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

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THE ANDREW GOODMAN FOUNDATION,

Plaintiff,

v. Case No. 19-CV-955

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as Wisconsin Elections Commissioners,

Defendants.

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**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY**

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## INTRODUCTION

A limited stay should be granted under all the applicable factors, but a stay is particularly appropriate because the Seventh Circuit's decision in *One Wisconsin Institute* will be binding authority that impacts the specific legal challenge here. Like in the stayed *Common Cause* case, Plaintiff here challenges the constitutionality of the student ID requirements for voting. *Common Cause v. Thomsen*, No. 19-CV-323 (W.D. Wis.). In *Common Cause*, Wis. Stat. § 5.02(6m)(f) is being challenged under the First and Fourteenth Amendments; here, Plaintiff challenges the law under the Twenty-Sixth

Amendment. *One Wisconsin Institute* will inevitably address both sets of constitutional claims, and both cases should be stayed.

Asserting there is no pressing need for a stay, Plaintiff mainly argues that *One Wisconsin Institute*'s analysis of the constitutionality of the voter photo ID law was "limited to considering intentional racial discrimination under the Fifteenth Amendment as a motivation for Act 23, as well as the burden it imposed on the right to vote under the Fourteenth Amendment and Voting Rights Act." (Dkt. 18:1 (citing *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 913–23 (W.D. Wis. 2016)).) Plaintiff is wrong.

The *One Wisconsin Institute* plaintiffs alleged the voter photo ID law violates the Twenty-Sixth Amendment, as their Second Amended Complaint shows. Post-trial, the plaintiffs pressed the claim in briefing. And the district court's analysis of all of the plaintiffs' Twenty-Sixth Amendment claims addressed and upheld the voter photo ID law—including the requirements for student IDs for voting. Then, on appeal, the *One Wisconsin Institute* plaintiffs challenged the district court's decision on the Twenty-Sixth Amendment as to the voter photo ID law. Plaintiff disregards this history and the district court's analysis, arguing that it covered only the use of student IDs for *registering* to vote, not for voting itself. (*See* Dkt. 18:2–3, 7.) The court's analysis was not so limited; therefore, *One Wisconsin* is eminently relevant.

Plaintiff's claim of "severe prejudice" is based only upon arguments in its response, not evidentiary support. (Dkt. 18:2.) For example, even if it could be proved that student voting declined in Wisconsin in 2016, Plaintiff offers no evidence linking this premise to Wis. Stat. § 5.02(6m)(f)'s requirements. With no support, Plaintiff cannot reasonably show substantial prejudice.

Considering the lack of prejudice and the other relevant factors that weigh in favor of a stay, a defined and limited stay is warranted. *One Wisconsin Institute* will determine whether the voter photo ID law and its requirements for student IDs in Wis. Stat. § 5.02(6m)(f) violate the Twenty-Sixth Amendment. The decision will be binding precedent that the parties and this Court will be obliged to apply. That looming, relevant precedent warrants a stay, just as it did in *Common Cause*, where a stay order was entered by the judge who decided *One Wisconsin Institute*.

This is the exceptional case where a limited stay is appropriate until the Seventh Circuit enters a decision in *One Wisconsin Institute*. The Court should grant Defendants' motion.

## ARGUMENT

### I. Like the court did in *Common Cause*, this Court should order a limited stay because *One Wisconsin Institute* will be binding precedent.

Like the court did in *Common Cause*, this Court should exercise its discretion to order a limited stay because *One Wisconsin Institute* resolved

essentially the same legal and factual issues this case could resolve. In response to Defendants' motion, Plaintiff misunderstands the nature of Defendants' request and the district court's analysis of the *One Wisconsin Institute* Twenty-Sixth Amendment claim about the voter photo ID law.

**A. Defendants are not requesting an "indefinite" stay.**

Defendants are not making what Plaintiff argues is "a quintessential request for an indefinite stay." (Dkt. 18:5.) The requested stay is not indefinite. It is specifically defined and limited by the issuance of a decision in *One Wisconsin Institute*. The event that will terminate the stay is defined, and it can easily be identified in a stay order, just as the court did in *Common Cause*. *See* No. 19-CV-323 (W.D. Wis.), at Dkt. 24 (text-only order) ("Once the appeal in *One Wisconsin* is resolved, the court will schedule a new preliminary pretrial conference."). Furthermore, *One Wisconsin Institute* has been awaiting a decision since it was fully briefed and argued in February 2017. A decision is closer today than ever before.

Indeed, the Seventh Circuit may enter a decision soon to act well in advance of the November 2020 general election if the decision is to take effect under the "*Purcell* principle," which instructs that courts should be very reluctant to issue orders that change the rules just before an election because of the risk of voter confusion and chaos for election officials. *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam).

In Wisconsin, there are elections on February 18, April 7, August 11, and November 3. *2020 Wisconsin Election Dates*, Wis. Elections Commission, https://elections.wi.gov/node/6560 (last visited Jan. 6, 2020). There is also a special election in the Seventh Congressional District on May 12. *7th Congressional District Special Election*, Wis. Elections Commission, https://elections.wi.gov/node/6577 (last visited Jan. 6, 2020). Given these elections, the *One Wisconsin Institute* decision may be issued relatively soon.

Continuing this case, without a stay, risks rulings here that may be inconsistent with the Seventh Circuit's guidance, which could create exactly the type of confusion that *Purcell* prevents. Additionally, the *Purcell* principle would counsel heavily against this Court hypothetically ordering a preliminary injunction with an election in close proximity, should Plaintiff file a motion seeking one. (*See* Dkt. 18:12 n.1.)

### B. *One Wisconsin Institute* addressed a Twenty-Sixth Amendment claim against the voter photo ID law and its requirements for using a student ID to vote.

The *One Wisconsin Institute* district court denied a Twenty-Sixth Amendment claim against the voter photo ID law and its requirements for using student ID cards to vote. Plaintiff's contrary argument is demonstrably wrong based upon the pleadings and briefing in *One Wisconsin Institute*, the district court's decision itself, and the fact that the *One Wisconsin Institute*

plaintiffs continue to press their Twenty-Sixth Amendment claim against the voter photo ID law on appeal.

To start, Plaintiff's response incompletely recounts the challenges to the voter photo ID law that were raised in *One Wisconsin Institute* and how the district court analyzed and disposed of them. It remains a simple fact that *One Wisconsin Institute* resolved a Twenty-Sixth Amendment claim against the entire voter photo ID law, including by specifically addressing requirements of Wis. Stat. § 5.02(6m)(f).

Plaintiff's response states that, "the Court's analysis of Wisconsin's photo ID requirement in *One Wisconsin* was limited to considering intentional racial discrimination under the Fifteenth Amendment as a motivation for Act 23, as well as the burden it imposed on the right to vote under the Fourteenth Amendment and Voting Rights Act. 198 F. Supp. 3d 896, 913–923 (W.D. Wis. 2016) (analyzing photo ID claims)." (Dkt. 18:1.) Plaintiff then incompletely summarizes the many challenges to the voter photo ID law that were leveled in *One Wisconsin Institute*. (Dkt. 18:2–3.) Plaintiff highlights in its "Background" section only a challenge to the requirement that student IDs must be unexpired to be accepted for voting and a challenge to the requirements for using a student ID to register to vote. (Dkt. 18:2–3.)

However, Plaintiff omits much. First, the pleadings and briefs filed in *One Wisconsin Institute* show that the voter photo ID law and its requirements

for student IDs were challenged under the Twenty-Sixth Amendment. The Second Amended Complaint, which was operative at trial, specifically listed "the voter ID law" as of one of the "provisions challenged under the Twenty-Sixth Amendment." (OWI[1] Dkt. 141:69–70 ¶ 210; *see also id.* at 50 ¶ 153 ("Wisconsin's voter ID law requires voters (with certain exceptions) to present one of a limited number of photo IDs to have their ballots counted. *See* Wis. Stat. § 5.02(6m).").)

Post-trial, the *One Wisconsin Institute* plaintiffs continued to press their Twenty-Sixth Amendment claim against the voter photo ID law, as pages 221 through 237 of their post-trial brief show. (OWI Dkt. 207:221–37.) This section summarized the reasons the plaintiffs believed the evidence proved the voter photo ID law violates the Twenty-Sixth Amendment, and the plaintiffs emphasized their belief that "[t]he voter ID law effectively targets college students . . . by making student IDs unnecessarily difficult to use for voting." (OWI Dkt. 207:227.)

Thus, the plaintiffs specifically alleged in their complaint and argued post-trial that the student ID requirements of the voter photo ID law violate the Twenty-Sixth Amendment, which is nearly the same claim Plaintiff makes

[1] References to the *One Wisconsin Institute* district court docket, case number 15-CV-324, are in the format (OWI Dkt. [docket number]:[page or paragraph number]).

here. And when the *One Wisconsin Institute* district court stated that, "Plaintiffs contend that *some* of the challenged provisions discriminate against younger voters on the basis of age, in violation of the Twenty-Sixth Amendment," 198 F. Supp. 3d at 925 (emphasis added), the court was necessarily addressing the voter photo ID law and student IDs.

Second, Plaintiff wrongly argues that, "*One Wisconsin* did not decide the constitutionality of the Student Voter ID Restrictions under the Twenty-Sixth Amendment or any other constitutional provision." (Dkt. 18:7.) On the contrary, the court's Twenty-Sixth Amendment analysis addressed the use of student IDs for voting and rejected the claim:

> One last point. *College students may use any of the means of identification* or proof of residence that are available to all citizens generally. The legislature also extended to students the *additional* ability to use their college IDs, albeit under certain restrictive conditions. As a practical matter, these restrictions meant that the *standard student IDs that many University of Wisconsin campuses issue were not valid for voting. But some universities have provided workarounds in the form of special university-issued voting IDs*. This seems like an unwarranted rigmarole, but the end result is that *college students have more ID options than other citizens do*.
>
> The court concludes that plaintiffs have not proven by a preponderance of the evidence that the challenged provisions were motivated by intentional age discrimination.

*One Wisconsin Institute*, 198 F. Supp. 3d at 927 (first, third, and fourth emphasis added). The district court was specifically addressing the use of student IDs for voting in these concluding paragraphs regarding the Twenty-Sixth Amendment. *See also id.* at 926 (finding that "Young people may be more

likely to lack a driver license. But that does not show that they are more likely to lack the credentials that one needs to get a Wisconsin ID.").

Third, on appeal, the *One Wisconsin Institute* plaintiffs continue to press their Twenty-Sixth Amendment challenge to the voter photo ID law. (OWI 7th[2] Cir. Dkt. 30:11–19.) Plaintiffs-Appellees' Response and Cross-Appeal Brief argues that, "while the legislature permitted student IDs to be used for voting, the requirements to use such IDs are so onerous, A. 190, that, at the time the voter ID law was enacted, no college ID met them." (OWI 7th Cir. Dkt. 30:14.) The plaintiffs argued that the district court's analysis rejecting their Twenty-Sixth Amendment claims "contains multiple errors," (OWI 7th Cir. Dkt. 30:19), including that "the court erred in assessing not whether the justifications offered for the challenged provisions were pretextual but whether the provisions were rational" and that "[t]he court gave too little weight to the direct evidence of Act 23's purpose." (OWI 7th Cir. Dkt. 30:19–20.)

Plaintiff also wrongly argues that *One Wisconsin Institute*'s Twenty-Sixth Amendment analysis considered only the use of student IDs for *registering* to vote, not for voting itself. (*See* Dkt. 18:7 ("when the district court in *One Wisconsin* considered the plaintiff's [sic] Twenty-Sixth Amendment

[2] The *One Wisconsin Institute* appeal involves two consolidated appeals, Nos. 16-3083 and 16-3091. References to appellate documents in *One Wisconsin Institute* are in the format (OWI 7th Cir. Dkt. [docket number]:[page or paragraph number]).

challenge in that case, it reviewed the constitutionality of Wisconsin's proof of residence statute, which limits when a voter can use a student ID to register to vote"); *see also id.* at 3 ("The district court found that the restriction on the use of expired student IDs violated the Fourteenth Amendment, but that the student ID proof of residence requirements did not violate the Twenty-Sixth Amendment. *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 925-27, 960-622.").)

But, as 198 F. Supp. 3d 925 through 927 of *One Wisconsin Institute* will confirm, Plaintiff does not summarize the district court's analysis correctly. The district court covered more than just the use of student IDs for registering to vote. In other words, the district court did not forget to address the *One Wisconsin Institute* plaintiffs' Twenty-Sixth Amendment claim challenging the voter photo ID law.

Plaintiff also attempts to distinguish the district court's holding regarding the use of expired student IDs from their own challenge to Wis. Stat. § 5.02(6m)(f), which allegedly is a challenge to "the requirement that an expiration date appear on the face of a student ID." (Dkt. 18:8.) In other words, Plaintiff argues that the actual expiration date of the student ID is not relevant to Plaintiff's claim, only how the information on the ID is presented. But Plaintiff's own complaint rebuts this argument, as it seeks an order that would "requir[e] the Commissioners of the Wisconsin Elections Commission to permit voters to use student IDs regardless of their . . . expiration date." (Dkt. 1:11.)

Beyond this, Plaintiff relies upon distinguishable cases to argue that district courts "have denied stays even where there are identical facts or claims at issue." (Dkt. 18:8; Dkt. 18:9 (citing *Williams* and *Ritter*).)

First, *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847 (E.D. Wis. 2015), involved a stay request filed in a district court case when there was another plaintiff with a similar, pending arbitration proceeding against Cash Call, Inc. *Id.* at 856–57. This arbitration posture is not comparable. *One Wisconsin Institute* will be precedent; another party's arbitration has no precedential value. The district court in *Williams* found that "there is no reason to believe that a stay will simplify the issues in question or streamline the trial in [the district court] case." *Id.* at 856–57.

Second, *Pet Milk Co. v. Ritter*, 323 F.2d 586 (10th Cir. 1963), involved new antitrust actions for continuing violations against defendants who already had appeals pending. *Id.* at 587. After stating the general principle that a stay is within a district court's discretion, the Tenth Circuit's analysis of the stay question is contained in a single sentence: "Although it might appear advisable that the trial of the cases now pending be delayed until the appeals involving identical questions are decided, we are convinced that there is no clear showing of abuse of discretion by the trial court in denying the stay." *Id.* at 588. *Ritter* is not persuasive here. Its analysis did not apply the *Grice* factors that govern

in this Circuit. And the analysis is almost nonexistent, consisting of a single sentence. *Ritter* should be disregarded.

Plaintiff also cites two cases to show that courts "have declined to stay cases when the outcome of another pending case would only be persuasive." (Dkt. 18:9 (citing *U.S. Oil v. Koch Refining Co.,* 497 F. Supp. 1125 (E.D. Wis. 1980), and *Candy Lab Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139 (E.D. Wis. 2017)).) But *One Wisconsin Institute* will be controlling, not merely persuasive, so these decisions are not helpful.

Plaintiff's last point about Defendants' stay request being solely for "efficiency and judicial economy" (Dkt. 18:9), does not address the main thrust of Defendants' motion. Specifically, *One Wisconsin Institute* will be binding precedent, so it makes little sense to forge ahead in the instant litigation until *after* the case is decided. As *One Wisconsin Institute* emphasized, "there is 'a dearth of guidance on what test applies to Twenty-Sixth Amendment claims.'" 198 F. Supp. 3d at 925 (citation omitted). There is *no* guidance from the Seventh Circuit. *One Wisconsin Institute* will provide needed guidance.

## II. Plaintiff's claim that it will be severely prejudiced is speculative and not supported by any evidence.

Plaintiff claims that it will be "grievously and irreparably prejudiced by a stay." (Dkt. 18:10; *see also* Dkt. 18:2 ("the severe prejudice Plaintiff faces if the Court waits to resolve this matter"); Dkt. 18:13 ("highly prejudiced non-

moving party").) This argument is speculative, is supported only by argument in a response brief and no evidence, and, therefore, does not weigh against a stay. *See Grice Eng'g v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (addressing "whether a stay will unduly prejudice or tactically disadvantage the non-moving party").

Focusing first on Plaintiff's alleged prejudice—as opposed to prejudice to any non-party entity or person—Plaintiff contends that it "would be forced to continue to divert resources to educate students about the Student Voter ID Restrictions." (Dkt. 18:10.) Further, "[i]n anticipation of the 2020 election, Plaintiff . . . will expend considerable resources to register students and get out the vote." (Dkt. 18:10.) "[Plaintiff] will have to divert many of those resources to educating the multitude of young, eligible voters that do not have a Wisconsin state ID or passport about the Student Voter ID Restrictions and how they can obtain an ID to comply with those restrictions." (Dkt. 18:10.)

First, these claimed prejudicial impacts are unsupported by evidence and do not explain how the alleged "diversion" of resources differs materially from Plaintiff's customary voter-outreach and education efforts under the unchallenged portions of the voter photo ID law. Plaintiff leaves the Court to guess at, for example, what percentage of its employees' or volunteers' time will be dedicated to tasks attributable to the challenged requirements in Wis. Stat. § 5.02(6m)(f). Without even a ball park way to quantify these specific

impacts, the Court cannot determine the alleged prejudice that would be caused by a stay.

Second, aside from *Grice*, the cases Plaintiff relies upon in support of its prejudice claim do not counsel in favor of denying a stay, either. Plaintiff relies upon, for example, *Mills v. Green*, 159 U.S. 651 (1895), for the idea that the supposed "burden on young voters' right to vote constitutes a 'grievous and irreparable wrong' and counsels against granting a stay." (Dkt. 18:10 (quoting *Mills*, 159 U.S. at 652).)

Plaintiff quotes only the bill in equity described in *Mills*, which does not recite the Supreme Court's holding. *Mills* involved the right to vote and voter registration, but it was dismissed on appeal as moot and had nothing to do with young voters' rights or a district court's discretion to enter a stay in light of alleged prejudice. *Mills*, 159 U.S. at 653–56.

The argument that "the prejudice in this case is heightened because Plaintiff seeks injunctive relief" is also unpersuasive. (Dkt. 18:11.) On the contrary, the injunction Plaintiff seeks would prevent state law from being enforced, which, in itself, has been recognized as an irreparable injury. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

Finally, setting aside its own alleged prejudice, Plaintiff also argues that "many students that Plaintiff serves will be prevented from voting in the elections that occur, likely including the upcoming 2020 presidential election, during the duration of the stay." (Dkt. 18:10.) Plaintiff claims that Wisconsin's student voting rate "plummeted" in 2016 for the general election and that "Wisconsin experienced the second-largest decline in student voter turnout in the country." (Dkt. 18:3.)

But this, too, is unsupported by evidence. And there is no plaintiff in this case who is an individual voter, either. Thus, even if Plaintiff had cited any authority to support that non-parties' interests are appropriate in the prejudice calculus, Plaintiff has done nothing to tie these allegations of prejudice to the challenged requirements in Wis. Stat. § 5.02(6m)(f).

## III. A stay will streamline and simplify the issues, reducing the litigation burden on the parties and the Court.

The third and fourth *Grice* factors are "(3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." 691 F. Supp. 2d at 920. The parties disagree about *One Wisconsin Institute*'s relevance, so their arguments about these factors are diametrically opposed. Plaintiff argues that "[a] stay will not meaningfully streamline or simplify this case, nor will it reduce the burden of litigation on the parties and the Court." (Dkt. 18:11.) *One*

*Wisconsin Institute* will allegedly "have no bearing on the only issue before the Court in this case." (Dkt. 18:11.)

*One Wisconsin Institute* is relevant and will be precedential, for the reasons explained in Argument section I.B., above. It is difficult to imagine how the *One Wisconsin Institute* decision will not give important guidance applicable to Plaintiff's claim here. A limited stay will simplify any issues to be resolved and prevent inefficient and potentially burdensome litigation in the meantime. It would not make sense to have to redo much of the litigation to consider the precedent *One Wisconsin Institute* will establish.

## IV. Plaintiff concedes its case is at an early stage, and the fact that Plaintiff intends to move for a preliminary injunction does not impact Defendants' stay request.

Plaintiff concedes *Grice* factor one, "[t]hat this case is in its early stages." (Dkt. 18:12); *see Grice*, 691 F. Supp. 2d at 920. Nonetheless, Plaintiff asserts this factor is "of no consequence" because "the requested stay will severely prejudice Plaintiff, who will likely lose any possibility of relief in time for the next election." (Dkt. 18:12.) Plaintiff also states its intent to move the Court for a preliminary injunction "in short order to expedite a decision on the issues in this case and to ensure relief in advance of the 2020 presidential election." (Dkt. 18:12 n.1.)

This case is at a very early stage; now is the appropriate time to stay the case before a preliminary pretrial conference occurs and litigation or

preliminary-injunction proceedings begin. Regarding a preliminary injunction, no such motion has been filed, and Plaintiff cites no authority suggesting that an anticipated preliminary injunction motion counsels against a stay. Furthermore, as noted above, the *Purcell* principle counsels against a preliminary injunction order immediately before an election. Thus, *Grice* factor one supports a stay, as this case has just started.

## V. A stay here is as appropriate as it was in *Common Cause*.

Plaintiff's final argument is that "*Common Cause* is not instructive." (Dkt. 18:13.) On the contrary, a stay here is as appropriate as it was in *Common Cause*. *One Wisconsin Institute* will inevitably address the constitutional claims raised in both cases.

Defendants agree with Plaintiff that *Common Cause*, like *One Wisconsin Institute*, involved an "undue burden" Fourteenth Amendment claim advanced under the *Anderson-Burdick* framework. (Dkt. 18:13.) Defendants disagree, though, with Plaintiff's argument that "analysis of the Twenty-Sixth Amendment in *One Wisconsin* was limited and did not involve the Student Voter ID Restrictions challenged here." (Dkt. 18:13.) That premise is incorrect, as explained in Argument section I.B., above.

Lastly, Plaintiff argues that the stay order in *Common Cause* "does not provide analysis of the most significant question at issue here: whether there

is a pressing need for a stay and how that need balances against prejudice to the non-moving party." (Dkt. 18:13.)

While the *Common Cause* stay order is necessarily tailored to the case's specific facts and circumstances, the legal factors in play are the same (*i.e.*, the *Grice* factors). The court in *Common Cause* was informed by exactly the same principles this Court is now, and the non-moving parties there also strongly opposed the stay request. *See Common Cause v. Thomsen*, No. 19-CV-323 (W.D. Wis.), at Dkt. 22. This Court should consider the specific facts and circumstances here and conclude, like in *Common Cause*, that a stay is appropriate.

## CONCLUSION

The Court should grant Defendants' stay motion and enter an order temporarily staying this case pending the outcome in *One Wisconsin Institute*.

Dated this 8th day of January, 2020.

Respectfully submitted,

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