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**IN THE 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 the Idaho Secretary of State, *Defendant.*	Case No. 1:23-cv-00107-AKB **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In lieu of a constitutional argument, Plaintiffs object to perceived inequity in HB 340. They raise generalized concerns about the way the Idaho Legislature chose to address voting security. The line drawing question about what ID ought to be necessary and sufficient to vote is not a constitutional injury that this Court needs to resolve. Plaintiffs' superlative objections to the ordinary sausage-making of politics reveals that Plaintiffs' goal is to engage this Court as a super legislature. As this Court knows, it is not such a body. Plaintiffs cannot show Article III standing as they do not track voter data and cannot tell whether they have been or will be injured. Plaintiffs have policy objections to HB 124 and HB 340. These are addressable to the Idaho Legislature, not the Court, and so the Court should grant Defendant's motion.

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ARGUMENT

I. Plaintiffs lack Article III standing.

Neither MFOL nor the Alliance can show "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d, 1083, 1088 (9th Cir. 2010) (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). "An organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Lake Forest*, 624 F.3d at 1088 n.4. MFOL and the Alliance have made no forced choice but continue business as usual as voter education organizations. MFOL says that it has "had to divert resources away from its normal activities to combat the injuries of [HB 124] and [HB 340]." Dkt. 57 at 3. But these normal activities include voter education. Dkt. 54-3 at 36:21-22; Woodard Decl. Ex. A 27:23-28:20. The bare fact that MFOL may educate voters at a tabling event is not an injury—that is part

and parcel of its purpose. *See Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019). Nor is using the DMV's website to get information MFOL would need no matter the change in law. Dkt. 54-3 at 38:2-39:11.

Plaintiffs do not dispute that they cannot demonstrate the disenfranchisement of any member, Dkt. 57 at 3–4, 11, and the record reflects that they have no evidence of anyone being disenfranchised at all. Pointing to this Court's prior decision, MFOL argues that injury to it as an organization is sufficient. But MFOL neglects to mention that this Court's ruling was premised on the motion to dismiss standard of notice pleading. Dkt. 47 at 8–9 (distinguishing *Tex. State LULAC v. Elfant*, 52 F.4th 248 (5th Cir. 2022) on that basis). At this stage, the perfunctory allegation of diversion, and the lack of any demonstrable frustration of purpose is insufficient to withstand a motion for summary judgment. *See* Dkt. 47 at 15. The Alliance is similarly deficient. Again, ignoring this Court's pointed reminder of the broad allegations permissible only at the motion to dismiss stage, Dkt. 47 at 15, they claim that they need not show a member who is even *conceivably* impacted by HB 124 and 340. Dkt 57 at 11. There is no diversion to remedy a potential or actual disenfranchisement that does not exist. The closest the Alliance comes to explaining how voting has become "a little tougher" is premised on a legal error—that the state of affairs before HB 340 and HB 124 allowed people to vote without showing identification at some stage of the process. Dkt. 54-3 at 24:24-25:12. This was not true previously and remains untrue—Idaho law has required all registered voters to identify themselves at the polls with either a photo identification card or an affidavit in lieu of personal identification if already registered for the last ten years. See Idaho Code §§ 34-1113, -1114.

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Nor does the Alliance's deposition demonstrate that they have or will face a choice between one allocation of resources or another. Unlike MFOL, the Alliance does not have any plans on educating anyone about these laws. Dkt. 54-3 at 42:13-16. While the Alliance speculates at one point that more volunteers will be required during election season, Alliance makes no effort in deposition or briefing to connect this need to the challenged acts. Nor can it, as the Alliance has no evidence of members, constituents, or anyone else who cannot vote because of HB 124 and HB 340. Dkt. 54-3 at 29:6-12 (speculation); *id.* at 21:7-22:18 (no members and speculation); *id.* at 24:10-25:15 (no members and speculation). To the contrary, Alliance admitted that its efforts to register voters at the Eastern Idaho State Fair after HB 340 went into effect were successful—in contradiction to their conclusory "roadblock" testimony. Dkt. 54-3 at 27:5-12; Dkt. 58-1 at 8:15-19. The claim that roadblocks exist, without any explanation, is mere conjecture entitled to no weight at summary judgment. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003) (citations omitted). Beyond these points, Alliance declined to elaborate beyond the broad allegations of its complaint as to how its mission was frustrated. Dkt. 54-3 at 27:13-30:16. What was sufficient on a motion to dismiss cannot help them here. Plaintiffs' reliance on a sham affidavit is further indication of this failure. *See* Dkt. 56 at 3–5, 7. Neither entity has diverted resources. Neither entity can claim frustration, either because the laws in question have not changed the status quo for them (MFOL) or because the entity does have any concrete action to address the change (Alliance). Because neither entity tracks identification, or has any information, about its members' forms of identification, none can say if registration and voting have in fact become even "a little tougher." Plaintiffs' reliance on motion to dismiss cases, like *La Raza*, cannot help them when their 30(b)(6) depositions have

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shown they have no evidence for their allegations. Dkt. 57 at 6–7, citing *Nat'l Council of La Raza v. Cegavske*, 800 F.3d, 1032, 1041 (9th Cir. 2015).

Plaintiffs' entire associational standing argument is based on conjecture—they have no member who can sue now. *Hunt v. Wash. St. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Instead, they presume that some unidentified future members will move to the state within six months of an election. Dkt. 58 at 7, 11. Conjecture is not an option at summary judgment and this claim fails. *Hernandez*, 343 F.3d at 1112.

Plaintiffs take issue with the fact that only 104 voters were recorded as having used a student ID in the 2022 general election.[1] But they offer no contrary data and no evidence that the counties that used e-pollbooks are somehow different than other counties. They offer no evidence that any voter has been harmed, or any evidence that a voter used a student ID out of necessity. *See* Dkt. 54-3 at 19:16-19; 34:1-15. As for their experts, both admitted in deposition that none of them spoke to anyone in Idaho. Any theorizing about "suppressive impact" Dkt 57 at 8, on Idahoans is pure speculation. Woodard Decl. Ex. B 23:5-27:16, 46:20-24; 50:14-51:21, 54:8-11, 57:8-64:20; *id.* Ex. C 28:3-30:3, 54:9-22, 56:5-20.[2] Indeed their experts admitted that the security interests served by HB 124 and HB 340 were legitimate and one was skeptical that "a piece of paper that somebody scans their face on is going to be appropriate" for identification. *Id.* Ex. B 31:20-22. Plaintiffs lack standing.

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[1] Only 27 were recorded as having voted using a student ID in 2023. It is striking that, after an election, no evidence of a person having difficulty under H.B. 340 exists. Dkt. 54-3 at 11.

[2] Dr. Mayer's expert report is unsworn. *See* Dkt. 57-2 at 31. "Courts in this circuit have routinely held that unsworn expert reports are inadmissible." *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011) (collecting cases).

II. Plaintiffs' Twenty-Sixth Amendment claim fails.

Plaintiffs' basic failure to grapple with the whole text of the Twenty-Sixth Amendment is their key failing. Courts must not hinge constitutional interpretation "upon a single word or phrase but rather look to the statute as a whole." *Lewis v. Hegstrom*, 767 F.2d 1371, 1376 (9th Cir. 1985). The Twenty-Sixth Amendment's purpose is to protect the class of voters between 18 and 20 years old. It does not protect students *qua* students. *See Walgren v. Bd. of Selectmen of Town of Amherst, Mass.*, 373 F.Supp. 624, 633 (D. Mass. 1974); *cf. Ramey v. Rockefeller*, 348 F.Supp. 780, 790, n.7 (E.D.N.Y. 1972). It does not protect a right to vote with whatever ID students happen to use. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)). As the trial judge put it in the companion state case: "not all young people are students, and not all students are young people." Dkt. 45 at 31. Plaintiffs want to write students per se into the Twenty-Sixth Amendment, but that is not law.

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Plaintiffs attempt to distinguish *Nashville Student Org. Comm. v. Hargett*—but it remains the most on-point case factually and analytically. 155 F.Supp.3d 749, 757 (M.D. Tenn. 2015). The court's holding was not merely that a removal of student ID cards would not trigger strict scrutiny, but that under the Supreme Court's holding in *Crawford*—which found the burden of ID laws to be de minimis—a voter ID law cannot constitute a denial "*or an abridgement*" of the rights granted under the Twenty-Sixth Amendment. *Id.* (emphasis added). A parsing of the word "abridge" in isolation is irrelevant when the Supreme Court has already considered the burdens of voter ID. *See also id.* at 758 (collecting and distinguishing other cases under Twenty-Sixth Amendment). Plaintiffs do not rebut this argument.

One case cited by Plaintiffs is simply off-base: the parties conceded that the *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), framework applied. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F.Supp.3d 1205, 1221, n.16 (N.D. Fla. 2018). "Tully II" also rejects the idea that accommodations to certain groups, be they the elderly or the merely "forgetful farmer," Dkt. 20 at 11, triggers any heightened scrutiny of the legislature's motive. *Tully v. Okeson*, 78 F.4th 377, 386 (7th Cir. 2023). Moreover, one aspect of *Arlington Heights* makes it alien to the Twenty-Sixth Amendment—the vindication of rights as to race under the Thirteenth, Fourteenth and Fifteenth amendments—is historically far afield from the rationale of the Twenty-Sixth Amendment. *Walgren*, 373 F.Supp. at 633–35.

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Plaintiffs' citations to *One Wis. Inst., Inc. v. Thomsen,* 198 F.Supp.3d 896 (W.D. Wis. 2016), and *Lee v. Va. St. Bd. of Elections*, 188 F.Supp.3d 577, 605 (E.D. Va. 2016), work against them. They support the proposition that a party cannot simply walk into federal court, claim a minimal burden infringes on students' right to vote, and get heightened scrutiny under *Arlington Heights* through the Twenty-Sixth Amendment. *One Wis. Inst., Inc.*, 198 F.Supp.3d at 926 (Evidence of mobility and less wealth for youth "falls short of showing that young people are more likely to face burdens that they cannot overcome with reasonable effort."; *aff'd in part, vacated in part on other grounds by Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020)). As to motive, "[e]ven assuming . . . that a single Republican senator had a latent motive to effect minority vote, such motive could not on the record at hand be imputed to the other [ ] senators . . . who voted for the bill. How many affirmative voters would be necessary to prove that a legislative body adopted a measure with discriminatory objective? That question remains unanswered!" *Lee*

188 F.Supp.3d at 605; *see also A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 793–94 (9th Cir. 2006) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

The record reflects that the statute was intended to standardize and enhance security in elections. The testimony of the Defendant himself before the State Affairs Committee, *see* Senate State Affairs Committee, Testimony of Phil McGrane, at 23:20-24:00 (Feb. 24, 2023), was that it was unwise to allow badges that could be run off a "desktop badge printer" to be used for voting. Plaintiffs do not like the result, but that does not transform ordinary line drawing into a constitutional violation. Those aged 18 to 20 can use the same ID as anyone else. Summary judgment is proper here on Plaintiffs' First Claim for violation of the Twenty-Sixth Amendment.

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III. Plaintiffs' poll tax claim fails.

The Ninth Circuit has rejected the contention that a universal identification requirement constitutes a poll tax. *Gonzalez v. Arizona*, 677 F.3d 383, 409–10 (9th Cir. 2012). Applying the Supreme Court's reasoning in *Harman*, the court held that while "obtaining the identification required under [Arizona law] may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax." *Id.* at 407 (citing *Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965)). Plaintiffs' only reply is that, unlike HB 340, the law in *Gonzalez* "did not require any voter to present a form of identification available only in exchange for the payment of a government fee." Dkt. 57 at 22. They reason that because "under HB 340, many voters who need identification to vote will have to pay Idaho a fee to obtain acceptable identification" this is a poll tax.

Id. This is not only factually incorrect, but it also simply ignores *Gonzalez* and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

First, the facts are wrong. Plaintiffs cite to Dkt. 57-1 ¶¶ 79-81 for the proposition that "many voters who need identification to vote" will need to pay for new ID. But the cited paragraphs do not say anything about anyone needing to pay for new identification, they simply recite the undisputed cost of three forms of federal and state identification. They cannot allege anything about the number of people who need to pay for identification (or even who they pay—be it Idaho or the federal government) because, as noted above, neither Plaintiffs tracks this data. Moreover, far from an onerous procedural requirement, a voter ID law requires no extraordinary effort. *Crawford*, 553 U.S. at 198; *One Wis. Inst., Inc.*, 198 F.Supp.3d at 926.

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Second, Plaintiffs are wrong on the law. The Ninth Circuit upheld the Arizona law, not because of who got the fee (Plaintiffs would be hard-pressed to argue that a utility bill or bank statement does not require payment) but because of the nature of the requirement. "Requiring voters to show identification at the polls does not constitute a tax." *Gonzalez*, 677 F.3d at 408. Nor is any fee for any identification paid in lieu of undergoing a bizarre bureaucratic process, which was the other feature of the *Harman* tax. *Id. Crawford* is not contrary, HB 124 and HB 340 are (at most) "'evenhanded restriction[s] that protect the integrity and reliability of the electoral process itself' [that] are not invidious and satisfy the standard set forth in *Harper*." 553 U.S. at 189-90 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

Nor is Justice Stevens' dicta applicable or controlling. *Crawford* 553 U.S. at 198; *see* Dkt. 58 at 13. First, HB 124 and HB 340 do not require voters to get a *new* identification to vote.

Moreover, his concern is not a holding of the Supreme Court as the three concurring justices reject the "record based resolution" of the plurality which considers questions like who pays for an identification. *Crawford* 553 U.S. at 208 (Scalia, J. concurring). Plaintiffs' read of *Crawford* is not law. *Marks v. United States*, 430 U.S. 188, 194–95 (1977). Every voter in Idaho is required to present a valid photo identification at the polls. For the first time in its history, Idaho also offers voters no-fee identification even as it removes a non-standardized format from usability that it need not have allowed in the first place. This is not a poll tax.

IV. Plaintiffs' equal protection claim fails.

Plaintiffs' argument under equal protection is paper thin. Plaintiffs admit that *Anderson-Burdick* applies. Dkt. 57 at 18–19. (*Burdick v. Takushi,* 504 U.S. 428, 434 (1992)). And so, under *Crawford*, the question is whether the law's *de minimis* burden that does not "represent a significant increase over the usual burdens of voting," *Crawford*, 553 U.S. at 198, or indeed of moving into Idaho, is justified. It plainly is. Requiring an in-state ID to be used comports both with Idaho law surrounding drivers' licenses and serves the purpose of assuring that those who register are Idaho residents. Plaintiffs do not show how this even-handed approach discriminates against new registrants. Every voter must register at some point.

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They suggest (along with their Twenty-Sixth Amendment arguments) that there was something untoward or unseemly about Defendant not getting the out-of-state IDs he wanted into HB 340. But notwithstanding superlatives like "hostage-taking" and the dissection of legislative procedure, there really is nothing unusual about individual legislators asking for compromises or engaging in horse-trading. That's politics, and Plaintiffs cannot heighten scrutiny on an ID requirement by objecting to typical sausage-making. *Fowler Packing Co., Inc. v. Lanier*,

844 F.3d 809, 815, n.3 (9th Cir. 2016). Indeed, *Fowler* stands for the principle that only where no "plausible legitimate justification" for legislation exists, will the court inquire further. Plaintiffs would turn *Fowler* on its head in this case. Ensuring that Idaho voters are Idahoans, and keeping desktop badge printers with no security features out of the voting booth are plainly legitimate. There is no discrimination here, let alone animus.

CONCLUSION

For all of these reasons, the Court should grant the Secretary's motion for summary judgment.

DATED: December 22, 2023.

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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 the following persons:

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