UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

-against-

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

Defendants.

Civil Action No.: 19-cv-00142

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

BOARDMAN & CLARK LLP
1 South Pinckney Street, Suite 410
Madison, WI 53701
(608) 257-9521

HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue, 14th Floor
New York, NY 10017
(646) 837-5151

Counsel for Plaintiffs

Dated: February 21, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Wisconsin State Constitution

Other Authorities

PRELIMINARY STATEMENT

Elections matter. In this case, a lame-duck legislature and outgoing governor deprived the people of Wisconsin of their electoral choice. They did so by curtailing the executive powers of the state's incoming governor and attorney general, and by transferring those powers to the legislature, which was to stay in Republican hands. In these rare circumstances, only the courts can redress these unconstitutional attacks on the will of the people.

In November 2018, Wisconsin's people voted then-Governor Scott Walker and then-Attorney General Brad Schimel out of office. They did so because then-candidates Tony Evers and Josh Kaul promised on the campaign trail to take Wisconsin in a different direction. For example, then-candidate Evers promised to expand access to health care by using executive powers, while then-candidate Kaul promised to defend Obamacare in litigation rather than seek to set it aside (as his predecessor had sought to do). These policies excited a majority of Wisconsin's voters, including plaintiffs here. But the prospect that these policies might be implemented frightened Walker and some of his colleagues in the state legislature.[1] So, together, they set about to undo the electoral results.

The method was simple — enact legislation that would, once Governor Evers and Attorney General Kaul took office, curb Wisconsin's Executive from taking action that had been open to predecessor administrations, such as promulgating regulations, appointing officers, and even acting on Wisconsin's behalf in litigation. Defendants' objective, plain from the face of the

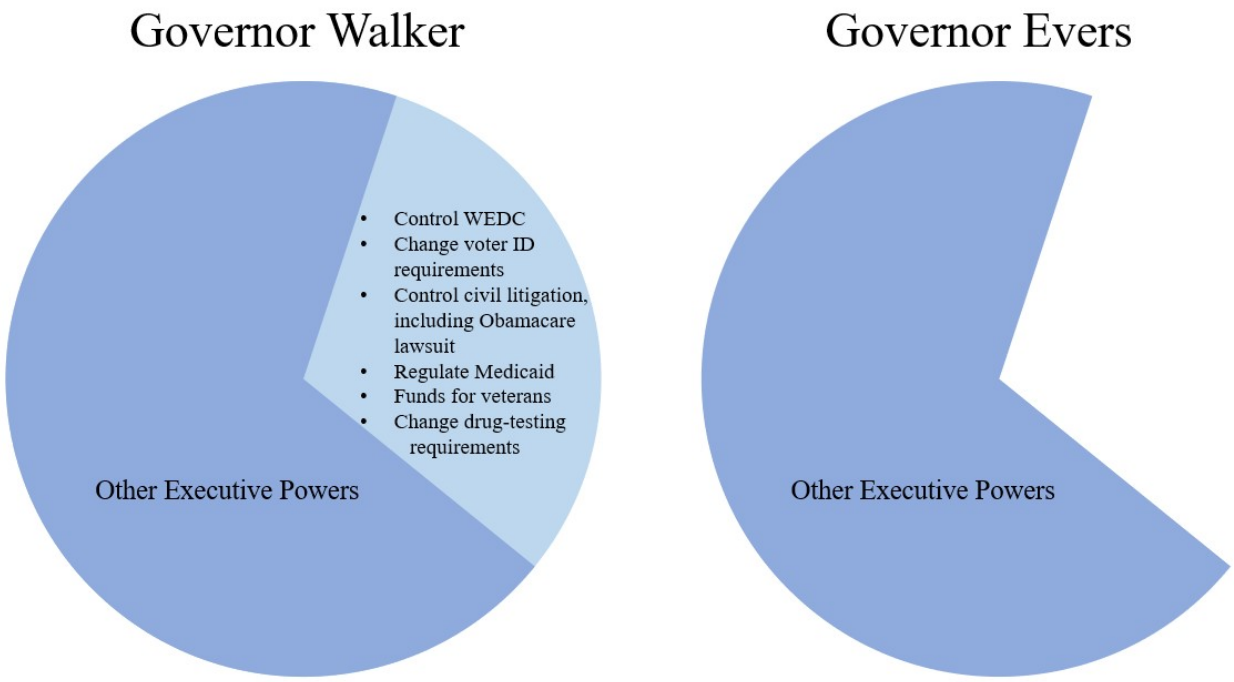
[1] The Legislator Defendants are Robin Vos, Scott F. Fitzgerald, Alberta Darling, John Nygren, Roger Roth, Stephen Nass, and Joan Ballweg. They are sued because they took the actions complained of in this suit and because they have been given the power to defend the legislation being challenged under the plain terms of that legislation. Governor Tony Evers and Attorney General Josh Kaul are nominal defendants in this suit because, under the Wisconsin Constitution, they are the principal officers tasked with implementing Wisconsin's laws, but they did not take any of the actions challenged in this suit. As a result, we refer to nominal defendants Evers and Kaul by name and to the remaining defendants simply as "Defendants."

proposed legislation, was also publicly conceded — Walker and the Legislator Defendants candidly admitted that their goal was to disempower the incoming administration and that, but for the electoral results, Defendants would not have sought to enact any of the legislative decrees they pushed through the legislature. Still, Defendants pushed them through an "extraordinary," lame-duck session of the legislature, without precedent in Wisconsin law or history.

When it came time to sign the bills into law, Walker was facing public pressure, and, on his way out the door, he sought to defend his role in curbing the powers of his successor. Thus, he argued to the public that the incoming administration would have the "same powers" that his own administration had possessed.

But the entire purpose of the extraordinary legislative session and of the bills that were pushed through it was to curb the authority of the incoming administration. And this is plainly what was accomplished: Defendants took many traditional powers away from the Executive, and gave the new Executive nothing in return, and did so solely to disempower Walker's

successor. Frankly, the fact that Walker felt compelled to go through the charade was simply an admission of his guilt. Had he been honest, this is what he would have shown instead:[2]



Defendants' conduct is not just offensive to the will of Wisconsin's voters. It is also unconstitutional and should be enjoined. *First*, Wisconsin Acts 369 and 370 violate the Guarantee Clause of the United States Constitution.[3] Defendants' "extraordinary" and unprecedented lame-duck session was unabashedly convened for the purpose of stripping the executive powers of a rival political faction after it secured electoral victory. And the legislation that Defendants enacted had that intended effect — Governor Evers is now without authority to enact policies that he promised to the voters; that, but for the passage of Acts 369 and 370, he could have pursued through executive action; and that Wisconsin's people voted on. The lame-

[2] *See* Philip Bump, *Let's hope Scott Walker's next job doesn't require chart making*, Washington Post (Dec. 14, 2018), available at https://www.washingtonpost.com/politics/2018/12/14/lets-hope-scott-walkers-next-job-doesnt-require-chart-making (discussing uses of Venn diagrams and proposing alternative diagrams).

[3] Act 369 and Act 370 can be found at Ex. A and Ex. B, respectively. References to "Ex." refer to the exhibits attached to the accompanying declaration of Kevin D. Benish.

duck removal of executive powers from the office, implemented after a new office-holder was elected to wield those powers, violated the Constitution's guarantee of a republican government.

Second, Acts 369 and 370 violate the First Amendment to the United States Constitution because, though them, the Legislator Defendants retaliated against, burdened, and interfered with plaintiffs' fundamental rights to associate, advance their collective beliefs, and express their views. Plaintiffs, the Democratic Party of Wisconsin and a group of Democratic voters, have spent years working to achieve the victories that came in November 2018. Acts 369 and 370, by undoing the will of the voters and depriving the Executive of powers the people voted on, violate the First Amendment.

Third, Acts 369 and 370 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The evidence could not be clearer that the Acts were passed solely to discriminate on the basis of the political viewpoint of the incoming administration and its voters. This is a violation of the Equal Protection Clause's promise that legislation not be passed on the basis of viewpoint discrimination. The Acts also unabashedly violate the precept that legislative action not dilute a vote, once granted by a state and exercised by the people.

In view of these violations, the Court should preliminarily enjoin Act 369 and Act 370. Now that Governor Evers and Attorney General Kaul have been sworn in, plaintiffs are suffering irreparable injury on account of Defendants' conduct. Every day that goes by is a day on which Governor Evers and Attorney General Kaul are foreclosed from pursuing the policy preferences of Wisconsin's voters through executive powers that belonged to Wisconsin's governor and attorney general until Democrats were elected. As there is no inequity to returning the Executive

branch to the status quo ante — indeed, Wisconsin's Governor and Attorney General will enjoy the "same powers" they always have — the Court should enter preliminary injunctive relief.

FACTUAL BACKGROUND[4]

A. Governor Tony Evers And Attorney General Josh Kaul Win Historic Election

On November 6, 2018, then-candidates Tony Evers, Josh Kaul, and every other Democratic candidate for statewide office won their elections, campaigning on various promises to take Wisconsin in a different direction. The candidates campaigned on the policies of, among other things, withdrawing the State of Wisconsin from a federal lawsuit challenging the constitutionality of the Affordable Care Act ("Obamacare"); expanding Medicaid; repealing costly and unproven drug testing requirements for public-assistance recipients; increasing opportunities for citizens to vote by changing unnecessary voter identification policies; and changing administrative rules to improve renewable energy and Wisconsin's environment.[5]

In that same election, the Republican majorities in the Wisconsin State Senate and Assembly continued to hold power by large margins despite decisively losing the statewide popular vote in both legislative bodies, as a result of gerrymandered district lines. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 853 (W.D. Wis. 2016), *vacated and remanded on standing grounds*, 138 S. Ct. 1916 (2018) (finding that Wisconsin's district lines had been gerrymandered on partisan grounds: "In 2012, the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly. In 2014, the Republican Party received 52% of the two-party statewide vote share and won 63

[4] The facts set forth herein are drawn from the complaint and the accompanying declaration of Kevin D. Benish.

[5] Laning Decl. ¶ 5; *see also*, Degenhardt Decl. ¶ 3; Dorff Decl. ¶ 3; Hostettler Decl. ¶ 3; Klitzke Decl. ¶ 3; Robson Decl. ¶ 3; Sabor Decl. ¶ 3; Steele Decl. ¶ 3; Stencil Decl. ¶ 3 (discussing Governor Evers' and Attorney General Kaul's campaign promises).

assembly seats.").[6] Following the November 2018 election, the people of Wisconsin were set to be represented by a divided government for the first time in a decade.

A. Defendants Move Swiftly To Blunt The Electoral Results

Republican leaders in the Wisconsin Legislature were quick to respond to the sudden (and unexpected) loss of power. Speaking on November 7, 2018, less than one day after the electoral defeat, Defendant Robin Vos, the Republican Speaker of the Wisconsin State Assembly, stated that he wished to "rebalance" the powers of Wisconsin's governor in light of the electoral outcome. Ex. E. The next day, November 8, 2018, Defendant Vos reportedly held a private meeting with Defendant Scott Fitzgerald, Majority Leader of the Wisconsin State Senate, and other Republican members of Wisconsin's lame-duck Legislature to discuss ways to limit the powers of the incoming Democratic administration. Ex. F.

On Friday, November 30, 2018, the Republican-dominated legislature convened an "extraordinary" lame-duck session that had not been planned before the Democrats' electoral victories, even though the Wisconsin Constitution does not contemplate any such session.[7] The purpose of that session, Defendant Vos admitted, was to "mak[e] sure what we have in practice stays in practice." Ex. G. During this session, Republicans introduced five bills to accomplish Vos' objective: Assembly Bill ("AB") 1069, AB 1070, AB 1071, AB 1072, and AB 1073. On the afternoon of that same day, Defendants Senator Alberta Darling and Representative John

[6] Despite losses in every statewide race held in November 2018, Republicans managed to expand their majority in the State Senate (Ex. C) and keep a hold on 63 of the State Assembly's 99 seats (Ex. D).

[7] The Wisconsin Constitution does not provide for extraordinary sessions convened by legislators in the way this session was. It provides that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened." Wisc. Const. art. IV § 11. This "extraordinary session" was convened by members of the legislature, so it does not count as a "special session" convened by the Governor. Moreover, the time for this "extraordinary session" was not "provided by law," because no statute had scheduled the session.

Nygren, who headed (and still head) the Legislature's Joint Committee on Finance, noticed a public hearing on the five bills, as well as an executive session in which that Committee — which was (and still is) composed of 12 Republicans and 4 Democrats — would vote on whether to advance the bills to the full legislature.

On Monday, December 3, the following business day, the Committee convened a public hearing on the five lame-duck session bills and their companion Senate bills, which had been introduced earlier that day. Ex. H. As the hearing proceeded, Defendant Fitzgerald stressed Republicans' concern that Evers' would be "absolutely the most liberal administration that we have ever seen in the state of Wisconsin." Ex. I. Defendant Fitzgerald regularly emphasized this concern as the reason for the lame-duck actions. *E.g.*, Ex. J ("I'm concerned. I think that Gov.-elect Evers is going to bring a liberal agenda to Wisconsin.").

In the early morning hours of December 4, 2018, three of the bills were passed out of the Finance Committee on a party-line vote. Ex. H. Once the sun had risen, Republicans hastily convened on the floors of the State Senate and Assembly to vote on these three bills. Addressing members of the public and media, Defendant Vos stressed again that the point was to curb the powers of the incoming administration:

> As you think about where the legislature has been over the course of the past eight years, we have had an incredible partner with Governor Walker. We have taken the time to look at Wisconsin in 2010 and where we are today. There are a number of very important reforms that each one of us [Republican members] have ran on and that we have promised our constituents we will do everything in our power to make sure that they stay on the books in Wisconsin.[8]

[8] WKOW, *Update: Senate begins debate on controversial lame-duck bills*, at 00:00 to 00:25 (Dec. 4, 2018), https://wkow.com/news/political/2018/12/04/update-senate-in-session-assembly-to-begin-work-at-4-p-m (Ex. K).

As the bills were approved one by one, never with a single Democratic vote in favor, Defendant Vos again warned that he "know[s] [] the situation that we are sitting in right now if we do not pass these proposals is that we are going to have a very liberal governor who is going to enact policies that are in direct contrast to what many of us believe in." *See* WisconsinEye, Assembly Floor Session – Part 1, at 36:35 to 36:56 (Dec. 4, 2018, at 10:49pm), https://wiseye.org/2018/12/04/assembly-floor-session-part-1-8.

His Republican colleagues expressed the same concerns. State Representative John Jagler stated that the lame-duck session was necessary because at least one Republican priority then subject to executive oversight was "in danger" because "Governor Tony Evers said it's going away." *Id*. at 1:54:05 to 1:54:41 (Dec. 5, 2018, at 12:06-07am). Similarly, Defendant Nygren stated that the legislation was being pursued because Evers "has publicly expressed his desire to undo things that this legislative body has passed . . . ." WisconsinEye, Assembly Floor Session – Part 2, at 1:14:00 to 1:14:11 (Dec. 5, 2018, at 5:45am). Asked whether the legislators "would [] be [t]here tonight" "if Governor Walker were re-elected," Defendant Nygren coyly admitted "My guess is we wouldn't necessarily be here tonight." Ex. L. Similarly, Defendant Vos stated that Republicans "are going to stand like bedrock to guarantee that Wisconsin does not go back." Ex. M.

Concerned about the imminent shift in power that Wisconsin's voters had heralded, Republicans worked through the night and pushed all the bills through both houses of the legislature. The legislature adjourned before 9:00am on December 5, 2018, having adopted three bills without a single Democrat voting in favor, over a period of just 24 hours.

The bills then made their way to Walker's desk. In a moment of candor, Walker recognized that the matters addressed by the lame-duck session were not even considered until

after the electoral results. Ex. N. Still, and despite obviously recognizing that the purpose and effect of the bills would be to curb the power of the incoming administration, Walker signed the lame-duck bills into law on December 14, 2018, all the while asserting (as if saying it would make it so) that the Executive's powers remained unchanged.

B. The Challenged Acts In Fact Curbed The Powers Of The Executive

Of course, the powers of the Executive did not remain intact and were instead arrogated by the Republican-controlled legislature to itself (or members of that body). Consistent with Defendants' objective, the Acts specifically targeted matters on which Wisconsin's incoming governor and attorney general had campaigned so as to make it impossible for them to enact those very policies that, but for the passage of the Acts, could (and would) have been pursued. For example:[9]

- Democratic candidates campaigned on promises to change Department of Transportation administrative rules implementing voter ID requirements; the Acts removed the power of the governor to change these rules.
- Democratic candidates campaigned on promises to withdraw the state of Wisconsin from challenges to Obamacare; the Acts removed the Executive's discretion to do so.
- Democratic candidates campaigned on promises to prevent transfers of funds from state veterans' homes; the Acts curtailed this power.
- Democratic candidates campaigned on eliminating Walker's work requirements for Medicaid recipients; the Acts removed the governor's power to change these requirements.
- Democratic candidates campaigned on negotiating with the federal government to expand Medicaid; the Acts transferred the ultimate discretion to expand Medicaid to the legislature.
- Democratic candidates campaigned on eliminating Walker's drug testing requirements under Wisconsin's food stamp program; the Acts removed the governor's power to change these requirements.

[9] *See* Tony Evers' Plan For Wisconsin, https://tonyevers.com/plan/ (last visited February 14, 2019) (included as Ex. O).

- Democratic candidates for executive office campaigned on promises to redirect the Wisconsin Economic Development Corporation ("WEDC"); the Acts packed the board of the WEDC with legislative appointees and removed the ability of the governor to appoint the CEO.

In addition, the Acts gave the legislature sweeping control over the personnel and budget of Wisconsin's Department of Health Services; they limited the governor's ability to delegate executive functions within executive departments; they gave the legislature final say over whether the State of Wisconsin can settle, compromise, or withdraw from injunctive suits involving the state; and they gave the legislature the power to suspend administrative rules.

According to nonpartisan reports, this was the first time in state history that an extraordinary session had been used to restrict the power of an incoming governor and attorney general in any way. Ex. H; *see also* Ex. P.

After the lame-duck bills were signed into law, even some Republican legislators expressed concern about the legitimacy of the lame-duck session. Republican Representative Joel Kitchens, for example, stated that "people are going to say, 'Why didn't you do this when Walker was governor?'" and then admitted, "[t]hat's legit." Ex. Q. But while Republican operatives acknowledged that "the process didn't look good," they expressed confidence that Republicans would be insulated from the consequences because "it won't be top-of-mind for voters when they decide on legislative races in 2020." *Id.* That, and the fact that the district lines had been gerrymandered on partisan lines to further insulate the faithless legislators.

ARGUMENT

To obtain a preliminary injunction, the moving party must demonstrate (1) "some likelihood of success on the merits," (2) no adequate remedy at law, (3) irreparable harm in the absence of the injunction, and (4) a balance of the equities in her or his favor. *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017); *ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). "[T]he

more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.*, 549 F.3d 1079, 1086 (7th Cir. 2008). Moreover, being subject to an unconstitutional state law counts as irreparable injury, and courts in this district have not hesitated to restrain unconstitutional state laws. *E.g.*, *One Wisconsin Inst., Inc. v. Thomsen*, 2019 WL 254093, at *1 (W.D. Wis. Jan. 17, 2019) (enjoining limits on early voting imposed by 2017 Wisconsin Act 369).[10] Applying these standards, the Court should enjoin Act 369 and Act 370 because they are unconstitutional.

I. ACTS 369 AND 370 VIOLATE THE UNITED STATES CONSTITUTION

Defendants enacted Act 369 and Act 370 (1) after Wisconsin's people voted the Republican governor and Republican attorney general out of office, (2) in an "extraordinary" and unprecedent lame-duck session, (3) for the purpose and with the effect of blunting the results of that election by arrogating to the Republican-controlled legislature powers traditionally held by the Executive branch, (4) while specifically targeting areas that the incoming administration had campaigned on (5) because members of a rival political party had won that valid election. This extraordinary and unprecedented conduct is a violation of the United States Constitution.

A. Acts 369 And 370 Violate The Guarantee Clause

The Constitution, in Article IV, Section 4, states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]" Acts 369 and 370 violate that constitutional protection, as made plain by a "careful examination of the textual, structural, and

[10] *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931- 35, 956, 960-61 (W.D. Wis. 2016) (enjoining similar statute on same grounds); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 868 (W.D. Wis. 2013) (entering temporary restraining order); *see also Judge v. Quinn*, 624 F.3d 352, 357 (7th Cir. 2010) (affirming "injunction defining the mechanics" of special election for U.S. Senate seat).

historical evidence" of what the Clause was intended to permit — and to prohibit. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).[11]

1. In referring to a "Republican Form of Government," the Constitution, by its plain text, was conferring a guarantee that the powers of state governments would emanate from and be answerable to the people, and that the states would maintain a representative system of government. *See* The Federalist No. 10 (a "republic" means "a government in which the scheme of representation takes place"); Noah Webster, *Republic*, American Dictionary of the English Language (1828) (" A commonwealth; a state in which the exercise of the sovereign power is lodged in representatives elected by the people.").[12] The words further conveyed the principle that the executive and legislative powers would remain separate from each other (and from the judicial authority). *See* Samuel Johnson, *Republick*, A Dictionary of the English Language (1785) ("Commonwealth; state in which the power is lodged in more than one.");[13] *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) (referencing a theory of free or republican government "which forbids a mixture of the Legislative and Executive powers");[14]

[11] Although some have questioned whether federal courts have the authority to enforce the Guarantee Clause, *Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991), the Supreme Court has never held that "all claims under the Guarantee Clause present nonjusticiable political questions." *New York v. United States,* 505 U.S. 144, 184 (1992). And multiple courts have considered such claims on the merits. *Id.* at 184-85 (collecting cases in which "the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable"); *Kerr v. Hickenlooper*, 744 F.3d 1156, 1181 (10th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 2927 (2015) (mem.) (allowing Guarantee Clause claim to proceed in federal court); *Largess v. Supreme Judicial Court*, 373 F.3d 219, 225 (1st Cir. 2004) (considering Guarantee Clause challenge to remedy issued by state court in a marriage equality case); *Bauers v. Heisel*, 361 F.2d 581, 588-89 (3d. Cir. 1966) (concluding that Civil Rights Act does not abrogate judicial or prosecutorial immunity because such result would violate the Guarantee Clause); *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 757-58 (E.D. Va. 2011) (deciding merits of Guarantee Clause challenge to the taxing powers of an unelected airport authority); *State v. Lehtola*, 198 N.W.2d 354, 356 (1972) (Wisconsin Supreme Court). *See generally* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 118 n. * (1980). The claim presented here is justiciable, as no part of the federal Constitution vests authority to resolve the issue presented here to a coordinate branch of government.

[12] Available at https://archive.org/details/americandictiona02websrich/page/n461.

[13] Available at https://johnsonsdictionaryonline.com/page-view/?i=1683.

[14] Available at https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

Alexander Hamilton, New York Ratifying Convention Remarks (June 24, 1788) ("[T]here should be in every republic, some permanent body to correct the prejudices, check the intemperate passions, and regulate the fluctuations of a popular assembly.").[15]

The structure of the Constitution reinforces this view. The U.S. Constitution assumes, repeatedly, that state governments would have branches of government resembling those of the federal government, with legislators and an executive selected by and answerable to the people. For example, in prescribing a method for electing members of the U.S. Congress and the President of the United States, the Constitution repeatedly refers to the authority of "State Legislatures" to appoint "Electors."[16] The Constitution prescribes that "Full Faith and Credit" would be accorded to state "judicial [p]roceedings."[17] The Constitution again references state legislatures when it discusses the process for admitting new states and joining them,[18] and the process for amending the Constitution.[19] And in affirming that state officials would be bound by

[15] Available at https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0023.

[16] *E.g.*, U.S. Const. Art. I, § 2, cls. 1, 4 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and *the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature*."); Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*[.]"); Art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as *the Legislature thereof* may direct," Electors).

[17] U.S. Const. Art. IV, § 1 ("Full Faith and Credit shall be given in each State to *the public Acts, Records, and judicial Proceedings of every other State*.").

[18] U.S. Const. Art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress.").

[19] U.S. Const. Art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two thirds of the several States*, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.").

the U.S. Constitution, it references "Members of the several State Legislatures" as well as their "executive and judicial Officers."[20]

These various provisions confirm that the Constitution guarantees that each state has a representative government in which the legislative, executive, and judicial branches are separate, and where the people ultimately select their representatives. Further underscoring the point, the Constitution expressly prohibits the "grant [of] any Title of Nobility,"[21] further guaranteeing that state officials acting as the people's representatives would in fact be answerable to them.

The historical evidence is to the same effect. "[O]ne of the most forceful lessons of the Revolution had been that despotism resulted when executive and legislative powers were concentrated in one body or one cohesive group." William M. Wiecek, The Guarantee Clause of the U.S. Constitution 20 (1972). Concerned about the abusive powers of both state legislatures and executives, the founders and framers of the U.S. Constitution guaranteed a republican form of government by ensuring that "[t]he three functional branches, legislative, executive, and judicial, being interdependent, were to be restrained from aggrandizing power, [such that] the excess of legislative power would [] be redressed." *Id.*

The originalist understanding indeed shows that the Guarantee Clause was understood to protect representative democracies roughly approximating the federal model. James Madison, describing "the distinctive characters of the republican form," stated in The Federalist No. 39 that republican governments are meant to be representative in character, that they separate the authorities of government, and that executive and legislative leaders are meant to be answerable

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[20] U.S. Const. Arts. VI, cl. 3 ("The Senators and Representatives before mentioned, and *the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States*, shall be bound by Oath or Affirmation, to support this Constitution.").

[21] U.S. Const. Art. I, § 10 ("No State shall . . . grant any Title of Nobility."); *cf. id.* Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States[.]").

to the people and to serve for fixed periods and during good behavior. A republic is thus necessarily a system of representative government.

But that is not enough. As James Madison observed, a "republic" must both "guard one part of the society against the injustice of the other part," *and* "guard the society against the oppression of its rulers." The Federalist No. 51 (James Madison); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1132-33 (1991) (describing the latter point as "protection of the people against self-interested government"). These two protections are essential to a republican form of government, as both work together to prevent self-interested leaders or factions from depriving others of their rights. *See* The Federalist Nos. 10, 39. The separation of powers was thus a key ingredient. And it is one reason why the Framers distinguished "genuine republics" from "hereditary aristocrac[ies] and monarch[ies]." The Federalist No. 39.[22]

In sum, although the Constitution "does not require a state to allocate powers among the branches of state government in the same manner" as the federal government, *Risser*, 930 F.2d at 552, state conduct is unconstitutional if it substantially subverts the system of representative government that the Guarantee Clause safeguards. This includes not just the basic precepts of representative democracy but also the core separation-of-powers principles inherent in our system, as "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). Thus, "substantial" transfers of power "from one branch of the government to another" violate the

[22] *See also* The Federalist No. 21 (Alexander Hamilton) ("A guaranty by the national authority would be as much levelled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.").

Clause where "its retention" in the transferring institution would have been "essential to the 'separation of power' doctrine." *State v. Lehtola*, 198 N.W.2d 354, 356 (Wis. 1972). Said differently, the question is whether there is an improper and "realistic risk of altering the form or the method of functioning of [a state's] government." *New York*, 505 U.S. at 186.

2. In this extraordinary case, Defendants went more than a bridge too far. Following Walker's electoral defeat, they set out to recalibrate the balance of authority in a lame-duck session so as to consolidate power in Republican hands and thwart the will of Wisconsin's voters after the people had already decided which candidates would wield which powers.

Defendants expressly targeted executive powers that would permit the pursuit of policy preferences voiced by incoming-Governor Evers and incoming-Attorney General Kaul on the campaign trail — policies, to repeat, that had been central to the campaigns and that Wisconsin's people had voted on.[23] To the greatest extent possible, moreover, they arrogated traditionally executive powers to the legislature (which would remain in Republican hands) by stripping the incoming administration of substantial, traditional powers to enforce the laws of Wisconsin that the Executive had wielded. For example, under section 26 of Act 369, any civil action prosecuted by Wisconsin's Department of Justice may be "compromised or discontinued" only with the approval of a legislative body. Likewise, the attorney general may not settle a civil action for injunctive relief without the approval of a legislative body.[24] And Act 369 gives the legislature the ability to intervene in litigation "as a matter of right" whenever the "construction

[23] Degenhardt Decl. ¶¶ 3-4; Dorff Decl. ¶¶ 3-4; Hostettler Decl. ¶¶ 3-4; Klitzke Decl. ¶¶ 3-4; Robson Decl. ¶¶ 3-4; Sabor Decl. ¶¶ 3-4; Steele Decl. ¶¶ 3-4; Stencil Decl. ¶¶ 3-4 (noting policies that motivating Plaintiffs to vote for Governor Evers and Attorney General Kaul and the efforts invested in getting them elected).

[24] *See* section 30 ("[I]f the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without the approval of [a legislative] intervenor or, if there is no intervenor, without first submitting a proposed plan to the joint committee on finance.").

or validity" of a statute is challenged (whether a Wisconsin statute or that of another polity), while restricting what legal arguments the Executive may make.[25]

Whether the Wisconsin legislature could have recalibrated the powers of its legislative and executive functions in this fashion on a clear day may well require a more rigorous analysis. *Cf. Lehtola*, 198 N.W.2d at 356 ("substantial" recalibration violates Constitution). Here, however, it was done for the purpose and with the effect of blunting an election result through an "extraordinary" lame-duck session without precedent in Wisconsin history. The substance of the Acts, provision by provision, was meant to countermand the will of the people. Defendants were so eager to get this done that they failed even to adhere to the basic requirements of the Wisconsin Constitution (which does not contemplate "extraordinary" legislative sessions), and then rushed the bills through a lame-duck session, mostly in the dead of night, and always with zero support from Wisconsin Democrats. Hans. A. Linde, *Who is Responsible for Republican Government*, 65 U. Colo. L. Rev. 709, 728 (1994) ("An objection under the Guarantee Clause is a claim against the process" by which a law is enacted, not just its substance.).

Defendants were, in other words, faithless representatives who set about destroying the very principles the Guarantee Clause was meant to safeguard by "altering the form [and] the method of functioning of [Wisconsin's] government." *New York*, 505 U.S. at 186. The Acts purposefully stripped the powers of the Executive because the voters had elected Democrats to wield powers those offices held before the election, and placed those powers in the hands of Republican legislators who, before the election, lacked those powers. Republicans all but

[25] *Compare, e.g.*, section 5 with section 26 (preventing the attorney general from settling cases "if the [settlement] concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization").

conceded that they never would have done this if the election had gone the other way. By reshuffling the powers of the people's representatives in this way, Defendants "violate[d] the most fundamental of all democratic principles—that 'the voters should choose their representatives[.]'" *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J. concurring) (quoting *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015)). This was a violation of the Guarantee Clause.

B. The Acts Also Violate Plaintiffs' First Amendment Rights

For much the same reasons, the Acts also violated the First Amendment. By substantially recalibrating state government in order to blunt the will of the people in the selection of their representatives, the Acts not only ravage the party that Plaintiffs have worked to support, but they also removed from the Executive the power to enact policy that was at the core of the electoral campaigns. The lame-duck Acts thus improperly retaliated against and blunted Democrats' exercise of their speech and associational rights, while prospectively burdening those rights. This is a violation of the First Amendment and of the core interests it protects.

1. The lame-duck Acts plainly implicate core First Amendment rights and interests. The First Amendment protects the right of the people to associate, petition the government, and express their views to their government about desirable social and political change.[26] "The constitutional safeguard" enshrined in the First Amendment, the Supreme Court has held, "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)

[26] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010) ("political speech" is "central to the meaning and purpose of the First Amendment"); *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) ("the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'" protected by the First Amendment (footnote omitted)).

(quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, "'[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'" *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

Consistent with these principles, the Supreme Court has held that state conduct infringing upon the ability of people to associate and express their views in an election implicates the First Amendment. The case of *Anderson v. Celebrezze* is instructive. 460 U.S. 780, 806 (1983). There, the Supreme Court considered the imposition of a March deadline for inclusion of an independent candidate for President of the United States on the ballot. *Id.* at 782-83. The Court set the deadline aside on First Amendment grounds, holding that the facially neutral deadline, which was defended in litigation on the basis of neutral principles such as voter education, equal treatment, and political stability, impermissibly burdened independent "voters' freedom of choice and freedom of association, in an election of nationwide importance." *Id.* at 796-806. In so holding, *Anderson* protected "two different, although overlapping, kinds of rights:" (1) "the right of individuals to associate for the advancement of political beliefs," and (2) "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).[27]

Other cases are in accord. Thus, the Court has held that state action depriving political parties of their ability to meaningfully participate in the electoral process violates the First

[27] It bears emphasis that, until the Nineteenth Century, the people cast their ballots in elections publicly and aloud. *See* Donald A. Debats, *How America Voted: By Voice*, available at http://sociallogic.iath.virginia.edu/node/35. The First Amendment protections for "the freedom of speech" and "to petition the Government for a redress of grievances" thus necessarily included the right to cast an effective vote.

Amendment. *California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000). It has set aside on First Amendment grounds a state law burdening the ability of political parties to place candidates on the ballot. *Williams*, 393 U.S. at 34. And it has invalidated campaign-finance restrictions that unduly burden the speech rights of persons and corporate entities in connection with elections. *Citizens United*, 558 U.S. at 372.[28]

In short, the First Amendment protects the rights to associate, speak, and petition for change in connection with election. And these rights are violated where, as here, a state purposely "subject[s] a group of voters or their party to disfavored treatment by reason of their [political] views" in connection therewith. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J. concurring); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Such "disfavored treatment" may include (i) imposing undue burdens on voters' representational rights; (ii) making it unduly more difficult for the targeted party to fundraise, register voters, attract volunteers, generate support from independents, or recruit candidates; and (iii) hobbling a political party's ability to carry out its activities and objectives. *Anderson*, 460 U.S. at 796-806 (1983); *see also Whitford*, 138 S. Ct. at 1939 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314.

2. Acts 369 and 370 violate these core principles. To begin, the lame-duck Acts violated the First Amendment by infringing upon the effectiveness of Wisconsinites' vote and retaliating against Wisconsinites who chose to elect Evers and Kaul as the representatives who would wield the powers at issue in this case. *See, e.g.*, Stencil Decl. ¶ 6 ("I voted for Democratic candidates

[28] *See also Libertarian Party of Illinois v. Scholz*, 872 F.3d 518, 526 (7th Cir. 2017) (affirming district court holding that law restricting political party's ballot access "severely burden[ed] fundamental constitutional rights and [was] not narrowly tailored to a compelling state interest").

because of the policy changes they would make with the powers of the offices they sought."); Steele Decl. ¶ 7 (noting same). Take the example of the Wisconsin Economic Development Corporation. This is "the agency that finalized Wisconsin's contract with Foxconn, a top priority for [Republican Assembly Speaker Robin] Vos." Ex. R.[29] In the gubernatorial campaign, then-candidate Evers took the position that the WEDC "has been a constant source of controversy, inefficiency and ineffectiveness," adding that "Walker's $4.5+ billion Foxconn giveaway costs taxpayers $200+ million annually[.]" Ex. O; *see also* Hostettler Decl. ¶ 3. Accordingly, then-candidate Evers pledged to disband the WEDC. *Id*. So the Republican-controlled lame-duck session worked with outgoing-Governor Walker to remove the governor's control over WEDC by packing the WEDC's board with legislative appointees, and by transferring to the newly packed board the governor's ability to appoint the WEDC's CEO. Act 369 §§ 82m, 83, 102. As Vos explained, "the move was aimed at preventing Evers from undoing agreements that were struck over the course of eight years between Republican legislators and outgoing Republican Gov. Scott Walker." Ex. R.

This change and the many others described above (pp. 9-10) were undertaken to blunt the vote and to retaliate against voters who chose to assemble in support of Democrats, and did so on account of voters' political views and their association. *Vieth*, 541 U.S. at 314; *see also Rosenberger*, 515 U.S. at 829; Degenhardt Decl. ¶ 6 ("I never heard any Republican official raise the need or even possibility of using an Extraordinary Session to remove the powers of Wisconsin's governor until after Democrats won the elections . . . ."). It is no more appropriate or constitutional for a lame-duck session to enact this sort of *ex post facto* "recalibration" in

[29] For background on the Wisconsin-Foxconn agreement, see Dominic Rushe, *'It's a huge subsidy': the $4.8bn gamble to lure Foxconn to America*, The Guardian (July 2, 2018), available at https://www.theguardian.com/cities/2018/jul/02/its-a-huge-subsidy-the-48bn-gamble-to-lure-foxconn-to-america.

order to blunt an election outcome (see pp. 6-8), than it is for a state legislature to set up rules, before an election, that unduly burden the effectiveness of the rights of voters to associate, speak, and petition for change. *Anderson*, 460 U.S. at 806; *see also Branti v. Finkel*, 445 U.S. 507 (1980) (affirming injunction barring state action taken in retaliation of exercise of First Amendment rights); *Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (arbitrary state procedures for counting votes violate U.S. constitution). Plainly, the Wisconsin legislature could not have enacted a pre-election statute specifying that, if Evers won, the powers of the Executive would be abridged, but not otherwise. They cannot accomplish the same result in a lame-duck session.

Moreover, the lame-duck Acts do not just improperly and retroactively dilute the effectiveness of voters' First Amendment rights; they also work an unconstitutional burden on those rights prospectively. By engaging in a lame-duck bait-and-switch with the powers of the Executive, the Acts have impermissibly burdened "the interests of the voters who chose to associate together to express their support for [a person's] candidacy and the views he espoused," in violation of the First Amendment. *Anderson*, 460 U.S. at 806; *Lee v. Keith*, 463 F.3d 763, 767-68 (7th Cir. 2006) ("The First Amendment . . . 'protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views.'" (citing *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quotation marks omitted)).[30] Due to the lame-duck laws, Plaintiffs and voters like them prospectively have reason to doubt their vote will be respected. *See* Klitzke Decl. ¶ 6; Sabor Decl. ¶ 7 ("[T]hese lame-duck laws will continue to

[30] *Cf. Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913, 921 (7th Cir. 2015) (holding that statute violated voters' First Amendment right of political association and stating that where a scheme "hinders electoral choice by which voters would have the opportunity to choose between competing alternatives that would have otherwise existed, the State has severely burdened the voter's ability to cast a meaningful and effective vote").

demoralize and disenfranchise democratic voters . . . ."). Without relief from this Court, they will expect that their votes will matter less and will subsequently be discouraged from participating in the political process, with their First Amendment rights chilled. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) ("The mere potential for the exercise of [governmental] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."); *Dickerson v. United States*, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting) ("[T]he Court has viewed the importation of 'chill' as *itself* a violation of the First Amendment"). Even assuming the effect of the Acts is "small," they are barred, "since there is no justification for harassing people for exercising their constitutional rights." *Surita v. Hyde*, 665 F.3d 860, 879 (7th Cir. 2011) (quotation marks and citation omitted).

C. Acts 369 And 370 Violate The Equal Protection Clause

Finally, Acts 369 and 370 violate the Equal Protection Clause of the Fourteenth Amendment for many of the same reasons. The Acts indeed violate the core precept that state legislatures may not adopt one set of rules for Democrats and another for Republicans, and they also impermissibly diluted the votes of Wisconsinites who elected Democrats for public office by substantially changing, in the lame-duck session, the authorities of the office.

1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). States violate Equal Protection when they target one category of persons or groups based on their political views. *See Advocates for Arts v. Thomson*, 532 F.2d 792, 798 n.8 (1st Cir. 1976) ("[The] distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause[.]"); *Bower v. Village of Mount Sterling*, 44 Fed App'x 670, 678 (6th Cir. 2002)

(allegations of retaliatory state action due to person's political views state equal protection claim under rational-basis standard).

Acts 368 and 369 contravene these principles. The Acts were adopted solely because the people of Wisconsin voted then-candidates Evers and Kaul into office, on the basis of the political views they expressed on the campaign trail, and for the purpose and with the effect of preventing these candidates (and the voters who elected them) from achieving their policy goals by wielding the authorities that predecessor administrations possessed.

2. This improper targeting also unconstitutionally diluted and blunted the vote of Wisconsinites. *See, e.g.*, Sabor Decl. ¶ 7 (noting that the Acts "ma[de] it impossible to achieve the policy goals I sought" in electing Evers and Kaul). Thus, Wisconsin's voters thought they were voting for one thing — a Democratic administration with all the powers of the outgoing administration — and, after the election, the lame-duck Republican legislature gave them another — a Democratic administration with fewer powers, with powers core to the fulfilment of the candidates' campaign promises having been transferred to the gerrymandered legislature. This sort of voter nullification is repugnant to our republic and offends the Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) (reaffirming that the Constitution protects the right to vote, and that state action diluting or nullifying the vote violates the Constitution); *Williams*, 393 U.S. at 34 (ballot restrictions, "taken as a whole," burdened associational rights and voting rights in violation of Equal Protection Clause).

Indeed, as the Supreme Court has held, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be

drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). In *Bush v. Gore*, as the Court is aware, the Supreme Court set aside on equal protection grounds arbitrary state conduct in the counting of votes. It did so "because 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush*, 531 U.S. at 104-05 (quoting *Reynolds,* 377 U.S. at 555). If an "arbitrary and disparate" counting of votes violates the Equal Protection Clause, *id.*, then surely lame-duck legislation that rejiggers the powers of the highest office in the state after the voters selected an office-holder and because of that electoral result offends the same constitutional principles.

3. Nor can any neutral, rational basis save the statutes, because "the expression of political ideas . . . cannot serve as a rational basis for differential treatment." *Esperanza Peace and Justice Center v. City of Antonio*, 316 F. Supp. 2d 433, 466 (W.D. Texas 2001). Here, in addition to statements by various legislators admitting that their purpose was to target political opponents who were about to take office on the basis of their political views, the viewpoint-based discrimination is there for everyone to see. Every provision of Act 369 and Act 370 takes power away from or otherwise targets Democratic office-holders (and voters). *E.g.*, Robson Decl. ¶ 5; Dorff Decl. ¶ 5. That is no coincidence. It is instead the very purpose of the Acts. Neither Act 360 nor Act 370 would have been enacted if Walker had won. They were passed to harm a group (Democrats) and a category of voters (Evers and Kaul's) because of their views.

The Supreme Court's decision in *Cleburne* is instructive. There, the Court struck down on equal protection grounds a statute that required a special permit to build a home for the developmentally disabled. The Supreme Court held that various neutral state interests, such as

flood risk and the size of the home, might be legitimate, but these did not suffice to treat the developmentally disabled differently. 473 U.S. at 449. When reviewing even ostensibly neutral laws that negatively affect one group, courts look to the "rational 'fit' between the challenged decision and those [legitimate] purposes[.]" *Esperanza*, 316 F. Supp. 2d at 466 (citing *Cleburne*, 473 U.S. at 449). Here, given the obvious purpose of disadvantaging a Democratic administration, no amount of jury-rigging could manufacture an adequate fit.

It is also irrelevant that Act 369 and Act 370 apply to all persons who would occupy the offices of governor and attorney general without regard to party. The laws' obvious intent was to transfer powers from the Democratic-controlled executive branch to the Republican-controlled legislature. It is no different than the purportedly content-neutral statute struck down in *Moreno* on the basis that it targeted an unpopular group (hippies). *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973). The statute in that case indeed differentiated between households on the purportedly neutral basis of whether all members in the household were related. *Id.* at 529. The record reflected that the statute was enacted in this way to target hippies who lived together; the Supreme Court held that the statute was not permissible despite furthering some possible legitimate government interests, because it improperly targeted hippies. *Id.* at 534-37 (rejecting the argument that this distinction was a rational way to combat fraud, a legitimate government interest); *see also Bower*, 44 Fed App'x at 676 (remanding for further proceedings plaintiff's equal protection claim based on retaliation against plaintiff's political views).

At the signing ceremony, then-Governor Walker cited the purportedly neutral purposes of "transparency, accountability, and protecting the taxpayer."[31] At the same time, he presented a

[31] YouTube.com, *Walker Signs Sweeping Lame-Duck GOP Bills*, https://www.youtube.com/watch?v=Ea5p9KgvL1o (Dec. 14, 2018).

diagram supposedly showing that the Acts left the Executive's powers unchanged. *See* pp. 2-3, *supra*. The Court should see this for the fig leaf that it is. There is indeed no evidence or explanation as to how moving various executive powers from one popularly elected branch to another branch, after an election and because of the electoral results, would produce any of these benefits. Transparency implies requiring a public process or document trail, not allowing the legislature to choose when Wisconsin's DOJ can withdraw from a lawsuit. No explanation is given as to why it serves the principle of accountability to transfer powers traditionally held by the governor from a candidate who had just been elected to the highest office in Wisconsin. Nor is it clear how a transfer of power or laws targeting Democratic constituencies protects the taxpayer. And when these ostensible goals are reviewed against Defendants' admissions that the Acts were designed to undo the electoral results, they can do nothing to save the Act.

* * *

For the foregoing reasons, plaintiffs are likely to prevail on their claims. Based on facts that are not subject to serious dispute, it is plain that the Acts violate the Guarantee Clause, the First Amendment, and the Equal Protection Clause.

II. THE COURT SHOULD ENTER A PRELIMINARY INJUNCTION.

Because plaintiffs are likely to prevail on their constitutional claims, the Court may enter a preliminary injunction if plaintiffs demonstrate that they stand to suffer irreparable injury absent that relief and also that the balance of the equities is in their favor. In the Seventh Circuit, "the more likely [Plaintiffs are] to win, the less the balance of harms must weigh in [their] favor[.]" *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). Similarly, a lesser showing on the merits is required if the other elements favor entry of a preliminary injunction maintaining the status quo. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

As explained below, plaintiffs easily show that they stand to suffer irreparable injury and that the equities favor them, so the Court should enter a preliminary injunction barring further enforcement of Act 369 and Act 370.

Constitutional violations are presumed to result in irreparable harm, so that element is straightforwardly and easily met as a matter of law. *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (collecting cases); *see, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (First Amendment); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1032 (W.D. Wis.), *modified*, 710 F. Supp. 1532 (W.D. Wis. 1989) (equal protection); *Jessen v. Vill. of Lyndon Station*, 519 F. Supp. 1183, 1189 (W.D. Wis. 1981) (equal protection, due process, and First Amendment).

On the other side of the balance, the Court should consider "any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Girl Scouts*, 549 F.3d at 1086. But "there can be no irreparable harm to a [defendant] when it is prevented from enforcing an unconstitutional statute[.]" *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 680 (7th Cir. 2004) (internal quotations omitted); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional [law].").

Similarly, consideration of the public interest leads to the same result. Indeed, it is "always in the public interest" to enjoin unconstitutional conduct and protect individual liberty. *Joelner*, 378 F.3d at 620. Conversely, "the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Alvarez*, 679 F.3d at 589–90; *Preston*, 589 F.2d at 303 n.3 (remedying a "continuing constitutional violation . . . certainly would serve the public interest." (citation omitted)).

Defendants may allege that they have an interest in maintaining the "rebalancing" of state governmental functions. But the people of Wisconsin who voted in the last election thought differently. Moreover, even if it were open to Defendants to make this claim despite Plaintiffs' showing of a constitutional violation, any such harm would be "speculative" at best, and therefore entitled little weight, if any. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1054 (7th Cir. 2017).[32] Indeed, for eight years, the Republican-dominated state legislature was perfectly content to provide Wisconsin's Executive with all the executive powers that are now at issue here. If the Legislator Defendants were not being harmed when Walker and Schimel held these powers, there is no way they can credibly claim to be harmed when Governor Tony Evers and Attorney General Josh Kaul have those same powers. The only conceivable harm they can claim is that Governor Evers and Attorney General Kaul will be able to enact the policy choices that Wisconsin's voters selected, consistent with the powers of the offices to which they were elected. But that is a reason to grant the motion, not to deny it.

[32] *Cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).

CONCLUSION

Plaintiffs respectfully ask this Court to enter a preliminary injunction, blocking enforcement of 2017 Wisconsin Acts 369 and 370 in full, until Plaintiffs' claims are adjudicated and a permanent injunction and declaratory relief can be entered.

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Respectfully submitted,

HOLWELL SHUSTER & GOLDBERG LLP

By: */s/ Vincent Levy*

Vincent Levy (vlevy@hsgllp.com)
Kevin D. Benish (kbenish@hsgllp.com)
Timothy W. Grinsell (tgrinsell@hsgllp.com)
425 Lexington Avenue, 14th Floor
New York, NY 10017
(646) 837-5151

Counsel for the Plaintiffs

Sarah A. Zylstra
State Bar No. 1033159
Boardman & Clark LLP
1 South Pinckney Street, Suite 410
P.O. Box 927
Madison, WI 53701
(608) 257-9521
szylstra@boardmanclark.com