

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

Plaintiffs,

v.

Case No.: 11-CV-4669

Case Code: 30701

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

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike the United States Constitution, the Wisconsin Constitution guarantees the right of suffrage to Wisconsin citizens. Article III of the Wisconsin Constitution recognizes that qualified electors have a fundamental right to vote and limits the Legislature's authority to enact laws qualifying the exercise of suffrage or disenfranchising classes of citizens. The Voter ID provisions of 2011 Wisconsin Act 23 (also referred to as "Act 23" or the "Voter ID law") violate Article III of our Constitution in two ways.

First, the Voter ID law exceeds the limited authority granted to the Legislature under Art. III, § 2 of the Wisconsin Constitution. Wis. Const. Art. III, § 2 confines legislative authority to enact laws limiting voting rights to four specific subject areas: (1) laws defining residency; (2) laws providing for voter registration; (3) laws providing for absentee voting; (4) laws excluding felons and persons adjudicated incompetent from suffrage. The Voter ID provisions in Act 23 that require constitutionally qualified voters to display certain government-issued photo identification to election officials before they may cast a ballot do not fall within the subject areas that the Constitution authorizes for laws restricting suffrage.

Second, the Voter ID law violates §§ 1 and 2 of Article III by creating an additional qualification for voting, i.e., by requiring constitutionally qualified voters to show specified identification before they may exercise their right to vote.

The arguments in support of these two legal bases for finding the Voter ID law unconstitutional are presented below.

II. SUMMARY OF THE VOTER ID PROVISIONS OF ACT 23.

Act 23 enacted sweeping changes to state law regulating voters and voting in Wisconsin. While the act contains numerous provisions altering the requirements for registration, proof and duration of residency, absentee voting, early voting, and other provisions, this challenge focuses exclusively on the provisions that now require constitutionally qualified voters to display a government-issued photo ID to election

officials at the polls before they may vote. The photo ID provisions are summarized below.

A. Presentation of Identification at the Polls

Wis. Stat. § 6.79(2), as revised by Act 23, requires “each eligible elector” who reports to a polling place to vote on election day to “state his or her full name and address and present to the officials proof of identification.” The election officials must “verify that the name on the proof of identification presented by the elector conforms to the name on the poll list or separate list and shall verify that any photograph appearing on that document reasonably resembles the elector.” Wis. Stat. § 6.79(2). “If proof of identification under sub. (2) is not presented by the elector, if the name appearing on the document presented does not conform to the name on the poll list or separate list, or if any photograph appearing on the document does not reasonably resemble the elector, *the elector shall not be permitted to vote*, except as authorized under sub. (6) or (7), but if the elector is entitled to cast a provisional ballot under s. 6.97, the officials shall offer the opportunity for the elector to vote under s. 6.97.” Wis. Stat. §6.79(3)(b) (emphasis added).

Pursuant to Act 23, the “identification” that a qualified voter must present to election officials in order to exercise the right to vote is defined as follows:

- (a) One of the following documents that is unexpired or if expired has expired after the date of the most recent general election:
1. An operator’s license issued under ch. 343.
 2. An identification card issued under s. 343.50.
 3. An identification card issued by a U.S. uniformed service.

4. A U.S. passport.
- (b) A certificate of U.S. naturalization that was issued not earlier than 2 years before the date of an election at which it is presented.
 - (c) An unexpired driving receipt under s. 343.11.
 - (d) An unexpired identification card receipt issued under s. 343.50.
 - (e) An identification card issued by a federally recognized Indian tribe in this state.
 - (f) An unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.30 (1) (d), that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented.

Wis. Stat. §5.02(6m) (as amended by 2011 Wis. Act 23).

B. Provisional Ballot Procedure

Electors who do not present proof of identification at the polls, or who present an ID that is not accepted by election inspectors, must be offered a “provisional ballot.”

Wis. Stat. 6.79(2). The procedure for provisional ballots is found at Wis. Stat. §6.97. The procedure, as amended by Act 23, requires the following:

The [election] inspectors shall provide the elector with an envelope marked "Ballot under s. 6.97, stats." on which the serial number of the elector is entered and shall require the individual to execute on the envelope a written affirmation stating that the individual is a qualified elector of the ward or election district where he or she offers to vote and is eligible to vote in the election.

Wis. Stat. §6.97(1).

The provisional ballot, once received, is placed in an envelope and set aside in a “separate carrier envelope.” *Id.* The provisional ballot is not placed in the ballot box unless the voter returns to the polling place before it closes and presents one of the

required forms of identification. Wis. Stat. §6.97(3)(a).

If the elector fails to provide proof of identification, “the elector bears the burden of correcting the omission by providing the proof of identification or copy thereof at the polling place before the closing hour or at the office of the municipal clerk or board of election commissioners no later than 4 p.m. on the Friday after the election.” Wis. Stat. §6.97(3)(b). A provisional ballot “shall not be counted unless the municipal clerk or executive director of the board of election commissioners provides timely notification that the elector has provided proof of identification or a copy thereof.” Wis. Stat. §6.97(3)(c).

C. Change in Standard of Proof and Grounds for Disqualifying A Person Offering to Vote

Both before and after the enactment of Act 23, an election inspector may challenge for cause a person offering to vote if the inspector knows or suspects the person is not qualified to vote.¹ Wis. Stat. §6.92. If a person is challenged for cause, an election inspector administers an oath or affirmation to the person that he or she “will fully and truly answer all questions put to you regarding your place of residence and qualifications as an elector of this election” and then asks “questions which are appropriate as determined by the board, by rule, to test the person’s qualifications.” *Id.*

¹ Another elector likewise may challenge for cause an elector whom the challenging elector knows or suspects is not a qualified elector, triggering the same procedure. Wis. Stat. §6.925. As amended by Act 23, Wis. Stat. §6.92 now permits an election inspector to challenge for cause a “voter who does not adhere to any voting requirement under this chapter.” However, the standard for disqualifying the vote of a challenged voter under Wis. Stat. §6.325 is a finding, beyond a reasonable doubt, that the person does not qualify as an elector or is not properly registered.

The inspector then administers an oath or affirmation by which the person affirms that he or she is qualified to vote. Wis. Stat. §6.94. If the person fully answers the questions, takes the oath or affirmation, and fulfills the applicable registration requirements, and the person's answers indicate that the person meets the qualifications to vote, the person's vote must be received. Wis. Stat. §6.94. The ballot is marked as a challenged ballot, but "challenged ballots shall be counted." Wis. Stat. §6.95.

The challenged ballot is not disqualified "unless the municipal clerk, board of election commissioners or a challenging elector under s. 6.48 demonstrates *beyond a reasonable doubt* that the person does not qualify as an elector or is not properly registered." Wis. Stat. §§6.95, 6.325. As amended by Act 23, an election inspector also may challenge for cause a "voter who does not adhere to any voting requirement under this chapter."² Wis. Stat. §6.92. However, the standard for disqualifying the vote of a challenged voter is a finding, beyond a reasonable doubt, that the person does not qualify as an elector or is not properly registered. Wis. Stat. §6.325.

Prior to the enactment of the Voter ID law, this "challenge for cause" procedure was the exclusive means of testing and disqualifying a person offering to vote based on the belief that a person was unqualified to vote. The procedure continues to apply when a voter is challenged at the polls based on an inspector's or another electors' knowledge or suspicion that the voter lacks the constitutional qualifications to vote, as

² This new language permitting a challenge for cause to a voter who does not comply with a statutory voting requirement does not, however, apply to a voter's failure to comply with the Voter ID requirement. The penalty for failing to comply with the Voter ID requirement, as discussed above, is the automatic loss of the right to vote.

codified by statute at Wis. Stat. §6.02.

Under the Voter ID law, however, no longer is the government required to find beyond a reasonable doubt that a citizen is unqualified to vote before the government may deprive the citizen of the right to vote. Indeed, no showing or claim must be made that the person lacks the qualifications required or permitted under the Wisconsin Constitution before the citizen is deprived of the right to vote. Rather, a citizen automatically and irretrievably loses the right to vote in an election if he or she fails to timely display the required identification to election officials. The citizen “bears the burden” of providing the specified identification to government authorities, in order for his or her right to vote to be recognized. The automatic loss of the right to vote based on a person’s failure to comply with statutory requirements represents a radical change from prior law, which prohibited government authorities from disqualifying a voter unless proof was presented, *beyond a reasonable doubt*, that the person lacked the qualifications specified in or allowed by Article III of the Constitution.

The Voter ID law statutorily bars a constitutionally qualified elector from voting if he or she fails to meet the requirement of displaying the specified identification. As shown below, these statutory changes are unconstitutional.

The constitutional infirmity of the Voter ID law is not that it requires voters to display identification at the polls. Rather, as detailed below, the Voter ID law is unconstitutional because the law conditions a constitutionally qualified voter’s exercise of the right to vote on compliance with the statutory requirement. The penalty for a

voter's failure to display the required ID is the deprivation of the fundamental constitutional right to vote, which can be remedied *only* by timely displaying one of the mandated forms of identification, a requirement that is not permitted by the Constitution. A voter who fails to timely show the required ID is disqualified from voting without any allegation, much less a shred of proof, that the voter lacks any constitutional qualification. By imposing a mandatory condition on a constitutionally qualified voter's exercise of the right to vote, the Voter ID law both exceeds the limited authority the Wisconsin Constitution delegates to the Legislature to enact laws restricting voting, and imposes a qualification on voters that is not required by the Wisconsin Constitution.

III. APPLICABLE LEGAL PRINCIPLES FOR SUMMARY JUDGMENT AND THE STANDARD OF PROOF FOR CONSTITUTIONAL CHALLENGES TO A LEGISLATIVE ACT.

There are no material disputes of fact in this case. The issues presented are wholly legal. Summary judgment is appropriate where, as here, based on evidence admissible at trial and provided to the Court, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Wis. Stat. §802.08(2); *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

"Legislative acts are presumed constitutional, and the party challenging a legislative act must prove it unconstitutional beyond a reasonable doubt." *GTE Sprint Communications Corp. v. Wisconsin Bell*, 155 Wis. 2d 184, 192, 454 N.W.2d 797 (1990).

IV. THE VOTER ID LAW IS UNCONSTITUTIONAL BECAUSE IT DOES NOT FALL WITHIN THE SPECIFIED SUBJECTS ON WHICH LAWS LIMITING THE RIGHT TO VOTE MAY BE ENACTED, IN VIOLATION OF WIS. CONST. ART. III, § 2.

A. The Wisconsin Constitution Guarantees The Right To Vote.

The Wisconsin Supreme Court has long recognized that the right to vote is a fundamental right of citizenship guaranteed by the Wisconsin Constitution and protected against legislative interference:

The right to vote is one reserved by the people to members of a class and as so reserved, guaranteed by the declaration of rights and by section 1, art. 3, of the Constitution. It has an element other than that of mere privilege. It is guaranteed both by the Bill of Rights, and the exclusive entrustment of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well. Such declared purpose and the declaration of rights, so far as they go, and the equality clauses,--constitute inhibitions of legislative interference by implication, and with quite as much efficiency as would express limitations, as this court has often held... Thus is given the right to vote a dignity not less than any other of many fundamental rights.

State ex rel. McGrauel v. Phelps, 144 Wis. 1, 14, 128 N. W. 1041 (Wis. 1910) (internal citations omitted).

The Court has distinguished between the legislature's authority to abridge the right of suffrage, which is strictly limited by the Constitution, and the legislature's plenary authority under the Constitution to regulate elections:

Under our Constitution the right of suffrage is a constitutional right vested in those who possess the qualifications prescribed by the Constitution.... In theory the sovereign political power of the state rests in the people; in practice, however, it is exercised by those individuals within

the state who possess the qualifications prescribed by the Constitution, who must proceed in the manner indicated by the Constitution and statutes to exercise it. The Constitution having fixed the qualifications, **persons falling within the classification thus established may not be deprived of their right by legislative act** and the right is protected by the applicable constitutional guaranties. The persons who may exercise the right of suffrage and the day of election are fixed by the Constitution. These provisions are not and were never intended to be self-executing or exclusive of regulation in other respects. By section 1 of article 4 the power of the state to deal with elections except as limited by the Constitution is vested in the senate and assembly to be exercised under the provisions of the Constitution; therefore **the power to prescribe the manner of conducting elections is clearly within the province of the Legislature.**

State ex rel. La Follette et al. v. Kohler, 200 Wis. 518, 228 N.W. 895 (1930) (emphasis added).

B. The 1986 Amendments to the Suffrage Article.

Article III of the Wisconsin Constitution is entitled "Suffrage." It contains two provisions. The second provision states:

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.

Wis. Const. Art. III, §2.

The Suffrage Article was given its present form by amendments ratified in 1986.

The 1986 amendments reinforced the constitutional guarantee, as recognized by the

Wisconsin Supreme Court over 100 years ago in *State ex rel. McGrael*, 144 Wis. 1, that the right to vote is a fundamental right not subject to legislative abridgement. The 1986 amendments to Article III removed certain qualifications to vote and specified, by enumeration, the areas in which laws limiting the right to vote may be enacted. Thus, the 1986 amendments both expanded the right of suffrage and strengthened the constitutional right to vote against legislative abridgment.

Article III, §2 does not explicitly allow the legislature to enact laws requiring electors to present government-issued identification at the polls. Thus, the question in this challenge to the Voter ID law is whether it implicitly allows such laws. This requires construction of the Constitutional provision. As shown below, the answer is no.

C. Construing a Constitutional Amendment.

The Wisconsin Supreme Court has articulated the following principles for construing an amendment to the state 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. *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (citations omitted). Constitutions should be construed so as to promote the objects for which they were framed and adopted. *Id.* “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[.]” *State ex rel Bare v. Schinz*, 194 Wis. 397, 404, 216 N.W. 509 (1927) (citation omitted). 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.

Dairyland Greyhound Park v. Doyle, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408.

An examination of these three primary sources demonstrates that Art. III, § 2 was intended to authorize laws limiting the right to vote *only* in the specified subject areas. The Voter ID law does not fall within one of the specified areas. Thus, its enactment violates Wis. Const. Art. III, §2.

D. First Primary Source: “Plain Meaning”

In construing Art. III, §2, the court first must examine its plain meaning. Section 2 defines five subject areas in which “laws *may be* enacted.”³ Each of the listed subjects describes a legislative means by which the right to vote may be limited or extended. The only reasonable construction of this provision is that it was intended to prohibit legislation limiting the right to vote, unless the law falls within one of the enumerated subjects.

Based on its plain meaning, Art. III, §2 prohibits the enactment of the Voter ID law. That law, in mandating that an elector display a specific form of government-issued identification to election officials at the polls before he or she is allowed to vote, is not a law that defines residency, as authorized by Wis. Const. Art. III, §2(1). The required ID need not display the voter’s current residence, and other provisions in the

³ The first four subsections of Art. III, §2 list subject areas in which the legislature may restrict the right to vote. The fifth subsection is a broad grant of legislative power to extend the suffrage to additional classes of citizens, but only upon referendum approval.

Wisconsin Statutes define the residency requirements for voting. *See* Wis. Stat. §§6.10, 6.34.

The ID requirement likewise is not a law providing for registration of voters, as authorized by Wis. Const. Art. III, §2(2). The Voter ID law is not a registration law. The laws providing for the registration of voters are found at Wis. Stat. §§6.33 & 6.34. Procedures for same-day registration of voters are found at Wis. Stat. §6.55. Although a citizen registering to vote must present proof of residence, a citizen may register to vote without displaying one of the forms of identification required to vote under the Voter ID law. *See* Wis. Stat. §§ 5.02(6m), 6.34 & 6.79(2). The Voter ID law imposes a requirement that is separate and distinct from the registration requirements by which a voter establishes his or her qualifications to vote under the Wisconsin Statutes. A voter who is duly registered in accordance with the statutes, and whose name appears in the poll books, must comply with the separate mandate under the Voter ID law of displaying a mandated form of ID before he or she may vote. Likewise, voters who register at the polls must display a required form of identification in order to vote *after* they have fully complied with the registration process. In either case, the requirement of displaying government-issued identification is separate from and in addition to the requirements for registration.

Additionally, the requirement of displaying identification at the polls is not a law providing for absentee voting, as authorized by Wis. Const. Art. III, §2(3).⁴ Nor is it a law excluding from voting persons convicted of a felony or adjudged incompetent, as authorized by Wis. Const. Art. III, §2(4).

The defendants may contend that Art. III, §2 is merely a grant of legislative authority and was not intended to restrict legislative power. Such a construction would render Art. III, §2 superfluous and meaningless. The Wisconsin Constitution confers plenary powers on the legislature to enact all laws not forbidden by it. Wis. Const. Art. IV, §1; *Jacobs v. Major*, 139 Wis. 2d 492, 507, 407 N.W.2d 832 (1987). Because of this plenary power, it is unnecessary for the Constitution to grant lawmaking power to the legislature in any specific subject area. If Art. III, §2 were construed merely as a grant of legislative authority, and not as a restriction or limitation on legislative power, the provision would be redundant of the legislature's plenary authority. A basic rule of construction is that "constitutional provisions should be construed to give effect 'to each and every word, clause and sentence' and 'a construction that would result in any portion of a statute being superfluous should be avoided wherever possible.'" *Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, 263 Wis. 2d 709, ¶33, 666 N.W.2d 816.

The Wisconsin Supreme Court has recognized that constitutional provisions that confer rights restrict or limit legislative power, even if the provision contains no express

⁴ Act 23 made changes to the absentee voting statutes that require the absentee voter to enclose a copy of government-issued identification. Wis. Stat. §§6.86(1)(ar). The absentee voting ID requirements are not challenged in this lawsuit.

limitation. For example, Art. I, §1 of the Wisconsin Constitution broadly provides: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” The Court repeatedly has held that although Art. 1, §1 “contains no reference to laws or express limitations on state action,” it is a “broad general restriction of legislative power.” *Jacobs v. Major*, 139 Wis. 2d 492, 507, 407 N.W.2d 832 (1987), citing, *inter alia*, *Pauly v. Keebler*, 175 Wis. 428, 430-31, 185 N.W. 554, 556 (1921); *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 434-35, 87 N.W. 561, 562 (1901). By contrast, Article III both confers a right, i.e., the right to vote, *and* makes explicit reference to “laws,” providing in Art. III, §2 that “laws may be enacted” in five specified areas. Thus, an even stronger basis exists for finding that Art. III, §2 imposes a limitation on legislative authority than Art. I, §1.

The only reasonable construction of Art. III, §2 is that, by expressly permitting laws restricting the right to vote in specified subject areas that, the provision *forbids* the enactment of laws that restrict the right to vote in ways not specified. In other words, laws limiting the right to vote that do not fall within the subjects listed in Art. III, §2 are unconstitutional. Because Art. III, §2 does not authorize laws requiring electors to present proof of identification to election officials before they are qualified to vote, the Voter ID law is unconstitutional.

E. Second Primary Source: Constitutional Debates and Practices of the Time

The next part of the *Dairyland* analysis for construing amendments to the Wisconsin Constitution is to examine the constitutional debates and practices of the time. These materials support the conclusion that Art. III, §2, as amended in 1986, was intended to define and constrain the legislature's authority to limit the right to vote only as to the subjects listed.

Before the 1986 amendments, Wis. Const. Art. III⁵ consisted of six sections relating to suffrage. Its provisions defined a qualified elector as a person 21 years of age or older; who resided in the state for one year preceding the election and up to 30 days in the election district, as prescribed by the legislature; and who was a United States citizen or a "person of Indian blood...declared by law of congress to be citizens of the United States." It provided that "the legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election," and that "the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor." It defined as "not electors" persons under guardianship, non compos mentis or insane, and persons convicted of treason or felony, unless restored to civil rights. It required voting by ballot except for township officer elections. It provided that a person could not lose state residence by reason of absence

⁵ A copy of Article III, in its form before the 1986 amendments, is included in the Plaintiff's Appendix at P. App. B.

on business of the United States or this state, and that military stationing does not confer residence. It provided that “laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery or larceny, or of any infamous crime,” and depriving persons who bet on elections of the right to vote at such an election.

As shown below, the legislative and ratification materials available from the adoption of the 1986 amendments reveal that the framers and the people intended the amendments to modernize the Wisconsin Constitution, which at that time diverged from federal constitutional law and the state practice of voting, as prescribed by the Wisconsin Statutes. The historical materials reflect an intention to align Article III with the principle of universal suffrage. The 1986 amendments did so by removing obsolete provisions that restricted the suffrage and by expressly delimiting the legislature’s authority to extend or limit the right to vote in specified areas.

The 1986 amendments to the Wisconsin Constitution arose from the recommendations of a Legislative Council special committee tasked with identifying obsolete and outdated provisions in the Wisconsin Constitution. A Legislative Council staff brief prepared for the special committee identified several provisions in Article III that were in conflict with amendments to the U.S. Constitution and Supreme Court decisions construing the U.S. Constitution. *Article III of the Wisconsin Constitution*, Legislative Council, September 20, 1978; P. App. C. The brief identified as obsolete the provisions requiring electors to be over 21 years old; requiring electors to reside in the

state for one year; and defining suffrage for “persons of Indian blood.” P. App. C:2-4.

The brief questioned the validity of a provision allowing the Legislature to require up to 30 days’ residency in the election district. P. App. C:4. It also noted that the Wisconsin statutes related to voting had been amended to align with federal constitutional requirements. P. App. C:3-5.

The proposal to amend Article III was first introduced for consideration by the Legislature in 1979. The Legislative Council, in an explanatory note included in the text of the 1979 resolution, described the proposal as follows:

Article III of the Wisconsin Constitution was adopted at a time when universal suffrage did not exist. In 1858, 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 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.

1979 AJR 54 (emphasis added), P. App. D. Thus, as presented to the legislature, the amendment’s purpose was to establish the principle of universal suffrage of adult citizens and to permit the legislature to enact laws “providing for *extension or limitation of the right to vote in specified areas*.”

The amendment passed the Legislature on first consideration in 1979 but was not presented for second consideration in the next legislative term. The amendment was re-introduced and passed by the Legislature in the 1983 and 1985 terms.⁶

The ballot question for ratification of the constitutional amendment by the people was presented as follows:

Suffrage defined by general law. Shall article III of the constitution be repealed and recreated so as:

- (1) to remove:
 - (a) The existing detailed provisions as to who may or may not vote (many of which are obsolete); and
 - (b) The referendum requirement for extensions of the right to vote; and
- (2) To substitute, instead, a new article that:
 - (a) Preserves the right of a secret ballot;
 - (b) Specifies that every U.S. citizen aged 18 or over who is a resident of an election district in this state is a qualified voter; and
 - (c) Provides that the legislature may enact laws on 1) residency, 2) voter registration, 3) absentee voting, 4) concerning the exclusion from the right to vote of convicted felons and persons adjudged by a court to be incompetent, and 5) extending, subject to ratification by the people at a general election, the right of suffrage to additional classes?

P. App. E. Thus, the history of the adoption in 1986 of amendments to Article III indicates that the amendments were intended to establish the principle of universal suffrage in the Wisconsin Constitution by removing obsolete provisions and by providing the legislature with specifically constrained authority to enact laws limiting the right to vote.

⁶ See 1985 AJR 3, P. App. E.

Given that the purpose of the proposed amendments was to remove constitutional provisions on voting that were more restrictive than existing practices under the statutes providing for universal suffrage, the amendment was not intended to invalidate existing statutes. Rather, the amendment brought the Wisconsin Constitution into alignment with the Wisconsin Statutes (and federal law) by defining the legislature's authority to enact laws restricting the right to vote in specific subject areas that were broad enough to encompass the state laws then in effect.

The statutes affecting the right to vote at the time the 1986 amendments were ratified are thus relevant "practices of the time" that may assist in determining the intent of the amendments. *Dairyland*, 2006 WI 107, ¶19. The state laws relating to electors as they existed when the 1986 amendments were ratified are found at Wis. Stat. Ch. 6 (1985-86). The provisions in the 1985-86 statutes that restricted the right to vote fall squarely within the subjects expressly authorized by Art. III, §2. They include provisions requiring voters in certain municipalities to register, permitting same-day registration by qualified electors in municipalities where registration was required, restricting voting by felons and persons adjudicated incompetent, and prescribing requirements for absentee voters. Wis. Stat. ch. 6 (1985-86). In addition, the 1985-86 statutes guarded the right to vote from governmental infringement, permitting a voter to be disqualified only upon proof beyond a reasonable doubt that he or she lacked the qualifications to vote. Wis. Stat. §6.325 (1985-86).

The “practices of the time” of the 1986 amendments, as reflected by the statutes, reveal a policy and practice of promoting and protecting the vigorous exercise of the right to vote. The 1986 Amendments should be liberally construed to promote and protect universal suffrage, consistent with the contemporaneous policy and practice at the time the amendments were adopted.

The case law interpreting the legislature’s authority under Article III prior to the 1986 amendments is also relevant in examining the “practices of the time.” Before the 1986 amendments, the Wisconsin Supreme Court evaluated the constitutionality of laws restricting the exercise of the right to vote by assessing whether the challenged legislation was “not unreasonable and ... consistent with the present right to vote as secured by the Constitution.” *See, e.g., State ex rel. O’Neill v. Trask*, 135 Wis. 333, 115 N.W. 823 (1908) (upholding a state law requiring an unregistered voter to submit an affidavit, in a prescribed form, establishing qualifications to vote). The framers of the 1986 amendments could have adopted the Wisconsin Supreme Court’s pre-1986 standard by drafting an amendment that prohibited the enactment of laws that unreasonably interfered with the present right to vote. However, that is not what the framers of the amendments proposed. Rather, the framers drafted narrower and more specific language that authorized laws restricting the right to vote only in certain subject areas. Thus, to the extent that pre-1986 Wisconsin Supreme Court decisions articulate a general standard that arguably defines a broader scope of legislative authority to restrict the right to vote than authorized by the 1986 amendments, the 1986

amendments, in adopting a more explicit standard, supersedes that case law.

“Constitutional amendments which deal with the substantive law of the state are presumed self-executing in nature and prospective in effect, and ... such amendments repeal inconsistent statutes and common law which arose under the constitution before the amendment.” *Kayden Industries, Inc. v. Murphy*, 34 Wis.2d 718, 150 N.W.2d 447 (1967).

F. Third Primary Source: Earliest Interpretations of the Provision by the Legislature

The first legislative enactment following the 1986 Amendments was 1985 Wis. Act 304, which was enacted on April 29, 1986, the same month that the constitutional amendments were ratified by popular vote. 1985 Act 304 made numerous changes to Wis. Stat. Ch. 6, primarily with respect to absentee voting. The Act contained this statement of legislative policy:

The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election ; to prevent undue influence on an absent elector to vote for or against a candidate or referendum ; or other similar abuses.

1985 Wis. Act 304, §68n; P. App. F.

The Act made compliance with the procedures for absentee voting mandatory, meaning that a failure to comply with the procedures renders the absentee ballot void

and invalid. *Id.* 1985 Act 304 included other changes to the laws affecting voters, including, for example, a provision that if an elector casts a ballot with fewer votes than the person is entitled to vote, the elector's votes are still valid; a provision requiring poll places to be accessible to persons with disabilities; and provisions relating to use of electronic voting equipment. These provisions reflect the legislative policy, as expressly stated in 1984 Act 304, of promoting the "vigorous exercise" of the right to vote.

Since 1986, the statutory provisions in Chapter 6 relating to voters have been amended by several acts, including by 1987 Wis. Act. 391 (amending absentee voting procedures relating to overseas voting and special voting deputies, among other provisions); 1989 Wis. Act 192 (changes to registration process); and 2003 Wis. Act 265 (amending proof of residence for registration, extending requirement of registration to all electors, and establishing a statewide voter registration system).

The laws related to voters enacted between 1986 and 2010 fall squarely within the express authority of Art. III, §2, consistent with its plain meaning. There is no hint that the legislature viewed its authority more broadly than that expressly conferred by Art. III, §2 until it enacted Act 23 in 2011, twenty-five years after the 1986 amendments.

G. All Three Prongs of the *Dairyland* Analysis Call For a Finding That The Voter ID Law Violates Art. III, §2 of the Wisconsin Constitution.

Each of the three primary sources for determining the meaning of a constitutional provision support the conclusion that Art. III, §2 restricts the enactment

of laws limiting the right to vote to the four listed subject areas,⁷ and that the legislature had no authority to enact the Voter ID law because it is not within any of those four areas. Art. III, §2 means what it says, operating to restrain the legislature's power to restrict the right to vote. The legislature may enact laws requiring voters to register; it may enact laws defining residency; it may restrict and regulate absentee voting; and it may enact laws excluding felons and persons adjudicated incompetent from voting. The legislature may not, however, impose limitations on the right to vote that are not expressly authorized by Art. III, § 2. The Voter ID law imposes such a limitation on the right to vote and therefore violates the Wisconsin Constitution.

V. 2011 WISCONSIN ACT 23 IS UNCONSTITUTIONAL BECAUSE IT LEGISLATIVELY IMPOSES A QUALIFICATION ON ELECTORS THAT IS NOT REQUIRED OR AUTHORIZED BY WIS. CONST. ART. III, §§ 1 and 2.

The Wisconsin Constitution defines who is a "qualified elector." Wis. Const. Art. III, § 1 provides: "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." Art. III, §2, as discussed above, provides that the legislature may enact laws that limit the right to vote. Taken together, these provisions establish up to six qualifications to vote that are either required or permitted by the Wisconsin Constitution. An elector must be (1) a U.S. citizen; (2) age 18 or older; (3) a resident of an election district of the state, as

⁷ As noted above, the fifth subsection of Art. III, §2 allows laws *extending* the suffrage to other groups, subject to ratification.

defined by state law; (4) registered to vote, if required by state law; and (5) not a felon, if required by state law; and (6) not adjudicated incompetent, if required by state law.

As argued above in Section IV, *supra*, the Voter ID law violates Art. III, §2 because it does not fall within the subjects on which laws limiting the right to vote may be enacted. In addition to exceeding the legislature's limited authority under Art. III, §2 to enact laws restricting voting to the enumerated subjects, Act 23 is also unconstitutional because it impermissibly imposes a qualification for voting that exceeds the qualifications required or permitted by the Wisconsin Constitution.

A. The Legislature May Not Require a Qualification to Vote That Exceeds Those Specified in Wis. Const. Art. III.

Soon after the Wisconsin Constitution was ratified, the Wisconsin Supreme Court established the principle that the legislature may not enact laws adding qualifications or requirements for voting beyond those then required by the Wisconsin Constitution. *See State ex rel. Knowlton v. Williams*, 5 Wis. 308 (Wis. 1856) (striking down law imposing a 30-day durational residence requirement). In *Knowlton*, the Court's earliest decision on the constitutionality of a voting law, the Wisconsin Supreme Court interpreted Wis. Const. Art. III as conferring a constitutional right to vote and imposing a limitation on legislative power :

We have no doubt that the qualifications of the voters as fixed by the act are, in respect to residence in the state, quite different from those prescribed in the constitution. The latter instrument is explicit; it provides in express terms that a person who possesses the other qualifications mentioned, and who has resided in the state one year next preceding any election, shall be deemed a qualified elector at such election.

It seems to us clear, that by requiring a residence of thirty days in the town where the elector offers to vote, *the legislature have added a qualification not contained in the constitution*, and which is repugnant to its provisions. The constitution provides, that if a person possesses certain qualifications, and has resided in the state one year next preceding any election, he shall be deemed a qualified elector at such election; while the act of the legislature in question provides, in effect, that this shall not be sufficient, but that he shall, in addition, have resided for thirty days previous to the time when the election is holden [sic] in the town where he offers his vote.

We have no doubt that the legislature have [sic] the power to provide that a person who has a right to vote under the constitution shall be allowed to exercise this right only in the town where he resides, because this would be only to prescribe the place where a right which he possessed under the constitution shall be exercised, and fixes upon the most convenient place for its exercise. Such a provision does not add to the qualifications which the constitution requires; *but 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.*

Id. (emphasis added).

Knowlton thus stands for the principle, affirmed in subsequent cases discussed below, that the state constitution defines the qualifications for voting, and a state law that places additional qualifications on the right to vote is unconstitutional.

Following *Knowlton*, the Wisconsin Supreme Court in several cases reviewed state laws that were challenged as imposing qualifications on the right to vote that were not required under Article III. The first of these cases is *State ex rel. Cothren v. Lean*, 9 Wis. 279 (Wis. 1859). *Cothren* involved a constitutional challenge to a statute requiring a voter to answer questions under oath to establish his qualifications, in the event that his vote was challenged. The statute under review in *Cothren* was an early version of the

“challenge for cause” procedure. It required the person challenging a voter’s qualifications to submit a sworn affidavit stating that the elector was not qualified to vote and the reasons therefore. Laws of 1857, ch. 85. The law directed election inspectors to ask the voter questions related to the basis of the challenge, so that they could assess whether the challenge was valid. The court rejected the argument that the provision imposed an additional qualification on electors, reasoning that “the grounds of challenge to which the sets of questions are adapted, imply only the qualifications required by the constitution.... This act, therefore, instead of prescribing any qualifications for electors different from those provided for in the constitution, contains only new provisions to enable the inspectors to ascertain whether the person offering to vote possessed the qualifications required by that instrument, and certainly it is competent for the legislature to enact such.” *Id.*

Notably, the 1857 statutes under review in *Cothren* did not require voters to register or otherwise to establish their qualifications unless subject to a challenge. The original Article III, likewise, contained no reference to the registration of voters and was considerably less explicit as to the legislature’s authority to enact laws regulating voting.⁸ *Cothren*’s broad proposition that the legislature may not enact laws imposing additional qualifications on voters that are not required by the Wisconsin Constitution continues to be binding precedent.

⁸ See Wis. Const. Art. III (1848), P. App. A. Article III has been amended several times since *Cothren* was decided in 1857. In addition to the 1986 amendments discussed at length in Section IV, Article III was amended in 1882, 1908, and 1934.

To the extent that *Cothren*'s rationale for upholding the law under review in that case continues to be valid, despite the intervening changes in Article III, it provides no support for the constitutionality of the Voter ID law. The archaic law under review in *Cothren* provided a means for election officials to determine the eligibility of voters who had never been required to register or otherwise establish their qualifications to vote and whose eligibility was challenged at the polls. By contrast, the voter ID requirement applies to registered voters, who have already established their qualifications to vote in the registration process. A qualified, registered voter who fails to show the requisite ID is absolutely barred from voting until and unless the voter timely produces the ID. As such, the Voter ID law establishes a qualification to vote that unconstitutionally adds to the qualifications established by Art. III, §§1 & 2.

The Wisconsin Supreme Court also addressed the constitutionality of voter registration laws early in its history. In *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875), votes in an election for county clerk were set aside because the voters were not on the registration list due to official errors in making the registration lists. To avoid an unconstitutional construction, the court construed the registration statute as requiring the votes of persons whose names were not on the registry to be counted. *Baker* affirms the principle that the legislature may not impose conditions on voting that deprive qualified voters of the right to vote:

The constitution vests every person having certain qualifications at the time of any election with the right of suffrage at such election. *Some of these qualifications rest on time which may ripen, or facts which may*

accrue, on the very day of election. So that one may well become vested with the right of franchise pending the election, who was not so vested before, or perhaps entitled to be registered at the time of registry. So one entitled to the franchise may be sick, or absent or imprisoned, or otherwise disabled, at the time of registry. *But the constitution vests and warrants the right at the time of election.* And every one having the constitutional qualifications then, may go to the polls, vested with the franchise, of which no statutory condition precedent can deprive him. Because the constitution makes him, by force of his present qualifications, 'a qualified voter at such election,' Art. III, sec. 1. Statutes cannot impair the right, 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.

Id. The court explained that registration laws are a means of proving that a citizen possesses the qualifications to vote:

And such we understand to be the theory of the registry law...not to abridge or impair the right, but *to require reasonable proof of the right.* It was undoubtedly competent for the legislature to provide for a previous registry of voters, as one mode of proof of the right; so that *it should not be a condition precedent to the right itself at the election,* but, failing the proof of registry, left other proof open to the voter *at the election, consistent with his present right.*

Id. (emphasis added).

The Court thus reaffirmed the principle that the legislature may not impose additional qualifications beyond those required by the Constitution. *Baker* upheld that a registration law was a valid means of establishing a voter's qualifications, provided that "other proof" was left available to the unregistered voter at the election, "consistent with his present right." While the *Baker* court's specific holding on the registration laws then in effect likely is superseded by intervening changes to Article III, the broader

principle that laws imposing “conditions precedent” that qualify the right to vote are unconstitutional is still valid. The Voter ID law, in mandating that already-registered voters display a mandated form of government-issued identification on election day or lose their right to vote, imposes exactly the kind of “condition precedent” allowing the disqualification of qualified voters that the Court warned against in *Baker*.

The court again addressed the unconstitutionality of laws imposing qualifications on the right to vote beyond those prescribed in the Constitution in *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (1880). *Kennedy* involved an 1879 registration law providing that “no vote shall be received an any general election unless the name of the person offering to vote be on the register...excepting only persons who may have become qualified voters before such election, but after the completion of such register.” The court held that the law violated Wis. Const. Art. III, §1, which at the time defined the qualifications of voters “without specifying registration.” The court emphasized the exclusivity of the constitutional qualifications to vote, stating:

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.*

Dells, 6 N.W. at 246 (emphasis added).

The court held that a registration 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.... If the mode or method, or regulations...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 on 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 disenfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the constitution." *Id.* at 247 (emphasis added).⁹

The Wisconsin Supreme Court again discussed the constitutionality of voter registration laws in *State ex rel. O'Neill v. Trask*, 135 Wis. 333 (1908) and *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 195 N.W. 707 (1923).¹⁰ Notably, both of these cases were decided after Article III was amended in 1882 to permit the legislature to require

⁹ Notably, Article III of the Wisconsin Constitution was amended in 1882, following the *Knowlton*, *Baker* and *Dells* decisions. 1881 J.R. 26A; 1882 J.R. 5; L.1882, c. 272; vote Nov. 1882. The amendment made two changes: first, it authorized the legislature to enact laws requiring electors to reside in the election district for such time as the legislature prescribed, but not more than thirty days. That change authorized exactly the type of law struck down by the Wisconsin Supreme Court in *Knowlton*. Second, it authorized legislation providing for the registration of electors in incorporated cities and villages. This history shows that the people of this state can and will amend the constitution when they believe it is necessary and proper to grant the legislature additional powers to restrict the exercise of the right to vote.

¹⁰ *Barnett* is the most recent case in which the Wisconsin Supreme Court addressed the constitutionality of a state law relating to voter qualifications under Wis. Const. Art. III. The court decided a number of other cases involving election laws challenged as encumbering the right to vote, but none involving voter qualifications. See, e.g., *State v. Frear*, 128 N.W. 1061, 144 Wis. 58 (1910) (challenge to law setting requirements for candidate to be placed on ballot); *State v. Buer*, 182 N.W. 855, 174 Wis. 120 (1921) (challenge to law establishing a special primary election system for Milwaukee County); *State ex rel. Frederick v. Zimmerman*, 37 N.W.2d 473, 254 Wis. 600 (1949) (challenge to law setting requirements for judicial candidates to be placed on ballot); *Ollmann v. Kowalewski*, 300 N.W. 183, 238 Wis. 574 (1941) (interpreting law requiring election inspectors to place initials on ballots); *In re Chairman in Town of Worcester*, 139 N.W.2d 557, 29 Wis.2d 674 (1966) (challenge to law invalidating absentee ballot that did not contain name or initials of issuing clerk).

voter registration in certain municipalities. In *Trask*, the court upheld a law that disqualified the votes of electors who had not registered before the election and had not complied with a procedure permitting an unregistered person to vote by submitting an affidavit establishing the elector's qualifications. The court reasoned that the law requiring an unregistered voter to submit an affidavit at the polls, in the form required, did not deprive any elector of the right to vote because "if he be disenfranchised it is not by force of the statute, but by his own voluntary refusal of proof." In *Barnett*, the court construed a registration law to avoid a constitutional defect by refusing to disqualify voters whose names were not on the registry as the result of official error.

Taken together, these early cases establish as a matter of state constitutional law that the legislature may not impose qualifications on the right to vote that exceed the exclusive qualifications required or permitted by the Wisconsin Constitution. While Article III has been amended several times since these cases were decided, the amendments do not undermine this general principle. If anything, the amendments to Article III, by removing many of the prior qualifications to vote and explicitly limiting the Legislature's authority to enact laws restricting the right to vote, strengthen this bedrock rule of constitutional law. In addition, the early cases establish the *purpose of registration laws*, holding that registration laws are a constitutional means of

establishing a voter's qualifications, so long as the law provides a means for an unregistered but qualified voter to establish his or her qualifications on election day.¹¹

B. The Voter ID Law Requires a Qualification to Vote That Exceeds Those Specified in Wis. Const. Art. III.

The Voter ID law imposes an additional qualification on voting that exceeds the exclusive qualifications required by the Wisconsin Constitution. As discussed in Part IV(D), above, the Voter ID requirements are separate from the requirements for registration or proof of residency under the Wisconsin Statutes. The mandate of displaying government-issued identification at the polls applies to registered voters, many of whom have been registered as voters in Wisconsin for decades.

As the Court reasoned in *Baker* and *Barnett*, registered voters have established that they meet the constitutional qualifications to vote. Moreover, as discussed in Part IV above, Article III, §2 does not broadly authorize the legislature to enact laws providing for proof of voter qualifications. Rather, it more narrowly permits laws to be enacted relating to registration.

When the 1986 amendments to Article III were adopted, voter registration laws had a history of more than 100 years in Wisconsin as a constitutionally-sanctioned means of establishing that voters were qualified. See *Dells v. Kennedy*, 49 Wis. 555 (1880). The 1986 amendments explicitly authorize the legislature to enact laws employing this

¹¹ Consistent with this requirement, the current Wisconsin Statutes permit voters to register on election day at the polls. See Wis. Stat. §6.55.

longstanding method of establishing voter qualifications. The proponents of the 1986 amendments and the people who ratified them evidently viewed voter registration laws as a wholly sufficient means of ensuring that voters were constitutionally qualified. By conditioning a constitutionally qualified and registered elector's right to vote on the display of government-issued ID at the polls, the Voter ID law imposes a qualification on voting that is not required by, and therefore violates, the Wisconsin Constitution.

VI. CONCLUSION

The plaintiffs have met their burden of establishing that the Voter ID law is an unconstitutional infringement of the right to vote as defined by Wis. Const. Art. III, §1 & 2. First, Article III, §2 restricts the legislature's authority to enact laws limiting the right to vote to five subject areas. The Voter ID requirement exceeds that authority and is therefore unconstitutional. Second, the Voter ID requirement imposes a qualification to vote that is not required or allowed by Article III, §§1 and 2 of the Wisconsin Constitution. By denying the right to vote to citizens who meet the constitutional qualifications as electors, Voter ID violates the Wisconsin Constitution.

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Respectfully submitted,

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