No. 16-3083, 16-3091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants, Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:15-cv-324
The Honorable Judge James D. Peterson, Presiding

MOTION OF COMMON CAUSE, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLEES-CROSS-APPELLANTS AND AFFIRMANCE IN PART AND REVERSAL IN PART OF THE DISTRICT COURT'S ORDER

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FED. R. APP. P. AND CIRCUIT RULE 26.1
DISCLOSURE STATEMENT

The undersigned, counsel of record for *amicus* Common Cause, hereby furnish the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

1) The full name of every party or amicus the attorney represents[1]:

   Common Cause

2) If such party or amicus is a corporation:

   a. Its parent corporation, if any:

      None. Common Cause has no parent corporations.

   b. A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

      None. No publicly held company has any ownership interest in Common Cause.

3) The names of all law firms whose partners or associates have appeared for the party or amicus in the case or are expected to appear for the party in this Court:

[1] Disclosure forms for counsel for amicus are included in the proposed brief.

The Institute for Public Representation, Georgetown University Law Center.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), Common Cause respectively moves this Court for leave to file the accompanying Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees, Cross-Appellants. Although Plaintiffs' counsel provided consent to the filing of this *amicus* brief, the State took no position. Thus, in order to ensure compliance with Fed. R. of App. P. 29(b), Common Cause seeks leave of this Court. Common Cause urges the affirmance in part and reversal in part of the order of the United States District Court for the Western District of Wisconsin based on the District Court's failure to apply the Twenty Sixth Amendment to Wisconsin laws primarily if not exclusively limiting youth's voting rights.

Common Cause advocates for reforms that will provide citizens with the tools they need to participate in the political process and hold their elected leaders accountable to the public interest. Founded in 1970, Common Cause is a nonprofit, nonpartisan, national citizens' organization. It is one of the largest nonprofit organizations working for accountability and reform in America's political and governmental institutions, with more than 625,000 members and supporters

nationally and 35 state chapters across the country. Moreover, Common Cause members include young people and students throughout the country, including in Wisconsin.

This case is of special interest to Common Cause, as it was involved in some of the earliest advocacy efforts surrounding the push for youth enfranchisement with respect to the 1970 Amendments to the Voting Rights Act and the 1971 ratification of the Twenty-Sixth Amendment. Moreover, Common Cause advocates for accountable government by empowering voters – including its young voter members and others – to make their voices heard by every level of government.

As part of its core mission, Common Cause works at both the state and federal levels to defend the bedrock freedom of our democracy: full and free access to the franchise for every eligible voter. These efforts include engagement with young Common Cause members on and off campuses across the country, and in Wisconsin, in voter registration drives, voter education programs, and advocacy efforts to ensure a 21st Century democracy in which every voice is heard. Indeed, Common Cause has worked to educate student voters on campuses across Wisconsin about the various laws at issue in this case and court rulings

that have affected implementation of the law, and to assist individual student voters as they attempt to register to vote and obtain an eligible voter ID in time for elections.

Further, Common Cause is a leading partner of the national "Election Protection" coalition, which provides nonpartisan information to voters across the country and in Wisconsin about the election process.

Common Cause's *amicus* brief will help inform the Court's resolution of this appeal for two primary reasons. First, the proposed *amicus* brief provides a "unique perspective" that "can assist the court of appeals beyond what the parties are able to do," *Nat'l Org. for Women v. Scheindler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F. 3d 1062, 1063 (7th Cir. 1997)); it provides the perspective of an organization consisting of young members who work to advance election reform and, as such, addresses the broad considerations that should inform a decision as to whether elimination of strong reforms amount to the infringement of the right to vote for young eligible voters.

Then-circuit judge Samuel Alito cogently explained the reasons why *amicus* briefs providing a unique perspective can benefit the appellate process:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party in the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. App. Prac. & Process 279 (1999). . . .
>
> The criterion of desirability set out in Rule 29(b)(2) is open-minded, but a broad reading is prudent. . . . If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.
>
> A restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable. A restrictive policy may also convey an unfortunate message about the openness of the court.

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F. 3d 128, 132-33 (3d Cir. 2002) (Alito, J.), *aff'd*, 299 F.3d 221 (3d Cir. 2002). The considerations identified by Justice Alito strongly support admission of Common Cause's brief.

Second, Common Causes' proposed brief provides a substantially more detailed discussion of the history of the Twenty-Sixth Amendment, its construction and application by state and federal courts, and context regarding current threats to the Amendment nationally and in Wisconsin. In particular, Common Cause's *amicus* brief provides a detailed exposition of the history, both judicial and legislative, of the 1970 Amendments to the Voting Rights Act and the Twenty-Sixth Amendment, and examines the unique opportunity presented to this Court to protect the right to vote under the Twenty-Sixth Amendment, given nationwide efforts to curb young people's access to the franchise. Thus, Common Cause's proposed *amicus* brief focuses principally on matters "that are not to be found in the parties' briefs." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). Common Cause's proposed brief avoids duplication, instead providing an in-depth analysis of legal principles

"the parties for one reason or another have not [fully] brought to [this Court's] attention," *Ryan*, 125 F.3d at 1064, or "have not adequately developed," *Sierra Club, Inc. v. Envtl. Prot. Agency*, 358 F.3d 516, 518 (7th Cir. 2004). The more extensive discussion of the history and proper application of the Twenty-Sixth Amendment in the proposed brief, therefore, will assist the Court by providing it with "information . . . beyond what the parties [have provided]." *Nat'l Org. for Women*, 223 F.3d at 617.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief as *amicus curiae* should be granted. If such relief is granted, Common Cause requests that the accompanying brief be considered filed as of the date of this Motion's filing.

Dated: October 26, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2016, I caused the foregoing Motion of Common Cause for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees and Affirmance and Reversal to be served on the following via the Electronic Case Filing (ECF) service:

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BRIEF OF AMICUS CURIAE COMMON CAUSE IN SUPPORT OF PLAINTIFFS-APPELLEES SUPPORTING AFFIRMANCE AND REVERSAL IN PART

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae Common Cause hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public. *Amicus* has not appeared earlier in this case; in this brief, it is represented only by Aderson B. Francois and Yael Bromberg of the Institute for Public Representation of Georgetown University Law Center.

Plaintiff-Appellees have consented to the filing of this *amicus* brief, while Defendants-Appellants take no position.

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INTEREST OF AMICUS CURIAE

Common Cause advocates for reforms that will provide citizens with the tools they need to participate in the political process and hold their elected leaders accountable to the public interest. Founded in 1970, Common Cause is a nonprofit, nonpartisan, national citizens' organization. It is one of the largest nonprofit organizations working for accountability and reform in America's political and governmental institutions, with more than 625,000 members and supporters nationally and 35 state chapters across the country. Moreover, our members include young people and students throughout the country, including in Wisconsin.

This case is of special interest to Common Cause, as it was involved in some of the earliest advocacy efforts surrounding the push for youth enfranchisement with respect to the 1970 Amendments to the Voting Rights Act and the 1971 ratification of the Twenty-Sixth Amendment. Moreover, Common Cause advocates for accountable government by empowering voters – including our young voter members and others – to make their voices heard by every level of government.

As part of its core mission, Common Cause works at both the state and federal levels to defend the bedrock freedom of our democracy: full and free access to the franchise for every eligible voter. These efforts include engagement with young Common Cause members on and off campuses across the country, and in Wisconsin, in voter registration drives, voter education programs, and advocacy efforts to ensure a 21st Century democracy in which every voice is heard. Indeed, Common Cause has worked to educate student voters on campuses across Wisconsin about the various laws at issue in this case and court rulings that have affected implementation of the law, and to assist individual student voters as they attempt to register to vote and obtain an eligible voter ID in time for elections.

Further, Common Cause is a leading partner organization of the national "Election Protection" coalition, which provides nonpartisan information to voters across the country and in Wisconsin about the election process.

Common Cause submits this brief in support of Plaintiff-Appellees in light of the significance of this matter to its members and to the furtherance of its goals.[1]

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that the Institute for Public Representation of Georgetown University Law Center paid the expenses involved in filing this brief. Plaintiff-Appellees have consented to the filing of this *amicus* brief, while Defendants-Appellants take no position.

SUMMARY OF ARGUMENT

This year marks the forty-fifth anniversary of the Twenty-Sixth Amendment, which provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States on account of age." U.S. Const. amend. XXVI. The Twenty-Sixth Amendment was a natural extension of the arc of American history toward progressive inclusion in our democratic politic.[2] It was widely supported by bipartisan super-majorities of the Congress, and the quickest amendment to be ratified in U.S. history.

While the United States Supreme Court and federal and state courts across the country vigorously rejected infringements of the Twenty-Sixth Amendment in the decade immediately following its ratification, the Amendment's invocation has largely lain dormant since. However, the surge of voter restriction laws that swept the country after the 2010 election, and with renewed vigor following the *Shelby County v. Holder* decision, has taken aim at keeping large

[2] The first clause of the Amendment "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26, at 2 (1971).

groups of voters from the polls, including young people, causing a resurgence in voting rights litigation. This Court is thus presented with a unique opportunity to protect the right to vote under the Twenty-Sixth Amendment, given nationwide efforts to curb young people's access to the franchise.

The sweep of laws enacted by the Wisconsin legislature during the narrow period of time between 2011 and 2015 has targeted student voters in particular. Fourteen provisions are at issue in this case, including but not limited to the uniform cancellation of high school registration programs across the state; imposition of very strict limitations on student identification to vote; imposition of citizenship certification for student dorm lists to register to vote; preemption of local ordinances popular in college towns that encourage voter registration amid the high tenant turnover; and restrictions on the absentee voting period and absentee voting locations.

The district court properly overturned some cuts to strong elections reform on First and Fourteenth Amendment grounds. It upheld others that were specifically aimed at students pursuant to a First and Fourteenth Amendment analysis, but skipped a Twenty-Sixth

Amendment analysis. By failing to consider the legislature's aim – to keep young people from the ballot box – the district court rendered the Twenty-Sixth Amendment obsolete, notwithstanding its clear purpose.

When examined together, these fourteen provisions cannot be read as anything other than an intentional targeting of youth voters in violation of the Twenty-Sixth Amendment. The legislative history and the jurisprudence of the Amendment demand that these claims be analyzed under it, in addition to the First, Fourteenth, and Fifteenth Amendments.

ARGUMENT

I. The Twenty-Sixth Amendment brought youth into the political system, consistent with the arc of American history toward democratic inclusion.

By 1970, 19,000 soldiers under the age of 21 had been killed in action in Vietnam. 116 Cong. Rec. S6650 (daily ed. Mar. 10, 1970) (statement of Sen. Kennedy). Nearly 30 percent of the United States fighting force was old enough to die for their country, but not old enough to vote for the politicians who sent them overseas. *Id*. Indeed, nearly half of the soldiers killed in Vietnam by March 1970 were between the ages of 18 and 21. *Id*. Meanwhile, "thousands of teenagers

[were] marching on the Nation's Capital in protest of the Vietnam war." 116 Cong. Rec. HR20251 (daily ed. Jun. 17, 1970) (statement of Rep. Griffin). The campaign slogan "Old Enough to Fight, Old Enough to Vote," which had been popular during the World War II era campaign for youth suffrage, saw a resurgence. Jenny Diamond Cheng, *How Eighteen-Year-Olds Got the Vote* 10, 42-43 (Aug. 4, 2016), *available at* http://ssrn.com/abstract=2818730.

The Civil Rights Movement was ongoing, and Congress recognized that "faith and confidence in our system of government . . . seems to have eroded among many of our young people . . . Much of this loss of faith is brought about by the evidence they see on all sides of how we are treating our own people in communities, the black citizens of our nation." 116 Cong. Rec. S6360 (daily ed. Mar. 6, 1970) (statement of Sen. Hatfield).

Advocates additionally argued that youth were qualified, noting that improvements in American public education and technology such as radios and televisions had made the current generation of 18 – 21-year-olds the most politically well-informed generation in history. Diamond Cheng, *supra* at 24 – 30. Whereas in 1900, only six percent of

18-year-olds had graduated high school, by 1970, 81 percent of 18-year olds held high school degrees. *Oregon v. Mitchell*, 400 U.S. 112, 279 (1970) (Brennan, J., concurring in part and dissenting in part). A growing portion of the adult workforce was between the ages of 18 and 21. *Id*. Moreover, 18-year olds had been permitted to vote for decades in Georgia and Kentucky, and elected officials from those states testified, in the words of Senator Talmadge, that, "young people . . . have made sophisticated decisions and have assumed the mature responsibilities of voting. Their performance has exceeded the greatest hopes and expectations." *Id*. at 280 (quoting 116 Cong. Rec. 6929 – 30 (daily ed. Mar. 11, 1970) (statement of Sen. Talmadge)).

Young people, thanks both to modern technology and to America's impressive public education system, not only understood how the political system worked but were also knowledgeable about the issues at stake in the upcoming elections. In fact, some advocates of youth voting went so far as to suggest that 18 – 25-year olds were "possibly even more qualified to vote than members of other age groups." Diamond Cheng, *supra* at 38 (relying on legislative history).

Against this backdrop, Congress passed the Voting Rights Act Amendments of 1970, which, among other provisions, lowered the voting age to 18. The new voting age was seen as a means of addressing "youths' alienation and expressing [Congress'] hope that youths' idealism could be channeled within the political system itself," *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972)[3], as well as a means to bring the apathetic and disengaged youth into the political system. Diamond Cheng, *supra* at 38.

The arc of American history had been moving toward more inclusive suffrage, and, to many advocates, youth enfranchisement was the next logical step. As Democratic Senator Birch Bayh articulated during a 1968 Senate Judiciary Committee Subcommittee on Constitutional Amendments hearing on lowering the voting age,

> The religious and property requirements for voting were removed in colonial America. Racial barriers to voting have been coming down for a century. Women were given the right to vote in 1920. [Lowering the voting age] seems to me to be in keeping with the tradition of expansion of the franchise.

[3] Craig Barnes, who founded the first state chapter of Common Cause and served on the National Governing Board until his recent passing, is the second-named plaintiff in *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972).

Hearing on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78: Relating to Lowering the Voting Age to 18 Before the S. Subcomm. on Const. Amend. of the S. Comm. on the Judiciary, 90th Cong. 4 (1968) (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amend. of the S. Comm. on the Judiciary).

Republican Senator Jacob Javits expressed a similar sentiment in the same hearing:

> [I]t has always been difficult to enlarge the voting franchise in this country. The colonists who wanted to remove ownership of property as a requirement for voting faced similar arguments about a deluge of irresponsible people entering the voting roles. [sic] So did those who fought to grant the vote to women, and those who joined in the struggle to assure the vote to [Blacks]. But in each case the eventual expansion of the electorate brought new ideas and new vigor to our political life.

Hearing on S.J. Res. 8, S.J. Res. 14, and S.J. Res. 78: Relating to Lowering the Voting Age to 18 Before the S. Subcomm. on Const. Amend. of the S. Comm. on the Judiciary, 90th Cong. 14 (1968) (statement of Sen. Jacob Javits, U.S. Senator).

When the Supreme Court invalidated the new voting age as applied to state elections, *Oregon v. Mitchell*, 400 U.S. 112 (1970), Congress quickly referred a constitutional amendment to the states to

reduce the voting age in time for the 1972 presidential election. The proposal that would become the Twenty-Sixth Amendment passed with widespread, bipartisan support. Both Democratic Senator Ted Kennedy and Republican Senator Barry Goldwater testified in support of the amendment, which passed the Senate 94 – 0 and the House 401 – 19. 117 Cong. Rec. S5830 (daily ed. Mar. 10, 1971); 117 Cong. Rec. HR7569 – 70 (daily ed. Mar. 23, 1971). The Twenty-Sixth Amendment was the most rapidly ratified amendment in U.S. history, achieving ratification in less than three months.

Proponents of the amendment also expected that young voters would energize the American political system. As President Nixon articulated when he addressed the soon-to-be enfranchised 18 – 21-year olds at the Ceremony Marking the Certification of the Twenty-Sixth Amendment:

> [T]he reason I believe that your generation, the 11 million new voters, will do so much for America at home, is that you will infuse into this country some idealism, some courage, some stamina, some high moral purpose that this Nation always needs, because a country throughout history, we find, goes through ebbs and flows of idealism. Time after time the country needs an infusion of new spirit, an infusion of youth. You bring that.

Richard Nixon, U.S. President, Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution (Jul. 5, 1971).

In sum, bipartisan super-majorities of Congress passed and the States ratified the Twenty-Sixth Amendment to bridge the conscription-enfranchisement gap and ensure that the young soldiers being sent to Vietnam had a voice in their nation's policies; to provide a constructive channel for frustrations of un-emancipated youth; to recognize the expanding political cognizance of youth as a result of improvements in public education and technology; and to ward off the disenfranchisement that came with forcing politically-informed young people to wait until they turned 21 to vote.

II. Recent efforts to curb youth access to the ballot have breached constitutionally-protected rights that are just as critical today as they were in the 1970s.

Just as the Vietnam War disproportionately affected young people in the 1970s, pressing contemporary issues disproportionally affect today's youth. As in the 1970s, youth today are at the forefront of democracy reform efforts addressing a range of issues, from voting and

political rights to civil rights, economic inequality, and the environment.[4]

Youth are also taking advantage of today's modern technologies,[5] just as 1970s youth increasingly plugged into radio and television to become politically informed. *See supra* pp. 7 – 8. Like their 1970s forbearers, today's youth have greater access to technology and to information about today's pressing issues than any generation of young people before them. *Id.*

And just as President Nixon expressed enthusiasm about the new spirit the youth of the 1970s would bring to the electoral system, today's youth bring a new spirit and open-mindedness to the ballot box. As

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[4] *See e.g.*, Sasha Costanza-Chock, *Youth and Social Movements: Key Lessons for Allies*, 13 Berman Ctr for Internet & Soc'y (2012); Ruth Milkman, *Millennial Movements*, Dissent 55, 55 (2014); Alexandra Olteanu, Ingmar Weber & Daniel Gatica-Perez, *Characterizing the Demographics Behind the #BlackLivesMatter Movement*, Association for the Advancement of Artificial Intelligence 310, 312 – 13 (2016); Ruth Milkman, *Understanding "Occupy,"* 11 Am. Soc. Ass'n 12, 13 – 14 (2012); Jacquelien Van Stekelenburg, *The Occupy Movement: Product of this time*, 55 Soc'y for Int'l Dev. 224, 225 (2012); Hinda Seif, *"Unapologetic and unafraid": Immigrant youth come out from the shadows*, 11 New Directions for Child & Adolescent Dev. 59, 60 (2011). *See also* Yael Bromberg, Allegra Chapman & Dale Eisman, *Tuning In & Turning Out: Millennials are active but not voting; what's stopping them & how can they make their voices count?* 26-29 Common Cause (2016), *available at* www.youthvoting.net.

[5] Ninety-six percent of 18 – 29-year olds use the Internet as compared with 81 percent of 50 – 64-year olds and just 58 percent of those 65 and older. Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, Pew Research Center, Jun. 26, 2015, http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/.

youth voters gain political parity with baby boomers – now making up roughly the same percentage of the voting age population – half of all Millennials (age 18 – 33) identify as political independents. Yael Bromberg, Allegra Chapman & Dale Eisman, *Tuning In & Turning Out: Millennials are active but not voting; what's stopping them & how can they make their voices count?* 19 Common Cause (2016), *available at* www.youthvoting.net.[6]

Against this backdrop, as in the 1970s, unrestricted access to the ballot continues to be both critical and a constitutionally-protected fundamental right for young voters.

Instead, in Wisconsin, and across the nation, states have enacted laws that abridge young people's right to vote in violation of the Twenty-Sixth Amendment. For example, of the fifteen states with strict voter identification requirements, seven do not accept student identification cards for voting. *Id.* at 14. Eleven of the strict voter identification states only accept driver's licenses issued within the state for voter identification, thereby impacting out-of-state students. *Id.* at

[6] Young people's political independence is not new. President Eisenhower earned 49% of the youth vote (those under 30) in 1952 and 57% of the youth vote in 1956. In fact, he received more support from those under 30 in 1956 than he did from those ages 30 – 49. Diamond Cheng, *supra* at 19.

15. Six of the strict voter identification states accept neither student identification cards nor out-of-state driver's licenses for voting. *Id.*

Given that many students do not drive at school and may have trouble accessing a DMV, especially in the narrow window afforded between moving onto campus and meeting advanced registration deadlines amid other new responsibilities, *id.* at 6, this hurdle may be insurmountable. Fortunately, courts are starting to recognize that requirements such as these unduly burden suffrage.[7]

Such restrictions are not limited to photo identification requirements. For example, North Carolina eliminated a voter preregistration program for 16 and 17-year olds that over 160,000 young people had used to register to vote between 2010 and 2013. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 217-18 (4th Cir. 2016). North Carolina also eliminated same-day registration and early voting, provisions that apply to all voters, but that disproportionately affect youth. Indeed, more than half of all young voters cast their ballots early in the 2008 and 2012 elections, and 20.58

[7] For example, in a *per curiam* opinion, the New Hampshire Supreme Court recently struck down an in-state driver's license requirement for New Hampshire student-voters as a violation of their fundamental right to vote. *Guare v. New Hampshire*, 117 A.3d 731 (N.H. 2015).

percent of young people used same-day registration. Expert Report of Peter Levine, Seth Avakian, and Kei Kawashima-Ginsberg Submitted on Behalf of the Duke Intervenor-Plaintiffs, *League of Women Voters of North Carolina v. State of North Carolina*, (No. 1:13-CV-660), at *5, http://moritzlaw.osu.edu/electionlaw/litigation/documents/League15511.pdf.

States have imposed other voting restrictions that apply to the general public, but that disproportionally affect youth voters. For example, in October 2015, the Kansas Secretary of State's office directed county officials to purge more than 36,000 names from the voter registration list, targeting those who had not produced proof of citizenship status within 90 days of registering to vote. More than half of voters culled were below the age of 35; 20 percent were between the ages of 18 and 20; and 90 percent were new voters. Julie Bosman, *Kansas Voter ID Law Sets Off a New Battle Over Registration*, NY Times, Oct. 15, 2015, http://www.nytimes.com/2015/10/16/us/politics/kansas-voter-id-law-sets-off-a-new-battle-over-registration.html.

Similar efforts to limit youth access to the ballot are at issue in the present case through a string of measures, including but not limited to: restricting the early voting period and early voting centers; imposing citizenship tests on student voters that are not imposed on other eligible voters; eliminating voter registration opportunities at high schools across the state; imposing strict limitations on the use of student ID cards for voter identification; and preempting popular local ordinances in college towns that require landlords to provide voter registration forms to new tenants. Most if not all of these reforms were exclusively used by young voters; the legislature's cuts limit the right to vote of youth alone.

While courts are beginning to strike down laws that harm eligible voters' rights on First, Fourteenth Amendment, and Fifteenth Amendment grounds, in addition to finding Section 2 violations of the Voting Rights Act for laws limiting people of color from the franchise, they have failed to apply the Twenty-Sixth Amendment to laws primarily if not exclusively limiting youth's voting rights. This Court is thus presented with a unique opportunity to uphold that Amendment's clear protections. Indeed, the legislative history and its jurisprudence

secure firm footing to address the Twenty-Sixth Amendment claims head-on in Wisconsin.

III. The statutory cuts to elections reforms used by Wisconsin youth, and the imposition of ID requirements, harms those that the Twenty-Sixth Amendment was intended to protect.

The United States Supreme Court has ruled once squarely on the Twenty-Sixth Amendment.[8] In *Symm v. United States*, 439 U.S. 1105 (1979), the U.S. Supreme Court summarily affirmed a three-judge district court's invalidation of a Waller County, Texas questionnaire that was part of a more pervasive pattern limiting student voter registration from college campus addresses, and that treated young registrants differently than other voters. *Id.*, summarily aff'g *U.S. v. Texas*, 445 F. Supp. 1245 (S.D.T.X. 1978). In particular, the *U.S. v. Texas* court examined the legislative history of the Twenty-Sixth Amendment, noting that:

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[8] The Supreme Court has also addressed youth voting in *Dunn v. Blumstein*, when the Court upheld, under the Fourteenth Amendment, the constitutional right of young voters to be free from a presumption of non-residency, 405 U.S. 330 (1972), and in *Cheyenne River Sioux Tribe v. Andrus*, when the Court denied a petition for certiorari, letting stand an Eighth Circuit Court of Appeals decision prohibiting a Tribe, pursuant to the Indian Reorganization Act, 25 USC 461 *et seq.*, from establishing a voting age of 21 in violation of the Twenty-Sixth Amendment. 566 F.2d 1085 (8th Cir. 1977), *cert denied*, 439 U.S. 820 (1978).

> [F]orcing young voters to undertake special burdens obtaining absentee ballots, or travelling to one centralized location in each city, for example in order to exercise their right to vote might serve to dissuade them from participating in the election. This result and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young.

445 F. Supp. At 1254 (quoting Senate Report No. 26, 92nd Cong., 1st Sess. (1971).

In the decade following ratification of the Twenty-Sixth Amendment, federal and state courts across the country repeatedly protected youth access to the ballot. *See e.g. Walgren v. Board of Selectmen of Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975) (determining that the holding of a special contest during winter break is not unconstitutional under the Twenty-Sixth Amendment based on the particular underlying facts where the election board made a good faith attempt to reschedule the special contest and the novel issue was raised at the last minute, but looking askance at local elections held over students' break, cautioning "we would be disturbed if . . . a town continued to insist on elections during vacations or recess, secure in the conviction that returning to town and absentee voting would be

considered insignificant burdens."); *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972) (striking down, under the Fourteenth Amendment, a state law that disqualified voters, primarily students, with the firm intent to leave their towns at a fixed time in the future); *Bright v. Baesler*, 336 F. Supp. 527 (E.D. Ky. 1971) (invalidating, under the Fourteenth Amendment, more stringent domicile requirements for students than applied to other voter registration applicants); *Ownby v. Dies*, 337 F. Supp. 38 (E.D. Tex.. 1971) (invalidating, under the Twenty-Sixth and Fourteenth Amendments, a state statute providing different criteria for determining voting residency for voters ages 18 – 21 than for voters over the age of 21); *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972) (invalidating, under the Twenty-Sixth Amendment, age-based restrictions on the right to circulate and sign referenda petitions); *Worden v. Mercer County Bd. of Elections*, 294 A.2d 233 (N.J. 1972) (invalidating, under the Twenty-Sixth Amendment, county policy of refusing voter registration to students who live on campus); *Jolicoeur v. Mihaly*, 488 P.2d 1 (Cal. 1971) (invalidating, under the Twenty-Sixth Amendment, a state policy that allowed only unmarried minors to register to vote from their parents' addresses

rather than their college addresses); *Wilkins v. Bentley*, 189 N.W.2d 423, 434 (Mich. 1971) (holding that a state residency requirement was unconstitutional under the Twenty-Sixth Amendment as applied to students and that "students must be treated the same as all other registrants. No special questions, forms, identification, etc., may be required of students.").

The legislative history of the Twenty-Sixth Amendment "clearly evidences the purpose not only of extending the voting right to young voters but also of encouraging their participation by the elimination of all unnecessary burdens and barriers." *Worden v. Mercer County Bd. of Elections*, 294 A.2d 233, 237 (N.J. 1972) (invalidating county policy of refusing voter registration to students who live on campus). In *Worden*, the New Jersey Supreme Court found it to be "significant that the twenty-sixth amendment prohibited not only denial but also abridgment of voting rights granted to young voters, many of whom . . . would be resident in their college communities at election time." *Id.*

The election law provisions enacted in Wisconsin between 2011 and 2015 similarly uniquely target students by imposing special questions, forms, identification, and other obstacles to the franchise.

However, the district court expressly declined to review the constitutionality of essentially all fourteen provisions challenged in its Twenty-Sixth Amendment analysis, reserving just nine short paragraphs of the 119 page Opinion and Order to a non-delineated summary analysis. The district court's failure to provide adequate consideration to this clear targeting of the youth vote comes at the expense of the very population that the Twenty-Sixth Amendment was meant to protect.

As the court below acknowledged through its brief examination of Twenty-Sixth Amendment jurisprudence:

> [I]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment.

One Wisconsin Institute v. Thomsen, 15-cv-324-jdp, 2016 WL 4059222, at *22 (W.D. Wis. July 29, 2016) (quoting *Walgren v. Bd. of Selectmen*, 519 F.2d 1364, 1367 (1st Cir. 1975)).

Nonetheless, while zero violations of the Twenty-Sixth Amendment were found of the fourteen provisions at issue, several were

deemed to violate the First and Fourteenth Amendments – and specifically as to youth voters.

These provisions include the restriction of a single voting location for early voting and reductions in the in-person absentee voting period, provisions which the court overruled as "problematic for a person whose job or class schedule is less flexible." *Id.* at *27. Similarly, the court overruled the elimination of the option to receive absentee ballots by fax or email, finding that this provision impermissibly burdens "students or researchers who are abroad in remote areas." *Id.* at *40. The court overturned changes to the durational residency requirement out of concern for voters who are transient or lack access to transportation, *id.* at *35, a description it similarly afforded to Wisconsin students, *id.* at *22.

The court further held that the citizenship certification for student dorm lists violated the First and Fourteenth Amendments because the requirement removes a method through which students can register to vote in Wisconsin. *Id.* at *31 – 32. Similarly, the court overturned the provision banning expired student identification cards pursuant to a disparate treatment analysis, finding the requirements to be

"redundant" and a prevention of "otherwise qualified voters from voting simply because they have not renewed their IDs since beginning school." *Id.* at *54.

The surgical aim of these restrictions at the student vote should not be overlooked. The citizenship certification requirement on dorm lists renders Universities unable to assist us, as Common Cause member students, in providing proof of residency when registering to vote due to the Federal Educational Rights and Privacy Act, 20 USC 1232g. And while Wisconsin may technically appear to accept student ID cards for voting, in practice the requirement imposes additional obstacles. Of the twenty-six colleges in the University of Wisconsin system, only 3 of the 13 four-year schools, and none of the two-year schools, offer a standard student ID that complies with the law. The remainder of the public colleges offer a compliant student ID, but only if we, as Common Cause students, additionally proactively seek it for the purpose of voting. Of the 23 private colleges in Wisconsin, only seven issue compliant IDs by default.[9]

[9] Common Cause-Wisconsin, University of Wisconsin 4-Year Schools – Student ID as a Voter Photo ID (Oct. 2016), https://commoncausewisconsin.files.wordpress.com/2016/10/univ-of-wi-4-year-colleges_student-id-voter-id-compliance_as-of-10-1-2016rev3.pdf; Common Cause-

While the court correctly struck down these requirements, its failure to find violations under the Twenty-Sixth Amendment is erroneous. The court largely avoided addressing these multitude of provisions pursuant to the Twenty-Sixth Amendment, and failed to consider how these provisions – enacted in concert during a narrow window in Wisconsin legislative and political history – deduct a finding of intentional discrimination based on age.

Moreover, by overlooking the provisions under a Twenty-Sixth Amendment inquiry while invalidating them under other constitutional protections, the court effectively did what it itself acknowledged would be "difficult to believe" – render the Twenty-Sixth Amendment less protective than the Fourteenth and First Amendments, particularly where the provision is "*imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of the amendment*." *See supra* pp. 20 – 21 (quoting *Walgren v. Bd. of Selectmen*, 519 F.2d 1364, 1367 (1st Cir. 1975)). (emphasis added).

Wisconsin, University of Wisconsin 2-Year Schools – Student ID as a Voter ID (Mar. 2016), https://commoncausewisconsin.files.wordpress.com/2016/03/univ-of-wi-2-year-colleges_student-id-voter-id-compliance_as-of-3-21-2016rev2.pdf; Common Cause-Wisconsin, Wisconsin Private Universities and Colleges – Student ID as Voter ID (Mar. 2016), https://commoncausewisconsin.files.wordpress.com/2016/03/wisconsin-private-univ-colleges_student-id-voter-id-compliance_as-of-3-21-2016rev2.pdf.

While the court invalidated the above provisions pursuant to the First and Fourteenth Amendments, it ultimately upheld eight provisions that escaped review under the Twenty-Sixth Amendment. As such, the doctrine of constitutional avoidance cannot explain why these claims were not addressed pursuant to the amendment under which they were challenged. Among these provisions, several clearly take aim at youth voters. These measures include the elimination of statewide special registration deputies ("SRDs") at public high schools and most other high schools across the state, and the elimination of the acceptance of applications by enrolled students and staff at high schools statewide. Similarly, the court upheld the preemption of local ordinances popular in college towns like Madison, home to Wisconsin's largest post-secondary institution with over 40,000 students, which required landlords to distribute voter registration forms to new tenants. See University of Wisconsin, *UW Facts and Figures*, (Oct. 18, 2016) http://www.wisc.edu/about/facts/.

What voter population would these multitude of tactics specifically target if not youth voters? Indeed, urging her colleagues to vote for omnibus Act 23 at the final meeting before its passage, the Chair of the

Senate Committee on Transportation and Elections, Senator Mary Lazich said, "Hey, we've got to think about what this could mean for the neighborhoods around Milwaukee and the college campuses across the state." *One Wisconsin Institute,* 2016 WL 2757454, at *23; Patrick Marley, *Ex-GOP staffer says senators were 'giddy' over voter ID law*, Milwaukee J. Sentinel, May 16, 2016, http://archive.jsonline.com/news/statepolitics/challenge-to-wisconsin-voter-id-law-begins-in-federal-court-b99726100z1-379657961.html.

The provisions enacted by the Wisconsin legislature in the narrow period of time between 2011 and 2015 paint a picture, based on the totality of the circumstances, that these tactics were directed at a single, simple strategy with regard to youth political participation: voter suppression.

The chaos that has been caused by failure to provide appropriate attention to youth voting rights claims pursuant to the Twenty-Sixth Amendment is curable and cannot be ignored.

This Court should thus uphold the district court's findings with regard to First and Fourteenth Amendment violations of young voters' access to the ballot pursuant to the State's restrictions on the absentee

voting period and absentee voting locations; the imposition of citizenship certification requirement for student dorm lists; the expansion of the durational residency requirement; the elimination of the option to receive absentee ballots by fax or email; and the restriction on student IDs.

This Court should reverse the district court with regard to its failure to find both Fourteenth and Twenty-Sixth Amendment violations for the remainder of the provisions at issue.

The judiciary will only perpetuate the delay of inevitable relief by failing to consider claims pursuant to the Twenty-Sixth Amendment, which was specifically passed to secure and encourage this discrete populations' participation in our democratic republic. Such delay of relief comes not only at the expense of young voters, including our membership, and the conduct of fair elections, but also at the expense of the American political system which the Twenty-Sixth Amendment aimed to energize.

CONCLUSION

For the foregoing, *amicus* Common Cause respectfully requests that the Court reject the State's argument that the provisions

challenged under the Twenty-Sixth Amendment are anything less than an abridgment of young voters' fundamental right to vote.

October 26th, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,432 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 26, 2016 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully Submitted,
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