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.

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

# BRIEF OF DEFENDANTS-APPELLANTS

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STATE OF WISCONSIN

C O U R T  O F  A P P E A L S

DISTRICT IV

Case No. 2012AP584

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Plaintiffs-Respondents,

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

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

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# BRIEF OF DEFENDANTS-APPELLANTS

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## STATEMENT OF THE ISSUES

1. Do the plaintiffs-respondents[1] League of Women Voters of Wisconsin Education Network, Inc. and Melanie G. Ramey have standing to pursue their claims?

Answer by the circuit court: Yes.

2. Is the photo identification requirement for voting created by 2011 Wisconsin Act 23 constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution?

Answer by the circuit court: No. The circuit court granted summary judgment to Plaintiffs.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendants believe that oral argument is unnecessary because the parties' briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

Defendants believe that publication of this Court's opinion is appropriate. This case will resolve novel issues of Wisconsin constitutional law.

## STATEMENT OF THE CASE

This case involves a challenge to the photo identification requirement for voting created by 2011 Wisconsin Act 23 ("Act 23"). The circuit court declared that the requirement violates article III, sections 1 and 2 of the Wisconsin Constitution and permanently enjoined it.

[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.

This case is about the Wisconsin Legislature's authority to regulate elections consistent with the Wisconsin Constitution. It is not about the alleged burdens placed on voters by Act 23. Setting aside the issue of Plaintiffs' standing, there is one question presented: Whether the photo identification requirement for voting created by Act 23 is constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution?

The answer to the question presented hinges upon the language of the Wisconsin Constitution. Article III, sections 1 and 2 of the Wisconsin Constitution govern electors and the electoral process and describe ways that the Legislature might regulate the franchise and the process of voting. Article III, section 2 does not restrict the Legislature's authority to enact reasonable laws governing voting procedures, including how, when, and where ballots may be cast by voters. Nowhere in the language of the Wisconsin Constitution is a limitation placed upon the Legislature's ability to craft requirements that qualified electors prove their identities prior to voting. The Legislature has always possessed that power, and voters have always been required to establish their identity in order to vote. The photo identification requirement of Act 23 is merely the most recent exercise of that power.

Act 23 does not create an additional qualification for voting, but instead creates a means for voters to prove that they are indeed qualified, registered electors. Act 23 helps voters prove to those administering elections that they are who they claim to be, thus preserving the integrity of the ballot for all voters.

The photo identification requirement created by Act 23 is constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution. The circuit court must be reversed.

## I. BACKGROUND REGARDING ACT 23.

Prior to Act 23, an eligible Wisconsin elector voting in person or by absentee ballot was not required to present an identification document, other than proof of residence in certain circumstances. Instead, voters identified themselves by stating their name. Under Act 23, an elector must present documentary proof of identification to vote in person or by absentee ballot. There are nine forms of acceptable photo identification, including a Wisconsin driver license or state identification card issued by the Wisconsin Department of Transportation ("DOT"). Wis. Stat. § 5.02(6m).

Act 23 requires, with certain exceptions,[2] that an elector must present an acceptable form of photo identification to an election official, who must verify that the name on the identification conforms to the name on the poll list and that any photograph on the identification reasonably resembles the elector. Wis. Stat. § 6.79(2)(a).[3] If an elector does not have acceptable photo identification, the elector may vote by provisional ballot pursuant to Wis. Stat. § 6.97. Wis. Stat. § 6.79(2)(d) and (3)(b). The provisional ballot will be counted if the elector presents acceptable photo identification at the polling place before the polls close or at the office of the municipal clerk or board of election commissioners by 4 p.m. on the Friday after the election. Wis. Stat. § 6.97(3)(b). If an in-person voter presents photo identification bearing a name that does not conform to the voter's name on the poll list or a photograph that does not reasonably resemble the voter, the person may not vote. Wis. Stat. § 6.79(3)(b).

To accommodate eligible electors who do not yet possess an acceptable photo identification and to ensure that no elector is charged a fee for voting, Act 23 requires

[2] *See* Wis. Stat. § 6.87(4)(a)-(b).

[3] Similar requirements apply to absentee voters. *See* Wis. Stat. § 6.86(1)(ar); Wis. Stat. § 6.87(1); Wis. Stat. § 6.87(4)(b)1.

the DOT to issue an identification card to such electors free of charge, if the elector satisfies all other requirements for obtaining such a card, is a U.S. citizen who will be at least 18 years of age on the date of the next election, and requests that the card be provided without charge for purposes of voting. Wis. Stat. § 343.50(5)(a)3.

## II. FACTUAL BACKGROUND.

This case involves legal issues. Nonetheless, Ms. Ramey's sworn responses to Defendants' requests to admit are material. (R. 40; A-App. 192-96.) In her responses, Ms. Ramey admitted that she possesses a form of identification listed in Wis. Stat. § 5.02(6m), namely an unexpired Wisconsin driver license. (R. 40 at p. 4; A-App. 195.)

## III. PROCEDURAL POSTURE.

Plaintiffs filed their complaint on October 20, 2011. (R. 2.) Defendants filed a motion to dismiss the complaint and a supporting brief on December 5, 2011. (R. 6, 8.)

Plaintiffs filed an amended complaint on January 24, 2012. (R. 22; A-App. 101-11.) Defendants moved to dismiss Plaintiffs' amended complaint on January 27, 2012. (R. 24, 26.) Plaintiffs filed a letter brief opposing the motion on February 3, 2012. (R. 35.)

Pursuant to the circuit court's oral instructions on January 20, 2012, (R. 21), Defendants answered the amended complaint on January 30, 2012. (R. 27; A-App. 112-18.)

On February 2, 2012, Plaintiffs moved for summary judgment. (R. 30, 31, 32.) Defendants responded on February 16, 2012, (R. 39, 40), and on February 23, 2012, Plaintiffs filed a reply. (R. 43.)

On March 5, 2012, the circuit court entered a Decision and Order Denying Defense Motions to Dismiss. (R. 45; A-App. 197-211.)

On March 9, 2012, the circuit court heard oral argument on Plaintiffs' motion for summary judgment, (R. 46, 54), and on March 12, 2012, entered a Decision and Order Granting Summary Declaratory Judgment and Permanent Injunction in favor of Plaintiffs. (R. 47; A-App. 212-19.)

On March 15, 2012, Defendants filed a notice of appeal. (R. 50.)

## STANDARDS OF REVIEW

Issue 1 (standing): The determination of whether a party possesses standing involves a question of law that is reviewed *de novo*. *See Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 14, 300 Wis. 2d 290, 731 N.W.2d 240 (citation omitted).

Issue 2 (summary judgment): When reviewing the grant of summary judgment, an appellate court applies the same methodology as the circuit court and considers the issues *de novo*. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

## ARGUMENT

### I. PLAINTIFFS LACK STANDING.

Plaintiffs lack standing, and their claim is not justiciable. Ms. Ramey has an unexpired Wisconsin driver license, which is sufficient for voting under Act 23. (R. 40 at p. 4; A-App. 195); Wis. Stat. § 5.02(6m)(a). She cannot be injured by the photo identification requirement because she can vote under Act 23. Likewise, the League submitted no evidence on summary judgment to show that the League has either: (1) associational standing based

upon the standing of its members; or (2) independent standing based upon its own injury.[4]

### A. Ms. Ramey Lacks Standing Because She Has A Wisconsin Driver License.

The circuit court concluded that Ms. Ramey has standing and that her claim is justiciable. The circuit court stated:

> Whether or not Ms. Ramey now has, or can obtain, such photo identification is beside the point, at least according to plaintiffs, because the requirement "affects" – indeed, burdens – Ms. Ramey's fundamental right to vote by imposing an additional impediment to its exercise not specified in the Wisconsin Constitution. In this, she is surely correct. While the burden of carrying and producing a photo ID may be "trifling" in her particular situation, § 806.04, on its face, requires nothing more. Furthermore, if the photo ID requirement is unconstitutional, as plaintiffs contend, it *ipso facto* constitutes an impermissible injury to all qualified electors (including Ms. Ramey), even if it were to present no burden at all. That is to say, constitutional injury itself confers standing.

(R. 45 at p. 3 (footnote omitted); A-App. 199.)

The circuit court erred in concluding that Ms. Ramey possesses standing. The Declaratory Judgment Act, Wis. Stat. § 806.04, *et seq.*, gives Wisconsin courts the power to construe statutes and declare the rights of persons "affected by a statute." Wis. Stat. § 806.04(2). Ms. Ramey is not affected by Act 23 because her driver license allows her to vote.

[4]The circuit court did not specifically address whether the League has standing because it concluded that Ms. Ramey's standing was sufficient. (R. 45 at p. 2; A-App. 198.) The circuit court did not address whether Ms. Ramey has taxpayer standing. (*Id.*)

Ms. Ramey has not presented a justiciable controversy when no legally protectable interest is at stake. "The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211 (citation and internal quotation omitted). A party asserting a constitutional claim must have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983). "Although the magnitude of the injury is not determinative of standing, the fact of injury is." *Id.* at 525 (citation omitted).

Ms. Ramey has asserted no legally protectable interest because she has not suffered and is not threatened with any injury due to Act 23. She has a form of qualifying photo identification and can vote under Act 23.

The circuit court homed in on the language in *Olson* that "a plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the [Declaratory Judgment] Act." *Olson*, 309 Wis. 2d 365, ¶ 43 (citation omitted); (R. 45 at p. 5; A-App. 201). In doing so, the circuit court concluded that, based upon *Olson*, it is enough that a declaratory judgment "serve a useful purpose" for the case to be justiciable. (R. 45 at p. 6; A-App. 202.)

The circuit court misapplied *Olson* and disregarded the "legally protectable interest" standard. The issue in *Olson* was the "ripeness" factor of justiciability, not the "legally protectable interest" factor. The *Olson* court could not have been clearer: "Only factor (4), ripeness, is at issue here." *Olson*, 309 Wis. 2d 365, ¶ 30. Therefore, the circuit court erred when it applied *Olson*'s ripeness holding to the issues of standing in the present case.

The circuit court's analysis of *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855, and *Foley-Ciccantelli v. Bishop's Grove Condominium. Association, Inc.*, 2011 WI 36, ¶ 129, 333 Wis. 2d 402, 797 N.W.2d 789, does not remedy its fundamentally erroneous holding regarding Ms. Ramey's alleged "injury" and the material fact that Ms. Ramey has an unexpired Wisconsin driver license. (*See* R. 45 at pp. 6-12.) Ms. Ramey has not personally suffered a real and direct, actual or threatened injury resulting from Act 23. *Fox*, 112 Wis. 2d at 524-25. Accordingly, she lacks standing, and her claim is not justiciable.

### B. The League Lacks Standing Because It Has Not Shown A Threatened Injury To It Or Its Members.

Because it concluded that Ms. Ramey has standing, the circuit court did not address the League's standing. (R. 45 at p. 2, and p. 2 n. 4; A-App. 198.) The record lacks any evidence upon which the circuit court could have concluded that the League has standing.

Act 23 applies to qualified electors. The League is not an elector and does not possess the right to vote. To establish standing, the League must show that: (1) it possesses a legally protectable interest as an organization that will be injured by Act 23, *see Fox*, 112 Wis. 2d at 524-25; or (2) at least one of its members has such an interest that will be injured by Act 23. *See Wisconsin's Envtl. Decade, Inc. v. PSC*, 69 Wis. 2d 1, 20, 230 N.W.2d 243 (1975).

First, the League has not alleged that any of its members other than Ms. Ramey possess standing. (R. 22 at ¶ 7; A-App. 103.) Ms. Ramey cannot be injured by Act 23 because she has a qualifying photo identification and can vote.

Therefore, the League does not possess associational standing as a function of its members' standing. *See Wisconsin's Envtl. Decade, Inc.*, 69 Wis. 2d at 20.

Second, the League has no standing based on its own injury because it offered no evidence of injury from Act 23.

Two paragraphs in Plaintiffs' amended complaint address the League and its interests. (*See* R. 22 at ¶¶ 5-6; A-App. 103.) The League submitted no evidence to confirm or prove its allegations. Defendants did not admit the allegations in their answer to the amended complaint and instead stated that they lack knowledge or information as to these allegations, a denial. (R. 27 at ¶¶ 4-5; A-App. 113); Wis. Stat. § 802.02(2).

To prove that its claim is justiciable, the League must demonstrate an injury to a legally protectable interest of its own. *See Olson*, 309 Wis. 2d 365, ¶ 28. The League submitted literally no evidence into the record to establish an injury to it or its members. Bare allegations in an amended complaint—which were denied—are not sufficient to demonstrate an injury. Accordingly, the League lacks standing and its claim is not justiciable.

## II. ACT 23 IS CONSTITUTIONAL IN LIGHT OF ARTICLE III, SECTIONS 1 AND 2 OF THE WISCONSIN CONSTITUTION.

The photo identification requirement for voting created by Act 23 is constitutional in light of article III, sections 1 and 2 of the Wisconsin Constitution. The circuit court erred when it concluded otherwise and must be reversed.

The circuit court summarized its decision:

> To be clear, this court does not hold that photo ID requirements under all circumstances and in all forms are unconstitutional *per se*. Rather, the

> holding is simply that the disqualification of qualified electors from casting votes in any election where they do not timely produce photo ID's satisfying Act 23's requirements violates Article III, Sections 1 and 2 [of] the Wisconsin Constitution.

(R. 47 at p. 8; A-App. 219.) The circuit court held that "[t]he government may not disqualify an elector who possesses [the qualifications stated in Article III] on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained in Article III, such as a photo ID." (*Id.* at p. 3; A-App. 214.)

The circuit court's decision is detached from the plain language of article III of the Wisconsin Constitution and gives short shrift to the Legislature's plenary power to regulate how, when, and where ballots may be cast. Act 23 does not create an additional qualification for voting. It only requires that a qualified and registered elector verify his identity in a specific manner. Accordingly, the circuit court erred, and it must be reversed.

### A. Act 23 Is Presumed Constitutional.

There is a strong presumption that legislation is constitutional. *See, e.g.*, *State v. Johnson*, 2001 WI 52, ¶ 10, 243 Wis. 2d 365, 627 N.W.2d 455 (citation omitted). Plaintiffs, therefore, were required to prove unconstitutionality beyond a reasonable doubt. *Id.* (citation omitted). They failed to meet this burden.

A court must indulge every reasonable presumption necessary to uphold legislation against constitutional challenges. *Wis. Bingo Supply & Equip. Co., Inc. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979) (citation omitted). Like other state legislatures, the Wisconsin Legislature possesses plenary power that is limited only by constitutional constraints. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 123, 295 Wis. 2d 1, 719 N.W.2d 408.

Determining the type of proof that a qualified elector must furnish to prove her identity to vote, thus, protecting the integrity of the ballot for all voters, is quintessentially a legislative policy-making function. *See State ex rel. La Follette v. Kohler*, 200 Wis. 518, 548, 228 N.W. 896 (1930) ("the power to prescribe the manner of conducting elections is clearly within the province of the Legislature"); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949) ("the legislature has the constitutional power to say how, when and where [a qualified elector's] ballot shall be cast"); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 17-18, 128 N.W. 1041 (1910) (regulation of the right to vote is a legitimate "field of legislative activity").

Act 23 reflects a policy choice by the Legislature designed to ensure that qualified electors appearing at the polls to vote are who they purport to be. It is not this Court's role to second-guess the Legislature's actions absent constitutional infirmity.

### B. The Wisconsin Supreme Court Has Consistently Upheld Laws That Preserve The Integrity of Elections, Including Those Relating To Confirming That Electors Are Qualified.

Since the middle of the 19th century our supreme court has consistently held that the right to vote, although fundamental, is nonetheless subject to reasonable legislative regulation designed to protect the integrity of the electoral process. For example, in the early case of *State ex rel. Cothren v. Lean*, 9 Wis. 279, 1859 WL 5133 (1859), the court rejected a claim that a statute allowing election inspectors to challenge the eligibility of individual voters at the polls was unconstitutional because it prescribed qualifications for electors beyond those provided for in the constitution. *Id.* at 283-84. While that *ultra vires* claim is not identical to the constitutional claim here, nonetheless noteworthy for

present purposes is the court's holding that "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." *Id.*

Sixteen years later in *State ex rel. Wood v. Baker*, 38 Wis. 71, 1875 WL 3541 (1875), the court rejected a claim that procedural errors made by election inspectors in the administration of the state's voter registration law invalidated the votes of individual electors who had voted without awareness of those official errors. Although the court concluded in *Baker* that the individual electors' right to vote could not be impaired by the erroneous official administration of the registration statute, the court's analysis was nonetheless consistent with the principle previously established in *Cothren*. *See id.* at 86-87. The court reasoned that statutes cannot impair the constitutional right to vote, but they can regulate the exercise of that right by requiring reasonable proof of a voter's qualifications. *Id.* at 86. Such proof requirements, "are not unreasonable, and are consistent with the present right to vote, as secured by the constitution. The statute imposes no condition precedent to the right; it only requires proof that the right exists." *Id.* at 87. If a voter is denied the opportunity to vote for failing to provide such proof, the court concluded that he is disenfranchised not by the statute, "but by his own voluntary refusal of proof that he is enfranchised by the constitution." *Id.*

The court repeated the essential holding of *Baker* in *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880). The court in *Dells* held invalid the voter registration requirements of chapter 235 of the Laws of 1879 as an unconstitutional disenfranchisement because it prescribed elector qualifications additional to those found in the Wisconsin Constitution. *Id.* at 556, 560. However, in doing so, the court reiterated that election laws may be sustained "as regulating reasonably the exercise of the constitutional right to vote at an election." *Id.* at 558. The *Dells* court reinforced the holding in *Baker* regarding the fact that a voter may be called upon to prove that he is a

qualified elector: "'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 disenfranchised, 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 559 (quoting *Baker*, 38 Wis. 71) (emphasis provided by the *Dells* court).[5]

The same principles were again applied in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), in which the court rejected a claim that the constitutional right to vote was infringed by a statute providing that a candidate could appear only once on the official ballot in an election, even if the candidate had received the nomination of more than one political party. In upholding the challenged ballot law, the court once more affirmed the view that the right to vote is properly subject to reasonable regulation:

> 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. Such regulations, within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them. Some interference with freedom of action is permissible and necessarily incident to the power to regulate at all, as some interference with personal liberty is necessary and incident to government; and so far as legislative regulations are reasonable and bear on all persons

[5] *State ex rel. O'Neill v. Trask*, 135 Wis. 333, 338, 115 N.W. 823 (1908), also quoted approvingly the holding of the *Baker* case. *Trask*, which involved the presentation of affidavits offered in lieu of registration by voters who were not on the voter registry, observed that the prevention of fraudulent voting is a legitimate aim of regulations governing the administration of elections. *Id.* ("The object of the statute is to prevent fraudulent voting by persons who assume the right, when, in fact, they are not entitled to it.").

> equally so far as practicable in view of the constitutional end sought, they cannot be rightfully said to contravene any constitutional right.

*Id.* at 533-34. The same passage was quoted in full in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 337, 125 N.W. 961 (1910), in which the court rejected the claim that Wisconsin's primary election law unconstitutionally interfered with the rights of voters to participate in the selection of candidates for public office.

Another claim that the right to vote was unconstitutionally impaired by the state's primary election laws was considered and rejected in *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910). In that decision, the court rejected the view that the right to vote was a mere privilege and instead found that right, as guaranteed by article III, section 1 of the Wisconsin Constitution, to be a fundamental and inherent right of the highest character. *Id.* at 14-15. Nonetheless, the court went on to note that the fundamental right to vote "is yet subject to regulation like all other rights." *Id.* at 15. The court further explained:

> It has become elementary that constitutional inhibitions of legislative interference with a right, including the right to vote and rights incidental thereto, leaves, yet, a field of legislative activity in respect thereto circumscribed by the police power. That activity appertains to conservation, prevention of abuse, and promotion of efficiency. Therefore, as in all other fields of police regulation, it does not extend beyond what is reasonable. Regulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees.

*Id.* at 17-18. The court then articulated a rationale for assessing the constitutionality of legislation affecting the right to vote:

> It is further elementary that, the extent to which the legislature may go in the field of police power, is primarily a matter for its judgment. As to the case in hand, the same as others, it could not properly go

> beyond reasonable regulation. However, what is and what is not reasonable, is primarily for legislative judgment, subject to judicial review. Such review does not have to do with expediency. It only deals with whether the interference, from the standpoint of a legitimate purpose, can stand the test of reasonableness, all fair doubts being resolved in favor of the proper exercise of the law making power.

*Id.* at 18.

In *State ex rel. Small v. Bosacki*, 154 Wis. 475, 475 N.W. 175 (1913), the court, in rejecting a claim that a statute prescribing voter residency requirements violated the voting rights of transient workmen, further elaborated the Legislature's authority to create such laws:

> It is competent for the legislature to prescribe reasonable rules and regulations for the exercise of the elective franchise. To do so infringes upon no constitutional rights. It is because of the sacredness of the lawful use of the ballot, and of its importance in governmental affairs, that the right as well as the duty is vested in the legislature to prescribe reasonable rules and regulations under which it may be exercised. Such rules and regulations tend to certainty and stability in government and render it possible to guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies. Their aim is to protect lawful government, not to needlessly harass or disfranchise anyone.

*Id.* at 478-79. Clearly, the court was of the view that reasonable procedural regulations designed to protect the integrity of elections are not constitutionally suspect and do not violate the fundamental right to vote.

In *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949), the court rejected a claim that a statute providing for primary and runoff contests in Wisconsin's spring elections for non-partisan state offices unconstitutionally impaired the voting rights of individual electors. In so holding, the court noted that

"[w]hile 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." *Id.* at 613 (citations omitted). The court continued:

> It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when, and where his ballot shall be cast[.]

*Id.*

The court repeated this same language from *Zimmerman* seventeen years later in upholding the constitutionality of a statute providing that absentee ballots could not be counted unless they were properly authenticated by the municipal clerk. *Gradinjan v. Boho*, 29 Wis. 2d 674, 684-85, 139 N.W. 557 (1966) (quoting *Zimmerman*, 254 Wis. 2d at 613).

In the cases discussed above, the Wisconsin Supreme Court has consistently held that the right to vote, although fundamental, is subject to reasonable legislative regulation designed to protect the integrity of the electoral process. The Legislature has the authority to regulate how, when, and where ballots are cast by qualified electors.

The State's interest in requiring photo identification for voting is significant. As the Supreme Court recognized in *Crawford v. Marion County Election Board*, the prevention of voter fraud is unquestionably both legitimate and important. 553 U.S. 181, 196 (2008). By requiring qualified electors to confirm their identity by showing a form of photo identification, Act 23 minimizes the possibility that a person will vote for another registered voter, for a person who is deceased, or for a fictitious person registered through fraud. Votes cast in any of these circumstances constitute vote dilution, which is a diminution of every elector's right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right

of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). The Supreme Court has also recognized that voter photo identification laws bolster the public's confidence in the integrity of the electoral process. *Crawford*, 553 U.S. at 197. Act 23 and the regulations previously upheld by the Wisconsin Supreme Court thus protect the fundamental right to vote and foster confidence in elections.

### C. The Principles Used To Interpret The Wisconsin Constitution Confirm That Act 23 Is Constitutional.

In *Dairyland Greyhound Park, Inc. v. Doyle*, the Wisconsin Supreme Court outlined principles for interpreting the Wisconsin Constitution:

> The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. Constitutions should be construed so as to promote the objects for which they were framed and adopted. The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.] We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.

295 Wis. 2d 1, ¶ 19 (internal citations and quotation marks omitted; brackets in original).

This Court's first task is to determine what impact, if any, the meaning of the plain language of article III of the Wisconsin Constitution has on the Legislature's authority to enact the photo identification requirement for voting created by Act 23.

### 1. The Plain Language Of Article III Does Not Prohibit The Legislature From Enacting A Photo Identification Requirement.

In discerning the meaning of a constitutional amendment, "[c]ourts should give priority to the plain meaning of the words of [the] provision in the context used." *State ex rel. Kuehne v. Burdette*, 2009 WI App 119, ¶ 9, 320 Wis. 2d 784, 772 N.W.2d 225 (citation and internal quotation marks omitted). Plain meaning analysis is the first of the *Dairyland Greyhound Park* factors. 295 Wis. 2d 1, ¶ 19.

The constitutional language at issue is:

> SECTION 1. Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.
>
> SECTION 2. Laws may be enacted:
> (1) Defining residency.
> (2) Providing for registration of electors.
> (3) Providing for absentee voting.
> (4) Excluding from the right of suffrage persons:
> (a) Convicted of a felony, unless restored to civil rights.
> (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.
> (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

The plain meaning of article III does not prohibit the photo identification requirement for voting created by Act 23, either explicitly or implicitly. Article III, section 2 includes words of permission, not prohibition. The section states that "Laws may be enacted" and lists topics for such laws. It does not state that "Laws *may only* be enacted" governing the listed topics. It does not state that "Laws *may not* be enacted" regarding a photo identification requirement for voting, or any other type of law governing the sound administration of elections.

Article III, section 2 creates no constitutionally prohibited class of laws. It does not prohibit or forbid any legislative action. It instead outlines possible ways that the Legislature might regulate elections.

Prohibitive constitutional language should be relatively clear. *McConkey*, 326 Wis. 2d 1, ¶ 44 ("The general purpose of a constitutional amendment is not an interpretive riddle. . . . A plain reading of the text of the amendment will usually reveal a general, unified purpose."). The point is illustrated by the language at issue in *Dairyland Greyhound Park*.

In *Dairyland Greyhound Park*, the Wisconsin Supreme Court reviewed a 1993 amendment to article IV, section 24(1) of the Wisconsin Constitution, which states: "Except as provided in this section, the legislature may not authorize gambling in any form." *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 20.[6] The court observed that clauses 3 through 6 of article IV, section 24 list four exceptions to the broad prohibition on gambling in article IV, section 24(1): (1) bingo games operated by charitable and religious organizations; (2) raffle games operated by charitable and religious organizations; (3) pari-mutuel on-track betting; and

[6]The issue in *Dairyland Greyhound Park* was the retroactivity of the prohibition on gaming in article IV, section 24(1)—whether the 1993 amendment to article IV, section 24 affected tribal gaming compacts entered into prior to the 1993 amendment. *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶¶ 1-2, 22-23.

(4) the state-operated lottery. *Id.* Finally, the court observed that, as amended, clause 6 specifically defined the state-operated lottery to exclude casino-style games, explicitly prohibiting blackjack, poker, roulette, craps, keno, slot machines, and video gaming. *Id.*

Unlike the prohibitive language of article IV, section 24(1) of the Wisconsin Constitution (*i.e.*, "Except as provided in this section, the legislature may not authorize gambling in any form."), the plain language of article III, section 2 does not prohibit any legislative action. Instead, it states that "Laws may be enacted," and then lists potential areas for legislation. There is no express prohibition on legislative authority.

Unlike the federal constitution, which is one of limited, delegated, and enumerated powers, the Wisconsin Constitution grants broad, plenary power to the Legislature. *See* Wis. Const. art. IV, section 1. The Wisconsin Supreme Court has explained:

> The framers of the Wisconsin constitution vested the legislative power of the state in a senate and assembly. The exercise of such power is subject only to the limitation and restraints imposed by the Wisconsin constitution and the constitution and laws of the United States.
>
> This court has repeatedly held that the power of the state legislature, unlike that of the federal congress, is plenary in nature, and we again repeat what Mr. Justice Cole stated in *Bushnell v. Beloit* (1860), 10 Wis. 155 (*195), 168 (*225), and which we previously quoted *in Cutts v. Department of Public Welfare* (1957), 1 Wis. 2d 408, 416, 84 N.W.2d 102, to wit:
>
> "We suppose it to be a well-settled political principle that the constitution of the state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature, and that it is competent for the legislature to exercise all

> legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States."

*State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 277, 118 N.W.2d 211 (1962).

The key language from *McCormack* is that "it is competent for the legislature to exercise all legislative power *not forbidden by the constitution*." *Id.* (emphasis added). Article III, section 2 does not forbid the Legislature from enacting laws. It includes words of permission (*i.e.*, "Laws may be enacted"), not words of prohibition or limitation on legislative authority. It cannot stand as a bar to the photo identification requirement for voting created by Act 23.

Even if article III, section 2 could be construed as imposing some implied limitation on legislative power, it would be wrong to conclude that any such limitation could be so broad as to preclude the Legislature from enacting any laws that reasonably regulate voting procedures other than those specifically enumerated in that provision. Such a sweeping limitation on legislative power would implicitly prohibit other laws governing the voting process that are not challenged here and that cannot reasonably be seen as constitutionally prohibited.

As argued above, 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.*, *Cothren*, 9 Wis. at 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."). Likewise, from at least 1967 through and beyond the time of the 1986 amendment to article III and up to the passage of Act 23, Wis. Stat. § 6.79 required that a qualified elector identify himself at the polls by announcing his full name

and address prior to receiving a ballot. *See* Wis. Stat. § 6.79(1), (2) (1967); Wis. Stat. § 6.79(2)(a) (2009-10).[7] It is not plausible that the 1986 amendment to article III, section 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. Accordingly, even if article III, section 2 could be viewed as imposing some implied limitation on legislative power, the requirement that a qualified elector 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.

Furthermore, identification requirements like the photo identification requirement created by Act 23 augment residency requirements, voter registration, *and* the qualifications for electors stated in article III, section 1 of the Wisconsin Constitution. The photo identification requirement directly supports the voter registration laws by requiring electors to prove that they are in fact the same person who is registered to vote. While the photo identification requirement created by Act 23 is not a law defining residency, providing for registration of voters, or providing for absentee voting *per se*, it nonetheless gives meaning and substance to these requirements by assuring that only qualified, registered electors vote at the polls on Election Day. Reading article III, section 2 as a limitation on legislative power would effectively overrule prior Wisconsin Supreme Court cases regarding the Legislature's authority to regulate the conduct of elections and would call into question portions of Wisconsin's election laws that are geared toward ensuring the integrity of elections and facilitating the right to vote.

The plain meaning of article III, section 2 of the Wisconsin Constitution does not stand as a prohibition—either expressly or implicitly—on the Legislature's plenary authority to enact laws governing

[7]Prior to this time, qualified electors were required to state their full names and post-office addresses "on request of the inspectors" before receiving a ballot. *See* Wis. Stat. § 6.45 (1965).

how, when, and where a qualified elector's ballot may be cast. Article III, section 2 contains words of permission, not prohibition. Thus, the photo identification requirement created by Act 23 is a permissible law governing the sound administration of elections in light of the plain language of article III.

### 2. The "Constitutional Debates" And "Practices Of The Time" That Plaintiffs Relied Upon Do Not Indicate That Act 23 Is Unconstitutional.

In the circuit court,[8] Plaintiffs asserted that under the second factor of the *Dairyland Greyhound Park* analysis "constitutional debates" and "practices of the time" relating to article III, section 2 supported their argument that this section was "intended to define and constrain the legislature's authority to limit the right to vote only as to the subjects listed." (R. 32 at p. 16.) Plaintiffs are incorrect because the materials that they submitted do not support their hypothesis.

First, Plaintiffs described the substance of article III as it existed prior to 1986 and included in an appendix two exhibits, which are copies of prior versions of article III, to illustrate. (R. 32 at pp. 16-17); (R. 31 at pp. 2-3 (Wis. Const. art. III (1848); (A-App. 120-21); (R. 31 at p. 4 (Wis. Const. art. III (1983-84 Statutes); A-App. 122.) While these materials place the current version of article III, section 2 into a historical context, they do not indicate that the 1986 amendment to that section was intended to restrain the Legislature's authority to enact laws governing how, when, and where qualified electors may vote. Nothing about the language in the 1848 and

[8]While the circuit court considered the plain language of article III, it did not consider the two other *Dairyland Greyhound Park* factors.

1983-84 versions of article III demonstrates that the 1986 version of article III restricted the Legislature's authority to create laws governing sound election administration.

Second, Plaintiffs submitted a Legislative Council staff brief dated September 20, 1978, which "analyzes Article III of the Wisconsin Constitution on a section-by-section basis in order to assist the Special Committee [on Constitutional and Statutory Review] in determining which, if any, provisions thereof are obsolete and in need of elimination and amendment." (R. 31 at p. 7; A-App. 125.) This document, too, does not further Plaintiffs' argument regarding why the 1986 amendment to article III restricted legislative authority.

The staff brief is not constitutional debates regarding the 1986 amendment to article III and merely offers suggestions for how the 1978 version of article III could (or should) be amended to reflect the then-current state of the law. It does not address photo identification requirements for voting and whether such requirements are constitutionally infirm in light of article III as it existed in 1978 or under the current version of article III. The staff brief is divorced from the relevant, current language of article III, section 2 that is at issue here.

Third, Plaintiffs submitted 1979 Assembly Joint Resolution 54, which was introduced in the Legislature by Legislative Council on April 18, 1979, and referred to the Committee on Elections. (R. 31 at p. 21; A-App. 139.) (The amendment to article III that was ratified in 1986 was first introduced for consideration by this 1979 resolution.) In their summary judgment brief, Plaintiffs quoted a Legislative Council explanatory note regarding the resolution:

> NOTE: Article III of the Wisconsin Constitution was adopted at a time when universal suffrage did not exist. In 1848, blacks, women and most Indians were not allowed to vote. The original article therefore set forth, and subsequent amendments have

> kept, detailed provisions on who may or may not vote. Developments in federal and state law have resulted in the divergence of actual practice from the letter of the constitutional article. This revision of article III, therefore**, *establishes the general principle of suffrage*** for all U.S. citizens 18 years or older who reside in an election district and allows the legislature to adapt the state's laws to changes in the federal law and state practice in ***providing for the extension and limitation of the right to vote in specified areas***. This revision also retains the right to a secret ballot, with the understanding that this requirement does not prohibit election officials from assisting disabled electors upon request. [Section 6.82, Wis. Stats.]

(R. 32 at p. 18 (quoting 1979 AJR 54) (emphasis Plaintiffs').) Plaintiffs asserted in the circuit court that this explanatory note signals that the purpose of the 1986 amendment to Article III was to "establish the principle of universal suffrage" and to "permit the legislature to enact laws 'providing for ***extension or limitation of the right to vote in specified areas.***'" (*Id.* (emphasis Plaintiffs').)

Plaintiffs are incorrect. "Universal suffrage," a vague and undefined concept, is reflected neither in the Legislative Council explanatory note nor in the 1986 amendment to article III. The explanatory note indicates that the amendment to article III "establishes the general principle of suffrage." (R. 31 at p. 23; A-App. 141.) It does not speak of establishing "universal suffrage." Furthermore, article III, section 1, as amended in 1986, does not indicate that the right of suffrage is "universal," but instead that it is limited to electors possessing three qualifications: (1) United States citizenship; (2) age 18 or older; and (3) residency in a state election district. Wis. Const. art. III, § 1. Such electors are deemed "qualified electors." *Id.*

Additionally, the "extension or limitation of the right to vote in specified areas" language from the Legislative Council explanatory note seems to refer only to article III, section 2, clauses 4 and 5, not article III,

section 2, clauses 1, 2, and 3. Article III, section 2, clauses 4 and 5 state:

> [Laws may be enacted:]
>
> (4) Excluding from the right of suffrage persons:
>
> (a) Convicted of a felony, unless restored to civil rights.
>
> (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.
>
> (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

It is clauses 4 and 5 that refer to the Legislature's ability to extend or limit the right to vote to otherwise qualified electors, not clauses 1, 2, and 3. Article III, section 2, clauses 1, 2, and 3 state:

> [Laws may be enacted:]
>
> (1) Defining residency.
>
> (2) Providing for registration of electors.
>
> (3) Providing for absentee voting.

Thus, the quoted language from the explanatory note suggests no more than that the 1986 amendment to article III would permit the Legislature to: (1) exclude certain determined classes of people from suffrage on grounds other than the qualifications in article III, section 1 (*i.e.*, article III, section 2, clause 4); and (2) grant additional classes of people the right to suffrage beyond those classes established by article III, section 1, subject to ratification by the people at a general election (*i.e.*, article III, section 2, clause 5). The explanatory note does not indicate that article III, section 2, clauses 1 through 5 were intended to *prohibit* the Legislature from enacting certain election laws.

Fourth, Plaintiffs submitted 1985 Assembly Joint Resolution 3, which reflects the Legislature's second consideration of the amendment to article III after the resolution passed the Legislature in 1983 on first consideration. (R. 31 at p. 27; A-App. 145.)[9] The 1985 Assembly Joint Resolution 3 "Explanation of Proposal" states:

> At the general election of 11/4/80, the people of this state ratified (for, 1,210,452; against, 355,024) chapter 299 laws of 1979, . . . . "to permit persons who own property in a public inland lake protection and rehabilitation district and who are U.S. citizens and are 18 years of age or older to vote at meetings of the district". Subsequently, when the constitutional amendment proposed in 1979 was placed before the 1981 legislature for '2nd consideration' (1981 AJR-84), there was concern that ratification of the constitution change proposed in 1979 might invalidate the limited voting rights granted to absentee lake property owners in November 1980. The 1981 version was never discharged from the assembly committee on elections to which it had been referred.

(R. 31 at pp. 27-28; A-App. 145-46.) Thus, the amendment to article III initially failed to gain support from two consecutive Legislatures to be placed before voters for ratification. The amendment was reintroduced and passed by the Legislature in the 1983 and 1985 terms.

1985 Assembly Joint Resolution 3 includes the same Legislative Council explanatory notes that were discussed above as to 1979 Assembly Joint Resolution 54. (*See* R. 31 at p. 28; A-App. 146.) However, additional discussion in the "Explanation of Proposal" prepared by the Legislative Reference Bureau for 1985 Assembly Joint Resolution 3 elaborates upon the purposes of amended article III, section 2, clauses 4 and 5, based upon

[9]Although 1979 Assembly Joint Resolution 54 passed the Legislature on first consideration, it did not pass when it was placed before the Legislature in 1981 for second consideration.

substantive changes that the 1983 Legislature made to the rejected 1979 amendment proposal:

> The 1983 legislature has made 2 substantive changes and one technical change in the legislative council's 1979 proposal:
>
> (1) It rephrased proposed new section 2 (4) (b) of article III to reflect current statute law:
>
> > [Excluding from the right of suffrage persons:] "(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside".
>
> (2) It added sub. (5) to the proposed new text of section 2 of article III to preserve the lake property owners' voting rights:
>
> > [Laws may be enacted:] "(5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes."

(R. 31 at p. 28; A-App. 146.)

From this "Explanation of Proposal" it is evident that article III, section 2, clauses 4 and 5 were intended to: (1) exclude certain determined classes of people from suffrage on grounds other than the qualifications in article III, section 1; and (2) grant additional classes of people the right to suffrage beyond those classes established by article III, section 1, subject to ratification by the people at a general election. These substantive changes to proposed-article III by the 1983 Legislature reflected the then-current law regarding the voting rights of incompetent persons and lake property owners. And, like the 1979 Legislative Council explanatory note, the "Explanation of Proposal" does not indicate that article III, section 2, clauses 1 through 5 were intended to *prohibit* the Legislature from enacting election laws.

Fifth, additional "practices of the time" confirm that article III, section 2 may not be read as establishing the only types of election administration laws that the Legislature may enact. This Court must consider Wis. Stat. § 6.03(2) (1985-86), which excluded persons from voting in an election who had "made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election."

Specifically, article III, section 6 of the 1985 Wisconsin Constitution excluded from suffrage the same persons excluded by Wis. Stat. § 6.03(2) (1985-86). (*See* R. 31 at p. 4; A-App. 122.) Article III was then amended in 1986, and section 6 was repealed and no longer appears in the current version of article III. Nonetheless, Wis. Stat. § 6.03(2) (1987-88) excluded from suffrage those betting on elections, even with no foundation for such a limitation in the language of article III. Wisconsin Stat. § 6.03(2) today still prohibits otherwise qualified electors from voting in elections on which they have wagered. Thus, any implication that the statutes in existence contemporaneous with the 1986 amendment to article III regulated *only* topics listed in article III, section 2 is incorrect. On the contrary, Wis. Stat. § 6.03(2) is a statute that excluded and still excludes a class of otherwise qualified electors from suffrage who are not listed in the 1986 amended version of article III, section 2.

Finally, the *McConkey* court observed that "[a] court might also find other extrinsic contextual sources helpful in determining what the amendment sought to change or affirm, . . . the title of the joint resolution, the common name for the amendment . . . and other such sources." *McConkey*, 326 Wis. 2d 1, ¶ 44. The "relating clause" in 1985 Assembly Joint Resolution 3 is another extrinsic contextual source that this Court should consider. (R. 31 at p. 27; A-App. 145.) The relating clause in the

1985 joint resolution summarizes the resolution's purposes:

> To amend so as in effect to repeal sections 1 to 6 of article III and section 5 of article XIII; to amend section 1 of article XIII; and to create sections 1, 2 and 3 of article III of the constitution, relating to removing obsolete provisions of the state constitution regarding elections and suffrage so as to revise the article on suffrage without impeding any voting rights granted under the constitution or laws of this state (2nd consideration).

(*Id.* (underlining in original).) The relating clause in 1985 Assembly Joint Resolution 3 does not indicate that the 1986 amendment to article III was intended to restrict the Legislature's authority to enact laws governing the sound administration of elections. It indicates that the amendment was meant to update the constitution to reflect the state of the then-current law, without impeding voting rights previously granted under the Wisconsin Constitution and state laws. The relating clause does not indicate that article III, section 2 contains an exclusive list of the types of election laws that may be enacted.

This Court should find that the second *Dairyland Greyhound Park* factor does not support the circuit court's ruling declaring Act 23 unconstitutional.

### 3. Plaintiffs' Evidence Of The "Earliest Interpretations" Of Article III Does Not Help Determine Whether Act 23 Is Unconstitutional.

The third *Dairyland Greyhound Park* factor to consider is "the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." 295 Wis. 2d 1, ¶ 19. Plaintiffs asserted that 1985 Wisconsin Act 304, which was enacted on April 29, 1986, and published on May 6,

1986, constitutes such an "earliest interpretation" of article III, section 2 that is relevant. (*See* R. 32 at pp. 22-23); (R. 31 at pp. 38-73; A-App. 156-91.)

Plaintiffs seem to be correct that 1985 Wisconsin Act 304 is the "earliest interpretation" of article III, section 2 by the Legislature, as it is the first law passed that relates to voting rights after a statewide vote in April 1986 ratifying the amendment to article III. However, 1985 Wisconsin Act 304 and the changes it made with regard to absentee voting and other laws affecting voters do not appear to be probative of the question whether article III, section 2 restricts the Legislature from enacting the photo identification requirement created by Act 23. The fact that in 1986 the Legislature enacted a voting law governing a topic (absentee voting) that is addressed in article III, section 2, clause 3 hardly indicates that article III, section 2 forbids the enactment of laws governing proof of identity in ways not specified in article III.

In sum, under the *Dairyland Greyhound Park* factors, this Court cannot reach the conclusion that article III prohibits the photo identification requirement created by Act 23.

### D. Act 23 Does Not Create An Additional Qualification For Voting.

Requiring voters to present a form of photo identification prior to voting is not in the nature of a personal, individual characteristic or attribute like a voting qualification, but functions merely as an election regulation to verify a voter's identity. Such a requirement helps election officials and poll workers answer the question: "Are you who you say you are?" The requirement also assures that only registered voters are permitted to vote. This type of regulation is permissible in light of article III, sections 1 and 2 of the Wisconsin Constitution.

Article III, section 1 of the Wisconsin Constitution includes the only constitutional qualifications for electors in Wisconsin: (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.

Article III, section 2 of the Wisconsin Constitution does not create constitutional qualifications for electors, but instead indicates that the Legislature may enact laws governing certain voting-related topics. Article III, section 2 does not independently restrict voting to certain classes of persons like article III, section 1. Importantly, as discussed at length above, article III, section 2 does not prohibit the Legislature from enacting laws like Act 23 governing the sound administration of elections.

The circuit court concluded that Act 23 creates an additional qualification for voting that is not found in article III and that Act 23 is therefore unconstitutional. (*See* R. 47 at pp. 3-4; A-App. 214-15.) The circuit court is incorrect. Act 23 created no additional qualification for voting and establishes only a means for election officials to confirm the identity of qualified electors.

### 1. Requiring Proof Of Identity Is Constitutional.

The government may require an elector to prove that he or she is a qualified elector prior to voting at the poll on Election Day. As the Wisconsin Supreme Court stated more than 150 years ago:

> 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.

*Cothren*, 9 Wis. at 283-84.

The *Baker* case, which dealt with the validity of the voter registry law, includes two passages that indicate that laws requiring proof of voting qualifications by demonstrating identity are constitutional:

> Statutes cannot impair the right [to vote], though they may regulate its exercise. Every statute regulating it must be consistent with the constitutionally qualified voter's right of suffrage when he claims his right at an election. *Then statutes may require proof of the right, consistent with the right itself*. And such we understand to be the theory of the registry law; "to guard against the abuse of the elective franchise, and to preserve the purity of elections;" not to abridge or impair the right, but to require reasonable proof of the right. . . .
>
> [The voter registration] requirements are not unreasonable, and are consistent with the present right to vote, as secured by the constitution. *The statute imposes no condition precedent to the right; it only requires proof that the right exists. 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*.

*Baker*, 38 Wis. at 86-87 (emphasis added). *Baker* confirms that requiring an elector to prove that he is a qualified elector is permissible and constitutional.

The circuit court relied heavily upon *Dells v. Kennedy*, a decision that struck down a registration law. (R. 47 at p. 3 (quoting *Dells*); A-App. 214.) Yet, the *Dells* decision relies upon and quotes the language above from *Baker*. *Dells*, 49 Wis. at 559. In striking down the registration law, the *Dells* court endorsed reasonable regulations to confirm that electors are qualified: "a

registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined. . . ." *Dells*, 49 Wis. at 558.

In any event, *Dells* is no longer good law. The case has been superseded by article III, section 2, clause 2 of the Wisconsin Constitution, which addresses laws providing for voter registration. Thus, it was error for the circuit court to rely upon *Dells* in concluding that the photo identification requirement for voting created by Act 23 constitutes an additional qualification for voting not found in article III. (R. 47 at p. 3; A-App. 214.)

### 2. Foreign Cases Confirm That Requiring Photo Identification Is Not An Additional Voting Qualification.

Wisconsin is not the first state to have its photo identification requirement challenged on the basis that it constitutes an unconstitutional qualification for voting. Following the reasoning of the highest state courts in Indiana, Georgia, and Michigan, this Court should reject the circuit court's conclusion that Act 23 creates an additional qualification for voting.

The Indiana Supreme Court's decision in *League of Women Voters of Indiana, Inc. v. Rokita* is instructive. In *Rokita*, the Indiana State and Indianapolis chapters of the League of Women Voters bought an action seeking a declaratory judgment and alleging, in part, that the Indiana Voter ID law violated article 2, section 2 of the Indiana Constitution. 929 N.E.2d 758, 760 (Ind. 2010). Like the instant case, the *Rokita* plaintiffs asserted only a facial constitutional challenge. *Id.*

The first argument asserted by the *Rokita* plaintiffs is virtually identical to Plaintiffs' argument here. The *Rokita* plaintiffs asserted that: "The requirements of the Voter ID Law constitute a 'qualification for voting' in violation of the Indiana Constitution which limits qualifications for voting to those specified in Article 2, Section 2." *Rokita*, 929 N.E.2d at 762.

The Indiana Supreme Court quoted the relevant constitutional provisions:

> Section 2.
>
> (a) A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.
>
> . . . .
>
> (c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct.

*Id.* at 763. Article 2, section 2, clause (a) of the Indiana Constitution and article III, section 1 of the Wisconsin Constitution are substantially similar. Likewise, article 2, section 2, clause (c) of the Indiana Constitution and article III, section 2 of the Wisconsin Constitution are similar in material respects.

The Indiana Supreme Court evaluated the competing arguments. The State argued that "the Voter ID law is merely a regulation of election procedures designed to ensure fair elections, not an alteration of voter qualifications." *Rokita*, 929 N.E.2d at 765 (internal quotation marks omitted). Further, the requirements of the Voter ID Law "are valid and reasonable means of enforcing the qualifications established in Article 2, Section 2" and reflected the legislature's "power to protect

the rights of citizens to a fair and reliable electoral system in which their individual votes are not diluted by the fraudulently cast votes of others." *Id.* (internal quotation marks omitted). The plaintiffs argued that "the Voter ID law created prohibited voter qualifications rather than permissible election regulations[.]" *Id.* at 764.

The Indiana Supreme Court held that "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." *Rokita*, 929 N.E.2d at 767. The court stated:

> 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.* The court concluded: "We conclude that the Indiana Voter ID law's photo identification card requirements are in the nature of an election regulation and, as such, must satisfy Indiana's requirements of uniformity and reasonableness. But the requirements of the Voter ID law are not, as the plaintiffs argue, unconstitutional as additional substantive voter qualifications." *Rokita*, 929 N.E.2d at 767.

Like the Indiana Constitution, the Wisconsin Constitution includes three qualifications for voting that are based upon citizenship, age, and residency. *Compare* Wis. Const. art. III, § 1 *with* Ind. Const. art. 2, § 2, cl. (a). Photo identification for purposes of voting does not add to these qualifications. "Requiring 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." *Rokita*, 929 N.E.2d at 767.

Decisions from the Georgia and Michigan Supreme Courts are in accord with *Rokita*. *See Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 72-73 (Ga. 2011); *In re Request for an Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 448 (Mich. 2007).

## CONCLUSION

For the reasons stated herein, the circuit court must be reversed.

Dated this 25th day of May 2012.

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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 10,724 words.

Dated this 25th day of May 2012.

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**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 25th day of May 2012.

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