No. 19-3138

In the
United States Court of Appeals
for the Seventh Circuit

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON, ALEXIA SABOR, PETER KLITZKE, DENIS HOSTETTLER, JR., DENNIS D. DEGENHARDT, MARCIA STEELE, NANCY STENCIL, AND LINDSAY DORFF,
Plaintiffs-Appellants,

v.

ROBIN VOS, SCOTT L. FITZGERALD, ALBERTA DARLING, JOHN NYGREN, ROGER ROTH, JOAN BALLWEG, STEPHEN L. NASS, JOEL BRENNAN, TONY EVERS, AND JOSHUA L. KAUL,
Defendants-Appellees.

On Appeal From the United States District Court
for the Western District of Wisconsin
Case No. 3:19-cv-142-jdp
The Honorable James D. Peterson, Judge

BRIEF FOR PLAINTIFFS-APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3138

Short Caption: Democratic Party of Wisconsin v. Vos

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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The Democratic Party of Wisconson, Colleen Robson, Alexia Sabor, Peter Klitzke, Denis Hostettler, Jr., Dennis D. Degenhardt, Marcia Steele, Nancy Stencil and Lindsay Dorff.

(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:

Holwell Shuster & Goldberg LLP

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

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ Vincent Levy Date: 11/5/2019

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: s/Kevin D. Benish Date: December 9, 2019

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3138

Short Caption: The Democratic Party of Wisconsin et al v. Robin Vos, et al.

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s Sarah A. Zylstra Date: 12/9/19

Attorney's Printed Name: Sarah A. Zylstra

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

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STATEMENT OF JURISDICTION

District-Court Jurisdiction. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the United States Constitution, specifically Article IV, Section 4 and the First and Fourteenth Amendments, as well as 42 U.S.C. §§ 1983 and 1988. The district court also had jurisdiction under 28 U.S.C. § 1343(a)(3)-(4).

Appellate Jurisdiction. On September 30, 2019, the District Court entered a final judgment dismissing all of Plaintiffs' claims and denying their motion for a preliminary injunction. Dkt. 71, 72.[1] No post-judgment motions were filed. Plaintiffs filed a timely notice of appeal on October 28, 2019. Dkt. 73. This Court thus has appellate jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This appeal principally involves the straightforward question of whether voters and their political party have standing to assert that a state statute infringes their voting rights under the U.S. Constitution. The Supreme Court and this Circuit have consistently made it clear that they do. The district court said otherwise. That was legal error, and the case should therefore be remanded.

The case arises out of the Wisconsin State Legislature's efforts, through a lame-duck session, to curb the results of the 2018 statewide elections for Governor and Attorney General by shifting powers previously exercised by the state's

[1] Throughout this brief, citations to "Dkt. __" refer to docketed submissions before the district court in this case, while citations to this Court's docket are referenced as "7th Cir. Dkt. __."

executive branch (such as the power to oversee the state's litigation and to promulgate rules) to committees controlled by Defendants,[2] all of whom are state legislators. This would ensure that the victorious candidates, who were in this instance Democrats, would not wield powers exercised by the previous administration and on which they had campaigned. Instead, legislative committees controlled by Republicans would have those powers. That is so even though the voters had elected to have a split government and to have the executive officials who would assume office in January wield the precise powers the lame-duck session took away.

Plaintiffs,[3] individual voters and their political party, challenged these lame-duck statutes, claiming that Defendants violated the First and Fourteenth Amendments as well as the Guarantee Clause, by improperly infringing upon, diluting, and retaliating based on the exercise of the vote and other protected conduct, including the right to associate, to express one's views, to advance one's collective beliefs, and to live under a republican form of government.

Although the district court expressly recognized that the Individual Plaintiffs were alleging violations of their rights *as voters*, it nonetheless dismissed the case without reaching the merits for lack of standing and on the basis that the Guarantee Clause was not justiciable. This was legal error, as we explain below.

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[2] The "Defendants" referred to in this brief are the so-called Legislative Defendants, Defendants-Appellees Robin Vos, Scott F. Fitzgerald, Alberta Darling, John Nygren, Roger Roth, Stephen Nass, and Joan Ballweg.

[3] The "Plaintiffs" referred to in this brief are the Plaintiffs-Appellants Colleen Robson, Alexia Sabor, Peter Klitzke, Denis Hostettler, Jr., Dennis D. Degenhardt, Marcia Steele, Nancy Stencil, Lindsay Dorff, and the Democratic Party of Wisconsin.

Indeed, the standing inquiry is not so demanding, and both the Supreme Court and this Court have expressly and repeatedly held that voters and political parties have standing to complain that a state statute infringes upon voter rights protected by the Constitution. That is precisely what Plaintiffs did here.

And if that were not enough, one of the *de facto* plaintiffs in this suit is *Governor Evers*, a state official whose powers were unconstitutionally abridged. Although technically a nominal defendant, Governor Evers answered the complaint in this case by conceding all the allegations, joined Plaintiffs' request for injunctive relief, and expressly requested that the district court consider him a plaintiff via the parties' Pretrial Conference Report, as directed by the district court's local rules. The Court nonetheless held, erroneously, that Governor Evers' participation was not enough to save the case and that it should be dismissed on standing and, regarding Plaintiffs' Guarantee Clause claim, on justiciability grounds. The latter holding was issued even though the Supreme Court, in words expressly contrary to the district court's holding, has stated that it is error to read into Guarantee Clause jurisprudence a bright-line rule barring judicial review.

The decision should be reversed and the case remanded for the district court to proceed to the merits on Plaintiffs' preliminary-injunction application.

STATEMENT OF ISSUES PRESENTED

1. Whether individual voters who allege that state officials unconstitutionally infringed upon their right to vote have standing to complain, or whether a district court can dismiss such a case for lack of standing by the

expedient of characterizing the voters' claims as mere allegations of "emotional distress."

2. Whether a district court can dismiss a case brought by a political party asserting voting-rights claims under the Constitution for lack of standing, when the political party has alleged that it has itself suffered financially and otherwise and will continue to suffer, when it also represents the voters who belong to that party, and when this Court and the Supreme Court have repeatedly held political parties have standing to press voting-rights claims under the Constitution.

3. Whether, for purposes of a standing analysis, Federal Rule of Civil Procedure 21 permits the district court to realign the parties and consider the injuries suffered by a nominal defendant who requested realignment via a Joint Rule 26(f) Report and joined with the plaintiffs in seeking the relief that they requested.

4. Whether it is appropriate to conclude that the U.S. Constitution's Guarantee Clause is *never* justiciable in light of *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), although the Supreme Court has expressly said that a case-by-case evaluation should be made of such claims.

STATEMENT OF THE CASE

The facts of this case are not in dispute for the purpose of this appeal and the motions underlying it. A2.[4] Shortly following the unexpected November 2018 election of Democrats Tony Evers and Joshua Kaul for the positions of Governor

[4] Throughout this brief, citations to "A__" refer to the Circuit Rule 30 Appendix filed with this brief.

and Attorney General of Wisconsin, the lame-duck Republican-controlled state legislature enacted statutes for the purpose and with the effect of curbing the electoral result. The lame-duck statutes did this by stripping the incoming administration of powers that were available to the Governor at the time and would have been available to the executive if the election had gone the other way and the Republican incumbents had prevailed, and giving those powers to legislative committees of legislators that were to be controlled by Republicans after inauguration day. There is indeed no dispute that the statutes in question, 2017 Wisconsin Acts 369 and 370 (the "Acts"), were enacted solely because Democrats won election to statewide offices. A2; Dkt. 38; *see also* Dkt. 37 at 3 n.2. Nor can there be: the lame-duck statutes targeted precisely those executive powers at the core of the incoming Governor and Attorney General's campaigns.

This lawsuit was filed to challenge these lame-duck statutes. Plaintiffs are the Democratic Party of Wisconsin ("DPW") and individual voters who voted for Governor Evers and Attorney General Kaul. Defendants are state legislators charged under the lame-duck statutes with enforcing and defending the lame-duck legislation as well as Governor Evers and Attorney General Kaul.

A. Governor Tony Evers And Attorney General Kaul Win Wisconsin's Statewide 2018 Elections, But The Lame-Duck Legislature Curbs The Results Through Acts 369 and 370

On November 6, 2018, then-candidates Tony Evers, Josh Kaul, and every other Democratic candidate for statewide office won their elections, after months of campaigning on various promises to take Wisconsin in a different direction, while the state legislature would remain in Republican hands.

Then-candidates Evers and Kaul campaigned on the policies of, among other things, withdrawing the State of Wisconsin from a federal lawsuit challenging the constitutionality of the Affordable Care Act ("Obamacare"); expanding Medicaid; repealing costly and unproven drug testing requirements for public-assistance recipients; increasing opportunities for citizens to vote by changing unnecessary voter identification policies; and changing administrative rules to improve renewable energy and Wisconsin's environment.[5] Following the November 2018 election, the people of Wisconsin were set to be represented by a divided government for the first time in a decade.

Republican leaders in the Wisconsin Legislature were quick to respond this the sudden (and unexpected) loss of power. Speaking on November 7, 2018, less than one day *after* the electoral results were announced, Appellee Robin Vos, the Republican Speaker of the Wisconsin State Assembly, stated that he wished to "rebalance" the powers of Wisconsin's governor in light of the electoral outcome. Dkt. 15-5. Later that month, the Legislature convened an "extraordinary" lame-duck session that had not been planned before Governor Evers' and Attorney General Kaul's electoral victories, with the stated purpose of "mak[ing] sure what [Republicans] have in practice stays in practice." Dkt. 15-7. During this session, the lame-duck legislators introduced a series of bills to accomplish this objective. Ultimately, the Legislature passed three bills, including the two at issue in this

[5] *See, e.g.*, A18 ¶ 3; A21 ¶ 3; A24, ¶ 3; A28 ¶ 3; A31 ¶ 3; A34 ¶ 3; A34 ¶ 3; A39 ¶ 3 (Plaintiffs' sworn affidavits discussing Governor Evers' and Attorney General Kaul's campaign promises).

case. Republican legislators have admitted that they would not have passed the Acts or reallocated the state's executive power had Democrats not won statewide office in 2018. For example, Defendant John Nygren conceded, in response to questioning by a Democratic legislator that the legislature "wouldn't necessarily be" in special session had Governor Evers and Attorney General Kaul lost. Dkt. 1 ¶ 4. Similarly, State Representative Joel Kitchens, while explaining his vote to a newspaper, admitted: "Again, people are going to say, 'Why didn't you do this when Walker was governor?' That's legit." *Id.* ¶ 74.

Wisconsin's then-outgoing and now-former Governor, Scott Walker, promptly signed the bills. While doing so, he recognized that the matters addressed by the lame-duck session had not been considered until after the electoral results. Dkt. 15-14. He also recognized that the purpose and effect of the bills would be to curb the power of the incoming administration at the expense of certain committees of legislators that would remain under Republican hands. Then-lame-duck Governor Walker signed the Acts into law on December 14, 2018, ensuring that they would not be considered by the incoming legislature or subject to future-Governor Evers' veto power.

Acts 369 and 370 achieved their objective of undermining the November 2018 electoral results by reallocating powers from the state executive to legislative officials or committees controlled by Defendants, making it impossible for Governor Evers and Attorney General Kaul to exercise the executive powers they had campaigned on. *See generally* Dkt. 15-15. For example:

- Democratic candidates promised to change Wisconsin Department of Transportation rules implementing voter ID requirements; the Acts removed the power of the governor to change these rules.
- Democratic candidates promised to withdraw the state of Wisconsin from challenges to Obamacare; the Acts removed the Executive's discretion to do so and more generally curbed the Attorney General's power to defend the state in constitutional cases, again placing these matters in the hands of a committee of legislators.
- Democratic candidates promised to prevent transfers of funds from state veterans' homes; the Acts curtailed this power.
- Democratic candidates promised to eliminate then-Governor Walker's Medicaid rule imposing work requirements for Medicaid recipients; the Acts again gave the governor's power to change these requirements to a committee of Republican legislators.
- Democratic candidates campaigned on eliminating then-Governor Walker's drug-testing requirements under Wisconsin's food-stamp program; the Acts removed the Governor's power to do this.

In addition, the Acts gave certain legislators the ultimate authority on whether Wisconsin would expand Medicaid; transferred to legislative officials executive control over the personnel and budget of Wisconsin's Department of Health Services; limited Governor Evers' ability to delegate executive functions within executive departments; gave legislative officials final say over whether the State of Wisconsin can settle, compromise, or withdraw from injunctive suits involving the state; and gave members of certain legislative committees the power to suspend administrative rules. This was not just an instance of changing substantive law via lame-duck session, but of a lame-duck legislature directly overruling the voters' choice as to which officers would wield executive powers.

According to nonpartisan reports, this was the first time in state history that the state legislature had restricted the power of an incoming governor and attorney general in any way during a lame duck session. Dkt. 15-16. And, as far as we can

tell, this sort of lame-duck maneuver was only ever attempted once before. *See Cooper v. Berger*, 370 N.C. 392 (N.C. 2018).

B. Plaintiffs Challenge The Acts To Vindicate Their Rights Under The U.S. Constitution, Alleging Specific, Concrete, And Redressable Injuries In Support Of An Injunction

Plaintiffs challenged Acts 369 and 370 under the U.S. Constitution, alleging that the acts had violated their federal constitutional rights as voters and seeking a preliminary injunction.

More specifically, Plaintiffs asserted that the Acts violated their First Amendment rights "'to cast their votes effectively,'" to petition the government for change, to express their views to that same end, "'to associate for the advancement of political beliefs,'" and otherwise to participate meaningfully in the political process. Dkt. 3 at 18-20 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), and citing additional authority); *see also* Dkt. 37 at 31-34.[6]

Plaintiffs also claimed the lame-duck statutes violated the Fourteenth Amendment's Equal Protection guarantee by arbitrarily infringing, diluting and debasing the effectiveness of their vote, after it was cast and in an unaccountable

[6] Plaintiffs thus argued that "[t]he lame-duck Acts plainly implicate core First Amendment rights and interests" like "the right of the people to associate, petition the government, and express their views to their government about desirable social and political change." Dkt. 3 at 18. This includes the First Amendment rights to cast an effective vote, *id.* at 19-20; the right of a political party to meaningfully participate in the electoral process, *id.* (citing *California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000)); the right of political parties to place candidates on the ballot, *id.* at 20 (citing *Williams v. Rhodes*, 393 U.S. 23, 34 (1968)); the right of entities to speak without unduly burdensome campaign finance restrictions in elections, *id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 372 (2010)); and the right to sign and circulate petitions, *id.* at 18 n.26 (citing *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)).

lame-duck session. Dkt. 3 23-25 (citing *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see also* Dkt. 37 at 34-35 ("Long-standing Supreme Court precedents establish that arbitrary voting procedures cannot be set in advance, either to harm political parties, arbitrarily exclude candidates, treat candidates for office differently based on their party affiliation or their political beliefs, or otherwise impair the effectiveness of the vote. . . . By the same token, the vote, once granted, cannot be effectively nullified or diluted after the fact in a lame-duck session by the same political branches who were charged with superintendence of the vote." (citing *California Democratic Party v. Jones*, 530 U.S. 567 (2000)).

And finally, Plaintiffs asserted that lame-duck enactment of Acts 369 and 370 violated the Guarantee Clause in Article IV of the Constitution by violating core norms of our democratic and republican form of government. Dkt. 37 at 29 ("What deprives Wisconsinites of republican government is a lame-duck legislature that sets out to, and does, blunt valid electoral results with the purpose and effect of punishing political enemies, and does so by "'altering the form [and] the method of functioning of [Wisconsin's] government.'" (quoting *New York v. United States*, 505 U.S. 144, 184-85 (1992)).

Because Plaintiffs were seeking a preliminary injunction, each of them submitted a sworn affidavit in support of the injunction request, attesting to some of the harm they suffered as a direct result of the Acts. These injuries included:

- Harm to fundraising and volunteering efforts as a direct result of the Acts. A44-45 ¶¶ 14-16 (Declaration of DPW Chair). For instance,

Plaintiffs submitted sworn testimony that they were "trying to mobilize Democratic voters for elections that will take place in the spring of [2019], and the [Acts] negatively affected our efforts . . . ." A22 ¶ 6; *see also* A32 ¶ 6.

- Dilution of Plaintiffs' votes, due to the fact that the Acts were rushed into law only after the November 2018 election had been decided and Plaintiffs were thus not able to effectively choose the representatives who would wield these powers. A44 ¶ 14; A40 ¶ 6.

- Harm to candidate and voter recruitment efforts as a result of the Acts. *See* A45 ¶ 16-17 (Declaration of DPW Chair); A34 ¶ 5; A29 ¶ 5.

- Discrimination based on their political viewpoint because, as a direct and immediate result of the Acts, Plaintiffs are unable to have their policy preferences enacted. Had they expressed policy preferences favorable to Republican candidates, Plaintiffs' electoral vote would have been treated with greater value. A32 ¶ 6; A34 ¶ 5; A40 ¶ 6.

The defendants in the suit split into two groups. Defendants, whom the district court called the "legislative defendants," chose to both oppose the preliminary-injunction application and to move to dismiss. The motion to dismiss asserted that plaintiffs lacked standing, that the case involved a non-justiciable political question, and that the statutes passed rationality review (although the motion did not explain why they should be subject to that standard of review). Governor Evers, whom Plaintiffs sued nominally out of an abundance of caution (see n.13, *infra*), filed an answer admitting to all the allegations in the complaint (Dkt. 53), joined Plaintiffs' request for a preliminary injunction (Dkt. 32), and then requested to be treated as a plaintiff (Dkt. 70 at 3). Attorney General Kaul did not meaningfully participate.[7]

[7] Attorney General Kaul has notified the Court that he is not participating in this appeal. *See* 7th Cir. Dkts. 11, 12.

C. The District Court Dismisses Plaintiffs' Case On Standing Grounds And Finds That The Guarantee Clause Claim Is Nonjusticiable; Plaintiffs Appeal

After briefing was complete on the motion for preliminary relief and the cross-motion to dismiss, on April 12, 2019, the district court *sua sponte* asked for briefing as to whether the case should be stayed in light of pending state cases challenging some of the provisions of the Acts on state-law ground. Plaintiffs, Defendants, and Governor Evers all opposed such a stay. Dkts. 51, 52.

The district court did not rule on the motion for a preliminary injunction and Defendants' cross-motion to dismiss until September 30, at which time the court dismissed the case on the basis that Plaintiffs supposedly "lack standing to sue on all their claims," and further held that the motion for a preliminary injunction was moot. A4-5. Acknowledging that Defendants "don't dispute that the lame-duck laws were intended to limit the power of the newly Democratic executive officers and to consolidate power in the Republican-controlled legislature" (A2), the district court nevertheless held that Plaintiffs had not "pointed to any concrete harms they have suffered or will suffer because of Acts 369 and 370." A4. Instead, the district court held the alleged harms were either claims of an "emotional" nature, based on "targeting," or were based on future harms—none of which, according to the district court, established standing. A7-8.

The district court next held that DPW also lacked standing and rejected the argument that Governor Evers could provide the requisite Article III controversy by virtue of having joined Plaintiffs' request for injunctive relief. Despite acknowledging that Governor Evers "suffered the effects of the limitations on [his]

office[]" (A12), and despite Governor Evers formally supporting Plaintiffs' case (Dkts. 32, 52, 70 at 3), the district court held that it could not consider Governor Evers' harms "without a proper motion" to realign himself formally as a plaintiff. A12.

Concluding its order and decision, the district court held that Governor Evers in any event could not press the claims at issue in the suit because the First and Fourteenth Amendment claims were voting-rights claims—despite Governor Evers himself being a voter. And it held that Plaintiffs' Guarantee Clause claim could not be adjudicated in federal court.

STANDARD OF REVIEW

Because the district court dismissed the case on the pleadings for lack of an Article III controversy, this Court's review is *de novo*. *Silha v. ACT, Inc.*, 807 F.3d 169 (7th Cir. 2015). The allegations contained in Plaintiffs' pleadings are accepted as true for the purpose of determining whether standing has been established. *Id. at* 173-74; *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2005) (holding that "whatever evidence has been submitted on the issue" should be considered).[8]

[8] *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("'[W]hen standing is challenged . . . we 'accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party, . . .'"); *Chicago Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 814 (7th Cir. 2018) (noting same and holding that plaintiff had standing to bring First Amendment claims because plaintiff still had interest in relief despite change in circumstances).

SUMMARY OF ARGUMENT

Plaintiffs have standing to have their dispute heard in federal court. *First*, Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes[.]'" *Judge v. Quinn*, 612 F.3d 537, 545 (7th Cir. 2010) (*Quinn I*) (collecting cases), *opinion amended on denial of reh'g*, 387 F. App'x 629 (7th Cir. 2010). Plaintiffs claim that the lame-duck statutes unconstitutionally infringed upon this right by reallocating executive powers to certain legislative committees in lame-duck session. Plaintiffs thus claim they were victims of vote dilution, and if the court concludes the statutes did violate these rights on the merits, then surely the voters have standing to proceed. The district court was wrong to shut them out of the courthouse.

Second, the Democratic Party of Wisconsin, DPW, has standing to challenge the Acts because the Acts infringes upon the party's own rights and also make it more difficult for DPW to organize voters. *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007). Plaintiffs alleged that the Acts targeted DPW members by diminishing the power their votes can wield, and as a result DPW has and will have more difficulty recruiting candidates, fundraising, finding volunteers, and contesting future elections. That is enough. Moreover, a political party like DPW can also assert the rights of its members under established law. *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 523 (7th Cir. 2017); *see also Hunt v. Wash. State Apple Advertising Commission*, 432 U.S. 333 (1977). The rights at issue here include not only individual voters, but also the rights of Governor

Evers and Attorney General Kaul. Even the district court agreed that Evers and Kaul suffered as a result of the Acts.

Third, Governor Evers himself has a "real and substantial" dispute with Defendants of a "definite and concrete" character, touching "adverse legal interests." Again, that is enough to confer standing. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Governor Evers accepted as true all the allegations in the complaint, joined the preliminary-injunction motion, and specifically asked the district court to have him considered as a plaintiff in this case. The district court's formalism—by focusing solely at the case's caption—eschews reality.

Finally, the court erred in holding that Plaintiffs' claims under the Guarantee Clause are nonjusticiable and that Governor Evers cannot prosecute the First and Fourteenth Amendment claims asserted here. The Supreme Court expressly cautioned the lower courts to evaluate each Guarantee Clause claim on its own and not to rule simply that the Guarantee Clause is not justiciable, *New York*, 505 U.S. at 184-85, and this case, unlike all the other Supreme Court cases that have dismissed Guarantee Clause cases on justiciability grounds, involves no issue at all addressed to one of the other branches of the federal government. *Compare Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). As for the district court's holding that Governor Evers cannot raise an Equal Protection claim alleging that state conduct unfairly diluted the vote in the aftermath of his election, suffice it to say that is exactly what happened in *Bush v. Gore*, on which plaintiffs relied.

ARGUMENT

A plaintiff has standing to bring suit in federal court upon showing (1) a concrete injury; (2) that can be traced to the act or law being challenged; and (3) that can be redressed through a favorable judicial decision. *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 146 (7th Cir. 2011); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Although the asserted injury cannot be a "generalized grievance," *id.* at 1931, standing is easily established where the alleged injury is "directly related to voting, the most basic of political rights." *FEC v. Akins*, 524 U.S. 11, 24-25 (1998). Indeed, a plaintiff's standing to sue is "particularly obvious" in situations where "large numbers of voters suffer interference" with the effectiveness of their votes. *Id.* at 24 (citations omitted).

In this case, Plaintiffs have alleged enough factual material to proceed past a motion to dismiss and also advanced enough facts to ask receive a preliminary injunction. That is particularly so given that, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Family & Children's Center v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir. 1994). Indeed, the pleaded facts "need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally." *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 919 (7th Cir. 2002).

I. Individual Voters Have Standing To Vindicate Their Voting Rights

Black-letter law of this Circuit and the Supreme Court establishes that the Individual Plaintiffs have standing to invoke constitutional provisions that protect their voting rights. "Where a plaintiff's voting rights are curtailed," this Court has

held, "the injury is sufficiently concrete to count as an 'injury in fact.'" *Quinn I*, 612 F.3d at 545; *Akins*, 524 U.S. at 24-25. Indeed, "each and every citizen [has an] inalienable right to full and effective participation in the political processes of [their] State," *Reynolds*, 377 U.S. at 565, and suffers harm when laws impede that right. Moreover, it would be error for a court to conclude that any individual plaintiff "lacks standing merely because [they] assert[] an injury that is shared by many people." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005). This line of authority controls and requires reversal of the district court's ruling that the Individual Plaintiffs lack standing.

Consider by way of example the Individual Plaintiffs' Equal Protection claim—vote dilution. As the Supreme Court explained in *Bush v. Gore*, once a state grants "the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05. And a flawed counting system – like the one in issue in *Bush* – is not the only way that a citizen's vote can be illegally diluted. As the Supreme Court explained in *Reynolds*, "the right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. at 555. Plaintiffs assert based on these precedents that the Acts violated the Constitution by improperly diluting the value of votes *ex post* in a lame-duck session. Dkt. 1 ¶ 67 ("Wisconsin voters voted for one thing – to give Evers and Kaul the authority to promulgate policy by using the then-existing

powers of the Executive" – but received another.). After all, if an "arbitrary and disparate" counting of votes, *Bush*, 531 U.S. at 104-05, or the maintenance of a system of representation that unlawfully empowers certain favored areas over others, *Reynolds*, 377 U.S. at 562-63, rise to the level of constitutional injury, then lame-duck legislation that achieves the same outcome – the aggrandizement of one party over the other in a manner inconsistent with an election – does too. *Bush*, 531 U.S. at 104-05.

The district court did not evaluate the merits of this claim, ruling instead that individual voters did not even have standing even to make that claim. That was legal error. Clearly, if Plaintiffs are right about the constitutional norms governing the lame-duck legislature's conduct, then individual voters who voted for the candidates whose powers were abridged in violation of the Constitution have standing to bring the claim. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) (concluding that individual voters had standing to challenge the apportionment of voters to districts in a manner that "plac[ed] them in a position of constitutionally unjustifiable inequality" compared to favored voters). Given that all of the claims in this case have as their gravamen the assertion that the lame-duck legislation infringed upon Plaintiffs' voting rights (in violation of the First and Fourteenth Amendments and the Guarantee Clause), Plaintiffs have standing to raise all of them, and the district courts ought to have considered the claims on the merits.

Indeed, as if to make the point, when the district court held that Governor Evers had no standing to press the First and Fourteenth Amendment claims

presented here (an erroneous ruling we discuss below), the district court explained that "plaintiffs' have framed their claims as violations of the *constitutional rights of voters*." A13 (emphasis added). ***If*** (as plaintiffs assert) the lame-duck legislation did violate the "constitutional rights of voters" as plaintiffs have claimed, then surely the voters who voted for Governor Evers and claim that their voting rights were infringed have standing to press these rights.

Brushing Plaintiffs' claims aside for purported lack of standing, the district court stated that the Individual Plaintiffs were complaining that the Acts "made it more difficult for [the Individual Plaintiffs] to achieve their favored policies." A8. The Individual Plaintiffs do not, of course, believe they have a constitutional right to have Governor Evers or Attorney General Kaul or any other state official adopt their policy preferences. But they do allege that they have a constitutional right to have their vote *count*. The Individual Plaintiffs assert on the merits that the Wisconsin lame-duck legislature violated that right. The Individual Plaintiffs may prevail or not on the merits (and Plaintiffs believe they should), but whatever the answer on that question, individual voters clearly have standing.

All of this ought to have been enough to reject the motion to dismiss. Of course, the Individual Plaintiffs also sought an injunction and, in an effort to identify concrete injuries over and above the injury to their vote, set out instances of concrete injuries in affidavits filed in support of their injunction application. For example, they explained that the dilution specifically and concretely injured their efforts to associate with other like-minded voters, explaining that the Acts "make it

more difficult to fundraise, register voters, attract volunteers, generate support from independents, and recruit candidates." Dkt. 1 ¶ 84.[9] And they explained that the lame-duck statutes injured them concretely by retaliating against them. Given the relatively low threshold the Supreme Court has established for establishing Article III injury, this showing, along with the claim of voter dilution, ought to have been more than enough to establish standing.

Indeed, compare in this regard *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011). There, the plaintiff identified "two contributors" who attested that, but-for the challenged contribution limit, the individuals would contribute again in the future. *Id.* at 147-48. According to the Court, these injuries were "easily sufficient" to confer standing to the organization—both on the basis of the plaintiffs' own injury and "to vindicate the political-speech rights of its [members]." *Id.* Considering the affidavits and evidence offered by Plaintiffs here, the injury requisite for standing has clearly been established under the standard put forth in *Wisconsin Right to Life*.

* * * *

To paraphrase this Court's decision in *Quinn I*, Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes[.]'" 612 F.3d at 545 (collecting cases). They "allege[] a concrete and specific injury that is neither conjectural nor hypothetical, and thus they may proceed with

[9] A19 ¶ 5 (Declaration of Nancy Stencil, stating that "the excitement and energy of Democratic activists in my area was zapped"); A22 ¶ 7 (Declaration of Marcia Steele, stating that the Acts "demoralized [Wisconsin] voters"); A25 ¶ 6 (Declaration of Alexia Sabor, stating that "many Democratic voters feel helpless").

their action." *Id.* at 546. These observations ought to have been dispositive on the question of standing.

II. DPW Also Has Standing

A. DPW Has Standing To Vindicate Its Own Rights

A political party like DPW has standing to challenge laws that adversely burden its participation in elections. Indeed, the Supreme Court has recognized the First Amendment right of political parties to, for example, meaningfully participate in the electoral process (*California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000)), and to place candidates on the ballot (*Williams v. Rhodes*, 393 U.S. 23, 34 (1968))—rights on which plaintiffs relied on the merits. Moreover, this Court has held that a "burden on [a party's] ability to field candidates for statewide and countywide office" is "easily sufficient" to establish that a political party has standing. *Libertarian Party of Illinois v. Scholz*, 872 F.3d 518 (7th Cir. 2017). DPW drew on these and other decisions to argue that the Acts violated the rights of DPW and of its voters to meaningfully participate in elections. Rather than address the merits, however, the district court held that that DPW lacked standing. That conclusion was wrong and requires reversal.

In rejecting DPW's bid to bring this suit, the district court ignored these precedents and concluded (without any citation) that "[i]f the court were to recognize a loss of party enthusiasm as an injury in this context, it would give a political party standing to challenge any decision by a governmental body that could be viewed as demoralizing the party's members." A11. But this Court *already* held

that a political party has standing to challenge government conduct that makes it more difficult, and more expensive, to participate in elections.

The district court's holding indeed cannot be squared with *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007). That case addressed an Indiana law requiring, generally, "that persons wanting to vote in person . . . must present at the polling place a government-issued photo ID." *Id.* at 950. Noting the difficulties associated with obtaining a photo ID – which, even if trivial, are real – this Court recognized that "even very slight costs in time or bother or out-of-pocket expense deter many people form voting." *Id.* at 950-51. This Court explained that the burdens of the statute were likely to fall most heavily on those "low on the economic ladder" (as those individuals are both less likely to have an ID in the first place and more likely to be deterred from obtaining one by cost), and thus were more likely to vote, "if they do vote . . . for Democratic rather than Republican candidates." *Id.* at 951. Thus, this Court held that the law injured the Indiana Democratic Party, "by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote," and that the Party had standing to seek an injunction. *Id.*

The Supreme Court granted *certiorari* in *Crawford* to address another issue presented by the case. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). The Court did not address standing beyond stating, in a footnote, that it "agree[d] with" the Seventh Circuit's resolution of the standing issue—that is, that "the Democrats have standing to challenge the validity of [the voter ID law]." *Id.* at

189 n.7. *Crawford* remains the law, as this Court just explained in *Common Cause Indiana v. Lawson*: "nothing in the Supreme Court's holdings" since 2007 "has undermined the holdin[g] of . . . *Crawford*." 937 F.3d 944, 950 (7th Cir. 2019). And it controls.

Indeed, as alleged in the complaint and substantiated by the Individual Plaintiffs' affidavits and the affidavit of its then-Chair, DPW counts on its members to support its candidates "by organizing together and engaging in activities such as public education, door knocking, small-donor fundraising, [and] phone banking." Dkt. 1 ¶ 9; *see also id.* at ¶ 15 (alleging that Plaintiff Degenhardt "worked with college students to help them comply with Wisconsin's restrictive voter identification laws").[10] These volunteers – several of whom have sworn under oath that their enthusiasm for the project of democracy was sapped – are less likely to participate in the 2020 election, and DPW will therefore have to (1) expend effort convincing them to contribute their time, (2) pay staffers to make up for the lost volunteer labor, or (3) simply go without. On that point, Ms. Laning – who, at the time, was the Chair of DPW – swore in an unrebutted affidavit (which was cited by the district court, A10) that in light of the Acts, DPW "will have more difficulty attracting volunteers." A45 ¶ 15. That sort of showing plainly suffices. *Compare*

[10] Plaintiffs' affidavits are properly considered in determining whether standing has been established. *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2005); *see also Hentosh v. Herman M. Finch Univ. of Health Scis./The Chicago Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999) ("A plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief in order to defeat a motion to dismiss if these facts are consistent with the allegations in the complaint." (citing *Hrubec v. Nat'l R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir. 1992)).

Krislov v. Rednour, 226 F.3d 851, 857, 862 (7th Cir. 2000) (affidavit stating candidate was "required to allocate additional campaign resources" established standing).

Beyond that, Chairwoman Laning explained in her unrebutted affidavit that Democratic voters "now have a reduced voice" and consequently diminished incentive "to conduct their associational activities—like fundraising, organizing volunteer activity, attracting additional supporters, and recruiting candidates for statewide office." Dkt. 14 ¶ 14. She swore under oath she had "already witnessed some of this firsthand." *Id*. These knock-on effects of party voter discouragement are plainly sufficient to confer standing under the precedents of this Court. *Wisconsin Right to Life*, 664 F.3d at 148; *Crawford*, 472 F.3d at 950-51.

B. DPW Also Has Associational Standing Through Its Members

In addition to injuries it suffered directly, DPW has standing to assert claims based on injuries suffered by its members. *Hunt v. Wash. State Apple Advertising Commission*, 432 U.S. 333 (1977); *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (supplier of firing-range facilities had standing to bring Second Amendment challenge to firing-range ban on behalf of members); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (allowing private schools to assert parents' rights to direct the education of their children).

As explained above, individual voters have standing under longstanding case law and basic logic to complain about an infringement of the "constitutional rights of voters." A13. *See* Point I, above. As a result, DPW can press its members'

constitutional claims on their behalf. *Ezell*, 651 F.3d at 696. Indeed, in *Hunt*, the Court held that an organization may press the rights of its members if some of the organization's members "would otherwise have standing to sue in their own right" and "the interests [the organization] seeks to protect are germane to [its] purpose." 432 U.S. at 343-44. That is plainly the case here.

DPW also has associational standing to assert the rights of Governor Evers and Attorney General Kaul, both of whom the district court acknowledged had been injured by the Acts. The district court nonetheless held DPW could not represent Evers and Kaul (or other prospective candidates), stating that Plaintiffs' "cite[d] no authority for the view that a political party may assert the rights of an elected official," (A11 n.1). But Plaintiffs expressly relied on *Hunt*, in which the Supreme Court held that an organization (like DPW) can assert the rights of its members (*i.e.*, Governor Evers and Attorney General Kaul). 432 U.S. at 343; *see* Dkt. 37 at 5; *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006) (political party had associational standing to raise candidate's claims).

It is true that, as the district court observed, Governor Evers and Attorney General Kaul are "capable of asserting [their] own rights," A11-12, n.1, but, in the words of this Court, to conclude that this means DPW does not have standing is "way off the mark." *Wisconsin Right to Life*, 664 F.3d at 147. Instead, the injuries suffered by Governor Evers and Attorney General Kaul actively support DPW's associational standing claim. In this regard, this case is no different from *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003), in which this court held that a candidate

for public office could bring a suit on behalf of the First Amendment rights of his supporters.

In holding that there was no standing, the district court also stated that DPW "represents Evers and Kaul as Democrats, not as the governor and attorney general." A11 n.1. The basis for the court's conclusion is unsupported by the record. At any rate, whether DPW represents Governor Evers and Attorney General Kaul as Democrats or as public officials is irrelevant. Even as elected-but-not-yet-installed Democrats, Evers and Kaul had legitimate interests in the integrity of the offices to which they were elected, and these interests were injured by the Acts. *See, e.g.*, *Crowe v. Lucas*, 595 F2d 985, 993 (5th Cir 1979) ("[O]fficial[s] who [are] entitled to hold an office under state law ha[ve] a property interest in [their] office . . . ."). DPW thus has standing to remedy the wrongs inflicted by Acts 369 and 370.

The district court's failure to permit DPW's claims to move forward was legal error, as this Court's precedents on the subject make clear. *See Wisconsin Right to Life*, 664 F.3d at 148 (collecting Supreme Court and Seventh Circuit precedents). The district court's decision should therefore be reversed and remanded for further proceedings.

III. Governor Evers' Injuries Also Ensure There Is An Article III Case

A. Governor Evers' Injuries Should Be Considered Under Rule 21

Next, it was also error to disregard the injuries that the Acts imposed on Governor Evers on the basis that he is a nominal defendant rather than a plaintiff. As earlier explained, Governor Evers not only filed an answer admitting all the

allegations in the complaint and joined Plaintiffs' request for a preliminary injunction (Dkts. 32, 53), he expressly informed the district court via the parties Joint Rule 26(f) Report that he is a "*de facto* plaintiff[] in this matter and should be considered as such." Dkt. 70 at 3. The district court nevertheless held that any injury to Governor Evers was not relevant because he was a defendant rather than a plaintiff and he "ha[dn't] asked to be realigned" as a plaintiff. A12.

The district court's decision is not just factually erroneous but also contrary to its own local rules of practice. Under the Western District of Wisconsin's local rules, parties filing their Joint Rule 26(f) Report are required to "identi[fy] [] any new parties to be added" to a case and "include[e] an explanation as to why these parties must (or should) be added."[11] As just noted, Governor Evers did just that. Dkt. 70 at 3.

In addition, the district court's refusal to realign Governor Evers as a plaintiff in this matter on the basis of formalism stands the Federal Rules on their head and disregards their plain goals. Federal Civil "Rule 21 authorizes the addition of a person who, for whatever reason, has not been made a party and whose presence as a party is deemed to be necessary or desirable. . . . Rule 21 also has been invoked to realign parties under Rule 19." Wright & Miller, 7 Fed. Prac. & Proc. Civ. § 1683 (3d ed. 2019). That Rule may be invoked to cure lack of standing, and the Supreme Court has previously used this power to do so. *Mullaney v.*

[11] Standing Order Governing Preliminary Pretrial Conferences, www.wiwd.uscourts.gov/sites/default/files/Standing_Order_Pretrial_SLC.pdf (last visited Dec. 9, 2019).

Anderson, 342 U.S. 415 (1952); *see also N. Tr. Co. v. Bunge Corp.*, 899 F.2d 591, 597 (7th Cir. 1990) ("In *Mullaney* the Supreme Court permitted the addition of two parties as plaintiffs to cure a perceived lack of standing."). And although Governor Evers *did* make such a request, it is also clear that Rule 21 may be invoked *sua sponte*. *Du Shane v. Conlisk*, 583 F.2d 965, 967 (7th Cir. 1978) ("Under this rule, it has been held that a party can be added [s]ua sponte by the court after judgment for remedial purposes."). The district court's decision disregarded these authorities.[12]

Article III's standing requirement is meant to ensure that the federal courts resolve actual controversies. It is not a question of formalism and case-caption syntax. "Our decisions," the Supreme Court has thus explained, "have required that [a] dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character.'" *MedImmune*, 549 U.S. at 127 (discussing declaratory-judgment actions that satisfy the case-or-controversy requirement, and citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Realignment to consider Governor Evers' interests adheres to these principles, especially Plaintiffs only included him as a nominal defendant out of an

[12] The district court stated that "Plaintiffs cite no authority for the view that a court may . . . realign the parties to preserve standing without a proper motion." A12. But plaintiffs cited both Rule 21 and *Mullaney v. Anderson*, 342 U.S. 415 (1952), in their opposition papers. See Dkt. 37 at 7 ("Indeed, Federal Rule 21 empowers federal courts to determine proper plaintiffs and defendants in an action, and thus efficiently address standing concerns.").

abundance of caution.[13] *See Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 159 (3d Cir. 1995) ("[T]he alignment inquiry [is] one which 'obliges the court to penetrate the nominal party alignment and to consider the parties' actual adversity of interest.'"). On the other hand, the district court's failure to consider the real interests of the parties disregarded Article III's purpose.

In a footnote, the district court sought to justify its decision by stating that realignment would create a "different problem": all the post-realignment defendants, the court explained, would be legislators, and "legislators are generally entitled to absolute immunity for any conduct performed in a legislative capacity." A12 n.3. But plaintiffs' suit does not address conduct performed in a legislative capacity. Instead, plaintiffs sue Vos, Fitzgerald, Darling, Nygren, Roth, and Ballweg because, under the lame-duck legislation bring challenged, *they* have arrogated to themselves *executive*—not legislative—power to defend the statutes in litigation. *See, e.g.*, Dkt. 1 ¶ 19 ("[Vos] is sued in his official capacity as co-chair of the Joint Committee on Legislative Organization, which has, under the Act, arrogated to itself powers formerly exercised by Wisconsin's Executive—including the power to defend the Acts."); *see also id.* ¶¶ 20-25.

[13] It has long been established that a plaintiff must "sue state officials, not the state in its own name, in order to avoid the Eleventh Amendment's prohibition," which "bar[s] unconsented suits against the states themselves, including those in which the plaintiffs seek injunctive relief only." Hart & Weschler, The Federal Courts and The Federal System 931 (7th ed. 2015) (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)).

Indeed, Act 369 makes this quite clear:[14]

> **Section 26.** 165.08 of the statutes is renumbered 165.08(1) and amended to read:
>
> 165.08(**1**) Any civil action prosecuted by the department by direction of any officer, department, board, or commission, ~~shall be compromised or discontinued when so directed by such officer, department, board, or commission. Any~~ or any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued with the approval of ~~the governor~~ an intervenor under s. 803.09 (2m) or, if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee.

Act. 369, Section 26 (Dkt. 15-1 ¶ 2). The state of Wisconsin has placed legislators in charge of the executive task of defending statutes, and it follows that those legislators should be subject to suits challenging those laws. *Accord Reeder v. Madigan*, 780 F.3d 799, 802 (7th Cir. 2015) (discussing scope of legislative immunity).

B. Plaintiffs' Guarantee Clause Claim Is Justiciable

In the alternative, the district court held that Governor Evers and Attorney General Kaul (even if they had standing) could not bring Plaintiffs' claims under

[14] Intervenors under Wis. Stat. Ann. § 803.09 (2m) are legislative bodies: "When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, *the assembly, the senate, and the legislature* may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14" (emphasis added).

the Guarantee Clause because that claim is "not justiciable." A13. This again was error.

1. The Supreme Court has instructed that the political-question doctrine, the sole doctrine on which Defendants have relied, has *nothing* to do with "the federal judiciary's relationship to the States"; it concerns *solely* "the relationship between the judiciary and the coordinate branches of the Federal Government[.]" *Baker*, 369 U.S. at 210. Thus, the doctrine only "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (citation omitted). It is irrelevant under the political-question doctrine that a plaintiff's claims "[touch] upon matters of state governmental organization." *Baker*, 369 U.S. at 218. Indeed, it is settled that "a federal court may correct constitutional wrongs in areas generally within the purview of state lawmakers[.]" *Judge v. Quinn*, 624 F.3d 352, 359 (7th Cir. 2010) (*Quinn II*). Here, although Defendants moved to dismiss the Guarantee Clause claim under the political-question doctrine and the district court granted relief on that ground, Defendants *never* identified a single question in this suit committed to Congress or the President of the United States. There is none. That ought to have been the end of the political-question inquiry.

In seeking relief, Defendants invoked (and the district court cited) decisions stating in dictum that the Guarantee Clause is never justiciable. But the Supreme Court has explained it never so held. *New York v. United States*, 505 U.S. 144, 184-85 (1992) (only "*some* questions raised under the Guarantee Clause are nonjusticiable" (emphasis added, citing *Reynolds*, 377 U.S. at 582)). And it has also cautioned that the political-question doctrine does not apply categorically, but instead requires a "case-by-case inquiry." *Baker*, 369 U.S. at 210-11. Meanwhile, all the Supreme Court cases that have dismissed Guarantee Clause cases on justiciability grounds have raised issues squarely addressed to one of the other branches of government. *See, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 141, 151 (1912) (considering challenge to all "statute[s] passed in Oregon since the adoption of [an] initiative and referendum," and concluding the case raised solely "political and governmental" issues that were "embraced within the scope of powers conferred upon Congress").[15]

The same is true of *Rucho v. Common Cause*, on which the district court relied. That case addressed gerrymandering claims committed to Congress under the Elections Clause. 139 S. Ct. 2484, 2508 (2019). In passing, the Supreme Court stated that the Guarantee Clause claim was not justiciable. But *Rucho* has to be read in the context of *New York v. United States* as well as *Baker v. Carr*'s caution about the scope of the political question doctrine—federalism.

[15] *See also Luther v. Borden*, 48 U.S. (7 How.) 42 (1849) (considering which of two governments was the legitimate government of Rhode Island, and holding that "it rests with Congress to decide what government is the established one in a State").

Nor do appellate decisions justify the district court's conclusion. In *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991), decided before *New York v. United States*, this Court considered the merits of the Guarantee Clause claim there presented. *Id.* at 552-53. Other Courts of Appeals, meanwhile, have held that the Guarantee Clause ***is*** justiciable. *See Kerr v. Hickenlooper*, 744 F.3d 1156, 1176-77 (10th Cir. 2014) (allowing Guarantee Clause claim to proceed in federal court on the merits; "*Baker*'s refusal to bar Guarantee Clause claims on an 'absolute' basis would be rendered a nullity if the clause itself contained a textual commitment to the coordinate political branches." (citing *Baker*, 369 U.S. at 222 & n.48)), *vacated on other grounds*, 135 S. Ct. 2927 (2015) (mem.); *Largess v. Supreme Judicial Court*, 373 F.3d 219 (1st Cir. 2004) (adjudicating Guarantee Clause claim on the merits).

2. In that context, plaintiffs' Guarantee Clause claim is plainly justiciable—not least of all because this case presents no issue that ought to be decided by another branch of the federal government.

Of course, the text of the U.S. Constitution commits the Guarantee Clause to the federal government as whole. The Constitution thus makes it the duty of the "United States"—not Congress nor the President—to ensure that each state has a republican form of Government. U.S. Const. art. IV, § 4. As Article IV makes clear, the Framers knew how to delegate authority to specific branches of government when they wished to do so. *See id.* at § 3, cl. 1 (granting power to admit new states to "The Congress" alone); *see also Nixon v. United States*, 506 U.S. 224, 238 (1993) (engaging in "a delicate exercise [of] constitutional interpretation" and finding that

the Impeachment Trial Clause provides no "identifiable textual limit on the authority which is committed to the Senate" (citation omitted)). But Article IV, Section 4 did not do that.

The Constitution's design lends further support to the view that the Clause is justiciable: by placing the Guarantee Clause in Article IV, rather than Article I ("All legislative Powers"), Article II ("The executive Power"), or Article III ("The judicial Power"), the Framers made every branch of the federal government responsible for the Clause's enforcement. *See Kerr*, 744 F.3d at 1176-77.

Considering all of this, it is plain that the district court should have evaluated plaintiffs' Guarantee Clause claim on the merits. *See id.* at 1176-77; *see also New York*, 505 U.S. at 184-85. It should have considered the "textual, structural, and historical evidence" of the meaning of the Guarantee Clause, and evaluated that evidence against the facts presented in this case. *Zivotofsky*, 566 U.S. at 201. This is the sort of inquiry federal courts conduct every day in applying the Constitution. *See Patchak v. Zinke*, 138 S. Ct. 897, 904-08 (2018) (adjudicating separations-of-powers question); *see also Stern v. Marshall*, 564 U.S. 462, 483 (2011) (Article III powers). As the Tenth Circuit noted in *Kerr*, "in order to develop judicially manageable standards [for the Guarantee Clause], courts must be permitted to reach the stage of litigation where such standards are developed." 744 F.3d at 1179. The district court should have done so here.

C. Governor Evers Can Prosecute The Other Voting-Rights Claims

Finally, the district court erred in ruling, without citing any authority, that Governor Evers lacked standing to raise voting-rights claims under the First and Fourteenth Amendments. A13-14. Governor Evers voted in the election. Moreover, the Supreme Court has of course permitted a candidate for political office to raise an Equal Protection claim alleging that state officials' lame-duck conduct was an unconstitutional deprivation of due process and equal protection because it unfairly diluted the votes tendered in favor of the candidate. *Bush v. Gore*, 531 U.S. at 104-05. The district court identified no basis to treat Governor Evers differently, and there is none.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed. The Court should hold that Plaintiffs have standing to proceed and that the Guarantee Clause claim is justiciable. The case should therefore be remanded so that the district court can consider the merits of the preliminary-injunction application in the first instance.

DATED: New York, New York
December 9, 2019

HOLWELL SHUSTER &
GOLDBERG LLP

By: /s/ *Vincent Levy*

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Circuit Rule 32(c), because this brief contains 9,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) 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 Microsoft Office 2016 in 12-point Century Schoolbook font.

December 9, 2019

/s/ Vincent Levy
Vincent Levy

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

The Rule 30(a) and 30(b) appendix, which are consolidated pursuant to Circuit Rule 30(b)(7), contain all material required by Circuit Rules 30(a) and (b).

December 9, 2019

/s/ *Vincent Levy*
Vincent Levy

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2019, I caused to be electronically filed the foregoing with the Clerk of 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.

December 9, 2019

/s/ Vincent Levy
Vincent Levy

CIRCUIT RULE 30(a) AND (b) APPENDIX

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON, ALEXIA SABOR, PETER KLITZKE, DENIS HOSTETTLER, JR., DENNIS D. DEGENHARDT, MARCIA STEELE, NANCY STENCIL, and LINDSAY DORFF,

Plaintiffs,

v.

ROBIN VOS, SCOTT L. FITZGERALD, ALBERTA DARLING, JOHN NYGREN, ROGER ROTH, JOAN BALLWEG, STEPHEN L. NASS, JOEL BRENNAN, TONY EVERS, and JOSHUA L. KAUL,

Defendants.

OPINION and ORDER

19-cv-142-jdp

This is another legal challenge to 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370. These are the so-called "lame-duck" laws, passed by the Republican-controlled legislature after the November 2018 election, while Republican Scott Walker was still governor. The lame-duck laws restrict the authority of the executive branch in numerous ways, such as by limiting the governor's control over the Wisconsin Economic Development Corporation and by prohibiting the attorney general from settling some lawsuits without legislative approval.

The Democratic Party of Wisconsin and several of its members challenge the constitutionality of the lame-duck laws. Plaintiffs allege that the legislature acted with partisan intent to limit the power the newly elected governor, Tony Evers, and attorney general, Josh Kaul, both Democrats. Plaintiffs say that the lame-duck laws effectively changed the results of the election, Dkt. 64, at 5, and as a result violate the First Amendment, the Equal Protection Clause, and the Guarantee Clause of the United States Constitution.

Two motions are before the court: (1) plaintiffs' motion to preliminarily enjoin Acts 369 and 370, Dkt. 2; and (2) a motion to dismiss filed by defendants Joan Ballweg, Alberta Darling, Scott L. Fitzgerald, Stephen L. Nass, John Nygren, Roger Roth, and Robin Vos, all of whom are Wisconsin legislators, Dkt. 34. (The court will refer to these individuals as "the legislative defendants" for the remainder of the opinion.) Defendant Evers and defendant Joel Brennan (Secretary of the Wisconsin Department of Administration) have filed briefs in support of the motion for a preliminary injunction and in opposition to the motion to dismiss. Defendant Kaul has not taken a position on either motion.

There are many reasons to criticize the lame-duck laws. The legislative defendants don't dispute that the lame-duck laws were intended to limit the power of the newly Democratic executive officers and to consolidate power in the Republican-controlled legislature. But the role of a federal court is not to second-guess the wisdom of state legislation, or to decide how the state should allocate the power among the branches of its government. The court will deny the motion for a preliminary injunction and grant the motion to dismiss, because the plaintiffs are not entitled to any remedy under the United States Constitution. Any judicial remedy for the harms alleged in this case must come from the courts of Wisconsin. *See, e.g., SIEU, Local 1 v. Vos*, 2019AP622 (Wis. Sup. Ct. reviewed accepted April 19, 2019) (case before state supreme court alleging that Acts 369 and 370 violate Wisconsin Constitution's separation of powers doctrine).

ANALYSIS

A. Overview of the claims and defenses

Enacted in December 2018, 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370 made dozens of changes to state law. Plaintiffs cite the following changes in their complaint:

- prohibiting the governor from renominating potential appointees who were already rejected by the legislature, 2017 Wis. Act 369, § 4;
- requiring the Department of Veterans Affairs to notify the legislature of certain transfers of funds, *id.* § 23;
- requiring legislative approval for the attorney general to withdraw from a lawsuit filed by state government, *id.* § 26;
- requiring legislative approval before the attorney general may settle lawsuits for injunctive relief, *id.* § 30;
- giving the legislature authority to suspend an administrative rule "multiple times," *id.* § 64;
- adding legislative appointees to the Wisconsin Economic Development Corporation, *id.*, § 82m;
- codifying administrative rules related to voter identification requirements, *id.* § 91;
- removing the governor's ability to appoint the chief executive officer of the Wisconsin Economic Development Corporation, *id.* § 102(2v);
- codifying administrative rules requiring drug testing for individuals applying for certain kinds of public assistance, 2017 Wis. Act 370, § 17;
- placing new conditions on funding for the Department of Health Services, *id.* §§ 10(6), 44(3)(b).

Plaintiffs challenge Acts 369 and 370 on three grounds. First, plaintiffs say that the Acts violate the Guarantee Clause, which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. Plaintiffs' Guarantee Clause theory has several components, but the gist is that the Acts violate

the Guarantee Clause because the purpose and effect of the Acts were "to blunt the electoral results" by transferring power from the executive to the legislature only after candidates from a rival party were elected as the governor and attorney general. Dkt. 1, ¶ 8 and Dkt. 3, at 17.

Second, plaintiffs raise claims under their First Amendment rights of free expression and association. Plaintiffs contend that the Acts violate the First Amendment in various ways, including by "retaliat[ing] against Plaintiffs due to their political views and the expression of their political preferences." Dkt. 1, ¶ 93. Plaintiffs' theory is that the legislature enacted Acts 369 and 370 to retaliate against those who voted for Evers and Kaul and to prevent those voters from "enact[ing] their policy preferences," which they had "spent years working to achieve." Dkt. 1, ¶ 92 and Dkt. 3, at 10.

Third, plaintiffs raise a claim under the Equal Protection Clause. As with the First Amendment claim, plaintiffs say that the legislature discriminated against them because of their political beliefs. Dkt. 1, ¶ 99. Plaintiffs also say that the Acts "dilute the power of Democratic voters' votes" by "by substantially changing, in the lame-duck session, the authorities of the" executive branch. *Id.*, ¶ 100 and Dkt. 3, at 23.

The legislative defendants move to dismiss plaintiffs' claims on three grounds: (1) plaintiffs lack standing to sue; (2) plaintiffs' claims present political questions that can't be resolved by a federal court; and (3) plaintiffs' allegations don't state a claim upon which relief may be granted. The court concludes that plaintiffs lack standing to sue on all of their claims because they haven't pointed to any concrete harms they have suffered or will suffer because of Acts 369 and 370. And even if the court were to accept plaintiffs' request to consider the injuries of the governor and attorney general, plaintiffs' claims would fail for other reasons. So

the court will grant the motion to dismiss in full, which moots plaintiffs' motion for a preliminary injunction.

B. Standing

1. Legal standard

Standing is an "essential aspect" of the requirement that every plaintiff in federal court show that its complaint falls within the judicial power under Article III of the Constitution. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). A plaintiff doesn't have standing unless he or she shows three things: (1) plaintiff suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). The injury must be an "invasion of a legally protected interest that is concrete and particularized," meaning that it "affects the plaintiff in a personal and individual way." *Id.* (internal quotations and alterations omitted). A plaintiff can't rely on a "generalized grievance about the conduct of government." *Id.* at 1931.

In determining whether a plaintiff has adequately pleaded the requirements for standing, the court applies the same standard that it applies to motions to dismiss for failure to state a claim: a complaint must contain sufficient factual matter, accepted as true, to plausibly allege each of the requirements for standing. *Silha v. ACT, Inc.*, 807 F.3d 169, 173–74 (7th Cir. 2015). The court must draw reasonable inferences in favor of the plaintiff but may not accept conclusory allegations. *Id.* However, when, as in this case, the parties have submitted evidence outside the pleadings, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *St. John's United Church of Christ*

v. City of Chi., 502 F.3d 616, 625 (7th Cir. 2007). In that situation, "the plaintiff bears the burden of coming forward with competent proof that standing exists." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009).

2. Plaintiffs' alleged injuries

A threshold problem for plaintiffs in meeting their burden to satisfy the requirements for standing is that Acts 369 and 370 do not restrict or regulate plaintiffs' conduct in any way. Rather, the laws at issue are restrictions on the governor and the attorney general, who are defendants, not plaintiffs. As the legislative defendants point out, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). This is because the causal connection between the government's conduct and the alleged harm tends to be more attenuated in those situations. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493–94 (2009); *DH2, Inc. v. U.S. S.E.C.*, 422 F.3d 591, 596 (7th Cir. 2005). Despite the legislative defendants' reliance on this aspect of *Lujan*, plaintiffs do not address it or explain why they believe that the causal relationship between the Acts and their alleged injuries is sufficiently direct to satisfy standing requirements. That is reason alone to conclude that plaintiffs haven't met their burden.

Another problem is that plaintiffs articulate many of their injuries at a high level of generality. For example, in their brief in opposition to the motion to dismiss, the individual plaintiffs describe their injuries as follows:

> [D]efendants diluted and retaliated against plaintiffs' exercise of their vote by enacting laws that disempowered the incoming administration from enacting [the] policy [that plaintiffs supported]. This conduct specifically and directly infringed plaintiffs' constitutional rights (1) to associate; (2) to express their views; (3) to advance their collective beliefs; (4) to not have their

> votes diluted; and (5) to live under a republican form of government.

Dkt. 37, at 11. But this is simply a summary of plaintiffs' legal theories; it is not a description of any "concrete and particularized" injuries that affect plaintiffs "in a personal and individual way." *Gill*, 138 S. Ct. at 1929.

The only identifiable harm alleged is that the legislature has prevented plaintiffs from enacting policies that they support. Specifically, they say that they voted for Evers and Kaul because of the policies the candidates promised to enact, but Acts 369 and 370 have prevented Evers and Kaul from keeping many of those promises. Dkt. 1, ¶¶ 2–7. But the Supreme Court has already rejected the view that a voter has a legally protected interest in advancing a particular policy, concluding that "the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable general interest common to all members of the public." *Gill*, 138 S. Ct. at 1931 (internal quotations omitted). Again, although the legislative defendants cite and rely on this holding from *Gill*, plaintiffs don't show how this principle would not apply directly to the harms they allege.

Plaintiffs name several other types of alleged harm throughout their complaint and briefs: (1) vote dilution; (2) emotional distress; (3) unequal treatment "targeting" plaintiffs; (4) resources expended by the Democratic Party; (5) future difficulties that the Democratic Party may experience. But none of these alleged harms are sufficient to give plaintiffs standing to sue.

a. Vote dilution

Plaintiffs invoke the concept of "vote dilution," but they don't clearly explain what they mean by that. The Supreme Court has recognized vote dilution as an injury arising from the malapportionment of legislative districts. Those cases "require that each elector have the same

voting power, as measured by the number of votes required to elect each elected state official." *Risser v. Thompson*, 930 F.2d 549, 553–54 (7th Cir. 1991). For example, a citizen's vote is diluted if legislative districts have significant population differences. *See Wesberry v. Sanders,* 376 U.S. 1, 7 (1964) (malapportioned maps "contract the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes). Plaintiffs don't allege anything like that in this case. Rather, they explain their theory of vote dilution as follows:

> Wisconsin's voters thought they were voting for one thing—a Democratic administration with all the powers of the outgoing administration—and, after the election, the lame-duck Republican legislature gave them another—a Democratic administration with fewer powers, with powers core to the fulfilment of the candidates' campaign promises having been transferred to the gerrymandered legislature.

Dkt. 3, at 30. So plaintiffs appear to be alleging that their votes were diluted because the Act made it more difficult for them to achieve their favored policies. This is just a re-packaging of their interest in a specific policy agenda. Such a view of vote dilution has not been recognized by the Supreme Court or the court of appeals.

b. Emotional distress

In their declarations, the individual plaintiffs discuss the way the Acts made them and others feel. Dkt. 4, ¶ 5 ("the excitement and energy of Democratic activists in my area was zapped"); Dkt. 5, ¶ 7 (the Acts "demoralized Wisconsin voters"); Dkt. 6, ¶ 6 ("many Democratic voters feel helpless"). That type of emotional harm might be understandable, but it doesn't qualify as an injury under the Constitution. *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 660 (7th Cir. 2015) ("Neither psychological harm produced by observation of conduct with which one disagrees nor offense at the behavior of government and a desire to

have public officials comply with one's view of the law constitutes a cognizable injury." (internal quotations omitted)).

c. "Targeting"

Plaintiffs say that they have standing because "the Acts were passed to target Democrats and the Democratic Party because of the views expressed by their voters and candidates and the subsequent electoral victory of Evers and Kaul." Dkt. 37, at 15–16. But plaintiffs are confusing the requirements of standing with the merits of their claims. Evidence of legislative intent might be relevant to prove a violation of the First Amendment or the Equal Protection Clause, but it is the effect of the Acts on plaintiffs, not the intent of the legislature, that matters for standing. *See Gill,* 138 S. Ct. at 1932 ("The question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent."). As discussed above, plaintiffs are not the "targets" of Acts 369 and 370 in the sense that those laws prohibit or require any action by plaintiffs; rather, the laws are directed at the governor and the attorney general. Even if it is true that the purpose of the law was to subject plaintiffs to unequal treatment, such a purpose doesn't provide a basis for standing unless it is coupled with concrete harm. *Johnson*, 783 F.3d at 666 ("[P]laintiffs . . . cannot rely on the theory that they have been injured by being treated unequally favorably in the abstract.").

d. Resources expended by the party

Plaintiffs say that the Democratic Party "raised millions of dollars in support of the candidates and policies that [the party] promoted, undertook significant efforts to register voters, coordinated the activities of its members and candidates for office, conducted recruiting and fundraising activities, and conducted a number of other activities designed to obtain victory at the polls in 2018." Dkt. 37, at 11–12. Those costs may be concrete and

particularized, but they cannot provide a basis for standing because the party incurred them *before* Acts 369 and 370 were enacted. So the costs are not "fairly traceable" to the Acts and they could not be recouped by prevailing in this lawsuit.

e. Future harm

Plaintiffs rely on a declaration by the Democratic Party chair, who predicts that the party will have greater difficulty attracting volunteers, recruiting candidates, and raising money because of the Acts. Dkt. 14. This theory of harm rests on a concurring opinion in *Gill*, in which Justice Kagan observed that a "disfavored party" subjected to gerrymandering could have standing to sue if the party "face[s] difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office" as a result of the gerrymander. 138 S. Ct. at 1938 (Kagan, J., concurring).

Justice Kagan's opinion was not adopted by a majority of the court. *See id.* at 1916 ("The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other."). And the Court expressed skepticism of that theory of harm in *Rucho v. Common Cause* because such harm would be difficult to measure: "How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?" 139 S. Ct. 2484, 2504–05 (2019).

But even if this court treated Justice Kagan's opinion as controlling, it would not help plaintiffs for two reasons. First, Justice Kagan's theory was specific to gerrymandering, in which one party is directly targeting another: "By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Although plaintiffs allege that Acts 369 and 370 "target"

them as well, the connection is more tenuous because the Acts on their face are about the relationship between the state legislative and executive branches rather than the political parties per se. If the court were to recognize a loss of party enthusiasm as an injury in this context, it would give a political party standing to challenge any decision by a governmental body that could be viewed as demoralizing by the party's members.

Second, Justice Kagan's theory rested on an assumption that a political party could show that it had already been harmed in tangible ways. In this case, plaintiffs rely on nothing but conclusory assertions to support a view that the Acts will have an adverse effect on the party. That's not enough. "Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (internal quotations omitted). Rather, the harm must be "actual or imminent." *Id.* at 409. "Although 'imminence' is concededly a somewhat elastic concept," *Lujan*, 504 U.S. at 564, "there must be at least a substantial risk that such harm will occur." *Hummel v. St. Joseph Cty. Bd. of Comm'rs*, 817 F.3d 1010, 1019–20 (7th Cir. 2016). Because plaintiffs have not adduced evidence or even alleged facts plausibly showing that the Democratic Party will suffer the harms identified by the party chair, they do not provide a basis for giving plaintiffs standing to sue in this case.

C. Potential claims of Evers and Kaul

Plaintiffs contend that, if they "lack the requisite interest to establish standing, Governor Evers and Attorney General Kaul can supply the missing ingredient" because there is no dispute that Evers and Kaul are injured by Acts 369 and 370 Dkt. 37, at 13.[1] The

[1] Plaintiffs also say that the Democratic Party of Wisconsin has standing to assert the rights of Evers and Kaul because they are members of the party. Dkt. 37, at 12–13. But plaintiffs cite no authority for the view that a political party may assert the rights of an elected official, who

legislative defendants dispute that Evers and Kaul were injured, but defendants' argument on that point is dubious. They say that Acts 369 and 370 were passed into law before Evers and Kaul took office, so "they never had any federal right (or state law right, or any other kind of right) to the powers that previous occupants of their offices had." Dkt. 40, at 9. But the laws were passed after the elections and just before the previous governor and attorney general left office, so it was only Evers and Kaul who suffered the effects of the limitations on their respective offices.

Regardless, Evers and Kaul are defendants, not plaintiffs, so any injuries they have suffered are irrelevant to the standing analysis. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one *plaintiff* must have standing to seek each form of relief requested in the complaint." (emphasis added)). Plaintiffs have not moved to dismiss Evers and Kaul as defendants; and Evers and Kaul haven't asked to be realigned as plaintiffs. The case plaintiffs cite had nothing to do with standing. *See Teamsters Local Union No. 727 Health & Welfare Fund v. L & R Grp. of Cos.,* 844 F.3d 649 (7th Cir. 2016). Rather, the court in that case amended the caption to reflect the real name of the party being sued. *Id.* at 652. Plaintiffs cite no authority for the view that a court may consider a defendant's injuries when determining standing or realign the parties to preserve standing without a proper motion. [2]

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is obviously capable of asserting his or her own rights. Also, the party represents Evers and Kaul as Democrats, not as the governor and attorney general. Because the court has concluded that plaintiffs haven't alleged an injury in fact to Democratic voters, Evers and Kaul's membership in the party provides no help in showing that the party itself has standing to sue.

[2] Realigning the defendants who are part of the executive branch would create a different a problem because the remaining defendants would all be legislators. Even in a lawsuit for injunctive relief, legislators are generally entitled to absolute immunity for any conduct performed in a legislative capacity. *See Reeder v. Madigan*, 780 F.3d 799, 802 (7th Cir. 2015).

Even if the court were to consider Evers and Kaul's injuries, doing so would not save the case for plaintiffs. Plaintiffs' claim under the Guarantee Clause is not justiciable. *See Rucho*, 139 S. Ct. at 2506 ("This Court has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim."). Plaintiffs contend that *Rucho* isn't dispositive because it didn't expressly disavow a statement in *New York v. United States*, 505 U.S. 144, 185 (1992), that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." But the Court didn't acknowledge any exceptions in *Rucho*, so if plaintiffs believe that the door is still open for presenting a claim under the Guarantee Clause, that is an issue they will have to raise with the Supreme Court. *See Risser*, 930 F.2d at 552 ("The clause guaranteeing to each state a republican form of government has been held not to be justiciable, [and that holding] is too well entrenched to be overturned at our level of the judiciary.").

And the court of appeals has already held that "[a] modest shift of power among elected officials is not a denial of republican government or even a reduction in the amount of democracy." *Id.* at 553. Although plaintiffs may resist a conclusion that the shift of power at issue in this case is "modest," the shift was not more substantial than what was at issue in *Risser*, which was the governor's ability to exercise a partial veto of legislation, a power so broad that it allows him to "delete phrases, words, and digits." *Id.* at 550. Both cases involve "a retail, not a wholesale, reallocation of" state power. *Id.* at 554.

As for plaintiffs' claims under the First Amendment and the Equal Protection Clause, adding Evers and Kaul as defendants wouldn't help because plaintiffs' have framed their claims as violations of the constitutional rights of voters and the Democratic Party, not as violations of the rights of the governor and attorney general. Plaintiffs haven't explained how Acts 369

and 370 burden the First Amendment rights of Evers or Kaul or discriminate against them within the meaning of the Equal Protection Clause. Rather, plaintiffs describe Evers and Kaul's injuries as an encroachment by the legislature on the powers of the executive branch. But it is well established that "[t]he Constitution does not prescribe the balance of power among the branches of state government." *Id.* at 552.

D. Conclusion

The bottom line is that federal courts don't have the authority under the United States Constitution to police the boundaries between legislative and executive power in state government in the absence of a concrete and particularized harm and the violation of a federal constitutional right. If Evers, Kaul, or anyone else believes that the state legislature has overstepped its lawful authority, the remedy is a lawsuit in state court under the state constitution. *See*, *e.g.*, *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018) (holding that state legislature violated separation of powers doctrine by transferring certain powers from legislative to executive branch during lame-duck session).

ORDER

IT IS ORDERED that the motion for a preliminary injunction, Dkt. 2, is DENIED, and the motion to dismiss, Dkt. 34, is GRANTED on the ground that plaintiffs lack standing to

sue. The case is DISMISSED without prejudice for lack of subject matter jurisdiction. The clerk of court is directed to enter judgment accordingly.

Entered September 30, 2019.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

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

THE DEMOCRATIC PARTY OF WISONSIN, COLLEEN ROBSON, ALEXIA SABOR, PETER KLITZKE, DENIS HOSTETTLER, JR., DENNIS D. DEGENHARDT, MARCIA STEELE, NANCY STENCIL, and LINDSAY DORFF,

Plaintiffs,

v.

ROBIN VOSS, SCOTT L. FITZGERALD, ALBERTA DARLING, JOHN NYGREN, ROGER ROTH, JOAN BALLWEG, STEPHEN L. NASS, JOEL BRENNAN, TONY EVERS, and JOSHUA L. KAUL,

Defendants.

Case No. 19-cv-142-jdp

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and dismissing the case for lack of subject matter jurisdiction.

s/V. Olmo, Deputy Clerk
Peter Oppeneer, Clerk of Court

9/30/2019
Date

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.:_____

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF NANCY STENCIL IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Nancy Stencil, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the City of Wausau in Marathon County. I am a mobile crisis professional and the chairperson of the Marathon County Democratic Party, and the Secretary for the Marathon County Central Labor Council.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as every other Democratic candidate seeking statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. The principal reason I voted for and supported these candidates was their promise to withdraw the state from federal lawsuits seeking to overturn the Affordable Care Act, expand access to Medicaid, and restore access to voting in northern parts of Wisconsin, where restricting "voter ID" laws have made it more difficult for people to vote. Other reasons I supported Governor Evers and Attorney General Kaul include increasing support for veterans and stopping Republicans' abuse of the Wisconsin Economic Development Corporation through corporate tax giveaways such as the Foxconn agreement, which gave away tax dollars at the expense of our children's public education.

4. For these reasons, I vigorously supported these Governor Evers and Attorney General Kaul while they were candidates for those offices. Their candidacy is one of the reasons that made me so motivated in my work as Chair as the Democratic Party of Marathon County, and I supported them and other Democratic candidates for statewide office by hosting office hours at our county Democratic Party office, training volunteers, knocking on doors, managing phone banks, and organizing campaign events in my area for Governor Evers and Attorney General Kaul. I also contributed money to their election campaigns and made in-kind contributions to their election effort.

5. After the Republicans introduced their lame-duck session bills to strip powers away from Governor Evers and Attorney General Kaul, the excitement and energy of Democratic activists in my area was zapped. Despite all of our work and our success in getting Democrats elected to every statewide office in Wisconsin State Government, Republicans used their lame-duck session to blunt that result. I do not believe anything like this has ever happened before, or that these laws would have been enacted if Republicans won the elections for Wisconsin's governor and attorney general.

6. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted for Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18 day of February, 2019.

Nancy Stencil

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs, **Civil Action No.:_____**

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF MARCIA STEELE IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Marcia Steele, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the Town of Algoma in Winnebago County. I am an urgent care nurse and the chair of the Democratic Party of Winnebago County.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. I elected Governor Evers and Attorney General Kaul primarily because of their promises to withdraw Wisconsin from a federal lawsuit challenging the Affordable Care Act (also known as Obamacare), to expand Medicaid, and to repeal drug testing requirements for people seeking public assistance, because I believe those requirements to be unethical and immoral. I also was motivated to support Governor Evers because of his commitment to undoing unnecessary restrictions on voting rights, reforming the Wisconsin Economic Development Corporation, and changing the Foxconn agreement between the State of Wisconsin and the foreign corporation that is getting billions of dollars from our state without accountability. Regarding Attorney General Kaul's campaign, I was motived to support him in addition to the reasons already stated, because I supported his pledge to use the Office of the Wisconsin Attorney General and Solicitor General to advocate for progressive change.

4. I worked to support these candidates based on their campaign promises. As Chair of the Democratic Party of Winnebago County, I organized campaign events for Governor Evers, Attorney General Kaul, and other candidates, knocked on hundreds of doors and talked to hundreds of voters in order to get out the Democratic vote, and recruited volunteers to help get Democratic candidates elected to office. I participated in these activities on a near-daily basis between August and Election Day in November 2018.

5. I never heard any candidate mention the possibility of stripping powers away from Governor Evers or Attorney General Kaul until after they had won their campaigns for statewide office.

6. As Chair of the Winnebago County Democratic Party, I have seen how the lame-duck session laws that stripped power from Governor Evers and Attorney General Kaul have affected Democratic voters. They have demoralized Democrats in my part of the state, leaving some activists and voters with the feeling that, no matter what they do to organize for Democratic candidates, they will not get the results they voted for, because Republicans will find ways to undo the results of an election even where a Democratic candidate wins. We are currently trying to mobilize Democratic voters for elections that will take place in the spring of this year, and the Republican's lame-duck scheme has negatively affected our efforts because Republicans have made it clear that they will try to change the outcome of an election, even after they lose.

7. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted—and worked to support—Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election. Based on my experience, these lame-duck laws will continue to demoralize and disenfranchise democratic voters unless they are stopped.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18 day of February, 2019.

Marcia Steele

Marcia Steele

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.:_____

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF ALEXIA SABOR IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Alexia Sabor, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the City of Madison in Dane County. I am a project manager for an IT company with a PhD in Forest Ecology and previous experience working with the Wisconsin Department of Natural Resources. I am also a cancer survivor and patient advocate.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. In particular, I elected Governor Evers and Attorney General Kaul because they believe in science, and I believed that they would use their executive authority to enact evidence-based rules and regulations. As a cancer survivor and patient advocate, I also supported them because of their campaign promise to withdraw the State of Wisconsin from federal lawsuits seeking to invalidate Obamacare, and Governor Evers' commitment to expanding Medicaid. And, as a mother with a young daughter, I supported Governor Evers and Attorney General Kaul because I am opposed to guns being carried in the Wisconsin State Capitol (which is close to my home), and I am opposed to the Foxconn corporate giveaway that has taken money out of my child's school and puts our natural environment at risk.

4. I also worked to support these candidates based on their campaign promises. I supported Governor Evers, Attorney General Kaul, and other Democratic candidates for statewide office in Wisconsin by knocking on doors in Madison and in other parts of the state for these candidates, and by donating at least $75 to the campaigns for Governor Evers and Attorney General Kaul. I worked more than 100 hours to conduct voter outreach and served on the communications team for the Democratic Party of Dane County, which is the local affiliate of

the Democratic Party of Wisconsin. I also took the day off of work on election day in November 2018 in order to assist with the election effort.

5. I never heard any candidate mention the possibility of stripping powers away from Governor Evers or Attorney General Kaul until after they had won their campaigns for statewide office. Once the Republicans in the state legislature proposed the lame-duck legislation, I worked to oppose the bills and sent over 1000 texts to voters throughout Wisconsin in an attempt to mobilize them to voice their opposition to the bills before they were signed into law to try to stop them from being enacted.

6. Now that the lame-duck bills have been signed into law, many Democratic voters feel helpless. While I was attempting to mobilize voters to oppose the lame-duck session bills, I found that many Democratic voters believed that there was no point in participating in the fight, because they believed that Republicans had rigged the system against Democratic voters and there was nothing that could be done—even after Democrats had just won every statewide election.

7. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted—and worked to support—Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election. Based on my experience, these lame-duck laws will continue to demoralize and disenfranchise democratic voters unless they are stopped.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of February, 2019.

Alexia A Sabor

Alexia Sabor

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.: 19-cv-142

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF COLLEEN ROBSON IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Colleen Robson, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the Village of East Troy in Walworth county. I am a special education teacher in Kenosha, Wisconsin.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. In particular, in voting for these candidates, I relied on their promises to (1) reform the Wisconsin Economic Development Corporation to eliminate apparent corporate giveaways to companies like Foxconn; (2) eliminate unnecessary voter identification requirements, especially for voters who are members of racial or ethnic minorities, and for college students; (3) withdraw the state of Wisconsin as plaintiff from a legal challenge to the Affordable Care Act; (4) expand the Medicaid program in the state of Wisconsin; and (5) eliminate drug testing requirements for recipients of food assistance in Wisconsin.

4. I also worked to support these candidates based on their campaign promises. I supported Governor Evers, Attorney General Kaul, and other Democratic candidates for statewide office in Wisconsin by volunteering for, and chairing, the Democratic Party of Walworth County; by housing a campaign organizer at my home; by coordinating logistics for teams that were canvassing, staffing phone banks, and attending meetings or conventions; by working with organizers of college students at the University of Whitewater to navigate and achieve compliance with voter identification laws; by holding office hours with the local chapter of the Democratic Party of Wisconsin; by entering voter data into databases; and by arranging for Governor Evers and Attorney General Kaul to speak in Walworth county. I provided management guidance to election campaign leaders, I coordinated with the Democratic Party of Wisconsin, and I led fundraising efforts. I spent at least one to five hours per day, generally five

days a week, on these activities during the campaign season. I also contributed money (about $500) directly to Governor Evers' and Attorney General Kaul's campaigns, as well as smaller sums to the Democratic Party of Wisconsin, Assembly and Senate campaign committees, and the Democratic Party of Walworth County.

5. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted—and worked to support—Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18 day of February, 2019.

Colleen J. Robson

Colleen Robson

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.: 19-cv-142

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin..

Defendants.

DECLARATION OF PETER KLITZKE IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Peter Klitzke, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the City of La Crosse in La Crosse County. I am a retired public elementary school teacher, and an avid sportsman.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as every other Democratic candidate seeking statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. The principal reason I voted for and supported these candidates was their promise to withdraw the state from federal lawsuits seeking to overturn the Affordable Care Act. Other reasons I supported Governor Evers and Attorney General Kaul include their commitment to (1) expanding Medicaid in the state of Wisconsin; (2) eliminating costly and unnecessary "voter ID" regulations; (3) providing greater services to veterans through programs such as Wisconsin's Veterans Trust Fund; and (4) enacting regulations to provide greater protections for the environment in order to enhance opportunities for sportsmen and women who hunt and fish in our state.

4. Also, as a retired public-school teacher, I voted for Democratic candidates because of their commitment to funding public education instead of corporate welfare projects like the Foxconn deal that was pushed through the legislature in the previous session. Tony Evers and Josh Kaul campaigned on reforming the Wisconsin Economic Development Corporation and holding Foxconn accountable, which would have resulted in more funding for priorities like public education and real job creation.

5. For these reasons, I actively supported these candidates. I supported Governor Evers, Attorney General Kaul, and other Democratic candidates for statewide office in Wisconsin by volunteering for the La Crosse County Democratic Party (a part of the Democratic Party of Wisconsin). I also knocked on thousands of doors and canvassed neighborhoods,

participated in voter outreach "phone banks," and spent hours organizing events for Democratic candidates and helped college students register to vote in La Crosse. In the weeks leading up to the election, I spent multiple hours every day of the week on these efforts in order to help elect Governor Evers and Attorney General Kaul.

6. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted for Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election. I would have concentrated my efforts and support differently had I known that the policy objectives I supported would not be within the powers of the candidates I campaigned and voted for.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18 day of February, 2019.

Peter Klitzke

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.: 19-cv-142

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF DENIS HOSTETTLER, JR., IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Denis Hostettler, Jr., under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the city of Cudahy in Milwaukee county. I am a call-center manager in New Berlin, Wisconsin.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. In particular, in voting for these candidates, I relied on their promises to (1) reform the Wisconsin Economic Development Corporation, which under former Governor Walker's administration had appeared corruptly managed; (2) eliminate voter identification requirements imposed by former Governor Walker, which I believe discriminate against low income Wisconsinites; (3) withdraw the state of Wisconsin as plaintiff from a legal challenge to the Affordable Care Act; (4) expand the Medicaid program in the state of Wisconsin; and (5) eliminate drug testing requirements for recipients of food assistance in Wisconsin.

4. I am not a registered Democrat. I voted for Governor Evers and Attorney General Kaul because of the promises they made in their campaigns.

5. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined my vote. I voted for Democratic candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19 day of February, 2019.

Denis Hostettler, Jr.

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.: 19-cv-142

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF LINDSAY ROSE DORFF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Lindsay Rose Dorff, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the City of Green Bay in Brown County. I am a stay-at-home mom and former public school teacher. I also volunteer as chair of the county Democratic party.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. In particular, in voting for these candidates, I relied on their promises to (1) expand the Medicaid program in the state of Wisconsin so that thousands more Wisconsinites could have access to affordable health care; (2) eliminate work requirements for Medicaid recipients; (3) withdraw the state of Wisconsin as plaintiff from a legal challenge to the Affordable Care Act; (4) reform the Wisconsin Economic Development Corporation to cut back on waste and corruption; and (5) eliminate drug testing requirements for recipients of food assistance in Wisconsin, which I know indirectly impact the food security of kids like the ones I used to teach.

4. I worked to support Governor Evers and Attorney General Kaul based on their campaign promises. During the November 2018 election cycle, I knocked on doors and made phone calls on behalf of these candidates. I also gave about $150 to Governor Evers' campaign. I attended many press events for statewide candidates, and I volunteered with the county Democratic party's communications team, actively promoting the Evers campaign on social media.

5. Each of the laws enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 undermined the work I did in support of Democratic candidates for statewide office in Wisconsin by making it impossible to achieve the policy goals I sought. I voted—and worked to support—Democratic

candidates because of the policy changes they could make with the powers of the offices they sought. The laws stripped those powers following the election.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18 day of February, 2019.

Lindsay Rose Dorff

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

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS D. DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF

Plaintiffs,

Civil Action No.: 19-cv-142

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin.

Defendants.

DECLARATION OF DENNIS D. DEGENHARDT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Dennis D. Degenhardt, under 28 U.S.C. § 1746, hereby declare and state:

1. I am a Wisconsin citizen, resident, and taxpayer. I live in the City of West Bend in Washington County. I am a retired credit union executive. I have spent almost my entire life in the State of Wisconsin. I am an active member of the Democratic Party of Wisconsin and have previously campaigned for public office in this state.

2. In the November 2018 election, I voted for Governor Tony Evers and Attorney General Josh Kaul, as well as other Democratic candidates for statewide office in Wisconsin.

3. I voted for Governor Evers and Attorney General Kaul because I supported their positions. In particular, in voting for these candidates, I relied on their promises to (1) expand the Medicaid program in the state of Wisconsin; (2) withdraw the state of Wisconsin as plaintiff from a legal challenge to the Affordable Care Act; (3) increase commitment to public education by reforming the Wisconsin Economic Development Corporation and eliminating corporate welfare like the Foxconn tax giveaway; (4) eliminate drug testing requirements for recipients of food assistance in Wisconsin; and (5) use the power of the Wisconsin Department of Justice and the Office of the Solicitor General to be a leader and represent the State of Wisconsin in lawsuits in a progressive way.

4. I also voted for Governor Evers with the expectation that, if he won the election to become Wisconsin's governor, he would be able to appoint progressive leaders to his cabinet and administration in the same way that Scott Walker and other Wisconsin governors have appointed members of their cabinets and administrations.

5. I worked to support Governor Evers and Attorney General Kaul based on their campaign promises. During the November 2018 election cycle, I was a candidate for the State Legislature and campaigned almost every day. I spoke on behalf of Governor Evers, Attorney General Kaul, and other Democratic candidates for statewide office because I believed that they

would carry out the campaign promises they made. During the four months leading up to the November 2018 election, I spent between four and eight hours almost every day knocking on doors and talking with voters on the phone, encouraging them to vote for Democrats and our Democratic values. I also spoke at election forums and worked with college students to help them comply with Wisconsin's restrictive voter identification laws.

6. I never heard any Republican official raise the need or even possibility of using an Extraordinary Session to remove the powers of Wisconsin's governor until after Democrats won the elections for Wisconsin's statewide offices in the 2018 election. Each of the laws enacted during this Extraordinary Session and signed into law by Scott Walker in December 2018 undermined the work I did in the months leading up to the election because they make it impossible for the candidates that I supported to carry out my policy goals in the state.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19 day of February, 2019.

Dennis D. Degenhardt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE DEMOCRATIC PARTY OF WISCONSIN, COLLEEN ROBSON; ALEXIA SABOR; PETER KLITZKE; DENIS HOSTETTLER, JR.; DENNIS DEGENHARDT; MARCIA STEELE; NANCY STENCIL; and LINDSAY DORFF,

Plaintiffs,

-against-

ROBIN VOS, in his official capacity as speaker of the Wisconsin State Assembly; SCOTT L. FITZGERALD, in his official capacity as majority leader of the Wisconsin State Senate; ALBERTA DARLING, in her official capacity as co-chair of the Wisconsin Joint Committee on Finance; JOHN NYGREN, in his official capacity as co-chair of the Wisconsin Joint Committee on Finance; ROGER ROTH, in his official capacity as President of the Wisconsin State Senate; JOAN BALLWEG, in her official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; STEPHEN L. NASS, in his official capacity as co-chair of the Wisconsin Joint Committee for Review of Administrative Rules; JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration; TONY EVERS, in his official capacity as Governor of the State of Wisconsin, and JOSHUA L. KAUL, in his official capacity as Attorney General of the State of Wisconsin,

Defendants.

Civil Action No.: 19-cv-00142_

DECLARATION OF MARTHA LANING IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

MARTHA LANING, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the Chair of the Democratic Party of Wisconsin ("DPW" or the "Party"). The statements herein are true, to the best of my knowledge, information, and belief.

2. In my capacity as Chair of the DPW, I oversee and manage the Party throughout the State of Wisconsin. The DPW represents the well over one million Democratic-supporting voters in the State of Wisconsin, including thousands of donors and volunteers. Members of the DPW include Governor Tony Evers and Attorney General Josh Kaul.

3. The DPW works to elect Democrats at every level of government in Wisconsin, including but not limited to the offices of Governor, Attorney General, and to seats in the Wisconsin State Senate and Wisconsin State Assembly. The Party supports incumbent Democratic officials, and also recruits and supports new Democratic candidates for these and other offices.

4. The goal of the DPW is not only to elect Democratic officials to every office at the local, state, and federal level, but to also enact policies that further the Democratic Party Platform.

5. During the 2018 election cycle, the DPW took positions on reforming the Wisconsin Economic Development Corporation to eliminate mismanagement and environmental harms; eliminating voter ID requirements imposed by regulation by former Governor Scott Walker; withdrawing the state of Wisconsin from a lawsuit that former Attorney General Brad Schimel had initiated to challenge the Affordable Care Act; opposing former Governor Walker's transfers of tens of millions of dollars from veterans homes by regulatory action; opposing regulatory cuts to Medicaid, including through the imposition of former Governor Walker's work requirements; expanding Medicaid through the power of the governor's office; and

eliminating former Governor Walker's drug testing requirements for Wisconsin food assistance programs.

6. To accomplish these goals and others, the DPW coordinated support among Wisconsin voters, predominately Democrats, for Democratic candidates. The DPW raised millions of dollars to support Democratic candidates for statewide executive office, including Governor Tony Evers and Attorney General Josh Kaul, both of whom are members of the DPW, because these candidates advanced the positions taken by the DPW.

7. In the course of work related to the November 2018 election, DPW members formed committees; elected leaders; revised and amended bylaws; coordinated with county parties and other organizations; collected and analyzed voter data; distributed voter files to candidates and campaign committees; and solicited and organized volunteers to staff phone banks, canvass voters door to door, and make calls on behalf of Democratic candidates in Wisconsin.

8. DPW members organized and staffed conventions, meetings, and press events for these candidates; arranged speaking events for these candidates; and assisted their campaigns with fundraising efforts.

9. In order to elect candidates for executive office in Wisconsin, DPW members registered voters, including college students and other populations targeted by former Governor Walker's voter ID requirements. DPW members coordinated to articulate DPW policy platforms (including the positions noted above) and resolutions.

10. In order to elect candidates for executive office in Wisconsin, DPW members prepared budgets, collected dues, and tracked membership in the DPW. DPW members coordinated with organizations like the Young Democrats of America and the College

Democrats of America.

11. In addition, the DPW conducted recruiting activities to mobilize new Democratic candidates to run for elected office. It provided these Democratic candidates with financial resources, research support, and advice in order to help them win in their elections. The DPW also conducted fundraising activities to support candidates and advocate the positions of its members.

12. The Acts have removed powers and functions from the offices of the Governor and Attorney General of Wisconsin that had been exercised by prior administrations and that should have been used to pursue the positions taken by the DPW and its members.

13. The laws challenged in these lawsuits, which were enacted in the Extraordinary Session by the Wisconsin Assembly and Senate and signed into law by former-Governor Scott Walker in December 2018 ("the Acts"), have undermined the work done by the DPW in support of Democratic candidates for statewide office in Wisconsin, and they undermine the DPW's ability to accomplish its policy objectives in the future.

14. The election results demonstrate that a majority of Wisconsin's voters can select Democrats for legislative and executive offices, but that the legislature will continue to be dominated by Republicans on account of Republican-drawn district lines and that the executive, when it is in Democratic hands, will have fewer powers than when it is in Republican hands. As a result, and because the Acts target Democratic executive officials by reducing their ability to implement DPW-supported policies, Democratic voters now have a reduced voice and thus a diminished incentive to conduct their associational activities—like fundraising, organizing volunteer activity, attracting additional supporters, and recruiting candidates for statewide office—through the DPW. As explained below, I have already witnessed some of this firsthand.

15. With respect to volunteer activity, the DPW will have more difficulty attracting volunteers to campaigns in support of Democratic candidates for executive office in Wisconsin. The Acts hamper Democratic executive officeholders from changing policy in Wisconsin by removing some of the levers of executive power. Again, this means volunteers are likely to seek out other avenues through which to change the policies that are affected by this removal, or they will shift their efforts to policies that are not affected by the Acts.

16. With respect to attracting support from independent voters, the DPW will have more difficulty because Democratic executive officeholders are able to influence fewer policy changes than Republican executive officeholders. This means that independents will tend to concentrate their efforts and attention on Republican candidates and officeholders rather than Democratic candidates and officeholders.

17. With respect to recruiting candidates for executive office, the DPW will have more difficulty recruiting and supporting such candidates than before the Acts were passed. The Acts remove some of the important powers of the governor and the attorney general, including the ability to implement administrative rules without veto by a simple majority of the legislature. Highly qualified potential candidates will decline to run because, in many important areas, the positions they seek are now subordinate to certain legislative offices.

18. The DPW finds its strength in its members. It therefore focuses significant time and money on developing a base of grassroots volunteers and a network of organizations who support the DPW's platform.

19. The DPW seeks to represent the values of all Wisconsin voters, and has an interest in enabling Governor Evers and Attorney General Kaul to enact the reforms on which they campaigned throughout the 2018 election cycle.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: on this 21st day of February, 2019.

Martha Laning
Chair, Democratic Party of Wisconsin