IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

COMMON CAUSE, COMMON CAUSE WISCONSIN, BENJAMIN R. QUINTERO,

Plaintiffs,

v. Case No. 19-CV-323

MARK L. THOMSEN, *et al.*,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Defendants' opening brief explains why Plaintiffs' challenge to Wisconsin's student-ID-as-voter-ID law, Wis. Stat. § 5.02(6m)(f), fails. (*See* Dkt. 48.) Plaintiffs' opening brief only confirms the shortcomings previously discussed. Their argument has three fundamental errors.

First, they approach this case as if *Crawford* and *Frank* don't exist. Those cases make clear that "the inconvenience of making a trip to the [DMV]" is constitutionally permissible, and that such trips—including, for example, to the student ID office—simply do not "even represent a significant increase over the usual burdens of voting." *Frank v. Walker (Frank I)*, 768 F.3d 744, 745–46 (7th Cir. 2014) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)). Plaintiffs don't even acknowledge these precedents, much less explain how their challenge can survive in their wake.

Second, Plaintiffs' do not meaningfully engage the applicable constitutional standards, or even clearly explain what standard they think applies. They say that the student ID provisions are unconstitutional because the requirements are irrational—that is a rational-basis challenge. (*See, e.g.*, Dkt. 37:25, 28 (complaint); 46:2, 25 (Plaintiffs' opening brief, arguing that student ID provisions are "unnecessary, useless, and irrational").) But Plaintiffs only discuss the alleged irrationality in terms of supposed "burdens" under the *Anderson/Burdick* framework. This analysis is incorrect. Wisconsin's student ID provisions do not impose any burden on voters, since they simply afford students an *additional* way to prove identity for voting. This type of claim is subject to simple rational-basis review. While Defendants prevail under either standard, Plaintiffs' inconsistent framing of their claims shows the weakness of their challenge.

Third, when Plaintiffs discuss the student ID law's alleged irrationality, their argument is based on a false premise: that if poll workers do not verify a particular element of an ID, that element is unconstitutionally irrational. (*See, e.g.*, Dkt. 46:23–27.) Under Plaintiffs' view, virtually every form of ID includes such "irrational" elements, like vehicle authorizations on driver's licenses or country of former nationality on a naturalization certificate. (*See* Dkt. 43:3, 11.) But a poll worker need not examine an element of an ID for that ID's requirements to pass the rational basis test. Instead, the constitutional inquiry

is whether the Legislature reasonably could have concluded that the acceptable IDs for voting serve the State's important interests in promoting election integrity. Because the student ID requirements (just like the various requirements on other IDs) unquestionably serve this broad interest, Plaintiffs' challenge to the student ID law fails.[1]

ARGUMENT

I. Plaintiffs' claims are subject to rational basis review, and Wisconsin's student ID law more than meets that standard.

Plaintiffs framed their complaint solely in terms of alleged irrationality, pointing numerous times to the alleged "useless[ness]" and "irrational[ity]" of Wisconsin's student ID law. (Dkt. 37:25, 28; *see also* Dkt. 46:2, 25 (Plaintiffs' opening brief, arguing that student ID provisions are "unnecessary, useless, and irrational").) Their briefing, however, totally ignores the rational-basis standard and instead discusses these alleged "burdens" under the *Anderson/Burdick* framework, apparently on the theory that that framework applies in any challenge to an election law. To the contrary, where an election law does not impose *any* burden on voting, rational-basis review applies. (*See* Dkt. 48:19–20.)

[1] In accordance with this Court's instruction in the scheduling order (Dkt. 41), Defendants believe that this case can be decided on the briefs and the parties' stipulated facts. Nonetheless, Defendants will be prepared to present argument and answer any questions the Court might have at the currently scheduled hearing.

A. Courts consistently apply rational basis review where an election law does not impose a demonstrable burden on voting.

In *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 803 (1969), the Court confronted a challenge to Illinois's absentee voting laws brought by pre-sentence detainees. The State's laws made absentee voting available to certain groups of voters but did not include these detainees. *See id.* at 803–04. Directly addressing the question of what constitutional standard applies, the Court held that rational-basis review applied because "there [was] nothing in the record to indicate that the Illinois statutory scheme has an impact on [the detainees'] ability to exercise the fundamental right to vote." *Id.* at 807. Instead, "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [the detainees'] the exercise of the franchise." *Id.* at 807–08. Important for current purposes, the Court expressly rejected the notion that a more stringent standard should apply "since voting rights are involved." *Id.* at 806.

Federal courts of appeals have recently reaffirmed *McDonald*'s approach to laws that do not actually burden any voting rights. In *Texas Democratic Party v. Abbott*, 961 F.3d 389, 403–05 (5th Cir. 2020), the Court relied on *McDonald* in overturning an injunction of an absentee voting provision,

applying rational-basis review and reasoning that because the law only made voting *more* available to some, it did not deny anyone's right to vote.[2]

Notably, the court in *Texas Democratic Party* also rejected an argument that *McDonald* was no longer good law since it was decided before *Anderson* and *Burdick*, pointing out that the Supreme Court "abrogates its cases with a bang, not a whimper, and it has never revisited *McDonald*." 961 F.3d at 405.

The Seventh Circuit has also applied *McDonald* in the context of assessing the constitutionality of a redistricting ordinance that was expected to have, at most, a "trivial and unavoidable" impact on apportionment in the county. *See Frank v. Forest County*, 336 F.3d 570, 574 (7th Cir. 2003). The court pointed to *McDonald* in rejecting the challenge, noting that, in light of the trivial impact of the redistricting, "it should be enough that good reasons *can* be given" for the ordinance. *Id.*

As *McDonald* and its progeny make clear, Wisconsin's decision to enact a law affording students an additional way to prove identity for voting need not—really, cannot—be analyzed for "burden." Instead, rational-basis review applies.

---

[2] Similarly, in *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020), the court questioned the applicability of *Anderson/Burdick* in cases involving laws "making it easier for some electors to vote," explaining that "it takes some legal gymnastics" to assess alleged burdens of that type of law. Nonetheless, the court in *Mays* applied *Anderson/Burdick* based on circuit precedent applying that framework even where no burden was shown. *See id.*

Indeed, this Court recognized the applicability of rational-basis review when it confronted the first challenge to Wisconsin's student ID provisions in *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 961–62 (W.D. Wis. 2016). Whereas the Court analyzed the voter-ID law as a whole under *Anderson/Burdick* based on the alleged burdens of having to obtain an ID to vote, *see id.* at 910–17, the Court analyzed the student ID provision under rational-basis review. *See id.* at 961–62.

Unlike *One Wisconsin*, Plaintiffs here are not challenging Wisconsin's voter ID requirement. Rather, they are challenging the specific provision of Wis. Stat. § 5.02(6m)(f) that permits students to use their student IDs as *another* form of qualifying voter ID. Since by Plaintiffs' own admission "[t]his lawsuit picks up where *One Wisconsin Institute* left off" (Dkt. 37:17), the same rational-basis standard applies here.

B. Wisconsin's student-ID-as-voter-ID law more than meets rational-basis review.

As explained in Defendants' opening brief, the challenged student ID law serves Wisconsin's important interests in promoting confidence in the electoral system and deterring fraud. (*See* Dkt. 48:21–25.) Because Wisconsin's student ID law is amply justified, Plaintiffs' rational-basis challenge fails. *See Luft v. Evers*, 963 F.3d 665, 677 (7th Cir. 2020) (rational-basis standard "is not demanding," and Wisconsin's student ID provision "serves a 'legitimate

governmental purpose'" (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). The Seventh Circuit's *Luft* decision disposes of Plaintiffs' constitutional challenge.

II. Even assuming *Anderson/Burdick* applies, Plaintiffs fail to point to any burdens that outweigh Wisconsin's important interests.

A. General problems with Plaintiffs' *Anderson/Burdick* analysis.

In support of their *Anderson/Burdick* analysis, Plaintiffs rely on *Luft*. (*See* Dkt. 46:10–13.) This is mistaken. Like this Court in *One Wisconsin*, the court in *Luft* did not analyze the student ID law under *Anderson/Burdick*, and instead applied rational-basis review. *See Luft*, 963 F.3d at 677. And even in rejecting Wisconsin's separate requirements of proof of enrollment and an unexpired ID, the court said nothing about "burdens"—"the point" of its decision was that "requiring two documents from students, but not other voters, needs justification, which has not been supplied." (*Luft*, at 7th Cir. Dkt. 102:2.)

Luft provides no support for Plaintiffs' *Anderson/Burdick* argument; to the contrary, the court's analysis of the perceived disparity in treatment highlights precisely why this is a rational-basis case and why Plaintiffs' claims fail. *Luft*'s holding was driven by the fact that students, and no one else, had to provide two documents to vote. *See Luft*, 963 F.3d at 677; (*see also Luft*, at 7th Cir. Dkt. 102:2.) Here, Plaintiffs do not point to any ID element that is uniquely required of students. Nor could they: every single element they

challenge is an element of at least one other form of ID. (*See* Dkt. 43:7–11 (required elements of various forms of ID); *see also* Dkt. 48:4–7.) Without any indication of disparate treatment, the question here is simply whether the Legislature acted reasonably in allowing certain student IDs to qualify as voting-eligible, provided the IDs include elements common to other voting-eligible IDs.

Plaintiffs' sole, strained effort to make this a disparate-treatment case is unavailing. They argue that a law allowing taller voters to use certain IDs could not be justified by pointing to the availability of other forms of ID that shorter voters could still use. (Dkt. 46:13–14.) They are absolutely correct, and equally off-point. In their example, it is unlikely that the height-based treatment for voting could even conceivably relate to a legitimate state interest. Here, there are multiple ways that the elements of student IDs serve important state interests. (*See, e.g.*, Dkt. 48:20–25.) Moreover, as just noted, those same elements are required in other forms of IDs, so there is no detrimental disparity between students and all other voters—if anything, students are better off, since they have the additional option of using a qualifying student ID to vote. Plaintiffs' attempt to shoehorn their *Anderson/Burdick* claims into *Luft*'s disparate-treatment analysis misses the mark.

A second general error in Plaintiffs' *Anderson/Burdick* discussion is their assertion that any burdens should be evaluated "notwithstanding" any other provisions in Wisconsin's electoral system. (Dkt. 46:12.) This type of piecemeal assessment of isolated provisions is precisely what the court disapproved in *Luft*, 963 F.3d at 671 ("Judges must not evaluate each clause in isolation.") Even assuming the student ID law imposed some burden, it would be evaluated in the context of Wisconsin's "election system as a whole," which includes "lots of rules that make voting easier." *Id.* at 672.

B. The alleged burdens that Plaintiffs point to either are not burdens at all, or, at most, are identical to the minimal burdens faced by every other voter who needs a qualifying photo ID to vote.

In discussing burdens that students allegedly face, Plaintiffs do not identify *any burden* beyond what *Crawford*, *Frank I*, *Frank III*, and *Luft* have already held are constitutionally permissible.

For example, Plaintiffs suggest that the student ID provisions are particularly impactful on new students who "learn of the [ID] requirement weeks before Election Day at best and on Election Day at the polling place at worst." (Dkt. 46:15, 19.) The "burdens" for these students are that they "must learn of this voter ID requirement, learn that a separate voter ID is available, go to an ID card office, and affirmatively request that ID." (Dkt. 46:16.) Try as they might to stretch out this list of steps, they fail to grapple with the reality

that the student ID law makes voting easier for students than for most other voters. Nor are these "burdens" any different than those faced by any voter.

In fact, the two student experiences highlighted by Plaintiffs demonstrate just how the voter-ID law *benefits* students. (*See* Dkt. 43:30–33; 46:18–19.) After finding out about the voter-ID requirement on Election Day, both Ms. Gomez and Ms. Abarca were able to quickly obtain student IDs from their schools' ID office. (*See* Dkt. 43:30–33; 46:18–19.) They did not have to search for a birth certificate, social security card, or other available documents that would otherwise be required to obtain a qualifying photo ID, nor did they even have to leave campus. Thus, by virtue of the law Plaintiffs now challenge, these two students were able to avoid even the minimal "inconvenience of making a trip to the [DMV]," which is itself a constitutionally acceptable burden. *See Crawford*, 553 U.S. at 198.

Plaintiffs nonetheless assert that "it is reasonable to infer that others are less fortunate" and would not learn about the voter ID requirement "until it is too late." (Dkt. 46:19.) That Plaintiffs cannot point to any real-life examples of such a student suggests that the problem they allege is minuscule—if not non-existent.[3] Plaintiffs' conjecture cannot carry their case.

[3] Indeed, at the six Wisconsin schools that do not offer a voter-compliant student ID, there are *at most* 2,136 out-of-state students. (Dkt. 43:24–25.) And of those, there is no information on how many possess another valid form of voter ID.

But even accepting that this hypothetical student exists, some individual students' lack of planning does make an election system unconstitutional. *Cf. Luft*, 963 F.3d at 675 ("One less-convenient feature does not an unconstitutional system make.") And what's more, their lack of planning would not even prevent them from voting: any voters in this position would be able to cast a provisional ballot and either return to their polling place with a valid ID by 8:00 p.m. on Election Day, or take that ID to the municipal clerk's office by 4:00 p.m. on the Friday following the election. (Dkt. 43:18.)

Finally, Plaintiffs point to the current pandemic as a unique burden for student voters. (Dkt. 46:20–21.) But this case is a facial challenge to the student ID law, and Plaintiffs can prevail only by "establishing that no set of circumstances exists under which the [student ID law] would be valid." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Difficulties occurring only in the current circumstances fall far short of this standard.

Moreover, as this Court is aware, the pandemic has prompted challenges to multiple aspects of Wisconsin's electoral system. *See Democratic Nat'l Comm. v. Bostelmann (DNC)*, No. 20-cv-0249 (W.D. Wis.) (and consolidated cases). Plaintiffs, however, have not raised such a claim here, even in their recently amended complaint. (*See generally* Dkt. 37.) But even if they had, that claim would fail for the same reasons this Court has already rejected

pandemic-related challenges to Wisconsin's voter ID law. *See DNC*, 447 F. Supp. 3d 757, 768 (W.D. Wis. 2020); *see also Edwards v. Vos*, No. 20-cv-340 (W.D. Wis.), at Dkt. 337:56–58 (consolidated with *DNC*). Indeed, just this week this Court again declined to enjoin Wisconsin's voter ID law in those cases, concluding that the plaintiffs there failed to establish "that the COVID-19 pandemic amplifies the typical burden of requiring a photo ID, so as to outweigh the State's repeatedly recognized interest in doing so." *Edwards*, No. 20-cv-0249, at Dkt. 337:58. Plaintiffs' argument about pandemic-related burdens is thus unavailing.

C. Plaintiffs' arguments do not undercut the important State interests served by the student ID law.

Crawford, *Frank I*, and *Luft* acknowledge Wisconsin's important state interests in both the voter ID law, generally, and the student ID provision. Indeed, in holding that "[d]rawing a line between current and expired documents serves a "legitimate governmental purpose," the court in *Luft* expressly disposed of three of Plaintiffs' four challenged elements of the student ID law. *Luft*, 963 F.3d at 977 (quoting *Heller*, 509 U.S. at 320). And the fourth element (signature) also easily survives in light of *Luft*'s reasoning. *See id.*; *see also* Dkt. 46:24–25.

Defendants previously discussed the State interests served by the student ID provisions. (Dkt. 48:22–25.) Plaintiffs' arguments attacking those important interests are unconvincing.

First, Plaintiffs conflate the "purpose of the voter identification requirement" with the State interests that support the law. (Dkt. 46:23; *see also id.* at 23–27.) All of the decisions addressing voter ID laws recognize that the state interests at issue are broader than "identifying a voter," and that voter ID laws instead serve the state's interests in "protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191. This encompasses "safeguarding voter confidence," "deterring and detecting fraud," and "participating in a nationwide effort to improve and modernize election procedures." *Id.* Wisconsin's voter ID law serves these very same purposes. *See Frank I*, 768 F.3d at 750–51.

Plaintiffs are therefore incorrect to pick at the various student ID requirements and ask how each element is necessary *to prove identity*. (*See* Dkt. 46:23–27.) As noted previously, all forms of ID include some elements that are not verified by poll workers and which are not used to prove identity when voting. *See supra* 2–3; *see also* Dkt. 48:38. But that does not make it irrational to require those elements in the various forms of ID. Rationality here requires only that the requirements of the student ID law bear a conceivable

connection to the State's broad interest in election integrity. That standard is generously met.

Plaintiffs are also wrong in arguing that the student ID law is irrational because not every category of ID is required to include the same information. (*See* Dkt. 46:22–27.) To the contrary, the Legislature could reasonably conclude that one form of ID serves the interest in election integrity even if another form of ID does not include the same elements. Student IDs illustrate this distinction well. Whereas many IDs are issued based on unchanging characteristics (such as tribal membership) or lifetime affiliation (veterans), most students do not remain students forever. The status of an individual as a tribal member, veteran, or naturalized citizens will likely never expire; the status of an individual as a driver or Wisconsin resident may expire, but not likely for some time; and the status of an individual as a student will likely have a shorter duration than any of these. Based on these distinctions, the Legislature could reasonably conclude that voters would have greater confidence in the electoral system and the integrity of a qualifying voter ID if the expiration periods of these IDs correlated with the purpose of the ID. Thus, it is reasonable for the Legislature to acknowledge these distinctions in Wis. Stat. § 5.02(6m)(f)'s requirements.

Similarly, student IDs—issued by dozens of different institutions with as many different standards for issuance—will typically lack safeguards that

are built into the issuance processes for other forms of ID such as military IDs, passports, and naturalization certificates. (*See* Dkt. 43:7–11.) As just one example, Ho-Chunk Nation IDs are issued only if the member provides another form of valid ID like a driver's license, military ID, a passport, or a certified birth certificate. (*See* Dkt. 43:9–10.) In contrast, at least one school whose ID is *not* voting compliant allows students to upload a picture of their own choosing, online. (Dkt. 43:26.) In the face of practices like this, the Legislature could reasonably conclude that requiring the challenged elements on student IDs would both promote voter confidence in those IDs and deter fraud.

Plaintiffs' arguments thus fail to undercut the important state interests served by the student ID law.

III. Plaintiffs' claim under the "materiality provision" fails.

Plaintiffs' arguments in support of their "materiality provision" claim add little to their complaint. (*See* Dkt. 37:29–30; 46:32–35.) They fail to even acknowledge the multiple decisions from federal courts that refused to apply the materiality provision in challenges to voter ID laws. *See, e.g.*, *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1357–58 (N.D. Ga. 2006); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2007 WL 9724581, at *3 (D. Ariz. Aug.

28, 2007). Plaintiffs offer no explanation why their proffered application of the law is different than this body of on-point precedent, and their claims fail on that basis alone.

But even assuming the materiality provision did apply to their voter ID challenge, Plaintiffs fail to explain why materiality should be assessed at the level they propose, namely, whether each specific ID element is verified at the polls. As discussed previously, it is nonsensical to examine which elements of specific IDs are "material" to voting, since the Legislature has already decided which elements must be included in any given ID for that ID to qualify as eligible for voting purposes. (Dkt. 48:33–36.) Plaintiffs' approach would result in the invalidation of virtually every form of ID, since all require some information that is not verified at the polls. They offer nothing to counteract this absurdity.

With these shortcomings in Plaintiffs' argument, and for the reasons discussed in Defendants' opening brief (Dkt. 48:33–36), their materiality claim fails.

IV. Putting aside all other problems with Plaintiffs' arguments, nothing they have presented supports injunctive relief.

As explained above and in the opening brief, Plaintiffs' claims fail on the merits and should be rejected outright. But even aside from the merits, Plaintiffs fail to support their request for injunctive relief.

First, Plaintiffs fail to show any irreparable injury. They have made no showing that *anyone's* right to vote is threatened by the student ID provision. To the contrary, the two examples they point to show why the student ID law is helpful to students, allowing them (unlike all other voters) to obtain a voting-eligible ID by simply going to the ID office at their school. (*See* Dkt. 43:30–33, 46:18–19.) Further, twice already this Court declined to enjoin Wisconsin's voter ID law generally during this pandemic, *see DNC*, 447 F. Supp. 3d at 768; *Edwards*, No. 20-cv-0249, at Dkt. 337:58, and Plaintiffs offer nothing to show why an injunction is necessary as to this component of the law.

Plaintiffs also offer nothing to show why the balance of hardships would tip in their favor. To the contrary, the timing of Plaintiffs' request and the likelihood of disruption and confusion that could arise from such a late-breaking injunction weighs heavily against enjoining the student ID provision. *See DNC*, 447 F. Supp. 3d at 765 (discussing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).)

Thus, even if Plaintiffs were to prevail, the Court should deny injunctive relief.

CONCLUSION

For the reasons discussed here and in Defendants' opening brief, this Court should grant the Defendants' motion for summary judgment and enter judgment in Defendants' favor on all claims.

Dated this 22nd day of September 2020.

Respectfully submitted,

ERIC J. WILSON
Deputy Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5457 (Murphy)
(608) 267-8904 (Johnson-Karp)
(608) 266-3094 (Schmelzer)
(608) 294-2907 (Fax)
murphysm@doj.state.wi.us
johnsonkarpg@doj.state.wi.us
schmelzerjj@doj.state.wi.us