Case No. CV-14-462

In The

ARKANSAS SUPREME COURT

MARK MARTIN, *et al.*,

Appellants,

-v.-

FREEDOM KOHLS, *et al.*,

Appellees.

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS HONORABLE TIMOTHY DAVIS FOX, CIRCUIT JUDGE (60CV-14-1495)

BRIEF OF AMICI CURIAE DR. THOMAS DeBLACK, DR. WILLIAM SCHRECKHISE, DEAN JOHN DiPIPPA, AND NATE COULTER IN SUPPORT OF APPELLEES

David B. Hird
Kristen M. Murphy
Cheryl James
WEIL, GOTSHAL & MANGES LLP
1300 Eye St. NW, Ste. 900
Washington, DC 20005
Tel.: 202-682-7175
Fax: 202-857-0940
david.hird@weil.com
kristen.murphy@weil.com

767 Fifth Avenue
New York, NY10153
Tel.: 212-310-8325
Fax: 212-310-8007
cheryl.james@weil.com

Myrna Pérez
Michael C. Li
Jennifer L. Clark
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Fl.
New York, NY10013
Tel.: 646-292-8310
Fax: 646-292-8310
myrna.perez@nyu.edu
michael.li@nyu.edu
jenniferl.clark@nyu.edu

Tim Cullen (AR 97062)
CULLEN & CO., PLLC
124 West Capitol Ave.
Suite 1750
Post Office Box 3255
Little Rock, AR 72203
Tel.: 501-370-4800
Fax: 501-370-9198
tim@cullenandcompany.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Consitutional Provisions

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

I. INTEREST OF AMICI CURIAE

Amici curiae are professors of law, history, and political science who have studied Arkansas constitutional and legal history and the impact of election laws on voter participation. *Amici curiae* submit this brief, which consists of a historical analysis of the right to vote provisions of the Arkansas Constitution, social science research concerning the potential of laws like Arkansas' Act 595 to impair the right to vote, and social science research concerning the nearly non-existent incidence of in-person voter impersonation in the United States and in Arkansas in particular. Courts have considered such evidence when determining the constitutionality of voting laws. See*, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bush v. Vera*, 517 U.S. 952 (1996); *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Dr. Thomas DeBlack is a professor of history at Arkansas Tech University. Dr. DeBlack conducted his doctoral work in Southern history, and has focused his research on the history of Arkansas. Among other award-winning scholarship, Dr. DeBlack authored *With Fire and Sword: Arkansas, 1861-1874*, which analyzes Arkansas' experience during the Civil War and Reconstruction periods, and co-authored *Arkansas: A Narrative History*.

Dr. William Schreckhise is an associate professor of political science and legal studies minor advisor at the University of Arkansas. He specializes in

constitutional law, public policy, public administration, and administrative law. Dr. Schreckhise has published numerous articles on the Arkansas political system.

Dean John DiPippa is Dean Emeritus and Distinguished Professor of Law and Public Policy at the William H. Bowen School of Law at the University of Arkansas at Little Rock. Dean DiPippa teaches, among other courses, Constitutional Law and Public Service Law, and has published numerous articles concerning constitutional law.

Nate Coulter is a lawyer in private practice in Little Rock. From 2012 to 2014 he served as a Distinguished Practitioner in Residence at the University of Arkansas School of Law in Fayetteville, where he taught courses on the Arkansas Constitution and election law. Mr. Coulter served as Chairman of the Arkansas Election Law Commission in 1990, where he drafted and facilitated adoption of Arkansas' first early voting statute.

II. SUMMARY OF ARGUMENT

The simple, clear test that the Arkansas Constitution uses to determine who is eligible to vote was purposely drafted to make it hard for majorities of the day to interfere with the fundamental right to vote. Indeed, it is part and parcel of a long, noteworthy Arkansas history of zealously guarding against legislative overreach, both in the area of voting and more generally.

Act 595's identification provisions impose a requirement that by its terms falls outside the ambit of Article 3, Section 1 of the Arkansas Constitution and thus directly and unconstitutionally contravenes the non-impairment guarantee in Article 3, Section 2 of the Constitution.

Moreover, the burdens imposed by photo identification laws are both very real and precisely the sort of additional voting requirement that the Arkansas Constitution leaves not to the discretion of legislators but instead to the people of Arkansas. Numerous social science studies show that laws like Act 595 raise the costs of voting, drive down voter participation, and disproportionally exclude low-income individuals and other historically politically disempowered groups from the electoral process.

There is all the more reason to reject this law because these costs are being imposed to combat what respected social scientists and researchers have concluded is the virtually non-existent problem of in-person voter impersonation fraud.

III. STATEMENT OF THE CASE

Amici curiae incorporate and adopt by reference the statement of the case set forth in the Brief of Appellees Freedom Kohls, Toylanda Smith, Joe Flakes, and Barry Haas.

IV. ARGUMENT

A. Arkansas Has a Long History of Constraining Legislative Power on Important Issues Like Voting.

1. The Arkansas Constitution imposes unambiguous constraints on the ability of the General Assembly to limit the franchise

Article 3, Section 1 of the Arkansas Constitution provides that:

> Except as otherwise provided by this Constitution, any person may vote in an election in this State who is (1) a citizen of the United States; (2) a resident of the State of Arkansas; (3) at least eighteen (18) years of age; and (4) lawfully registered to vote in the election.

Ark. Const. art. 3, § 1. This textual guarantee of the fundamental right to vote is buttressed by the next provision of the article, Section 2, which provides that "[no] law shall be enacted, whereby such right shall be *impaired* or forfeited, except for the commission of a felony, upon lawful conviction thereof." Ark. Const. art. 3, § 2 (emphasis added).

The operation of these provisions in tandem could not be more straightforward. Any person who meets the four articulated qualifications in Section 1 *must* be permitted to vote in Arkansas elections. Moreover, while other states have similar provisions defining the qualifications for voting, Arkansas is unique in that its constitution goes further and, with Section 2, deliberately constrains the ability of the Arkansas General Assembly to take any action that impairs or burdens the right to vote in any way.

Despite this clear constitutional mandate, the Arkansas General Assembly, in passing Act 595, did precisely what the drafters of the Arkansas Constitution prohibited. It imposed an additional requirement to vote that prevents an otherwise qualified Arkansas citizen who does not possess and present one of the limited forms of required identification from voting. As such, it is both facially invalid and contrary to the state's constitutional tradition.

2. *Article 3 of the Arkansas Constitution must be read in light of the state's long history of limiting interference with its citizens' fundamental right to vote*

Although the textual language of the right to vote provisions is clear on their face, Arkansas' constitutional history leaves no doubt that the provisions must be given an expansive and literal reading.

From the middle of the nineteenth century, Arkansas has used its state constitutions to carefully define who can vote. Since 1874, it also has barred the General Assembly from taking actions that would impair persons who meet those qualifications from exercising their right to vote. These provisions, which are unlike anything in the United States Constitution, arose in the context of an uncertain and chaotic post-Civil War period, during which groups jockeyed for power and advantage in a political system fraught with corruption. Although the post-war period saw Arkansas adopt three constitutions in rapid succession (in 1864, 1868, and 1874), the state's constitutional right to vote guarantees not only

have remained largely intact since they were first adopted in 1864 but were, in fact, strengthened by the 1874 Constitution.

The constitutional right to vote guarantee first appeared as part of Arkansas' constitutional structure as part of the broadly populist 1864 Constitution, which provided:

> Every free white male citizen in the United States who shall have attained the age of twenty-one years, and who shall have been a citizen of the state six months next preceding the election, shall be deemed a qualified elector, and be entitled to vote in the country or district where he actually resides, or in case of volunteer soldiers, within their several military departments or districts, for each and every office made elective under the state or under the United States.

Ark. Const. of 1864, art. 4, § 2.

However, just four years later, under pressure from the federal government, Arkansas adopted the 1868 Constitution. This newer constitution did revise the right to vote provisions to include African Americans within its ambit, but also took a step back from the nascent egalitarian and limited government ethos in the 1864 Constitution by disenfranchising former Confederates and creating a strong, highly centralized executive.

The new structure did not last long. Under the resulting government, "[c]orruption was at an all-time high in Arkansas. The Legislature spent many millions on non-existent railroads, levees, and buildings, and the state debt rose from three to twelve million dollars with only about $100,000 in public

improvements to show for the indebtedness. County debts increased at a similar rate." Walter Nunn, *The Constitutional Convention of 1874*, 27 Ark. Hist. Q. 177, 182 (1968). The backlash was swift and led to the adoption of the 1874 Constitution, which went even further than the 1864 Constitution in sharply decentralizing power. As explained by one historian:

> [T]he 1874 constitution reflects a general suspicion of government and authority. . . . County governments became all powerful as administrative units of the state, with jurisdiction over roads and bridges, local judiciary, and taxation as well as spending. The state's power to tax and borrow were severely limited, the terms of elected officials were reduced from four years to two years, the number of county officials was increased from two to ten, and the legislative sessions were limited to sixty days every two years. . . . Detailed provisions ensured that governmental power would not be misused, and a great deal of authority transferred from state to local government.

Arkansas Constitutions, Butler Ctr. for Ark. Studies Cent. Ark. Library Sys., http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2246 (last visited Aug. 7, 2014).

Notably, as part of this shift back to a limited government model, the 1874 Constitution also significantly strengthened the right to vote provisions of the Arkansas Constitution. While both the 1864 and 1868 Constitutions contained right to vote provisions substantially similar to Article 3, Section 1 of today's Constitution, the 1874 Constitution went further and added Section 2, which explicitly (and uniquely among states) provided that the right to vote set out in Section 1 could not be "impaired."

The clear limits that Section 2 places on the General Assembly are part and parcel of a broader egalitarian constitutional tradition that, throughout the state's history, has favored an open franchise and limited government. With its 1874 Constitution, for example, Arkansas became one of the few states of the period that allowed low-income citizens to vote, specifically repealing restrictions in the state's 1868 Constitution that barred paupers — defined as people who received public aid or resided in a poorhouse — from voting. Arkansas, likewise, is one of the few southern states to never have implemented a literacy requirement for voting. And when Arkansas voters adopted a constitutional amendment in 1964 creating a modern system of permanent voter registration, as part of reforms advocated by future governor Winthrop Rockefeller, the amendment allowed the General Assembly to adopt statutory provisions governing the mechanics of voter registration *but only if* such provisions could garner support from a two-thirds majority of both houses of the Arkansas General Assembly. Ark. Const. amend. 51. Reading the right to vote provisions in Article 3 of the 1874 Constitution strictly and literally is consistent with this strong tradition of egalitarianism and limited government.

Given both this tradition and the clear textual language, Act 595 can only be read as an additional qualification — not only because the requirement to present identification appears nowhere in the four qualifications set forth in Article 3,

Section 1, but also because the Secretary of State Martin conceded below that Act 595 is *not* a registration requirement. As the trial court aptly observed: "[F]rom a legal analysis standpoint, if you have to present something at the time you vote that's in excess of what you had to show up with to get registered to vote, then . . . it's a qualification and not the registration process." Ab. at 40; *see also* Ab. at 37-38 (Mr. Cordi: " . . . [P]hoto ID is not necessarily required during the registration process.").

3. Changes affecting the right to vote in Arkansas have always been made by constitutional amendment, not by the Arkansas General Assembly

True to the state's long populist tradition, Arkansas courts have consistently rejected efforts by the general Assembly and its predecessors to side-step the mandates of Article 3. In an early challenge to the constitutional right to vote, the Arkansas Supreme Court held in *Rison v. Farr* that parallel language in the 1864 Arkansas Constitution "fixes the qualifications, and determines who shall be deemed qualified voters in this state in direct, positive, and affirmative terms, and these qualifications cannot be added to by legislative enactment." *Rison v. Farr*, 24 Ark. 161, 170 (1865). There, the Arkansas Supreme Court was confronted with an "oath law" that required that:

> [E]ach voter shall, before depositing his vote at any election in this state, take an oath that he will support the constitution of the United States and of this state, and that he has not voluntarily borne arms against the United States or this state, nor aided, directly or indirectly, the so-called confederate authorities since the 18th day of April, 1864.

Id.

In rejecting the "oath law" the Court used strong language to articulate the unequivocal suffrage right granted by the 1864 Arkansas Constitution. The Court reasoned:

> And clearly, if the legislature cannot, by direct legislation, prohibit those who possess the constitutional qualification to vote, from exercising the elective franchise, that end cannot be accomplished by indirect legislation. The legislature cannot, under some color of regulating the manner of holding elections, which to some extent that body has a right to do, impose such restrictions as will have the effect to take away the right to vote as secured by the constitution.

Id. at 172.

Since *Rison*, changes to the scope of the franchise have come about by constitutional amendment or, where they did not, they have been struck down by courts. In 1920, for example, the right to vote provisions of the Arkansas Constitution were amended to include women. Likewise, in 1964, Arkansas voters approved a groundbreaking constitutional amendment creating a permanent system of voter registration and the right to vote provisions in Article 3 of the 1874 Constitution were amended to make being registered one of the requirements for voting. Other changes, like imposition of a poll tax at the turn of the twentieth century, limited rather than expanded the franchise. But, whether expansive or not, all took place through the constitutional amendment process rather than through legislation.

The convoluted and controversial history of Arkansas' poll tax is instructive of Arkansas voters' sole ownership of the right to change voting qualifications. Prior to the 1880s, conservative white Democrats and African-American Republicans in many parts of Arkansas operated under an informal agreement by which they allocated public offices between themselves. John William Graves, *Negro Disenfranchisement in Arkansas*, 26 Ark. Hist. Q. 199, 201 (1967). However, the end of the nineteenth century saw the emergence of a coalition of African Americans and poor agrarian whites, without parallel elsewhere in the South, that showed an increasing ability to challenge the power of established Democratic Party barons — coming close to defeating the Democratic nominee for governor in both 1888 and 1890. Calvin R. Ledbetter, Jr., *Arkansas Amendment for Voter Registration Without Poll Tax Payment*, 54 Ark. Hist. Q. 134, 135 (1995). Eager to stem that growing threat, establishment elements in the Democratic Party proposed a constitutional amendment in 1892 to enact a poll tax. *Id.* However, in the subsequent election to approve the amendment, the amendment received only a plurality of the votes cast. *Id.* Arkansas nonetheless put the amendment into effect as if it had received a majority, and for the next thirteen years, Arkansas voters paid a poll tax before voting. *Id.*

Then, in 1905, an Arkansas voter, who "possessed all the qualifications prescribed by article 3, Sec. 1" brought suit in federal court challenging the legality

of the poll tax on the grounds that the Arkansas Constitution had not been amended to allow imposition of an additional requirement. *Knight v. Shelton*, 134 F. 423, 426 (E.D. Ark. 1905). The court agreed, holding:

> There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode therein prescribed. . . . If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution.

Id. Although Arkansas voters later approved another constitutional amendment creating a poll tax (this time by a majority), the *Knight* case affirms the proposition that the right to change voter qualifications rests squarely with the people of Arkansas and not the Arkansas General Assembly.

This principle was reaffirmed some sixty years later when this Court held that statutory enactments by the Arkansas General Assembly to, in effect, do away with the poll tax were unconstitutional. *Faubus v. Miles*, 237 Ark. 957 (1964). In *Faubus,* the Arkansas General Assembly had, in the face of mounting criticism of the poll tax, passed legislation creating a system of voter registration which "purport[ed] to substitute a 'free' poll tax (for registration purposes) in lieu of a poll tax for which the voter has paid $1.00." *Id.* at 963. This Court unanimously rejected the attempt, holding that:

> It is our conclusion that the legislature has no power, in state elections . . . to substitute said 'free' poll tax for the poll tax required by Amendment 8 which provides that the voters 'shall exhibit a poll tax receipt or other evidence that they have *paid* their poll tax.' (Emphasis added.) To hold

> otherwise would be to approve a subterfuge for evading the letter and spirit of a plain constitutional provision.

Id. This rejection led directly to Amendment 51 of the 1874 Arkansas Constitution, which, with bipartisan support, formally ended the poll tax and created a modern system of permanent voter registration.

Given the purported reason for the current voter ID law, it is noteworthy that attempts to end the poll tax by legislation in the 1960s were motivated not only by the civil rights movement but also by long-voiced concerns that the poll-tax regime was not very secure and subject to manipulation. As the late Professor Calvin Ledbetter recounts in his seminal analysis of efforts to end the poll tax in Arkansas, many at the time regarded Arkansas' poll-tax system as problematic because:

> It was not necessary to purchase a poll tax in person. A poll tax could be obtained by an individual through the mail or by a member of his or her immediate family. . . . Because poll tax receipts were often not stamped and dated in a given election, it was possible for an individual to take an unstamped receipt and vote in another precinct or another county. The procedures governing absentee ballots were equally permissive. A request to the county clerk with a dollar brought a poll tax receipt and an absentee ballot. Although voters were required to sign an oath saying that they would be absent on election day and would not vote again, the poll tax receipt was not stamped, and there was no investigation of whether the absentee voters actually met voting requirements.

Calvin R. Ledbetter, Jr., *Arkansas Amendment for Voter Registration Without Poll Tax Payment*, 54 Ark. Hist. Q. 134, 139-40 (1995). However, despite the fact that legislation to end the poll tax was motivated in part by the desire to make the franchise more secure, this Court held that the Arkansas Constitution should be

interpreted strictly and that the poll tax was "entitled to protection by the courts until the people (by amendment) direct otherwise." *Faubus*, 237 Ark. at 963.

B. Social Science Research Demonstrates that the Requirements of Act 595 Impair the Fundamental Right to Vote in Violation of the Arkansas Constitution.

The burdens imposed on the franchise by strict photo ID laws, like Act 595, are not incidental or ministerial (like signing a poll book), but rather precisely the type of "impairment" of the fundamental right to vote that Arkansas has prohibited since 1874. Data suggesting these burdens will fall disproportionately on certain vulnerable groups, including (i) low income individuals;[1] (ii) individuals with low levels of educational attainment; and (iii) the disabled and the elderly, should be all the more reason for concern, given Arkansas' history of egalitarianism in the franchise.

1. Act 595 raises the costs of voting for all citizens, and will drive down Arkansas' already low voter participation rates

Social scientists today accept that, for a typical voter, decisions about whether to vote are much like most other life decisions in that they are made not based on high-minded first principles, but under a rational choice framework in which people balance the incremental costs and benefits of various options. In the case of voting, each individual voter instinctively knows that his or her vote is unlikely to determine the outcome of an election. Thus, many voters make what

[1] In Arkansas, as in most of the country, poverty is heavily correlated with race.

social scientists term "marginal" decisions on whether to vote. See*, e.g.*, William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62(1) Am. Pol. Sci. Rev. 25, 25-42 (1968). This means the greater the inconvenience voting presents, the less likely it is that voters will choose to participate in the system.

A recent study by political science professors at the University of Wisconsin-Madison explains that the impact of election law changes typically will be felt most keenly by voters "who are on the turnout bubble, that is, neither highly likely to vote nor abstain." Barry C. Burden et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 Am. J. of Pol. Sci. 95, 97 (2013). As Professor Burden and his colleagues go on to explain:

> Citizens who are almost certain to cast a ballot will not be affected by marginal changes in the rules; they will vote regardless. Similarly, low-likelihood voters simply may be beyond the reach of any voting reforms. For people near the voting threshold, it is axiomatic that small changes have the highest likelihood of turning nonvoters into voters, or vice versa.

Id.; see *also* Barry C. Burden & Jacob R. Neiheisel, *Election Administration and the Pure Effect of Voter Registration on Turnout*, 66(1) Pol. Sci. Res. Q. 77, 77-90 (2013).

Because such moderately-engaged voters are at the margins of deciding whether or not to vote, small changes in the voting process have an outsized impact on voter participation rates. Indeed, empirical studies increasingly support the

conclusion that even small, seemingly neutral changes can have a statistically significant effect on voter turnout.

For example, in 2005, Professors Moshe Haspel and H. Gibbs Knotts conducted a study looking at the correlation between the relative distances between a voter's home address and her polling place in Atlanta, Georgia, and that voter's decision whether to vote. They found that "small differences in distance from the polls can have a significant impact on voter turnout." Moshe Haspel & H. Gibbs Knotts, *Location, Location, Location: Precinct Placement and the Costs of Voting*, 67 J. of Pol. 560, 560 (2005). All other things being equal, voters who lived less than a half a mile from a polling place were 50% more likely to vote than voters whose polling places were four miles away if neither owns a vehicle. *Id.* at 569.

Likewise, a study of California's decision to consolidate voting precincts for a 2003 gubernatorial recall election demonstrated that the increased cost of searching for and obtaining transportation to the proper polling location decreased in-person voting by 3.03 percentage points. Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105(1) Am. Pol. Sci. Rev. 115, 115-34 (2011).

Similarly, a 2009 study of a New York City school district's decision to consolidate voting locations found that the decision contributed to a 7% decrease in turnout even though the election was one that, by its nature, tended to attract

highly motivated, well-educated, and well-informed voters. John E. McNulty et al., *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17(4) Pol. Analysis 435 (2009).

Conversely, empirical evidence shows that the implementation of measures that make it marginally easier to access the polls correlate to an increase in voter turnout. Riker & Ordeshook, *supra*, at 25-42. For example, research has consistently found that Election Day Registration "increases turnout . . . from three to seven percentage points" because it "lowers the cost of voting by combining the separate steps of registering and voting into one essentially continuous act." Burden et al., *Election Laws*, *supra*, at 96.

Given this research, there are three foreseeable ways in which Act 595 is likely to decrease the number of qualified voters who cast a ballot that counts. First, there are voters who possess one of the permitted forms of identification but who may for one reason or another arrive at the polling place without it. A prominent example of this occurred in the May 2014 Arkansas primary when gubernatorial candidate (and former congressman) Asa Hutchinson arrived at his polling place in Bentonville without an ID. Congressman Hutchinson was able to dispatch an aide to retrieve his ID, but voters without such resources would either have to return home to get their ID (a time and opportunity cost that, as social science has demonstrated, many would-be voters will be unwilling or unable to

undertake) or cast a provisional ballot and then go to his or her county clerk with the required ID no later than noon on the Monday after the election in order to have the ballot counted (an even greater time and opportunity cost). Clare Kim, *Pro-voter ID candidate Asa Hutchinson forgets ID needed to vote*, MSNBC (May 20, 2014), http://www.msnbc.com/the-last-word/asa-hutchinson-forgets-photo-id-vote.[2]

Second, there are Arkansas residents who may lack one of the eight permitted forms of identification, and for whom the costs of getting such identification are either too high to make voting a rational choice, or simply insurmountable due to resource restraints. Although Arkansas-specific data about the number of eligible voters who lack identification is not available, a 2006 nationwide survey found that "as many as 11 percent of United States citizens – more than 21 million individuals – do not have government issued photo

[2] While a voter also theoretically could go to his or her county board of election commissioners to perfect their provisional ballot, Ark. Code Ann. § 7-5-321(c)(1), most county boards of election do not keep offices, an official address, staff, or office hours, and instead meet only for meeting dates and times; official records relating to the county boards often give only home addresses for individual members.

identification." Brennan Center for Justice at NYU School of Law, *Citizens Without Proof* 3 (2006), *available at* http://www.brennancenter.org/analysis/citizens-without-proof. This is consistent with judicial findings in states with comparable demographics to Arkansas:

- In Wisconsin, courts found that approximately 9% of the population lacked identification to vote under that state's voter identification law. *Frank v. Walker*, 2014 WL 1775432, at *12-13 (E.D. Wis. Apr. 29, 2014).
- In Pennsylvania, 259,000 to 511,000 registered voters lacked the forms of identification required to vote under that state's identification law. *Applewhite v. Pennsylvania*, 2014 WL 184988, at *11 (Pa. Commw. Ct. Jan. 17, 2014).
- In Indiana, 7% of registered voters reported that they did not exercise their right to vote specifically because they lacked the requisite form of identification required by Indiana's identification law. *See Texas v. Holder*, 888 F. Supp. 2d 113, 129 (D.D.C. 2012), *rev'd on other grounds*.

In fact, in the state's May 2013 primary election, over 131 in-person ballots and 933 absentee ballots were not counted specifically because voters who met the four requirements set forth in Article 3, Section 1 did not present the forms of identification required by Act 595. Accordingly, Act 595 has already impaired the right to vote of over *one thousand* voters. John Lyon, *Secretary of state asks judge to keep voter ID law in effect*, Ark. News (July 9, 2014), http://arkansasnews.com/news/arkansas/secretary-state-asks-judge-keep-voter-id-law-effect.

Finally, all Arkansas voters, whether or not they have identification, could be impacted if implementation of the photo identification law results in longer wait times. A recent study by the Pew Charitable Trusts of electoral performance among states showed that in 2012 Arkansas ranked 36th in the nation in wait time on Election Day. See PEW Charitable Trusts, *2012 Elections Performance Index,* (Apr. 8, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/elections-performace-index#state-AR. If implementation of the state's photo identification law results in longer delays, it is empirically sound to be concerned that such delays could negatively impact voters who are at the edge of deciding whether to participate in the electoral process. See*, e.g.*, Scott Powers & David Damron, *Analysis: 201,000 in Florida didn't vote because of long lines*, Orlando Sentinel, (January 29, 2013), http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner.

The threat of decreased electoral participation due to voter ID requirements is especially concerning in light of the fact that Arkansas already has among the lowest voter turnout in the country, ranking 49th in voter turnout in 2008, 45th in 2010, and 47th in 2012.

2. Arkansas' photo ID law will disproportionately exclude vulnerable groups from the electoral process

Even more alarming is that, statistically, the burdens imposed by photo identification requirements like Arkansas' will affect some groups of voters more than others.

In 2007, a paper tracking the effects of photo identification requirements on national elections from 2000 to 2006 found that "stricter voter identification requirements *do* depress turnout to a greater extent for less educated and lower income populations," and "lower income registered voters are *significantly* less likely to vote." R. M. Alvarez et al., *The Effect of Voter Identification Laws on Turnout* 3, 19 (Caltech/MIT Voting Tech. Project, Working Paper No. 57, 2007), *available at* http://votingtechnologyproject.org/sites/default/files/vtp_wp57.pdf. A 2006 survey likewise found that "[c]itizens earning less than $35,000 per year are more than twice as likely to lack current government-issued photo identification as those earning more than $35,000."[3] Brennan Center, *supra*, at 3.

[3] All but one of the forms of identification accepted under Act 595 are government issued. The remaining form is a college-issued photo identification card, which the poorest residents of Arkansas are least likely to possess because of the high correlation between income and educational attainment.

The disproportionate effect of Arkansas' voter ID law on low-income individuals in Arkansas is likely to be even more stark. Arkansas ranks 47th in the country in terms of average median income. U.S. Census Bureau, *Median Household Income by State – 2-Year Averages*, http://www.census.gov/hhes/www/income/data/statemedian/ (last visited Aug. 8, 2014). Arkansas also ranks in the bottom fifth of the country in terms of vehicle ownership, meaning that a disproportionate number of Arkansans will encounter mobility problems when attempting to acquire the photo identification needed to vote, or when returning to sign an affidavit. U.S. Department of Transportation Federal Highway Administration, *Our Nation's Highways: 2010*, Figure 3-2, http://www.fhwa.dot.gov/policyinformation/pubs/hf/pl10023/fig3_2.cfm (last visited Aug. 8, 2014).

Social science research also has found a significant correlation between educational attainment levels and the likelihood that photo identification requirements will disenfranchise voters. For example, a 2007 study found that, as a state's restrictions on the right to vote move along the spectrum toward a strict photo identification requirement, individuals with lower education levels become less and less likely to vote. Alvarez et al., *supra*, at 19. These findings suggest that strict voter ID requirements will be especially deleterious in Arkansas, which ranks 44th in the nation in terms of the percentage of the population with a high school degree. U.S. Census Bureau, *Educational Attainment by State: 1990-2009*,

http://www.census.gov/compendia/statab/cats/education/educational_attainment.html (last visited Aug. 8, 2014). Additionally, as noted above, the only non-government-issued form of identification accepted under Act 595 is a college-issued photo identification card, which individuals with low education attainment levels will not have.

Likewise, while Secretary of State Martin has pointed to the availability of a "free" photo ID, obtaining such an ID will be highly burdensome for certain groups of voters. For example, getting to the county clerk to obtain an ID or gathering the necessary documents to obtain ID is likely to be especially hard for individuals with disabilities and the elderly. People with disabilities are not only much less likely to drive, own a vehicle, possess a driver's license, and to have other forms of government ID, but they are also less likely to travel and more likely to be underemployed. In 2012, 21.6% of the voting-age population had a disability. W. Erickson et al., *2012 Disability Status Report: United States* (2014), *available at* http://www.disabilitystatistics.org/.

Although there is a narrow exception in the law for those living in licensed nursing facilities, the exception covers fewer than 5% of the Arkansas population of people with disabilities and taking advantage of the exception requires specific, additional administrative steps. Elderly and disabled voters residing in licensed long-term care and nursing facilities, for example, must obtain a written document

on the facility's letterhead verifying their residency by an administrator. Equally significant, independent living facilities and many daily assistance facilities are *not* licensed long-term care facilities. This means that residents of those facilities must show a valid photo ID in order to be able to vote, despite facing the same obstacles as ID-exempt voters living in licensed facilities. Ark. Code Ann. § 20-10-2004.

Indeed, regardless of whether they are in assisted living facilities or still living independently, many elderly citizens ceased driving long ago and may not possess a driver's license valid for voting purposes. Though they may continue — particularly in small, close-knit communities — to use a long-expired driver's license for other purposes, Arkansas' voter ID law does not permit the use of forms of identification expired more than four years.

While there may be a popular perception among Americans who do possess valid photo ID that functioning in modern society requires a valid photo ID, the reality is that many Americans go through life without access to such identification. For example, most check-cashing locations take non-governmental forms of identification, such as a private employer's photo ID card or student ID. *C.f.* Lisa J. Servon, *The High Cost, for the Poor, of Using a Bank*, New Yorker, (Oct. 9, 2013), http://www.newyorker.com/business/currency/the-high-cost-for-the-poor-of-using-a-bank, (noting that over 17 million people in the United States do not have a checking account); Keesha Gaskins & Sundeep Iyer, *The Challenge*

of Obtaining Voter Identification 4 (2012), *available at* http://www.brennancenter.org/ publication/challenge-obtaining-voter-identification, (finding that more than 1 in 20 voting-age citizens do not have access to a car). No photo ID is required to obtain a Social Security card, and not all banks require a photo ID to open a bank account. *See* Josh Spaulding, *True or False: You Need a Photo ID to…*, Fair Elections Legal Network (May 18, 2012), http://www.fairelectionsnetwork.com/blog/true-or-false-you-need-photo-id. Indeed, even the Transportation Security Administration will accept alternative forms of non-photo identification to board an airplane, including a birth certificate, marriage license, or credit card. See Transp. Sec. Admin., *Contact Us*, http://www.tsa.gov/contact-us (last visited Aug. 8, 2014).

C. Studies Do Not Support the Existence of Measurable Levels of Voter Impersonation Fraud.

Last but not least, it is important to note that there is scant evidence to support the conclusion that the burdens of photo identification laws are justified by their ostensible end: preventing in-person voter impersonation fraud.

Detailed empirical studies refute the existence of anything more than very incidental voter impersonation fraud. In a comprehensive 2003 study, updated in 2007, Rutgers University political scientist Lorraine Minnite found that voter impersonation fraud in the United States is "very rare." See *generally* Lorraine C. Minnite, *An Analysis of Voter Fraud in the United States* (2007), *available at*

http://www.demos.org/sites/default/files/publications/Analysis.pdf. In that study, the author conducted in-depth research, including interviews with law enforcement officers in 12 states and found "little evidence" of such fraud in those states between 1992 and 2002. *Id.* at 6. The author also conducted comprehensive news analyses throughout the entire country, and determined that reports of fraud therein were "exaggerated." The research revealed a "low level of voter fraud in the United States." *Id*.

Although empirical studies tracking rates of in-person voter impersonation fraud in Arkansas have yet to be conducted (most likely because there have not been any reported cases of such fraud), other studies and data from around the country uniformly conclude that impersonation fraud is exceedingly uncommon. A recent comprehensive investigation of credible allegations of voter fraud that might have been prevented by requiring photo ID to vote found only 31 such instances *nationwide* over the past *fourteen years*. Not one of these took place in Arkansas. Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, Wash. Post, (Aug. 6, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/. A judge in Pennsylvania who recently struck down that state's strict photo ID law credited expert testimony that "in-person voter fraud

in Pennsylvania is exceedingly rare" in striking that law down as unconstitutional. *Applewhite v. Pennsylvania*, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014). Similarly, a Wisconsin federal district court found that, based on all the evidence at trial, "virtually no voter impersonation occurs in Wisconsin," and struck down that state's photo ID law. *Frank v. Walker*, 2014 WL 1775432, at *6 (E.D. Wis. Apr. 29, 2014). While a recent state court opinion hailing from Wisconsin upheld the same photo ID law, the Wisconsin Supreme Court did not purport that voter fraud in the state was widespread. Rather, it supported its conclusion that "voter identification laws *could* detect and deter voter fraud" by citing to one lone example of fraud in the state, which actually would not have been prevented by a photo ID requirement at the polls. *League of Women Voters of Wis. v. Walker*, 2014 WL 3744174, at *11 & fn.12 (Wisc. July 31, 2014).

V. CONCLUSION

Dr. Thomas DeBlack, Dr. William Schreckhise, Dean John DePippa, and Nate Coulter, as amici curiae, respectfully request that the Court strike down Act 595 of 2013, Ark. Code Ann. § 7-5-201(d), and the implementing Rules of the Arkansas State Board of Election Commissioners, as a violation of Article 3, Sections 1 and 2 of the Arkansas Constitution.

Dated: August 11, 2014

Respectfully submitted,

/ s / Tim Cullen

Tim Cullen (AR 97062)
Cullen & Co., PLLC
124 West Capitol Avenue, Suite 1750
Post Office Box 3255
Little Rock, Arkansas 72203
Tel.: 501-370-4800
Fax: 501-370-9198
tim@cullenandcompany.com

David A. Hird
Kristen M. Murphy
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Tel.: 202-682-7175
Fax: 202-857-0940david.hird@weil.com
kristen.murphy@weil.com

Cheryl A. James
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
Tel.: 212-310-8325
Fax: 212-310-8007
cheryl.james@weil.com

Myrna Pérez
Michael C. Li
Jennifer Clark
Brennan Center for Justice
at NYU School Of Law
161 Avenue of the Americas, 12th Floor
New York, New York 10013
Tel.: 646-292-8310
myrna.perez@nyu.edu
michael.li@nyu.edu
jenniferl.clark@nyu.edu

CERTIFICATE OF SERVICE

The undersigned attorney does hereby state that a true and correct copy of the foregoing was served on the following by U.S. Mail, First Class Postage prepaid, this 11th day of August, 2014:

David A. Curran
Deputy Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

C. Joseph Cordi, Jr.
Senior Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

The Honorable Timothy Davis Fox
Circuit Judge
401 West Markham, Room 210
Little Rock, AR 72201

Jeff R. Priebe
James, Carter & Coulter, PLC
500 Broadway, Suite 400
Little Rock, AR 72201

Martha Adcock
General Counsel
L. Justin Tate
Associate General Counsel
Secretary of State
State Capitol, Suite 256
500 Woodlane Avenue
Little Rock, AR 72201

/ s / Tim Cullen
Tim Cullen

CERTIFICATE OF COMPLIANCE
AND IDENTIFICATION OF PAPER DOCUMENTS
NOT IN PDF FORMAT

Case Name: Martin v. Kohls
Docket Number: CV-14-462
Title of Document: Brief of Amici Curiae Dr. Thomas DeBlack, Dr. William Schreckhise, Dean John DiPippa, and Nate Coulter in Support of Appellees

Certification: I hereby certify that:

I have submitted and served on opposing counsel an unredacted and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s): NONE

/ s / Tim Cullen
Attorney for Amici