Appeal No. 18-1673

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ST JOAN ANTIDA HIGH SCHOOL, INC.,

Plaintiff – Appellant,

v.

MILWAUKEE PUBLIC SCHOOL DISTRICT

Defendant – Appellee.

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN,
THE HONORABLE J.P. STADTMUELLER, PRESIDING
CASE NO. 17-CV-413

BRIEF OF DEFENDANT-APPELLEE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case.

Milwaukee Public School District.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Office of the Milwaukee City Attorney, Grant F. Langley, City Attorney and Calvin V. Fermin, Assistant City Attorney.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any: *Not Applicable.*

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: *Not Applicable*

(4) Attorney's Signature: Dated: June 25, 2018

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Plaintiff-Appellant's brief is complete and correct.

STATEMENT OF THE ISSUES

Milwaukee Public School District ("MPS") is the largest school district in the State of Wisconsin and although not required by law, it provides transportation services to students in its own schools as well as to those in private institutions. Student eligibility for free MPS transportation depends on a variety of factors, including but not limited to the type of school, the proximity of the student's residence to either the school or other public transportation, and the grade level of a student. This case presents two issues: (1) whether the eligibility requirements in MPS's transportation policy as it applies to certain private schools violates the Equal Protection Clause; and (2) whether the roster submission deadline that applies to private schools in MPS's transportation policy violates the Equal Protection Clause.

STATEMENT OF THE CASE

I. Relevant Wisconsin Law.

The Wisconsin Constitution requires public school districts to provide free and nearly uniform education. Wis. Const. art X § 3 ("The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years…"); *see also Vincent v. Voight*, 236 Wis.2d 588, 618, ¶ 39 (2000) (holding that the phrase "as nearly uniform as practicable" refers to the character of instruction in public schools and that equal opportunity for education is a fundamental right in Wisconsin). In Wisconsin, school districts are classified as common, union high, unified, and first class city school districts. Wis. Stat. § 115.01(3).

Wisconsin has four classes of cities based on the population of the city and official proclamation by the city. Wis. Stat. § 62.05. A first class city is the largest class with a population of 150,000 or more. Wis. Stat. § 62.05(1)(a). The City of Milwaukee is the largest city in Wisconsin and currently the only first class city in Wisconsin. *See, e.g.*, *Davis v. Grover*, 166 Wis.2d 501, 535 (1992) ("Presently, Milwaukee, with a population of 628,088, is the only city in Wisconsin which is officially a first class city."). As such, the Milwaukee Public School District is the only first class city school district in Wisconsin. Wis. Stat. § 119.01.

In Wisconsin, school districts generally are required to divide schools within attendance areas. *See, e.g.*, Wis. Stat. § 119.16(2) ("The board shall divide the city into attendance districts for such schools."); *see also* Wis. Stat. § 121.845(1) ("'Attendance area' means the geographical area within a school district established by the school board thereof for the purpose of designating the elementary, middle, high or other school which pupils residing within the area normally would attend."). The Wisconsin Supreme Court discussed the importance of attendance areas as follows:

> The attendance area concept is no newcomer to the educational scene in Wisconsin. Long before transportation to schools, public or private, was provided at public expense, the approach of area-based public school districts was the rule. One of the statutory responsibilities of local public school boards involved the often troublesome and frequently controversial assignment of establishing school attendance district lines and boundaries. *Exceptions were made by reason of overcrowding of particular schools or individual or special situations, but proximity was the measuring stick used.* While parents and school administrators often disagreed as to what the attendance area boundaries ought to be, there was acceptance of the general neighborhood school approach that sought to assign pupils to the nearest available public school. Before bussing at public expense came along, cold winters alone made eminently reasonable minimizing the time and distance involved in walking to and from school, elementary or high school.

State ex rel. Vanko v. Kahl, 52 Wis.2d 206, 210-11 (1971) (emphasis added). Similarly, the Wisconsin legislature requires private school operators to set attendance areas for its schools. Wis. Stat. § 121.51(1) ("'Attendance area' is the geographic area designated by the governing

body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located."). As with public schools, if a private school operator has multiple schools, the attendance areas cannot overlap.[1] *Id.*

Regarding student transportation, many school districts are required to provide transportation to public and private school students within the school district that live two or more miles from their school. Wis. Stat. § 121.54(2)(a) & (b)1. However, first class city school districts[2] are exempt from the requirement to provide transportation to students when transportation is available through a common carrier of passengers. Wis. Stat. § 121.54(1)(a) & (c). An exempt school district may elect to transport some or all students within the district, and they may receive state aid for transportation so long as there is reasonable uniformity in the transportation furnished to the students, whether they attend public or private school. Wis. Stat. § 121.54(1)(b).

II. The Parties.

Plaintiff-Appellant, St. Joan Antida High School, Inc. ("SJA"), is an independent female-only private high school located in the City of Milwaukee. (R. 24, Defendant's Proposed Findings of Fact ("DPFF") ¶ 1). SJA has an attendance area, and its attendance area encompasses the entire City of Milwaukee. (R. 24, DPFF ¶ 7). In the 2016-2017 school year, SJA had an enrollment of 145 students. (R. 24, DPFF ¶ 19).

Defendant-Appellee, MPS, is a first class city school district in the state of Wisconsin. (R. 24, DPFF ¶ 3). In the 2016-2017 school year, MPS had an enrollment of approximately

[1]It is also a matter of common sense that attendance areas cannot overlap. A child can have only one designated (neighborhood) school that he or she is entitled to attend.

[2] The exemption is for school districts serving a 1st, 2nd, or 3rd class city with a population of at least 40,000, which includes a first class city school district. *See* Wis. Stat. §§ 62.05(1)(a) & 119.01.

76,234 students in 159 schools. (R. 24, DPFF ¶ 20). MPS has broken down the City of Milwaukee into attendance areas (both for elementary schools and for high schools), with one school as the designated school within each attendance area ("attendance area school," or "neighborhood school"). (R. 24, DPFF ¶ 8). MPS's attendance areas do not overlap (within the respective elementary or high school breakdown). (R. 24, DPFF ¶ 8). Additionally, MPS has Citywide Specialty high schools that do not have an attendance area. (R. 24, DPFF ¶ 9). MPS's Citywide Specialty high schools have special programs or areas of study such as the arts, International Baccalaureate ("IB"), Montessori, language immersion, or gifted and talented programs. (R. 24, DPFF ¶ 10). MPS does not offer these special programs in all of its high schools, (R. 24, DPFF ¶ 10), largely because MPS has limited resources and there are limited teachers available to offer these special programs in all MPS high schools. (R. 24, DPFF ¶¶ 13-14).

III. MPS's Transportation Policy.

Although MPS is exempt from providing student transportation services, Wis. Stat. § 121.54(1)(c), MPS has elected to provide transportation services (or, busing benefit) to some students. MPS has established a student transportation policy as set forth in MPS Administrative Policy 4.04. (A. App. at 127-133; R. 24, DPFF ¶ 25). MPS's student transportation policy governs the transportation services MPS provides to public and private school students who reside within the Milwaukee Public School District. (R. 24, DPFF ¶¶ 25-31). For elementary-grade students, all public and private school students who live two or more miles from their school receive transportation services from MPS. (A. App. at 127, MPS Policy 4.04(2)(a)1. & (b)1.). For high school students, public and private students will receive transportation services if the student lives two or more miles from the school and more than one mile from public

transportation. (*Id.*, MPS Policy 4.04(2)(a)3. & (b)2.). Because Milwaukee County has a robust bus transit system through the Milwaukee County Transit System ("MCTS"), especially within the City of Milwaukee, the effect of the general rule is that MPS generally does not provide transportation to students attending their attendance area high school. (R. 24, DPFF ¶ 29). Because SJA is an attendance area high school, (R. 19, Gessner Decl. ¶ 6), MPS applies the same requirements to SJA's students as it does to public school students attending their designated attendance area high school.

MPS does have different requirements for public school students attending a high school other than their designated attendance area high school. For example, if a public school student is enrolled at another attendance area high school (not the designated school in his/her attendance area), the student will receive transportation services if the student lives two or more miles from the school. (A. App. at 129, MPS Policy 4.04(5)(b)2.). Also, if a public school student is enrolled at a Citywide Specialty high school (non-attendance area school), the student will receive transportation services if the student lives two or more miles from the school. (A. App. at 129, MPS Policy 4.04(5)(a)2.). Again, these requirements only apply to students that are not attending their designated attendance area high school. Under MPS's transportation policy, these requirements do not apply to private schools like SJA, even if their attendance area is the entire City of Milwaukee.

MPS's student transportation policy also requires a private school to submit the names, grade levels, and locations (addresses) of eligible students to MPS no later than the third Friday in September. (A. App. at 127, MPS Policy 4.04(2)(b)4.). However, in practice, MPS actually requires private schools to submit the roster of eligible students to MPS by July 1st of each year.

(R. 24, DPFF ¶ 35). Only those students on the roster submitted by the private school may receive transportation services if otherwise eligible. (R. 24, DPFF ¶ 34).

The roster notification provides MPS the relevant information concerning which private school students are eligible for transportation and to begin making provisions for such transportation. (R. 24, DPFF ¶¶ 36-41). MPS does not apply the same July 1st deadline (or any deadline) on itself with respect to providing transportation for its own students, (R. 24, DPFF ¶ 37), but MPS need not set a similar deadline for its own students because MPS has immediate access to such information within its own records. (R. 24, DPFF ¶ 38). Also, MPS staff goes through the information provided by all private schools and compares that information to the readily available public school information. (R. 24, DPFF ¶ 39). For example, MPS compares the information to see if a student on the private school's roster is also listed as enrolled in MPS's system; if so, MPS must do additional work to determine where the child is actually enrolled. (R. 24, DPFF ¶ 39). Similarly, MPS compares the private school information against MPS's student transportation policy to determine transportation eligibility. (R. 24, DPFF ¶ 40). For example, MPS must determine if the student lives less than or more than two miles from the school, or less than or more than one mile from public transportation. (R. 24, DPFF ¶ 40). MPS uses the roster information to make provisions for student transportation in accordance with Wis. Stat. § 121.55, whether that be setting up yellow bus service, entering into a contract with the private school, or entering into a contract directly with parents. (R. 24, DPFF ¶¶ 41-43).

IV. SJA'S CLAIM.

In the 2016-2017 school year, SJA sought transportation services from MPS for 68 of its students. (R. 24, DPFF ¶¶ 44-46). MPS declined to provide transportation services to those 68 SJA students. (R. 24, DPFF ¶ 47). Of the 68 students, 61 students were denied transportation by

MPS because they live within one mile of a public bus stop, six students were denied transportation by MPS because they were not on SJA's July 1st roster, and one student was denied transportation by MPS because the student lives within two miles of SJA. (R. 24, DPFF ¶ 48). However, all 68 SJA students that were denied transportation services by MPS also live within one mile of a public bus stop, (R. 24, DPFF ¶ 49), and therefore, they would have been ineligible for MPS's busing benefit due to their proximity to a public bus stop. (A. App. at 127, MPS Policy 4.04(2)(b)2.).

SJA challenged in district court MPS's student transportation policy as it applies to SJA's 68 students who were denied transportation services by MPS. (R. 1, Compl.). The parties filed cross-motions for summary judgment which were decided by the district court on February 28, 2018. (A. App. at 101-124; R. 49, Order). The district court granted summary judgment to MPS on SJA's federal claim and declined to exercise supplemental jurisdiction on SJA's state law claim, dismissing that claim without prejudice. (*Id.*). Judgment was entered that same day. (A. App. at 125-126). SJA filed a Notice of Appeal on March 27, 2018. (R. 51, Notice of Appeal). SJA seeks review only of the district court's granting of summary judgment on the federal equal protection claim. (SJA Br. at 9 n. 10).

SUMMARY OF THE ARGUMENT

Governmental bodies draw distinctions between different groups of people in nearly every instance they create policy. For example, a person driving 66 miles per hour may break the law whereas a person driving only 65 miles per hour commits no crime. But lines must be drawn somewhere, and the law grants governmental bodies great deference in making these decisions. This case involves SJA's challenge to MPS's choices it made regarding transportation policies for students residing in Milwaukee, Wisconsin.

The first issue in this case is what level of scrutiny the Court should apply to the distinctions at issue. Strict scrutiny is not applicable in this case because the distinctions do not involve a suspect class and because MPS transportations policies do not burden a fundamental right. SJA argues that MPS transportation policies significantly burden the fundamental right of parents to direct the upbringing of their children. In doing so, SJA relies on a nearly century old United States Supreme Court Case, *Pierce v. Society of Sisters*, 268 U.S 510 (1925), that held that a state could not force parents to send their children to public school. As discussed below, *Pierce* is inapplicable to this case because a parent's right to direct the upbringing of their child will not be affected by whether free transportation to school exists or does not exist.

Because no fundamental right is at issue, the Court should apply the deferential rational basis standard to MPS's transportation policies. Under this standard, the second issue is whether MPS's transportation policies are rationally related to a legitimate governmental interest. A statute must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification. As discussed below, SJA cannot meet its heavy burden to show that no rational basis exists for the classifications in MPS's transportation policy.

ARGUMENT

I. Strict Scrutiny Does Not Apply Because Private Schools Are Not a Protected Class and MPS's Policy Does Not Significantly Burden a Fundamental Right.

Strict scrutiny does not apply to this case because SJA cannot show that it is a protected class and MPS's policy does not burden a fundamental right. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This provision is "essentially a direction that all persons similarly situated should be treated alike." City of

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Strict scrutiny of a legislative classification is appropriate "'when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) (quoting *Mass. Bd. Of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)). Under strict scrutiny, the challenged law is upheld only if it is "narrowly tailored" to achieve a "compelling" government interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The United States Supreme Court has held "in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983); *see also Buckley v. Valeo*, 424 U.S. 1, 143–44 (1976) (declining to apply strict scrutiny to statute that provides federal funds for candidates who enter primary campaigns but does not provide funds for candidates who do not run in party primaries); *Harris v. McRae*, 448 U.S. 297, 316–18 (1980) (stating, "although government may not place obstacles in the path of a [person's] exercise ... of freedom of [speech], it need not remove those not of its own creation.").

Here, SJA contends that strict scrutiny applies to this case "because MPS's policy significantly burdens the fundamental right of parents to 'direct the upbringing and education of children under their control….'" (SJA Br. at 12) (quoting *Pierce*, 268 U.S at 534- 35).[3] In *Pierce*, the United States Supreme Court held that an Oregon statute that compelled public school attendance for children from age eight to age 16 violated the Due Process Clause. The Court reasoned that "[t]he inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for

[3] SJA does not contend that MPS's policy implicates a suspect class. (*See* SJA Br. at 12-16).

normal children within the State of Oregon." *Id.* at 534. As a result of this finding, the Court held that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35.

Since *Pierce*, the Supreme Court has commented on the narrow boundaries of the *Pierce* holding. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court stressed the limited scope of *Pierce*, pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" but rather "held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.* at 239 (White, J., concurring). Additionally, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court once again stressed the "limited scope of Pierce," *Id.* at 461, which simply "affirmed the right of private schools to exist and to operate...." *Id.* at 462.

Similarly, this Court recognized the limitations of the *Pierce* holding in *Griffin High School v. Illinois High School Association*, 822 F.2d 671 (7th Cir. 1987). In *Griffin*, a private religious high school challenged, on equal protection grounds, a high school association by-law that imposed a one-year bar on interscholastic athletic participation for all students who transferred schools, except for those students who transferred from a private to a public school. *Id.* at 673-74. The private school argued that the reasoning of *Pierce* applied because the policy would effectively weaken private school athletic teams, and that as a result, parents would choose to send their children to public school instead. This Court concluded, however, that "[t]his chain of causation [was] too attenuated and speculative to support the conclusion that the new transfer policy unreasonably interferes with the freedom of parents to direct their children's upbringing." *Id.* As such, this Court found that strict scrutiny was inapplicable and instead

applied the more lenient rational basis standard to the law at issue. The district court correctly relied upon *Griffin* in finding that strict scrutiny does not apply to this case.

Contrary to SJA's assertions, *Griffin*'s holding is applicable to this case. SJA argues that *Griffin* is not on point because it involved participation in an athletic program as opposed to the transportation policy at issue here; this factual dissimilarity, however, is a distinction without a difference. As the district court noted, any causal connection between the destruction of private schools and MPS's allegedly discriminatory policy is attenuated and speculative just as it was in *Griffin.* In an attempt to show a causal connection, SJA references anecdotal evidence where a family declined to enroll their daughter at the school because of a lack of free transportation. (SJA Br. at 16). In light of this one example, SJA then leaps to the conclusion that a lack of free transportation will directly and substantially affect the right of a parent to send their child to private school; a causal connection cannot be gleamed from this fact alone.[4] *Pierce* stood for the proposition that parents could chose to send their children to private schools; it did not hold that governmental entities must subsidize their decision to do so. Without more, SJA cannot show that MPS's transportation policies unreasonably interfere with parents' freedom to direct their children's upbringing.

In sum, the Court should not apply strict scrutiny to this case because MPS's transportation policies do not implicate a fundamental right. As such, and as discussed below, the Court should apply a rational basis standard in evaluating the constitutionality of MPS's transportation policy.

[4] This is especially true in light of the fact that SJA did provide transportation to its students at no additional cost to them. (R. 19, Gessner Decl. ¶ 27).

II. The Deferential Rational Basis Standard Applies to MPS's Transportation Policies.

SJA posits two separate policies that are allegedly not rationally related to a governmental interest: (1) the busing policy itself; and (2) the deadline for SJA to submit its roster of eligible students for transportation. As discussed separately below, both policies pass constitutional muster because they are rationally related to legitimate governmental interests. The district court properly granted MPS summary judgment on these claims because SJA has failed to meet its burden to prove that the policies fail the rational basis test.

"'A classification neither involving fundamental rights nor proceeding along suspect lines … cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)); *accord F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (holding that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification). Courts are not to pronounce a "classification 'unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.'" *Armour*, 566 U.S. at 681 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). The Supreme Court has described rational-basis review as "a paradigm of judicial restraint." *Beach Commc'ns, Inc.*, 508 U.S. at 314.

"To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose

or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *see also Beach Commc'ns*, 508 U.S. at 315 (Under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). Also, contrary to SJA's assertion that MPS must show some legitimate state purpose, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller*, 509 U.S. at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Nonetheless, MPS has presented legitimate state purposes for its transportation policy, and SJA fails to negate every conceivable basis which supports them.

A. There is a rational relationship between the disparity of treatment in MPS's extension of its busing benefit and a legitimate governmental purpose.

MPS's busing policies are constitutional because they are rationally related to a legitimate governmental interest. MPS has two primary purposes for the distinctions at issue: (1) cost; and (2) fulfilling its educational mandate under the Wisconsin Constitution.

1. Significant cost is a rational basis for the disparate treatment in MPS's transportation policy.

First, cost is a rational basis for the difference in treatment in MPS's policy because there is no invidious or suspect classification and there is a significant enough expense at issue. The law of this circuit dictates that "significant expense is a sufficient rational basis that justifies disparate treatment." *Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 948 (7th Cir. 2009); *accord Racine Charter One v. Racine Unified Sch. Dist.*, 424 F.3d 677, 687 (7th Cir. 2005) ("We need only recognize that extending the busing benefit will come at a significant enough expense to [the school district], and that is rational basis enough to justify its transportation policy decision.")). In *Srail*, citizens of the village of Lisle challenged the municipality's decision not to purchase a

private water company in their subdivision. *Id.* at 942. The village chose to purchase one of two existing private water companies in the area, but did not purchase the private company that operated in the Oak View subdivision. The village pointed to the $400,000.00 cost in purchasing a similar private company, and found the purchase of another company to be cost prohibitive. *Id.* In analyzing whether the village's decision met the rational basis standard, the court found that "significant expense is a sufficient rational basis that justifies disparate treatment." *Id.* at 948.

Here, for the 2016-2017 school year, MPS paid approximately $41,513,258 for regular education pupil transportation. (R. 24, DPFF ¶ 65). While MPS received state aid for transportation provided pursuant to Wis. Stat. § 121.54, MPS received only $2,322,123 for the 2016-2017 school year. (R. 24, DPFF ¶ 66). That resulted in approximately $39,191,135 in pupil transportation costs that were not covered by the state aid provided for transportation services pursuant to Wis. Stat. § 121.54 in the 2016-2017 school year. (R. 24, DPFF ¶ 67). This Court has found cost as a rational basis even absent dire financial straits. *See Racine Charter*, 424 F.3d at 687 ("But the defendant's financial straits need not be dire for us to find its refusal to extend transportation services to Charter One rational."). But, given that MPS only received state aid for roughly 5.6% of its pupil transportation costs in the 2016-2017 school year, (R. 24, DPFF ¶ 68), the added cost for providing transportation to these additional public[5] and private high school pupils would add a significant cost to MPS that mostly would go uncompensated by any additional state aid.

This Court found cost to be a rational basis for a Wisconsin school district to deny transportation services to a charter school, even where "[t]he record does not provide a hard

[5] Because MPS's transportation policy treats all public and private high school students who attend their designated attendance area school the same, if this Court finds that MPS's policy violates the Equal Protection Clause, then MPS most likely will need to extend the busing benefit to all these *public and private* high school students attending their designated attendance area school.

number on exactly how much more it would cost," aside from the charter school's estimate of $124,000 that the court determined to be "in all likelihood over-inflated." *Id*. at 686. Similarly, here, SJA alleged that the busing benefit for its students cost $108,200 for the 2016-2017 school year, and SJA seeks $178,640 for the 2016-2017 and 2017-2018 school year. (SJA Br. at 7). Thus, cost is a rational basis as it applies to the provision of transportation services to SJA's pupils.[6]

SJA asserts that increased cost alone cannot provide a rational basis for withholding benefits from a group, (SJA Br. at 25), but the cases it cites do not support that proposition. For example, SJA correctly summarizes the Supreme Court's discussion of the general governmental interest in reducing costs:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by *invidious distinctions* between classes of its citizens. It could not, for example, reduce expenditures for education by barring *indigent children* from its schools.

Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (emphasis added), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). The Court then succinctly held that "[t]he saving of welfare costs cannot justify an otherwise *invidious classification*." *Id*. (emphasis added). *Shapiro* concerned a statute that imposed a one-year waiting period before a new resident could receive welfare benefits. *Id*. at 627. The Court noted that "the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance" but that "the purpose of inhibiting migration by needy persons into the State is constitutionally

[6] The real costs, however, will be significantly higher than the numbers for SJA alone if required to provide busing to SJA's students. MPS would almost certainly need to provide transportation to similarly situated private school in Milwaukee.

impermissible." *Id*. at 629. The Court ultimately rejected cost as a rational basis because of the invidious classification in that case. *See id*.

Here, however, this Court is not confronted with a discrimination against an invidious group. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) ("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."); *see also Plyler*, 457 U.S. at 216n. 14 ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish."). There is no invidious classification here for two reasons: (1) because private school students are not an invidious group; and (2) more importantly, because SJA is not alleging discrimination against the entire class of private school students, but rather a smaller class of students attending a private high school with an attendance area that covers the entire City of Milwaukee.[7] Thus, cost is a rational basis for MPS's transportation policy because MPS is not discriminating against an invidious group.

SJA further asserts that this Court's decision in *Irizarry v. Board of Education of City of Chicago*, 251 F.3d 604 (7th Cir. 2001), shows that cost cannot be a rational basis for MPS's transportation policy. SJA states that *Irizarry* only allows for special costs to be a rational basis, but that is not the holding in *Irizarry*. *See id*. *Irizarry* concerned a school board policy that extended spousal health benefits only to same-sex domestic partners and not opposite-sex

[7] For example, this case does not concern the equal treatment of private and public elementary school students under MPS's policy. Nor does it appear to concern the equal treatment of public high school students attending their designated attendance area (non-Citywide) school and private high school students whose school's attendance area is less than "city-wide" under MPS's policy.

domestic partners. *Id*. at 606. The Court found that cost was a rational basis because "extending domestic-partner benefits to mixed-sex couples would greatly increase the expense of the program." *Id*. at 607. The Court also found that the board would reap cost savings in the administrative/compliance functions of the program. *Id*. at 610. The Court properly encapsulated why cost can be a rational basis when it stated that "if it is the law that domestic-partnership benefits must be extended to heterosexual couples, *the benefits are quite likely to be terminated for everyon*e lest the extension to heterosexual cohabitors impose excessive costs and invite criticism as encouraging heterosexual cohabitation and illegitimate births and discouraging marriage and legitimacy." *Id*. at 609 (emphasis added).

This Court in *Irizarry* recognized—as have other courts that have dealt with cost as a rational basis—that cost is a rational basis because governments have limited resources, and therefore, they must be selective in how they extend certain benefits and programs. If this Court accepts SJA's position that cost can never be a rational basis for governmental benefits or programs, then it will leave an all-or-nothing proposition for governments which, given the limited resources they have, will more often than not result in no benefits for anyone. But, case law does not so hold; it is only where the classification concerns a suspect class, an invidious group, or some other arbitrary and irrational classification where cost alone cannot serve as a rational basis. *See, e.g., id*. at 610 ("Only when the plaintiff in an equal protection case is complaining of a form of discrimination that is suspect because historically it was irrational or invidious is there a heavier burden of justifying a difference in treatment than merely showing that it is rational.").

SJA similarly points to *Bankers Life & Casualty Company v. Crenshaw*, 486 U.S. 71 (1988), as supporting its position that only special costs can be a rational basis. But, the Court in

Bankers Life similarly acknowledged that "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Id.* at 83. There, the Court found cost to be a rational basis, in large part because "Mississippi's penalty statute does not single out a class of appellants in an arbitrary and irrational fashion." *Id.* Here, MPS's transportation policy also does not single out a class of appellants in an arbitrary and irrational fashion. MPS is extending a busing benefit to students who, for various reasons, do not have access to certain educational programs at their designated attendance area school.[8] MPS uses the busing benefit to meet its requirements under the Wisconsin Constitution to provide free and nearly uniform education to all children living within the school district. Wis. Const. art X § 3.

SJA cites other authority it claims supports the position that cost can never be a rational basis for governmental benefits or programs, but they also fail to support SJA's position. For example, SJA cites *Zobel v. Williams*, 457 U.S. 55 (1982). In *Zobel*, the Supreme Court struck down an Alaska statutory scheme that distributed income to adult citizens of the state based on the length of the citizen's residence. *Id.* at 56. However, in striking down the statutory scheme, the Court never discussed whether cost was a rational basis for the statutory scheme. *See id.* The Court struck down the stated purpose of rewarding citizens for past contributions as being a legitimate state purpose. *Id.* at 63 (citing *Shapiro*, 394 U.S. at 632-33). The Court also rejected Alaska's argument that the statutory scheme gives residents an incentive to stay because that purpose was not served by giving benefits to citizens for their residency during the 21 years prior to enactment. *Id.* at 62. Thus, *Zobel* provides no insight or controlling law for the issues in the instant case.

[8] Again, while not at issue in this case, MPS also extends the busing benefit to all private and public elementary-grade students who live two or more miles from their school because of safety concerns for these younger children even on a public bus.

SJA also cites *Hooper v. Bernalillo County Assessor*, 472, U.S. 612 (1985). In *Hooper*, the Supreme Court struck down a New Mexico statue that granted a tax exemption only to those Vietnam veterans who resided in the state before May 8, 1976. *Id*. at 614-15. As in *Zobel*, however, the Court never discussed whether cost was a rational basis for the statute. *See id*. at 612. Also as in *Zobel*, the Court held that a state cannot favor established residents over new residents. *Id*. at 622-23 (citing *Zobel*, 457 U.S. at 63). The Court also found that the statute did not serve New Mexico's stated purpose of helping displaced veterans of the Vietnam war because "the statute is not written to benefit only those residents who suffered dislocation within the State's borders by reason of military service." *Hooper*, 472 U.S. at 623. Thus, *Hooper* also provides no insight or controlling law for the issues in the instant case.

SJA further cites *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), to support its position that cost cannot be a rational basis. In *Moreno*, the Supreme Court struck down a federal law that rendered ineligible for participation in a food stamp program any household containing individuals who were unrelated to any other member of the household. *Id*. at 529. Here again, the Court never discussed whether cost was a rational basis for the statute. *See id*. The Court found that the statute discriminated against an invidious group because the purpose of the statute was to discriminate against hippies. *Id*. at 534 ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). MPS has already established that discrimination against an invidious group cannot be a legitimate governmental interest, but again, there is no invidious discrimination in MPS's transportation policy.

Finally, SJA cites part of a footnote in *Sims v. Harris*, 607 F.2d 1253 (9th Cir. 1979), to support its argument that cost cannot be a rational basis. MPS contends that controlling law in

this Circuit is clear about cost as a rational basis and that the quoted sentence from a footnote from another circuit's decision does not fully align with this Circuit's prior holdings. Aside from that, SJA's quotation is also incomplete. SJA does correctly quote the first sentence in the footnote which states that "the mere fact that a classification saves money because it does not extend benefits to some people, by itself, does not demonstrate the classification's rationality." *Id*. at 1257 n.4. But, the court continued to state "[b]ut we also believe that concern about the fiscal impact of expanding a program, which in some respects resembles an insurance program, to include a new class of beneficiaries may provide a rational reason for imposing more stringent eligibility requirements on that class." *Id*. While the facts in *Sims* offer very little parallelism to the instant case, it is important to note that the court in *Sims* upheld the classification. *See id*. at 1257. The court reached its conclusions in part because "[w]e think this concern about the fiscal impact of providing disability benefits to a new class of beneficiaries is a legitimate government objective to which the challenged classification is rationally related." *Id*. (relying on *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients," and "[i]t is enough that the State's action be rationally based and free from invidious discrimination."). Again, here, MPS's policy is free from invidious discrimination. Also, MPS's transportation policy does not outright deny the busing benefit to certain groups,[9] rather it places different eligibility requirements (conditioning the benefit on the availability of public bus service for some) to strategically address certain problems it faces while judiciously allocating its limited public funds.

[9] MPS tried to neutrally structure its general transportation policy by conditioning the busing benefit on the availability of public bus transport. Thus, if the MTCS were to close bus stops or routes, other students may become available for the busing benefit from MPS under its current policy as written.

In the instant case, the district court correctly found that cost is a rational basis for MPS's transportation policy, largely relying on *Racine Charter*. 424 F.3d 677. SJA seeks to distinguish this Court's holding regarding cost as a rational basis in *Racine Charter* from the instant case, but that holding is consistent with other case law and fully applicable here. *Racine Charter* concerned an independent charter school (not chartered by the school district) that sought transportation benefits from the school district. *Id*. at 679. SJA alleges that this Court found cost as a rational basis in *Racine Charter* because the school district was facing a special cost by busing students of an independent charter school. (SJA Br. at 27-28). But, this Court made very clear that it found cost as a rational basis *apart* from the independent nature of the charter school, stating:

> But we need not find that Wisconsin charter schools established under Wisconsin Statute § 118.40(2r) in general, or Charter One in particular, constitute independent schools districts of their own right in order to reveal the deficiency in the plaintiff's class of one equal protection claim here. Rather, we need only recognize the unique and additional costs that RUSD would incur were it to provide such service to Charter One.

Id. at 685-86. The court made clear that "[t]his Court has already recognized cost as a rational basis for differential treatment." *Id*. at 686 (citing *Irizarry*, 251 F.3d at 610). The Court ultimately found that "while the record does not allow us to quantify these additional costs to RUSD with any degree of certainty, we are confident that they are substantial enough to provide a rational basis for RUSD's refusal to extend the busing benefit to Charter One students." *Racine Charter One*, 424 F.3d at 686. Here, as discussed above, MPS has similar cost considerations as it makes the difficult decision of extending the busing benefit to certain students.

2. MPS has as a rational basis for extending the busing benefit to certain public school students its need to fulfill its educational mandate under the Wisconsin Constitution.

MPS has a legitimate governmental purpose of fulfilling its educational mandate under the Wisconsin Constitution, and the busing benefit is a tool that allows MPS to fulfill this obligation. The Wisconsin Constitution requires public school districts like MPS to provide free and nearly uniform education. Wis. Const. art X § 3. The uniformity requirement for public schools here refers to the character of instruction, and therefore, equal opportunity to education is a fundamental right in Wisconsin. *See Vincent*, 236 Wis.2d at 618, ¶ 39. It is against this backdrop that MPS has extended a busing benefit to those students that can't receive the appropriate level of education at their designated attendance area school.

For example, if the capacity of an attendance area school is less than the number of school-aged children who live within that attendance area, MPS must make education available to these children in another district school, either in another attendance area school or in a Citywide Specialty school. Because of MPS's inability to provide the necessary education at the student's designated attendance area school, MPS extends the busing benefit to these students to minimize the negative impact of them having to attend this farther school to receive their free education.

SJA tries to argue that overcapacity is not a legitimate governmental interest for MPS because MPS does not have an overall capacity problem since the total enrollment of high school students is less than the total capacity of all high schools within the school district. (SJA Br. at 32). However, this ignores that a child is entitled to attend their designated attendance area school, and therefore, overcapacity issues should be viewed on a school-by-school basis. *See* Wis. Stat. § 121.845(1); *see also Vanko*, 52 Wis.2d at 210-11 (discussing the history and

importance of attendance areas in Wisconsin's educational scene). SJA then points to some MPS high schools that don't have an overcapacity issue to support its position, but yet it acknowledges that there are some MPS high schools where space could have been a problem. (SJA Br. at 31 (citing R. 20, Flanders Decl. ¶ 15)). SJA confirms that there are four MPS high schools that would have an overcapacity problem if all children in the particular attendance area went to their designated school. (R. 24, DPFF ¶ 55 (citing R. 20, Flanders Decl. ¶ 15, Ex. C)). Thus, overcapacity is a legitimate governmental interest. Again, because MPS cannot provide space for at least some of these students at their designated attendance area school, MPS buses them either to another attendance area school or to a Citywide Specialty school. (A. App. at 129, MPS Policy 4.04(5)(a)2. & (b)2.). Therefore, there is a rational basis for the distinctions in MPS's transportation policy as it relates to the legitimate overcapacity issue.

Similarly, MPS offers various special programs, such as language immersion programs, IB programs, and gifted and talented programs.[10] (R. 24, DPFF ¶ 10). However, MPS does not have the resources to offer these special programs in all attendance area schools, nor are there sufficient qualified teachers to offer these special programs in all schools. (R. 24, DPFF ¶¶ 13-17). As such, MPS offers these special programs at its Citywide Specialty schools, non-attendance area schools that are open to any student in the school district who meets the select criteria for entrance.[11] (R. 24, DPFF ¶ 10).

[10] Under Wisconsin law, MPS "shall ensure that all gifted and talented pupils enrolled in the school district have access to a program for gifted and talented pupils." Wis. Stat. § 118.35(3). Again, MPS accomplishes this through its Citywide Specialty schools as MPS cannot offer gifted and talents programs in all schools.

[11] In the district court, SJA stressed the fact that MPS Citywide Specialty schools are select criteria schools in support of its argument, but this fact further shows that Citywide Specialty schools are not attendance area schools. The school is not the designated school for all students in the school district, but any student may attend if they meet the select criteria requirements.

Additionally, MPS Citywide Specialty high schools are a means to closing the achievement gap, both the achievement gap between low-income pupils and all pupils, Wis. Stat. § 118.44(1)(a), as well as the achievement gap between minority pupils and all pupils.[12] (R. 24, DPFF ¶ 12). MPS's Citywide Specialty high schools help to directly address these achievement gaps by not restricting these special programs to particular attendance area schools, which would work to exclude various parts of the student population merely based on where they live. (R. 24, DPFF ¶ 12).

The Citywide Specialty high school programs are essential to providing the best education possible to all students, and MPS seeks to remove barriers to these special programs for all students. (R. 24, DPFF ¶ 11). As such, MPS extends the busing benefit to these students as a means of accessing this education that MPS cannot offer them in their designated attendance area school. Thus, MPS has as a rational basis the need to make available to all district pupils the special programs available at MPS Citywide Specialty high schools. *See, e.g., Heller*, 509 U.S. at 321 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.") (quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913)).

The district court felt that these reasons for having a Citywide Specialty school were a red herring because although it "certainly supports MPS's attendance policy for its own schools" that it was irrelevant the its decisions regarding extending the busing benefit.[13] (A. App. at 117, Order at 17). This might be true if not for MPS's obligation under the Wisconsin Constitution to

[12] A discussion of the minority achievement gap can be found in the Wisconsin Department of Public Instruction's report, "Promoting Excellence for All: A Report from the State Superintendent's Task Force on Wisconsin's Achievement Gap" https://dpi.wi.gov/sites/default/files/imce/excforall/exc4all-report.pdf

[13] SJA asserts that this ends the analysis. (SJA Br. at 29). It should not.

provide free and nearly uniform education, Wis. Const. art X § 3, and the fact that a student generally is entitled to attend his or her designated attendance area school. Wis. Stat. §§ 119.16(2) & 121.845(1). MPS contends that it certainly can use the busing benefit as a tool to transport students to these other schools they are now required to attend in order to obtain their appropriate free education because, through no fault of their own, they cannot do so at their designated school.[14] While SJA may try to argue that MPS has other options, courts are "compelled under rational-basis review to accept a legislature's generalizations even where there is an imperfect fit between means and end," *Heller*, 509 U.S. at 321, and a classification "does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id*. (quoting *Dandridge*, 397 U.S. at 485). Thus, MPS asserts that these unique challenges it faces in providing an appropriate education to all students in the school district provides a rational basis for its distinctions in extending the busing benefit to some students.

SJA asserts that the purpose of Wisconsin's transportation statute was to address the safety and welfare of students. (SJA Br. at 2). While it is true that was the primary concern of the legislature, it does not lead to the conclusion that safety is the only legitimate governmental interest in providing a busing benefit. In fact, under the Wisconsin statute, MPS is exempt from

[14] Similarly, Wisconsin statutes allow school districts to transfer students:

> By minority group pupils *who reside in an attendance area* where minority group pupils constitute 30 percent or more of the number of pupils enrolled in the school serving that attendance area and which the pupil normally would attend, *from that school* to another school within the district where minority group pupils constitute less than 30 percent of the number of pupils enrolled in that school *or to a school serving the entire district*.

Wis. Stat. § 121.85(2)(b)1. (emphasis added). Thus, the State acknowledges the need to allow students to attend these Citywide Specialty schools (or, a school serving the entire district) in order to have access to these special programs that they might not otherwise have access to at their designated school. Further, this statute also shows that the State acknowledges the difference between an attendance area school and a Citywide Specialty school.

providing busing to students within the school district under the "City Option" because there is available public bus service to these students through the Milwaukee County Transit System ("MCTS"). Wis. Stat. § 121.54(1)(c). The Wisconsin Court of Appeals has discussed the reasonableness of the City Option, stating:

> Conditioning the option on the availability of common carrier passenger service makes sense. It is that availability which exempts the city school board from the general policy under sec. 121.54(2), Stats., requiring that pupils be provided free transportation if they live two or more miles from school. That availability exempts the board from providing free transportation because pupils having a city bus available already have a means of transportation to and from school.

St. John Vianney Sch. v. Board of Educ. of Sch. Dist. of Janesville, 114 Wis.2d 140, 149-150 (Ct. App. 1983). To align with the state statute, MPS's transportation policy conditions its busing benefit for public and private high school students attending their designated attendance area school on the unavailability of public bus service. (A. App. at 127, MPS Policy 4.04(2)(a)3. & (b)2.). Thus, the safety and welfare of students is not the purpose of the distinctions at issue in this case.

Where safety and welfare is a purpose within MPS's transportation policy is regarding elementary-grade students. There, MPS's policy provides busing to all public and private elementary school students who live two or more miles from their school (not conditioned on public bus service) because MPS has concerns about the safety of these younger children even on the public bus service. (A. App. at 127, MPS Policy 4.04(2)(a)1. & (b)1.). But, again, MPS does not rely on "safety and welfare" as the purpose for the distinctions SJA is challenging.

3. SJA's argument that MPS can have no legitimate state purpose under Wisconsin law is without merit.

SJA incorrectly asserts that MPS can have no legitimate state purpose due to Wisconsin's requirement to provide transportation to public and private school students with "reasonable uniformity"; however, SJA cites no case law to support this position. First, relying on *Allegheny*

Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989), SJA alleges that there can be no legitimate state purpose for MPS's transportation policy because it flouts the state's purpose expressed in the relevant state statute. (SJA Br. at 21). In *Allegheny Pittsburgh*, the Webster County tax assessor was valuing similar homes with different assessment methods that resulted in gross disparities in the assessed value and thereby gross disparities in the tax on these similar homes. 488 U.S. at 336. The Court acknowledged that states have broad powers to impose and collect taxes and "may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable" *Id*. at 345. But, the Court found that West Virginia made no such distinction because "[i]ts Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." *Id*. The Court noted that it was "not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute." The Court ultimately found that there was a denial of the equal protection of the law because Webster County was discriminating against members within the same class without a rational basis. *Id*. (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)) ("The equal protection clause ... protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.").

Allegheny Pittsburgh is not analogous to the instant case because it concerned a state's taxing authority and not social or welfare benefits. That aside, *Allegheny Pittsburgh* is also inapplicable here because Wisconsin does have different standards for different school districts. As discussed, some school districts are required to bus all public and private school students, but under the "City Option" MPS is not required to bus to any students. Wis. Stat. § 121.54(1)(c).

Thus, SJA's assertion that MPS's policy flouts the state's stated purpose is inaccurate. Also, unlike in *Allegheny Pittsburgh*, MPS's policy does not discriminate against members within the same class because all attendance area high schools, public and private, are treated the same under the policy. (A. App. at 127, MPS Policy 4.04(2)(a)3. & (b)2.). Therefore, the facts in *Allegheny Pittsburgh* are too dissimilar to the facts in this case and should not be viewed as providing any insight or controlling law on the issue in this case.

Next, SJA asserts that *Deutsch v. Teel*, 400 F. Supp. 598 (E.D. Wis. 1975), is controlling and that because the court could not find a legitimate state purpose in that case, MPS cannot have a legitimate state purpose in the instant case. (SJA Br. at 22-23). However, *Deutsch* was a limited holding based on the specific facts of that case. In *Deutsch*, MPS bused all private and public elementary school students who lived two or more miles from their school, including the plaintiffs (students of Hillel Academy private school). 400 F. Supp. at 599. MPS stopped busing students of Hillel Academy when the school moved 400 feet beyond the city limits. *Id*. The court held that there was no rational basis for denying the busing benefit to these students simply because the school changed its situs because the same city students were attending the school and the busing distances were no greater than the distances to other private and public elementary schools. *Id*. at 605.

The holding in *Deutsch* is limited to the very specific fact pattern of private school students losing a busing benefit solely because of the school's change in location when all other members of the same class continue to receive the busing benefit, and therefore, it offers very little guidance to the issue in the instant case. *Deutsch* is simply inapplicable because SJA is being treated the same as all other private high schools in the city (as well as all other similarly situated public attendance area high schools in the city). Therefore, there is no support for SJA's

contention that MPS can have no legitimate governmental interest for how it extends the busing benefit to some students.[15]

MPS's decisions regarding its transportation policy carry a presumption of validity; SJA has failed to meet its burden to negate every conceivable basis which might support it. As such, the Court should affirm the district court's ruling and find no equal protection violation on this basis.

B. There is a rational relationship between the disparity of treatment with regard to the roster submission deadline in MPS's transportation policy and a legitimate governmental purpose.

MPS's decision to impose a July 1st deadline for SJA to submit its transportation roster is rationally related to a legitimate governmental interest. First, the roster notification allows MPS the relevant information concerning which private school students are eligible for transportation and to begin making provisions for such transportation. (R. 24, DPFF ¶¶ 36-41). MPS need not set a similar deadline for its own students because MPS has immediate access to such information within its own records. (R. 24, DPFF ¶ 38). If SJA does not submit such information to MPS, there would be virtually no way for MPS to know which private school students need transportation services. (R. 24, DPFF ¶ 36).

Additionally, MPS staff goes through the information provided by all private schools and compares that information to the readily available public school information. (R. 24, DPFF ¶

[15] SJA also asserts that because MPS is required to provide transportation to public and private school students with "reasonable uniformity" under Wisconsin statute, MPS can have no rational basis for the distinctions in its transportation policy. (SJA Br. at 38). The "reasonable uniformity" requirement was the central issue in SJA' state law claim. (*See* R. 17). Thus, despite the fact that SJA is not appealing the state law claim, (SJA Br. at 9 n. 10), SJA essentially wants this Court to decide the state law claim on the merits and then use that decision (assuming it was in favor of SJA) to find that MPS has no rational basis for the distinctions in its transportation policy. This Court should reject SJA's invitation to review the state law claim on the merits and rely on the facts in the record and the appropriate federal law pertaining to equal protection claims.

39). For example, MPS compares the information to see if a student on the private school's roster is also listed as enrolled in MPS's system; if so, MPS must do additional work to determine where the child is actually enrolled. (R. 24, DPFF ¶ 39). Similarly, MPS compares the private school information against MPS's student transportation policy to determine transportation eligibility. (R. 24, DPFF ¶ 40). For example, MPS must determine if the student lives less than or more than two miles from the school, or less than or more than one mile from public transportation. (R. 24, DPFF ¶ 40).

Lastly, MPS begins to make provisions for student transportation in accordance with Wis. Stat. § 121.55, whether that be setting up yellow bus service, entering into a contract with the private school, or entering into a contract directly with parents. (R. 24, DPFF ¶¶ 41-43). Thus, the rational basis is that MPS staff must undertake all this administrative work with information not otherwise readily available to them, on top of doing similar administrative tasks for MPS students. (R. 24, DPFF ¶¶ 41-42); s*ee, e.g.*, *Armour*, 566 U.S. at 682 (City that chose to forgive all tax assessments still owed under a former system while declining to give a refund to homeowners who already had paid their assessments under the former system had as a rational basis for its distinction administrative considerations, including complexity and expense associated with continuing to collect the unpaid debts and the additional administrative costs of providing refunds.). This administrative work takes time and resources, and, therefore, provides a rational basis for MPS setting a submission deadline for private school notifications.

SJA argues that MPS has no rational basis because the deadline penalizes the wrong person, and that the statute that imposes this benefit did not intend for the students to be penalized in this way. (SJA Br. at 36). But, SJA overlooks that the very statute it cites imposes a deadline on private schools to submit the roster where the school district is required to provide

transportation. Wis. Stat. § 121.54(2)(b)4. Thus, the State very clearly intended for the benefit to be tied, at least in part, on the private school gather the relevant information and providing it to the school district in a timely manner.[16] Because SJA has failed to adequately negate the rational basis for the roster notification deadline, this Court should affirm the district court's decision that the distinction meets the rational basis standard.

CONCLUSION

For the reasons set forth above, MPS asks this Court to find that there is a rational basis that supports the distinctions in MPS's transportation policy. Therefore, MPS asks this Court to affirm the decision of the district court granting summary judgment in favor of MPS on SJA's equal protection claim.

Respectfully submitted,

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[16] SJA's position also ignores that MPS is not obligated to provide any transportation services under the cited statute. Wis. Stat. § 121.54(1)(c).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This Brief complies with the type volume limitation of Cir. Rule 32 because it contains 11,513 words.

2. This brief complies with the typeface requirements of Cir. Rule 32 because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **12 point Times New Roman in the body** and with **11 point Times New Roman for the footnotes**.

Dated this 25th Day of June, 2018

/S/ CALVIN V. FERMIN

CERTIFICATE OF SERVICE

I certify that on June 25, 2018, I electronically filed the foregoing Brief with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the case, who are registered CM/ECF users:

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