because McConkey has at least a trifling interest in his voting rights, we believe the unique circumstances of this case render the merits of McConkey's claim fit for adjudication.
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> ¶ 18 Numerous reasons support our conclusion. First, McConkey has competently **861 framed the issues and zealously argued his case. Second, it is likely that if his claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit, raising judicial efficiency concerns. Third, the consequences of our decision are sufficiently clear; a different plaintiff would not enhance our understanding of the issues in this case. Fourth, a detailed analysis of the nature of an injury here might inappropriately require us to prematurely interpret the substance of the amendment. Fifth, as a law development court, we think it prudent that the citizens of Wisconsin have this important issue of constitutional law resolved. The question of whether an amendment was effectually adopted weighs heavily in favor of addressing the merits of McConkey's challenge. Finally, none of our prior cases concerning the separate amendment rule involved a challenge on standing grounds. Instead, we addressed the issue without articulating a specific injury, and were animated by policy considerations similar to those articulated today. *See, e.g., State ex rel. Hudd v. Timme,* 54 Wis. 318, 332-33, 11 N.W. 785 (1882) (deciding to address the separate amendment claim because "forcible" arguments against the amendment's validity were presented and because of the importance of settling whether an amendment is part of the constitution or not).

326 Wis. 2d at 12-13.

McConkey's holding and entire discussion on standing support this court's conclusion that plaintiffs may proceed with their lawsuit here.

First, can there be any doubt whatsoever that the "issues and arguments presented [regarding the constitutionality of new statutory requirements for voting]

will be carefully developed and zealously argued" by the League of Women Voters and its president? Or that plaintiffs and defendants will fully "inform[ ] the court of the consequences of its decision"? Can anyone credibly assert that those who will actually be disenfranchised by the photo ID requirements — perhaps because they are too physically infirm, mentally ill, impoverished, itinerant, elderly, or simply neglectful to comply (but are nonetheless qualified electors under Article III, Sections 1 and 2 of the Wisconsin Constitution) — are in a better position "to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions" than plaintiffs? This is the same cohort of citizens that shows up in the circuit courts in increasing numbers, day in and day out, ***without lawyers*** in foreclosure proceedings, collection actions and family matters — that is, if they have the wherewithal to show up at all. Who will advocate for them on these constitutional issues that affect their fundamental, inherent and constitutional right to vote, if not plaintiffs, or some persons or entities like plaintiffs?

This court has no difficulty determining that *any* qualified elector faced with an unconstitutional statutory requirement for voting has suffered an articulable injury that can hardly be called "trifling". Even if this were not the case, Justice Gableman's "[n]umerous reasons" supporting standing in *McConkey* apply equally here. *See* 326 Wis. 2d at 13.

First, plaintiff Ramey, like Professor McConkey, has competently framed the issues and zealously argued the case.

Second, as in *McConkey*, it is likely that if plaintiff Ramey's claim were dismissed on standing grounds, another person who could more clearly demonstrates standing would bring an identical suit, raising judicial efficiency concerns. Indeed, as acknowledged at oral argument, a second case challenging the constitutionality of Act 23 has already been filed by the NAACP in Dane County Circuit Court, Branch 12,

Third, the consequences of the Supreme Court's decision are abundantly clear and a different plaintiff will not enhance the Supreme Court's understanding of the issues.

Fourth, a detailed analysis of the nature of an injury here might inappropriately require the Supreme Court to prematurely interpret the substance of the statute. Indeed, if the Supreme Court were to jump ahead to consider the constitutional merits of the statute, and find them lacking, plaintiff Ramey's standing would be undeniable, since her voting rights would be unconstitutionally infringed, however insignificant the actual burden to her might be.

Fifth, it is as important here as it was in *McConkey* that the Supreme Court, as a law development court, resolve this important issue of constitutional law. Just as the question of whether a constitutional amendment was effectually adopted weighed heavily in the favor of addressing the merits of Professor McConkey's

challenge, so too does the question of whether Act 23 unconstitutionally burdens an otherwise qualified elector's fundamental right to vote tip the scales in favor of addressing the merits of the challenge here.

Finally, neither this court nor defense counsel (as acknowledged at oral argument) can find any prior cases concerning Article III, Sections 1 and 2 which involved a challenge on standing grounds.

C. General Case Law on Standing: Even if we reach out beyond the declaratory judgment arena into other types of lawsuits where standing has been challenged, the case law, particularly from Wisconsin, supports Ms. Ramey's right to bring this lawsuit here. We begin with an observation from the United States Supreme Court:

> Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. *99 Standing has been called one of 'the must amorphous (concepts) in the entire domain of public law.'18 Some of the complexities peculiar to standing problems result because standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability.'19 In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.

Flast v. Cohen, 392 U.S. 83, 98-99 (1968) (footnotes omitted). Echoes of *Flast* are heard throughout the Wisconsin Supreme Court's recent foray into Wisconsin's thorny thicket of general standing law in *Foley-Ciccantelli v. Bishop's Grove Condominium Association, Inc.*, 333 Wis. 2d 402 (2011). Acknowledging the amorphous nature of standing à la *Flast,* Chief Justice Abrahamson, writing for the majority, observed what is apparent to even the most casual reader of this area of Wisconsin law:

> There is no single longstanding or uniform test to determine standing in the case law. Courts have inconsistently used a variety of terminologies as tests for standing.

333 Wis. 2d at 410. Seeking the proverbial unified theory on standing in an effort to impose order on the chaos[6], Chief Justice Abrahamson continued:

> Upon careful analysis of the case law, it is clear that the essence of the determination of standing is: (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing has been challenged.

[6] In this, the Chief Justice garnered only modest success, at least according to the separate concurring opinions of Justices Prosser and Roggensack (the latter joined by Justices Ziegler and Gableman).

> These three aspects of standing do not necessarily eliminate the various tests that have been applied in administrative review cases, in constitutional law cases, and in declaratory judgment cases. These various tests, while at times inconsistently used by courts, when appropriately used in particular types of cases are tools for determining personal interest, adverse effect, and *411 judicial policy, the three essential aspects of standing. When a statute, rule, or constitutional provision is at issue, a court determines these three aspects of standing by examining the facts to determine whether an injured interest exists that falls within the ambit of the statute, rule, or constitutional provision involved that judicial policy calls for protecting. When no statute, rule, or constitutional provision directly governs the standing analysis, a **794 court determines these three aspects of standing by examining the facts to determine whether an injured interest exists that falls within the ambit of relevant legal principles that judicial policy calls for protecting. The present case falls within the latter group of cases.

333 Wis. 2d at 410-411 (boldface added.) After acknowledging that standing in Wisconsin is not to be construed narrowly or restrictively, but rather should be construed liberally, and repeating her observation regarding the lack of uniformity in the case law on standing, 333 Wis. 2d at 420, Chief Justice Abrahamson reiterated:

> On careful analysis of the cases, it is clear that the basic thrust of all the cases, the essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected;17 and (3) whether judicial policy **799 *422 calls for protecting the interest of the party whose standing is challenged.

333 Wis. 2d at 421.

Specifically pertinent to standing in cases involving constitutional challenges like Ms. Ramey's, the *Foley-Ciccantelli* majority held:

> The essence *431 of the question of standing in these cases (that is, the essence of determining personal interest, adverse effect, and judicial policy, the three aspects of standing) is whether there is an injury and whether the injured interest of the party whose standing is challenged falls within the ambit of the statute or constitutional provision involved.
> ¶ 55 In other words, the question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision. Contrary to the assertions in Justice Roggensack's concurrence, our delineating the essence of this court's standing analyses does not necessarily eliminate the two-part test established in *Fox,* 112 Wis.2d at 524, 334 N.W.2d 532, which is applicable to administrative review cases, or the two-fold analysis described in *First National Bank,* 95 Wis.2d at 308, 290 N.W.2d 321, applicable to actions based in the constitution, or the justiciability analysis established by *Loy v. Bunderson,* 107 Wis.2d 400, 410, 320 N.W.2d 175 (1982). These

> "tests," while at times inconsistently used by courts, when appropriately used are tools for determining personal interest, adverse effect, and judicial policy, the three essential aspects of standing. In these cases a court decides standing by examining the facts and interpreting a statute, rule, or constitutional provision at issue.30

333 Wis. 2d at 430-431 (footnotes omitted).[7]

As supportive of Ms. Ramey's standing here, *Foley-Ciccantelli* three-prong analysis provides the following.

First, Ms. Ramey need only demonstrate that she has a "personal interest in the controversy", i.e. a "personal stake". The *Foley-Ciccantelli* majority hastens to add that even a "trifling interest" will suffice. 333 Wis. 2d at 422, n. 17 (citations omitted). Here Ms. Ramey alleges far more than a "trifling interest", i.e. she asserts that she is a qualified elector with an interest or personal stake in exercising her inherent and constitutional right to vote free of unconstitutional restrictions.

Second, the required "injury" for standing equates to having her personal interest/stake merely "adversely affected". The type of injury/adverse effect necessary for standing is wide ranging. As stated by the *Foley-Ciccantelli* majority,

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[7] The "two-fold analysis" from *First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308-309 (1980) referenced by the *Foley-Ciccantelli* majority, also supports Ms. Ramey's standing:

> Where, as here, a plaintiff has raised a constitutional challenge to legislative, executive, or administrative acts, the standing question is twofold: whether "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action,' " Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975), quoting Linda R. S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973); and "whether the constitutional . . . provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Warth v. Seldin, supra, 422 U.S. at 500, 95 S.Ct. at 2206.4
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> > "The federal law of standing is not binding on Wisconsin, but recent federal cases are certainly persuasive as to what the rule should be." (Footnotes omitted.) Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis.2d 1, 11, 230 N.W.2d 243 (1975).
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> 3 To meet the requirement5 of an injury, a plaintiff must allege "such a personal stake in the outcome of the controversy," ***309** Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), as to insure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968). However, the magnitude of a plaintiff's injury is not a determinant of his standing. " 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis ****326** for standing and the principle supplies the motivation.' " United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973), quoting Davis, Standing: Taxpayers and Others, 35 U.Chi.L.Rev. 601, 613 (1968)

"[t]he injury need not be physical, economic, or pecuniary; it may, for example, be aesthetic, conservational, or recreational." 333 Wis. 2d at 422, n. 17 (citations omitted). Ms. Ramey satisfies this low threshold for injury by contending that her inherent and constitutional right to vote has been burdened by the legislature's superimposition of voting requirements not countenanced by the Wisconsin Constitution. Furthermore, she is threatened with future injury in that she must continually renew her forms of photo ID to cast her ballot in future elections because, for example. drivers licenses, passports, etc. are subject to periodic expirations.

Third, and most importantly, in issues of constitutional significance such as the one presented by Ms. Ramey, judicial policy is front and center in the analysis. To be sure, as Justice Prosser points out in his concurrence, 333 Wis. 2d at 463, judicial policy "is not a "catch all" provision [to] allow courts to act as they see fit." Nonetheless, if judicial policy does not call for protecting a constitutionally qualified elector's right to vote against unconstitutional impediments, what good is judicial policy?[8]

II. GOVERNOR WALKER, IN HIS OFFICIAL CAPACITY, IS AN APPROPRIATE PARTY TO THIS LAWSUIT

Plaintiffs' Amended Complaint, ¶ 10 alleges the following against defendant Scott Walker:

> 10. Defendant Scott Walker is the Governor of the State of Wisconsin who was sued in his official capacity. Defendant Walker's address is 115 East E. State Capitol, Madison, WI 53702. As Governor, Defendant Walker is the chief executive officer of the State of Wisconsin and pursuant to Article V, Section 4, is responsible for the faithful execution of 2011 Wisconsin Act 23. Defendant Walker, as Governor, also has statutory responsibilities and authority relating to the promulgation of administrative rules by state agencies, including the Governmental Accountability Board, pursuant to Wis. Stat. ch 227, subch.II.[9]

Read in the light most favorable to plaintiffs, as is required on a motion to dismiss, the Amended Complaint seeks to enjoin Governor Walker from enforcing Act 23 which plaintiffs contend is unconstitutional.

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[8] Because this court has found that plaintiff Ramey, as a qualified elector under the Wisconsin Constitution, satisfies Wisconsin's standing requirements to challenge the constitutionality of Act 23, it is unnecessary to address her additional standing arguments premised on her status as a Wisconsin taxpayer. Moreover, having found that Ms. Ramey has standing, the conclusion follows that her membership in the League of Women Voters grants the League of Women Voters standing as well, as defendants have stipulated and the case law holds.

[9] Also, concerning taxpayer standing, plaintiffs allege in ¶ 8 that the Office of the Governor has expended public funds in the furtherance of Act 23.

Governor Walker seeks an order dismissing him from the action under § 802.06 (2) (a) 6, Stats.,, arguing that plaintiffs' Amended Complaint fails to state a claim for which relief may be granted against him, even in his official capacity. In support of this position, Governor Walker cites only one case, *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899 (E.D. Wis. 2002), a United States District Court decision from the Eastern District of Wisconsin.

Governor Walker's arguments are unpersuasive, and his dismissal motion must be denied, for several reasons.

First, United States District Court decisions are generally not precedent in Wisconsin courts. *See e.g. Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1, 116, n. 26 (2006) (Prosser, J., concurring in part, dissenting in part). To be sure, they can provide useful guidance to this court when the issues addressed involve similar laws and fact situations. Such is not the case with *Deida,* which applied federal procedural doctrine [*Ex Parte Young*, 209 U.S. 123, 157-158 (1908)] to federal constitutional issues (11th Amendment immunity).

Secondly, even if we look to *Deida* for guidance by analogy, it is not particularly helpful here because it simply holds that, under the 11th Amendment of the United States Constitution, Governor Walker is immune from suit in the federal courts where "his only connection" [to act 23] is a general duty" under the Wisconsin Constitution, Article V, Section 4 "to take care that the laws are faithfully executed". 192 F. Supp. 2d at 917. *Deida* simply applies and arguably extends the doctrine in *Ex Parte Young, supra*:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

Subsequent federal cases adopting the *Deida* rule[10] indicate that little more than the broad general enforcement powers under the Wisconsin Constitution is required to vitiate 11th Amendment immunity. The Governor's connection to enforcing the allegedly offending statute may even be indirect. *See e.g. Back v. Carter*, 933 F. Supp. 738, 752 ((N.D. Ind. 1996) *citing Los Angeles County Bar v. Eu*, 979 F. 2d 697 (9th Cir. 1992).

Here, Governor Walker's involvement in the enforcement of Act 23 is more than indirect. He not only has general enforcement authority for Act 23 under Article V, Section 4 of the Wisconsin Constitution, but substantial authority over its administration by virtue of his direct control over the process for creating and adopting administrative regulations governing the GAB's enforcement of Act 23, which authority is accorded him by the recently enacted § 227.185, Stats. Moreover,

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[10] No Wisconsin cases appear to even acknowledge *Deida*, let alone cite it as persuasive authority.

Governor Walker has directly implemented his new authority by issuing Executive Order # 50. Accordingly, it is extremely doubtful the federal courts would immunize Governor Walker from suit on the basis of *Deida.*

Instead, we should be guided by Wisconsin law on this issue, sparse though it may be. *Lister v. Board of Regents of the University of Wisconsin*, 72 Wis. 2d 282, 302-303 (1976) is the fountainhead and controlling case:

> Some confusion in this respect has resulted from the rules which have developed concerning the right to maintain a declaratory judgment action to obtain a ruling as to the constitutionality or proper construction of a statutory provision. This court has, on several occasions, *303 noted that sec. 269.56, Stats., does not make any provision for a suit against the state and that, as a result, declaratory judgments against the **623 state are barred by principles of sovereign immunity.22 However, the court has also recognized that the declaratory judgment procedure is particularly well-suited (in cases where such relief is otherwise appropriate) for resolving controversies as to the constitutionality or proper construction and application of statutory provisions.23 As a result, **it has been necessary to engage in a fiction that allows such actions to be brought against the officer or agency charged with administering the statute** on the theory that a suit against a state officer or agency is not a suit against the state when it is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority.

(Boldface added.)

While it is certainly true that the GAB is the principal agency charged with administering Act 23, the GAB is largely useless in that role without the power to formulate rules and regulations to advance that purpose. Under § 227.185, Stats. Governor Walker has a virtual monopoly on implementing these administrative rules and regulations:

> After a proposed rule is in final draft form, the agency shall submit the proposed rule to the governor for approval. The governor, in his or her discretion, may approve or reject the proposed rule. If the governor approves a proposed rule, the governor shall provide the agency with a written notice of that approval. No proposed rule may be submitted to the legislature for review under s. 227.19(2) unless the governor has approved the proposed rule in writing.

Again, Governor Walker has affirmatively embraced his statutory authority by promulgating Executive Order # 50. Therefore, to say that he is not "charged with administering the statute [Act 23]" within the meaning of *Lister* is neither practically nor literally true. Thus, the Amended Complaint states a claim for relief against Governor Walker in his official capacity, and he is a proper party to this lawsuit for declaratory and injunctive relief.

Dated this ____ day of _____________, 2012.

BY THE COURT:

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Richard G. Niess
Circuit Judge

CC: Attorney Susan Crawford
Assistant Attorney General Clayton P. Kawski
Attorney Peter E. McKeever
Assistant Corporation Counsel Dyann Hafner