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

RESPONSE BRIEF OF LEGISLATIVE DEFENDANTS-APPELLEES

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN SANDERS LLP
One North Wacker Drive
Suite 2905
Chicago, Illinois 60606
(608) 999-1240 (telephone)
(312) 759-1939 (facsimile)
misha.tseytlin@troutman.com

Attorneys for Legislative Defendants-Appellees

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3138

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

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.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Robin Vos, Scott L. Fitzgerald, Alberta Darling, John Nygren, Roger Roth, Joan Ballweg, and Stephen L. Nass,

in their official capacities as members of the Wisconsin State Legislature

(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:

Troutman Sanders, LLP

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

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

N/A

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

N/A

Attorney's Signature: s/ Misha Tseytlin Date: November 1, 2019

Attorney's Printed Name: Misha Tseytlin

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

Address: Troutman Sanders, LLP One North Wacker Drive Suite 2905, Chicago, IL 60606

Phone Number: 312.759.5947 Fax Number: 312.759.1939

E-Mail Address: misha.tseytlin@troutman.com

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Attorney's Signature: s/ Kevin M. LeRoy Date: November 1, 2019

Attorney's Printed Name: Kevin M. LeRoy

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

Address: Troutman Sanders, LLP One North Wacker Drive Suite 2905, Chicago, IL 60606

Phone Number: 312.759.1938 Fax Number: 312.759.1939

E-Mail Address: kevin.leroy@troutman.com

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Plaintiffs-Appellants (hereinafter, collectively, "Plaintiffs") is not complete and correct. 7th Cir. R. 28(b). Legislative Defendants[1] provide a complete jurisdictional statement as follows:

The district court lacked subject-matter jurisdiction, 7th Cir. R. 28(a)(1), because, as explained below, Plaintiffs' claims raise only nonjusticiable political questions, *infra* Part I, and because Plaintiffs lack Article III standing, *infra* Part II. Plaintiffs claimed that the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. §§ 1983 and 1988, because their action alleged violations of the Guarantee Clause of the Constitution, as well as the First and Fourteenth Amendments to the Constitution. Dkt.1 at 14.[2] Plaintiffs claimed that the district court had jurisdiction over their requests for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Dkt.1 at 14.

This Court has jurisdiction to decide whether Plaintiffs' claims raise nonjusticiable political questions, *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019), and whether Plaintiffs lack standing, *Perry v. Vill. of Arlington Heights*, 186

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[1] "Legislative Defendants" refers to Legislative Defendants-Appellees Robin Vos, Scott L. Fitzgerald, Alberta Darling, John Nygren, Roger Roth, Joan Ballweg, and Stephen L. Nass. The remaining Defendants-Appellees are Tony Evers, in his official capacity as Governor of the State of Wisconsin; Joel Brennan, in his official capacity as Secretary of the Wisconsin Department of Administration; and Joshua L. Kaul, in his official capacity as Attorney General of the State of Wisconsin. Plaintiffs named Governor Evers and Attorney General Kaul as "nominal defendants" only. Dkt.1 at 2 n.1. None of these other defendants are participating in this appeal. 7th Cir. Dkt.11 & 12 (Attorney General Kaul); 7th Cir. Dkt.17 & 19 (Governor Evers and Secretary Brennan).

[2] "Dkt.__" refers to the district court's docket; "7th Cir. Dkt.__" refers to this Court's docket; and "A.__" refers to Plaintiffs' Required Short Appendix.

F.3d 826, 830–31 (7th Cir. 1999), and would have jurisdiction over the merits if Plaintiffs both had raised justiciable claims and had standing, 28 U.S.C. § 1291; *see* 7th Cir. R. 28(a)(2). The district court issued an Opinion and Order on September 30, 2019, dismissing the case for lack of subject-matter jurisdiction, and entered Judgment that same day. Dkts. 71 & 72; *see* 7th Cir. R. 28(a)(2)(i). Plaintiffs filed their Notice of Appeal on October 28, 2019, within the 30-day deadline. Dkt.73; Fed. R. App. P. 4(a)(1)(A); *see* 7th Cir. R. 28(a)(2)(iv). No party filed any motion that tolled the date of time within which to appeal, *see* 7th Cir. R. 28(a)(2)(ii)–(iii), and this case is not a direct appeal from the decision of a magistrate judge, *see* 7th Cir. R. 28(a)(2)(v).

This Court also has jurisdiction to "award just damages and single or double costs" to Legislative Defendants "after a separately filed motion," Fed. R. App. P. 38, if this Court concludes that "the result [of this appeal] is obvious or [that Plaintiffs'] argument is wholly without merit," *White v. Keely*, 814 F.3d 883, 889 (7th Cir. 2016) (citations omitted). Legislative Defendants have filed such a motion contemporaneously with this Response Brief.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' Guarantee Clause claim, and their rephrase of the same theory under the First Amendment and the Equal Protection Clause, raises only nonjusticiable political questions.

2. Whether Plaintiffs lack Article III standing.

3. Whether Plaintiffs claims fail as a matter of law.

INTRODUCTION

Plaintiffs filed this lawsuit simply to make a political statement, and the results have been predicable: a needless waste of judicial and taxpayer resources, with no prospect of legal success. Plaintiffs' core theory is that because the Wisconsin Legislature used its authority under the Wisconsin Constitution to make some changes to the statutory powers of the Governor and the Attorney General after the 2018 election, and did so with allegedly partisan intent, that somehow violates the United States Constitution's promise of a republican form of government and, "for much the same reasons," the right to free speech and the equal protection of the laws.

Plaintiffs' lawsuit is legally foreclosed. First, in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court held that to survive dismissal under the political-question doctrine, a plaintiff must put forward judicially manageable standards for adjudicating its case. Yet, *Plaintiffs have never even attempted to put forward judicially manageable standards for the adjudication of their novel theory*. Instead, they ask this Court to flout *Rucho* with the bizarre argument that federal courts can adjudicate state separation-of-powers disputes—including under the Guarantee Clause—absent any judicially manageable standards, simply because Congress and the President are not empowered to act. Second, Plaintiffs argue that they have Article III standing because politicians that they support have fewer powers now. Not only is Plaintiffs' standing submission foreclosed by *Gill v. Whitford*, 138 S. Ct. 1916 (2018), but they are unable to cite a single decision, from any court in this Nation's history, adopting their politicians-we-support-lost-powers thesis of

Article III injury. Finally, Plaintiffs urge this Court to embrace a novel cause of action that has partisan intent as an essential element. But *Rucho* and several of this Court's cases hold that partisan intent has no constitutional import, and, regardless, Plaintiffs waived below any argument that any of the state-law provisions that they challenge fail the only possibly applicable legal standard.

Legislative Defendants respectfully submit that this Court should put an end to this legally foreclosed effort to embroil the federal courts in a state-law political dispute, while "award[ing] just damages and single or double costs" to Legislative Defendants because Plaintiffs pursued this futile appeal. Fed. R. App. P. 38.

STATEMENT OF THE CASE

A. Legal Background

This lawsuit is a challenge to every provision of 2017 Wisconsin Acts 369 and 370 ("Act 369" and "Act 370"). The Wisconsin Legislature enacted, and the Governor signed, the Acts in December 2018, when both the Legislature and the Governor were serving their constitutional terms. *See* Wis. Const. art. IV, §§ 4–5, art. V, §§ 1, 3.

Acts 369 and 370 contain dozens of provisions, most of which Plaintiffs failed to mention in their Complaint, despite purporting to challenge every provision. *E.g.*, Dkt.1 at 31; A.3. A brief summary of the major provisions of the Acts follows, with the provisions that Plaintiffs actually cited in their Complaint in **bold**.[3]

[3] This is not a comprehensive summary of every provision in Acts 369 and 370. A more fulsome discussion of these two Acts is available from Wisconsin's non-partisan Legislative Fiscal Bureau at http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf.

Provisions Relating to Litigation Impacting State Law. Sections 3, 5, 7–8, 26–30, 97–98, and 101–103 of Act 369 focus largely on prohibiting the Attorney General from unilaterally conceding away the constitutionality or validity of state law.

Before Act 369, when the Attorney General represented the State or one of its entities as a defendant, the Attorney General had the authority to "compromise and settle [a legal] action as . . . [the Attorney General] determine[d] to be in the best interest of the state." *See* Wis. Stat. § 165.25(6)(a) (2015–16). In addition, when the Attorney General initiated an action, he could settle the lawsuit at the direction of a state official or the Governor, as relevant. Wis. Stat. § 165.08 (2015–16). Meanwhile, the Wisconsin Court of Appeals had severely limited the Legislature's authority to intervene to defend state law, as a matter of statutory interpretation. *See Helgeland v. Wis. Municipalities*, 724 N.W.2d 208 (Wis. Ct. App. 2006).

Act 369 revises this regime, giving the Legislature a seat at the litigation table. **Section 30** of Act 369 requires the Attorney General to obtain approval from the Legislature before he may settle an action on behalf of the State, as a defendant, under certain circumstances. *See* Wis. Stat. § 165.25(6)(a)(1). If the Legislature has intervened in the action, then the Legislature must approve of the Attorney General's proposed settlement; if the Legislature has not intervened, then the Legislature's Joint Committee on Finance must approve. *See id.* Under **Section 26** of Act 369, the Attorney General now may only "compromise[ ] or discontinue[ ]" cases that he is prosecuting as a plaintiff with the approval of the Legislature, if it has intervened, or from the Joint Committee on Finance, if the Legislature has not intervened. Wis.

Stat. § 165.08. The Attorney General may no longer obtain the consent of the "officer, department, board, or commission," or the Governor, as applicable, to "compromise[ ] or discontinue[ ]" such cases. *Id.*

Under **Section 5** and Sections 28–29, 97–98, and 101 of Act 369, notice must be given to the Legislature if the constitutionality or validity of a state statute is challenged, Wis. Stat. §§ 806.04(11), 893.825; the Legislature may intervene in the action to defend the constitutionality of state law, *see* Wis. Stat. §§ 13.365(1)–(3), 165.25(1), 165.25(1m); and the Legislature may intervene in legal challenges to the "construction or validity of a statute . . . at any time in the action as a matter of right," Wis. Stat. § 803.09(2m); *see generally Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803–04 (7th Cir. 2019). Section 3 of Act 369 permits the Legislature to obtain "legal counsel other than from the" Attorney General "if the acts or allegations underlying the action are arguably within the scope" of the duties of members of the Legislature or their staff. Wis. Stat. § 13.124.

Sections 27 and 103(1) of Act 369 require the Attorney General to deposit settlement funds into the general fund, and lapse all "unencumbered" settlement funds to the general fund. *See* Wis. Stat. § 165.10.

Legislative Oversight Provisions. Sections 9–10, 16, 39, and 64 of Act 369 and Sections 10–13 of Act 370 create or modify the authority of Wisconsin's joint legislative committees, consistent with longstanding Wisconsin practice. **Section 64** of Act 369 modifies the Legislature's Joint Committee for Review of Administrative Rules' preexisting authority to review administrative rules, now permitting that

committee to suspend an administrative rule more than once. *See* Wis. Stat. § 227.26(2)(im). Section 16 gives the Legislature's Joint Committee on Legislative Organization oversight authority over changes made by the Wisconsin Department of Administration to the security at the Capitol. Wis. Stat. § 16.84(2m). And Sections 9–10 of Act 369 address the Joint Committee on Legislative Organization's authority to assign office space for the Legislature. Wis. Stat. § 13.90(3).

Section 18, **Section 23**, and Section 90 of Act 369 provide for legislative oversight of agency activities by requiring: the Wisconsin Department of Administration to submit certain annual reports to the Joint Committee on Finance and to the Legislature, Wis. Stat. § 16.973(15); the Wisconsin Department of Veterans Affairs to notify the Joint Committee on Finance of the transfer of certain funds to the veterans trust fund, Wis. Stat. § 45.57; and the Wisconsin Department of Corrections to prepare a report regarding any persons pardoned prior to their original sentences' conclusion, upon request of the Legislature, Wis. Stat. § 301.03(16).

Section 10 of Act 370 authorizes, among other things, either the Legislature or the Joint Committee on Finance to review certain submissions by Wisconsin's Department of Health Services to the Federal Government related to waivers of certain federal requirements. Wis. Stat. § 20.940.

Section 11 of Act 370 gives the Joint Committee on Finance authority to review the Wisconsin Department of Workforce Development's reallocation of certain funds (specified in Sections 1–9, 18–26, 44(1), and 45 of Act 370), which replaces the previous statutory scheme that provided for a lump appropriation to be allocated by

that department, *see* Wis. Stat. §§ 20.005(3), 20.445(1)(b), (bz), (cg), (dg), (dr), (e), (fg), (fm), 106.05(2)(b), (3)(a), 106.13(3m)(b), 106.18, 106.26(3)(c), 106.272(1), 106.273(3)(a)–(b), 106.275(1)(a).

Section 12 of Act 370 authorizes the Joint Committee on Finance to review certain proposed reductions that the Department of Workforce Development may be required to submit for federal-block grant programs. Wis. Stat. § 49.175(2)(c). Under Section 13 of this Act, the Department of Health Services must submit proposals with an economic impact exceeding $7.5 million to the Joint Committee on Finance for review before seeking federal approval to amend Wisconsin's Medicaid program. *See* Wis. Stat. § 49.45(2t). Sections 84E–85R of Act 369 require recipients of economic-development tax credits to attest to the accuracy and truthfulness of the reports that they submit to the Wisconsin Economic Development Corporation ("WEDC"), *see* Wis. Stat. §§ 238.03(2)(c), (e), 238.04(15), 238.306(1)(a), 238.308(5)(b), 238.395(3)(d), 238.396(4)(d), and then requires WEDC to verify the accuracy of a sample of these reports, Wis. Stat. § 238.16(5)(e). Sections 87 and 88F of Act 369 both authorize the Joint Committee on Finance to review WEDC's proposed designation of "new enterprise zones" and to create an annual process for receipt of the related tax benefits. Wis. Stat. § 238.399(3)(a), (f). Finally, **Sections 82M**, **83**, and **102** of Act 369 adjust the WEDC's structure and member tenure. *See* Wis. Stat. § 238.02(1)–(2); *see also* 2017 Wisconsin Act 369, §§ 102(2m), (2s), (2t), (2v) ("Nonstatutory provisions").

Codification of Certain Federally Approved Plans and Other Regulations. **Section 14** and Sections 38–43 of Act 370 codify federal waivers previously approved

by the United States Department of Health and Human Services ("HHS") for programs for childless adults, *see* Wis. Stat. § 49.45, and implement the State's health-carrier reinsurance program (recently enacted by 2017 Wisconsin Act 138) in accordance with the terms and conditions approved by HHS in July 2018, *see* Wis. Stat. §§ 601.83(1), 601.85(4). Sections 15–16 and **Section 17** of Act 370 codify existing regulations aimed at strengthening drug screening, testing, and treatment regulations for able-bodied adults participating in certain public-assistance programs, which were all approved by the Centers for Medicare and Medicaid Services in October 2018. *See* Wis. Stat. §§ 49.79(9)(d), 49.791. Finally, Sections 27–37 of Act 370 codify the regulations adopted by the Wisconsin Department of Public Works concerning job-search requirements for recipients of unemployment insurance. *See* Wis. Stat. § 108.04(2)(a), (b), (bb), (bd), (bm).

Prohibition on Certain Renominations. **Section 4** of Act 369 specifies that "the governor or another state office or agency" may not renominate an individual for the same office, or to perform any duties of that office or position, during the same legislative session if the Senate rejected a previous nomination of that individual. Wis. Stat. § 13.127.

Changes to Wisconsin Voting Laws. Many Sections of Act 369 relate to Wisconsin's voting laws.[4] The vast majority of these voting-related provisions make

[4] These are Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1K, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, 1NG, and 91–95 of Act 369.

the law more favorable to military and other oversees electors,[5] such as Section 1MS, which expands the ability to witness a vote. Beyond those provisions, Section 1K provides that absentee voting may occur "no earlier than 14 days preceding the election and no later than the Sunday preceding the election." Wis. Stat. § 6.86(1)(b). Section 1 clarifies that certain unexpired technical-college-student identification cards qualify as a proper form of identification, consistent with the same requirements for "university or college" identification cards. Wis. Stat. § 5.02(6m). Sections 91–95 codify preexisting administrative regulations, which detail the process for obtaining a Wisconsin identification card by eligible voters and set forth specific requirements with which this same agency must comply. *See* Wis. Stat. §§ 343.165(8), 343.50(1)(c), (3)(b). **Section 91** mandates that Wisconsin's Department of Transportation provide an identification card to an applicant if it concludes that it is "more likely than not" that the applicant's petition is correct, Wis. Stat. § 343.165(8)(h), and Section 92 allows an applicant's receipt to be used for 60 days, Wis. Stat. § 343.50(1)(c).

Regulation of Guidance Documents. Sections 22, 31, 38, 65–71, and 96 of Act 369 regulate the issuance of agency guidance documents. Section 31 defines "guidance document," as compared with Section 32's definition of a "rule." *Compare* Wis. Stat. § 227.01(3m), *with* Wis. Stat. § 227.01(13). Section 38 establishes the statutory process that an agency must follow to issue new guidance documents,

[5] *See* Wis. Stat. §§ 5.02(12n), 5.05(13)(c)–(d), 6.22(2)(b),(e), 6.22(4)(a), (c), 6.24(2), (4), 6.25(1)(b), 6.276(1), 6.34(1), 6.855(5), 6.865(1), 6.87(2)–(4), 6.88(1), 6.97(1), 7.15(1) (Sections 1B through 1JS, and 1L through 1NG of Act 369).

including posting the proposed guidance document publicly, providing a 21-day notice-and-comment period, and certifying that the proposed guidance document complies with Wisconsin law. *See* Wis. Stat. § 227.112(1)–(6). Agencies, with a few exceptions, must apply this process to preexisting guidance documents before July 1, 2019. Wis. Stat. § 227.112(7). Finally, Sections 65–71 permit court challenges to guidance documents and establish the requisite procedure for litigants bringing such challenges. Wis. Stat. § 227.40(1)–(3), (4)(a).

Codification of the Elimination of Agency Deference. Sections 35 and 80 of Act 369 codify the Wisconsin Supreme Court's holding in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018), which ended the state courts' practice of deferring to agency interpretations of law. *See* Wis. Stat. §§ 227.10(2g), 227.57(11).

B. Factual And Procedural Background

On February 21, 2019, Plaintiffs filed their Complaint, asking the district court to invalidate every provision of Acts 369 and 370. Dkt.1. Plaintiffs named Legislative Defendants as defendants, and Governor Evers and Attorney General Kaul as "nominal defendants." Dkt.1 at 2 n.1 (also naming Secretary Brennan, a member of Governor Evers' cabinet). For their first count, Plaintiffs claimed that Acts 369 and 370 violated the Guarantee Clause because these Acts take away authority from certain officials in Wisconsin government "in order to blunt . . . electoral results" or "curb the authority of the incoming administration." Dkt.1, ¶¶ 6, 8, 87–88. For their second and third counts, Plaintiffs alleged that these Acts violated the First Amendment and the Equal Protection Clause "for much the same reasons" that they

allegedly violated the Guarantee Clause. *See* Dkt.1, ¶¶ 8, 91–95, 98–102. Plaintiffs moved for a preliminary injunction the same day. Dkt.3. Plaintiffs also asserted that partisan-gerrymandering claims offered an "analogy" to their claims. Dkt.37 at 27.

Legislative Defendants moved to dismiss Plaintiffs' Complaint and simultaneously opposed the preliminary injunction motion. Dkts. 34 & 35. Legislative Defendants argued that Plaintiffs raised only non-justiciable political questions because they had not proposed judicially manageable standards for adjudicating their novel theory. Dkt.35 at 14–21; Dkt.40 at 6–8; Dkt.63 at 1–9. Legislative Defendants also explained that Plaintiffs lacked Article III standing, pointing out that Plaintiffs had not identified any decision, from any court, upholding Plaintiffs' standing theory. Dkt.35 at 10–14; Dkt.40 at 2–5; Dkt.63 at 10–11. And Legislative Defendants argued that Plaintiffs' claims failed on the merits, both because Plaintiffs impermissibly sought to rely upon allegations of subjective partisan intent as an element, and because the statutes at issue were plainly rational. Dkt.35 at 23–28; Dkt.40 at 8–9; Dkt.63 at 9–10.

Governor Evers (along with Secretary Brennan) filed an extremely abbreviated brief in support of Plaintiffs. Dkt.32; A.2. Attorney General Kaul took no position at this stage of the litigation. A.2.

Thereafter, the Supreme Court decided *Rucho* in a way that made even clearer that Plaintiffs had no chance of success, if such further clarity were even needed. During the parties' supplemental briefing on this intervening Supreme Court decision, Legislative Defendants explained: "Now that *Rucho* [ ] made what was

obvious before entirely inescapable, Legislative Defendants had hoped that Plaintiffs would abandon their meritless lawsuit, to avoid any further waste of judicial and public resources. Given the content and tenor of their supplemental brief, however, Plaintiffs have apparently signaled their 'unreasonable' decision of 'continu[ing] to litigate' in the face of a 'Supreme Court's intervening decision' that plainly requires dismissal." Dkt.65 (quoting *Werch v. City of Berlin*, 673 F.2d 192, 196 (7th Cir. 1982)).

On September 30, 2019, the district court granted Legislative Defendants' motion to dismiss, focusing mainly on Plaintiffs' failure to satisfy the Article III standing requirements. As a threshold matter, Plaintiffs are not "restrict[ed] or regulate[d]" by Act 369 or Act 370 "in any way"; rather, these Acts apply to "the governor and attorney general, who are defendants, not plaintiffs." A.6. Plaintiffs failed even to attempt to make the "substantially more difficult" showing of standing that is required when, as here, "'the plaintiff is not himself the object of the government action'" that he challenges. A.6 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)). "That is reason alone to conclude that [P]laintiffs haven't met their burden" to establish Article III standing. A.6.

Further, Plaintiffs only "articulate[d] many of their injuries at a high level of generality," and even then only as "a summary of [their] legal theories," not as "any 'concrete and particularized' injuries" that affect them "'in a personal and individual way.'" A.6–7 (quoting *Gill*, 138 S. Ct. at 1929). The district court listed Plaintiffs' alleged injuries and explained why they were not sufficiently particularized or traceable to Acts 369 and 370: Plaintiffs complain "that the legislature has prevented

[Governor Evers and Attorney General Kaul] from enacting policies that [Plaintiffs] support," but "the Supreme Court has already rejected the view that a voter has a legally protected interest in advancing a particular policy." A.7 (citing *Gill*, 138 S. Ct. at 1931). They complain of "vote dilution," but only as "a re-packing of their interest in a specific policy agenda," which again "has not been recognized" as a legal interest. A.8. They complain about "the way the Acts made them and others feel," but this kind of "emotional harm" does not "qualify" for standing. A.8–9. They claim the Acts "target" Democrats and the Democratic Party because of their views, but that does not confer standing because Acts 369 and 370 do not "prohibit or require any action by [P]laintiffs; rather, the laws are directed at the governor and the attorney general." A.9 (citing *Gill*, 138 S. Ct. at 1932). They assert that they expended resources "to obtain victory at the polls in [November] 2018," but they incurred those expenses "*before* Acts 369 and 370 were enacted," thus they "are not 'fairly traceable' to the Acts." A.9–10 (citation omitted). Finally, the Democratic Party complained that it "will have greater difficulty attracting volunteers, recruiting candidates, and raising money because of the Acts." A.10. That limitless theory "would give a political party standing to challenge any decision by a government body that could be viewed as demoralizing the party's members." A11.

The district court explained that Plaintiffs could not rely upon any potential claims of Governor Evers or Attorney General Kaul to satisfy their burden to demonstrate standing. A.11–12. Governor Evers and Attorney General Kaul "are defendants, not plaintiffs, so any injuries they have suffered are irrelevant" for

standing. A.12. Furthermore, they "haven't asked to be realigned as plaintiffs" in "a proper motion"—but even if they had, this would have raised immunity concerns, since "the remaining defendants" would have all been "legislators." A.12 & n.2.

Regardless, the district court then held that it would have lacked jurisdiction over Plaintiffs' claims if it could "consider Evers and Kaul's injuries." A.13. Plaintiffs' "claim under the Guarantee Clause is not justiciable" because, as *Rucho* explained, the Supreme Court "has several times concluded . . . that the Guarantee Clause does not provide the basis for a justiciable claim." A.13 (alterations in original) (quoting *Rucho*, 139 S. Ct. at 2506). And as for the First Amendment and Equal Protection Clause claims, Plaintiffs have not explained how Governor Evers' and Attorney General Kaul's rights under these constitutional provisions are burdened: Plaintiffs "describe[d] Evers and Kaul's injuries as an encroachment . . . on the powers of the executive branch," but the Constitution "does not prescribe the balance of power among the branches of state government." A.13–14 (citation omitted).

SUMMARY OF ARGUMENT

I. Plaintiffs' Guarantee Clause claim, as well as their repackaging of that same claim under the First Amendment and the Equal Protection Clause, is a nonjusticiable political question.

This Court does not have jurisdiction to decide "political questions," which include claims lacking judicially manageable standards. The Supreme Court's recent decision in *Rucho* holds, in line with longstanding Supreme Court precedent, that a plaintiff must articulate judicially manageable standards when asserting a claim.

Rucho applied this rule to dismiss plaintiffs' political-gerrymandering claims for lack of judicially manageable standards. In the course of reaching that holding, *Rucho* also reaffirmed the Court's settled holding that Guarantee Clause claims are categorically nonjusticiable for want of judicially manageable standards. This Court's pre-*Rucho* decision in *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991), reached the same result.

Plaintiffs have asserted a Guarantee Clause claim, as well as a repackaged First Amendment and an Equal Protection Clause claim, built on the theory that Acts 369 and 370 have "too much" partisan effect. Remarkably, *Plaintiffs have never even attempted to present a judicially manageable standard to govern their lawsuit*, even after *Rucho*. And their theory is not amenable to such standards, given the multitude of unanswerable questions that their novel theory presents. That Plaintiffs articulated their claims under the Guarantee Clause, the First Amendment, and the Equal Protection Clause does not change that result, especially since Plaintiffs have stated that the latter two claims are "much . . . the same" as the former.

Plaintiffs' response to *Rucho* is to ask the Court to ignore this decision. They claim, most prominently, that the political-question doctrine extends only to questions textually committed to a political branch of the federal government, but *Rucho* plainly held that the doctrine also includes, as an independent basis, claims lacking in judicially manageable standards.

II. Plaintiffs also lack standing to assert their three claims.

To have Article III standing to challenge a law at the pleadings stage, the plaintiff must allege facts demonstrating that, among other requirements, it has

suffered an invasion of a legally protected interest. When a plaintiff challenges a law regulating a third party only, its burden to demonstrate standing is substantially more difficult to carry. In *Gill*, the Supreme Court held that a plaintiff does not have such an Article III interest in the "policies adopted by the legislature" generally.

Plaintiffs claim that Acts 369 and 370 injured them because politicians whom they support now have less power, as a result of those Acts. Yet, Plaintiffs are not themselves regulated by Acts 369 and 370, and they did not even attempt in the district court to make the substantially more difficult showing required to demonstrate standing under that circumstance. They repeat that legal error here by completely failing to address this determinative point in their Opening Brief, despite the district court specifically faulting them for this same failure below.

This conclusive point aside, the district court's holding that Plaintiffs' allegations do not establish standing was plainly correct. Individual Plaintiffs' "voting rights" are not harmed by these Acts, since, as *Gill* explained, those rights extend only to the right to cast ballots, which right these Acts do not affect. Plaintiffs' claims that these Acts undermine their ability to fundraise, register voters, attract volunteers, and the like, do not supply Article III standing because such emotional disappointment by a political parties' voters does not give that party Article III standing. The Democratic Party's claim of associational standing likewise fails, since none of its members have standing, which is a necessary prerequisite. That result is unchanged by the Democratic Party's inclusion of Governor Evers and Attorney

General Kaul in its ranks, since they are members of that party only in their individual capacities, like all other members who similarly lack standing.

Plaintiffs' efforts to invoke the interests of Governor Evers to satisfy their own standing are legally irrelevant. A *plaintiff* bears the burden of demonstrating standing, and the Governor is a defendant, not a plaintiff. Nor should the district court have realigned the Governor as a plaintiff to consider his alleged injuries in the standing calculus. To begin, the Governor has not appealed the failure to realign, thus this Court does not have jurisdiction to review that portion of the district court's opinion. In any event, the Governor did not properly move for realignment below. Regardless, realignment would have been improper, since the Governor cannot assert these Section 1983 causes of action against the State and has not alleged any violation of his constitutional rights, in his official capacity.

III. Plaintiffs' lawsuit fails on the merits in any event. An essential element of Plaintiffs' claims is the assertion that the Legislature acted with "too much" partisan intent when enacting Acts 369 and 370. Yet, *Rucho* squarely holds that "securing partisan advantage" is a "permissible intent" while legislating, even when that intent "predominates," absent some "actual burden" on a plaintiff. That holding accords with this Court's precedent and is alone sufficient to dispose of all of Plaintiffs' claims on the merits. This aside, Plaintiffs' claims would trigger only rational-basis review, and Acts 369 and 370 easily pass that permissive judicial scrutiny, as Plaintiffs conceded by forfeiture in their briefing below.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss a complaint for lack of subject-matter jurisdiction, "taking the facts alleged in the complaint as true and drawing reasonable inferences in [the nonmovant's] favor." *Miller v. FDIC*, 738 F.3d 836, 840 (7th Cir. 2013); *Perry*, 186 F.3d at 828.

When a party challenges a district court's case management decision, such as the district court declining to enter an order without a party's prior submission of a formal motion, this Court reviews for an "abuse of discretion." *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1030–31 (7th Cir. 1998).

While the district court did not dismiss the Complaint for failure to state a claim, Legislative Defendants also moved for dismissal on these grounds below and have presented those arguments here as alternative grounds for this Court to affirm. *See infra* Part III (citing *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 (7th Cir. 1995); *Matushkina v. Nielsen*, 877 F.3d 289, 297 (7th Cir. 2017); and *Richardson v. Koch Law Firm, P.C.*, 768 F.3d 732, 734 (7th Cir. 2014)). Had the district court dismissed on these grounds, this Court's review would also be de novo, "accept[ing] all of the well-pleaded facts as true" and asking whether the complaint "contain[s] sufficient factual information to 'state a claim to relief that is plausible on its face.'" *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 839 (7th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court is not "bound to accept as true a legal conclusion couched as a factual allegation," or

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

ARGUMENT

I. Plaintiffs' Guarantee Clause Claim, As Well As Their Rephrasing Of That Claim Under The First Amendment And The Equal Protection Clause, Raises Only Nonjusticiable Political Questions

A. *Rucho* Unambiguously Holds That Failure To Articulate Judicially Manageable Standards To Adjudicate A Claim Mandates Dismissal Under The Political-Question Doctrine

Article III of the Constitution permits the federal courts to decide only "Cases" and "Controversies." U.S. Const. art. III, § 2. That means that the federal courts can "address" only those "questions historically viewed as capable of resolution through the judicial process" or—"in James Madison's words"—questions "of a Judiciary Nature." *Rucho*, 139 S. Ct. at 2493–94 (citations omitted). A "political question" is "outside the courts' competence and therefore beyond the courts' jurisdiction." *Id.* at 3495 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). This case involves one type of political question: where there is a "lack [of] judicially discoverable and manageable standards." *Id.* at 2494 (citations omitted).

The Supreme Court's recent decision in *Rucho* holds—consistent with decades of the Court's precedent—that a cause of action raises a nonjusticiable political question when the plaintiff fails to articulate judicially manageable standards for adjudicating the lawsuit. In *Rucho*, the plaintiffs argued that certain legislative districts were an unconstitutional political gerrymander, including in violation of the First Amendment and the Equal Protection Clause. *Rucho* held that the plaintiffs'

claims were nonjusticiable political questions on one, and only one, basis: the lack of judicially manageable standards. The Court explained, relying on Justice Kennedy's controlling opinions in two earlier cases—*Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006)—that the critical question under the political-question doctrine is whether there are "judicially discernible and manageable standard[s]" that are "grounded in a 'limited and precise rationale'" and are "'clear, manageable, and politically neutral'" to resolve the claims. *Rucho*, 139 S. Ct. at 2498 (first quoting *Vieth*, 541 U.S. at 306 (plurality op.), second quoting *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring in the judgment)); *see id.* (citing *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.)).

Rucho then considered and rejected as not judicially manageable each of the proposed standards in the case, mandating dismissal of the lawsuits. *Id.* at 2502–06. The proposed tests, whether phrased under the First Amendment or the Equal Protection Clause, required judges to make decisions "outside judicial expertise." *Id.* at 2503–04. The approaches variously failed to provide a measure for when activity motivated by partisan intent "goes too far." *Id.* at 2504–05. The Court disparaged the district courts' reliance on plaintiffs' "slight anecdotal evidence" that the maps led to "a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and that they "burdened [ ] fundraising, attracting volunteers, campaigning, and generating interest in voting." *Id.* at 2504 (citations omitted). That evidence did nothing to make the standard manageable, which is what matters: "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?" *Id.* More generally, other proposed standards failed to resolve "the original unanswerable question (How much political motivation and effect is too much?)." *Id.* at 2505–06 (quoting *Vieth*, 541 U.S. at 296–97 (plurality op.)). Simply asserting that "This much is too much" is "not even trying to articulate a standard or rule." *Id.* (citation omitted).

The Court also rejected the argument that political gerrymandering violates Article I, Section 2 of the Constitution and, in doing so, reaffirmed its long-standing holding that claims under the Guarantee Clause are categorically nonjusticiable because that Clause itself "is not a repository of judicially manageable standards." *Baker*, 369 U.S. at 217–28; *see Rucho*, 139 S. Ct. at 2506. *Rucho* explained that the assertion that "the voters should choose their representatives, not the other way around," 139 S. Ct. at 2506 (citation omitted), "seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4," but the "Court has several times concluded [ ] that the Guarantee Clause does not provide the basis for a justiciable claim," *id.* *Rucho* drew upon more than 150 years of the Court's Guarantee Clause jurisprudence. As this Court explained in *Risser*, 930 F.2d 549—where it concluded that all Guarantee Clause claims are nonjusticiable political questions—the Supreme Court had long "held" that this Clause is "not to be justiciable." *Id.* at 551–52, 554; *see, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234–35 (1917); *O'Neill v. Leamer*, 239 U.S. 244, 247–48 (1915); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 147 (1912); *Forsyth v. City*

of Hammond, 166 U.S. 506, 519 (1897); *Minor v. Happersett*, 88 U.S. 162, 176 (1875); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

B. Plaintiffs Never Even Attempted To Articulate Any Judicially Manageable Standards To Adjudicate Their Claims, Meaning Their Lawsuit Cannot Possibly Survive *Rucho*

1. Plaintiffs' Guarantee Clause theory, as well their rephrasing of that same theory under the First Amendment and the Equal Protection Clause, all share the same core claim: Acts 369 and 370 took "too much" power away from the Governor and the Attorney General, and did so with "too much" partisan intent to frustrate the ability of these newly elected officials to fulfill "too many" of their campaign promises. *See, e.g.*, Opening Br. 2, 7–10; Dkt.1 at ¶¶ 6–8, 87–102. No matter how Plaintiffs rephrase these sets of conclusory assertions and rank speculation of allegedly nefarious motives—and no matter whether they cite the Guarantee Clause, the First Amendment, or the Equal Protection Clause—*Rucho* holds that Plaintiffs' claims must be dismissed unless they can identify "judicially discoverable and manageable standards." *Rucho*, 139 S. Ct. at 2493–94 (citations omitted; brackets omitted).

Remarkably, *Plaintiffs have never even attempted to present a judicially manageable standard to govern their lawsuit*, even after the Supreme Court issued *Rucho*. This utter silence is, no doubt, a recognition of the fact that their theory is not amenable to such standards. Consider the myriad unanswerable questions, *Rucho*, 139 S. Ct. at 2504–06, that courts would need to confront to adjudicate lawsuits under Plaintiffs' new theory: How much of a change in an official's statutory power is too much? Must the removal of the powers at issue relate to a specific campaign promise

by that official? What if the fulfillment of that official's promise required the legislature to enact an additional law, but a majority of the legislature secured reelection while running against that same promise and would never have adopted that law? What if the vast majority of the members of the legislature won reelection—like both the Wisconsin Assembly and the Wisconsin Senate did in 2018, where the Senate Republicans *increased* their majority?[6] If the members of the legislature won reelection with a veto-proof majority (which in some States is just a simple majority, *see Veto Overrides in State Legislatures*, Ballotpedia[7]) could the legislature then change the governor's statutory powers? If the governor and the members of the legislature all won reelection, could they remove statutory powers from a separately elected attorney general after the election, thereby frustrating that attorney general from fulfilling some of his campaign promises? Do the answers to any of these questions change after the inauguration of the newly elected officials, or do these prohibitions apply throughout the governor's and attorney general's entire terms? What if legislators subjectively believed that the incoming governor's campaign promises would be bad for the people of the State, would removing the governor's powers on that subjective belief be permissible? And so on. Plaintiffs' silence on these

[6] *See Wisconsin State Assembly Elections, 2018*, Ballotpedia, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2018 (last visited Feb. 5, 2020); *Wisconsin State Senate Elections, 2019*, Ballotpedia, https://ballotpedia.org/Wisconsin_State_Senate_elections,_2018 (last visited Feb. 5, 2020); *see also* Summary of 2018 Fall General Election Results, Wis. Elections Comm'n, available at https://elections.wi.gov/sites/electionsuat.wi.gov/files/Summary%20Results-2018%20Gen%20Election_0.pdf.

[7] Available at https://ballotpedia.org/Veto_overrides_in_state_legislatures (last visited Feb. 5, 2020).

points seems to say, "This much is too much," but that is "not even trying to articulate a standard or rule." *Rucho*, 139 S. Ct. at 2505–06 (citation omitted).

Or take a specific hypothetical that Legislative Defendants repeatedly articulated below, Dkt.35 at 1, 12–13; Dkt.40 at 2; Dkt.65 at 6, for which Plaintiffs never have even attempted to provide an answer. During the 2016 Presidential election, one of the core promises that Candidate Donald Trump made was to build a wall across the southern border. *See Immigration, President Donald J. Trump Achievements*, PromisesKept.com;[8] Nolan D. McCaskill, *Trump Promises Wall And Massive Deportation Program*, Politico (Aug. 31, 2016, 11:26 PM).[9] If, immediately after the 2016 election, Congress had repealed the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.*—a potential basis to fulfill the wall promise—would that action violate the Equal Protection Clause and/or the First Amendment, under Plaintiffs' theory? How would a court even go about deciding the issue? Would this be an unconstitutional removal of the statutory power of the President—just like Plaintiffs allege that Acts 369 and 370 are an unconstitutional removal of the statutory powers of the Governor and the Attorney General—or would this simply be Congress exercising its constitutional authority to repeal one of its own laws, as is its constitutional right and duty? That Plaintiffs do not even purport to provide "judicially discoverable and manageable standards" to answer any of these questions

[8] Available at https://www.promiseskept.com/achievement/overview/immigration/ (last visited Feb. 5, 2020).

[9] Available at https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612 (last visited Feb. 5, 2020).

well-illustrates why their claims are obviously nonjusticiable political questions. *Rucho*, 139 S. Ct. at 2493–94 (citations omitted; brackets omitted).

Importantly, Plaintiffs' claims remain nonjusticiable regardless of whether Plaintiffs style them under the Guarantee Clause, the First Amendment, or the Equal Protection Clause, *id.* at 2502–06—especially since Plaintiffs stated that the latter two claims are "much . . . the same" as the former, *see* Dkt.1, ¶¶ 8, 91–95, 98–102.

For the Guarantee Clause, the Supreme Court has already held, as a bright-line matter, that this Clause "does not provide the basis for a justiciable claim," *Rucho*, 139 S. Ct. at 2506, since that Clause "is not a repository of judicially manageable standards," *Baker*, 369 U.S. at 216–28. This Court in *Risser* similarly held that *all* political-gerrymandering claims are nonjusticiable. 930 F.2d at 552. But even if the Supreme Court were to overturn that rule, that would make no difference here, as Plaintiffs would still need to articulate "judicially discoverable and manageable standards" to adjudicate their novel theory, *Rucho*, 139 S. Ct. at 2493–94 (citations omitted; brackets omitted), which they have not even attempted to do, *see supra* pp. 24–25.

Turning to the First Amendment, Plaintiffs did not attempt to present any judicially manageable standards in their briefing below or in their Opening Brief. Plaintiffs merely cited a grab-bag of inapposite First Amendment cases and doctrines, *e.g.*, Dkt.3 at 18–20, 28 (citing, for example, *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); and *Elrod v. Burns*, 427 U.S. 347 (1976)); *accord* Opening Br. 9–10, without "articulat[ing]" how these cases

provide "a standard or rule" to adjudicate their claim, *Rucho*, 139 S. Ct. at 2505. The *Rucho* plaintiffs unsuccessfully cited many of the same cases and doctrines in support of their First Amendment claim. *See* Br. for Common Cause Appellees, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Nos. 18-422 & 18-726), 2019 WL 1077302.

Similarly, as to the Equal Protection Clause, Plaintiffs never attempted to articulate judicially manageable standards. They merely presented a jumble of unrelated equal-protection cases, *e.g.*, Dkt.3 at 23–28 (citing, for example, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)); Dkt.37 at 12 (citing *Baker*, 369 U.S. 186); *accord* Opening Br. 9–10 & n.9, many of which, again, the *Rucho* plaintiffs futilely cited in support of their Equal Protection Clause claim, *e.g.*, Br. for Common Cause Appellees, *Rucho*, 139 S. Ct. 2484, 2019 WL 1077302.

2. Plaintiffs' response to *Rucho*'s clear holding that a claim is nonjusticiable for lack of judicially manageable standards is to ask this Court to flout that decision. Plaintiffs request that this Court adopt the legally foreclosed position that a lawsuit cannot be dismissed for lack of judicially manageable standards unless the issue is committed to either Congress or the President to resolve. *See* Opening Br. 31–33. But the Supreme Court has clearly articulated at least two independent bases for the application of the political-question doctrine: "when there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable and manageable standards for resolving it*.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217) (emphasis added).

Rucho rested its holding entirely upon the second of these two bases, the failure to articulate "judicially discoverable and manageable standards," 139 S. Ct. at 2493–94, after rejecting the defendants' argument that correcting congressional redistricting problems in the States was committed exclusively to Congress under the Elections Clause, *id.* at 2495–96.

While Plaintiffs argue that the Supreme Court's decision in *Baker v. Carr* supports them, Opening Br. 33, *Baker* explicitly held that the Guarantee Clause claims in that very case were *nonjusticiable* due to a lack of "judicially manageable standards," even though that claim involved only state legislative districts over which the President and Congress have no authority, *Baker*, 369 U.S. at 216–28. Plaintiffs' citation, Opening Br. 31, to *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), is a distraction, as that case did not deal with the judicially manageable standards variant of the political-question doctrine. *Id.* at 229. And their citation, Opening Br. 31, to *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), backfires, as that case specifically acknowledges the "judicially discoverable and manageable standards" test as a stand-alone basis for finding a political question, but merely held that both parties "offer detailed legal arguments" that provided just such standards. *Id.* at 197 (citation omitted).

Plaintiffs' position leads to the absurd consequence that federal courts must adjudicate claims relating to the state separation of powers—like this one—simply because Congress and the President have no authority to meddle with those powers, even if the courts conclude that the controversy is not amenable to judicially

manageable standards. For example, under Plaintiffs' theory, political-gerrymandering challenges to state legislative districts could still be brought in federal court, even after *Rucho*, because neither Congress nor the President has any say as to such districts. *But see* Op. and Order at 2, *Whitford v. Gill*, 15-cv-421-jdp (W.D. Wisc. July 2, 2019), ECF No. 318 ("no doubt that" claims alleging that state legislative bodies are politically gerrymandered "cannot succeed in federal court").

Plaintiffs' reliance, Opening Br. 32, on dicta from *New York v. United States*, 505 U.S. 144 (1992), that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," *id.* at 185, does not support their cause. If the Supreme Court were ever to adopt the tentative *New York* dicta as law and hold for the first time that Guarantee Clause claims are potentially justiciable, that would not free Plaintiffs of their burden to articulate judicially manageable standards for adjudicating their novel theory, whether they assert that their theory arises under the Guarantee Clause, the First Amendment, or the Equal Protection Clause. In any event, *New York*'s noncommittal dicta did not overrule any caselaw, including the 150 years of Supreme Court cases and this Court's clear holding in *Risser* that all political-gerrymandering claims are nonjusticiable. Further, *New York*'s dicta is irrelevant in light of *Rucho*'s Guarantee Clause statement that the Court's caselaw forecloses political-gerrymandering claims, which "didn't acknowledge any exceptions." A.13. Finally, even before *Rucho*, this Court already explained that *New York*'s dicta only referred to the possibility of Guarantee Clause claims "*raised by states*" against the federal government, not claims "raised by private persons" against

the States, which is not at issue here. *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998); *accord* Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988) ("[i]t is, after all, the states to which the clause extends its explicit guarantee").

The remaining cases that Plaintiffs rely upon do not change the analysis. Opening Br. 31, 33–34. *Judge v. Quinn*, 624 F.3d 352 (7th Cir. 2010), turned on the "Seventeenth Amendment"—not the Guarantee Clause—which amendment this Court held did "suppl[y] a concrete rule" with "judicially manageable standards." *Id.* at 358. As for Plaintiffs' two pre-*Rucho*, out-of-circuit Guarantee Clause decisions—*Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 2927 (2015) (mem.), and *Largess v. Supreme Judicial Court*, 373 F.3d 219 (1st Cir. 2004) (per curiam)—those decision conflict directly with this Court's holding in *Risser* and are irrelevant after *Rucho*, in any event. *Rucho* not only explained that all Guarantee Clause claims are nonjusticiable political questions, but also articulated the controlling rule for when *any* claim is nonjusticiable as a political question for lack of judicially manageable standards, regardless of which constitutional provision the plaintiff happens to invoke. *See supra* pp. 20–23.

While Plaintiffs cite the Tenth Circuit's vacated, pre-*Rucho* statement that courts should develop justiciable standards at a later point in the litigation, Opening Br. 34 (quoting *Kerr*, 744 F.3d at 1179), *Rucho* explicitly affirmed Justice Kennedy's controlling concurrence in *Vieth*, *Rucho*, 139 S. Ct. at 2498–99, which held that a plaintiff's failure to propose judicially manageable standards *required dismissal of a lawsuit at the pleading stage*, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the

judgment). Under Plaintiffs' theory, plaintiffs could bring political questions about state separation of powers to federal court and survive dismissal, thereby forcing the State to undergo costly discovery and trial without even knowing what claimed judicially manageable standards they must defend against. The absurdity of Plaintiffs' position played out in the parties' Rule 26(f) submission below, where Legislative Defendants explained, with utter confusion, "that they do not know what the elements of Plaintiffs' novel claims are, so they are unable to state at this time the additional subjects on which discovery will be needed." Dkt.70, at 5.

Finally, even putting aside plaintiffs' failure to articulate judicially manageable standards, all Guarantee Clause claims are also nonjusticiable under the other branch of the political-question doctrine: "'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Nixon*, 506 U.S. at 228 (quoting *Baker*, 369 U.S. at 217). As Professor Ryan C. Williams has recently detailed, the word "guarantee" in the Guarantee Clause independently renders all claims under this Clause nonjusticiable political questions. Ryan C. Williams, *The "Guarantee" Clause*, 132 Harv. L. Rev. 602, 679–88 (2018); *see* Dkt.35 at 16 n.9. Professor Williams explained, after a comprehensive historical analysis, that the "most plausible" interpretation of the Guarantee Clause is that it "carr[ies] the meaning it would have held under the eighteenth-century law of nations." Williams, *supra*, at 672–73. Under this body of international law, "the term 'guarantee' signified a diplomatic pledge by one sovereign to come to the aid or assistance of another." *Id.* at 681. However, "every invocation of a . . . guarantee

[pledge] called for at least a tacit political judgment by the sovereign from whom assistance was sought regarding whether circumstances were such as to warrant invocation of the treaty." *Id.* Accordingly, "decisions regarding th[e]se public rights of sovereigns . . . were inappropriate subjects for judicial cognizance"; rather, they were "reserved to the political branches of government." *Id.* at 681–83. Further, the Clause's reference to "The United States" is simply an international-law convention to bind a sovereign without "need to carefully specify the precise domestic legal actors . . . needed to carry the treaty into effect." *Id.* at 632–33. Thus, contrary to Plaintiffs' view, Opening Br. 33, use of "The United States" does not commit the responsibility of enforcing the Guarantee Clause to every federal branch and employee. Instead, "the political branches of government" are to enforce it. Williams, *supra*, at 681–83.

II. Plaintiffs Lack Standing

A. Binding Caselaw, Including *Gill*, Forecloses Plaintiffs' Standing

1. "A plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy," which requires him to "satisfy the familiar three-part test for Article III standing: that he (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill*, 138 S. Ct. at 1929 (citations omitted). At the pleadings stage, "the plaintiff must allege facts that, assuming their truth, would establish . . . standing." *MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 752 (7th Cir. 2007). To satisfy the Article III injury requirement, a plaintiff must plead facts that show that the plaintiff has suffered an

"invasion of a legally protected interest" that "affect[s] the plaintiff in a personal and individual way." *Gill*, 138 S. Ct. at 1929 (quoting *Lujan*, 504 U.S. at 560). "[W]hen the plaintiff is not himself the object of the government action . . . [that] he challenges, standing is not precluded, but it is ordinarily *substantially more difficult* to establish." *Lujan*, 504 U.S. at 562 (citation omitted; emphasis added).

In *Gill*, the Supreme Court unanimously held that a voter does not have standing to assert a statewide partisan-gerrymandering challenge to an entire redistricting map, but could only possibly have standing to challenge "the particular composition of the voter's own district." 138 S. Ct. at 1930–31. That is because a voter's "right to vote for his representative" is his only legal "interest in . . . the legislature." *Id.* at 1931. There is no protectable interest in "the legislature's overall composition and policymaking" or in "policies adopted by the legislature" in general, since those are only "abstract" or "general interest[s] common to all members of the public." *Id.* (citations omitted).

2. Plaintiffs claim that Acts 369 and 370 injured them, but neither Act makes Plaintiffs the "object of [ ] government action," since these Acts regulate (at most) only the powers of state-government officials who are not plaintiffs here, such as the Governor, the Attorney General, or various state agencies. *Lujan*, 504 U.S. at 562; *see supra* pp. 4–11. Yet, despite the fact that Plaintiffs are not themselves "targeted" by these laws, A.9, Plaintiffs have not attempted to make the "substantially more difficult" showing needed to "establish" injury in fact under these circumstances, *Lujan*, 504 U.S. at 562. This "is reason alone to conclude that [P]laintiffs haven't met

their burden" to establish standing. A.6; *compare* Opening Br. 16–26 (addressing standing with no mention of this burden). Plaintiffs' failure to "address" or "explain" this point in their Opening Brief is all the more glaring because the district court faulted them for this same failure below. A.6.

Even putting this outcome-determinative point aside, considering the specific injuries that Plaintiffs rely upon shows that the district court's conclusion that they lack Article III standing was plainly correct.

First, Plaintiffs assert that the individual Plaintiffs have standing because Acts 369 and 370 frustrated their "voting rights" by taking away statutory authority from politicians whom they support. *See* Opening Br. 16–21. But, as *Gill* explained, "voting rights" are "embodied in" the right to cast a ballot, 138 S. Ct. at 1931, and Acts 369 and 370 did not take away anyone's right to do so. According to Plaintiffs, Acts 369 and 370 resulted in their preferred candidates having less power to achieve policies than Plaintiffs expected, thus preventing the "policies that [they] support" from becoming law, and causing "emotional harm" because Plaintiffs would not see their preferred policies enacted. A.7–9. Those kinds of harms are "common to all members of the public," and so do not support Plaintiffs' standing. *Gill*, 138 S. Ct. at 1931 (citation omitted). As *Gill* held, voters like individual Plaintiffs have no Article III injury resulting from frustration with "policies adopted by the legislature," *id.*, and for the same reason, Plaintiffs have no cognizable interest in the policies that Governor Evers and Attorney General Kaul will or will not be able to adopt. Plaintiffs have never cited any decision from any court in the Nation's history supporting their

theory that the supporters of specific politicians suffer Article III harm because the politicians that they favor lose some amount of their statutory powers.

Plaintiffs' theory of individual Plaintiffs' standing also has no logical stopping point, giving standing to voters to challenge any loss of power from any politician that they have ever supported. Recall the hypothetical example discussed above: Congress repealing the National Emergencies Act after the 2016 election to frustrate President-Elect Trump's ability to use that Act to fulfill his border-wall pledge. *See supra* 25–26. Under Plaintiffs' standing theory, *every person who voted for Candidate Trump would have standing to challenge that repeal*. After all, many of his supporters expected him to have this statutory power after his election, and any repeal would certainly cause these supporters to suffer policy frustration of exactly the type that the individual Plaintiffs claim here. Article III does not permit such lawsuits to "vindicate[ ] generalized partisan preferences." *Gill*, 138 S. Ct. at 1933.

Plaintiffs' caselaw citations on this score are inapposite. Plaintiffs' claim that they want their "vote [to] *count,*" or to not be counted "arbitrar[ily], citing cases like *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), Opening Br. 18–19, but Acts 369 and 370 have no effect on the counting of Plaintiffs' votes—which votes, in any event, Plaintiffs cast *before* these Acts were enacted. This also disposes of *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010), Opening Br. 20–21, which considered the Governor of Illinois' "failure to issue a writ of election" allowing plaintiffs' to exercise their right to vote in the future for a replacement Senator, *Judge*, 612 F.3d at 543–45. Similarly, Plaintiffs' claim of "vote dilution," Opening Br. 17, has no grounding in *Reynolds v.*

Sims, 377 U.S. 533 (1964), as their votes counted the same as all other voters, just as the votes of the individual plaintiffs in *Gill* counted the same as all others' votes under the challenged map, *Gill*, 138 S. Ct. at 1930–31. And Plaintiffs' generalized claims of injury are nothing like the specific injuries in *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011), Opening Br. 20, where a campaign-finance regulation caused Article III injury to a political action committee because that regulation "limit[ed] the contributions the committee may lawfully receive." *Barland*, 664 F.3d at 147.

Second, Plaintiffs claim that the Democratic Party (and its individual volunteers, some of whom are individual Plaintiffs, Opening Br. 19–20) has standing because Acts 369 and 370 undermine its ability to "fundraise, register voters, attract volunteers, generate support from independents, and recruit candidates" by allegedly demoralizing the Party's base. Opening Br. 20 (citation omitted). Remarkably, Plaintiffs concede, Opening Br. 21–22, that the district court was correct that this theory "would give a political party standing to challenge any decision by a government body that could be viewed as demoralizing the party's members." A.11. It would, of course, be trivially easy for a political party to argue truthfully that the enactment of *any* high-profile legislation (or adoption of any high-profile agency rule, or any high-profile executive order) demoralized its base; after all, that is a normal human reaction to a serious political setback. And such disappointment could thereby make it harder for the out-of-power party to "fundraise, register voters, attract volunteers, generate support from independents, and recruit candidates," Opening

Br. 20 (citation omitted), for the same reason that Plaintiffs' allege that Acts 369 and 370 had these impacts here. Holding that this is sufficient for standing would create an elephant-or-donkey-sized loophole in the Supreme Court's Article III jurisprudence, giving standing to political parties to challenge virtually any controversial achievement by elected politicians of an opposing party.

The cases that Plaintiffs offer here provide no support. Acts 369 and 370 do not "prohibit or require any action" by the Democratic Party, such as participating in an election, fielding candidates, placing candidates on the ballot, or the like. A.9. This renders irrelevant the cases that Plaintiffs cite here. Opening Br. 21–23; *see Cal. Democratic Party v. Jones*, 530 U.S. 567, 571, 581–82 (2000) (law requiring political parties to allow nonmembers to vote in their primaries); *Williams v. Rhodes*, 393 U.S. 23, 24–25 (1968) (law requiring political parties to obtain a certain number of signatures); *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 520 (7th Cir. 2017) (law requiring political parties to "field candidates for all offices on the ballot"); *Krislow v. Rednour*, 226 F.3d 851, 855 (7th Cir. 2000) (law restricting who was eligible to collect signatures on behalf of a candidate). And *Crawford v. Marian County Election Board*, 472 F.3d 949 (7th Cir. 2007*), aff'd on other grounds*, 553 U.S. 181 (2008), Opening Br. 22–23, is merely one decision in the line of cases holding that organizations devoting resources to helping a group of voters comply with a particular law—like voter ID laws or voter-registration laws—have Article III standing to challenge statutes that make this work more difficult or time-consuming. *See Crawford*, 472 F.3d at 950–51; *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950–51 (7th Cir. 2019).

Crawford did not hold or suggest that the Democratic Party would have standing to challenge any law that the Party opposed, on the grounds that the enactment of the law demoralized its membership. Plaintiffs' view of *Crawford* as an Article-III-generating-machine for political parties—allowing them to challenge any laws that allegedly upset their core voters, such that the party will need to redouble its fundraising, volunteer efforts, and the like to buck those voters up—would turn "*Crawford* . . . [into] something as amorphous as taxpayer standing." *Common Cause*, 937 F.3d at 950.

Third, Plaintiffs claim that the Democratic Party has associational standing to assert the rights of its members. Opening Br. 24–26. But an association can only enjoy associational standing when "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). As explained above, no voter in Wisconsin, including individual Plaintiffs, has standing to challenge Acts 369 and 370's removal of statutory power from offices held by politicians who some individual voters happen to support. *Supra* pp. 32–35.

That the Democratic Party includes Governor Evers and Attorney General Kaul in its ranks, in their personal capacities, does not change this result. *See* Opening Br. 25–26. Plaintiffs' Complaint shows that the Democratic Party purports to represent all of its supporters, including Evers and Kaul, as *"voters in the State of Wisconsin,"* not in any official capacities like Governor and Attorney General of the State of Wisconsin. Dkt.1, ¶ 9 (emphasis added); *compare* Opening Br. 25 (erroneously asserting that the district court's conclusion on this score "is

unsupported by the record"). Thus, for purposes of associational standing, Evers and Kaul are no different than any other member of the Democratic Party, whom all lack standing under *Gill*. *See supra* 32–35. But if this Court were to conclude that the Democratic Party somehow had the lawful authority to represent the Governor and the Attorney General of the State of Wisconsin, in their official capacities, those offices are *defendants* in this lawsuit. As explained below, no party made a motion to realign Governor Evers, in his official capacity, from defendant to plaintiff, and he could not lawfully be a plaintiff in this case, in any event. *See infra* pp. 40–43. As for Attorney General Kaul, Plaintiffs do not argue that he should have been realigned from defendant to plaintiff, meaning that even Plaintiffs appear to concede that they have no authority to rely upon any harms that his office allegedly suffered.

Finally, Plaintiffs have not alleged any injury from the vast majority of Acts 369 and 370's provisions, even under their own legally foreclosed standing theories. Plaintiffs' Complaint only mentions alleged harms from a handful of the sections in the Acts.[10] Plaintiffs even filed an appendix below that conceded that numerous provisions were nowhere "expressly referenced" in their papers and that effectively admitted that they only merely restated many other sections, with no allegations as to how they burdened Plaintiffs. Dkt.37-1 at 2–5. Because "standing is not dispensed

[10] As for Act 369, the Complaint alleged harms from Sections 82m, 102, 91, 26, 4, 30, and 64. *See* Dkt.1 ¶¶ 59 & nn. 20–21, 60 & n.22, 61 & n.23, 62, 66 & nn.28, 31–32. As for Act 370, the Complaint alleged harms from Sections 14, 13, 17, 44, and 10. *See* Dkt.1 ¶¶ 63 & n.25, 64 & n.26, 65 & n.27, 66 & nn.29–30.

in gross," *see Gill*, 138 S. Ct. at 1934 (citation omitted), Plaintiffs have failed to satisfy Article III standing as to, at a minimum, most provisions in Acts 369 and 370.

B. Plaintiffs' Efforts To Invoke The Interests Of Defendant Governor Evers Are Legally Irrelevant

The district court also properly concluded that Plaintiffs could not rely upon Governor Evers' alleged injuries to satisfy their own obligation to demonstrate standing. A.12–13. The federal courts "insist[ ] that a *plaintiff* satisfy the familiar three-part test for Article III standing," not the defendant. *Gill*, 138 S. Ct. at 1929 (emphasis added). The plaintiff is "[t]he party invoking federal jurisdiction," which means he must "bear[ ] the burden of establishing these elements." *Lujan*, 504 U.S. at 561. So, because Governor Evers is a defendant, "any injuries [he] ha[s] suffered are irrelevant to the standing analysis." A.12 (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)).

Plaintiffs claim that the district court should have "realigned" Governor Evers, sued in his official capacity as Governor of Wisconsin, as a plaintiff under Federal Rule of Civil Procedure 21, and then proceeded to include his public office's alleged injuries in its standing calculus. Opening Br. 26–30. But this is legally foreclosed for a variety of independently sufficient reasons.

As a threshold matter, this Court lacks jurisdiction to review the district court's decision not to realign the Governor. When any party seeks to attack the judgment "with a view [ ] to enlarging his own rights," either an appeal or a "cross-appeal" is necessary, under "inveterate and certain" rules of appellate jurisdiction. *U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 937 (7th Cir. 1975); *accord Jennings*

v. Stephens, 574 U.S. 271, 278 (2015). That the district court did not realign the Governor as a plaintiff affects only defendant Governor's rights, not Plaintiffs' rights, and the Governor would have had to appeal to afford this Court jurisdiction to enlarge those rights. The Governor did not file such an appeal. Indeed, he is not even "participating in this appeal," 7th Cir. Dkt.17, so he has not challenged anything that the district court did below. That is the end of the matter.

Regardless, the Governor did not move for realignment below, thus the court was justified in refusing to order it. A.12 & n.2. While Plaintiffs claim that the Governor asked for realignment in the parties' Joint Rule 26(f) report, Opening Br. 26–27, in that report the Governor "restate[d]" his "position" that he is a "*de facto* plaintiff[ ] in this matter and should be considered as such," Dkt.70 at 3. That is not a motion for realignment, since realignment turns a defendant into a *de jure* plaintiff, not a *de facto* plaintiff. *See Wolf v. Kennelly*, 574 F.3d 406, 413 (7th Cir. 2009).

The district court has "great authority" to manage its docket and did not abuse that discretion by refusing to allow a party to bury a request for realignment in a Rule 26(f) report, filed after completion of motion-to-dismiss briefing where Plaintiffs' standing was a core issue. *See Gonzalez*,133 F.3d at 1031. Plaintiffs quibble that the court's own rules for Rule 26(f) reports expressly provide for realignment requests, Opening Br. 27, but the relevant rule requires disclosing "[t]he identity of any *new* parties to be added," which does not fairly contemplate a realignment of an *existing* party. *See* W.D. Wis. Standing Order Governing Preliminary Pretrial Conferences

(rev. 12/17).[11] In any event, Legislative Defendants made clear in the very same Rule 26(f) report that a formal realignment motion would be necessary if any party were actually to be realigned from defendant to plaintiff, so the district court requiring a formal motion was well within its broad discretion, including because a formal motion would have allowed Legislative Defendants an adequate opportunity to respond. Dkt.70 at 3.[12]

Finally, realigning the Governor would have been legally improper in any event. As a mere "creature of the state," the Governor litigating in his official capacity could not lawfully bring a Section 1983 claim against the State,[13] so he could not be a plaintiff in this case. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); Dkt.1 at 28–31 (alleging § 1983 as the basis for each claim). Any contrary holding would "turn[ ] [Section 1983] on its head," *Alabama*, 791 F.2d at 1456 n.4

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[11] Available at http://www.wiwd.uscourts.gov/sites/default/files/Standing_Order_Pretrial_SLC.pdf (last visited Feb. 5, 2020).

[12] Plaintiffs cite cases dealing with realignment generally, *see* Opening Br. 27–29, but Legislative Defendants are not disputing the general power of a court to order realignment. In any event, Plaintiffs' main case, *Mullaney v. Anderson*, 342 U.S. 415 (1952), Opening Br. 27–28 & n.12, merely allowed late joinder for additional nonresident members of plaintiff's own organization, 342 U.S. at 416–17.

[13] That this lawsuit is against the State of Wisconsin is why Legislative Defendants disagree with the district court's footnote suggestion that, if they were the only defendants here, that would require dismissing this case under the legislative-immunity doctrine. A.12 n.2. While "legislators are generally entitled to absolute immunity from liability under § 1983 for their legislative activities," A.12 n.2 (citing *Reeder v. Madigan*, 780 F.3d 799, 802 (7th Cir. 2015)), under Wis. Stat. §§ 13.365, 803.09(2m), the Legislature—appearing here through its leadership—has the state-law right to speak for the State of Wisconsin in defense of *the State's* interests in the validity of state law, *see Planned Parenthood*, 942 F.3d at 978. These statutes are precisely the type that the Supreme Court has explained States should adopt if they want to authorize their legislatures to defend duly enacted laws against constitutional challenges. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52 (2019).

(citation omitted), since it "was enacted as a civil remedy for *all individual citizens and people* whose constitutional rights have been deprived under color of state law," *Barbara Z. v. Obradovich*, 937 F. Supp. 710, 722 (N.D. Ill. 1996) (emphasis added). The Governor, in his official capacity, is also not a voter in the State of Wisconsin, so that office could not possibly bring First Amendment or Equal Protection Clause claims, as the district court properly held. A.13–14. *Bush*, 531 U.S. at 104–05, is not to the contrary, *see* Opening Br. 35, as that case merely considered the "mechanisms" for tallying the ballots cast for a candidate, suing in his capacity as a candidate. Here, had the Governor moved for realignment, he would have been seeking the reinstatement of the powers of his office, in his official capacity. The Governor does not claim that Acts 369 and 370 impacted the First Amendment or Equal Protection Clause rights of the office.

III. Plaintiffs' Claims Fail As A Matter Of Law, In Any Event

A. If this Court were to conclude that Plaintiffs both raised justiciable claims and had standing, this Court should still affirm the judgment below because all of Plaintiffs' claims fail on the merits. "This Court ordinarily may modify dismissal for lack of jurisdiction and convert it to a dismissal on the merits if warranted," which includes when the plaintiff had an "opportunity to respond" to the merits arguments, *Skinner*, 44 F.3d at 538, and when "modifying the dismissal . . . makes no practical difference" because the "jurisdictional dismissal effectively bar[red] relief on the merits in any judicial forum," *Matushkina*, 877 F.3d at 297. Modification is appropriate when it is "consistent with" the "approach" of affirming the judgment on

alternative grounds "appearing in the record." *See id.* (citations omitted); *Richardson*, 768 F.3d at 734 (citing *Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976)).

Here, modifying the dismissal below to a merits dismissal would be plainly permissible. Legislative Defendants presented their merits arguments to the district court, *e.g.*, Dkt.35 at 23–28, thus Plaintiffs had an adequate "opportunity to respond" to them, *Skinner*, 44 F.3d at 538. In addition, the district court's jurisdictional dismissal "effectively barr[ed]" Plaintiffs from asserting their federal claims in any "judicial forum," *Matushkina*, 877 F.3d at 297, as the court concluded that Plaintiffs failed to show any "concrete and particularized harm" to "a federal constitutional right," A.14. Finally, dismissing on the merits here would be "consistent with" Legislative Defendant's defending the judgment on alternative grounds properly preserved in the record. *Matushkina*, 877 F.3d at 297; *Richardson*, 768 F.3d at 734 (citing *Ludwig*, 426 U.S. at 481).

B. On the merits, Plaintiffs lawsuit fails for two interrelated reasons: (1) one of the essential elements of Plaintiffs' theory is that the Legislature acted with "too much" alleged partisan intent when it enacted Acts 369 and 370, *see supra* p. 23, but binding caselaw forecloses any theory that makes partisan intent an essential element; and (2) Plaintiffs' claims, at most, are subject to rational-basis review, and Plaintiffs have forfeited any argument that they can prevail under that standard.

1. Binding caselaw forecloses Plaintiffs' lawsuit because that lawsuit is built around an essential element of partisan intent. As *Rucho* explained, "[a] permissible intent—securing partisan advantage—does not become constitutionally

impermissible, like racial discrimination, when that permissible intent 'predominates.'" 139 S. Ct. at 2503. This holding is consistent with this Court's binding caselaw. In *Hearne v. Board of Education of City of Chicago*, 185 F.3d 770 (7th Cir. 1999), *Wisconsin Education Association Council v. Walker* (*WEAC*), 705 F.3d 640 (7th Cir. 2013), and *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), this Court rejected challenges to laws that legislators had enacted with the allegedly partisan intent to harm their political enemies. As this Court explained, such alleged partisan intent is irrelevant, since "there is no rule whereby legislation that otherwise passes the proper level of scrutiny (and does not infringe on a fundamental right, or rest on an impermissible distinction such as race), becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign." *Hearne*, 185 F.3d at 775 (citations omitted); *accord WEAC*, 705 F.3d at 654 ("[W]e must resist the temptation to search for the legislature's motivation for the Act's classifications."); *Frank*, 768 F.3d at 755 ("[I]f a nondiscriminatory law is supported by [any] valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation . . . ." (citation omitted)).

In the present case, Plaintiffs built their theory around the allegation that the Wisconsin Legislature acted with too much partisan intent in enacting Acts 369 and 370, making such partisan intent an essential element of their claim. *Rucho*, *Hearne*, *WEAC* and *Frank* make clear that this sort of theory is unavailable, as a matter of law.

2. Even if Plaintiffs' reliance on partisan intent did not suffice to doom their claims, Plaintiffs' claims would be adjudicated under the most lenient form of judicial scrutiny. As this Court explained in *WEAC,* when all that a plaintiff can allege is partisan intent, a law need only "bear[ ] a rational relationship to a legitimate government interest." 705 F.3d at 653. This test does not require the State to "'actually articulate' the law's purpose or 'produce evidence to sustain the rationality' of the classification." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Rather, plaintiffs bear the burden to "'negative every . . . basis which might support' the law." *Id.* (quoting *Heller*, 509 U.S. at 320). Similarly, for Plaintiffs' Guarantee Clause claim, courts addressing the merits of such claims (usually as a belt-and-suspenders back-stop to a nonjusticiability holding) summarily consider whether the law at issue installs a state-level "dictator" or works some other extreme hypothetical. *See, e.g, Risser*, 930 F.2d at 553.

Legislative Defendants briefly address below the categories of provisions in Acts 369 and 370, explaining why these are nothing more than modest changes in Wisconsin law, achieving well-established state interests. Plaintiffs did not respond to these arguments when Legislative Defendants made them before the district court, and thus they have "forfeited" any argument to the contrary. *Scheidler v. Indiana*, 914 F.3d 535, 540 (7th Cir. 2019). Legislative Defendants discuss the specific provisions in Acts 369 and 370 in more detail in their Statement of the Case:

Provisions Relating to Litigation Impacting State Law. These provisions merely give the Legislature a seat at the table in a limited universe of cases, so that

the Attorney General cannot unilaterally settle away duly enacted law. The Supreme Court has articulated why this concern is legitimate and consistent with the separation of powers: "[W]hen [a legislature] has passed a statute and a [governor] has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify [the legislature's] enactment solely on its own initiative." *United States v. Windsor*, 570 U.S. 744, 762 (2013). The Court has also explained that States should enact laws just like those that Wisconsin enacted here to safeguard against that problem. *Bethune-Hill*, 139 S. Ct. at 1951–52. Indeed, the Attorney General's recent decision to attack, rather than defend, many of the provisions in Acts 369 and 370 in *Service Employees International Union, Local 1 v. Vos*, No. 2019AP622 (Wis. argued Oct. 21, 2019), and his refusal to defend the laws in this very case well-illustrate the separation-of-powers problem that the Legislature was seeking to address here.

Legislative Oversight Provisions. These provisions give legislative committees the authority to review certain agency actions, consistent with four decades of materially indistinguishable laws that the Legislature has enacted. *See generally* Wis. Legislative Fiscal Bureau, *Informational Paper 76* (Jan. 2019).[14] As the Wisconsin Supreme Court explained in upholding these same kinds of provisions in its landmark decision in *Martinez v. Department of Industry, Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992), it is "incumbent on the legislature, pursuant

[14] Available at http://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0076_joint_committee_on_finance_informational_paper_76.pdf.

to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Id.* at 587. The other changes in this category of laws in Acts 369 and 370, such as to the enlargement of the Wisconsin Economic Development Corporation's board of directors, allow for greater representation and deeper expertise, thereby enhancing the agency's ability to fulfill its purpose in Wisconsin. *See generally* Wis. Legislative Council, *Memo: 2011 Wisconsin Act 7* (Feb. 15, 2011).[15]

Codification of Certain Federally Approved Plans and Other Regulations. Act 370 codifies certain state plans that have already been approved by relevant federal agencies, as well certain prior administrative regulations. This furthers the State's legitimate interests in the stability of the law, so that the public need not worry about withdrawal of programs that are already federally approved and/or codified. *See Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) (recognizing "continuity[ ] and stability" as legitimate interests). These provisions also preserve the traditional understanding of separation of powers by making sure that the Legislature makes important policy decisions. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

Prohibition on Certain Renominations. These provisions prohibit the wasteful practice of renominating individuals whom the Wisconsin Senate has already concluded should not be confirmed for a particular position.

Changes to Wisconsin Voting Laws. Many of Acts 369 and 370's voting-law changes increase the availability of voting options for military and overseas voters.

[15] Available at https://docs.legis.wisconsin.gov/2011/related/lcactmemo/act007.

Some provisions codify preexisting regulations relating to Wisconsin's voter ID law, furthering the legitimate state interest in stability. *See Nordlinger*, 505 U.S. at 12.

Regulation of Guidance Documents. These provisions forward the legitimate state interests in transparency and accountability by subjecting agencies' guidance documents to the well-respected processes of notice and comment and judicial review. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Codification of the Elimination of Agency Deference. These provisions codify the Wisconsin Supreme Court's decision to eliminate agency deference, *Tetra Tech*, 914 N.W.2d 21, consistent with the concerns that numerous respected jurists have expressed about this doctrine, *see Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring); *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

CONCLUSION

This Court should affirm the judgment of the District Court.

Dated, February 7, 2020

Respectfully Submitted,

/s/ Misha Tseytlin

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN SANDERS LLP
One North Wacker Drive
Suite 2905
Chicago, Illinois 60606
(608) 999-1240 (telephone)
(312) 759-1939 (facsimile)
misha.tseytlin@troutman.com

Attorneys for Legislative Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 13,475 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: February 7, 2020

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2020, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: February 7, 2020

/s/ Misha Tseytlin

MISHA TSEYTLIN