STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

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

Plaintiffs,

v. Case No. 11 CV 4669

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

Defendants.

DECISION AND ORDER GRANTING SUMMARY DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

STATEMENT OF THE CASE

Article III, Section 1 of the Wisconsin Constitution specifies who may vote in Wisconsin:

> 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.

Article III, Section 2, ¶ (4) of the Wisconsin Constitution authorizes the government to exclude from voting those otherwise-eligible electors (1) who have been convicted of a felony and whose civil rights have not been restored, or (2) those adjudged by a court to be incompetent or partially incompetent, unless the judgment contains certain specifications. In its entirety, Article III, Section 2 reads:

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.

2011 Wisconsin Act 23, effective June 10, 2011, now provides that qualified electors under the Wisconsin Constitution may not vote in an election unless they also satisfy the additional requirement that they display acceptable government-sanctioned photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election. *See* §§ 6.79, *et seq.*, Stats.

Plaintiffs League of Women Voters of Wisconsin Education Network, Inc. ("League of Women Voters") and Melanie G. Ramey sue defendants Governor Scott Walker and individual members of the Government Accountability Board ("GAB")[1], in their official capacities, for a declaration under § 806.04, Stats., that those portions of 2011 Wisconsin Act 23 relating to photo ID requirements violate the Wisconsin Constitution, Article III, Sections 1 and 2. They also seek to enjoin the further implementation and enforcement of Act 23's photo ID provisions.

Before the court is plaintiffs' motion for summary judgment, which has been fully briefed and argued. The motion documents reveal no disputed issue of material fact requiring further evidentiary proceedings. They present a purely legal issue ripe for decision. Because plaintiffs are entitled to judgment as a matter of law, their motion is GRANTED as follows.

ANALYSIS AND DECISION

I.

Article III is unambiguous, and means exactly what it says. It creates both necessary and sufficient requirements for qualified voters. **Every** United States citizen 18 years of age or older who resides in an election district in Wisconsin is a qualified elector in that district, unless excluded by duly enacted laws barring certain convicted felons or adjudicated incompetents/partially incompetents.

[1] Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, David G. Deininger, and Timothy Vocke.

The government may not disqualify an elector who possesses those qualifications on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained in Article III, such as a photo ID. As our Supreme Court stated 132 years ago:

> 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 to or abridge them in any respect. In the language of the chief justice, in *Page* v. *Allen,* 58 Pa. St. 346: "These are the constitutional qualifications necessary to be an elector. They are defined, fixed and enumerated in that instrument. In those who possess them is vested a high, and, to a freeman, sacred right, of which they cannot be divested by any but the power which establishes them, viz., the people, in their direct legislative capacity. This will not be disputed. For the orderly exercise of the right resulting from these qualifications it is admitted that the legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free excrcise. But this duty and right inherently imply that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretence of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state is to prove this position. As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would be necessarily absolutely void and of no effect."
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> …
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> No registry law can be sustained which prescribes qualifications of an elector *additional* to those named in the constitution, and 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, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method, or regulations, prescribed by law for such purpose, and to such end, deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the constitution. It would be attempting to do indirectly what no one would claim could be done directly.

Dells v. Kennedy, 49 Wis. 555, 6 N.W. 246, 246-247 (1880) (spelling in original).

II.

By enacting Act 23's photo ID requirements as a precondition to voting, the legislature and governor have exceeded their constitutional authority.

To be sure, the Wisconsin Constitution empowers the legislature and governor to enact laws regulating elections, both expressly and by implication. The *express authority* is found in Article III, Section 2 and is limited to (1) defining residency, (2) providing for registration of electors, (3) providing for absentee voting, (4) excluding from the right of suffrage certain convicted felons and adjudicated incompetents/partially incompetents, and (5) extending the right of suffrage to additional classes of persons, subject to ratification by the electorate at a general election.

Act 23's photo ID requirements do not fall within any of these five categories.

Accordingly, if it exists, the authority to enact photo ID requirements as a qualification[2] to vote must be found by *implication or inference* from the text of the Constitution, particularly Article IV, Section 1 relating to the plenary powers of the senate and assembly. *See e.g. State ex rel. LaFollette v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905-906 (1930).[3]

Herein lies the fatal flaw in defendants' legislative-authority-trumps-constitutional-qualifications argument. The people's fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature's so-called "plenary authority"), not the other way around. Until the people's vote approved the Constitution, the legislature had no authority to regulate anything, let alone elections. Thus, voting rights hold primacy over implicit legislative authority to regulate elections. In other words, defendants' argument that the fundamental right to vote must yield to legislative fiat turns our constitutional scheme of democratic government squarely on its head.

This is why, over the years, although recognizing that the legislature and governor are accorded implicit authority to enact laws regulating elections, our Supreme Court has repeatedly admonished that such laws cannot destroy or substantially impair a qualified elector's right to vote. On this point, for example, our Supreme Court has held:

> The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of

[2] Defendants unsuccessfully attempt to masquerade the photo ID mandate as merely an election regulation requirement, not a qualification for voting, which is a distinction without a difference. However one wishes to parse the English language, a qualified elector without a photo ID is disqualified from voting under Act 23,

[3] Defendants conceded this point at oral argument.

> 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. It is a right which was enjoyed by the people before the adoption of the constitution and is one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law. State ex rel. McGrael v. Phelps, 1910, 144 Wis. 1, 128 N.W. 1041, 35 L.R.A.,N.S., 353; State ex rel. Barber v. Circuit Court, 1922, 178 Wis. 468, 190 N.W. 563
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> While 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. State ex rel. McGrael v. Phelps, supra; State ex rel. La Follette v. Kohler, 1930, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348, and cases cited.
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> 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 for a justice of the supreme court.
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> Legislation regulating the exercise of the elective franchise is subject to at least five tests:
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> (a) The express and implied inhibitions of class legislation;
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> (b) The recognized existence and inviolability of inherent rights;
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> (c) The constitutionally declared purposes of government;
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> (d) The express guaranty of the right to vote, and
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> (e) The regulation must be reasonable.

State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613-614 (1949).

However, Act 23 goes beyond mere regulation of elections. Its photo ID requirements impermissibly eliminate the right of suffrage altogether for certain constitutionally qualified electors. As just one example, an individual who has incontrovertible and even undisputed proof at the polls that he/she is a qualified elector under Article III, but lacks statutorily acceptable photo ID then or by the following Friday, may not vote under Act 23.

Thus, Act 23's photo ID requirements are unconstitutional because they abridge the right to vote. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1047 (1910). Regulation may not deny the right of suffrage, either directly or indirectly. *Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 190 N.W. 562, 566 (1922). This has been the law of Wisconsin since its birth:

> an act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained.

State ex rel. Knowlton v. Williams, 5 Wis. 308, 316 (1856). *See also State ex rel Wood v. Baker*, 38 Wis. 71, 86 *et seq.* (1875).

Worded differently, as a matter of law under the Wisconsin Constitution, sacrificing a qualified elector's right to vote is not a reasonable exercise of the government's prerogative to regulate elections. *See. e.g. Dells v. Kennedy* and *State ex rel. McGrael v. Phelps*, *supra.*

Finally, on this point, we cannot ignore the proper role of the courts in constitutional litigation. Because the Wisconsin Constitution is the people's bulwark against government overreach[4], courts must reject every opportunity to contort its language into implicitly providing what it explicitly does not: license to enact laws that, for any citizen, cancel or substantially burden a constitutionally-guaranteed sacred right[5], such as the right to vote.[6] Otherwise we stray into judicial activism at its most insidious. Our Constitution is a line in the sand drawn by the sovereign authority in this state – the people of Wisconsin[7] – that the legislature, governor, and the courts may not cross, particularly under the all-too-convenient guise of strained construction and attenuated inference.

III.

Affidavits have been submitted by *amici curiae* Wisconsin Democracy Campaign and Dane County demonstrating the very real disenfranchising effects of Act 23's photo ID requirements. They show that many constitutionally qualified electors from all walks of life will be blocked from voting at the polls by Act 23, involuntarily and occasionally through no fault of their own. Governor Walker and the GAB correctly observe that this court may not rely on this evidence in deciding plaintiffs' purely facial challenge to Act 23's constitutionality. Indeed, it is not necessary to consider the human cost of photo ID requirements in order to expose their constitutional deficiencies. As seen above, they are unconstitutional on their face.

Still, there is no harm in pausing to reflect on the insurmountable burdens facing many of our fellow constitutionally qualified electors should Act 23 hold sway. These disenfranchised citizens would certainly include some of our friends,

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[4] "As often said and always conceded, our state Constitution is not so much a grant as a limitation of powers…". *State ex rel. Binner v. Buer*, 174 Wis. 120, 182 N.W. 855, 857 (1921).

[5] "The constitutional right of an elector to have any reasonable expression of his intention in voting given effect is of the most sacred character…". *State v. Anderson*, 191 Wis. 538 (1928).

[6] Tellingly, in contrast to the very limited, specific authority to deny the right of suffrage to only two classes of individuals otherwise qualified to vote under Article III (certain convicted felons and adjudicated incompetents/partial incompetents), Section 2 provides the government with virtually unlimited authority to extend the right of suffrage to additional classes of people, provided that the people of this state agree at a general election. Far-fetched is the notion that, in adopting Section 2, the people of this state chose to retain strict oversight over the expansion of the voter rolls, but simultaneously chose to grant the state silent, implicit authority to disenfranchise qualified electors without *any* direct oversight.

[7] *State ex rel. LaFollette v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905 (1930) ("In theory, the sovereign political power of the state rests in the people…").

neighbors and relatives. Mostly they would consist of those struggling souls who, unlike the vast majority of Wisconsin voters, for whatever reason will lack the financial, physical, mental, or emotional resources to comply with Act 23, but are otherwise constitutionally entitled to vote. Where does the Wisconsin Constitution say that the government we, the people,[8] created can simply cast aside the inherent suffrage rights of any qualified elector on the wish and promise – even the guarantee – that doing so serves to prevent some unqualified individuals from voting?[9]

It doesn't. In fact, it unequivocally says the opposite. The right to vote belongs to all Wisconsin citizens who are qualified electors, not just the fortunate majority for whom Act 23 poses little obstacle at the polls.

Accordingly, while the legislature and governor are constitutionally accorded broad authority to police fraud in elections, including through criminal and civil penalties, their power, like all police power, ends at the precise point where it transgresses the fundamental voting rights of Wisconsin citizens:

> 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. So it follows that, if the law in question trespasses upon the forbidden field, it is only law in form.

State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1047 (1910).

CONCLUSION AND ORDER

Without question, where it exists, voter fraud corrupts elections and undermines our form of government. The legislature and governor may certainly take aggressive action to prevent its occurrence. But voter fraud is no more poisonous to our democracy than voter suppression. Indeed, they are two heads on the same monster.

A government that undermines the very foundation of its existence – the people's inherent, pre-constitutional right to vote – imperils its legitimacy as a government by the people, for the people, and especially of the people. It sows the seeds for its own demise as a democratic institution. *See State ex rel.*

[8] Wisconsin Constitution, Preamble.

[9] Whether photo ID at the polls is a good idea or bad, effective as a means of stifling voter fraud or not, is beside the point of this decision and order. The sole issue before the court is the constitutionality of Act 23's photo ID requirements. Questions regarding the merits of photo ID as a pre-requisite to voting are appropriately addressed only to the electorate in the form of a constitutional amendment.

Frederick v. Zimmerman, supra. This is precisely what 2011 Wisconsin Act 23 does with its photo ID mandates.

Judgment is rendered declaring 2011 Wisconsin Act 23's photo ID requirements unconstitutional to the extent they serve as a condition for voting at the polls. Moreover, defendants are permanently enjoined forthwith from any further implementation or enforcement of those provisions.

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 the Wisconsin Constitution.

This order is FINAL for purposes of appeal.

Dated this ____ day of _____, 2012.

BY THE COURT:

_____
Richard G. Niess
Circuit Judge

CC: Attorneys Susan M. Crawford/Lester A. Pines/Tamara B. Packard
Attorney General J.B. Van Hollen/Assistant Attorney General Clayton P. Kawski/Assistant Attorney General Carrie M. Benedon
Attorney Peter E. McKeever
Assistant Dane County Corporation Counsel Dyann Hafner