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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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ECF NO. 55]

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INTRODUCTION

By Defendant's own admission, House Bill 340 bars some eligible Idahoans from voting unless they pay a government fee to obtain one of the limited forms of government-issued identification cards that are now required to register and vote. *See* ECF No. 57-2 Ex. 5 at 140:20-23. That includes voters with valid out-of-state drivers' licenses or whose licenses expire less than six months before an election. House Bill 340 forces such voters to pay a government fee if they wish to register and vote. Idaho cannot constitutionally require them to do so.

Only one Plaintiff need establish standing, but both have standing on two independent grounds—based on (1) direct harm to them as organizations and (2) associational harm to their members and constituents. Defendant argues otherwise by relying on out-of-context snippets from their depositions. The record as a whole refutes this reconstruction of the evidence, and the Court should reject Defendant's standing challenges, which are contrary to binding precedent.

On the merits, Defendant largely relies on the Ninth Circuit's inapposite decision in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), which considered a very different law that permitted the use of *any* form of photo identification or any two forms of *non-photo* identification to vote. House Bill 340, in contrast, requires one of just a few forms of identification, and Defendant admits that some voters will not be able to obtain them unless they pay a government fee. House Bill 340 is not meaningfully distinguishable from the poll tax in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966).

Plaintiffs' motion for partial summary judgment should be granted.

ARGUMENT

I. Plaintiffs have standing to assert their poll tax claim.

Plaintiffs have injury-in-fact sufficient to support Article III standing because House Bill 340 injures them as organizations and injures their members and constituents by making it harder

for them to register and vote.[1] Plaintiffs' declarations provide—in the form of admissible evidence—exactly the factual support for standing that the Court already held sufficient in denying the motion to dismiss. *See* ECF No. 47. These declarations are entirely consistent with Plaintiffs' deposition testimony.

A. House Bill 340 injures Plaintiffs as organizations.

House Bill 340 makes it harder for Plaintiffs' members and constituents to register and vote, requiring Plaintiffs to divert resources away from other activities and towards educating voters about the requirements 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.'" *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 makes 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] Defendant does not challenge the other aspects of standing—traceability and redressability. *See* ECF No. 56-0 at 3.

1. 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[.]" ECF No. 57–1 ¶ 94. But House Bill 340 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.* (citing ECF No. 55-3 Ex. B ¶¶ 9–10). This evidence supports the allegations that the Court already held were sufficient to show injury-in-fact. ECF No. 47 at 10.

Defendant argues that the Court should disregard this evidence, claiming that the Alliance "admitted" in its deposition that there was no diversion of resources. ECF No. 56 at 3–4. The Alliance did nothing of the sort. Defendant makes this argument by cherry picking statements and ignoring the witness's own contemporaneous explanation. As the Alliance's President's full answer makes clear, 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. This testimony is consistent with the Alliance's allegations in the Complaint, ECF No. 20 ¶ 15, and the Alliance President's declaration that the organization will be required to divert resources away from other activities as a result of House Bill 340, ECF No. 55-3 Ex. B ¶¶ 9–10. The deposition transcript makes clear

that this point was understood at the time: "Q: And so you mentioned volunteers. You definitely call them a resource, correct? A: Oh, yeah. Q: Any *other resources* that you think will be diverted from those activities towards educating people?" ECF No. 54-3 Ex. 3 at 41:16–21 (emphasis added). In addition, the President had earlier explained quite clearly how House Bill 340 injured the Alliance:

> [W]e no longer have the ability to just easily, without a lot of roadblocks, register people to vote. And by not doing that now, our job is more to educate them about HB 340. . . . And if we can't get people register to vote and we can't get them to the polls then we can't get them to vote for the people that we know will support their issues, which is our primary aim. . . . [T]his retards and puts roadblocks in our way of achieving that and making it happen. That's why it is harder for the Alliance and that's why it becomes a burden for the Alliance.

Baxenberg Decl. Ex. 1 at 35:15–19, 36:19–37:4, filed herewith. There is therefore no contradiction here—and certainly nothing on the order of *Yeager v. Bowlin*, in which the deponent "did not recall answers to approximately two hundred questions" and then filed a declaration with "many facts that [he] could not remember at his deposition, even when he was shown exhibits in an attempt to refresh his recollection." 693 F.3d 1076, 1079 (9th Cir. 2012). And federal courts have routinely recognized that diversion of non-monetary resources, including volunteer time and effort, is sufficient to establish an injury-in-fact under a resource diversion theory of standing. *See, e.g.*, La Raza, 800 F.3d at 1039.

Defendant also incorrectly argues that the Alliance cannot show "frustration of its mission" because "[t]he Alliance acknowledged at deposition that the passage of H.B. 340 will require it to educate people on the bill to register them to vote" and "[v]oter education is one of the Alliance's stated ways of advancing its mission," ECF No. 56 at 4 (citing *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147 (9th Cir. 2019)). The Ninth Circuit's decision in *American Diabetes Association* turned on the Association's failure to show that it "had altered or intended to alter its

resource allocation to allow its attorneys to take a higher volume of calls." 938 F.3d at 1155. Here, in contrast, the Alliance testified that it would require "more volunteers to achieve the same objective." ECF No. 54-3 Ex. 3 at 41:8–10. And devoting more volunteer time to that activity means fewer resources are available for the Alliance's "other mission-critical activities" such as "voter registration, get-out-the-vote activities, and other voter engagement and education activities." ECF No. 55-3 Ex. B ¶¶ 9–10; *see also* Baxenberg Decl. Ex. 1 at 35:15–19, 36:19–37:4. That suffices to show frustration of the Alliance's mission. *See* ECF No. 47 at 10.

Defendant also insists that the Alliance cannot show frustration of its mission because it has not identified a specific member who is unable to register to vote because they lack the required identification. ECF No. 56 at 4. But no such evidence is needed to show an organizational injury: as the Court previously held, the Alliance's allegations—now shown through specific evidence—that House Bill 340 threatens its mission and causes diversion of its resources is sufficient for organizational standing. ECF No. 20 ¶¶ 13–14; ECF No. 47 at 10; *see La Raza*, 800 F.3d at 1040.

2. MFOL Idaho

MFOL Idaho has organizational standing also. It is a youth-led organization dedicated to organizing young people to fight for common sense solutions to gun violence. ECF No. 57-1 ¶ 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 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*. MFOL Idaho's deposition testimony was entirely consistent with this sworn

declaration, emphasizing that the organization's "time is the largest resource," and that as a result of the challenged laws, that time "has had to be focused on helping to educate people about how to get registered to vote . . . now that we can't solely use the voter registration cards," because of the need to "inform [potential voters] about how to apply for or either obtain the form of identification they need." Baxenberg Decl. Ex. 2 at 27:13–22, 28:7–12. This evidence supports the allegations the Court held sufficient at the motion to dismiss stage. ECF No. 47 at 9.

Defendant argues that MFOL Idaho has not identified a specific 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. 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. Defendant's claim that MFOL Idaho has presented conflicting evidence on its membership therefore is irrelevant to its organizational standing (in addition to being wrong, *see infra* at p. 7–8).

Plaintiffs therefore have organizational standing based on their own injuries.

B. House Bill 340 injures Plaintiffs' members and constituents.

Both Plaintiffs also 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 directly supports the allegations the Court already held sufficient to support associational standing.

See ECF No. 47 at 10–12.

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 "[w]here it is relatively clear, rather than merely speculative," that a member will be injured, there is "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 who will be harmed by the poll tax that House Bill 340 imposes. *Id.* Many of the Alliance's 11,407 members are elderly, 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. ECF No. 57-1 ¶ 96. This is not speculative: Defendant *volunteered* at his deposition that seniors would particularly need voter identification if they were no longer driving, and then agreed that they would be ineligible for free identification until six months after their driver's license expires. ECF No. 57-2 Ex. 5 at 101:11–102:18. And MFOL Idaho's constituents are primarily high school and college students, some of whom will turn 18 shortly before an election and will therefore have difficulty getting a free identification card.[2] ECF No. 55-3 Ex. A ¶¶ 6, 14. House Bill 340's poll tax will injure these members whether they can afford to pay for an identification card or not, and whether they "pay[]

[2] Contrary to Defendant's argument, there is no inconsistency between MFOL Idaho's declaration and deposition testimony on this point. MFOL Idaho's representative testified in her deposition about a particular former member who possessed only a student identification card but has since moved out of state, and about the fact that most of its members are students with student IDs. ECF No. 54-3 Ex. 4 21:16–22:3, 22:9–12, 41:21–42:8. Beyond that, she testified only that MFOL Idaho—an organization made up predominantly of high school students—could not identify a specific member who had *already* had trouble obtaining a required form of identification, registering to vote, or voting. ECF No. 56 at 7. MFOL Idaho's declaration does not say otherwise.

the fee or fail[] to pay it." *Harper*, 383 U.S. at 668. Defendant's insistence that Plaintiffs identify specific members who cannot pay the fee demands far too much.

Moreover, House Bill 340 has been in effect for only a few months, during which there has not yet been a single statewide general election. 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 until a specific member is harmed.

II. House Bill 340 imposes an unconstitutional poll tax.

House Bill 340 imposes an unconstitutional poll tax in violation of the Twenty-Fourth Amendment and the Equal Protection Clause by requiring one of just a handful of forms of identification to register and vote, even though some voters can obtain acceptable identification only by paying for it. Defendant does not dispute that under House Bill 340, some voters will have to pay the government for identification if they wish to vote because they will be ineligible for a free identification card. ECF No. 57-2 Ex. 5 at 140:14–23; ECF No. 55-3 Ex. Q at 34:5–8. Rather, Defendant argues—relying on the Ninth Circuit's decision in *Gonzalez*—that only laws that "forc[e] a voter to pay directly to vote or else be subjected to unclear and burdensome processes" are unconstitutional poll taxes. ECF No. 56 at 9.

The first problem with Defendant's argument is that House Bill 340, unlike the Arizona law at issue in *Gonzalez*, does directly require some voters to pay a government fee to vote, by sharply restricting the acceptable forms of identification, most issued by Idaho, and none available without charge to all who need them. In *Gonzalez*, the identification requirement was far less restrictive, allowing *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." 677 F.3d at 404. House Bill 340 is different because it requires not *any* adequate form of identification but only *very specific ones*, and Idaho demands that at least some voters pay a state fee for acceptable identification.

The Supreme Court's decision in *Crawford*, which *Gonzalez* applied, expressly recognized that such a regime would be an unconstitutional poll tax "under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." *Crawford*, 553 U.S. at 198 (plurality op.). The law in *Crawford* was valid only because free identification was available to all who needed it, and the law in *Gonzalez* was valid only because any adequate identification at all was accepted, so the voter did not need to pay a government fee for an identification card. *Id.* at 198; *Gonzalez*, 677 F.3d 383, 410.[3] In House Bill 340, in contrast, Idaho does exactly what *Crawford* bars.

Confirming the point, Defendant's reading of *Gonzalez* would prove far too much. If any voter identification requirement is permissible regardless of cost, then Virginia could re-enact the very poll tax invalidated in *Harper* simply by reframing it as a requirement that every voter present a specific state-issued "voter identification card" that is available only for an annual payment of $1.50. *See Harper*, 383 U.S. at 664 n.1. The Constitution is not so easily evaded. Even the law in *Harper* itself did not literally require payment of a fee at the polling place or in exchange for

[3] It makes no difference that House Bill 340 also accepts some forms of federal identification, because those forms of identification, too, are generally available only to those who pay a government fee. ECF No. 55-2 ¶ 12. And regardless, *Harman* itself holds that a burdensome alternative to a poll tax does not save the poll tax from invalidity. *Harman v. Forssenius*, 380 U.S. 528, 542 (1965). "For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*

voting—it merely imposed a universal, $1.50-per-person annual tax, owed by everyone but enforceable via the disenfranchisement of those who had not paid at least six months before the election. *Harper*, 383 U.S. at 664 n.1. And, "like the Fifteenth Amendment, the Twenty-fourth 'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed" and "hits onerous procedural requirements which effectively handicap exercise of the franchise – by those claiming the constitutional immunity." *Harman v. Forssenius*, 380 U.S. 528, 540–41 (1965) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

Moreover, unlike House Bill 340, the Arizona statute at issue in *Gonzalez* and the Indiana statute at issue in *Crawford* did not actually require anyone to pay to vote because they offered alternatives to the photo identification requirement. As the Ninth Circuit recognized, Arizona "[v]oters who use an early ballot to vote do not even have to show identification." 677 F.3d at 408 n.37; *see also Crawford*, 553 U.S. at 199 ("[V]oters without photo identification may cast provisional ballots that will ultimately be counted."). Defendant dismisses these discussions as dicta, ECF No. 56 at 11, but does not explain why. The existence of an alternative was among the material facts that prompted the courts to uphold the challenged laws in those cases, so that alternative limits the scope of their holdings. *Crawford*, 553 U.S. at 199; *Gonzalez*, 677 F.3d at 408 & n.37; *see In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) ("A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." (quoting *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969–70 (3d Cir. 1979)).

CONCLUSION

The Court should grant Plaintiffs' motion for partial summary judgment.

Dated: December 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 22, 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 R. Fox*