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STATE OF WISCONSIN
COURT OF APPEALS - DISTRICT IV

10-05-2012

Case No. 2012AP000584-AC
Dane County Case No. 11CV4669

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**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 DECISION AND ORDER DATED
MARCH 12, 2012, GRANTING SUMMARY DECLARATORY
JUDGMENT AND PERMANENT INJUNCTION BY THE DANE
COUNTY CIRCUIT COURT, HON. RICHARD G. NIESS PRESIDING**

***AMICUS CURIAE* BRIEF AND APPENDIX
ON BEHALF OF DANE COUNTY**

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ARGUMENT

I. INTRODUCTION.

Dane County is a government entity charged with administering and maintaining the integrity of the electoral system as a whole.¹ It supports Plaintiffs-Respondents' brief and agrees that the Circuit Court was correct in holding that 2011 Wisconsin Act 23 ("Act 23") violated Article III of the Wisconsin Constitution. (R.47.)

II. THE WISCONSIN CONSTITUTION PROHIBITS ABROGATION OF A CITIZEN'S INHERENT RIGHT TO VOTE.

A. Interpretation Of Article III Of The Wisconsin Constitution Must Be Read In The Context Of Article I.

Article III of the Wisconsin Constitution protects the right to vote of all qualified electors in the state. To give Article III its proper effect, its meaning must be read within the context of Article I. Article I states:

All people are born equally free and independent, and have certain inherent rights;

¹ See Wis. Stat. § 7.10.

among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. Art. I, § 1.

The declaration of Article I makes unequivocal that the purpose of government is to secure for its citizens certain inherent and inalienable rights. The bedrock upon which our democracy is seated is that the government derives its powers from the consent of its citizenry. *McKally v. Tollander*, 100 Wis. 2d 490, 501, 302 N.W.2d 440, 446 (1981). “The right to vote is the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained.” *Id.* Citizens choose their elected representatives; government officials do not choose their electors.

Suffrage is a right deeply interwoven into the fabric of our constitutional democracy. In *State ex rel. McGrauel v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910), the court described suffrage as “the structure upon which our whole constitutional system is bottomed . . . around and upon it are clustered all other things as subsidiary in a complete

structure. *Id.* at 1046. In *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949), the court again highlighted the importance of the right to vote.

The right of a qualified elector to cast a ballot for the elections of a public officer, which shall be free and equal, is one of the most important rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our Democracy, we will soon cease to be a Democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage.

Id. at 613-614.

The right to vote is inextricable, inherent and fundamental to our constitutional democracy, the guarantee of which is explicitly mandated by Article I. Accordingly, Article III must be read within the context of that mandate to give the right to vote its broadest effect.

B. The Right To Vote Can Only Be Abrogated By Constitutional Restriction.

The legislature cannot abrogate the inherent right to vote vested in all persons who meet the qualifications articulated by Article III of the Wisconsin Constitution. *Dells*

v. Kennedy, 49 Wis. 555, 6 N.W. 246 (1880); *McGrael*, 144 Wis. at 15, 128 N.W. at 1046. Any statute that denies a qualified elector the right to vote is unconstitutional and void. *Ollman v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185 (1941).

The elector possessing the qualifications prescribed by the constitution is invested with the constitutional right to vote at any election in this state. These qualifications are explicit exclusive, and unqualified by any exceptions, provisos or conditions, and the constitution either directly or by implication, confers no authority upon the legislature to change, impair, add or abridge them in any respect.

Dells, 49 Wis. at 556, 6 N.W. at 247. Article III clearly delineates the only conditions requisite, collectively both necessary and sufficient, to establish an individual as a qualified elector.

Article III also clearly identifies two specific classes of individuals who may, at the discretion of the legislature, be disenfranchised: (a) persons convicted of a felony and (b) those adjudged incompetent. Wis. Const. Art. III, § 2(4). Such an explicit grant of power must be read as a limitation on the

legislature's power to disenfranchise any individual who otherwise is a qualified elector. *See McGrael*, 144 Wis. at 15, 128 N.W. at 1046 (holding that the Wisconsin Constitution's grant of suffrage to a specific set of persons functions as a limitation on the legislature to confer that right on persons who do not meet the characteristics articulated in the Constitution).

Article III delegates a set of limited powers to the legislature for the purpose of regulating elections. Wis. Const. Art. III, § 2. The legislature may enact laws to define residency, provide for registration of electors, provide for absentee voting, and to extend the right of suffrage to additional classes, subject to ratification by the people. *Id.* Art. III, §§ 2(1) – (4). The legislature possesses no other explicit authority to regulate suffrage absent the direct consent of the public at a general election.²

² Article XII of the Wisconsin Constitution enables and outlines the process for amendment to the constitution.

Act 23's Voter ID provisions do not fit within the types of legislative action contemplated by the explicit grants of power in the Article III, section 2.

III. LEGISLATIVE REGULATION OF THE VOTING PROCESS MUST BE REASONABLE.

Act 23's Voter ID mandate imposes an unconstitutional qualification to vote on otherwise qualified Wisconsin voters. However, even if one accepts Defendant-Appellant's argument that Act 23's Voter ID provisions only regulate the administration of elections, those provisions still fail constitutional muster because they place an unreasonable burden on the right to vote of otherwise qualified electors.

While the legislature may regulate the administration of elections under its inherent police powers, that regulation must be reasonable. *Dells*, 49 Wis. at 557, 6 N.W. at 247; *Frederick*, 254 Wis. at 614, 37 N.W.2d at 480. The court must frame the question of reasonableness within the context of Article I, § 1 and Article II, § 1 in order to give the voting right its most expansive form consistent with the limitations of that right as defined by the constitution not the legislature.

See e.g. State ex rel. Barber v. Circuit Court for Marathon County, 178 Wis. 468, 190 N.W. 562 (1922) (analyzing legislative regulation of the right to vote within the context of the inherent right to vote as it is guaranteed by the Wisconsin Constitution); *see also McGrael*, 144 Wis. at 17-18, 128 N.W. at 1047 (discussing the inherent and constitutionally transcendent nature of the right to vote and its regulation by the legislature).

When regulation inhibits the exercise of the individual right to vote instead of promoting it, such regulation is unreasonable and unconstitutional. *Id.* In *McGrael*, the court defined the boundaries of the legislature’s inherent police powers with regards to elections, holding that “[r]egulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees.” *Id.* at 18.

In *Barber*, the court again confronted the limits of legislative regulation of the right to vote. The court reaffirmed its holding in *McGrael* stating:

[L]egislation on the subject of elections is within the constitutional power of the Legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

178 Wis. 468, 190 N.W. at 566.

Act 23's Voter ID provisions are inherently onerous and limit exercise of the elective franchise itself. Such legislative regulation does not comport with the Supreme Court's requirement that regulation of the right to vote be reasonable and is therefore unconstitutional.

IV. THE PROVISIONS OF ACT 23 REQUIRING ELIGIBLE VOTERS TO PROVE THEIR IDENTITY BY A NARROW LIST OF ACCEPTABLE DOCUMENTS PROCURED BY A CUMBERSOME PROCESS REQUIRING THE COOPERATION OF THE STATES IS UNREASONABLE AND THEREFORE, UNCONSTITUTIONAL.

The Voter ID provisions of Act 23 focus on correcting the elusive problem of identity theft at the voting booth. Act 23 requires an eligible voter to prove that he or she is in fact the person he or she purports to be. However, the means by

which the voter may prove identity is narrowed to presenting one of eight acceptable forms of identification.³

The use of one or more documents which might, in other contexts, be typically used to demonstrate identity such as school or employment identification cards, credit cards, leases, loan documents, property tax receipts, library cards, insurance cards, social security cards or medical assistance cards is not permitted. Wis. Stat. § 5.02(am) (as created by Act 23 § 1). Further, the long-standing practice of having a person vouch for ones identify is no longer allowed. *See* Act 23, § 17.

By far, the easiest form of acceptable identification to obtain for individuals who do not already possess approved

³ The eight acceptable forms of identification accepted as proof of identity are: (1) a current or recently expired Wisconsin Driver's license, (2) a current or recently expired Wisconsin identification card, (3) a current or recently expired military identification card, (4) a current or recently expired U.S. Passport, (5) a certification of naturalization issued within the previous two years, (6) an unexpired Wisconsin Driving receipt or identification card receipt, (7) a tribal identification card, or (8) an accredited university or college identification card issued within the previous two years, if the student also brings separate documentation showing proof of enrollment. *See* Wis. Stat. § 5.02(6m) (as created by Act 23 § 1).

identification is the Wisconsin Identification Card.⁴ In order to obtain an identification card, a voter must provide documentary proof of their identify to the Wisconsin Department of Transportation. *See* Wis. Stat. § 343.14(er). For most voters this will come in the form of a certified copy of his or her birth certificate.⁵ *See* Wis. Admin. Code Trans § 102.15. For those Wisconsin residents who do not possess a certified copy of their birth certificate, especially those from out-of-state, Act 23 imposes a significant and unreasonable barrier to exercising their right to vote.

Birth recording systems were not designed to provide foundational documentation to exercise the right to vote. The

⁴ The other forms of identification either require the applicant to meet additional qualifications. For instance, in order to obtain a Wisconsin Operators License, the individual must pass a driving examination. Wis. Stat. § 343.16. Likewise, only a small number of Wisconsin residents are current or former members of the military, naturalized citizens, members of federally recognized Indian tribes, or students or faculty at a university or college.

⁵ Similarly, a voter may need to supply their birth certificate to obtain many of the other forms of identification enumerated as acceptable proof of identification in Act 23. *See* Act 23 § 1. A certified copy of a person's birth certificate functions as documentary proof of identity and citizenship for the purposes of obtaining both a Wisconsin Operators License, *see* Wis. Admin. Code. Trans § 102.15, and a United States Passport, *see* 22 C.F.R. § 51.23.

procedures and qualifications for obtaining one's birth certificate are not uniform and depend upon where one was born, forcing Wisconsin residents to comply with other states' or countries' laws, bureaucratic processes, and institutions in order to be entitled to vote in Wisconsin. These systems were not designed to provide information quickly so as to enable the timely production of documents in order to exercise the right to vote on a particular date. In many cases, otherwise qualified electors will be prohibited from voting through no fault of their own because they have been unable to navigate other states' bureaucracies to obtain a certified copy of their birth certificate, or have not been provided the necessary documents in time to obtain an approved form of identification.

In perhaps an ironic twist, some states require production of photo identification to obtain one's own birth certificate. While some states allow individuals to provide an alternate form of identification in substitution of a photo ID, this often entails producing multiple types of identification

and can significantly increase the burden on the voter before they are able to exercise their right to vote.

Persons whose names do not match their birth certificate will also incur an increased burden before being able to exercise their right to vote. They may have to provide documentation of their legal name change in order to be entitled to receive a copy of their birth certificate, putting married and/or divorced women at a disadvantage to unmarried women, women who did not change their names upon marriage, and men. Persons who have changed their gender are likely to face more difficulty using their birth certificate as identification.

Voters who are not able to travel out-of-state, or do not have an address where items may be mailed, will not be able to obtain a birth certificate thereby disenfranchising many homeless individuals.

Voters who are adopted may be confronted with additional challenges when trying to obtain their birth certificate. While it is likely that an adopted person's birth

certificate was changed to reflect the adoption, the birth certificate may or may not exist in the state in which the adoption occurred. In order to obtain his or her birth certificate, the adopted person may need to find their place of birth, adding complication when they are a product of a closed adoption or the adoption records have been sealed.

Some states prohibit the release of a birth certificate to anyone who is not yet reached the age of eighteen, including the release of one's own birth certificate. Individuals who are not yet eighteen but turning eighteen before an oncoming election may not be able to obtain a birth certificate and therefore may miss their first election.

And even if one were to discount the bureaucratic burden placed on electors by Act 23, the financial burden that it places upon those citizens who do not have the money to obtain a certified copy of their birth certificate in-and-of-itself is an unreasonable and unconstitutional barrier to exercising their right to vote. Almost uniformly, states require that individuals pay a fee to obtain a certified copy of their birth

certificate. This fee is often significantly increases when the individual needs that birth certificate in a shortened time frame. In effect, the Wisconsin Legislature has allowed other states to disenfranchise Wisconsin residents by allowing those states to place a financial barrier in between the Wisconsin resident and his or her vote.

Inherently, the burden placed on voters by Act 23's Voter ID provisions is not equal, placed unevenly on voting citizens, by age, gender and life circumstances. Persons with access to copy machines, the internet, fax machines, telephones and funds will do better than those without such access. For those persons that lack the necessary resources, this burden becomes an impassable hurdle, placed by the state in front of their inherent and fundamental right to vote as guaranteed by the Wisconsin Constitution.

V. THE INTEGRITY OF THE ELCTORAL SYSTEM MUST BE MAINTAINED BY A PROCESS THAT ENSURES THAT QUALIFIED VOTERS ARE NOT ARBITRARILY DENIED THE RIGHT TO VOTE.

In order to preserve the democratic form of government guaranteed to all citizens of this state, the legislature must concern itself not only with the risk of election fraud as a result of those voting who are not entitled; but must remain equally concerned with the risk of unreasonable degradation of the legitimacy of our government as a result of eligible voters arbitrarily and unjustly deprived of their right to vote.

Act 23's Voter ID provisions provide no flexibility in allowing voters to establish that they are who they purport to be. If an elector does not have one of the eight forms of acceptable identification articulated by Act 23, and could not provide such identification by the Friday after the election, they will be deprived of their right vote. Act 23's inflexibility ignores the states responsibility and obligation to ensure the enjoyment of suffrage to those constitutionally provided with such right.

There are ways to vindicate both interests. Voters could prove that their identification is authentic through a wider array of documentation, or by providing two or more forms of documentation. Since before 1860 voters were provided the opportunity to answer questions under oath to substantiate their qualifications to vote. *See State ex rel. Cothren*, 9 Wis. 279, 1859 WL 5133, *2 (1859). Historically, affidavits declaring one's qualifications to vote, sworn under penalty of law, have also been used to substantiate voter qualifications. *See State ex rel. O'Neil v. Trask*, 135 Wis. 333, 115 N.W.2d 823 (1908). As an alternative to having approved identification, voters could sign affidavits proving their identity, even at the polling place under criminal penalty of false swearing. Polling officials could take the person's picture as he or she signed the affidavit at relatively low cost.

Where eligible voters are turned away from the polls, the election may be ruled invalid, even where the process that turned the voters away is designed to prevent fraud and abuse of the electoral system. *Town of Washington v. City of*

Altoona, 73 Wis. 2d 250, 260, 243 N.W.2d 404, 409-410 (1976); *McNally v. Tollander*, 100 Wis. 2d 490, 302 N.W.2d 440 (1981). It is not within the purview of the legislature to omit from the voting process those it considers unworthy or not worth protecting; government cannot choose its electors.

CONCLUSION

Act 23 fails to withstand scrutiny under the Wisconsin Constitution because it constitutes an unreasonable regulation of the electoral process, unduly burdening all people who do not already have the approved forms of identification; and disenfranchising those unable to maneuver the document procurement process. Because the legislature receives its consent from the governed, it may not create new groups of persons who are disenfranchised nor create regulations that have the same effect. Accordingly, the provisions of Act 23 which require photo identification as a prerequisite to voting should be declared void.

Dated this _____ day of October, 2012.

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CERTIFICATION REGARDING COMPLIANCE
WITH RULE § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), Stats., for a brief produced with a proportional serif font. The length of this document is 2,743 words.

Dated this _____ day of October, 2012.

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**CERTIFICATION REGARDING COMPLIANCE
WITH 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 § 809.19(12). I further certify that this electronic brief is identical to the text of the paper copy 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 _____ day of October, 2012.

Richard D. Greenlee, SBN: 1070380
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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) the findings or opinion of the trial court;
- (3) a copy of any unpublished opinions cited under Wis. Stat. § 809.23(3)(a) or (b); and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court’s reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of October, 2012.

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