No. 21A471

In the Supreme Court of the United States

THE WISCONSIN LEGISLATURE, BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Applicants,

v.

MARGE BOSTELMANN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, *ET AL.*,

Respondents.

ON APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BLOC RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI AND SUMMARY REVERSAL

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PARTIES TO THE PROCEEDING & RELATED PROCEEDINGS

Applicants to this proceeding include the Wisconsin Legislature, an Intervenor-Respondent in the Wisconsin Supreme Court proceeding, and Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, Petitioners in the proceedings below.

Respondents include the Wisconsin Elections Commission, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell Jr., and Mark Thomsen, in their official capacities as members of the Wisconsin Elections Commission. The Commission and its members were Respondents in the proceedings below.

Respondents also include Governor Tony Evers, in his official capacity as Governor of Wisconsin, who was an Intervenor-Respondent in the proceedings below.

Respondents also include Janet Bewley, in her official capacity as Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus, who was an Intervenor-Respondent in the proceedings below.

Respondents also include Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, Congressman Scott Fitzgerald, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim, Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesha, Jha, who were Intervenors-Petitioners in the proceedings below.

The proceedings below include:

Johnson, et al. v. Wisconsin Elections Commission, et al., No. 2021AP1450-OA (Supreme Court of Wisconsin). The court's opinion and order at issue here was entered on March 3, 2022. On March 4, 2022, the Wisconsin Legislature (but not the individual Applicants) filed an expedited motion for a stay pending appeal with the Wisconsin Supreme Court. On March 7, 2022, the court ordered responses to the Legislature's motion to be filed by March 9, 2022 at 11:00 AM. *BLOC* Respondents filed a response, as did a number of other parties. Also on March 7, Justice Coney Barrett requested responses to the Applicants' application with this Court by March 11, 2022 at 5:00 PM. As of this filing, the Wisconsin supreme court has not ruled on the stay application.

Related proceedings include:

Hunter, et al. v. Bostelmann, et al., No. 3:21-cv-512 (W.D. Wis.) and *Black Leaders Organizing for Communities, et al., v. Spindell, et al.*, No. 3:21-cv-535 (W.D. Wis.), where the parties have been ordered to state their positions by March 18, 2022 on whether the federal cases should be dismissed in light of the Wisconsin Supreme Court's March 3, 2022 opinion and order establishing reapportioned state legislative and congressional maps based on the 2020 census.

In Re Wisconsin Legislature, No. 21-474 (U.S. 2021), where the Wisconsin Legislature's petitions to this Court for writs of mandamus and prohibition were denied on December 6, 2021.

RULE 29.6 STATEMENT

Black Leaders Organizing for Communities (BLOC)[1] is a fiscally sponsored project of Tides Advocacy, a California nonprofit, non-stock corporation, with no stock and no parent corporation.

Plaintiff Voces de la Frontera is a nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with no stock and no parent corporation.

The League of Women Voters of Wisconsin (LWVWI) is a Wisconsin nonprofit, non-stock corporation. LWVWI's parent is the League of Women Voters of the United States.

Respectfully submitted,

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Dated: March 11, 2022

[1] The "BLOC Respondents" include the three organizations noted above and individual voters Cindy Fallona, Lauren Stephenson, and Rebecca Alwin.

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TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

Applicants' gall in demanding that this Court decree into effect maps that were vetoed by the Wisconsin Governor, rejected by the Wisconsin Supreme Court, and that this Court *has not even seen* is matched only by the paucity of evidence they advance to meet their burden of proof in this appeal. The emergency application for a stay, the petition for a writ of certiorari, and the requested injunctive relief should be denied for a host of reasons.

First, none of the Applicants has standing to pursue racial gerrymandering arguments on appeal. The party who invokes the federal judicial power must prove standing, and those advancing appellate arguments must have standing to pursue them. This Court has repeatedly held that racial gerrymandering imposes personal injuries by making racial classifications about voters and creating representational harms for voters who *reside in the challenged district*. The Legislature is not a voter, has no race, and does not reside in the challenged Milwaukee districts. It suffers none of the personal, concrete, and particularized injuries this Court has held exist when a racial gerrymander occurs. Nor do the four individual Applicants have standing. None live anywhere near the challenged Milwaukee assembly districts, and the record does not even identify their race or ethnicity. Applicants advance only generalized grievances about their view of what the Constitution and Voting Rights Act require. That is not enough to invoke this Court's Article III jurisdiction.

Second, Applicants do not come close to meeting their demanding burden to show that race predominated in the drawing of the seven challenged assembly

districts by subordinating all the traditional districting criteria to racial considerations. The only evidence proffered by Applicants is that the districts *are* majority Black. But merely reciting the demographic makeup of a district does not prove that race was the predominant motive, nor that traditional districting principles were subordinated to race. Applicants took no discovery in the proceedings below and proffer no actual evidence to support their racial gerrymander arguments. They offer no testimony from mapdrawers about motives, no evidence that would suggest a racial purpose for the districts as a whole, no evidence of split precincts or census blocks included or excluded along racial lines, and no evidence about the districts' adherence or departure from traditional districting principles. They merely recite the districts' demographic percentages. But this Court has repeatedly held that mapdrawers are always aware of race and that challenging a majority-minority district as a racial gerrymandering requires a demanding proffer of proof that race predominated in the district as a whole. Applicants fall far short of that burden, and so strict scrutiny is not triggered.

Third, even if the mere recitation of district demographics somehow revealed on its own the predominant motivation for those districts, the Wisconsin Supreme Court and the Governor had good reasons to believe that Section 2 of the Voting Rights Act required the new Black opportunity district drawn in the Milwaukee area. It is undisputed that each of the three *Gingles* preconditions is present; the BLOC Respondents and others provided reams of expert analysis below proving each precondition—and it went entirely unchallenged. Unchallenged expert testimony

also showed that the totality of the circumstances—with Wisconsin's racial disparities across a range of metrics being either the worst or close to it nationwide—supported finding vote dilution by the existing packing and cracking of Black voters. This Court has found good reasons for race-based districting on far thinner records. Applicants' contention that *Cooper*, *De Grandy*, and *Miller* require otherwise is premised on a misapprehension of those cases. In *Cooper*, unlike here, *Gingles* prong three was unsatisfied. In *De Grandy*, this Court emphasized that proportionality was one among many considerations and was not a safe harbor against Section 2 obligations; Applicants have offered no evidence or argument to show clear error in the Wisconsin Supreme Court's proportionality consideration. And unlike in *Miller*, the Wisconsin Supreme Court did not establish a maximization plan untethered to the *Gingles* requirements. Rather, it reviewed an unchallenged body of evidence that pointed to a Section 2 obligation. Applicants come nowhere close to showing the court below clearly erred in finding good reasons to support the map it adopted.

Fourth, this Court has repeatedly rejected litigation seeking to alter district lines at this point in the 2022 election cycle. The concern motivating those rejections is particularly acute here, where the deadline set by the Wisconsin Election Commission to begin implementing the election under the districting plan has come and gone. If *Purcell* applies in the other cases brought to this Court this Term, it must also apply here.

For these and other reasons, the application for a stay, the alternative petition for a writ of certiorari, and the requested injunctive relief should be denied.

BACKGROUND AND PROCEDURAL HISTORY

I. Demographic Changes in Wisconsin Following the 2020 Census

Following the 2020 decennial census, Wisconsin's population increased by approximately 200,000 people. This population growth was not spread evenly across Wisconsin, resulting in malapportioned state legislative districts and the proceedings in the state supreme court. *Johnson v. Wisconsin Elections Commission*, 967 N.W.2d 469, 476-77 (Wis. 2021).

Wisconsin's population change also was not distributed evenly across demographic groups. From 2010 to 2020, Wisconsin's Black Voting Age Population ("BVAP") grew at a much higher rate than did the state's white Voting Age Population ("WVAP"). BLOC-App. 279-81. Census data shows that the state's BVAP grew by 43,594 persons (17%), while the state's WVAP grew by only 20,553 (0.5%). *Id*. at 280. In Milwaukee County, only the BVAP grew, increasing by around 10,000 persons (5.5%), while the WVAP declined by over 41,000 (-9.5%). *Id*. at 280-81.[2] The WVAP population decrease in Milwaukee County is equivalent to around 70 percent of a roughly 59,000-person state assembly district.[3] According to corrected Citizen Voting Age Population ("CVAP") estimates, statewide the Black CVAP in Wisconsin is 6.5%. *Id*. at 263-65.

[2] These numbers are taken directly from the 2010 and 2020 Census data. Per this Court's guidance, *BLOC* Respondents' expert counted as Black any person who self-identifies as Black alone or Black in combination with any other race or ethnicity. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003). The Legislature's numbers improperly use only the "Black alone" category, and thus artificially deflate the Black population's growth.

[3] *See Johnson*, 967 N.W.2d at 476 (ideal population for Wisconsin assembly and districts is 59,533 and 178,598, respectively).

II. Procedural Background

After the release of the Census data in August 2021, two sets of Plaintiffs including Wisconsin voters and nonprofit groups filed suit in the U.S. District Court for the Western District of Wisconsin, alleging that Wisconsin's existing state legislative and congressional districts were malapportioned in violation of the First and Fourteenth Amendments. *Hunter v. Bostelmann*, No. 3:21-cv-512 (W.D. Wis.) (Aug. 13, 2021); *Black Leaders Organizing for Communities v. Spindell*, No. 3:21-cv-535 (W.D. Wis.) (Aug. 23, 2021). On September 21, 2021, the *BLOC* Plaintiffs filed an amended complaint adding a claim that the state legislative districts dilute the voting strength of Black voters in violation of Section 2 of the Voting Rights Act ("VRA").

On August 23, 2021, after suits were filed in federal court, the four individual Applicants here, Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, filed a petition for original action in the Wisconsin Supreme Court. Applicants requested that the court exercise its original jurisdiction to declare the existing districts malapportioned, enjoin the Wisconsin Elections Commission ("WEC") from administering elections under the existing districts, and resolve reapportionment in the event of an impasse between the Legislature and the Governor. BLOC-App. 1-20.

The Legislature, individual Applicants, and other parties moved to intervene in the federal litigation and dismiss Plaintiffs' claims. On September 16, 2021, the federal court denied the Wisconsin Legislature's and congressmen intervenors' motions to dismiss the *Hunter* and *BLOC* complaints, and denied the *Johnson* intervenors' motion to stay the federal litigation. In doing so, the federal court

acknowledged that it "underst[ood] the state government's primacy in redistricting its legislative and congressional maps." *BLOC*, No. 3:21-cv-00534 (W.D. Wis. Sept. 16, 2021), ECF No. 30 at 7. On September 22, the Wisconsin Supreme Court granted the petition for original action and set deadlines for parties to intervene and initial rounds of briefing. BLOC-App. 24-25. BLOC Respondents intervened in the state litigation, as did a number of other parties, including the Legislature.

Ignoring the federal court's respect for the state's redistricting process, on September 24, 2021, the Legislature petitioned this Court to issue writs of mandamus and prohibition directing the federal court to dismiss the *Hunter* and *BLOC* complaints. *In Re Wisconsin Legislature*, No. 21-474, Leg. Pet. at 3-4 (Sept. 24, 2021).[4] On October 6, the district court granted a limited stay of the federal cases pending action by the state supreme court. *Hunter*, No. 3:21-cv-000512 (W.D. Wis. Oct. 6, 2021), ECF No. 103 at 5.

In its petition to this Court, the Legislature argued that "this Court [has] held that . . . the primacy of the State in designing [] districts compels a federal court to defer to the State and any state-court proceedings." *In Re Wisconsin Legislature*, Leg. Pet. at 2 (citing *Growe v. Emison*, 507 U.S. 25, 35 (1993). The Legislature also lamented federal court involvement in redistricting, noting "there is no logical stopping point. Why not issue a structural injunction and take over Wisconsin redistricting for the next thirty years?" and emphasized the "State's sovereign power

[4] The Legislature's Petition is available on the Supreme Court's online docket: https://www.supremecourt.gov/DocketPDF/21/21-474/193667/20210924153104402_In%20re%20Wisconsin%20Legislature%20Petition.pdf

to reapportion." *Id*. The Legislature argued that unlike the federal court, there was an "unquestioned capacity of the state courts to act" on redistricting, *id*. at 13, and that "even if an impasse were to arise later, all agree that there is active litigation in the fully and equally capable Wisconsin Supreme Court to resolve it." *Id*. at 18. The Legislature continued, stating that "[O]n issues of redistricting and state law, Wisconsin's supreme court justices are indeed *more* capable (not to mention answerable to the people of Wisconsin and residents of the State themselves)." *Id.* (emphasis in original). Finally, the Legislature asserted that "there was 'no question' [redistricting] case[s] belonged in the [state] supreme court," *id*. at 28, and "once the state court acts, its judgment demands full faith and credit by every other court." *Id*. at 34.

After receiving briefing from the parties, including the *BLOC* Respondents, this Court denied the Legislature's petition on December 6, 2021. Meanwhile, the Wisconsin Supreme Court had set a deadline for briefing, including on the question of which redistricting criteria it should consider and the deadline for new maps to be in place for the 2022 elections. The WEC, which is responsible for administering the State's elections, told the Court that any new maps would be needed by March 1, 2021 in order to "properly, effectively, and timely administer the fall general election" because "administering an election requires that the Commission perform much work well before election day, especially in the year after the census data is released." BLOC-App. 43. The WEC letter outlined some of the tasks necessary and also noted

that "staff will be performing all this necessary work of recording new boundaries . . . while simultaneously administering the spring 2022 statewide election." *Id.* at 44.

On November 11, 2021, the Legislature passed state legislative and congressional maps. Governor Evers vetoed the Legislature's plans on November 18, 2021, creating an impasse.[5] On November 17, 2021, the Wisconsin Supreme Court issued an order setting a schedule for the state court litigation, including a deadline for discovery, and deadlines for the parties to submit map proposals and expert reports on December 15, responses on December 30, and replies on January 4, 2022. BLOC-App. 47-49. The court also set aside January 18, 2022 and the following days for an oral argument or hearing. *Id.* at 49.

Shortly thereafter, on November 30, 2021, the state supreme court issued an order noting that impasse had occurred and that "all parties agree the existing maps, enacted into law in 2011, are now unconstitutional because [of] shifts in Wisconsin's population." *Johnson,* 967 N.W.2d at 473, 477. The Court also outlined the criteria it would consider for map proposals, including a "least changes" approach that required the parties to make "'the least change' necessary for the maps to comport with relevant legal requirements" by "using the existing maps 'as a template' and implementing only those remedies necessary to resolve constitutional or statutory deficiencies." *Id.* at 488, 490.

[5] *See, e.g., S.B.* 621, 2021 Leg., 105th Sess. (Wis. 2021), https://docs.legis.wisconsin.gov/2021/proposals/sb621; S.B. 622, 2021 Leg., 105th Sess. (Wis. 2021), https://docs.legis.wisconsin.gov/2021/proposals/sb622.

On December 3, 2021, the parties submitted a joint discovery plan to the state supreme court. In that discovery plan, all parties "agree[d] that . . . at this time they do not anticipate that fact discovery is needed beyond the exchange of maps, expert disclosures, and any documents or data that a party intends to rely upon or an expert has relied upon." BLOC-App. 52-53. The Legislature did not take fact or expert discovery beyond the exchange of this information. On December 19, 2021, given the developments in the state court litigation, the district court stayed the federal litigation through the end of January 2022.

III. Map Proposals Submitted to the Wisconsin Supreme Court

On December 15, 2021, six parties, including BLOC, Senator Bewley, the Governor, the Legislature, the Hunter petitioners, and a group of citizen mathematicians and scientists ("CMS") submitted state legislative map proposals and expert reports to the state supreme court. App. 8. The Johnson and Congressmen Intervenor-Petitioners did not submit state legislative maps. *Id*. The parties submitted response and reply briefs, expert reports, and map information on December 30, 2021 and January 4, 2022. On January 7, 2022, BLOC submitted amended state legislative maps with technical, non-substantive corrections, as did the Governor on January 5. These amended maps were accepted by the state supreme court. BLOC-App. 284-85. Oral argument was held on January 19, 2022.

Four of the six parties that submitted state legislative maps, including BLOC, the Governor, the Hunter petitioners, and CMS, argued that seven Black opportunity state assembly districts were necessary in order to comply with the VRA. The parties

argued these districts were necessary due to population changes in the Milwaukee area, along with the presence of the three *Gingles* preconditions and the totality of the circumstances demonstrating that the existing six state assembly districts packed and cracked Black voters and thus did not provide an equal opportunity for Black voters to elect their candidates of choice to the state legislature. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); BLOC-App. 165-283. The Legislature admitted that "[t]he Milwaukee area has always been an area of concern for the Voting Rights Act" and that "there is no requirement that a district exceed 50% BVAP to comply with the Voting Rights Act; indeed, *unnecessarily inflating a district to exceed 50% BVAP can itself violate the Fourteenth Amendment*." BLOC-App. 102, 105, n.24 (emphasis added).

Before impasse occurred, the Legislature also sent a letter to select groups, including Black Leaders Organizing for Communities ("BLOC"), NAACP Wisconsin State Conference, Mexican American Legal Defense and Educational Fund, Voces de la Frontera, and the League of United Latin American Citizens, among others, soliciting analyses showing that racial groups are "sufficiently large and geographically compact to constitute a majority in a single-member district, including all supporting materials," any "'racially polarized voting analysis,'" and "all supporting materials for any racially polarized voting analysis." BLOC-App. 21-22.

The 2011 state assembly plan contained six Black-majority districts. By 2020, the BVAP numbers in some of those six districts were excessively high. The populations in the districts according to the 2020 census are as follows:

Act 43 Black opportunity assembly districts with 2020 Census data[6]

District	2011 Wis. Act 43 BVAP%
10	59.4%
11	65.5%
12	60.6%
16	55.6%
17	68.4%
18	60.7%

BLOC-App. 217-18.

Despite the compound effects of Black population growth combined with white population decline in the Milwaukee area, the Legislature's 2021 proposed state assembly plan *reduced* the number of Black-majority districts from six to only five. Those five districts had BVAP ranges from 52.6% to 73.3%. App. 178. The Legislature also had another district, AD 10, with a BVAP of 47.2%, reduced from 59.4% in the 2011 plan. *Id*.

Multiple parties, including BLOC and the Governor, submitted state assembly maps with seven Black-majority districts that complied with all traditional redistricting criteria just as well, if not better, than the Legislature's maps. *See, e.g.,* App. 22. It was undisputed that the Black population in the Milwaukee-area, one of

[6] In their petition, Applicants deceptively provide 2010 census data for the 2011 districts, while using the 2020 data for the Governor's plans. App. Br. at 8-9. That is like comparing apples to oranges. Using the appropriate 2020 data, it is evident that the BVAP percentages in the 2011 districts are much higher than the Legislature portrays (ranging from 55.6 to 68% BVAP).

the most racially segregated cities in the world, is geographically compact and large enough to be the majority in seven assembly districts. BLOC-App. 218-19; *See, e.g.,* App. 29.

BLOC also submitted statistical analysis from expert Dr. Loren Collingwood demonstrating that Black voters in the Milwaukee area are extremely politically cohesive in their preferences for candidates for political office, and that local white voters usually vote as a bloc to defeat Black voters' candidates of choice. *See Gingles*, 478 U.S. at 48. Dr. Collingwood analyzed eight probative elections including nonpartisan primary races, Democratic primary races, and spring general races from 2016-2021 that involved Black candidates running for office, using the reliable and widely accepted statistical methods of homogenous precinct analysis, ecological regression, and ecological inference to measure voter preferences. BLOC-App 166-68. He found that "without a doubt" racially polarized voting is present in Milwaukee-area elections, *id.* at 28, and Black voters "strongly back" the same candidates for political office "at very high rates even in multi-candidate primary elections." *Id.* at 165, 168-86. No party disputed that Black voters are politically cohesive.

Dr. Collingwood also found that white voters in the Milwaukee area usually bloc vote against Black voters' candidates of choice. He found that in four of seven (57.14%) elections he analyzed, white bloc voting defeated the candidate of choice of Black voters. *Id.* at 187. Discounting aberrational elections, *see Gingles*, 478 U.S. at 54, he found that the bloc rate increased to four of six (66.66%). *Id.* Experts for other parties also analyzed the extent of racially polarized voting, including the

Legislature, but there were no opinions that contradicted Dr. Collingwood's analysis. *See, e.g.,* App. 29.[7]

In addition, BLOC's expert Dr. David Canon provided a detailed report examining the "Senate Factors" identified in the Senate Judiciary Report for the 1982 amendments to the VRA to determine whether, in the totality of the circumstances, Black voters have less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice. *Gingles*, 478 U.S. at 36-37. He found that six of the seven Senate Factors demonstrated that a six-seat configuration in the assembly does not provide Black voters in the Milwaukee-area with an equal opportunity to participate in the political process. BLOC-App. 110-13. For example, Wisconsin places last (or close to) on many racial disparity metrics for Black residents, including lower graduation rates, fewer high school degrees, lower standardized testing scores, fewer college degrees, lower homeownership rates, higher unemployment rate, the highest incarceration rate in the nation, and lower life expectancy (Senate Factor 5). *Id*. at 121-38. Dr. Canon found that these extreme effects of past discrimination combine to reduce Black voters' opportunity to participate in elections. *Id*. at 137-38. "[I]n 2018, Wisconsin had the third largest gap between Black and white [voter] turnout; in 2020 that gap was the second largest in the nation." *Id*. at 112, 137-38.

[7] Past courts in Wisconsin have also found that racially polarized voting exists in the Milwaukee area. See, e.g., *Baumgart v. Wendelberger*, 2002 WL 34127471 at *5 (E.D. Wis. May 30, 2002) (noting that intervenors "presented expert testimony that all of the *Gingles* criteria were present in Wisconsin in general and the City of Milwaukee in particular).

He further noted that Dr. Collingwood's analysis demonstrated racially polarized voting (Senate Factor 2). *Id*. at 117-18. Examining local election conditions, Dr. Canon also found that practices enhancing the opportunity for discrimination against Black voters had been utilized (Senate Factor 3), that there is a history of voting-related discrimination in the State (Senate Factor 1), campaigns are marked by racial appeals (Senate Factor 6), and that the extent of Black elected officials (outside of majority-BVAP districts) is limited (Senate Factor 7). *Id*. at 114-17, 118-21, 138-45. No party disputed that, overall, the totality of the circumstances had been shown.[8]

Finally, BLOC's expert Dr. Collingwood also analyzed proportionality, a factor considered in the totality analysis that compares the Black population statewide to the number of assembly seats held by Black-preferred candidates. *See, e.g., LULAC v. Perry,* 548 U.S. 399, 436 (2006). He calculated that the Black CVAP statewide was 6.5%. Collingwood Response Rpt. at 15-17. Thus, he concluded that between six and seven Black opportunity districts would be proportionate for the Black population. *Id*. The Legislature's plan only had five opportunity districts that would perform for Black voters, falling below proportionality. BLOC-App. 258-60, 281.

IV. Wisconsin Supreme Court's Findings

On March 3, 2022, the Wisconsin Supreme Court issued an opinion and order selecting Governor Evers' state assembly plans as best complying with state and federal legal requirements. *See, e.g.,* App. 34. The Court prioritized the least changes

[8] The only Senate Factor that was disputed by any party was proportionality.

approach, as measured by core retention, noting that it first "prob[ed] which maps make the least change from current district boundaries," and then "examine[d] the relevant law to ensure that the map producing the least change also comports with all state and federal legal requirements." App. 7-9, 13; (Ziegler, C.J., dissenting) ("core retention was the sole factor for determining least change and further, for selecting maps"); *id.* at 209 n.1 (Bradley, J., dissenting) (stating that the majority's "misapplication of the least-change approach [] allows core retention (an extra-legal criterion) to override the United States Constitution, the Wisconsin Constitution, and the VRA"). The Court selected the Governor's state legislative maps, finding that they "produce the least change from current law" and that "no other proposal comes close" on core retention. *Id.* at 10, 22. Only after selecting the map that performed best on core retention did the court analyze compliance with other criteria. It also found that "all [of the Governor's state legislative] districts are contiguous, sufficiently equal in population, sufficiently compact, appropriately nested, and pay due respect to local boundaries." *Id.* at 10, 22. Lastly, the court considered the plans' VRA compliance.

In considering the VRA, the court carefully "analyzed whether a strong basis in evidence suggests the *Gingles* preconditions are satisfied" and "determined] whether the Governor's propos[ed maps are] within the 'leeway' states have to 'take [race-based] actions reasonably judged necessary under a proper interpretation of the VRA.'" App. 29. It reiterated that because of the "unusual procedural posture" of the case, it would follow this Court's guidance in *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017), and provide "good reasons" why the VRA permits seven Black opportunity

districts. *Id*. at 26. Citing the extensive, uncontested evidence provided by the parties to the litigation, including BLOC, the Court held that "there are good reasons to believe a seventh majority-Black district is needed to satisfy the VRA." *Id*. at 10, 26, 37.

Starting with *Gingles* prong one, the Court noted that it was "undisputed that the Black voting age population in the Milwaukee area is 'sufficiently large and geographically compact' to form a majority in seven 'reasonably configured legislative districts.'" *Id.* at 29. It found that "[s]ix such districts were created by the 2011 maps," and [multiple] parties "submissions demonstrate that it is now possible to draw a seventh sufficiently large and compact majority-Black district." *Id*. It also held that relevant population shifts warranted an additional Black-majority district, finding that over the last decade "the Black population in Wisconsin grew by 4.8% statewide, while the white population fell by 3.4%." *Id*. at 33-34. More specifically, in Milwaukee County, "the Black voting age population increased 5.5%, while the white voting age population decreased 9.5%." *Id.*

Turning to *Gingles* prong two, the Court found that it was "undisputed that Black voters in the Milwaukee area are politically cohesive," and credited expert analysis from multiple parties that "analyzed voting trends and concluded political cohesion existed." *Id*. at 29; *see also* BLOC-App. 165, 168-86, 192.

Finally, examining *Gingles* prong three, the Court found that "the parties offered a strong evidentiary basis to believe white voters in the Milwaukee area vote 'sufficiently as a bloc to usually defeat the minority's preferred candidate.'" App. 29.

The Court relied on "experts from multiple parties . . . [who] look[ed] at various election contests, with the most comprehensive expert analysis calculating that white voters in the Milwaukee area defeat the preferred candidate of Black voters 57.14% of the time." *Id*. at 30. The Court further noted that it "received little in the way of alternative data or analysis to counter this," and that any contentions that prong 3 was not met were "virtually unsupported by expert analysis or argument." *Id*.[9] In addition, the Court also relied on numerous federal courts before it that have consistently applied the Voting Rights Act to the Milwaukee area. *Id.; see also Baumgart v. Wendelberger*, 2002 WL 34127471 at *5 (E.D. Wis. May 30, 2002) (noting that intervenors "presented expert testimony that all of the *Gingles* criteria were present in Wisconsin in general and the City of Milwaukee in particular).

The Court then analyzed the totality of the circumstances evidence. *Id*. at 32-34. The Court outlined the non-exhaustive list of factors relevant to the totality analysis and focused on proportionality. *Id.*[10] Crediting Dr. Collingwood's analysis, it found that "proportionality suggests" that "between six and seven majority-Black assembly districts are appropriate." *Id*. at 32. In particular, the Court found that "population trends [over the past ten years] and statewide population numbers now," in combination with "the baseline of six opportunity districts ten years ago" provided

[9] The Court elaborated, finding that "an alternative analysis was not conducted [by the Legislature's expert], nor did the Legislature's briefing advance or develop this in any meaningful way." App. 31, n.27.

[10] In addition to proportionality, the Court also explicitly found the existence of racially polarized voting (Senate Factor 2) and the other two *Gingles* preconditions. *See, e.g., Gingles*, 478 U.S. at 36-37; *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1020 n.21 (2d Cir. 1995) ("It will only be the very unusual case in which the plaintiff can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under a totality of the circumstances.").

"good reasons" to "suggest a seventh majority-Black district may be required." *Id.* at 32-34. It further noted that "a significant proportion of Wisconsin's Black population lives in Milwaukee County where the subject districts are principally located." *Id.*

The Court also found the Legislature's proposed assembly districts "problematic under the VRA." *Id.* at 34. It noted that the Legislature's plan had only "a configuration with five majority-Black districts, and a sixth just under a majority." *Id.* Further, the Court found that one of the Legislature's "proposed districts has a Black voting age population of 73.28%, a level some courts have found to be unlawful 'packing' under the VRA." *Id.* (citing *Ketchum v. Byrne*, 740 F.2d 1398, 1418 (7th Cir. 1984)). In light of the evidence from the parties, the Court concluded that "the risk of packing Black voters under a six-district configuration further suggests drawing seven majority-Black districts is appropriate to avoid minority vote dilution." *Id.* The Court further stated that:

> [v]iewing the totality of the circumstances, we see good reasons to conclude a seventh majority-Black assembly district may be required. To be clear, the VRA does not require drawing maps to maximize the number of majority-minority districts, and we do not seek to do so here . . . on this record, we conclude selecting a map with seven districts is within the leeway states have to take 'actions reasonably judged necessary' to prevent vote dilution under the VRA. (citations omitted).

Id. The court enjoined the WEC "from conducting elections under the 2011 maps" and ordered the WEC "to implement the congressional and legislative maps submitted by Governor Evers for all upcoming elections." *Id.*

On March 4, 2022, the Legislature (but not the individual Applicants) filed an emergency application for a stay pending appeal with the Wisconsin Supreme Court,

asking that court to permit the malapportioned 2011 districts to remain in place for the 2022 elections. Applicants then filed its application for a stay and injunctive relief and alternative petition for writ of certiorari with this Court on March 7, 2022. The Wisconsin Supreme Court ordered responses to the Legislature's stay application by March 9, 2022. Multiple parties, including BLOC, filed letter briefs in opposition to the stay request at the state supreme court.

The State's elections process, including preparing for the upcoming primary and general elections, is already underway. On March 9, the WEC told the state supreme court that "staying t[he court's March 3] decision on or after today's date would impair the Commission staff's ability to make necessary preparations for the April 15 beginning of the nominating petition circulation period. BLOC-App. 289-91. The WEC explained that it must "record the maps' new boundaries in WisVote, integrate the new redistricting data with existing voter registration and address data, and manually review ward map changes and parcel boundary data to ensure that each voter is correctly located in their proper districts." *Id*. at 290. It reiterated that "these tasks must be completed before . . . April 15, because candidates need to know which district they reside in and which office they can run for, and voters need to know which candidates' petitions they can properly sign." *Id.* Other statutory election deadlines are also impending, including a March 15, 2022 deadline requiring the WEC to send a Type A notice containing a statement specifying where information concerning district boundaries may be obtained, along with deadlines on April 5 and April 12. BLOC-App. 292-93. June 1, 2022 is the deadline for candidates to file their

nomination papers and other materials, and absentee ballots must be distributed by June 23, 2022. *Id.*

ARGUMENT

A stay pending appeal in this Court is "granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "[A]n applicant must show (1) a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants do not meet this standard because they lack standing to pursue their appeal in this Court and the Wisconsin Supreme Court did not clearly err in concluding that it had good reasons to conclude that Section 2 of the Voting Rights Act required the drawing of a new opportunity district in the state assembly for Milwaukee's growing Black population.

This Court reviews the factual findings of the Wisconsin Supreme Court for clear error and those findings "warrant[] significant deference on appeal to [the United States Supreme] Court." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (citing Fed. Rule Civ. P. 52(a)(6); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("*Cromartie II*"). This Court "may not reverse [a lower court] just because [it] 'would have decided the [matter] differently,'" *Cooper*, 137 S. Ct. at 1465 (citation omitted), as long as "the lower court's view of the evidence is plausible in light of the entire record." *Brnovich*

v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2349 (2021); *see also Cooper*, 137 S. Ct. at 1465; *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

I. The Court Is Unlikely To Grant Certiorari or Reverse the Wisconsin Supreme Court's Judgment.

A. Applicants Lack Standing to Pursue this Appeal.

Applicants lack standing to pursue this appeal. "Standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts in the first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). "To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way." *Id.* (internal quotation marks omitted). A litigant asserting a "generalized grievance" about the "proper application of the Constitution and laws" does not have Article III standing. *Id.* at 706.

As this Court has emphasized, the injuries caused by an alleged racial gerrymander are "personal" and "include[] being 'personally subject to [a] racial classification' . . . as well as being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) ("*ALBC*") (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) (first bracket added). These injuries "directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim." *Id.* (emphasis in original). In *United States v. Hays*, this Court explained that a party who "resides in a racially

gerrymandered district . . . has been denied equal treatment because of the [] reliance on racial criteria, and therefore has standing." 515 U.S. 737, 744-45 (1995). On the other hand, this Court explained that voters who do "not live in such a district . . . do[] not suffer those special harms." *Id.* at 745. "[A]bsent specific evidence" showing that an out-of-district voter has been *personally* subjected to a racial classification in the map, that person "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve" and would not have Article III standing. *Id.*

None of the Applicants has standing to invoke the federal judicial power to contend that the Milwaukee-area majority Black state assembly districts adopted by the Wisconsin Supreme Court violate the Equal Protection Clause. The four Individual Applicants reside in Madison, Spring Green, Grand Chute, and Wrightstown, BLOC-App. 6-7—nowhere near the seven Milwaukee assembly districts they ask this Court to invalidate as racial gerrymanders. They have offered no evidence at all—let alone "specific evidence," *Hays*, 515 U.S. at 744-45, to show that they suffer some personal injury from the alleged racial design of districts hundreds of miles away. Nor does the record even reflect these voters' race. They cannot invoke this Court's jurisdiction to assert their generalized grievance against districts they live nowhere near.

Neither does the Legislature have standing. The Legislature—a branch of government—is not a *voter* capable of being "personally subjected to [a] racial classification." *ALBC*, 575 U.S. at 263 (quotation marks omitted). Nor is the

Legislature represented by a *legislator*—let alone one focused solely on representing a particular racial group. The Legislature cannot assert its generalized grievance against the affected districts.

In its stay briefing in the Wisconsin Supreme Court, the Legislature contended that it was not asserting a "new action for racial gerrymandering" but rather was bringing "an appeal from [the Wisconsin Supreme Court's] final opinion and order." Leg. Reply Br. at 3. But that is a meaningless distinction. Applicants are "the party attempting to invoke the federal judicial power" to assert their contention that the Milwaukee-area Black majority assembly seats are a racial gerrymander. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989). As such, they must prove they are personally injured by the alleged racial gerrymander—a burden they have not met and cannot meet. It is irrelevant that Applicants raise their arguments on appeal from a lower court's order as opposed to in the first instance as plaintiffs. *See Hollingsworth*, 570 U.S. at 705. The Legislature also cited *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 802 (2015), in its briefing below, but that case is inapposite. In *Arizona State Legislature*, that legislature claimed that a constitutional amendment creating an independent redistricting commission violated the U.S. Constitution's Elections Clause by stripping the legislature of its power to redistrict. This Court held that the Arizona Legislature had standing to assert that institutional injury. *Id.* But the Wisconsin Legislature does not allege a federal cause of action that its institutional power has been unlawfully usurped; it contends instead that seven specific assembly districts adopted by the

Wisconsin Supreme Court are racial gerrymanders. It has suffered none of the personal injuries that flow to voters living within racially gerrymandered districts. The harms flow to voters in the affected districts, not the Legislature as an institution.

Finally, the Legislature lamented below that the *Rooker-Feldman* doctrine applies, and if *it* does not have standing now, then the Wisconsin Supreme Court's decision will be unreviewable. That is not a justification to breach Article III's limitations. *See, e.g.*, *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 420 (2013) ("[T]he assumption that if [applicants] have no standing to sue, no one would have standing, is not a reason to find standing." (quotation marks omitted)). But the argument is also wrong. If a voter who lives in one of the affected districts believes she has been subjected to a racial gerrymander, she can file a lawsuit in federal court. *See Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994) (explaining that *Rooker-Feldman* doctrine does not bar federal suit alleging harm caused by state court's order by person who was not party to the state court proceeding).

Applicants do not have standing to pursue this appeal. There is thus no chance that four justices would vote to grant certiorari, or that five justices would vote to reverse the Wisconsin Supreme Court's order. Applicants' requested stay and alternative petition for a writ of certiorari should be denied.

B. Applicants Have Not Established that Race Predominated or that Traditional Districting Criteria Were Subordinated to Racial Considerations.

Applicants have not shown that race was the predominant consideration in the Wisconsin Supreme Court's adoption of the Governor's proposed plan. A party alleging a racial gerrymander "must prove that 'race was the predominant factor motivating the . . . decision to place a significant number of voters within or without a particular district.'" *Cooper*, 137 S. Ct. at 1463 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). To make that showing, the party must prove that the entity adopting the map "'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Id.* In "many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). This is so because those who "engage in impermissible race-based redistricting" generally "will find it necessary to depart from traditional principles in order to do so. And, in the absence of a conflict with traditional principles, it may be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside." *Id.* As this Court explained in *Bethune-Hill*, "to date [it] has not affirmed a predominance finding, or remanded a case for determination of predominance, without evidence that some district lines deviated from traditional principles." *Id.*

Mapdrawers "will 'almost always be aware of racial demographics' during redistricting, but evidence of such awareness does not show that" an unconstitutional racial gerrymander occurred. *Id.* at 1487 (quoting *Miller*, 515 U.S. at 916). To prove an equal protection violation, a party cannot show that race was "simply . . . *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the . . . districting decision." *Cooper*, 137 S. Ct. at 1487 (quoting *Cromartie II*, 532 U.S. at 241 (emphasis in original). In other words, simply showing that a majority-minority district resulted from the line drawing, or that race was one consideration among others in drawing that majority-minority district, does not establish a constitutional violation. As this Court has emphasized, a challenger's "evidentiary burden is a demanding one." *Id.* Federal courts "must be very cautious about imputing a racial motive to a State's redistricting plan." *Id.*

Applicants have not satisfied their burden to show that race was the Wisconsin Supreme Court's predominant consideration—to which it subordinated all other traditional districting criteria—in the drawing of the challenged districts. Applicants proffer a single piece of evidence: the Black voting age population percentages in the seven challenged districts. *See* App. Br. at 1. But standing alone this says nothing about the Wisconsin Supreme Court's (or the Governor's) motivations in drawing the districts as a whole. As this Court explained in *Cromartie II*, merely proving that a majority-minority district *was drawn* does not prove that its predominant motivating factor was race. 532 U.S. at 234. Rather, Applicants must prove—with actual evidence about the holistic line-drawing motivations for each district—that race

predominated and subordinated traditional criteria. Applicants cite *nothing* in the record to meet their burden, and indeed have made no attempt to carry that burden. Applicants had the opportunity—but declined—to conduct discovery regarding the Governor's proposal. BLOC-App. 52-53. They presented *no evidence* below—and present none here—that bears on the predominant "motive for the district's design as a whole." *Bethune-Hill*, 137 S. Ct. at 793. Nor do Applicants offer any evidence to suggest that traditional districting criteria were disregarded or subordinated to race. Indeed, Applicants offer no evidence regarding the districts' adherence—or lack of adherence—to considerations of compactness, contiguity, avoiding incumbent pairings, or any other traditional districting criteria *at all*. Rather, having declined to develop any factual record whatsoever, Applicants ask this Court to simply *assume*—based upon the fact that an additional majority-minority district is included in the map adopted by the Wisconsin Supreme Court and nothing more—that race was the predominant factor to which all other considerations were subordinated in the drawing of the challenged districts.[11]

This Court has never been presented with so thin a record in a racial gerrymandering case, much less concluded that a plan was a racial gerrymander in the absence of any developed evidentiary record bearing on the mapdrawer's motivations in designing the challenged districts as a whole. Applicants come nowhere near meeting their "demanding" burden to prove a racial gerrymander,

[11] Applicants seem to believe that any time a district has as one motivating factor satisfying *Gingles* prong one it *must* have been drawn with race as the predominant motive for the district as a whole. That is not the law, which is why simply showing that districts *are* majority minority does not prove that race was their predominant motivating factor. *See Cromartie II*, 532 U.S. at 234.

Cooper, 137 S. Ct. at 1487, and are miles from meeting their burden to obtain the extraordinary relief of a stay pending appeal.

Contrary to Applicants' telling, it is apparent that the Wisconsin Supreme Court had a *single* overriding motivation—imposing a plan with the "least changes" necessary to equalize population from those last adopted by the legislature in 2011. App. 9-10, 12, 19-23. This consideration, and not race, was the predominant factor to which all other criteria were subordinated. The state supreme court itself has stated and demonstrated that considerations of race did not predominate over other redistricting criteria in its process of selecting state legislative maps. In its November 30, 2021 opinion, the Court set out a number of redistricting criteria it would consider, including a "least-change" approach, population equality, compactness, political subdivision splits, contiguity, and compliance with the VRA. *See Johnson v. Wis. Elections Comm'n*, 967 N.W. 2d 469 (Wis. 2021). Of those criteria, there can be no dispute that following a "least-change" approach predominated over every other factor considered in the majority's selection of a state legislative map. This is evident from the court's recent opinion, which stated "the first question is which map most complies with our least-change directive," measured through core retention. App. 9. In fact, the court selected its preferred plans *based on this criterion alone*, App. 10 (noting that "no other proposal comes close" to the Governor's state legislative maps on core retention), and only then analyzed the Governor's plans' compliance with other criteria. App. 19-23. The court analyzed VRA considerations last, and only after selecting the plan that best performed on core retention. App. 19-35.

The dissenting Justices also acknowledge the predominance of core retention over all other criteria. App. 45 (Ziegler, C.J., dissenting) (noting "core retention was the sole factor for determining least change and further, for selecting maps."); App. 127 (R. Bradley, J., dissenting) (describing the majority's "misapplication of the least-change approach that allows core retention (an extra-legal criterion) to override the United States Constitution, the Wisconsin Constitution, and the VRA."). Indeed, there is no evidence whatsoever here that the Court (or the Governor) subordinated any other criteria to racial considerations; the Court did not look at maps with racial shading data displayed, nor did it set any racial target or tweak any district lines to impact the racial demographics of any districts. The Court also found that the Governor's state legislative maps complied with traditional redistricting criteria, stating "Under the Wisconsin Constitution, all districts are contiguous, sufficiently equal in population, sufficiently compact, appropriately nested, and pay due respect to local boundaries" and "the federal constitution's population equality requirement." App. 10. Rather, the majority opinion explicitly stated that it had no intent to maximize the number of majority-minority districts:

> To be clear, the VRA does not require drawing maps to maximize the number of majority-minority districts, and we do not seek to do so here. *See De Grandy*, 512 U.S. at 1016-17. Rather, on this record, we conclude selecting a map with seven districts is within the leeway states have to take "actions reasonably judged necessary" to prevent vote dilution under the VRA. *Cooper*, 137 S. Ct. at 1472.

App. 35.

Rather than the Court or the Governor, the *Legislature* unlawfully made race the predominant consideration in drawing its Milwaukee area Black opportunity

districts (which it *reduced* from six to five despite the growth in Black population and decline in white population in the area). The Legislature in its briefing below repeatedly praised itself for keeping more Black Wisconsinites in their prior districts than white residents. App. 104-04. However, unlike the use of race to comply with the VRA, this Court has *never* approved a goal of ensuring that the percentage of "Black Individuals Retained" in new districts exceeds the same percentage for white voters. Not only does maximizing this invented metric undermine VRA compliance by locking in packed Black districts, but it is also the type of race-based statistical target that violates the Equal Protection Clause. *See, e.g.*, *ALBC,* 575 U.S. at 304.

Applicants' mere recitation of the demographic makeup of the districts they challenge falls far short of their burden to prove—with actual evidence elucidating the intent behind the lines—that the districts they challenge were an unlawful racial gerrymander. For that reason, strict scrutiny is not triggered and this Court can end its consideration of the merits—which it should not even reach in light of Applicants' lack of standing—there. *See Cooper*, 137 S. Ct. at 1464 (explaining that *if* a challenger satisfies burden to show that "racial considerations predominated over others, the design of the district must withstand strict scrutiny").

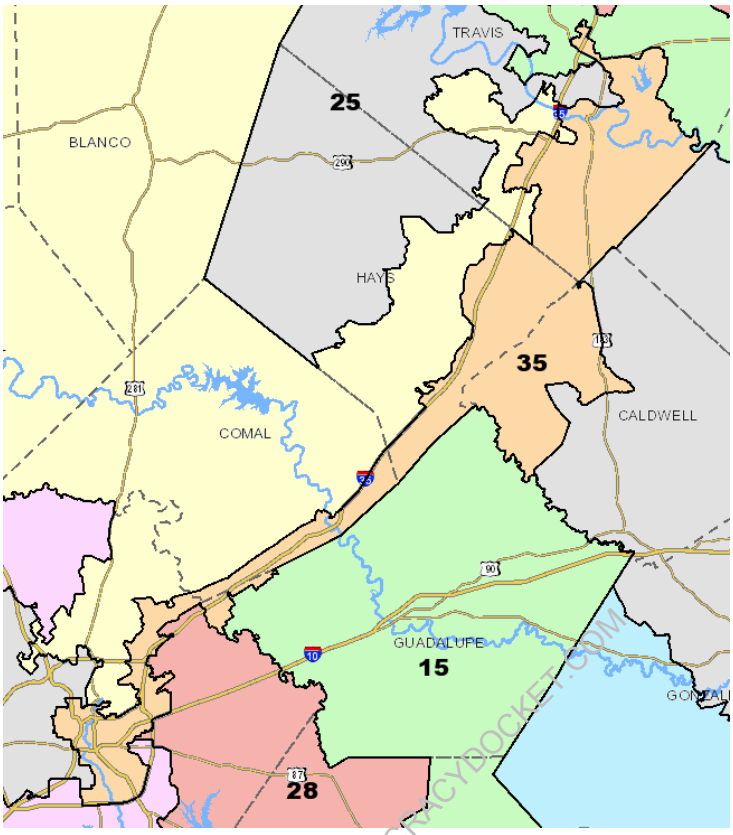
C. The Wisconsin Supreme Court Had Good Reasons to Believe Section 2 Required Seven Black Opportunity Districts.

Even if Applicants somehow met their demanding burden to show racial predominance by merely listing the demographic makeup of the districts they challenge, the map adopted by the Wisconsin Supreme Court satisfies strict scrutiny because the court had good reasons to believe that Section 2 of the VRA required

seven Black opportunity districts in the Milwaukee-area state assembly map. "When a state invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 137 S. Ct. at 1464. Stated differently, the State must show "that it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines." *Id.* This standard "gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.* (quoting *Bethune-Hill*, 137 S. Ct. at 802).

In *Abbott v. Perez*, this Court held that the Texas Legislature had good reasons to think a new Latino opportunity congressional district (CD35) was required, reversing the district court's ruling that the district was a racial gerrymander. *Abbott v. Perez*, 138 S. Ct. 2305, 2331-32 (2018). That district combined Latino populations in San Antonio and Austin, with a narrow strip of interstate highway between them, as shown below:[12]

[12] Tex. Legislative Council, Plan C2100, https://dvr.capitol.texas.gov/Congress/2/PLANC2100.



The district court had concluded that the Texas Legislature lacked good reasons to conclude that Section 2 required CD35 because white bloc voting was absent in the Travis County (Austin) portion of the district. *Id.* at 2331-32. This Court held otherwise, concluding that the district court "went astray" by concluding that *Gingles* prong three was unsatisfied based only upon Travis County's white voters—a county that "makes up only 21% of the district." *Id.* at 2332. On the contrary, this Court held that Texas had "'good reasons' to believe that . . . CD35 was a viable Latino opportunity district that satisfied the *Gingles* factors." *Id.* In addition to its satisfaction of *Gingles*, this Court highlighted the fact that a Latino advocacy group—the Mexican American Legal Defense Fund (MALDEF)—proposed the "concept" that

led to the drawing of CD35 "and the [Texas] Latino Redistricting Taskforce (a plaintiff group) argued that the district is mandated by § 2." *Id.*[13]

Here, the Wisconsin Supreme Court did not clearly err by concluding that there were good reasons to believe that Section 2 required the creation of an additional Black opportunity district among the Milwaukee state assembly seats. The court carefully "analyze[d] whether a strong basis in evidence suggests the *Gingles* preconditions are satisfied" and "determin[ed] whether the Governor's propos[ed maps are] within the 'leeway' states have to 'take race-based actions reasonably judged necessary under a proper interpretation of the VRA.'" App. 28 (quoted source omitted).[14] In doing so, the court correctly applied the *Gingles* factors to the evidentiary record. The evidentiary record here surpasses what this Court found to provide good reasons for drawing CD35 in *Perez*.

Gingles *Prong One*. As the court noted, it was "undisputed that the Black voting age population in the Milwaukee area is 'sufficiently large and geographically compact' to form a majority in seven 'reasonably configured legislative districts.'"

[13] Applicants cite a different district addressed in *Perez*, Texas House District 90. In that instance, this Court ruled that Texas lacked good reasons to racially redraw the district because its only evidence were two close primary elections and the request of the Mexican American Legislative Caucus that the Hispanic percentage be increased. *Id.* at 2334-35. The record in this case is nothing like that, and exceeds the record the *Perez* Court concluded provided good reasons with respect to CD35.

[14] By contrast, the dissenting Justices misunderstand the VRA. For example, one dissenting opinion expressly argues that white bloc voting in the Milwaukee area does not exist because Black representatives like Lena Taylor, LaTonya Johnson, Leon Young, and Jason Fields have been elected to the state legislature. But those representatives were elected from districts *explicitly crafted as Black opportunity districts under the VRA*; it is no surprise the districts elect candidates of choice, and thus do not tell us anything about whether white bloc voting will usually defeat Black voters' candidate of choice *absent* the drawing of VRA compliant districts. In addition, minority candidates running unopposed in elections, such as Leon Young and Jason Fields, are a special circumstance explicitly discounted in white bloc voting analysis under *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

App. 29. In addition, multiple parties submitted maps "demonstrat[ing] that it is now possible to draw a seventh sufficiently large and geographically compact majority-Black district." App. 30. The court also found that relevant population shifts warranted an additional Black opportunity district, finding that over the last decade "the Black population in Wisconsin grew by 4.8% statewide, while the white population fell by 3.4%." App. 34. In Milwaukee County, "the Black Voting age population increased 5.5%, while the white voting age population decreased 9.5%." *Id.* The court did not clearly err in concluding that *Gingles* prong one was satisfied.

Gingles *Prong Two.* The court likewise correctly concluded that it was "undisputed that Black voters in the Milwaukee area are politically cohesive," and credited the expert analysis from multiple parties that "analyzed voting trends and concluded political cohesion existed." App. 30. This expert analysis included an examination of at least eight probative elections, including nonpartisan primary races, Democratic primary races, and spring general races from 2016-2021, that involved Black candidates running for office, using the widely accepted statistical methods of homogenous precinct analysis, ecological regression, and ecological inference techniques. BLOC-App. 166-68. The results demonstrated that "without a doubt" racially polarized voting is present in Milwaukee-area elections and that "Black and white voters consistently prefer different candidates and Black voters 'strongly back' the same candidates for political office 'at very high rates even in multi-candidate primary elections.'" BLOC-App. 165, 168-86, 192. This evidence provided good reasons for the court to conclude that *Gingles* prong two was satisfied.

Gingles *Prong Three.* Finally, examining *Gingles* prong three, the court found that "the parties offered a strong evidentiary basis to believe white voters in the Milwaukee area vote 'sufficiently as a bloc to usually defeat the minority's preferred candidate.'" App. 30. The court relied on "experts from multiple parties . . . [who] look[ed] at various election contests, with the most comprehensive expert analysis calculating that white voters in the Milwaukee area defeat the preferred candidate of Black voters 57.14% of the time." *Id.*[15] This analysis of elections provides strong evidence that Black-preferred candidates are usually defeated by white bloc voting. *See Gingles*, 478 U.S. at 56; *Missouri State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1039 (E.D. Mo. 2016) ("There is **no** requirement that white voters have an 'unbending or unalterable hostility' to minority-preferred candidates such that those candidates always lose.") (internal citations omitted) (emphasis in original). The court further noted that no parties seriously disputed the existence of prong three and that any arguments that prong three was not met were "virtually unsupported by expert analysis or argument." App. 31. In addition, the court also relied on numerous federal courts before it that have applied the VRA to the Milwaukee area. App. 31; *Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL 34127471, at *5 (E.D. Wis. May 30, 2002) (noting that intervenors "presented expert testimony that all of the *Gingles* criteria were present in Wisconsin in general and the City of Milwaukee in particular); *Gingles*, 478 U.S.

[15] This bloc voting rate is also the most conservative estimate—the bloc voting rate increases to 66.66% if the 2018 Milwaukee County Sheriff Democratic Primary race is excluded for demonstrating special circumstances. BLOC-App. 165, 170-71, 187.

at 57 (noting that longtime voting patterns are highly probative of racial polarization). The evidence provided good reasons for the court to conclude that *Gingles* prong three was satisfied.

Totality of the Circumstances. Finally, the state supreme court then analyzed the totality-of-the-circumstances evidence. App. 32-33. The court outlined the non-exhaustive list of factors relevant to the totality analysis and focused in particular on proportionality. *Id.*; *De Grandy*, 512 U.S. at 1017-21; *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) ("There is no requirement that any particular numbers of factors be proved, or that a majority of them point one way or the other.") (quoting S. Rep. No. 97-417, at 29 (1982)).[16] In particular, the court found that the Black voting age population statewide, in combination with "the baseline of six districts ten years ago" and Black population growth, provided "good reasons" to "suggest a seventh majority-Black district may be required." App. 33-34. The Court also found the Legislature's proposed assembly districts "problematic under the VRA." *Id* at 34-35. For example, the Legislature's proposed state assembly plan contained *fewer* majority-Black districts (five) than the 2011 plan (which had six). *Id.* at 34. Further, the Court found that one of the Legislature's "proposed districts has a Black voting population of 73.28%, a level some courts have found to be unlawful 'packing' under the VRA." *Id.* (citing *Ketchum*, 740

[16] In addition to proportionality, the Court also found the existence of racially polarized voting (Senate Factor 2). *See, e.g.*, *Gingles*, 478 U.S. at 36-37; *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1020 n.21 (2d Cir. 1995) ("It will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under a totality of the circumstances.").

F.2d at 1418). In light of the evidence presented by the parties, the Court concluded that "the risk of packing Black voters under a six-district configuration further suggests drawing seven majority-Black districts is appropriate to avoid minority vote dilution." App. 34-35.

As this court explained in *Perez*, evidence that the *Gingles* preconditions are satisfied provides a mapdrawer good reasons to think that Section 2 may require a particular district configuration. Here, it is undisputed that the *Gingles* preconditions are satisfied, and the court below went a step further by analyzing the totality of the circumstances evidence—a step this Court did not require the Texas legislature to show it had done in *Perez*. The Wisconsin Supreme Court did not clearly err in concluding that good reasons supported its decision to approve the Governor's addition of a seventh Black opportunity district in Milwaukee.

Applicants contend that the Wisconsin Supreme Court's decision is foreclosed by *Cooper*, *De Grandy*, and *Miller*. But that is not so. In *Cooper*, the North Carolina legislature altered a performing crossover district in which Black voters were succeeding in electing their preferred candidates by increasing it, predominantly on the basis of race, to be majority Black. 137 S. Ct. at 1470. There were no good reasons to believe the VRA required these changes, this Court held, because white bloc voting—the third *Gingles* precondition—was absent: that was why the district performed for Black voters without being majority Black. *Id.* at 1472. For that reason, this Court concluded that North Carolina lacked a "strong basis in evidence" to think its race-based districting was required by the VRA, because it made a "pure error of

law" in thinking there could be VRA liability without *Gingles* prong three being satisfied. *Id.*

This case is nothing like *Cooper*. Here, a *new* Black opportunity district that did not previously exist is at issue. So the problem that arose in *Cooper*—making race-based districting decisions when the current district was non-dilutive—does not arise here. And unlike in *Cooper*, there is no dispute that each of the three *Gingles* preconditions are satisfied here.

Likewise, Applicants' reliance on *De Grandy* is erroneous. In *De Grandy* this Court ruled that Florida did not violate Section 2 by failing to maximize the number of Hispanic opportunity districts. Under the totality of the circumstances in that case, this Court held that there was no Section 2 violation because Hispanic voters "form effective voting majorities in a number of districts roughly proportional" to their share of the voting age population. 512 U.S. at 1000. In so holding, this Court explicitly "reject[ed] [a] safe harbor rule" whereby proportionality forecloses Section 2 liability. *Id.* at 1019. Rather, "the degree of probative value assigned to proportionality may vary with other facts." *Id.* at 1020. This Court reiterated this in *LULAC v. Perry*, explaining that proportionality has "some relevance" but should not be given "undue emphasis" in the overall totality of circumstances analysis. 548 U.S. at 436.

Applicants are thus wrong to contend that the Wisconsin Supreme Court ran afoul of *De Grandy*. To begin, *De Grandy* was in a different posture—Florida had been sued for violating Section 2, and the Court was adjudicating the presence of a

violation. Here, the question before the Wisconsin Supreme Court was whether the record provided good reasons to believe Section 2 might require the seventh Black opportunity district. Regardless of the issue of proportionality, the record in this case shows that on a host of totality of circumstances factors, Wisconsin is the worst, or among the worst, in the nation. BLOC-App. 121-38 (expert analysis of Dr. Canon showing Wisconsin ranking last or close to last on disparity metrics for graduation rates, degree attainment, standardized testing scores, unemployment rates, homeownership rates, incarceration rates, life expectancy, and voter turnout).

Applicants are likewise wrong to contend that the Wisconsin Supreme Court's decision was contrary to *Miller*. Contrary to Applicants' telling, the Wisconsin Supreme Court did not set out to maximize the number of Black majority districts. It said as much. App. 35. Rather, the Court carefully examined the *Gingles* preconditions, the totality of the circumstances, and the robust evidentiary record to conclude that there were good reasons to conclude a seventh Black opportunity district may be required by Section 2. That is nothing like the "max Black" plan—untethered from the actual statutory requirements—of which *Miller* disapproved.

II. Denial of The Stay Will Not Result in Irreparable Harm, Applicants Cannot Overcome *Purcell,* and the Balance of the Equities Weighs Against a Stay

In reviewing a stay application, in addition to the likelihood of success on the merits, the Court must analyze whether "the applicant will be irreparably injured absent a stay," "whether issuance of the stay will substantially injure the other parties," and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426

(2009). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). Rather, a stay pending appeal is "extraordinary relief," and the applicant bears a "heavy burden." *See, e.g., Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers).

This Court regularly denies applications seeking to stay election-related orders of state courts. *See, e.g., Moore v. Harper,* 595 U.S. ___ (2022) (denying stay of North Carolina Supreme Court decision pending the filing and disposition of a petition for writ of certiorari); *Berger v. North Carolina State Bd. of Elections,* 141 S. Ct. 658 (2020) (mem.); *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 643 (2020) (mem.); *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (mem.).[17] This case is no different. Applicants cannot show they will be irreparably harmed, nor can they overcome the *Purcell* principle this late into the election cycle. The deadline that the Wisconsin Elections Commission ("WEC") established for new maps to be in place has already passed, and election deadlines begin as soon as next week, with candidate nomination starting in just a month. A stay would also substantially harm Respondents and the public interest. Therefore, Applicants' request should be denied.

A. Applicants Cannot Show Irreparable Injury Absent a Stay

Applicants do not even attempt to argue that they will suffer irreparable harm absent a stay. *See* App. Br. at 32-36. Nor could they. The Legislature, a governmental

[17] In fact, "[d]enial of such in-chambers stay applications is the norm.'" *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers).

body, is not a voter and cannot be injured by the district lines in a legislative map. *See, e.g., Virginia State House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) (noting that "although redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members."). Absent a stay, a map will be in place for the 2022 elections, thus disturbing no legislative functions.[18] Nor could the Legislature claim to be harmed by the Wisconsin Supreme Court's selecting maps – it argued before this Court just months ago that in the event of an impasse, the State Supreme Court should do just that.[19] *See In Re Wisconsin Legislature*, No. 21-474, Leg. Pet. at 20 (Sept. 24, 2021) (stating that "important 'principles of federalism and comity' require a federal court to defer to the State, including the state courts because there can be 'only one set of legislative districts'"); *Growe,* 507 U.S. at 32-34; *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003) ("[S]elf-inflicted wounds are not irreparable injury."). And any harm from the Wisconsin Supreme Court's maps is not irreparable; the Legislature retains the option of proposing new plans through the legislative process, subject to gubernatorial veto.[20]

[18] The denial of a stay now also would not prevent Applicants from continuing their challenge through the normal process of a petition for a writ of certiorari, if they can meet the requirements of Article III standing (they cannot). Any claims could then be remedied *after* the 2022 election and any review on the merits.

[19] The individual Applicants also filed the original action at the Wisconsin Supreme Court claiming the 2011 state legislative maps were malapportioned. *See* BLOC-App. 1-20.

[20] The Legislature has done so before following court-ordered plans. *See Redistricting in Wisconsin 2020: The LRB Guidebook*, Wis. Legis. Reference Bur. 61 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf; 1983 Wis. Act 29.

In addition, none of the four individual Applicants live anywhere near the districts in the Milwaukee area that they allege are racially gerrymandered, nor do they vote in those districts. BLOC-App. 6-7 (affirming that Applicants Johnson, O'Keefe, Perkins, and Zahn live in Madison, Spring Green, Grand Chute, and Wrightstown, Wisconsin). It follows that they thus cannot be harmed by the configuration of those districts, nor are they subject to any alleged racial classification. *See, e.g., ALBC,* 575 U.S. at 263; *Hays*, 515 U.S. at 744-45 (1995).

The only possible harms the Applicants cite are not to them, but to others. That is not sufficient. *See Nken*, 556 U.S. at 434 (stating the standard as "whether the *applicant* will be irreparably injured absent a stay") (emphasis added). In any event, comments from one incumbent state legislator, along with conjecture about how plans *may* impact elections if the Applicants' last-ditch effort is unsuccessful, App. Br. at 33-34, do not qualify as any kind of cognizable injury, let alone an irreparable one. *See, e.g., Nken*, 556 U.S. at 434-35 (holding that "simply showing 'some possibility of irreparable injury' fails to satisfy" this factor) (citation omitted).[21] The Applicants' stay request should be denied because they cannot show that irreparable harm will result from implementation of the Wisconsin Supreme Court's maps.

[21] The Applicants' citation to the comments of an incumbent representative misrepresents the record in this litigation. The commonalities of the communities in the opportunity districts adopted by the Wisconsin Supreme Court, including in areas such as "economic interests, poverty, and racial demographics," App. Br. at 34, were extensively examined by expert Dr. David Canon and presented to the Court. BLOC-App. 121-38.

B. The *Purcell* Principle Requires the Denial of a Stay

In recent redistricting cases, Justices of this Court have emphasized that federal courts—including this Court—should exercise caution in enjoining state election laws when an election is imminent. *Merrill v. Milligan*, 656 U.S. ___ (2022); *Merrill v. Caster*, 656 U.S. ___ (2022), slip op. at 2, 4 (stating that "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election."); *Moore v. Harper*, 595 U.S. at ___ (2022), slip op. at 1 (stating "this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election"); *Toth v. Chapman*, 595 U.S. __ (2022) (mem.). *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*). This principle applies with equal force here, where the WEC and almost two thousand local clerks are at most *less than one week away* from starting to administer Wisconsin's 2022 state elections.

In considering the burdens that result from changes to state election laws close to an election, Justice Kavanaugh outlined a four-factor test that Applicants must meet to overcome the *Purcell* principle, including showing at least that:

> (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Merrill, slip op. at 5 (citing *Lucas v. Townsend*, 486 U. S. 1301 (1988) (Kennedy, J., in chambers); *McCarthy v. Briscoe*, 429 U. S. 1317 (1976) (Powell, J., in chambers)).

Here, Applicants seek to overcome *Purcell*, and thus have the burden. *See, e.g., Moore,* slip op. at 1-2 (Kavanaugh, J., concurring) (applying the *Purcell* principle to applicants seeking to overturn state supreme court decision). Applicants fail on at least three of these prongs and thus cannot meet their burden.

First, Applicants cannot show that the underlying merits are "entirely clearcut" in their favor; the opposite is true here. None of the Applicants have standing to pursue their claims, and the Wisconsin Supreme Court, properly implementing this Court's precedent, has already issued an opinion at odds with Applicants' arguments. *See supra* Section I.A-C. At the very least, Respondents have "a fair prospect of success on appeal" and Applicants cannot meet their burden for this factor. *Merrill*, slip op. at 6, n.2.[22]

Applicants also fail the second factor of this test, as they cannot show that irreparable harm will result to them absent a stay of the Wisconsin Supreme Court's maps. *See supra* II.A.

Finally, Applicants fail the fourth factor, as the changes they request, including a stay of the Supreme Court's state legislative maps and potential implementation of the Legislature's proposed maps instead, are not "feasible before the election without significant cost, confusion, or hardship." *Merrill*, slip op. at 5. Wisconsin has a complex and decentralized state election system, where elections are administered by

[22] In *Merrill,* Justices of this Court noted that the Plaintiffs "ha[d] at least a fair prospect of success on appeal," but stated that was not enough to establish that the merits were "clearcut" in their favor. *Merrill*, slip op. at 6, n.2. If the Plaintiffs' well-supported claims of vote dilution in *Merrill* do not meet this factor, then neither can the Legislature's unsupported claims that the Wisconsin Supreme Court engaged in racial gerrymandering.

the WEC and over 1,850 local clerks.[23] This means that once the election machinery starts, any changes will be complicated to implement, and implementation of the 2022 elections in already underway.

The first deadline articulated by the WEC, the March 1 deadline for new state legislative maps, has already passed. *See* BLOC-App. 43, 289-90. The next impending deadline is only *days away* from this filing, which requires the WEC to send a Type A notice to county clerks for the primary and general elections by March 15, 2022. Wis. Stat. §§ 10.01(2)(a), 10.06(1)(f). This notice must contain a statement specifying where information concerning district boundaries may be obtained. *Id.* By April 5, county clerks must then send Type A notices to municipal clerks, and publish those notices by April 12. Wis. Stat. §§ 10.01(2)(a); 10.06(2)(gm), (h). Only a month from now, on April 15, candidates may begin to circulate nomination papers for the General Election (and by extension to appear on the Primary ballot), and the state is only three months or less away from the deadline for state legislative candidates to file nomination papers, deliver ballots to municipal clerks, and to send absentee ballots to voters. Wis. Stat. §§ 8.15(1), 8.20(8)(a); §§ 7.10(1), (3); § 7.15(cm). Any delays to these deadlines will entirely disrupt the election process.

Indeed, on March 9, 2022 the WEC told the Wisconsin Supreme Court that "staying [the supreme court's] decision on or after today's date would impair the Commission staff's ability to make necessary preparations for the April 15 beginning

[23] *See* Katy Owens-Hubler, *Wisconsin Elections: Decentralized Down to the Village Level*, NCSL (June 24, 2014), https://www.ncsl.org/blog/2014/06/24/wisconsin-elections-decentralized-down-to-the-village-level.aspx.

of the nomination petition circulation period." BLOC-App. 290. This is because administering the 2022 elections "requires that the Commission perform much work well before election day." BLOC-App. 43. Among other things, once state legislative maps are in place "Commission staff must begin the complex process of recording these new boundaries in WisVote—the statewide election management and voter registration system" including "manual review of ward map changes and parcel boundary data throughout the state of Wisconsin to ensure accurate and efficient implementation of new redistricting data," which is necessary to "ensure[] that each voter receives the correct ballot and is correctly located in their proper districts." *Id.* This process also requires the WEC to "[c]ommunicat[e] with municipal clerks about certain addresses . . . because only local clerks would have such knowledge." *Id.* These tasks must be completed by the April 15 opening of the period for candidate nomination petitions. BLOC-App. 43.[24] Thus, changing the maps at this "late hour" would only lead to election chaos. *Purcell*, 549 U.S. at 1, 5; *Merrill*, slip op. at 3 (stating that "state and local election officials need substantial time to plan for elections. Running elections statewide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges").

Further, Wisconsin voters and organizational groups, including BLOC Respondents, as well as candidates "must know their proper districts far ahead of the

[24] The WEC has stated that "if new maps are not in place at least 45 days before April 15, 2022, there is a significant risk that there will be errors in the statewide system, and, in turn, less time for the Commission to correct those errors before circulation of nomination papers begin." BLOC-App. 44.

fall general election . . . . If map boundaries and not drawn and finalized *well before* April 15, candidates will not know in what district they reside and in turn will not know for what office they can run. And voters will not know what candidates' petitions they may properly sign." BLOC-App. 43-44, 290 (emphasis added). Just as in *Merrill*, if the Wisconsin Supreme Court's districts are stayed, it is a "prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others." *Merrill*, slip op. at 3-4.

Applicants' requested stay would instead flip this Court's *Purcell* principle on its head, by actively pausing a state's election law "in the period close to an election." *Id*. at 4; *Purcell*, 549 U.S. at 1. Applicants have offered no principled reason to breach this Court's practice of regularly staying lower court actions that "contravene that principle." *Merrill*, slip op. at 4; *see, e.g.*, *Merrill v. People First of Ala.*, 592 U.S. __ (2020); *Andino v. Middleton*, 592 U.S. ___ (2020); *Merrill v. People First of Ala.*, 591 U.S. __ (2020); *Clarno v. People Not Politicians*, 591 U.S. __ (2020); *Little v. Reclaim Idaho*, 591 U.S. __ (2020); *Republican National Committee v. Democratic National Committee*, 589 U.S. __ (2020) (*per curiam*); *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. __ (2020) (declining to vacate stay); *Moore*, slip op. at 1; *Toth v. Chapman*, 595 U.S. __ (2022) (mem.).

Applicants also extraordinarily suggest that this Court could instead impose the Legislature's proposed maps for the 2022 elections out of thin air, App. Br. at 4-5, but that request is meritless. *See* Section III, *infra.* The Legislature's plans have no special significance, as they were vetoed by the Governor and rejected by the

Wisconsin Supreme Court. *See Johnson*, 967 N.W.2d 469, 490, n.8 (Wis. 2021) (stating that the Legislature's "characteriz[ation]" of its maps "as an expression of 'the policies and preferences of the State . . . fails because the recent legislation did not survive the political process. The existing plans are codified as statutes, without a sunset provision, and have not been supplanted by new law"); *id.* at ¶ 86, n.15 (Hagedorn, J., concurring) ("The Legislature suggested we start with their proposed maps. But those maps, if not enacted into law, are mere proposals deserving no special weight").

Further, the Legislature's proposed maps feature fundamental legal flaws under both state and federal law and thus were found to be insufficient by the Wisconsin Supreme Court. App. 20-23 (noting that the Legislature's state assembly maps move 96,178 more people than the Governor's, have lower core retention scores, and created "more change, not less" through municipal splits); App. 34 (noting "concern" that the Legislature "submitted a configuration with [only] five majority-Black districts," that "[o]ne of its proposed districts has a Black voting age population of 73.28%, a level some courts have found to be unlawful 'packing' under the VRA" and rejecting Legislature's maps to "avoid minority vote dilution."). Given these serious concerns, the Legislature's maps would likely be the subject of additional legal challenges, cause additional delay and confusion, and present the same or worse harms than Applicants allege are sufficient to stay the State Supreme Court's plans. Nor are the 2011 state legislative maps a viable alternative; all parties to this litigation and the Wisconsin Supreme Court agree that they are unconstitutionally

malapportioned and cannot be used. App. 6 (noting that "the maps enacted into law in 2011 cannot constitutionally serve as the basis for future elections.").

Given that neither the Legislature's proposed maps nor the 2011 state legislative maps are viable legal options, granting a stay in this case would leave *no* state legislative maps in place for the 2022 elections underway. The mere *suggestion* (by parties without standing) that the Wisconsin Supreme Court's maps *may* violate the law cannot mean that Wisconsin's elections must be entirely disrupted with no backup plan (or worse, unlawful alternative maps that harms tens of thousands of more voters).[25]

In light of the above, Applicants cannot overcome the *Purcell* principle. Granting a stay here would cause a *Purcell* problem, given the exigent election deadlines and processes underway. As this Court has stated, "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U. S. 406, 426 (2008).

C. The Balance of the Equities and Public Interest Weigh Against a Stay

The balance of the equities and public interest weigh heavily against a stay. Substantial harm would result to Respondents, Wisconsin voters, and the public interest if this Court granted Applicants' stay request, which would upend Wisconsin's elections process.

[25] In this scenario, *granting* the stay may even harm the Applicants themselves, including Johnson, O'Keefe, Perkins, and Zahn, who alleged harm from the malapportioned state legislative districts at the Wisconsin Supreme Court. *See* BLOC-App. 1-20.

After careful analysis, the Wisconsin Supreme Court found that the maps it selected met state and federal constitutional muster. The "elementary principles of federalism and comity" mean that, "[a]t the very least," the Wisconsin Supreme Court's decision must be given "full faith and credit." *Growe*, 507 U.S. at 35-36; *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, ¶ 17 (Wis. 2002) ("The people . . . have a strong interest in a redistricting map drawn by an institution of state government . . . [including] this court."). Applicants here do not even have standing to pursue their claims, let alone muster a case on the merits. Staying the judgment of the Wisconsin Supreme Court on that basis does not serve the public interest in having a map drawn by a state institution.

That is particularly so here, because if this Court stays implementation of the Wisconsin Supreme Court's maps, there are no plausible back-up maps in place, inviting confusion and electoral chaos in disregard of this Court's *Purcell* principle. *See supra* II.B. It follows that granting a stay risks substantial harm to the BLOC Respondents, who are individual voters and organizations that dedicate resources to elections. Respondents need to know which districts they are voting in, which candidates are running in their district, which petitions and nomination papers they can sign, and where to dedicate resources for the upcoming state legislative elections. The same also goes for candidates, who must know which district they live in, and who they will be running against. *See, e.g., Merrill*, slip op. at 3. Given that exigent election deadlines in Wisconsin, the public interest lies in an orderly election, rather

than the "voter confusion and consequent incentive to remain away from the polls" that will result from a stay here. *Purcell*, 549 U.S. 1, 5.

Contrary to the substantial harms to Respondents and the public interest, Applicants would not be harmed *at all* absent a stay. *See supra* II.A. Thus, Applicants cannot satisfy this factor, and the stay should be denied.

III. Applicants' Extraordinary Request for Injunctive Relief is Unwarranted and Would Not Be in Aid of this Court's Jurisdiction

An injunction under the All Writs Act "is appropriate only if (1) it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n] . . . and (2) the legal rights at issue are 'indisputably clear.'" *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (citations omitted). This Court's "authority to issue [an] injunction . . . is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (citations omitted). This Court recently denied a request for injunctive relief in a Pennsylvania redistricting case seeking to enjoin the Pennsylvania State Supreme Court from implementing a district map following impasse, and it should here as well. *Toth v. Chapman*, 595 U.S. __ (2022) (mem.). Applicants cannot show that their extraordinary request for this Court to impose the Legislature's unlawful state legislative plans—rejected by the people of the Wisconsin through both the Governor and the Wisconsin Supreme Court—is necessary or appropriate here, and thus injunctive relief should be denied.

First, the alleged legal rights at issue here are far from "indisputably clear." *Turner*, 507 U.S. at 1312. Applicants made no attempt to argue that they were, and

for good reason. *See* App. Br. at 37-38. As explained *supra*, neither the Legislature nor the individual Applicants have standing to bring their racial gerrymandering claims and have not been subjected to racial classifications. *See* Section I.A. Because Applicants are not subject to any harm by the districts, they also cannot show irreparable harm if an injunction is not granted. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers) ("Even without an injunction pending appeal, the applicants may continue their challenge" including a "petition for a writ of certiorari in this Court"). Finally, even if this Court reaches the merits, Applicants' claims are not clearcut, and they cannot show a strong likelihood of success on the merits. *See Supra* I.A-C.

Applicants also make no argument that the astounding relief they request is either necessary or appropriate here. Nor could they. Because Applicants lack standing, this Court does not have jurisdiction to hear their claims, and Applicants' requested relief cannot possibly aid jurisdiction this Court does not have. Further, this case is far from the extraordinary circumstance necessary to grant Applicants' remarkable request for injunctive relief. This Court has regularly endorsed non-legislative map drawing in the context of impasse.[26] Applicants themselves urged the

[26] *See, e.g., Gaffney v. Cummings*, 412 U.S. 735 (1973); *Essex v. Kobach,* 874 F. Supp. 2d 1069 (D. Kan. 2012)*; Favors v. Cuomo,* No. 1:11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012)*; Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Colleton Cnty. Council v. McConnell,* No. 3:01-CV-3581, 201 F. Supp. 2d 618 (D.S.C. Mar. 20, 2002)*; Balderas v. Texas,* No. 6:01-CV-158 (E.D. Tex. Nov. 14, 2001)*, aff'd* 536 U.S. 919 (2002) (mem.); *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. Dist. Ct., Santa Fe Cnty. Dec. 29, 2011); *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011); *Alexander v. Taylor*, No. 97836, 51 P.3d 1204 (Okla. 2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002); *Avalos v.*

Wisconsin Supreme Court to take up the issue of redistricting in the event of an impasse. *See In Re Wisconsin Legislature*, No. 21-474 (U.S. 2021) (petition denied); *Johnson*, 967 N.W.2d at 474. While Applicants may not like the *results* of their preferred process, that is not enough to show the exigency necessary for injunctive relief from this Court.

Applicants also have other avenues for relief, which means their extraordinary request for an injunction cannot be "necessary" or "appropriate" in aid of this Court's jurisdiction. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999) (holding that relief under All Writs Act was "unjustifiable either as 'necessary' or as 'appropriate' in light of alternative remedies available"). At any time, the Legislature can draft and propose new maps and present them to the Governor subject to the veto power. Further, even if this Court thought relief was necessary, the ordinary course would be to remand back to the lower court for potential remedial proceedings – not impose a map out of thin air. Applicants also argue that the parties may seek review of the supreme court's judgment only in this Court, App. Br. at 6, n.3, but they are mistaken. There is no categorical bar to legal challenges to a state supreme court's maps in federal court. *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *Cooper*, 137 S. Ct. at 1467-68 (upholding decision rejecting the State's argument that a "state trial court judgment" in "a very similar state-court lawsuit" barred a federal lawsuit altogether). If Applicants had standing, the denial of an

Davidson, No. 01CV2897 (Dist. Ct. Denver Cnty. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos*, No. 02SC87, 42 P.3d 642 (Colo. 2002) (en banc); *Jepsen v. Vigil-Giron*, No. D0101-CV-2001-02177 (N.M.. Dist. Ct., Santa Fe Cnty. Jan. 2, 2002); *Perrin v. Kitzhaber*, No. 0107-07021, (Dist. Ct. Multnomah Cnty., Or. Oct. 19, 2001).

injunction pending appeal also would not stop them from continuing their challenge through the normal process for a petition for a writ of certiorari. *Hobby Lobby Stores, Inc.,* 568 U.S. at 1404.

Finally, even in the unlikely event that the Court thinks injunctive relief is proper, the maps suggested by the Applicants are not. The Legislature's proposed maps were vetoed by the Governor, rejected by the State Supreme Court, and suffer their serious legal flaws. Further, the 2011 state legislative maps are unconstitutionally malapportioned, thus diluting the votes of countless Wisconsinites. The use of either of these sets of maps would magnify the harm in this case, not solve it. *See supra* II.B.

Consequently, Applicants' do not make the proper showing necessary for the extraordinary injunctive relief requested, and their request should be denied.

CONCLUSION

For the foregoing reasons, BLOC Respondents respectfully request that this Court deny Applicants' emergency application for a stay and injunctive relief as well as Applicants' alternative petition for writ of certiorari and summary reversal.

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