

Appeal No. 2012AP584

Cir. Ct. No. 2011CV4669

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

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

PLAINTIFFS-RESPONDENTS,

FILED

V.

MAR 28, 2012

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

Diane M. Fremgen
Clerk of Supreme Court

DEFENDANTS-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

This appeal challenges a circuit court order that permanently enjoined implementation of those portions of 2011 Wisconsin Act 23 requiring Wisconsin electors to display government-authorized photo identification either at the polling place or to election officials by the Friday following an election. The injunction was based upon the circuit court's declaratory judgment that Act 23 violates article III, sections 1 and 2 of the Wisconsin Constitution. The constitutionality of Act 23 is an issue of first impression and one of great consequence to all citizens of Wisconsin. The appeal is also highly time-sensitive due to upcoming elections. Therefore, pursuant to WIS. STAT. RULE 809.61

(2009-10),¹ we hereby certify this appeal, as well as two pending motions, to the Wisconsin Supreme Court.

This case presents a purely legal issue as to whether the photo identification requirements of Act 23 are unconstitutional on their face. Because the appeal has not yet been briefed, our framing of the issue is based on the circuit court's decision, of which we take judicial notice pursuant to WIS. STAT. § 902.01(2). As we understand it, the circuit court's reasoning is as follows:

(1) Article III, section 1 of the Wisconsin Constitution provides that “[e]very 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,” subject to the legislature’s authority in article III, section 2 to place voting limitations upon felons and persons adjudged to be incompetent to vote.

(2) Article III, section 2 of the Wisconsin Constitution additionally authorizes the legislature to enact laws defining residency, providing for registration of electors, and providing for absentee voting.

(3) The photo identification requirement is not expressly authorized by article III of the Wisconsin Constitution because it is not one of the stated qualifications for an elector in section 1, nor does it fall within the scope of an express delegation of legislative authority under section 2.

(4) It follows that, if legislative authority to enact a photo identification requirement exists, it must be implied from the constitutional text relating to the plenary powers of the Senate and Assembly under article IV, section 1.

(5) A number of cases, including *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949), do recognize the inherent right of the legislature to exercise its plenary powers under article IV, section 1 to say “how, when, and where” ballots shall be cast. *Frederick*, 254 Wis. at 613. However, *Frederick* also explains that, because suffrage is an inherent right that “was enjoyed by the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

people before the adoption of the constitution,” the right of a qualified voter to cast a ballot “cannot be destroyed or substantially impaired” by legislative action. *Id.* Thus, *Frederick* continues, any “[l]egislation regulating the exercise of the elective franchise is subject to at least five tests,” including that it not violate “[t]he express guaranty of the right to vote.” *Id.* at 613-14. Or, as the circuit court paraphrased it, “voting rights hold primacy over implicit legislative authority to regulate elections.”

(6) Similarly, *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246, 6 N.W. 381 (1880), held that, because the qualifications for electors set forth in article III are “exclusive,” they cannot be “abridge[d] ... in any respect” by legislative action. *Dells*, 49 Wis. at 556. Although the legislature has inherent authority to enact “regulations as to the places, mode and manner” of elections in order to effectuate “the orderly exercise of the right resulting from these qualifications,” *id.* at 557, such regulations must not impose additional conditions making it “impracticable or impossible” for a qualified elector to vote at an election, *id.* at 558.

(7) Act 23 provides that even qualified electors may not vote in an election unless they display acceptable government-authorized photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election.

(8) Because the photo identification requirements in Act 23 “eliminate the right of suffrage altogether” for qualified electors who lack acceptable photo identification, those requirements are not merely “regulations as to the places, mode and manner” of elections. Instead, they effectively serve as an additional condition for voting. Thus, the requirements exceed the legislature’s implied constitutional authority under article IV, section 1.

(9) Because there is neither express nor implied constitutional authority for the legislature to deny qualified electors the right to cast a ballot unless they present government-authorized photo identification, the provisions of Act 23 are void and should be permanently enjoined.

We are aware that on this same day a panel of District II Court of Appeals judges is certifying another case, *Milwaukee Branch of the NAACP v. Scott Walker*, No. 2012AP557-LV, involving different constitutional challenges and defenses to Act 23. Because the two cases present different legal theories, viewed together they seemingly present a fuller picture of the alleged constitutional infirmities of the photo identification law. A decision in one case

might make it unnecessary to resolve legal issues in the other. For example, if the Supreme Court were to uphold the facial unconstitutionality decision at issue in this appeal, it might be unnecessary to resolve the constitutional challenges in the District II case. In any event, it seems desirable to have all of the currently pending state court constitutional challenges before the Supreme Court so that they may be promptly resolved.

Along with the appeal itself, we also certify two pending motions. The appellants seek to expedite this appeal and to stay the permanent injunction throughout the proceedings. Both motions are largely predicated on the perceived harm of allowing the upcoming elections to proceed without the photo identification requirements in place. We have not acted on the motion to expedite because we believe that, if the Supreme Court decides to take the case, it will want to determine whether it desires accelerated briefing and, if so, the timing of that briefing.

As to the stay motion, we note that there has also been a motion to stay a temporary injunction of the same photo identification requirements in the District II case. If the panels in the different districts were to reach different conclusions with respect to these motions, granting a stay motion in one district would have little effect because the injunction before the other district would remain in place. Thus, we believe it makes sense to have both stay motions before the same tribunal.

In sum, this case involves the legislature's authority to regulate elections, the public's interest in preventing election fraud, and the public's interest in preventing voter disenfranchisement. This is an unresolved constitutional issue with significant statewide implications. Given the need for a

prompt, final resolution of the issue, we respectfully certify the appeal and the two pending motions.

