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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MARCH FOR OUR LIVES IDAHO and **IDAHO ALLIANCE FOR RETIRED AMERICANS**,

Plaintiffs,

v.

PHIL MCGRANE, in his official capacity as Idaho Secretary of State,

Defendant.

Case No.: 1:23-cv-00107-AKB

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 54]

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INTRODUCTION

House Bill 124 and House Bill 340 make it dramatically harder for many eligible Idaho citizens to register and vote, by sharply restricting the forms of identification that may be used. House Bill 124 specifically targets young voters, by eliminating student identification; House Bill 340 targets young and old voters alike with gaps in a provision for free identification that will require many such voters to pay a government fee if they wish to register and vote, while exempting existing registrants from that potentially onerous requirement.

Plaintiffs March For Our Lives Idaho ("MFOL Idaho") and the Idaho Alliance for Retired Americans ("the Alliance") have standing because the challenged laws have required Plaintiffs to divert resources from their other activities towards combatting the laws' effects, and on behalf of their members or constituents whose right to vote is burdened by the new requirements. And ample record evidence supports Plaintiffs' claims that the elimination of student identification involved purposeful age discrimination in voting in violation of the Twenty-Sixth Amendment, that the new voter identification requirements will require some voters to pay a government fee to vote in violation of the constitutional prohibition on poll taxes, and that the new identification regime unlawfully discriminates against new registrants in favor of existing voters. At a minimum, disputes of fact preclude summary judgment against those claims.

The Court should deny Defendant's motion.

LEGAL STANDARD

In ruling on a motion for summary judgment, the Court must "draw[] all inferences in the light most favorable to the nonmoving party," *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007), and may not grant summary judgment if there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

ARGUMENT

I. Plaintiffs have both organizational and associational standing.

Plaintiffs have injury-in-fact sufficient to support Article III standing because the challenged laws injure them as organizations and injure their members and constituents by making it harder for them to register and vote.[1] Defendant simply rehashes arguments the Court already rejected in denying the motion to dismiss. *See* ECF No. 47. And while, on summary judgment, Plaintiffs must now offer evidence in place of allegations, Plaintiffs have done so with their declarations and deposition testimony, which provide—in the form of admissible evidence—exactly the factual support for standing that the Court already held sufficient.

A. House Bill 340 and House Bill 124 injure Plaintiffs as organizations.

The challenged laws injure Plaintiffs as organizations by making it harder for their members and constituents to register and vote, thus requiring Plaintiffs to divert their resources away from other activities and towards educating voters about the requirements of the new laws and ensuring that voters have required identification. As the Court already held, "organizational standing requires 'only a minimal showing of injury.'" ECF No. 47 at 7 (quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007)). "Organizations can demonstrate organizational standing by showing that the challenged practices have perceptibly impaired their ability to provide the services they were formed to provide." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) ("*EBSC I*") (cleaned up); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("*EBSC II*") (merits panel reaching same conclusion). Organizations therefore have standing if a challenged law "frustrates the organization's goals and requires the organization 'to expend resources . . . they otherwise would spend in other ways.'"

[1] Defendant's summary judgment motion does not challenge the other aspects of standing—traceability and redressability. *See* ECF No. 54-1 at 11–14.

EBSC I, 932 F.3d at 765 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)).

Plaintiffs satisfy this standard with evidence that House Bill 340 and House Bill 124 make voting and voter registration more difficult, causing Plaintiffs to "expend[] additional resources that they would not otherwise have expended, and in ways that they would not have expended them." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1036–37, 1039–42 (9th Cir. 2015).

1. MFOL Idaho

The challenged laws injure MFOL Idaho as an organization. As MFOL Idaho's co-director explains, MFOL Idaho is a youth-led organization dedicated to organizing young people to fight for common sense solutions to gun violence. Resp. SMF ¶ 90. It conducts advocacy campaigns to bring young activists into the political process, registers voters, and engages in turnout and education activities focused on young voters. *Id.* Its constituents are high school and college students, some of whom lack a driver's license and do not possess or have difficulty accessing other identification documents. *Id.* ¶ 91. And it has had to divert resources away from its normal activities to combat the impacts of House Bill 124 and House Bill 340, including by creating new education materials; contacting DMV offices for guidance; and re-training volunteers. *Id.* ¶ 93. It therefore now has fewer resources to support activities central to its mission of fighting gun violence. *Id*. This evidence mirrors the allegations the Court held sufficient at the motion to dismiss stage. ECF No. 47 at 9.

Defendant's contrary argument is irreconcilable with the Court's denial of the motion to dismiss. Defendant argues that MFOL Idaho has not identified a specified constituent who has been unable to register to vote, unable to obtain a free identification card, or unable to pay a fee for the required identification. ECF No. 54 at 7. But no such evidence is required—and certainly not for organizational standing—because Article III injury need not take the form of total

disenfranchisement of an organization's member. Significantly, MFOL Idaho did not allege in the Complaint that it had such members, *see* ECF No. 20 ¶¶ 11–12, but the Court properly found standing based on injury *to MFOL Idaho itself*, ECF No. 47 at 8–9. That conclusion still holds.

2. The Alliance

The challenged laws also injure the Alliance. The Alliance's mission is to "protect the civil rights of retirees," and it furthers that mission by "spend[ing] resources—staff and volunteer time and financial—on voter registration, get-out-the-vote activities, and other voter engagement and education activities[.]" Resp. SMF ¶ 94. But House Bill 340 inevitably will force the Alliance "to divert resources away from [other] activities and towards educating its members about the stricter voter registration requirements and helping them obtain acceptable photo identification to register to vote." *Id.* ¶ 95. In particular, the time and resources spent educating members about House Bill 340's identification requirements and helping them obtain acceptable identification comes at the expense of programming focused on recruiting new members, opening new chapters, making presentations to members, and promoting substantive policy campaigns in areas such as retirement income security, pension protections, social security, Medicare, Medicaid, and services for older Idahoans. *Id.* ¶ 95. As with MFOL Idaho, this evidence closely tracks the allegations the Court already held sufficient to show injury-in-fact. ECF No. 47 at 10.

Defendant is wrong to say that the Alliance conceded that House Bill 340 has not resulted in the diversion of resources. ECF No. 54 at 6. The Alliance's President's full answer makes clear that he meant only that there was no diversion of *monetary* resources, because "[e]verything is done by volunteer. And now it requires more volunteers to achieve the same objective that we achieved before." ECF No. 54-3, Ex. 3 at 41:8-10. Monetary diversion is not required; diversion of volunteer time and effort constitutes organizational injury. *See, e.g.*, *La Raza*, 800 F.3d at 1039.

Defendant also argues that the Alliance cannot show "frustration of its mission" because it

has not identified a specific member who is now entirely unable to register to vote and because it continues to engage in voter registration activities. ECF No. 54-1 at 7. But again, no such evidence is needed: the Alliance's allegations, which the Court already held sufficient to support organizational standing, likewise did not assert that any particular member was entirely unable to register, vote, or obtain identification, nor that the Alliance itself would halt its voter registration activities. *See* ECF No. 20 ¶¶ 13–14; ECF No. 47 at 10. It was enough that the Alliance alleged—and now shows through evidence—that House Bill 340 threatens its mission and, as a result, it must devote additional resources. *See* ECF No. 47 at 10; *La Raza*, 800 F.3d at 1040.

Plaintiffs therefore have organizational standing based on their own injuries.

B. House Bill 340 and House Bill 124 injure Plaintiffs' members and constituents.

Plaintiffs also independently have associational standing because the challenged laws injure their members and constituents. An organization has associational standing "when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021). Each of these elements is satisfied here by evidence that—again—almost exactly mirrors the allegations the Court already held sufficient to support associational standing. *See* ECF No. 47 at 10–12.

First, Plaintiffs' members and constituents would otherwise have standing to sue because the challenged laws make it harder for them to vote. As explained below, the challenged laws specifically target the students and young voters who make up MFOL Idaho's constituents, *infra* p. 10, and the elderly voters who form the core of the Alliance's membership, *infra* p. 17-18. Those injured members would have standing to sue in their own right, whether or not they are fully

disenfranchised by the challenged laws. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009).

Second, both Plaintiffs seek to protect interests germane to their purposes: they have missions of promoting registration and voting among their members and constituents, and they seek to protect their members' and constituents' right to vote. Resp. SMF ¶¶ 90, 94.

Third, the participation of individual members is not required because Plaintiffs seek only declaratory and injunctive relief based on a facial challenge to statutes. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977).

Defendant argues Plaintiffs lack associational standing because they have not identified a specific individual member who has been harmed by House Bill 124 or House Bill 340. ECF No. 54-1 at 13–14. But the law does not require either Plaintiff to do so. The Ninth Circuit has rejected Defendant's argument that "an injured member of an organization must always be specifically identified in order to establish Article III standing for the organization" via associational standing. *La Raza*, 800 F.3d at 1041. Rather, the Ninth Circuit has explained that:

> Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured. *Id*.

Here, it is more than "relatively clear" that Plaintiffs' members and constituents include voters that will be harmed by the challenged laws. *Id.* Many of the Alliance's 11,407 members are elderly and no longer drive, and would not otherwise renew their driver's license, but may be forced to if they want to vote as a result of House Bill 340. Resp. SMF ¶ 96. And MFOL Idaho's constituents are primarily high school and college students who all possess student identification

cards but are now unable to use them to register to vote or to vote at the polls, even though some had previously relied on their student identification cards because they do not have a driver's license. *Id.* ¶ 91. Both groups have members and constituents who are new to the state—many of whom moved in retirement or to attend school—and must register under the strict requirements of House Bill 340. *Id.* ¶¶ 92, 97. The most impacted members and constituents have not even moved yet but will move to the state within six months of the election and may possess an out-of-state driver's license that precludes them from obtaining a no-fee identification card. *Id.* ¶¶ 92, 97. Accordingly, there is no legal requirement for Plaintiffs to specifically identify an injured individual member in order to demonstrate associational standing. *La Raza*, 800 F.3d at 1041.

Moreover, it would be absurd to require such a particularized identification when the challenged laws have not yet been in effect for a single general election. Such a requirement would contradict controlling law holding that plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). As this Court recognized, "[t]he operation of the two challenged laws against certain individuals seeking to register to vote or to vote at the polls using a student identification card is certain." ECF No. 47 at 16. There is simply no reason to bar plaintiffs from obtaining preventive relief before a specific individual has had their constitutional rights violated.

Defendant attempts to downplay any potential harm, repeating that "only 104" people were recorded as using their student identification to vote in e-pollbooks from certain counties in the 2022 election. ECF No. 54-1 at 14. At the outset, the purported "fact" that only 104 voters used student identification in the 2022 general election—the fact on which Defendant has based much of his public (Resp. SMF ¶ 86) and legal (*see, e.g.*, ECF No. 29-1 at 7, 10, 16) defense of HB 124—is disputed at best. *See* Resp. SMF ¶ 38. The 104-voter number is based on an incomplete

set of data for an incomplete set of counties. *Id*. As Defendant's own witness explained in a prior version of the analysis, it "do[es] not represent the entire range of voters in the November [2022] election" because it considers only 30 of Idaho's 44 counties, and even for those counties, it does not include "the ID type used by election day registrants." *Id*. The 104-voter number therefore considers only "66%" of the young voters who voted in November 2022, and Defendant *does not know* what form of identification was used by 7,128 young voters in November 2022, including everyone who used same-day registration. *Id*. Defendant now phrases the assertion about the 104 voters more carefully, as reflecting e-pollbook check-ins only—though without acknowledging that this limitation excludes nearly half of all young voters. *See, e.g.*, ECF No. 54-1 at 3. But Defendant's counsel have never corrected their previous, unqualified representations to the Court that "just 104 voters used" student identification in the November 2022 general election. ECF No. 29-1 at 7; *see also id.* at 16 (asserting that a "vanishingly small group of voters . . . used student ID in the last election—104 in total, less than a tenth of a percent").

In any event, the Court already held that the 104-voter number actually "supports Plaintiffs' position that some voters use student identification for purposes of voting." ECF No. 47 at 6. And the total suppressive impact of the challenged laws extends well beyond the number of students who actually used student identification to vote in the past, as studies have shown that intimidation and confusion created by restrictive election laws can suppress youth turnout, particularly if such laws are targeted at them. Resp. SMF ¶ 61. *see also* ECF No. 47 at 6 ("Even if some of these would-be voters would be able to obtain a free identification card before the next election, the challenged laws will likely discourage them from voting[.]").

Plaintiffs therefore have associational standing, too.

II. Summary judgment on Plaintiffs' Twenty-Sixth Amendment claims is not appropriate.

Disputes of material fact preclude summary judgment against Plaintiffs' claim that HB 124 and HB 340 intentionally discriminate against young voters in violation of the Twenty-Sixth Amendment. That claim is based on discriminatory intent: Plaintiffs assert that HB 124 is unconstitutional because it was "motivated by a discriminatory purpose" against young voters, even if the law is age-neutral "on its face." *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (citing *Guinn v. United States*, 238 U.S. 347 (1915)), *superseded by statute on other grounds*, 96 Stat. 134.

The Twenty-Sixth Amendment undeniably prohibits such purposeful age discrimination in voting, even in facially age-neutral laws. Its language echoes the Fifteenth Amendment's prohibition on race discrimination in voting, which provides that voting rights "shall not be denied or abridged . . . on account of race," U.S. Const., amend. XV, § 1—language that has been consistently interpreted as prohibiting not only facially discriminatory restrictions, but also restrictions that were "motivated by a discriminatory purpose." *City of Mobile*, 446 U.S. at 62. Courts have therefore repeatedly held that the "*Arlington Heights* standard" for assessing purposeful discrimination "provides the appropriate framework" for adjudicating Twenty-Sixth Amendment claims. *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 609-10 (E.D. Va. 2016).

Arlington Heights requires the Court to consider all "circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This includes, but is not limited to, "(1) statistics demonstrating a 'clear pattern unexplainable on grounds other than' discriminatory ones, (2) '[t]he historical background of the decision,' (3) '[t]he specific sequence of events leading up to the challenged decision,' (4) the

defendant's departures from its normal procedures or substantive conclusions, and (5) relevant 'legislative or administrative history.'" *Pac. Shores Props. v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (quoting *Arlington Heights*, 429 U.S. at 268) (alterations in original).

Claims governed by *Arlington Heights* require "very little . . . evidence" of discriminatory intent "to raise a genuine issue of fact" that precludes summary judgment. *Id.* at 1159. "[A]ny indication of discriminatory motive," whether direct or circumstantial, suffices to "raise a question that can only be resolved by a fact finder." *Id.* (quoting *Schindrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). Particularly under this forgiving governing standard, Plaintiffs have more than enough evidence that HB 124 and HB 340's elimination of student identification as an accepted from of voter identification was motivated by a discriminatory purpose to survive summary judgment.

First, the challenged laws directly affect young voters in particular. Evidence that a law "bears more heavily on one [group] than another" provides "an important starting point" for proving discriminatory purpose. *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Students are overwhelmingly young, and the average age of undergraduate students at large public universities in Idaho is around 21-23. Resp. SMF ¶ 52. The elimination of student identification as a form of voter identification bears far more heavily on young voters than on voters of other ages. Indeed, Defendant's own analysis shows that 57% of the voters who, according to e-pollbook records, used student identification in the 2022 general election were between 18 and 24 years old—and 63% in the 2023 general election. *Id.* ¶ 89. That is an extraordinarily disparate impact—only 5.69% of all voters in the 2022 general election fell into that age group. *Id.* ¶ 57. Based on that same e-pollbook data, younger voters were 35 times more likely to use student identification than older voters. *Id.* ¶ 53. Moreover, young voters are

more mobile and therefore more likely to have to re-register—and thus to provide HB 340-compliant identification—than older voters. *Id.* ¶¶ 54-56.

Second, direct evidence shows that the legislature that enacted HB 124 and HB 340 was interested in age-based voting patterns specifically. That same session, while the legislature was considering a bill that would have eliminated the affidavit alternative to showing identification at polling places, Defendant's Policy Director asked for and received a breakdown by party *and age* of the voters who had voted using an affidavit in a recent election. *Id.* ¶ 65. Defendant testified that this request was likely prompted by questions from legislators or other interested parties. *Id.* ¶ 66. And his Policy Director testified that this sort of request was "kind of normal" and asked for party and age breakdowns of the users of particular voting methods "a lot." *Id.* ¶¶ 65-66. In considering the affidavit legislation, at least one legislator (who also opposed student identification) "was interested to see . . . the party and age breakdowns of the [users of] affidavits, who are the people most typically to use an affidavit, who they would be." *Id.* ¶ 66. Significantly—and suggestive of discriminatory animus against young voters—the legislature then rejected the bill that would have eliminated the affidavit alternative after the data that Defendant's Policy Director requested revealed that even in Ada County, affidavits were more often than not used by older voters, and by Republicans. *Id.* ¶¶ 65–66, 68.

Third, the sequence of events that led to the introduction and passage of the challenged laws provides substantial circumstantial evidence that the legislature's true purpose in eliminating student identification for voting was not the security-based arguments that were publicly raised. Defendant initially prepared two forms of the legislation that became HB 340—one that permitted student identification and one that banned it. *Id.* ¶ 69. And when Defendant first circulated the legislation to legislators, he circulated the version that would have allowed student identification.

Id. ¶ 70. But Defendant changed course after Representative Brandon Mitchell, whose district includes a large student population from the University of Idaho, asked him to eliminate student identification because "Student ID is a big issue in college towns." *Id.* ¶¶ 71–72. Defendant could not recall what Representative Mitchell's specific concerns were. *Id.* ¶ 73. Representative Brent Crane, who chairs the House State Affairs Committee with jurisdiction over voting legislation, *Id.* ¶ 74, was then so eager to eliminate student identification for voting that he blocked his committee from even *considering* Defendant's favored voter registration legislation, which became HB 340, until after the legislature had already passed and the governor signed HB 124's elimination of student voter identification. *Id.* ¶ 75. Chairman Crane's hostage-taking was part of why Defendant supported HB 124—indeed, Defendant identified only that hostage-taking and the deeply flawed e-pollbook analysis described above, *supra* p. 7-8, 10-11, as the factors that motivated his support. Resp. SMF ¶ 76.

Meanwhile, the purported concerns about voter fraud that the challenged laws' supporters publicly invoked as the basis for the legislation, and that Defendant relies on now, seem to have been at most an afterthought in the actual negotiations over the bills. There is no evidence of any voter fraud ever being committed in Idaho—or elsewhere—using student identification. *Id.* ¶¶ 58–59. And Defendant was unable to recall any specific basis whatsoever for legislators' requests to him to remove student identification from his legislation. *Id.* ¶ 73.

Fourth, the challenged laws were passed in the broader context of the Idaho legislature suppressing rising youth political engagement. Idaho students have repeatedly organized to protest at the Idaho Capitol to advocate for action on climate change, protect transgender rights, and protest restrictive voting legislation. *Id.* ¶ 62. In response, two house committees sharply restricted legislative testimony by Idahoans who are not 18 years old, and the Idaho legislature passed

legislation prohibiting teachers from offering extra credit as an incentive for students to vote. *Id.*; Idaho Code § 74-604. Also, the voter registration process on the Idaho Administration & Elections website singles out college students with intimidating warnings and additional questioning about their residence, and a never-withdrawn directive from the prior Secretary of State specifically warns students: "Registering to vote is a serious matter, which needs to be considered carefully because if abused it can subject individuals to criminal penalties." Resp. SMF ¶ 63. Viewed in this broader context, the student identification ban is only the Idaho legislature's latest salvo against political activity by young people.

Finally, there were substantial procedural irregularities in the enactment of the challenged laws. *See Arlington Heights*, 429 U.S at 267. Chairman Crane held the legislation that became House Bill 340 hostage in the State Affairs Committee to ensure that House Bill 124 was passed, setting "multiple milestones" for House Bill 124's progress "and any time that milestone was met he would create a new milestone for the student ID bill." Resp. SMF ¶ 75. Chairman Crane did this over Defendant's objection, even though it "generated conflict and . . . raised concern through the legislative process by other legislators who, ultimately, would be voting on" the bills. *Id*. Then, when Defendant's voter registration legislation was finally considered, Chairman Crane called a recess in the middle of the committee hearing to object to the legislation off the record, even though "it's not common to even have a recess during one of those types of hearings." *Id.* ¶ 77. As a result of those objections, the voter registration legislation was made substantially stricter by eliminating out-of-state drivers' licenses, too, and then had to be rushed through the legislative process with little to no time for debate. *Id.* ¶ 78.

Defendant has no adequate answer to this evidence. He relies on the bills' official statements of purpose, which—of course—identify reasons for enactment other than

discriminatory intent, and on Defendant's own description of House Bill 340's purpose. ECF No. 54-1 at 11–12. And he offers new evidence that he says supports concerns about the adequacy of student identification, without any showing that this evidence was before the legislature when it passed the bills. *Id.* at 12–13. This evidence, at most, leads to a dispute of fact over why the legislature did away with student identification for voting—it cannot support summary judgment.

Defendant also argues that, purpose aside, the elimination of student identification cannot violate the Twenty-Sixth Amendment unless it absolutely prevents someone from voting. ECF No. 54-1, at 9–10. This argument is irreconcilable with the Twenty-Sixth Amendment's text, which provides that the right to vote "shall not be denied *or abridged* . . . on account of age." U.S. Const. amend. XXVI. "Abridge" is defined as to "curtail, lessen, or diminish; to reduce the extent or scope of." *Abridge,* Oxford English Dictionary (3d ed. 2009). And the Supreme Court has held that this same language in the Fifteenth and Twenty-Fourth Amendments "nullifies sophisticated as well as simple-minded modes of discrimination," and "hits onerous procedural requirements which effectively handicap exercise of the franchise" on prohibited grounds "although the abstract right to vote may remain unrestricted." *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *see also Harman v. Forssenius*, 380 U.S. 528, 540–41 (1965) ("Significantly, the Twenty-fourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason."). The Twenty-Sixth Amendment therefore protects against *any* age-based diminution of the right to vote—not just against complete disenfranchisement. *See, e.g.*, *Detzner*, 314 F. Supp. 3d at 1222–23; *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972).

In arguing otherwise, Defendant relies on the Seventh Circuit's 2020 decision in *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020) (*Tully I*), and on a 2015 decision from the Middle District

of Tennessee in *Nashville Student Organizing Committee v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015). But the Seventh Circuit has since disavowed *Tully I*'s reasoning, explaining in a later appeal that it "was made on the eve of the 2020 election" in the face of particular difficulties created "due to COVID-19," and that the decision "does not constitute the law of the case; nor do we consider ourselves bound by its reasoning." *Tully v. Okeson*, 78 F.4th 377, 379, 382 (7th Cir. 2023) (*Tully II*).[2] Under the Seventh Circuit's revised approach, the imposition of any "material requirement" as a prerequisite to voting constitutes an abridgement of the right to vote that is subject the Twenty-Sixth Amendment. *Id.* at 386. The requirement of identification other than student identification to register and vote plainly qualifies, because it "erects a real obstacle to voting"—those who lack accepted identification will have to get it if they wish to register and vote. *Harman*, 380 U.S. at 541. As for *Hargett*, it involves scant analysis of the relevant issues: it does not consider the significance of the Twenty-Sixth Amendment's reference to "abridg[ment]" of the right to vote, and it improperly emphasizes instead precedent under the Fourteenth Amendment that did not involve an anti-discrimination rule at all.

Thus, the Twenty-Sixth Amendment is properly interpreted to bar purposeful age discrimination in voting, and there is at least a dispute of fact over whether the challenged laws

[2] *Tully I*'s reasoning was extreme: it asserted that even laws facially "restricting the ability of African Americans or women or the poor to vote by mail" would not "violate the Fifteenth, Nineteenth, and Twenty-Fourth Amendments" because they would somehow not "implicate the right to vote" at all. *Tully I*, 977 F.3d at 614. Regardless, even *Tully I* would not help Defendant here, because it turned on the Seventh Circuit's unusual rule that restrictions *on absentee voting* do not implicate the right to vote as long as in-person voting is available. *See id.* at 611, 613–14. Other circuits have disagreed. *See, e.g.*, *Tex. Dem. Party v. Abbott*, 978 F.3d 168, 193 (5th Cir. 2020); *Obama for Am. v. Husted*, 768 F.3d 524, 540–41 (6th Cir. 2014), *vac. as moot*, No. 14-3877 (6th Cir. Oct. 1, 2014). The voter identification requirements at issue here apply to in-person voting and all forms of voter registration as well. Unlike the plaintiffs in *Tully*, Idaho voters therefore cannot avoid the requirements by voting in a different manner—the restrictions are a barrier to their ability "to cast a ballot at all." *Tully I*, 977 F.3d at 611.

were motivated by a desire to discriminate against young voters.

III. House Bill 340 is an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendments.

House Bill 340 imposes an unconstitutional poll tax for the reasons given in Plaintiffs' motion for summary judgment. ECF No. 55-1. In particular, HB 340 allows only four forms of identification to register to vote and vote, and some voters cannot obtain any of those forms of identification except by paying a government fee. Resp. SMF ¶¶ 79-81. HB 340 creates a form of free voter identification in an apparent effort to avoid that problem, but Defendant admits that not everyone who needs new identification to vote will be eligible for the free identification card. *Id.* ¶¶ 82–83. HB 340 therefore imposes an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. *See Harman*, 380 U.S. at 540-41; *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

Defendant has no answer to this, and certainly no factually undisputed answer. Defendant relies on *Gonzalez v. Arizona*, 677 F. 3d 383, 409 (9th Cir. 2012), *aff'd sub nom*. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). But unlike House Bill 340, the Arizona statute at issue in *Gonzalez* did not require any voter to present a form of identification available only in exchange for the payment of a government fee. Rather, the Arizona statute allowed *any* "form of identification that bears the name, address and photograph of the elector" *or* "two different forms of identification that bear the name and address of the elector." *Id.* at 404. Thus, voters could vote using "photograph-bearing documents such as driver's licenses as well as non-photograph-bearing documents such as utility bills or bank statements." *Id.* And while obtaining some of those documents may cost money, one can get documents like "utility bills or bank statements" without paying a fee to the government. In contrast, under HB 340, many voters who need identification to vote will have to pay Idaho a fee to obtain acceptable identification. Resp. SMF ¶¶ 79-81.

The Supreme Court's decision in *Crawford v. Marion County Election Board,* which *Gonzalez* applied and followed, shows that this distinction is dispositive. 553 U.S. 181, 198 (2008). The *Crawford* plurality was clear as can be: a voter identification requirement would impose an unconstitutional poll tax "if the State required voters to pay a tax or a fee to obtain a new photo identification." *Id.* It is only *indirect* costs, like the costs of obtaining primary documents such as birth certificates, that are subject to a balancing analysis. *See id.* at 198–201; *Gonzalez*, 677 F.3d at 410 (explaining that the challenged law "allows voters to present th[e] same sort of primary documents" that were needed to obtain identification in *Crawford*).

Moreover, the law at issue in *Gonzalez* applied only to voters who wish to vote in-person at their polling location. Ariz. Rev. Stat. Ann. § 16-579(A)(1). As *Gonzalez* recognized, Arizona voters without the necessary documents could instead vote early. *Gonzalez*, 667 F.3d at 408, n. 37. And *Crawford* similarly emphasized that "voters without photo identification may cast provisional ballots that will ultimately be counted." *Crawford*, 553 U.S. at 199. In contrast, House Bill 340 forgives no voters and offers no alternatives. Eligible voters without one of the four accepted forms of identification who choose not to pay the government fee cannot register to vote, have no alternative methods to access the franchise, and are completely shut out of the political process.

Defendant also argues that "if anything, H.B. 340 alleviates any financial burden on voting." ECF No. 54-1 at 15. But that is simply not the case for every Idaho voter, much less undisputedly so. HB 340 provides no-fee identification cards in some circumstances, but it narrowly limits who may get one and leaves many voters who need one ineligible. Defendant admitted that there are "instances in which people would need an ID for voting purposes and would not be eligible for the free [voter] ID." Resp. SMF ¶ 82. He also admitted that seniors were among "the most likely users of the no-fee ID" because they—like many of the Alliance's members—

may no longer be driving and no longer need a license, but that such seniors whose licenses expire in the six months before an election would *not* be eligible for a no-fee identification card in time for that election, so they will need to pay for an ID, or to renew their license, if they wish to vote. *Id.* ¶¶ 82, 96. Other eligible Idahoans who would be forced to pay a fee to vote include those who have recently moved to the state who do not qualify for the no-fee identification card because they have a valid non-Idaho driver's license. *Id.* ¶ 83. And voters who turn eighteen on or shortly before an election day have only a narrow window to request a no-fee identification card after they turn 18 and before election day and no room for errors in the process. *Id.* ¶¶ 84, 88.

The size of the fee, and whether voters will choose to pay it, makes no difference. Conditioning the right to vote on the payment of a government fee is an unconstitutional poll tax "whether the citizen, otherwise qualified to vote, has [funds to pay the poll tax] or nothing at all, pays the fee or fails to pay it." *Harper*, 383 U.S. at 668. Nor is the inquiry focused on the total number of voters who are forced to pay a poll tax. The Supreme Court has noted that "[t]he fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save [a] statute . . . if the State required voters to pay a tax or a fee to obtain a new photo identification." *Crawford*, 553 U.S. at 198.

Because HB 340 indisputably requires multiple groups of Idaho voters to pay a government fee if they wish to vote, it imposes an unconstitutional poll tax, and Defendant's summary judgment motion must be denied.

IV. House Bill 340 violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against new registrants.

The parties agree that the *Anderson-Burdick* framework applies to Plaintiffs' final claim: that House Bill 340 violates the Equal Protection Clause by discriminating against new registrants as compared with existing voters. ECF No. 54 at 15; *see also* ECF No. 20 ¶ 90. In assessing a law

under *Anderson-Burdick*, the Court must balance the character and magnitude of injury to the right to vote with the justifications put forth by the State for the burdens imposed. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The Court "must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. "[R]easonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters" are often justified by "important regulatory interests," *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995), but discriminatory and irrational restrictions are a different matter. And "[h]owever slight th[e] burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (quotation marks omitted).

This is a fact-intensive analysis that may rarely be resolved at summary judgment. The Ninth Circuit has "stressed" that the application of this framework "rests on the specific facts of a particular election system." *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) (quoting *Ariz. Green Party*, 838 F.3d 983, 990 (9th Cir. 2016)); *see also Gill v. Scholz*, 962 F.3d 360, 364–65 (7th Cir. 2020) ("[T]he balancing test requires careful analysis of the facts . . . precedent requires courts to conduct fact-intensive analyses when evaluating state electoral regulations."). The Court must "(1) identify and determine the magnitude of the burden imposed on voters by the election law; (2) identify the State's justifications for the law; and (3) weigh the burden against the State's justifications." *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 387 (9th Cir. 2016).

Here, the challenged identification requirements are neither reasonable nor non-discriminatory, so they are subject to heightened scrutiny under *Anderson-Burdick*. They create two classes of voters: the previously registered, who may vote without a photo identification by

using an affidavit, and the unregistered, who may not vote without obtaining voter identification. Resp. SMF ¶¶ 13, 87. And House Bill 340 imposes a severe burden on this second class: it creates "an absolute barrier to voting by otherwise eligible Idaho voters who do not possess, or who cannot obtain, a qualifying voter ID," while allowing those who already have registered to vote even if they lack such an ID. *Id.* ¶ 87. The barrier is especially severe for new registrants who have recently moved from out of state, who do not yet need an Idaho driver's license and cannot obtain one without passing a test, but who cannot obtain an Idaho identification card without surrendering their still-valid out-of-state license. *Id.* ¶¶ 79, 92, 97. And it was intentionally imposed: Legislators expressly sought to allow existing voters to vote by affidavit while requiring new registrants to show one of just a few forms of identification. *Id.* ¶¶ 13, 66, 68.

Moreover, even a minimal burden requires *some* justification, and there is no justification for this one. Defendant admits there is no reason to prohibit out-of-state driver's licenses for voter registration—he wanted them included, but they were excluded at the demand of a legislator who "didn't like out-of-state IDs" and would not let the legislation out of his committee if such IDs were allowed. *Id.* ¶ 77. Such political demands are inadequate to justify the burdens that the challenged laws impose. *See Fowler Packing Co. v. Lanier*, 844 F.3d 809 (9th Cir. 2016).

In any event, evaluating the interests asserted by the State and whether those interests justify the burdens imposed requires a factual determination that may not be made at this stage of the case. *Feldman*, 843 F.3d at 387. The State asserts various interests to justify voter identification laws but does not explain why those interests justify *different* identification requirements for new and existing registrants. This Court will need to examine the evidence presented by both parties at trial to determine whether the State has a legitimate interest in making this distinction.

CONCLUSION

The Court should deny Defendant's motion for summary judgment.

Dated: December 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to all counsel of record.

/s/ *David Fox*