No. 21A471

In the Supreme Court of the United States

THE WISCONSIN STATE 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.

GOVERNOR TONY EVERS'S OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI AND SUMMARY REVERSAL

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PRELIMINARY STATEMENT

Over the past five months, the State of Wisconsin—through its highest court—has exercised its sovereign responsibility to devise legislative maps. To ensure a fact-driven and thorough process, the Wisconsin Supreme Court received four rounds of briefing and hundreds of pages of expert reports, held a five-hour oral argument, and issued two comprehensive and careful opinions. Ultimately, the Wisconsin Supreme Court adopted a final legislative map on a schedule consistent with unanimous and bipartisan guidance from the Wisconsin Election Commission (WEC), which saw a serious risk of disruption and confusion if the map were not finalized by March 1, 2022. WEC based that advice on a detailed description of the State's electoral calendar, its own experience with the State's highly decentralized election system, and the need for arduous (sometimes manual) work at both the state and county level to implement new districting data in advance of deadlines that are now a mere month away.

In a brief that blows past all this, paying virtually no heed to the facts on the ground or this Court's recent orders, Petitioners seek a stay or summary reversal of the State's districting decision. They also ask this Court in the first instance to issue an unprecedented injunction—one that would require Wisconsin to use a map that failed in the State's political process, that the State's map-drawer did not adopt, and that (as the court below noted) is "problematic" under the Voting Rights Act.

The Court should reject these requests for three reasons. *First*, Petitioners do not carry their heavy burden of proving error in the Wisconsin Supreme Court's map-

drawing decision. Indeed, Petitioners skip past their obligation to demonstrate that they have Article III standing—which, under this Court's precedents, they do not. And if the Court nonetheless reached the merits, Petitioners fare no better. Given the Wisconsin Supreme Court's clearly articulated standard, which Petitioners had urged upon that court, it was "least changes" analysis (not race) that predominated in its decision adopting a legislative map. Moreover, even if race were seen as predominant in the Wisconsin Supreme Court's map-drawing, that court considered a voluminous expert record (which Petitioners ignore) and faithfully applied this Court's recent precedents interpreting the VRA and the Equal Protection Clause. In seeking to show otherwise, Petitioners misstate or skip over key facts, misdescribe the decision below, and misread this Court's precedents. They offer no basis for emergency relief.

Second, the equities cut powerfully against Petitioners' position. Rather than engage in detail with the realities of election administration in Wisconsin—and the needs of officials, candidates, and voters—Petitioners breezily assert that there's plenty of time to redo the legislative map. A closer inspection of the calendar, and the record assembled on this point in the Wisconsin Supreme Court, makes clear that Petitioners are wrong. Federal judicial intervention is especially disfavored here because it would sharply infringe upon the State's sovereign role in redistricting and administering its own elections. Five weeks ago, in a case presenting questions about the interaction of the Equal Protection Clause and the VRA, this Court held that it was too late for a federal court to overturn Alabama's maps; here, too, it would be improper for this federal court to overturn Wisconsin's maps. *See Merrill v. Milligan*,

142 S. Ct. 879, 880-81 (2002) (Kavanaugh, J., concurring in grant of applications for stays); *id.* at 883 (Roberts, C.J., dissenting from grant of applications for stays).

Finally, as Petitioners recognize, a stay alone would only invite chaos, since Wisconsin needs to know what map to use. But their solution—this Court serving as the map-drawer for Wisconsin and mandating immediate use of Petitioners' preferred map—is only more deeply flawed. To our knowledge, this Court has never provided such relief, let alone in a fast-paced emergency proceeding with skimpy briefing, no argument, no evidentiary presentations, and hundreds of pages of expert evidence that the lower court absorbed over months of deliberation. That proposed remedy is also squarely at odds with this Court's refusal to serve as a forum of first view, as well as its deference to map-drawers and fact-finders in election cases. It would be especially improper here given substantial concerns—endorsed by the Wisconsin Supreme Court—that Petitioners' proposed map violates the VRA. And it would only invite future litigants to seek equally intrusive, extravagant, and disruptive relief.

For all these reasons, Petitioners' application should be denied.

BACKGROUND

In 1982, 1992, and 2002, federal district courts drew Wisconsin's legislative districts. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012). Following the 2020 census, the legislature passed a redistricting proposal, the Governor vetoed it, and the State once again reached an impasse. App. 6-7, 37. Meanwhile, two groups of plaintiffs filed suit in federal court, and the Individual Petitioners filed an original action in the Wisconsin Supreme

Court. *See Hunter v. Bostelmann*, No. 3:21 Civ. 512 (W.D. Wis.); *BLOC v. Spindell*, No. 3:21 Civ. 534 (W.D. Wis.); *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis.). The federal court agreed that the State had primary responsibility for map-making—but when it declined to dismiss outright, the Legislature (unsuccessfully) sought mandamus relief in this Court, denouncing federal intervention in the State's redistricting process as an "affront to Wisconsin's sovereignty." *See* Petition for Writ of Mandamus at 2, *In re Wis. Legislature*, No. 21-474 (U.S. filed Sept. 24, 2021).

Ultimately, the Wisconsin Supreme Court proceedings took precedence, with private parties, the Governor, and the Legislature participating as intervenors. On September 22, 2021, the Wisconsin Supreme Court asked the parties "when (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date?" Order at 3, *Johnson* (Sept. 22, 2021). The Wisconsin Elections Commission—a bipartisan state agency—unanimously replied as follows: "[I]n order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Letter Br. of Wis. Elections Comm'n at 1, *Johnson* (Oct. 6, 2021) ("WEC Letter").[1] Citing Wis. Stat. § 8.15, which statutorily establishes April 15, 2022 as the nomination paper circulation date for candidates in Wisconsin, the WEC added that "if new maps are not in place at least 45 days before April 15, 2022, there is a

[1] https://www.wicourts.gov/courts/supreme/origact/docs/ltrbriefwec.pdf.

significant risk that there will be errors in the statewide system[.]" *Id.* at 3.[2]

In early October, the Wisconsin Supreme Court sought additional briefing from the parties on (among other things) "what factors we should consider in evaluating or creating new maps" and "what litigation process should we use to determine a constitutionally sufficient map[.]" Order at 2, *Johnson* (Oct. 14, 2021). Petitioners supported a "least changes" analysis and agreed that compliance with Section 2 of the VRA is essential. *See* Br. of Wis. Legislature at 32-41, *Johnson* (Oct. 25, 2021); Br. of Wis. Inst. for L. & Liberty at 21-27, *Johnson* (Oct. 25, 2021). The Governor (among others) disagreed with employing a "least changes" approach, explaining that it was not the proper standard. *See, e.g.*, Br. of Resp't at 8-13, *Johnson* (Oct. 25, 2021).

Just over a month later, the Wisconsin Supreme Court—divided 4-3—issued a decision agreeing with Petitioners and adopting a "least changes" methodology: "[T]his court will confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements" *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 634 (2021). Concurring, Justice Hagedorn agreed that least changes would be the "primary concern," though "traditional redistricting criteria" might also "prove helpful." *Id.* at 677 (Hagedorn, J., concurring).

On December 15, 2021, the parties submitted proposed maps—and 15 days

[2] Respondent BLOC identified March 14, 2022 as the latest date, since March 15, 2022 "is a statutory deadline for [WEC] to provide notice of those new districts to county clerks," and "Wisconsin statutes, as well as practical constraints, require election officials and candidates to complete multiple administrative steps well in advance" of the August 2022 primary. Letter Br. of Black Leaders Organizing for Communities (BLOC) at 1, *Johnson* (Oct. 6, 2021).

later, they filed responses to each other's maps. This briefing left no doubt that the Governor's map significantly outperformed all others with respect to "least changes" analysis. As confirmed by a detailed expert report, the Governor's maps moved only 14.21% of the population to different Assembly Districts, as compared to 15.84% in the Legislature's proposal. App. 170. With respect to Senate Districts, 7.83% of the population moved under the Governor's plan, while the Legislature's plan moved a negligibly different 7.79%. *Id.* And whereas the Legislature proposed changes to every single Assembly District, the Governor left 13 untouched. *Id.* With "least changes" as its core concern, the Governor's map most directly satisfied the controlling criterion advocated by Petitioners and adopted by the state court. In addition, the Governor's map met a host of state and federal requirements, including Wisconsin's significant compactness, contiguity, and population equality standards. *See* App. 168-184.

Most relevant here, the Governor's map complied with Section 2 of the VRA, which had long been understood to require the drawing of majority-minority districts in Milwaukee. *See, e.g.*, *Baldus*, 849 F. Supp. 2d at 855. As the Governor explained in his own briefs before the Wisconsin Supreme Court—and as we address at length *infra* in Part I.B—a careful study of the updated population data made clear that Section 2 required the creation of one more majority-Black district in Milwaukee. The Governor did not reach this view lightly. It followed from a study of precedent and a review of changes in population data, which revealed (among other things) a decrease in the number of white voters, an increase in the number of Black voters, the persistence of a geographically compact and politically cohesive Black population, the

endurance of highly racially polarized voting, and changes in proportionality data bearing on the totality of circumstances relevant to VRA analysis. *See* Resp. Br. of Resp't at 15-19, *Johnson* (Dec. 30, 2021). The Governor's view that Section 2 required an additional majority-Black district in Milwaukee was supported by comprehensive reports by two experts, each filed separately by BLOC and adopted by the Governor (and the Governor's expert) in his own submissions. *See id.* at 16; App. to Br. of BLOC at 13-152, *Johnson* (Dec. 15, 2021); App. to Resp. Br. of BLOC at 5-22, *Johnson* (Dec. 30, 2021); App. to Reply Br. of BLOC at 7-12, *Johnson* (Jan. 4, 2022).

The Legislature proposed a plan that fared less well under the very criterion that the Legislature itself had successfully urged the Wisconsin Supreme Court to adopt. *See* Resp. Br. of Resp't at 7-25, *Johnson* (Dec. 30, 2021). Moreover, as the Governor and BLOC explained in detail in their responsive submissions, the Legislature's plan violated the Wisconsin Supreme Court's guidance because it unlawfully diluted Black voting strength under Section 2. *See id.* at 14-19; Resp. Br. of BLOC at 8-20, *Johnson* (Dec. 30, 2021). Most notably, the Legislature packed Black voters in District 11 (increasing BVAP from 65.55% to 73.3%), while cracking Black voters elsewhere (principally in the Village of Brown Deer). *See* Resp. Br. of BLOC at 9, *Johnson* (Dec. 30, 2021). Although the Legislature proffered an expert to support its approach, his report suffered from intractable methodological flaws, including an underestimate of the total Black adult population. *Id.* at 12.

On January 19, 2022, the Wisconsin Supreme Court heard five hours of oral argument on the proposed maps. Petitioners, the Governor, the BLOC Respondents,

and other intervenors participated in this hearing. Both the Justices and the parties focused mainly on the "least-change" criterion. In attending to that touchstone consideration, the parties and the court also explored whether the proposed plans complied with the VRA. Notably, there was no serious dispute among the parties that Section 2 of the VRA applied to (and had implications for) all of the proposed maps. Justice Hagedorn thus noted that he "didn't read any arguments that the VRA doesn't apply to the black population in Milwaukee." Oral Arg. Video Recording at 1:20:20-26.[3] Counsel to the Legislature agreed, stating that "[t]he question is not whether the VRA applies," but rather "what the VRA requires." *Id.* at 4:51:24-30. In fact, in direct response to Justice Hagedorn's questioning as to whether the VRA "requires the drawing of some black opportunity districts in and around the city of Milwaukee," the Legislature's lawyer indicated that the Legislature "assumed that is so." *Id.* at 1:57:26-43. The Legislature's counsel clarified that its proposed plan "complies with the Voting Rights Act": although the "legislative process" was "race neutral," the Legislature nevertheless "made arguments about the racial makeup of the districts in [its] briefs" and its "expert [had] done a VRA analysis." *Id.* at 1:59:54-2:00:17. In other words, the Legislature insisted that it had acted in a race-neutral manner, but it also recognized (or at least assumed) that the VRA required consideration of race in Milwaukee—and it also argued and analyzed questions of race in its briefing.

On March 3, 2022, the Wisconsin Supreme Court issued an opinion adopting the Governor's legislative map. After restating its "least change" approach, the court

[3] Citations refer to the time-stamps of the argument recording, which is accessible at this link: https://invintus-client-media.s3.amazonaws.com/2789595964/6563c4ae1b950699ec71ca651028be4bc5424423.mp4.

found that "[t]he proposed senate and assembly maps making the least changes from current law are … those of Governor Evers." App. 10. The court added: "No other proposal comes close." *Id.* Although the Legislature raised complaints about districts in the Milwaukee area, the court rejected these arguments on the ground that the Legislature's proposal would "change districts even more elsewhere." App. 22.

After finding that the Governor's maps complied with all other requirements, the court turned to the VRA. In so doing, it emphasized the "unusual procedural posture," adding: "our task is to produce districts in the first instance without the benefit of a trial and a fully-developed factual record regarding the performance of specific districts." App. 27. The court further noted that "this case *does not* involve a claim under the Equal Protection Clause or VRA." App. 29 n.24 (emphasis added). Instead, the court sat as Wisconsin's "remedial map-drawers," and considered the VRA's applicability out of a desire to "act in compliance with the Constitution and applicable federal laws" while "relying on the more limited record before us." *Id.*

Because it functioned in the capacity of map-drawer, the Wisconsin Supreme Court followed cases describing the role that an assessment of VRA requirements should play "when a State invokes the VRA" during districting. App. 27. Under those cases, the state's map-drawer must show "'a strong basis in evidence' for concluding that the statute required its action." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). Given the limitations inherent to map-drawing and the possibility of reasoned dispute about exactly when Section 2 may require creating an additional majority-minority district, this "strong basis" standard "gives States 'breathing room'" in

adopting "reasonable compliance measures" when they draw maps. *Id.*

Applying that standard, the Wisconsin Supreme Court saw "good reasons" to find that "the three *Gingles* preconditions are met for the Black voting age population in the Milwaukee area." App. 29, 32. Indeed, it did not see *any* credible reasons to doubt that conclusion. To start, it was "undisputed" that the Black voting age population in this area is sufficiently large and compact to draw seven majority-Black districts. App. 29. It was "also undisputed that Black voters in the Milwaukee area are politically cohesive." App. 30. And with respect to the third *Gingles* precondition, the court found "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.'" *Id.* While the Legislature had questioned that point at oral argument, it offered no "expert analysis or argument" and its briefs did not "advance or develop this in any meaningful way." App. 31 & n.27. Accordingly, after examining the evidence before it—including numerous expert reports—the Wisconsin Supreme Court found substantial evidence supporting all three *Gingles* preconditions. App. 32.

The court next considered "the totality of the circumstances to determine whether members of a racial group 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* (quoting 52 U.S.C. § 10301(b)). Here, while recognizing the role of the Senate factors, it highlighted proportionality: "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *Id.* (internal quotation marks omitted).

Considering the evidence before it, the court observed that "[o]ver the last decade, the Black population in Wisconsin grew by 4.8% statewide, while the white population fell by 3.4%." App. 33-34. This resulted in a Black voting population statewide "between 6.1% to 6.5%," suggesting the need for "between six and seven majority-Black assembly districts." App. 34. But looking "a bit deeper"—and assessing whether an additional, seventh majority-Black district was required—the court observed that "a significant proportion of Wisconsin's Black population lives in Milwaukee County," where "the Black voting age population increased 5.5%, while the white voting age population decreased 9.5%." *Id.* Given that fact, "[t]he baseline of six districts ten years ago, combined with population trends since then and statewide population numbers now, suggest a seventh majority-Black district may be required." *Id.*

Finally, turning back to the Legislature's proposal, the court found that it "could prove problematic under the VRA." *Id.* After all, the Legislature's configuration had only "five majority-Black districts, and a sixth just under a majority." *Id.* And one of the Legislature's proposed districts exceeded "a level some courts have found to be unlawful 'packing' under the VRA." *Id.* "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.

For these reasons—and based on its independent "assessment of the totality of the circumstances"—the court found "good reasons to conclude a seventh majority-Black assembly district may be required." App. 33-35. This conclusion was explicitly *not* based on a belief that the VRA requires "drawing maps to maximize the number

of majority-minority districts." App. 35. "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." *Id.*

ARGUMENT

This Court grants a stay pending appeal "only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). An applicant must "meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (requiring a "reasonable probability" of certiorari, a "fair prospect" of ultimate reversal, and a likelihood of irreparable harm absent a stay).

The standard for a mandatory injunction is higher still: an applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings, *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013).

Petitioners do not satisfy these standards. They lack Article III standing to raise an Equal Protection Clause claim in this proceeding. Their varied attacks on the Wisconsin Supreme Court's opinion are meritless. At this stage in the election process, the equities cut overwhelmingly against the extraordinary relief they seek.

And their request for a mandatory injunction is foreclosed by precedent.

I. PETITIONERS' ATTACKS ON THE DECISION BELOW LACK MERIT

For three reasons, Petitioners cannot meet their burden of demonstrating that the decision below was erroneous (let alone that it suffered from indisputably clear error). First, Petitioners make no attempt to demonstrate that they have Article III standing to press their Equal Protection Clause claims in this federal court, and in fact they do not possess such standing. Second, Petitioners fail to demonstrate that the Wisconsin Supreme Court allowed race to predominate in its decision about which legislative map to adopt—a decision it based almost entirely on the neutral "least change" criterion. Finally, even if this Court concludes that race predominated in the Wisconsin Supreme Court's map, the decision below faithfully applies this Court's precedents to a substantial record that supports its conclusions under the VRA.

A. Petitioners Lack Article III Standing

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Thus, Article III "'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizon*a, 520 U.S. 43, 64 (1997)); *see also* Shapiro, *Supreme Court Practice* § 19.1(b) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements at that point. That is true even if the initial entry occurs at the Supreme

Court level."). Here, none of the Petitioners complies with this fundamental constitutional requirement. In fact, despite the burden they bear in seeking emergency relief, they do not even attempt to affirmatively demonstrate their entitlement to proceed in this Court—and, as we will establish below, any arguments they could offer would be foreclosed by precedent.

1. The Individual Petitioners Lack Standing

As this Court has repeatedly observed, a "racial gerrymandering claim" applies only to "the boundaries of individual districts," not to "a State considered as an undifferentiated 'whole.'" *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (*ALBC*). Given the "personal" nature of the harms alleged in any such claim, it follows (and this Court has held) that standing is limited to voters who reside in districts allegedly drawn in violation of equal protection principles. *See id.* at 262-63; *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("[A] plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district, but [] a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification."); *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

None of the Individual Petitioners resides in a district alleged to be the product of a racial gerrymander. Pet. for Original Action of Johnson et al., ¶¶ 14-17, *Johnson* (Aug. 23, 2021). So none of them has standing to raise an equal protection challenge to the legislative map adopted by the Wisconsin Supreme Court.

2. The Legislature Lacks Standing

Like the Individual Petitioners, the Wisconsin Legislature cannot satisfy the requirements of Article III. This Court has carefully delineated the circumstances in which a legislature has standing to sue—and has *never* held that a legislature itself suffers injury-in-fact from the alleged racial gerrymander of specific districts. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) (holding the Virginia House of Delegates lacked standing to bring a racial gerrymander claim).

That is unsurprising. The Court has consistently described the harm in racial gerrymandering cases as "personal," *ALBC*, 575 U.S. at 263, and "individualized," *Hays*, 515 U.S. at 744. This focus on individual voters who live in allegedly affected districts—and this rejection of statewide theories of harm—is squarely at odds with treating an alleged racial gerrymander as injuring the entire state legislature. So, too, is the Court's observation that a racial gerrymander may cause "representational harms": that harm accrues to a person with the right to representation, not to the entire branch of government in which all state representatives sit. *See id.* at 744-45.

This conclusion is bolstered by the Court's broader approach to legislative standing. State courts have long stepped in to draw state legislative maps when the political branches reach an impasse. *See Growe v. Emison*, 507 U.S. 25, 30-31 (1993). That judicial duty arises only when a state legislature fails to enact maps under state law procedures (which may include a gubernatorial veto). So there is no basis for concluding that judicial map-drawing inflicts institutional injury on the legislature, *cf. Raines*, 521 U.S. at 829, or works a permanent deprivation of legislative authority,

cf. Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 804 (2015), or undermines the state legislature's proper role in the redistricting process, *cf. Virginia House*, 139 S. Ct. at 1953. Simply put, the Legislature's authority remains fully intact. And to the extent the judicial map-drawing function gives rise to equal protection (or other) challenges, those claims are properly brought by parties alleged to suffer actual injury-in-fact from the specific alleged constitutional defect.[4]

As a fallback, the Legislature may contend that it is authorized by state law to bring a claim. That would be incorrect. Wisconsin law empowers the Legislature to intervene "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute." Wis. Stat. § 803.09(2m). Here, the Legislature seeks to bring a distinct Equal Protection Clause challenge to the remedial map adopted by the Wisconsin Supreme Court; whatever statutory authorization it had to serve as an intervenor in the state court original action, that authorization by its terms does not apply here.

Finally, the Legislature might assert that by virtue of the denial of its proposed map in the Wisconsin Supreme Court, it suffered injury-in-fact from that court's ruling adopting a map. If the Legislature did advance that argument (again, we have to guess what it might say, since it did not seek to establish its Article III

[4] Nor does the Wisconsin Supreme Court's decision inflict injury-in-fact on the Legislature by sole virtue of affecting its composition or operations: "[A]lthough redrawing district lines indeed may affect the membership of the chamber, the [Legislature] as an institution has no cognizable interest in the identity of its members," and it is "scarcely obvious how or why" changes to district lines will "profoundly disrupt its day-to-day operations." *Virginia House*, 139 S. Ct. at 1955.

standing), it would be mistaken. The issue before the Wisconsin Supreme Court, acting as a map-drawer, was solely which map to adopt. As that court noted, "this case *does not* involve a claim under the Equal Protection Clause or VRA." App. 29 n.24 (emphasis added). The Legislature participated in the state court redistricting process below only as an intervenor advocating adoption of a particular map. Its failure to persuade the Wisconsin Supreme Court to adopt its preferred map does not suddenly vest it with Article III standing (which it would otherwise lack) to bring an equal protection claim (which was not otherwise part of the case) in the federal courts (whose involvement in the redistricting process it otherwise denounced). *See, e.g.*, *Hollingsworth*, 570 U.S. at 705. Put differently, where a party would otherwise lack Article III standing to advance federal claims, it does not somehow grab hold of such standing just because it lost as an intervenor in state court (again, especially where the federal claim it seeks to maintain was not even part of that proceeding).[5]

Because Petitioners cannot demonstrate Article III standing—and certainly cannot demonstrate *indisputably clear* standing—their application cannot succeed.

B. Petitioners Present a Meritless Constitutional Claim

Separate from their lack of standing, Petitioners' position fails because it is fundamentally meritless. Rather than engage with the evidentiary record in the case,

[5] To be sure, the Court can grant review where "the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989). But here, for the reasons given above, the requisites of a case or controversy are *not* met. Moreover, *ASARCO*'s limited rule is inapplicable because the state court's adoption of the Governor's map—among varied proposals set before it—did not cause "direct, specific, and concrete" injury to the Legislature. Holding otherwise would blow open the doors to Supreme Court review from any and all state map-making decisions, even if a party otherwise lacked standing and had not even pressed their claims for relief below.

or with the Wisconsin Supreme Court's actual reasoning, Petitioners ignore the facts and attack a strawman. Along the way, they misstate settled law and misdescribe precedent. For these reasons—among others—their position must be rejected.

1. Race Did Not Predominate in the Wisconsin Supreme Court's Decision to Adopt the Challenged Legislative Maps

The first question in any racial gerrymandering claim is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916 (1995). Here, the Wisconsin Supreme Court served as Wisconsin's map-drawer—and there is no basis to conclude that race predominated in its decisionmaking, especially in light of its *express* adherence to "least change" analysis as the decisive criterion.

In determining whether race predominated, the Court affords a presumption of good faith to the Wisconsin Supreme Court: because "[f]ederal-court review of districting [decisions] represents a serious intrusion on the most vital of local functions," courts "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 915-16. "The burden of proof lies with the challenger," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), who must show that "the [state's map-drawer] subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Cooper*, 137 S. Ct. at 1463-64 (cleaned up). "Race must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the [] districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (cleaned up). "[I]n 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. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017).

Here, despite the steep standard for emergency relief and their heightened burden of proof, Petitioners make virtually no effort to show that race predominated in the Wisconsin Supreme Court's decision. *Contra Abbott*, 138 S. Ct. at 2324. Nor do they identify any specific respect in which its map conflicts with or subordinates traditional redistricting criteria. *Contra Bethune-Hill*, 137 S. Ct. at 799. Instead, they gesture at statistics about the racial demographics of challenged districts and insist that the thing speaks for itself. That conclusory assertion contrasts starkly with the fact-intensive inquiry required (and demonstrated) by this Court's precedent. *See ALBC*, 575 U.S. at 272-75; *Cromartie*, 532 U.S. at 241-57; *Miller*, 515 U.S. at 916-19.[6]

Petitioners' position is especially untenable in light of the Wisconsin Supreme Court's explicit criteria for selecting a map. At Petitioners' insistence, that court placed "least change" analysis at the very heart of its decision. *See* App. 9-10; Br. of Wis. Legislature at 32-41, *Johnson* (Oct. 25, 2021). This was no mere background

[6] There is no merit to Petitioners' suggestion that the shape of the legislative map itself proves the predominance of race. To start, Petitioners point out that Assembly District 11 expands into Ozaukee County. Pet. 11. Leaving aside that Petitioners' proposed Assembly District 23 crosses that very same county line, District 11 was shaped by efforts to increase its population while protecting Senate incumbents. Assembly District 12's expansion into Waukesha County can be similarly explained; it was drawn to keep wards intact while following the Washington County line to the north and a preexisting Assembly line to the west. In a similar vein, Districts 10, 17, and 18 avoided pairing incumbents and kept wards intact; District 16 was left largely unchanged to promote least change; and District 14 was altered to remain in one county and include two, rather than three, cities. These changes to the Assembly Districts, in turn, required changes to Senate Districts 4 and 6 that themselves uphold traditional redistricting principles—SD 4 was drawn to include adjacent wards, and SD 6 maintains similar northern, eastern, and southern boundaries to the preexisting map.

rule, *see ALBC*, 575 U.S. at 273, but rather a controlling redistricting criterion that constituted the predominant basis on which the Wisconsin Supreme Court selected a map from the options before it, *see* App. 9-10. The "least change" criterion—moving as few people as possible into new districts—prevailed over every other redistricting consideration and was the single overriding reason why the Wisconsin Supreme Court ordered the use of this specific map. It was only after the court reached this conclusion that it double-checked to ensure the map complied with state and legal standards—including the Wisconsin Constitution's controlling requirements "that districts be compact, contiguous, and proportionally populated; [that] they must respect certain local political boundaries; and [that] the districts must 'nest' three assembly districts within each senate district." App. 23-24. Nothing about this procedure suggests that race predominated in the Wisconsin Supreme Court's decisionmaking: a slate of maps was set before it; it chose the one that made the least change; and it then confirmed that its selection complied with relevant law.

It was only in this latter confirmatory analysis that the Wisconsin Supreme Court considered the VRA at the express urging of *every* party, including Petitioners (who separately sought to assure the court that its own map complied with the VRA, and presented both briefing and expert analysis to demonstrate that it had respected the VRA's requirements regarding majority-Black districting around Milwaukee).

Nothing in the record suggests that the Wisconsin Supreme Court engaged in this analysis because it believed race had predominated in its own selection of a map. To the contrary, the selection criteria it stated and applied were entirely race neutral.

Rather, this VRA analysis was a happenstance of the "unusual procedural posture" confronting the court, App. 27: beyond the undoubted neutrality of its own criteria, which led it to adopt this map without considering race at all, it wanted to double-check that if the Governor had taken race into account in drafting his proposal, he had done so consistent with the Constitution. This reflected an admirable degree of caution and rigor on the part of the Wisconsin Supreme Court. But it does not support a conclusion that the Wisconsin Supreme Court *itself* allowed race to predominate in drawing districts, or that any consideration of race by the Governor (in seeking to comply with the VRA) somehow tainted or infected the Wisconsin Supreme Court's own selection process, which was explicitly devoid of any race-based considerations. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (rejecting attempt to impute discriminatory intent to Arizona legislature based on statements by the bill's legislative sponsors or proponents); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 564-65 (D.S.C.), *aff'd* 568 U.S. 801 (2012) (similar in South Carolina).

For these reasons, Petitioners are mistaken: the legislative map chosen by the Wisconsin Supreme Court resulted from a race-neutral decisionmaking process and does not trigger strict scrutiny under this Court's equal protection precedents.

2. Even if Race Predominated in the Map Adopted Below, the Wisconsin Supreme Court's Decision is Correct

That all said, even if this Court does find that the Wisconsin Supreme Court allowed race to predominate in its map, the record powerfully supports that court's conclusion that any such limited consideration of race was justified under Section 2 of the VRA. Based on the substantial evidence before it—including multiple expert

reports—the Wisconsin Supreme Court properly found a strong basis to conclude that Section 2 required creating one more majority-Black district in Milwaukee.

a. The Wisconsin Supreme Court Correctly Stated the Law

Petitioners identify precious little that the Wisconsin Supreme Court allegedly got wrong in stating the law—and the few criticisms they level are meritless.

To start with common ground, where race predominates in drawing districts, strict scrutiny applies. *See Cooper*, 137 S. Ct. at 1464; App. 26. This Court has long assumed compliance with the VRA ranks as a compelling interest in such analysis. *See Cooper*, 137 S. Ct. at 1464; App. 27. That is partly because the VRA prohibits the manipulation of district lines in ways that "dilute the voting strength of politically cohesive minority group members." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); App. 27. When faced with a vote dilution claim under Section 2, courts ask two key questions: whether the three *Gingles* preconditions are met, and whether the totality of the circumstances shows a dilution of minority voting power. *See Abbott*, 138 S. Ct. at 2330-31; *De Grandy*, 512 U.S. at 1007; App. 28. The *Gingles* factors are especially important: "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." *Cooper*, 137 S. Ct. at 1470; App. 27-28.

As the Wisconsin Supreme Court further recognized—without serious dispute here from Petitioners—when the *Gingles* factors and the totality of circumstances support it, Section 2 can require the creation of a new majority-minority district. *See* App. 28*; see also, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (holding that "§ 2

can require the creation of these districts"); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006) (*LULAC*) (holding that Texas should have created six majority-Latino districts but had instead created only five); *id.* at 495 (Roberts, C.J., concurring) ("[I]n cases involving single-member districts, the question was whether an *additional* majority-minority district should be created[.]").

So far, so good. But as several Justices have noted, putting these principles into effect is "notoriously unclear and confusing." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *accord id.* at 883 (Roberts, C.J., dissenting) (finding "considerable disagreement and uncertainty" in this field).

Over the past decade—and as the Wisconsin Supreme Court described in its opinion—this Court has responded to such concerns by giving states "'breathing room' to adopt reasonable compliance measures." *Cooper*, 137 S. Ct. at 1464 (citation omitted); *see* App. 28. In case after case, the Court has affirmed that a state need demonstrate only "good reasons" or a "strong basis in evidence" for its assessment of what the VRA requires. *See, e.g.*, *Abbott*, 138 S. Ct. at 2335; *Cooper*, 137 S. Ct. at 1464; *Bethune-Hill*, 137 S. Ct. at 801; *ALBC*, 575 U.S. at 278. This standard is no free pass: it requires a "strong showing" based on facts and sound analysis. *Abbott*, 138 S. Ct. at 2335. But it does not demand unattainable precision that would leave states "'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 137 S. Ct. at 802 (citation omitted).

Petitioners insist (at 27-32) that this standard does not apply when state courts are called upon to draw maps. To our knowledge, no court has ever agreed with that

position, which makes it an unlikely basis on which to grant the extraordinary relief they seek. Regardless, Petitioners' view is nonsensical. Every reason supporting the allowance of "breathing room" applies with equal force to both judicial and legislative map-drawers. If "[t]he law cannot lay a trap for an unwary legislature," *ALBC*, 575 U.S. at 278, there is no good reason why it *can* lay a trap for state courts—many of whom take on redistricting reluctantly and with limited resources. Forcing judges (but not legislatures) to find mathematical precision in vote dilution doctrine would disserve the redistricting process, offend principles of federalism, and invite conflict and confusion. *See id.* It would also be inconsistent with this Court's recognition that state courts stand in the shoes of states legislatures—and exercise a core sovereign state function—when they redistrict, including when they are drawn into that role by a malapportionment dispute. *See Branch v. Smith*, 538 U.S. 254, 272 (2003); *Growe*, 507 U.S. at 30-31, 33-34; *Scott v. Germano*, 381 U.S. 407, 409 (1965).

Accordingly, if race predominated in the Wisconsin Supreme Court's drawing of district lines, it was required to ascertain whether a "strong basis in evidence" or "good reasons" supported that consideration of race under Section 2. If so, then it was proper to allow or require the creation of an additional majority-Black district.

b. The Wisconsin Supreme Court Correctly Applied the Law

The Wisconsin Supreme Court's VRA analysis centered on whether Section 2 required the creation of an additional, seventh majority-Black district in Milwaukee. Petitioners focus the bulk of their attacks on this analysis. But in launching these criticisms, they steadfastly ignore or trivialize the evidence before that court. They

also misdescribe the decision below. Taken on their terms—and approached with all due deference—the Wisconsin Supreme Court's findings are right and reasonable.

That analysis began with the *Gingles* factors. Petitioners largely skip past this point, but it's an important one: with respect to a seven-district map, the Wisconsin Supreme Court found good reason to believe (and no credible reason to doubt) that all three *Gingles* factors were satisfied. Indeed, this issue was hardly contested. No party disputed that the first and second *Gingles* factors were met (a conclusion supported by all experts). And nobody disputed that the third *Gingles* factor was met until oral argument, when the Legislature raised conclusory objections; the court rejected these late-in-the-day, unsupported contentions because they were inconsistent with expert evidence analyzing racially polarized voting behavior in prior Milwaukee elections.

There is thus no doubt that all three *Gingles* factors are present here: in other words, that the Black voting age population in the Milwaukee area is large and compact enough to form a majority in seven reasonably configured districts; that this Black voting age population is politically cohesive; and that the risk of vote dilution is stark because white voters in the area vote sufficiently as a bloc to usually defeat the Black voting age population's preferred candidates. *See* App. 29-32.

Under *Cooper v. Harris*, that conclusion goes a long way toward establishing a sufficient basis for believing "that § 2 requires drawing a majority-minority district." 137 S. Ct. at 1470. Strangely, Petitioners insist that *Cooper* cuts the other way. Pet. 24-27. But they are mistaken. In the section of *Cooper* that they repeatedly quote and

cite, the Court held only that a state lacked "good reasons" to believe Section 2 required a majority-minority district where the third *Gingles* factor was *not* satisfied. *See* 137 S. Ct. at 1470-72. Here, of course, the third *Gingles* factor *is* satisfied. So Petitioners' reliance on *Cooper* is simply misplaced. And to the extent Petitioners seek to relitigate the third *Gingles* factor, despite failing to brief or develop that position below (and despite failing to conduct an alternative expert analysis), their position is foreclosed by numerous detailed expert analyses that the Wisconsin Supreme Court properly credited in its capacity as finder of fact. *See* App. 30 & nn.26-27.

After concluding that all three *Gingles* factors are present, the Wisconsin Supreme Court turned to the totality of the circumstances analysis. Here, too, Petitioners find fault, asserting that the court failed to adhere to the text of the VRA, failed to account for proportionality, and failed to provide specific reasoning. Pet. 21-24. Once again—and with respect to each criticism—Petitioners are wholly mistaken.

To start, the Wisconsin Supreme Court *expressly* framed its totality of the circumstances analysis by reference to the statutory text, which directs attention to whether members of a racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." App. 32 (quoting 52 U.S.C. § 10301(b)). The Wisconsin Supreme Court then followed this Court's own clear guidance by undertaking a proportionality analysis in seeking to evaluate whether the statutory framework supported creation of a new majority-Black district. App. 32-34 & n.28 (engaging in a proportionality analysis and discussing this Court's use of proportionality analysis in *LULAC* and *De Grandy*). To

perform that analysis, it started by addressing concrete statewide figures that had been briefed by the parties and contested by the experts. After finding that statewide data would "suggest somewhere between six and seven majority-Black assembly districts are appropriate," the court looked "a bit deeper" to proportionality data from Milwaukee County. App. 34. There, it determined, a substantial increase in the number of Black voters and decrease in the number of white voters over the past decade indicated a starker disparity and supported the need for a new majority-Black district. *Id.* These conclusions were careful, thorough, and well supported. They constitute *precisely* the evidence-based reasoning this Court has approved.[7]

In finding good reasons to believe an additional majority-Black district was required, the Wisconsin Supreme Court cited this Court's holding that "§ 2 does not require a mapmaker to maximize minority representation." App. 33. It added: "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." App. 35. Unimpressed, and apparently unwilling to take the Wisconsin Supreme Court at its word, Petitioners devote an entire section of their brief to insisting that the Wisconsin Supreme Court improperly undertook to maximize majority-minority districts. Pet. 18-21.

[7] Petitioners assert that the court "never grappled with the proportionality of the existing six districts." Pet. 23. But the entire premise of its statewide proportionality analysis was to determine how many districts would be proportional: six or seven. It concluded that proportionality could support either number, and then more carefully probed local conditions to refine its understanding.

Moreover, all of the remaining totality of the circumstances factors strongly supported the Wisconsin Supreme Court's conclusion that the requirements of the VRA were met, as demonstrated by expert reports from Dr. Loren Collingwood and Dr. David Canon. This expert testimony confirmed the court's assessment. It also left no doubt that Black voters in Milwaukee face precisely the political and governmental impediments that the VRA exists to address. *Contra* Pet. 21-25.

No, it didn't. The rule against maximization is not a requirement that states maintain *less* than the number of majority-minority districts required by Section 2. Here, all the *Gingles* factors were fully implicated (even with a seventh district) and the totality of the circumstances (including proportionality and demographic trends) strongly supported creating a new majority-Black district. In these circumstances, the Wisconsin Supreme Court did not seek to maximize. Instead, the only thing it sought to maximize was the "least changes" approach as compared to the prior 2011 map. Beyond that, it strove only to double-check that the top "least changes" map also complied with the law—and, based on the record, it had "good reasons" and a "strong basis in evidence" to determine that the legislative map before it reflected a reasonable assessment of what Section 2 of the VRA required in Milwaukee.

* * * * *

The Wisconsin Supreme Court had a difficult job to do here. After an impasse in the Wisconsin political process forced it to draw legislative districts, it received four separate rounds of briefing and multiple rounds of expert reports and rebuttals. It issued a detailed opinion adopting the neutral criterion of "least change" analysis as the North Star of its map selection process. It made clear its intent to ensure the chosen map complied with an array of state and federal requirements. It held a five-hour hearing with argument from a host of intervenors. And finally, after months of deliberation and review, it issued an exceptionally thoughtful opinion.

Recognizing the irregular nature of his institution's role as both map-drawer and court, Justice Hagedorn adhered to the least-change criterion and selected a map

on that basis. He then double-checked to ensure there were no possible lurking state or federal defects—and, in so doing, he engaged in a VRA analysis (as urged by every party) even though his own court had not considered race at all in deciding what the legislative map would be. This VRA analysis required him to apply a series of vote dilution doctrines that Members of this Court have criticized as confounding. Yet he applied them faithfully, carefully, and with close attention to precedent and the record. His decision is properly reasoned and supported by the facts. Petitioners have offered no sound reason (let alone an indisputable one) to block it—and, in asking this Court to do so, they tread far beyond settled limits imposed by Article III.

Given all that, there is no basis for granting extraordinary relief to stay or summarily reverse the Wisconsin Supreme Court, or to issue a mandatory injunction.

II. THE EQUITIES WEIGH CONCLUSIVELY AGAINST PETITIONERS' REQUEST THAT THIS COURT OVERTURN WISCONSIN'S MAPS

Petitioners' application should also be denied because the equities cut firmly against their proposed federal judicial intervention in Wisconsin's electoral process, which soon confronts a series of statutory deadlines that can be met only through fast-paced and immediate action by local and statewide officials and candidates.

As Justice Kavanaugh explained earlier this week in voting to deny a request to alter North Carolina's congressional districts, "this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election." *Moore v. Harper*, No. 21A455, 2022 WL 667937, at *1 (Mar. 7, 2022) (Kavanaugh, J., concurring in denial of application for stay); *see also, e.g.*, *Merrill*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring) (staying federal district court order

requiring Alabama to redraw its congressional district lines in early February). "Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (Sutton, J.); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006). These decisions reflect "a basic tenet of election law" that the Court affirmed in another case arising from Wisconsin: "When an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

That principle takes on special force where, as here, a federal court is asked to encroach upon a state's sovereign prerogative to administer its own electoral process. Under this Court's precedents, the state—"through its legislative *or* judicial branch," *Growe*, 507 U.S. at 33—is entrusted with principal responsibility for carrying out the redistricting process. *See also Miller*, 515 U.S. at 915 (holding that redistricting "is primarily the duty and responsibility of the State"). Accordingly, "[i]t 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." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). That rule is well known to Petitioners, who filed a mandamus petition in this Court last year expressing outrage at the prospect of a federal court, rather than the Wisconsin Supreme Court, "oversee[ing] [the] State's redistricting process." Pet. for Writ of Mandamus at 2, *In re Wisconsin Legislature*, No. 21-474; *see also id.* at 29

("States, not federal courts, have primary redistricting responsibility[.]").

Here, the State of Wisconsin, acting pursuant to its own constitutional process, through its highest court, and with extensive fact-finding and deliberate process, has adopted legislative maps for the upcoming election. This federal court, for reasons it has expressed many times, should not attempt an on-the-fly redo of that process at this late stage and with minimal briefing. If it was too late in early February for a federal district court in Alabama to overturn a state's maps (especially based on its views about the "notoriously unclear and confusing" interaction of Section 2 and the Equal Protection Clause), then it follows *a fortiori* that it is too late in mid-March for this federal court to overturn Wisconsin's maps (especially given that Petitioners base that request on arguments arising from the same legal doctrine at stake in *Merrill*).

In seeking to resist this conclusion, Petitioners rely on two strategies. First, they discuss the harms that this Court has recognized in cases involving illegal racial gerrymanders, which (a) are not present in this case for the reasons given above and (b) are not different in kind from the alleged harms advanced by other parties who have unsuccessfully sought late-stage stays of state election procedures.

Second, and most surprisingly, Petitioners simply ignore the extensive briefing below on the deadlines and procedures for Wisconsin's election. To hear them tell it, the primary is scheduled for August 9, 2022, candidates need to qualify between April 15 and June 1, 2022, and there really aren't any other deadlines of note, so there is plenty of time to rewrite the legislative map and otherwise tinker with the election.

That account of Wisconsin's electoral process is jarringly incomplete. A more

accurate picture makes clear that preparing for the August 2022 primary election and November 2022 general election in Wisconsin is a herculean task—and that it is too late in the statutorily prescribed electoral calendar to change the legislative map without inflicting substantial disruption and confusion on candidates, local officials, and statewide election administrators. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) ("State and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.").

An important but oft-overlooked consideration in Wisconsin is that it has a highly decentralized election system. Although the Wisconsin Elections Commission (WEC) takes the lead in overseeing the electoral process, there are 1,851 moving pieces—namely, county clerks, who need to coordinate with WEC and other local government actors—which means that even seemingly minor changes in legislative maps have ripple effects across municipalities and impose significant burdens (that are magnified as the April 15, 2022 nominating petition circulation period approaches).

For these reasons, WEC explained to the Wisconsin Supreme Court last year that "in order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general elections, a new redistricting plan must be in place no later than March 1, 2022." WEC Letter at 1. As WEC explained, once new districts are drawn, its staff

"must begin the complex process of recording these new boundaries in WisVote" and "integrate the new redistricting data with existing voter registration and address data." *Id.* at 2. "This process includes manual review of ward map changes and parcel boundary data throughout [] Wisconsin." *Id.* In addition, "[c]ommunication with municipal clerks about certain addresses is required because only local clerks would have such knowledge." *Id.* This burdensome and time-consuming process is necessary to ensure "that each voter receives the correct ballot and is correctly located in their proper districts." *Id.* Moreover, as WEC explained, if legislative maps are not settled "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." *Id.* at 2-3. That would be a serious issue because "[i]mproper residency of both a candidate and a signor of a petition are bases for a challenge to a candidate's nomination papers." *Id.* Commission staff therefore need to "produce new district lists for nomination paper review," and must do so "before candidates can begin to prepare and circulate nomination papers." *Id.*

Given all this, WEC advised 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." *Id.* More recently, following entry of the Wisconsin Supreme Court's decision, WEC has reaffirmed its conclusion that staying or modifying the legislative maps "would be contrary to the goal of providing final state senate and assembly district maps in time for them to be properly implemented for the fall

general election." Letter Br. of Wis. Elections Comm'n at 2, *Johnson* (Mar. 9, 2022).[8] That is particularly true in light of the fact—unmentioned by Petitioners—that WEC and county officials are already hard at work administering the Spring 2022 statewide election for certain state executive and judicial officers. WEC Letter at 3.

Petitioners resist all this, asserting (without citing anything) that a stay will not cause disruption because there is "sufficient time" for officials to reallocate "time and resources" and implement the Legislature's preferred map before the April 15 nominating period. Pet. 34-35. But as WEC itself pointed out, it "is in the best position to say what work its staff needs to do to prepare for the fall election." *See* Letter Br. of Wis. Elections Comm'n at 1-2, *Johnson* (Oct. 13, 2021).[9] Moreover, WEC is a bipartisan agency. Here, its six commissioners (of both political parties) took no position on which map should be adopted, but have remained unanimous in their conclusions about the risks of staying or altering the State's legislative maps at this point in the primary election calendar.

And there is more: if county and statewide elections officials fall behind now, resulting in delay, confusion, and heightened error rates, there will be cascading effects across the fast-paced and interconnected deadlines that follow the nominating petitions period. By June 4, 2022, candidates must file their Statement of Economic Interests with the state ethics commission, Wis. Stat. § 19.43(4), and any challenges to nomination papers must be filed, Wis. Admin. Code § EL 2.07(2)(a). By June 7,

[8] https://www.wicourts.gov/courts/supreme/origact/docs/wec_mst.pdf.
[9] https://www.wicourts.gov/courts/supreme/origact/docs/resltrbriefswec.pdf.

2022, candidates facing challenges to their nomination papers must file a verified response. *See id.* § EL 2.07(2)(b). Meanwhile, as those issues are resolved (and there will be many more of them if this Court changes the maps in the coming weeks), county clerks must also prepare ballots and send drafts to WEC for review. *See* Wis. Stat. §§ 5.72(1), 7.10(2). Once ballots are finalized—and by no later than June 22, 2022—county clerks must deliver ballots and supplies to municipal clerks for the partisan primary. *Id.* § 7.10(3). By June 23, any requested absentee ballots must be delivered, *id.* § 7.15(cm), and two days later is the federal deadline for transmission of eligible overseas and military voters, 52 U.S.C. § 20302(a)(8). There are then a series of continuing deadlines through July and into August. *See, e.g.*, Wis. Stat. §§ 5.15(6)(b), 5.25(3), 6.02(1-2), 7.50(2)(em), 6.875(6), 10.06(2)(j).

If Petitioners' application is granted, the foreseeable (indeed, the inevitable) result will be a significant disruption to local and statewide election administration in Wisconsin, as well as confusion for candidates and voters—particularly as they seek to understand what districts they live in, what offices can be sought, and who can sign which nominating petitions. See *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (warning against "unanticipated and unfair consequences for candidates, political parties, and voters, among others"). The Wisconsin Supreme Court clearly took the risk of disruption seriously, issuing a decision on March 1, 2022. That considered judgment of the experts, officials, and judges charged with supervising Wisconsin's upcoming election deserves respect, not the rough treatment that Petitioners would have this Court inflict.

III. PETITIONERS ARE NOT ENTITLED TO THE REMEDY THEY SEEK

For the reasons just given, Petitioners' request for emergency relief should be denied: they fail to establish error (let alone indisputably clear error) in the Wisconsin Supreme Court's opinion and the equities cut overwhelmingly against rewriting the rules for Wisconsin's upcoming primary. But Petitioners do not seek only a stay; they also seek a mandatory injunction from this Court "that orders the Legislature's 2021 districts as the appropriate districts until this Court resolves the Applicants' request for review." Pet. 4-5. To our knowledge, this Court has *never* issued the unusual remedy that Petitioners request: throwing out the map adopted by a state's high court, selecting its own preferred redistricting plan in the first instance, and then directing the State to implement that plan during the pendency of an appeal. That request would be startling in *any* circumstance. Here, though, it arrives with just weeks to spare before statutory deadlines requiring substantial advance preparation, with limited briefing that hardly addresses any of the underlying factual disputes or evidentiary issues, and with a request that the Court replace in mere days a map that the Wisconsin Supreme Court adopted after months of study and deliberation.

The standard for a mandatory injunction from this Court is an exceptionally high one. Petitioners come nowhere close to meeting it. There is no good reason for this Court to rewrite the rules and award an unprecedented injunction at this stage in the electoral process. Even if this Court had the most urgent and grievous concerns about the ruling below (which it should not), the proper course would be a remand to the Wisconsin Supreme Court with directions to rule expeditiously to try to mitigate

the ensuing disruption. Otherwise, this Court risks ordering the use of a map that itself violates federal law, and further risks establishing a precedent that invites all manner of mischief as parties ask this Court for ever-more-disruptive remedies.

A. This Court Should Not, for the First Time Ever, Undertake the Act of Redistricting State Electoral Maps in the First Instance

This Court has long acknowledged that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe*, 507 U.S. at 34. Consistent with that principle, and its own state constitution, the Wisconsin Supreme Court exercised original jurisdiction over this redistricting matter, conducted five months of highly fact-intensive evidentiary proceedings, reviewed hundreds of pages of briefs, evidence, and expert reports, analyzed several proposed maps, and held a five-hour oral argument. *See supra* pp. 4-10. After careful deliberation and studious application of governing law to the underlying facts, the Wisconsin Supreme Court adopted the map that made "the least change" from the 2011 redistricting maps and complied with the law. App. 35.

Even if the Court believed that the Wisconsin Supreme Court committed clear error in that process, the appropriate remedy would be to send this matter back to the Wisconsin Supreme Court so that the *state* court can correct any such errors and retain its principal role as mapmaker in the redistricting process. It would not be what Petitioners urge: the United States Supreme Court serving as map-drawer for Wisconsin and ordering use of a specific map in an emergency posture, on a highly expedited turnaround, and without full briefing or argument. That course of action would unquestionably be, in Petitioners' own words, an "affront to Wisconsin's

sovereignty." Petition for Writ of Mandamus at 2, *In re Wis. Legislature*, No. 21-474.

It would also be exceedingly irregular. When this Court invalidates a state's redistricting map, its practice is to remand for further proceedings—not to redraw the lines itself in the first instance. *See, e.g.*, *LULAC*, 548 U.S. at 447; *Perry v. Perez*, 565 U.S. 388, 399 (2012); *accord Clark v. Calhoun County*, 88 F.3d 1393, 1408 (5th Cir. 1996); *Sanchez v. Colorado*, 97 F.3d 1303, 1329 (10th Cir. 1996) (similar). While lower federal courts have sometimes engaged in map-drawing when faced with state maps that they view as constitutionally defective, they play that role only rarely and reluctantly and with significant fact-finding, expert input, and deliberation. Unlike those lower federal courts, moreover, this Court serves as a forum of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Particularly given the deference due to state mapmakers and judicial fact-finders in election law cases—and also accounting for the unique sovereign interests at stake in our federal system—it would be a jolting departure from past practice and principle for this Court to issue a mandatory injunction requiring use of a particular legislative map. *See Bethune-Hill*, 137 S. Ct. at 800; *ALBC*, 135 S. Ct. at 1272; *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *accord Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) ("We have stressed repeatedly the special need for detailed findings of fact in vote dilution cases."). That innovation would surely lead a horde of future parties to seek comparable relief, and would drag this Court into a thicket it has never previously seen fit to enter.

B. Petitioners Ask This Court to Adopt an Interim Map That Raises Substantial Concerns under the VRA

As if that were not enough, the map that Petitioners ask this Court to mandate in an emergency posture is itself substantively infirm. In the Wisconsin Supreme Court's view, Petitioners' favored map is "problematic under the VRA." App. 34. That conclusion is both correct and entitled to deference. If the coffin were not already sealed on Petitioners' unprecedented request, this would surely be the final nail.

In rejecting the Legislature's proposed map, the Wisconsin Supreme Court critically noted that the Legislature "submitted a configuration with five majority-Black districts, and a sixth just under a majority." App. 34. The court added that one of the Legislature's proposed majority-Black districts "has a Black voting age population of 73.28%, a level some courts have found to be unlawful 'packing' under the VRA." *Id.* at 34 (citing *Ketchum v. Byrne*, 740 F.2d 1398, 1418 (7th Cir. 1984)). For these reasons, which had been fully briefed before it, the court had "some concern that a six-district configuration could prove problematic under the VRA." App. 34.

If anything, the Wisconsin Supreme Court understated the issue based on the record before it. The Legislature's proposed map packs 73.28% Black voting age population into District 11 and 61.81% Black voting age population into District 17, *see* App. 178 (expert report of Dr. Clelland). In addition, the Legislature's map contains only five performing majority-Black districts because its proposed District 10 contains 47.2% Black voting age population. *See* App. 34; App. to Resp. Br. of BLOC, Collingwood Rpt. at 10-12, *Johnson* (Jan. 4, 2021); Resp. Br. of BLOC at 9, *Johnson* (Dec. 30, 2021). By packing Black voters into fewer districts, the

Legislature's plan "minimize[s] their influence in the districts next door"—a textbook violation of Section 2 of the VRA. *De Grandy*, 512 U.S. at 1007.

Despite fulsome briefing on this issue below, and despite an explicit warning by the Wisconsin Supreme Court that their proposed map may itself be unlawful, Petitioners devote only a *footnote* to the point. Pet. 38 n.15. In that footnote, they do not cite any of the expert reports or findings below, or any of the briefing below that canvassed this issue, or any of their own statements at oral argument concerning their own efforts to comply with the VRA, or any cases supporting their bare assertion that their maps do not "pack" voters in violation of Section 2. For a party to ask this Court to issue a mandatory injunction imposing a legislative map, and then to say so little in defense of that map, is itself a sign that their request is beyond the pale.

This Court has never been in the business of mandating specific maps for state elections. It certainly has never done so on such a thin record, with so little time, in contradiction of a fulsome state supreme court redistricting process, and with election officials actively advising that is it too late to change the maps without causing harm to candidates, voters, and the statewide election administration. Now is not the time to open that door. Petitioners' application should be denied in its entirety.

CONCLUSION

Petitioners' application for a stay and injunctive relief—and alternative petition for writ of certiorari and summary reversal—should be denied.

Respectfully submitted,

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