

**WISCONSIN COURT OF APPEALS
DISTRICT II**

**MILWAUKEE BRANCH OF THE NAACP, VOCES DE LA
FRONTERA, RICKY T. LEWIS, JENNIFER T. PLATT, JOHN
J. WOLFE, CAROLYN ANDERSON, NDIDI BROWNLEE,
ANTHONY FUMBANKS, JOHNNIE M. GARLAND, DANETTA
LANE, MARY MCCLINTOCK, ALFONSO G. RODRIGUEZ,
JOEL TORRES AND ANTONIO K. WILLIAMS,**

PLAINTIFFS-RESPONDENTS,

V.

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

DEFENDANTS-PETITIONERS.

FILED

MAR 28, 2012

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Reilly and Gundrum, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2009-10),¹ this court certifies the petition for leave to appeal and accompanying motion to stay in this case to the Wisconsin Supreme Court for its review and determination.

¹ Although this citation is to the 2009-10 version of the Wisconsin Statutes, the remaining statutory references are to statutes created or amended by 2011 Wis. Act 23, and are therefore accompanied by citations to the sections of the Act creating or amending them.

ISSUES

The defendants-petitioners, Scott Walker et al., petition for leave to appeal the March 6, 2012, nonfinal order granting a motion for temporary injunction (“the Order”) issued by the Circuit Court for Dane County, the Honorable David T. Flanagan presiding.² The Order imposed a temporary injunction commanding the defendants to immediately cease all efforts to enforce or implement those portions of the 2011 Wis. Act 23 (“the Act”) that require eligible electors to verify their identity by presenting an acceptable form of photographic identification to election officials. The defendants-petitioners further request a stay of the temporary injunction pending disposition of the petition and of any subsequent appeal, if the petition is granted.

There are many issues in this case, but this certification focuses on the following questions: (1) What level of judicial scrutiny should be employed in reviewing the plaintiffs’ challenge to the Act? (2) Does the Wisconsin Constitution provide greater protection to voting rights than is guaranteed under the United States Constitution? (3) Did the circuit court correctly assess the burden imposed by the Act from the facts of this record? and (4) Given the answers to these previous questions, are the Act’s identification requirements permitted by the Wisconsin Constitution?

² The circuit court subsequently issued a revised order granting the motion for temporary injunction on March 12, 2012. The differences between the March 6, 2012 order and March 12, 2012 order are negligible.

BACKGROUND

This case concerns a recent action by the Wisconsin Legislature requiring Wisconsin electors to produce one of several specific forms of photographic identification in order to receive an election ballot.

The plaintiffs in the case are twelve Wisconsin voters and two nonprofit organizations, Milwaukee Branch of the NAACP and Voces De La Frontera, whose activities include assisting voters in protecting and exercising their voting rights. The defendants are the Governor of Wisconsin and the individual members of Wisconsin's Government Accountability Board (GAB), who were sued in their official capacities. The plaintiffs are seeking a declaratory judgment and injunctive relief against enforcement of the Act's identification requirements.

Prior to the Act, an eligible Wisconsin elector voting at a polling place or by absentee ballot was not required to present identification, other than proof of residence in certain circumstances. Under the Act, an elector is required to present proof of identification in order to vote. Proof of identification is defined as identification that contains the name and a photograph of the individual, which name must conform to the name on the person's voter registration form. *See* WIS. STAT. § 5.02(16c); 2011 Wis. Act 23, § 2.³

The Act requires, with certain exceptions, that an elector who seeks to vote in person at a polling place must present one of the acceptable forms of identification to an election official, who must verify that the name on the

³ For a list of acceptable forms of identification, *see* WIS. STAT. § 5.02(6m); 2011 Wis. Act 23, § 1.

identification conforms to the name on the poll list and that any photograph reasonably resembles the elector. WIS. STAT. § 6.79(2)(a); 2011 Wis. Act 23, § 45.⁴ If an elector does not present acceptable identification, he or she must be offered the opportunity to vote by provisional ballot. Section 6.79(2)(d) and (3)(b); 2011 Wis. Act 23, §§ 47-50. A provisional ballot will thereafter be counted if the voter presents acceptable identification at the polling place before the polls close 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); 2011 Wis. Act 23, § 90. If an elector presents identification bearing a name that does not conform to the one on the poll list or a photograph that does not reasonably resemble him or her, then the elector may not be permitted to vote. Section 6.79(3)(b); 2011 Wis. Act 23, §§ 48-50.

In order to accommodate electors who do not possess an acceptable form of identification, the Act requires the Department of Transportation (DOT) to issue a free identification card to any elector who satisfies all other requirements for obtaining the card, is a citizen who will be at least eighteen years old on the next election day, and requests that the card be provided without charge for voting purposes. WIS. STAT. § 343.50(5)(a)3.; 2011 Wis. Act 23, § 138.

Finally, the Act requires the GAB to take various steps to implement the identification requirements, including: (1) revising instructions, forms, and informational materials for voters; (2) engaging in outreach to identify and assist groups needing help in obtaining acceptable identification; and (3) conducting a

⁴ Similar requirements apply to absentee voters. *See* WIS. STAT. §§ 6.86(1)(ar), 6.87(1) and (4)(b)1.; 2011 Wis. Act 23, §§ 56, 63, and 66.

public information campaign to inform people about the identification requirements. *See* WIS. STAT. §§ 5.35(6)(a)4a., 6.869, 6.87(2), 6.875, and 7.08(8) and (12); 2011 Wis. Act 23, §§ 4, 62, 64, 73-82, 93, 95, and 144.

On December 16, 2011, the plaintiffs filed their complaint, alleging that the Act's identification requirements violated the Wisconsin Constitution by unreasonably burdening the right to vote and denying substantive due process and equal protection.⁵ The plaintiffs subsequently moved for a temporary injunction of the identification requirements.

In support of their motion for a temporary injunction, the plaintiffs submitted two kinds of evidence. The first consisted of initial and supplemental expert reports establishing that there are approximately 221,975 constitutionally eligible voters in Wisconsin who lack either a Wisconsin driver's license or a state photo identification. The second consisted of affidavits from forty individuals who state that their voting rights have been burdened in various ways by the identification requirements.

On February 8, 2012, following briefing on the injunction motion, the circuit court for Dane County, the Honorable David T. Flanagan, III, presiding, issued an order denying the motion for temporary injunction. In it, the court acknowledged that the plaintiffs' request "poses a close and extremely serious question." However, the court concluded that the plaintiffs had not made a sufficient showing of irreparable harm to justify the requested injunction.

⁵ The plaintiffs also alleged that the Act's identification requirements improperly imposed voter qualifications beyond those specified in the Wisconsin Constitution. However, they later agreed to withdraw that claim from consideration in the case.

On February 13, 2012, the circuit court held a conference for the purpose of scheduling a trial on the merits of the case. The court determined that it would not be feasible to try the case and issue a decision prior to the April 3, 2012, election. At that point, the court decided to reconsider its previous decision denying the plaintiffs' motion for temporary injunction and scheduled an evidentiary hearing for March 1, 2012.

Following the evidentiary hearing, the circuit court issued a temporary injunction on March 6, 2012, ordering the defendants to cease immediately any effort to enforce or implement the identification requirements of the Act pending trial and further order of the court. In reaching its decision, the court found that the plaintiffs had demonstrated likely success on their claim that the Act's identification requirements unconstitutionally burden voting rights under the Wisconsin Constitution. The court further found that the plaintiffs had demonstrated a substantial probability of irreparable harm to the voting rights of a significant portion of the electorate, sufficient to justify a facial injunction of all enforcement or implementation of the identification requirements.

On March 9, 2012, the defendants moved the circuit court to stay the temporary injunction, pending the defendants' petition for leave to appeal. The circuit court denied the motion on March 15, 2012, concluding that the defendants had not met the criteria for a stay. The defendants subsequently petitioned this court for leave to appeal and moved to stay the temporary injunction pending disposition of the petition and of any subsequent appeal, if the petition is granted. We now certify both the petition for leave to appeal and accompanying motion to stay in this case to the Wisconsin Supreme Court for its review and determination.

DISCUSSION

Because this case has not yet been briefed as an appeal, our framing of the issues is based on the circuit court's decision as well as the parties' arguments set forth in their petition for leave to appeal and response. As we understand it, the circuit court's reasoning for granting the temporary restraining order may be summarized as follows:

- 1) The plaintiffs' claims are founded exclusively upon the Wisconsin Constitution, which provides that "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." WIS. CONST. art. III, § 1.
- 2) A significant proportion of constitutionally eligible voters in Wisconsin—approximately 221,975 individuals—do not possess acceptable photo identification.
- 3) The Act imposes a substantial burden upon these voters in several respects. First, for some of these voters, the Act imposes an indirect financial burden in having to pay a fee to acquire documents—such as a birth certificate—that may be needed to obtain free identification from the DOT. Second, for some of these voters, the Act imposes a general burden in having to deal with multiple visits to government offices, delay, dysfunctional computer systems, misinformation, and a significant investment of time to avoid being turned away at the ballot box. Third, for a smaller number of these voters, the Act imposes a specific burden related to their specialized circumstances (*e.g.*, individuals who cannot locate their birth certificates or have a birth certificate with a misspelled name, etc.).
- 4) There is no evidence of voter fraud that would have been prevented by the Act.
- 5) The Act's identification requirements are notably inflexible in that they do not mandate any heightened review or validation of the ballot of a constitutionally eligible voter who lacks the required identification. Under the Act, a constitutionally eligible voter who cannot produce the required identification at the polling place, or within three days thereafter, is simply prohibited from voting.

- 6) Constitutionally eligible voters who do not possess a driver's license are disproportionately elderly, indigent, or members of a racial minority.
- 7) The Wisconsin Supreme Court has not deferred to the legislature on questions of voter qualification.
- 8) The proper level of judicial review is strict or heightened scrutiny, as the Act implicates a fundamental interest in the constitutional right to vote.
- 9) The Act's identification requirements have been shown to be an improper impairment of the constitutional right to vote by (a) failing to account for the difficulty they demand upon indigent, elderly, and disabled citizens who are otherwise constitutionally eligible to vote; and (b) offering no flexibility to prevent the exclusion of constitutionally eligible voters. Thus, the Act is in violation of the WIS. CONST. art. III, § 1.
- 10) The decision of the United States Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), does not require judicial deference to the Act for three reasons. First, unlike the present case, the *Crawford* case was based upon the United States Constitution. Second, unlike the present case, the *Crawford* case was based upon a flawed factual record lacking substantial evidence of the burden imposed by the challenged law. Finally, the law in *Crawford* was less rigid than the Act because it offered alternative voting opportunities to eligible voters who lacked the required identification.⁶

In its petition for leave to appeal, the defendants-petitioners argue that the circuit court erred in several respects. Specifically, they accuse the court of (1) introducing new discrepancies into the interpretation of the right to vote under the state and federal constitutions; (2) facially enjoining a state election law that is constitutional as applied to the vast majority of voters; (3) holding that every statute implicating the right to vote is subject to strict scrutiny; and (4) concluding

⁶ The law at issue in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), permitted voters who were indigent or had a religious objection to being photographed to cast a provisional ballot that would be counted if they executed an appropriate affidavit before the circuit court clerk within 10 days following the election. *Id.* at 186.

that the Act's identification requirements permanently disenfranchise every voting-eligible person who does not already possess a driver's license or a state photo identification.

The plaintiffs-respondents, of course, disagree. In their response, they contend that the circuit court adhered to existing Wisconsin precedent construing Article III, Section 1 of the Wisconsin Constitution. They further assert that the court adopted and applied the correct heightened level of scrutiny and employed the proper inquiry, balancing the harms and benefits of the Act. Additionally, they maintain that the court employed the correct legal standard to sustain a facial challenge to the identification requirements, finding the Act's inflexible and widespread application to be unconstitutional for a substantial number of voters.

From these arguments, several issues emerge. First, what level of judicial scrutiny should be employed in reviewing the plaintiffs' challenge to the Act? Second, does the Wisconsin Constitution provide greater protection to voting rights than is guaranteed under the United States Constitution? Third, did the circuit court correctly assess the burden imposed by the Act from the facts of this record? Finally, given the answers to these previous questions, are the Act's identification requirements permitted by the Wisconsin Constitution? Because these issues have great consequence to the voters of this state and election officials, we believe that the Supreme Court is the proper forum to hear this case.

CONCLUSION

In sum, this case presents significant legal issues that impact the essential political functions of the State. Given the need for a prompt resolution, we respectfully certify the petition for leave to appeal and accompanying motion to

stay in this case to the Wisconsin Supreme Court for its review and determination.⁷

⁷ As noted in the certification for *League of Women Voters of Wisconsin Education Network, Inc. v. Scott Walker*, No. 2012AP584, this matter is also highly time-sensitive due to upcoming elections.

