STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants,

and

DORIS JANIS, JAMES JANIS, And MATTHEW AUGUSTINE,

Intervenors-Appellants.

Appeal No.
2012-AP-000584-AC

Dane County
Circuit Court No.
11-CV-4669

On Appeal from the Judgment of the Circuit Court for Dane County, the Honorable Richard G. Niess, Presiding

REPLY BRIEF OF INTERVENORS-APPELLANTS

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I. THE LEAGUE HAS NOT PRESENTED A VALID FACIAL CHALLENGE

This Court should reject the facial challenge to Wisconsin's voter identification law, 2011 Wisconsin Act 23, brought by Plaintiffs League of Women Voters and Melanie Ramey (collectively, "the League"). Plaintiffs contend that, because the statute imposes an additional "qualification" on voters, beyond those set forth in the Wisconsin Constitution's Qualifications Clause, *see* Wis. Const., art. III, § 1, it is "void and unenforceable as to all constitutionally qualified voters, including those who could meet its terms," League Br. at 9; *id.* at 62-63.

A facial challenge is appropriate only where a law "cannot be constitutionally enforced under any circumstances." *Soc'y Ins. v. Labor & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 463, 786 N.W.2d 385, 395 (2010). Even if a statute might be "unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." *State v. Konrath*, 218 Wis. 2d 290, 304 n.13, 577 N.W.2d 601, 607 n.13 (1998). Here, the trial court held that Act 23 constitutes an additional qualification for voters because it "cancel[s]" or "substantially burden[s]" their right to vote. R.47 at 5-6. The fact that, as the trial court itself found, "the

vast majority of Wisconsin voters" either possess or readily may obtain valid identification, R.47 at 7, therefore precludes such a requirement from being considered an invalid additional qualification for most people. By the trial court's reasoning, the League's facial challenge to the statute must be rejected.

II. THE WISCONSIN SUPREME COURT ALREADY HAS REJECTED PLAINTIFFS' PROPOSED INTERPRETATION OF THE QUALIFICATIONS CLAUSE

Plaintiffs repeatedly argue throughout their brief that Act 23 violates the Qualifications Clause because it establishes "an absolute condition precedent to voting." League Br. at 6 (emphasis removed); *see also id.* at 10 ("[T]he law is unconstitutional because . . . [t]he consequence of a voter's failure to display the required ID is the deprivation of his or her fundamental constitutional right to vote in an election."), *id.* at 19.

The Wisconsin Supreme Court, however, has rejected this reasoning repeatedly. It has held that a voter "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 any one, with justice be said to be his own fault." *State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566, 575-78 (1867).

This is especially true regarding laws that require voters to demonstrate their entitlement to vote to election officials at the polling place. A statute that bars from voting a person who "fail[s] to furnish the proof required by law, showing his right to vote" does not establish a "new qualification" for voting in violation of the state constitution. *State ex rel. Cothren v. Lean*, 9 Wis. 279, 284 (1859), *cited by* League Br. at 14. Requiring a person to provide "proof of [his] right" to vote to election officials "imposes no condition precedent to vote," because the person "may vote, if he will, by reasonable compliance with the law." *State ex rel. Wood v. Baker*, 38 Wis. 71, 86-87 (1875), *cited by* League Br. at 14.[1] "[I]f [the voter] 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." *Id.* at 87; *State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338-39, 115 N.W. 823, 825 (1908).

[1] The League also maintains that *Cothren* and *Baker* were overruled when Article III, § 2 was added to the state Constitution. League Br. at 23-24, 33, 47. Nothing in the League's discussion of that provision's adoption history, the circumstances of its enactment, or its early interpretations suggests that it was intended to overturn any Wisconsin Supreme Court rulings or narrow the scope of the legislature's authority to "preserv[e] the purity of the ballot box." *Cothren*, 9 Wis. at 283. *Cf.* League Br. at 38-49.

Thus, this Court should reject the League's argument that every statute with which a person must comply in order to vote establishes a new "qualification" for voting in violation of the Qualifications Clause. *See, e.g.*, *State ex rel. Knowlton v. Williams*, 5 Wis. 308 (1856) (stating that a law providing "that a person who has a right to vote under the constitution shall be allowed to exercise this right only in the town where he resides . . . [would] not add to the qualifications which the constitution requires" to vote); *State ex rel. Bancroft v. Stumpf*, 23 Wis. 630, 631-32 (1869) (holding that votes should not be counted due to violations of state election laws).

None of the three cases upon which the League primarily relies supports its case. In *Baker*, 38 Wis. at 85, *cited by* League Br. at 15, the court held that individuals could not be barred from voting on the grounds that, through no fault of their own, the election register prepared by voting officials was defective. "Nonfeasance or malfeasance of public officers," the court properly explained, "could have no effect to impair a personal, vested, constitutional right." *Id.* at 87.

A person's failure to present proper identification, in contrast, can seldom be blamed on government officials. Moreover, the *Baker* court held that, although the

legislature may not "impair" the right to vote, it "may regulate its exercise" and require voters to present "proof of the right." *Id.* at 86; *see also State ex rel. La Follette v. Kohler*, 200 Wis. 518, 548, 228 N.W. 895 (1930), *quoted by* League Br. at 28 (holding that individuals "who possess the qualifications [to vote] prescribed by the Constitution . . . must proceed in the manner indicated by the Constitution and statutes to exercise it").

Finally, the *Baker* Court noted that, as a general matter, the law requiring voters' names to appear on an election registry was constitutional because it "left other proof open to the voter at the election" if his name did not appear in the registry. 38 Wis. at 86, *cited by* League Br. at 23; *see also* League Br. at 32 (arguing that a qualified voter must have a means to "establish his or her qualifications on election day"). Likewise, in this case, if an individual attempts to vote at a polling location without showing proper identification (or submits an absentee ballot without including a copy of his identification), his vote will be accepted as a provisional ballot, Wis. Stat. §§ 6.79(2)(d), (3)(b), 6.97(1)-(2). That provisional ballot will be counted if the voter presents his photo identification either to election officials at the polling place before it closes, *id.*

§ 6.97(3)(a)-(b), or to his municipal clerk or board of elections by 4 P.M. on the Friday after Election Day, *id.* § 6.97(3)(b)-(c). Thus, the photo identification statute is fully consistent with *Baker*.

The League also places great weight on *Dells v. Kennedy*, 49 Wis. 555, 556 (1880), *cited by* League Br. at 17, in which the Wisconsin Supreme Court held that a law requiring a person to register in advance of Election Day in order to vote violated the Qualifications Clause. The fatal defect with the statute, according to the Court, was that it "provides no method, chance or opportunity for [a person] to make proof of his qualifications on the day of election." *Id.* at 558.

In this case, in contrast, a person has the opportunity to satisfy Act 23's requirements on Election Day by presenting his identification to election officials at the polling location. Wis. Stat. § 6.79(2)(a). Furthermore, as discussed above, even if a person fails to present proper identification at the polling location, he is permitted to cast a provisional ballot, *id.* §§ 6.79(2)(d), (3)(b), 6.97(1)-(2), which will be counted if he later shows his identification to the proper local or county official, *id.* §§ 6.97(3)(a)-(c). Thus, Act 23 is fully consistent with *Dells*, 49 Wis. at 556.

Finally, the League's attempt to distinguish *State ex rel. Cothren v. Lean*, 9 Wis. 279 (1859), *cited by* League Br., at 20-22, is unsuccessful. The plaintiffs in *Cothren* brought a Qualifications Clause challenge to a law that allowed challenges to be lodged against individuals attempting to vote at polling locations. *Id.* at 283. Election officials were required to question challenged individuals under oath to determine whether they were qualified to vote. *Id.* The court held, "While, therefore, it is incompetent for the legislature to add any new qualifications for an elector, it is clearly within its province to require any person offering to vote, to furnish ***such proof as it deems requisite***, that he is a qualified elector." *Id.* at 283-84 (emphasis added).

The League argues that the voter ID requirement differs from the voter challenge requirement upheld in *Cothren* because "[t]he voter who fails to display a mandated form of ID is simply excluded from voting, even if the voter is listed as a registered voter in the poll book. . . . [I]t is the poll book — proof that the voter has registered — not the display of ID, that shows election officials that a voter is qualified to vote." League Br. at 22.

This argument misses the fundamental premise underlying Act 23. The inclusion of an individual on the voter registration rolls establishes that person's qualification to vote. Photo identification, however, establishes that the individual presenting to vote at a polling location (or submitting an absentee ballot) is the same person to which the registration rolls refer. Thus, requiring individuals to present photo identification is a reasonable and constitutionally permissible means of confirming their eligibility to vote. *Cothren*, 9 Wis. at 283 (holding that the legislature may enact requirements to "ascertain whether the person offering to vote possessed the qualifications required by that instrument"); *see also Washington v. Altoona*, 73 Wis. 2d 250, 255-56, 243 N.W.2d 404, 407 (1976) (noting that the Qualifications Clause does not bar the legislature from "mandat[ing] proof that one who seeks to vote is qualified").

Thus, an unbroken line of well-established precedent confirms that Wisconsin's photo identification statute is fully consistent with the Qualifications Clause.

III. THE PHOTO IDENTIFICATION LAW DOES NOT VIOLATE WIS. CONST. ART. III, § 2

The League further argues that Act 23 is unconstitutional because it does not fall within any of the

five categories of laws the legislature is permitted to enact under Art. III, § 2 to "implement the right of suffrage." League Br. at 8. This argument fails for three independent reasons.

First, at least as applied to federal elections, the source of the legislature's authority to enact a photo identification requirement was not the state constitution, but rather the Elections Clauses of the U.S. Constitution. *See* U.S. Const., art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. The U.S. Supreme Court has explained that those provisions grant state legislatures the "authority to provide a complete code" for federal elections, including but not limited to laws for the "protection of voters" and the "prevention of fraud and corrupt practices." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . ***only*** within the exclusive delegation of power under the Elections Clause") (emphasis added). Thus, at least for federal elections, it is irrelevant whether the state constitution provides an independent source of authority for these laws.

Second, Act 23 was a legitimate exercise of the legislature's plenary "legislative power" under Article IV, § 1. This provision grants the legislature the authority

to "prescribe the manner of conducting elections." *La Follette*, 200 Wis. at 548, 228 N.W. at 906; *see, e.g.*, *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 323-25, 125 N.W. 961, 962-63 (1910) (recognizing that Wisconsin's Primary Elections Law was enacted pursuant to Article IV, § 1). Article III, § 2 should be read in harmony with this provision, rather than as an implicit repeal or restriction of it.

Finally, even under Art. III, § 2 itself, Act 23 is a legitimate exercise of the legislature's authority to enact laws "[p]roviding for registration of electors." Wis. Const. art. III, § 2(2). The League admits that Wis. Const., art. III, § 2 allows the State to enact laws that establish "procedures by which election officials determine at the polls that voters are registered." League Br. at 50. The League complains that the voter identification law "far exceeds what is necessary, as a practical matter, for election officials to determine that a voter is registered." League Br. at 51; *see also id.* at 25, 41.

As discussed above, however, Act 23 simply requires an individual who presents to vote at a polling location or submits an absentee ballot to provide reasonable evidence that he is, in fact, the person identified on the voter registration rolls who has been deemed qualified to vote.

Thus, Act 23 is a reasonable component of the state's voter registration scheme.

IV. THIS COURT SHOULD CONSIDER ANALOGOUS PROVISIONS OF THE U.S. CONSTITUTION AND OTHER STATE CONSTITUTIONS

Stunningly, the League asks this Court to ignore the manner in which courts have construed the Qualifications Clauses of other states' constitutions, as well as the U.S. Constitution. League Br. at 54, 58. When construing the Wisconsin Constitution, however, the courts of this state frequently consider how sister states have construed comparable provisions of their constitutions. *See, e.g.*, *Wagner v. Milwaukee Cnty. Election Comm'n*, 2003 WI 103, ¶ 51, 263 Wis. 2d 709, 754, 666 N.W.2d 816 (2003) ("Other states have found this type of language in constitutional provisions to be unambiguous."); *State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis. 2d 335, 360, 797 N.W.2d 451, 465 (2011) (noting that "parallel provisions" of the state and federal constitutional are generally interpreted "consistent[ly]").

In particular, the U.S. Supreme Court's interpretation of the federal Qualifications Clauses is instructive, despite the fact that, as the League points out, they establish "qualifications" for serving in the U.S. Congress, rather than "qualifications" for voting. League Br. at 54. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S.

779, 834-35 (1995) (quotation marks omitted), the Court held that "procedural regulations" and "safeguards" that "protect the integrity and reliability of the electoral process itself" — such as a photo identification requirement — do not "even arguably impose any substantive qualification[s]."

V. THE PHOTO IDENTIFICATION REQUIREMENT IS VALID UNDER THE U.S. CONSTITUTION'S ELECTIONS CLAUSES

Finally, the League does not — and cannot — provide a substantive response to Intervenors' arguments under the Elections Clauses. They contend that these issues "were not raised in the circuit court and are therefore waived." League Br. at 8, 53, 57. It is appropriate, however, for a party to pursue on appeal "an additional argument on issues already raised by [the parties]" below. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983); *see also In re Willa L.*, 2011 WI App. 160, ¶¶ 23-24, 338 Wis. 2d 114, 125, 808 N.W.2d 155. This is especially true where a party asserts a constitutional issue that is related to the arguments raised below. *Sambs v. Brookfield*, 95 Wis. 2d 1, 12, 289 N.W.2d 308, 313 (Wis. Ct. App. 1979), *rev'd on other grounds*, 295 N.W.2d 504 (Wis. 1980).

The League points out that there are no precedents directly addressing this specific issue. League Br. at 57.

This does not change the fact that, when enacting a statute (at least as applied to federal elections) for the "protection of voters" and the "prevention of fraud and corrupt practices," *Smiley*, 285 U.S. at 366, the legislature was acting "within the exclusive delegation of power under the Elections Clause[s]," *Cook*, 531 U.S. at 523. The state constitution may not restrict the scope of power directly conferred by the U.S. Constitution. *See* U.S. Const., art. VI, § 2. Thus, at least as applied to federal elections, the photo identification law is constitutional.

CONCLUSION

For these reasons, Intervenors respectfully request that this Court REVERSE the judgment of the Dane County Circuit Court and VACATE that court's injunction.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in § 809.19(8)(b)-(c) for a brief produced with a monospaced font. The length of this brief is 13 pages (excluding signature page, *see* § 809.19(8)(c)(1)).

Signed on: Sept. 7, 2012

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

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.

Signed on: Sept. 7, 2012

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CERTIFICATE OF SERVICE

I hereby certify that upon this day I caused to be served via U.S. Mail, upon the below listed persons, three copies of Reply Brief of Intervenors-Appellants':

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