STATE OF WISCONSIN
COURT OF APPEALS

Case No. 2012AP584

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

Plaintiffs-Respondents,

v.

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

Defendants-Apellants-Petitioners,

and

DORTHY JANIS, JAMES JANIS, and MATTHEW AUGUSTINE,

Intervenors-Co-Appellants

ON APPEAL FROM A MARCH 12, 2012 DECISION AND ORDER GRANTING SUMMARY DECLARATORY JUDGMENT BY THE DANE COUNTY CIRCUIT COURT HON. RICHARD G. NIESS, PRESIDING
Case No. 11-CV-4669

BRIEF OF *AMICI CURIAE* MARGARET FARROW, GEORGE MITCHELL, MICHAEL SANDVICK, AARON RODRIGUEZ, AND DEBORAH HAYWOOD

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INTRODUCTION

Respondents' argument can be summarized as follows: Art. III, sec. 1 confers the right to vote on 1) citizens of the United States, 2) over the age of 18, who 3) reside in the district in Wisconsin in which they seek to vote. Art. III, sec. 2 then specifies certain areas in which the Legislature can enact laws relating to voting, including those which define residence and provide for voter registration. Because Art. III, sec. 1 does not list the possession of photo identification as a "qualification" for voting and Art. III, sec. 2 does not specify "requiring photo identification" as one of the areas specifically enumerated, the Legislature lacked the power to enact an identification law – no matter how reasonable it might be or how necessary to reduce the risk of fraudulent voting or bolster public confidence in the legislative process.

With respect to the Respondents and the Circuit Court below, this argument cannot be right. It defies common sense and proves far too much. The Wisconsin Supreme Court has long recognized that, notwithstanding the exclusive constitutional prescription of voter qualifications, the Legislature may "reasonably regulate" the exercise of the franchise. *See, e.g., State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 115, 517 N.W.2d

169, 174 (1994) (right to vote subject to reasonable regulation by Legislature); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613 37 N.W.2d 473, 480 (1949) ("While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature."); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482, 487 (1898) (regulation of franchise must be "reasonable and bear on all persons equally as far as practicable). Legislative regulation of the right to vote may require "the requisite proofs of the right." *Wood v. Baker*, 38 Wis. 71 (1875); *see also State ex rel. O'Neill v. Trask*, 135 Wis. 333, 115 N.W. 823 (1908) (Requiring proof of qualification to vote "is recognized as proper regulation by the decisions of this court."); *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246, 247 (1880) (The Legislature may adopt a "reasonable mode or method by which the constitutional qualifications of an elector may be ascertained …."). Notwithstanding the prescription of qualifications, "the legislature has the constitutional power to say how, when and where [a voter's] ballot shall be cast." *Zimmerman*, 254 Wis. at 613.

Respondents formally concede this, but argue that requiring photo identification is a new and impermissible "qualification" for voting because

if electors do not display it, they will not be able to vote. For them, any regulation which must be complied with establishes a new and impermissible "extra constitutional" qualification for voting.

But many restrictions on the place and manner of voting will, if not complied with, result in loss of the right to vote. The Constitution does not prohibit mandatory regulations concerning "proof of the right" or "how, when and where" a ballot may be cast.

ARGUMENT

I. Wisconsin's Constitution Is Not Unique, and Comparable Provisions Have Not Been Interpreted to Prohibit Voter Identification Requirements.

Not surprisingly, in other states where challengers to photo identification laws have presented identical arguments, courts have rejected them. For example, in *League of Women Voters v. Rokita*, 929 N.E.2d 758 (Ind. 2010), challengers to a voter identification law in Indiana made an argument that was absolutely identical to the one advanced here. As here, the *Rokita* plaintiffs premised their argument on a state constitutional provision which conferred the right to vote on United States citizens over the age of 18 who reside in the district in which they seek to vote. As here, the "plaintiffs argue[d] that the legislature may not alter the voting

qualifications established by the Indiana Constitution and that the Voter ID Law [was] not a permissible procedural regulation but instead [was] a statute that impose[d] a new property qualification and arbitrary, burdensome, and exclusionary conditions on the right to vote of constitutionally eligible voters." 929 N.E.2d at 764.

As here, the challengers in *Rokita* relied on an old case which struck down an overly restrictive registration law as creating an extra-constitutional and impermissible restriction on voting. The *Rokita* Court rejected that argument:

> In our view, however, the Voter ID Law's requirement that an in-person voter present a government-issued photo identification card containing an expiration date is merely regulatory in nature. The voter qualifications established in Section 2 of Article 2 relate to citizenship, age, and residency. Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity.

Id. at 767.

In *Democratic Party of Georgia v. Perdue*, 707 S.E.2d 67 (Ga. 2011), the Georgia Supreme Court also rejected the argument that a voter identification requirement creates an additional "requirement" to vote, concluding that state constitutional language conferring the franchise "does

not require that qualified citizens be allowed to vote in any particular manner." 288 Ga. at 726, 707 S.E.2d at 73.

As detailed in the Intervenors' brief (Int. Br. at 35-37), almost all state constitutions have suffrage provisions identical to or very much like those in Wisconsin. Our constitutional scheme is not unique. The courts in these states do not treat regulations of the voting process – even when failure to comply with procedural requirements (including requirements regarding proof of eligibility) will result in the inability to vote – as an "extra" qualification placed on the right to vote. (*See* Int. Br. at 37-41.) There is no reason that our jurisprudence, based on comparable constitutional language, should differ.

II. Wisconsin Law Does Not Warrant a Different Outcome.

Respondents say that Wisconsin is different in that our courts, apparently unlike those in other states, regard a "regulation" to be a new "qualification" when it has the effect of disqualifying a voter who does not comply. (Resp. Br. at 19.) They argue that the voter identification law is constitutionally impermissible because it is mandatory. In their view, the constitution requires some sort of safety valve.

This argument is conceptually incoherent, unworkable in practice, and unsupported by the law of this State.

It is conceptually incoherent because the State's powers to require proof of an elector's qualifications and regulate the time, place and manner of voting – things that it is undeniably permitted to do[1] - are rendered meaningless if there must always be another way to vote. It is in the nature of regulation to demarcate permissible and impermissible action. The Respondents want to eliminate that demarcation as a matter of constitutional right. In their world, the State may regulate elections and prescribe a method for the proof that an elector is both qualified and registered to vote, but *only* if it does not actually insist upon the method of proof that has been prescribed.

The Wisconsin Supreme Court has long recognized that construing provisions designed to regulate and protect the electoral process as permissive will defeat their purpose. As Chief Justice Dixon long ago explained in connection with an earlier prescription of the manner by which a voter's qualifications must be proven, "[If we h]old the [registry] act to be directory, and allow the electors to vote without their names being

[1] *See* App. Br. at 12-17; Resp. Br. at 26-29; Int. Br. at 23-28

registered and without the affidavit and oath prescribed in case they are not, . . . the object of the legislation would be entirely defeated." *State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 572 (1867).

It is unworkable in practice because it would call into question almost all election regulation. As noted above, election regulations are almost always mandatory. If electors do not comply with the deadlines and methods for obtaining an absentee ballot, their ballots will not be counted. If electors do not possess one of the specified forms of proof of residency, they will be unable to register and, as a consequence, will be unable to vote. State law governing voter registration states that a registrant "shall provide an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2). An acceptable "identifying document" is "limited" to one of eleven specified documents. Wis. Stat. § 6.34(3). If electors do not have one of these, they will be unable to register and vote. The mandatory nature of the prescribed forms of proof does not make possessing one of these documents – "having" a driver's license, approved identification card, bank statement, paycheck, utility bill, etc. - a new and extra constitutional "qualification" for voting.

Similarly, a law fixing the places and hours of voting will prevent electors who fail to present themselves at the specified location during the prescribed hours from voting. This does not make the ability to appear at the proper place at the proper time a new and extra constitutional "qualification" for voting.

The Wisconsin Supreme Court has always recognized that the Legislature may establish reasonable regulations that, if not complied with, would result in forfeiture of the right to vote. In *State ex rel. Doerflinger v. Hilmantel*, *supra*, an elector's vote was not counted because he had failed to register or produce the requisite corroborated affidavit establishing his qualifications. Rejecting the very argument advanced here – that the requirement of a particular form of affidavit amounted to a constitutionally impermissible alteration of voter qualifications, 21 Wis. at 575 – the court held that a voter who does not comply with a reasonable regulation has not been deprived of the franchise, but has forfeited it, *id.* at 571 ("[An elector] is presumed to know the law and must go to the polls prepared to comply with its conditions; and if he does not, and his vote is lost, it may, so far as it is the fault of anyone, with justice be said to be his own fault.").

Even after *Dells*, the case on which Respondents' entire argument seems to hinge, the court took the *Doerflinger* approach. In *State ex rel. O'Neill v. Trask*, *supra*, the question was, once again, how to treat the votes of unregistered voters who had not complied with the statutory requirements of proof of their qualification to vote. The Supreme Court upheld the trial court's rejection of their votes, observing that:

> Any elector whose name is not on the registry may show by affidavit in the manner prescribed by section 61, St. 1898, that he is a qualified voter of the district at the time he offers his ballot. There is nothing in this regulation which deprives the elector of the right to vote at the time of the election. It is recognized as proper regulation by the decisions of this court, and is so declared in *State ex rel. Wood v. Baker*, *supra*: "The voter may assert his right, if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be disfranchised it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the Constitution." These statutory requirements have been considered by this court, and it has been held that they are not unreasonable and are consistent with the present right to vote as secured by the Constitution.

115 N.W. at 825.

Respondents' view is inconsistent with Wisconsin case law. As noted earlier, the Wisconsin Supreme Court has long held that the State may enact reasonable regulation of voters and voting, requiring "proof of the right "and specifying "how, when and where" ballots may be cast. The court has emphasized that such regulation may not be unreasonable and

may not destroy the right, but it has also recognized that a voter's failure to comply with a reasonable regulation – including one specifying the method of proof that he or she is a qualified elector – may result in the inability to vote without violating the Constitution.

In response, the Respondents offer only *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880). It is questionable whether *Dells* – the last case in which the Wisconsin Supreme Court has upheld a facial challenge to an election regulation – is consistent with the ensuing century of cases upholding such regulations and establishing a standard of "reasonableness." Its particular holding was overruled by the amendment of the Constitution to provide for registration, and its applicability to voter identification – a means to verify that an elector is the person who has registered – is minimal, if it is relevant at all. As we have seen, whatever *Dells* means today, it cannot mean what Respondents claim. It cannot stand for the proposition that any mandatory method of proving qualifications or an elector's identity is impermissible. And it is precisely this blanket "lack of authority" argument that the Respondents push and upon which the Circuit Court relied.

Respondents may believe that the burden imposed by the voter identification law is just as onerous as the burden of registration. They may argue that it fails some unspecified balancing test. But that was not their argument and that was not the basis for the decision below. Indeed, the whole purpose of Respondents' "extra qualification" argument – as it was in *Rokita* and *Perdue* – has been to avoid the type of deferential judicial scrutiny actually called for by the Wisconsin cases (mere reasonableness) or applied by the United States Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).[2]

But scrutiny under such a deferential standard of review is precisely what the Respondents cannot avoid. Dropping their guard, they admit that it is within the power of the Legislature to enact regulations to ensure that a voter is registered. Thus, it is perfectly fine to require that a voter announce his or her name so that the voters' registration may be verified. (Resp. Br. at 50-51.) They even suggest that the Legislature could "craft" a voter ID

[2] In *Crawford*, Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, applied the balancing test of *Anderson v. Celebrezze,* 460 U.S. 780 (1983), under which "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious. 553 U.S. at 189-190. Justice Scalia, joined by Justices Thomas and Alito, applied the standard of *Burdick v. Takushi*, 504 U.S. 428, (1992), calling for "application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." 553 U.S. at 254. Under both standards – neither of which appears to be any less deferential than the "reasonableness" standard traditionally applied by the Wisconsin Supreme Court – Indiana's voter identification law survived.

law as long as it did not disqualify a voter who lacked voter ID. (*Id.* at 61.) In other words, it could "require" voter ID as long as it did not "insist" on voter ID.

But if the Legislature has the power to do these things, then the Respondents' argument addresses not legislative authority, but the way in which that authority has been exercised. In exercising that authority, constitutional interests lie on both sides of the balance. In crafting Act 23, the Legislature had to balance the interest in avoiding unneeded obstacles to voting and unduly interfering with exercise of the franchise with the need to minimize fraud, bolster public confidence in the integrity of the process and protect against the interference with the franchise that is worked by the casting of fraudulent votes. Because that balancing was undertaken in a reasonable manner, Act 23 should be upheld.

CONCLUSION

Presumably, Respondents would have struck the balance differently. They would have preferred that the Legislature take a more roseate view of human nature and not insist upon extrinsic proof that voters are who they say they are. It ought to "trust" but not "verify."

The Wisconsin Supreme Court has never required such a balancing. It has long recognized the delicate balance that is committed to the Legislature:

> If all men were pure in their relations to each other, and the state, were not only able, but would with certainty, correctly perform all the duties of citizenship, very little of the great mass of statute laws which we possess would be of any practical use. But such is not the case. We must therefore deal with things as they are and as they must ever continue to be. We must appreciate the fact that without wise and careful legislative regulations, supplementing the constitutional guaranties, the elective franchise might be so abused and the means of such corruption as not only to nullify its controlling purpose, but that of every purpose of popular constitutional government.

Runge, supra, 76 N.W. at 487.

Amici respectfully request that the judgment below be vacated.

Dated this 4th day of September, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,799 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of September, 2012.

/s/ Richard M. Esenberg
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