STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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 BRENNAN, THOMAS CANE, DAVID G. DEININGER, and TIMOTHY VOCKE,

Defendants-Appellants,

DOROTHY 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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

The decision of the circuit court must be reversed because the photo identification requirement for voting created by 2011 Wisconsin Act 23 ("Act 23") is constitutional in light of Wis. Const. art. III, §§ 1 and 2. Over 150 years ago, the Wisconsin Supreme Court could not have been clearer in explaining that the Wisconsin Legislature's authority to prescribe the manner and mode of elections includes the authority to require voters to furnish proof of identity:

> The necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar to need suggestion. 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 qualif[i]ed elector.

State ex rel. Cothren v. Lean, 9 Wis. 254 (*279), 258 (*283-84) (1859).

Contrary to the assertions made by Plaintiffs-Respondents[1] League of Women Voters of Wisconsin Education Network, Inc. and Melanie G. Ramey, Act 23 does not create an additional qualification for voting. Instead, it establishes a means for voters to prove that they are indeed qualified electors. It helps election officials at the polls answer the question: "Are you who you say you are?" It furthers this purpose and achieves the important goals of curbing voter fraud, preserving the integrity of elections, and fostering public confidence in elections in a manner consistent with the Legislature's plenary power to regulate how, when, and

[1]Plaintiffs-Respondents will be referred to individually as the League and Ms. Ramey and collectively as Plaintiffs. Defendants-Appellants will be referred to collectively as Defendants.

where ballots may be cast. Because Act 23 is constitutional, the circuit court must be reversed.

I. THE PHOTO IDENTIFICATION REQUIREMENT CREATED BY ACT 23 IS CONSTITUTIONAL.

A. Act 23 does not create an additional qualification for voting.

Act 23 does not create an additional qualification for voting. Wis. Const. art. III, § 1 establishes the only qualifications for voting: (1) United States citizenship; (2) age 18 or older; and (3) residency in a state election district. Electors possessing these characteristics are deemed "qualified electors." Wis. Const. art. III, § 1. Act 23 does not add to these three qualifications; to the contrary, Act 23 helps election officials confirm them by requiring the presentation of evidence that a person appearing at the polls to vote is, in fact, the individual that he or she claims to be.

The fundamental dichotomy between Plaintiffs' and Defendants' position lies in the way each characterizes the photo identification requirement. Plaintiffs characterize it as a regulation governing *who* may vote. (*See* Br. of Pls.-Resp'ts at 7, 27, and 30.) Defendants' position is that the requirement governs *how* one votes. This "who versus how" dichotomy is at the crux of this case.

The voter photo identification requirement is regulatory in nature and governs *how* one votes. It prescribes the manner by which voters obtain a ballot at the polls—by first showing a form of acceptable identification to election officials to confirm their identity. The qualifications listed in Wis. Const. art. III, § 1 are *inherent* to electors themselves. Showing photo identification is not an inherent, immutable characteristic of an individual voter—it is something external to the individual. Thus, requiring voters to present a specified

form of identification is not in the nature of such a personal, individual characteristic or attribute like the three qualifications found in Wis. Const. art. III, § 1, but rather functions merely as an election regulation to verify the voter's identity.

Plaintiffs argue that Act 23 constitutes the imposition of a new type of qualification for voters because it imposes a condition on voters who wish to vote. (Br. of Pls.-Resp'ts at 18-19.) But "qualifications" and "conditions" for voting are not the same thing. One condition of voting is that a voter must appear at his proper polling location on Election Day during the hours that the polls are open (unless he voted absentee in advance). For a voter who arrives at the polling place after the poll has closed, this condition of voting will have the effect of preventing the individual from voting. That does not render the "condition" an unconstitutional "qualification." Rather, such "conditions" fall within the Legislature's plenary power to regulate how, when, and where elections are to take place. *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949).

Plaintiffs seem to suggest that any law that has the effect of excluding any qualified voter from voting impermissibly regulates "who" may vote, and not just "how, when, and where" they may do so. (Br. of Pls.-Resp'ts at 30.) By this argument, however, a law that sets dates, locations, and hours for voting would be impermissible because such laws have the effect of excluding voters who do not vote at the predetermined time and location. This argument was long ago foreclosed by the Wisconsin Supreme Court, which unequivocally established that the State may require a voter to provide proof of his qualifications, and if the voter fails to do so, he is disenfranchised not by the statute, "but by his own voluntary refusal of proof that he is enfranchised by the constitution." *State ex rel. Wood v. Baker*, 38 Wis. 71, 87 (1875).

Plaintiffs assert that the poll book—and not the display of photo identification—shows election officials that "a voter is qualified to vote." (*See* Br. of Pls.-Resp'ts at 22.) Indeed, the poll book shows that *a voter* of a certain name is registered and qualified to vote. However, the poll book does nothing to confirm that *this voter*, appearing in person before the election official on Election Day, is the person whose name appears in the poll book. The poll book shows only that a registrant with a particular name, address, and voter number is on the poll list to vote in a particular ward and district. *See, e.g.*, GAB's Statewide Voter Registration System Training Manual, available at *http://gab.wi.gov/sites/default/files/publication/69/012_poll_books_2012_pdf_21191.pdf*, at 15 (last visited Sept. 6, 2012). Without the presentation of photo identification, the election official has no way of confirming that the individual appearing to vote is actually the person listed in the poll book.

Plaintiffs' response regarding the need to confirm voter identity is that "[a]ny voter can readily fulfill the requirement of stating his or her name and address to election officials on election day, consistent with his present right to vote." (Br. of Pls.-Resp'ts at 52.) This may be true, but a voter can just as easily state *someone else's* name and address. An election official cannot confirm the individual's identity with only an orally announced name and address.

Plaintiffs concede that, as a matter of practical necessity, the Legislature has the authority to require voters to state their name and address to the election official in order to verify that the voter is registered. (Br. of Pls.-Resp'ts at 51.) There is no legal difference in the Legislature's constitutional authority to require a voter to state his name and address as a means of verifying that he is listed on the poll book and the authority to require a voter to show photo identification as a means of verifying that he is listed on the poll book. Both are means of regulating the manner of conducting elections, which

Plaintiffs acknowledge falls within the Legislature's plenary power. *See State ex rel. La Follette, et al. v. Kohler*, 200 Wis. 518, 548, 228 N.W. 895 (1930); *see also* Br. of Pls.-Resp'ts at 22.

Finally, Plaintiffs assert that the State's valid interest in ascertaining the qualifications of voters is distinct from its interest in preventing voter impersonation. (Br. of Pls.-Resp'ts at 24-25.) In fact, these interests are the same. By requiring that voters produce photo identification to verify that they are qualified, registered electors, the State simultaneously prevents voter impersonation. Act 23's photo identification requirement effectively verifies an individual's qualification to vote by establishing that a voter is the registered voter he says he is. Photo identification is a more foolproof method of verifying an individual's identity—and thus his qualification to vote—than merely stating one's name and address. By more dependably verifying that a person is the qualified elector he claims to be, the State concurrently prevents voter impersonation. Plaintiffs concede, as they must, that the State has the authority to ascertain the qualifications of voters. (Br. of Pls.-Resp'ts at 23); *see Cothren*, 9 Wis. at 258 (*283-84). That the Legislature has chosen to verify the qualifications of voters using a method that simultaneously prevents voter impersonation does not undermine its authority to pass laws that ascertain voter qualifications.

B. Act 23 is consistent with the Legislature's constitutional authority to enact laws regarding the manner of voting.

Act 23's photo identification requirement is consistent with the Legislature's constitutional authority to enact laws prescribing how, when, and where voters may cast ballots. *See, e.g.*, *La Follette*, 200 Wis. at 548 ("the power to prescribe the manner of conducting

elections is clearly within the province of the legislature"); *Frederick*, 254 Wis. at 613 ("the legislature has the constitutional power to say how, when and where [a qualified elector's] ballot shall be cast"). The Legislature's plenary power to regulate the conduct of elections comes from Wis. Const. art. IV, § 1. Wis. Const. art. III, § 2 does not cabin that power to prohibit a voter photo identification requirement.

Plaintiffs assert that "[b]ased on its plain meaning, Art. III, §2 prohibits the enactment of the Voter ID law." (Br. of Pls.-Resp'ts at 40.) Plaintiffs are wrong. "'[I]t is competent for the legislature to exercise all legislative power *not forbidden* by the constitution[.]'" *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 277, 118 N.W.2d 211 (1962) (emphasis added). By its plain language, Wis. Const. art. III, § 2 does not *forbid* the Legislature from enacting a photo identification requirement. It states that certain election laws "may be enacted." These are words of permission, not prohibition. Wis. Const. art. III, § 2 does not state that election laws "may *only* be enacted" governing the topics enumerated. It does not state that certain election laws "may *not* be enacted."

Plaintiffs assert that Defendants' theory of plain meaning interpretation "would render Art. III, §2 entirely superfluous." (Br. of Pls.-Resp'ts at 35.) Plaintiffs are incorrect. Plaintiffs are in principle arguing that the canon of construction "*expressio unius est exclusio alterius*" (expression of one thing is the exclusion of another) is applicable to the construction of Wis. Const. art. III, § 2 because that provision "prohibits legislation from restricting the exercise of suffrage by qualified electors, unless the law falls within one of the enumerated subjects." (Br. of Pls.-Resp'ts at 39-40.) By its plain language, Wis. Const. art. III, § 2 does not prohibit any law. Plaintiffs' argument must, therefore, be that Wis. Const. art. III, § 2, *implicitly* prohibits a voter photo identification requirement. That argument fails.

The Wisconsin Supreme Court has held that the "construction of '*expressio unius est exclusio alterius*' should not be invoked where the result will be to limit the plenary power of the legislature by implication." *McCormack*, 18 Wis. 2d at 280 (citations omitted). Plaintiffs' argument is based upon a perceived limiting implication in the Wisconsin Constitution. Thus, Plaintiffs would like this Court to do precisely what the *McCormack* court has cautioned against, namely, to limit the Legislature's plenary power to enact laws by finding an *implicit* limitation on that power in Wis. Const. art. III, § 2. This Court lacks the authority to find such an implicit limitation on the Legislature's authority. To do so would usurp the Legislature's plenary power to create laws under Wis. Const. art. IV, § 1.

Plaintiffs assert that the discussion regarding Wis. Const. art. I, § 1 in *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987), would permit this Court to find an implicit limitation on the Legislature's plenary power in the language of Wis. Const. art. III, § 2. (*See* Br. of Pls.-Resp'ts at 36.) The Court should reject Plaintiffs' contention, as the *Jacobs* decision restates the principle from *McCormack* that Wisconsin courts should not "apply the doctrine of *expressio unius est exclusio alterius* where the result will be to limit the plenary power of the legislature by implication." *Jacobs*, 139 Wis. 2d at 507 (citation and internal quotation marks omitted).

Furthermore, the Wisconsin Supreme Court has consistently held that the Legislature has the power to impose reasonable regulations designed to protect the integrity of elections, including requirements that a qualified elector identify himself at the polls prior to voting, even requiring identification by affidavit in some cases. *See, e.g.*, *State ex rel. O'Neill v. Trask*, 135 Wis. 333, 115 N.W. 823 (1908); *see also Cothren*, 9 Wis. at 258 (*283-84) ("it is clearly within [the Legislature's] province to require any person offering to vote, to furnish such proof as it deems requisite, that he is

a qualif[i]ed elector."). It is not plausible to suggest that the 1986 amendment to Wis. Const. art. III, § 2 was intended, *sub silentio*, to sweep away over a century of well-established judicial interpretation of the scope of legislative power over the election process. (*See* Br. of Pls.-Resp'ts at 47-48.) Accordingly, even if Wis. Const. art. III, § 2 could be viewed as imposing some implied limitation on legislative power, the requirement that a voter show a form of photo identification would still be valid as just another permissible way to require a qualified elector to identify himself prior to voting.

Preserving the constitutional right to vote is essential. The Legislature "must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure [the] full and free exercise" of the right to vote established by Wis. Const. art. III. *Dells v. Kennedy*, 49 Wis. 555, 557, 6 N.W. 246 (1880). Preserving the "full" exercise of the right to vote includes establishing requirements to ensure that each vote counts on par with all others and is not diluted by fraud. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "Manifestly, the right to vote, the secrecy of the vote, and the purity of elections, all essential to the success of our form of government, cannot be secured without legislative regulations." *State ex rel. Runge v. Anderson*, 100 Wis. 523, 533, 76 N.W. 482 (1898). "Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them." *Id.* at 533-34. Thus, "so far as legislative regulations are reasonable and bear on all persons equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right." *Id.* at 534. Act 23 is consistent with the Legislature's constitutional authority to enact reasonable laws governing how elections are administered so the right to vote has equal value for all voters. Because Act 23 is constitutional, the circuit court must be reversed.

II. PLAINTIFFS LACK STANDING.

Plaintiffs lack standing. First, Ms. Ramey has a Wisconsin driver license and can vote under Act 23. She is not "affected by" Act 23's photo identification requirement when she has an ID and can vote; she lacks standing. Wis. Stat. § 806.04(2).

Second, Plaintiffs misconstrue the proposition that a party need not suffer an actual injury before seeking declaratory relief. (*See* Br. of Pls.-Resp'ts at 67.) Even a *threatened* injury is sufficient to confer standing. *See, e.g., Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983). However, Ms. Ramey is not *threatened* with an injury by Act 23. "Although the magnitude of the injury is not determinative of standing, the fact of injury is." *Id.* at 525 (citation omitted). Ms. Ramey will not be injured by Act 23. This case is akin to *Perdue v. Lake*, where the Georgia Supreme Court held that a voter lacked standing to pursue her claims challenging Georgia's 2006 Photo ID Act because she had photo identification acceptable for voting. 647 S.E.2d 6, 8 (Ga. 2007).

Third, Plaintiffs assert that Act 23 violates the rights of "all eligible voters." (Br. of Pls.-Resp'ts at 66.) They are wrong. This is not a class action lawsuit, and, if it were, Ms. Ramey would be an insufficient class representative. Plaintiffs have not identified any voter that would be prevented from voting under Act 23.

Fourth, Plaintiffs assert that Defendants waived their standing argument as to the League because that argument was not addressed on summary judgment. (Br. of Pls.-Resp'ts at 65.) Plaintiffs neglect that Defendants strenuously asserted that the League lacks standing in motions to dismiss Plaintiffs' complaints. (R. 6; R. 8; R. 12; R. 24; R. 25; R. 26.) Defendants' first dismissal motion had been argued orally and a dismissal motion as to Plaintiffs' amended complaint was pending when summary judgment briefing was completed on

February 23, 2012. Defendants' standing argument as to the League is not waived.

Finally, there are no facts in the appellate record to conclude that the League will suffer injury that is caused by Act 23. The League's standing cannot be based upon Ms. Ramey's non-standing. There is not a single piece of evidence in the appellate record that demonstrates why the League has standing. Neither Plaintiffs nor the circuit court have pointed to any. The League has no standing to pursue this declaratory judgment action based upon the rights of its members or upon its own purported "injury."

CONCLUSION

Act 23's photo identification requirement is a commonsense, reasonable, and constitutional election regulation. For the reasons stated herein and in Defendants' opening brief, the circuit court must be reversed.

Dated this 7th 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. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,955 words.

Dated this 7th day of September, 2012.

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CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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 Wis. Stat. § (Rule) 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 7th day of September, 2012.

_____

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