No. _____

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

EMERGENCY APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI AND SUMMARY REVERSAL

Adam K. Mortara
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, IL 60606
(773) 750-7154
mortara@lawfairllc.com

Kevin M. St. John
BELL GIFTOS ST. JOHN LLC
532 Wall Street, Suite 2200
Madison, WI 53718
(608) 216-7990
kstjohn@bellgiftos.com

Jeffrey M. Harris
Taylor A.R. Meehan
Counsel of Record
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

Richard M. Esenberg
Anthony F. LoCoco
Lucas T. Vebber
WISCONSIN INSTITUTE FOR LAW & LIBERTY
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org

Counsel for Applicants

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants include the Wisconsin Legislature, a Respondent-Intervenor in the proceedings before the Supreme Court of Wisconsin. Applicants also include individual voters Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, who were Petitioners in the proceedings below.

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

Respondents also include the Wisconsin Elections Commission and 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. And Respondents include Janet Bewley, in her official capacity as the Senate Democratic Minority Leader, who was a Respondent-Intervenor 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 Somesh Jha, who were Petitioner-Intervenors in the proceedings below.

The proceedings below were:

1. *Johnson, et al. v. Wisconsin Elections Commission, et al.*, No. 2021AP1450-OA (Supreme Court of Wisconsin), where the final opinion and order was issued on March 3, 2022. Applicants moved for an expedited stay pending appeal on Friday, March 4, 2022. Applicants alerted the state supreme court that it would be filing this application for a stay given the exigency. The state supreme court has not ruled on the stay application.

Related proceedings include:

1. *Hunter, et al. v. Bostelmann, et al.*, No. 3:21-cv-512 (W.D. Wis.), where proceedings have been deferred for the state-court proceedings.

2. *Black Leaders Organizing for Communities, et al. v. Spindell, et al.*, No. 3:21-cv-534 (W.D. Wis.), where proceedings have been deferred for the state-court proceedings.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

/s/ Taylor A.R. Meehan

Taylor A.R. Meehan
Counsel of Record
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

Richard M. Esenberg
Anthony F. LoCoco
Lucas T. Vebber
WISCONSIN INSTITUTE FOR LAW & LIBERTY
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org

Counsel for Applicants

Dated: March 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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

Wisconsin is now home to the 21st-century racial gerrymander. Days ago, the Supreme Court of Wisconsin issued an opinion and order to resolve malapportionment claims with respect to Wisconsin's existing state assembly and senate districts. In place of the existing districts, the court adopted the Wisconsin Governor's proposed redistricting plan. Race dominated the drawing and adoption of this plan, the product of an untheorized and deeply wrong re-writing of the Voting Rights Act. The districts themselves tell the story:

Table 1: Black Voting-Age Population of Wisconsin Senate and Assembly Districts

Wisconsin State Legislative District	2022 Black Voting-Age Population[1]
Wisconsin State Senate District 4[2]	50.62%
Wisconsin State Senate District 6	50.33%
Wisconsin State Assembly District 10	51.39%
Wisconsin State Assembly District 11	50.21%
Wisconsin State Assembly District 12	50.24%
Wisconsin State Assembly District 14	50.85%
Wisconsin State Assembly District 16	50.09%
Wisconsin State Assembly District 17	50.29%
Wisconsin State Assembly District 18	50.63%

[1] App.178 (Clelland Opening Expert Report).

[2] In Wisconsin, three assembly districts are nested into one senate district. *See* Wis. Const. art. IV, §5. Senate District 4 comprises predominantly Black Assembly Districts 10, 11, and 12. Senate District 6 comprises predominantly Black Assembly Districts 16, 17, and 18.

These court-ordered districts, each touching Wisconsin's largest city of Milwaukee, mark a radical redraw from Wisconsin's past redistricting plans. Previously, there were six majority-Black assembly districts and two majority-Black senate districts that ranged between 51 and 62 percent Black voting-age population. *See* App.51 (Ziegler, J., dissenting) (¶87). All were wholly contained in Milwaukee County.

But now? By order of the Supreme Court of Wisconsin, Wisconsin election officials must intentionally dial down the Black voting-age populations of these existing districts to meet the new quota of 50 percent. *See id.* ("[T]he Governor carves seven districts by race with the exactness of only the most gifted social scientists…. At oral argument and in briefing, it was clear that race imbued the decisions of the Governor in drawing districts."). The court could not "say for certain" that this racial targeting was lawful but imposed it anyway because there were "good reasons" under the Voting Rights Act to make room for one more (barely) majority-Black district in Wisconsin's state assembly. App.11, 33 (¶¶10, 47). The redraw is nothing short of a court-ordered maximization of majority-Black districts (over the objections of the Milwaukee minority representatives who railed against earlier iterations of the Governor's redistricting plan during the legislative session, *infra*, p. 34). There is no excuse for it. *See Johnson v. DeGrandy*, 512 U.S. 997, 1016-17 (1994); *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). As even the state supreme court acknowledged, "Here, we *cannot* say for certain on this record that seven majority-Black assembly districts are required by the VRA." App.33 (¶47) (emphasis added). Such stark racial

discrimination requires a better justification than "maybe the Voting Rights Act might require something like this."

Classifying citizens on the basis of race "is constitutionally suspect." *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 904 (1996). That is so even if the racial classification is "benign or the purpose remedial." *Id.* at 904-05. There is no redistricting exception to that fundamental constitutional principle. "[R]eapportionment is one area in which appearances do matter." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 647 (1993). "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 657; *see also Holder v. Hall*, 512 U.S. 874, 906 (1994) (Thomas, J., concurring in judgment) ("our voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race"). In Wisconsin—just as everywhere—racially gerrymandering districts perpetuates the very harm that the Voting Rights Act was enacted to eliminate. *See Shaw I*, 509 U.S. at 647-48, 657.

This Court's immediate intervention is justified. Applicants respectfully request that the Court issue a stay pending appeal and, given the exigency, also construe this emergency application as a petition for writ of certiorari. The decision below is contrary to this Court's precedents in *DeGrandy*, *Miller*, and *Cooper v. Harris*,

137 S. Ct. 1455 (2017). And the state court's refusal to scrutinize the Governor's racial targets bears no resemblance to the strict scrutiny applied by this Court in redistricting cases for decades. The decision is ripe for summary reversal. The Supreme Court of Wisconsin cannot so badly flout this Court's precedent without correction. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531-32 (2012) (per curiam); *V.L. v. E.L.*, 577 U.S. 404, 408 (2016) (per curiam); *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (per curiam). At the very least, the case should be stayed and scheduled for plenary review; especially so when the Court has announced it will be hearing Alabama's redistricting appeals to clarify the "notoriously unclear and confusing" Voting Rights Act obligations in redistricting, *Merrill v. Milligan*, 595 U.S. ___, ___ (2022) (Kavanaugh, J., concurring) (slip op. 6), and "resolve the wide range of uncertainties arising under" the existing test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Merrill*, 595 U.S. at ___ (Roberts, C.J., dissenting) (slip op. 2).

In the meantime, there must also be a map for Wisconsin's forthcoming August primary elections that is not the product of an unconstitutional quota system. Applicants therefore respectfully request an emergency stay of the state supreme court's order to carry out that racial gerrymander while this Court considers the Applicants' requested relief. In addition, Applicants request that this Court issue an injunction pending appeal that orders the Legislature's 2021 districts as the appropriate

districts until this Court resolves the Applicants' request for review. *See* Part III, *infra.* Those districts passed both houses of the Legislature, are race-neutral, and retain the existing 2011 district lines except for changes for shifting populations.

OPINION BELOW

The Wisconsin Supreme Court's opinion and order was entered on March 3, 2022. It is reproduced at App.1-166 and is reported at __ N.W.2d __, 2022 WL 621082.

JURISDICTION

This Court has jurisdiction over this application for a stay pending appeal and injunction pending appeal under 28 U.S.C. §1257 and §1651. Section 1257 gives this Court jurisdiction to hear Applicants' appeal regarding the constitutionality of Wisconsin's legislative districts. Both a stay of the Wisconsin Supreme Court's order and an injunction pending appeal would be in aid of this Court's jurisdiction over those constitutional issues. *See, e.g.*, *Smith v. E.L.*, 577 U.S. 1046 (2015) (granting application for stay of state-court judgment pending *V.L.*, 577 U.S. 404).

BACKGROUND AND PROCEDURAL HISTORY

I. The Wisconsin Constitution vests the Wisconsin Legislature with the responsibility for redistricting every decennial. Wis. Const. art. IV, §3. After receiving 2020 Census data from the federal government in August 2021, the Legislature set off on its constitutionally required task. After soliciting public comment, holding a public hearing, and extended floor debates, the Legislature passed new redistricting plans to reapportion its existing congressional, state senate, and state assembly districts. 2021 Wis. Senate Bill 621; 2021 Wis. Senate Bill 622. The Wisconsin Governor ultimately vetoed the Legislature's redistricting bills.

II.A. Meanwhile, litigation had already begun 24 hours after the delivery of 2020 Census data to Wisconsin. Two sets of plaintiffs filed suit in the U.S. District Court for the Western District of Wisconsin. *See Hunter v. Bostelmann*, No. 3:21-cv-512; *BLOC v. Spindell*, No. 3:21-cv-534. In the federal suits, plaintiffs alleged that Wisconsin's existing districts were now malapportioned and ought to be enjoined in advance of the 2022 elections. The plaintiffs proclaimed that a political impasse between the Legislature and the Governor was inevitable and prayed for the federal court to take over and redraw Wisconsin's districts. (And unsurprisingly, once litigation was underway and with the prospect of court-ordered districts, the Governor did veto the Legislature's redistricting bills.) The federal proceedings were later stayed for this parallel action in the Wisconsin Supreme Court.[3]

B. In the Wisconsin Supreme Court, Applicants Johnson, O'Keefe, Perkins, and Zahn filed an original action and raised the same malapportionment claims. Parties to the federal proceedings intervened in the state action, and the federal court eventually deferred to the state court's proceedings. *See Growe v. Emison*, 507 U.S. 25 (1993). Once the Governor vetoed the Legislature's redistricting bills, the state supreme court solicited redistricting proposals from all parties and announced the redistricting criteria it would apply to choose between those proposals. *See Johnson v. Wis. Elections Comm'n* ("*Johnson I*"), 967 N.W.2d 469 (Wis. 2021). Those criteria

[3] There is nothing further for the lower federal court to do now that there is a judgment from the state supreme court. The parties may seek review of that judgment only in this Court. 28 U.S.C. §1257(a); *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

included compliance with the Fourteenth Amendment, U.S. Const. amend. XIV, and Section 2 of the Voting Rights Act, 52 U.S.C. §10301, for Wisconsin's legislative districts in the Milwaukee area. *Id.* at 634, 643.

The Legislature submitted the same redistricting plans that passed the Legislature after public comment, public hearing, and floor debate. It is undisputed that the Legislature drew its districts without any consideration of race. App.52 (Ziegler, C.J., dissenting) (¶88).[4] The Legislature's plan retained the existing geography of the Milwaukee-area state senate and assembly districts, reapportioning them only as necessary to adjust for shifting populations. *See id.*; *see also* 2021 Wis. Joint Senate Resolution 63 (announcing redistricting policy of "[r]etain[ing] as much as possible the core of existing districts, thus maintaining existing communities of interest"). The resulting plan contained the same number of predominantly Black districts in Milwaukee as there were in the 2011 redistricting plan.[5]

[4] The legislative record for the Legislature's redistricting bills is publicly available at https://docs.legis.wisconsin.gov/2021/proposals/sb621. As discussed in the Wisconsin Speaker's public statement on the bill, "employees were instructed not to consider race when drafting the legislative maps, instead, relying on classic redistricting principles, adjusting for population changes." Testimony of Speaker Robin J. Vos on SB621 (Oct. 28, 2021), https://bit.ly/3CkjU0v.

[5] In one of the Legislature's six predominantly Black districts, the resulting Black voting-age population is less than 50 percent. *Accord Cooper*, 137 S. Ct. at 1472 (explaining that a district need not exceed 50 percent to comply with the Voting Rights Act). Even so, the Black voting-age population remains the largest demographic in the district. *See* "SB621 Assembly Districts," Legislative Technologies Services Bureau (LTSB) Open Data Page, https://bit.ly/3q34ZD9 (csv with demographic data). And in litigation, the Legislature's Voting Rights Act expert established that in reconstituted elections using past election data minority voters would elect their candidate of choice.

The Legislature's plan—making minimal changes to the existing districts—is consistent with the demographic reality that Milwaukee's Black population remained almost exactly the same between 2010 and 2020. The Black voting-age population increased by roughly 6,600 people in Milwaukee County over the course of the last decade—an increase that would account for only 11 percent of a roughly 59,000-person Wisconsin assembly district.[6] And the six predominantly Black assembly districts (6.1 percent of the 99-member assembly) remain proportionate to the Black voting-age population statewide (between and 6.1 and 6.5 percent). *See* App.34 (¶48).

In the court below, the Governor submitted an alternative redistricting plan created for the Wisconsin Supreme Court litigation. And it is that plan that the Wisconsin Supreme Court ultimately chose for the State's state senate and assembly districts. The Governor's plan maximized the number of majority-Black assembly districts in the Milwaukee area—increasing from the existing six districts to seven. According to the Governor, because seven (bare) majority-Black assembly districts *could* be drawn in the Milwaukee area, the Voting Rights Act required that they *must* be drawn. *See* App.53 (Ziegler, C.J., dissenting) (¶90).

The Governor's proposed seven assembly districts are possible only if drawn with unmistakable mathematical precision when it comes to race:

---

[6] Specifically, the county's Black voting-age population ("Black 18") grew from 168,280 individuals in 2010 to 174,889 individuals in 2020. *Compare* "2020 Wisconsin Counties with P.L. 94-171 Redistricting Data," *with* "2010 Wisconsin Census Voting Age Population Counts, LTSB, https://legis.wisconsin.gov/ltsb/gis/data/; *see Johnson I*, 967 N.W.2d at 476 (ideal population for Wisconsin assembly and senate districts is 59,533 and 178,598 respectively); *see also* App.33-34 (¶48).

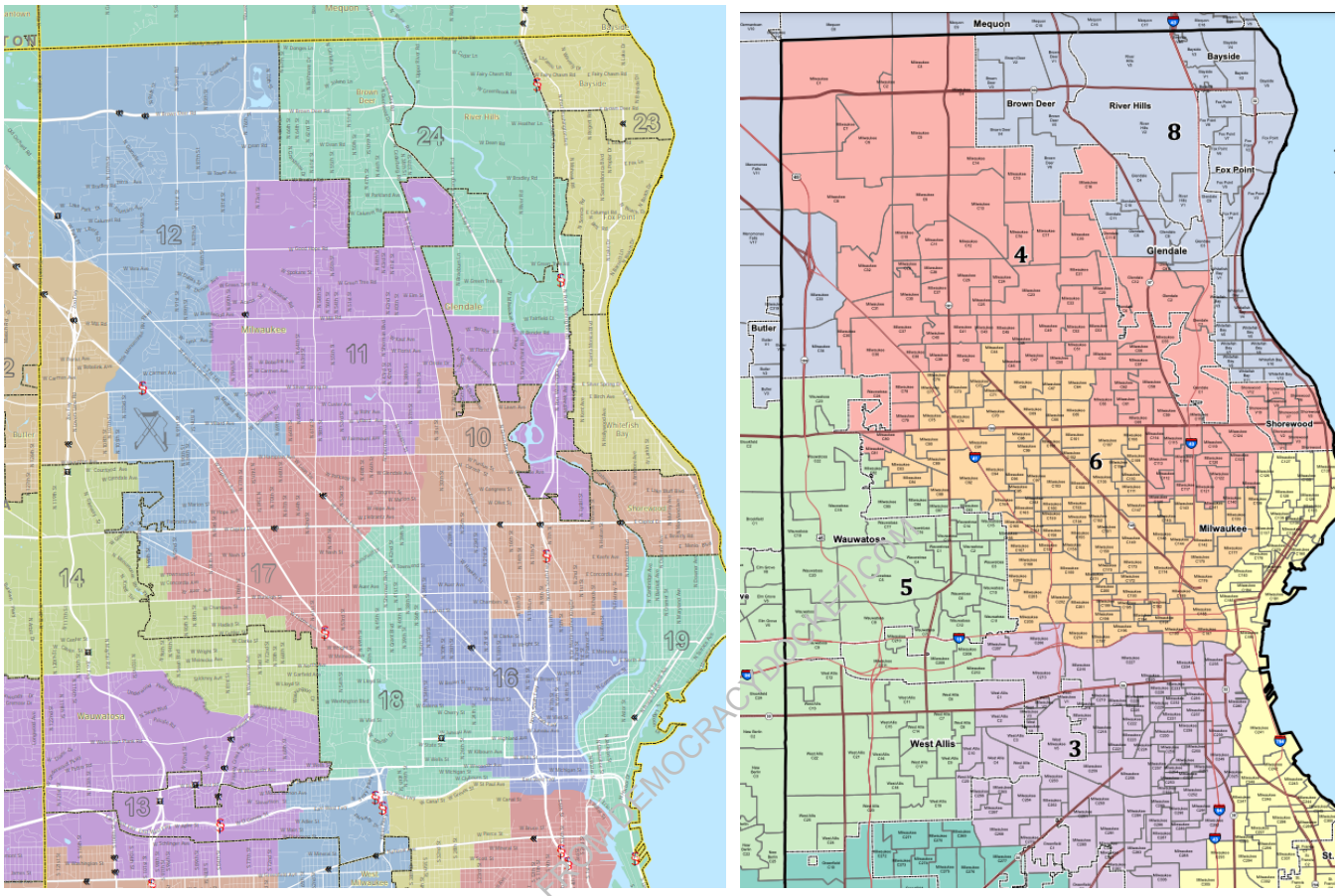
Table 2: Black Voting-Age Population Comparison

	2011 District BVAP	Proposed District BVAP[7]
Senate District 4	58.4%	50.62%
Senate District 6	61.0%	50.33%
Assembly District 10	61.8%	51.39%
Assembly District 11	61.9%	50.21%
Assembly District 12	51.5%	50.24%
Assembly District 14	(not previously majority-BVAP)	50.85%
Assembly District 16	61.3%	50.09%
Assembly District 17	61.3%	50.29%
Assembly District 18	60.4%	50.63%

Shown above, the Black voting-age population in the existing 2011 districts ranged between 58 and 61 percent in the state senate and between 51 and 62 percent in the state assembly. App.51 (Ziegler, C.J., dissenting) (¶87). And shown below, those existing majority-minority districts abided by Milwaukee County's natural borders. No more. The Governor's proposal reduces every district to 50 percent and not a percentage more (save for Assembly District 11 at 51 percent) by making significant geographic changes to the northern and western district lines to make room for a seventh district. *See id*.

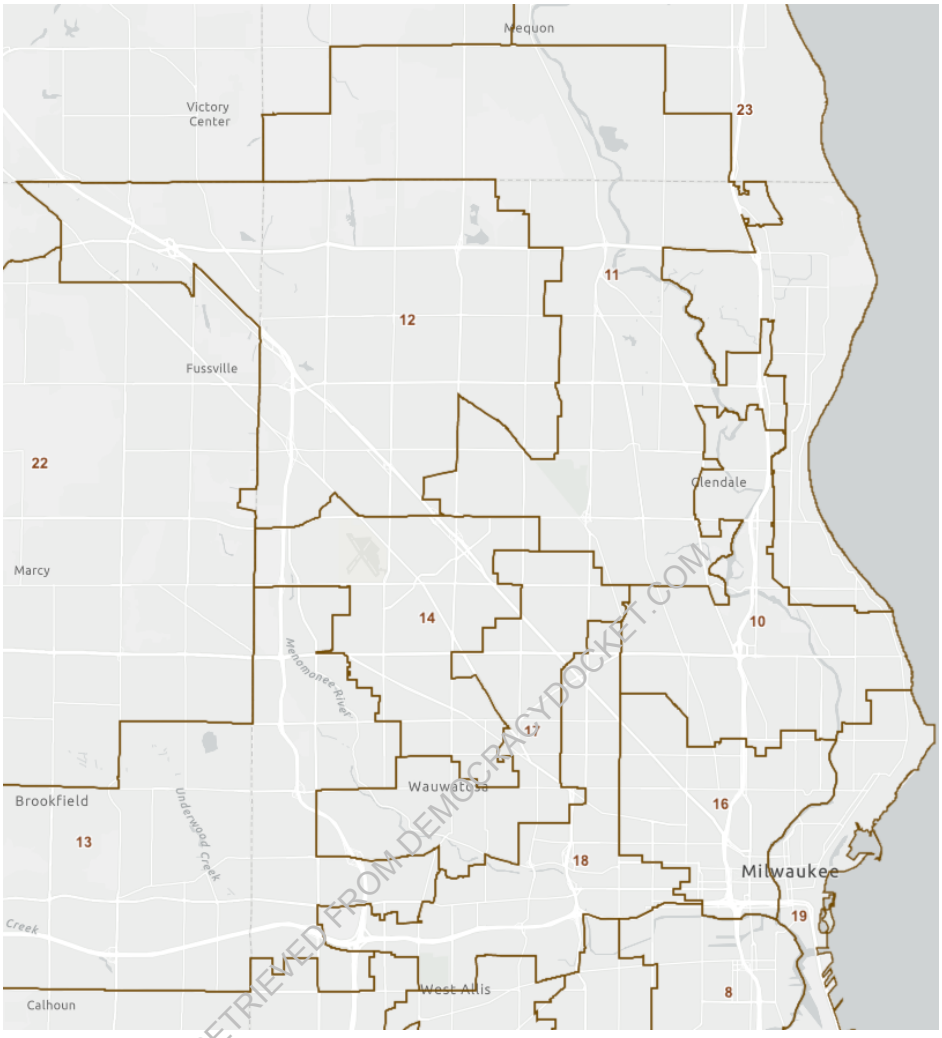
[7] *See* App.178 (Clelland Opening Expert Report).

Figure 1: 2011 Existing 2011 Assembly (Left) and Senate (Right) Districts[8]



[8] *See* "Milwaukee County Assembly Districts," LTSB (2012), https://bit.ly/35DM6iR; "Milwaukee County Senate Districts," LTSB (2012), https://bit.ly/3pHYVzA. Noted above, Wisconsin's predominantly Black Senate District 4 comprises Assembly Districts 10, 11, and 12. Wisconsin's predominantly Black Senate District 6 comprises Assembly Districts 16, 17, and 18.

Figure 2: Governor Proposed Assembly Districts[9]



Shown above, the Governor's proposal expands Assembly Districts 11 and 12 that once stopped at the Milwaukee County line and pushes them into Ozaukee County (to the north) and Waukesha County (to the west). Senate District 4

[9] *See* "Proposed Assembly District Plans to the Wisconsin Supreme Court–Proposed Assembly Districts by Governor," LTSB, https://bit.ly/37busUl. Corresponding senate districts available at "Proposed Senate District Plans to the Wisconsin Supreme Court–Proposed Senate Districts by Governor," LTSB, https://bit.ly/3pG9vHe. By expanding Assembly Districts 11 and 12 north and west beyond the county line and pushing Assembly Districts 16, 17, and 18 south and east, the Governor's proposal makes room for a seventh Black assembly district in Assembly District 14.

(comprising Assembly Districts 10, 11, and 12) now stretches from Lake Michigan to Ozaukee County's City of Mequon, to Waukesha County's Village of Menomonee Falls. In the Governor's proposal, nearly 40,000 Ozaukee and Waukesha County residents—who are overwhelmingly white[10]—are added to that predominantly Black senate district. *See* App.245 (Bryan Response Report 61). Similarly, Milwaukee's predominantly Black Senate District 6 (comprising Assembly Districts 16, 17, and 18) pushes east and south, leaving behind more than 20,000 residents who were previously districted in that predominantly Black district. *Id.* With these geographic changes, all to make room for a seventh majority-Black assembly district, the Governor's proposal dilutes the Black voting-age population of every majority-Black assembly and senate district to 50 percent with exacting precision.

III. On March 3, 2022, the Wisconsin Supreme Court issued its final order and opinion. The court enjoined the existing 2011 legislative districts as malapportioned, given the 2020 Census data. App.35 (¶52). And the Court ordered Wisconsin election officials to replace the existing districts with the Governor's proposed plan, described above. *Id*. It is that decision—the choice of the Governor's unconstitutionally racially gerrymandered plan for Wisconsin's state senate and assembly districts—that is the subject of this stay application and request for summary reversal or plenary review.

[10] The Black voting-age populations of Ozaukee County (to the north of Milwaukee County) and Waukesha County (to the west) *is less than 2 percent*, as compared to Milwaukee County's 24-percent Black voting-age population. *See* "2020 Wisconsin Counties with P.L. 94-171 Redistricting Data," LTSB, https://legis.wisconsin.gov/ltsb/gis/data/.

In its opinion, the Wisconsin Supreme Court acknowledged the possible constitutional problem with its chosen race-conscious remedy. The Governor's plan might well be a racial gerrymander. *See* App.26-27, 33 (¶¶38, 47). But the court believed there were "good reasons" to think that the *Gingles* preconditions were met in the Milwaukee area, and that was sufficient to order the maximization of seven majority-Black districts. *See* App.29 (¶42). The court stated flat out: "Here, we *cannot* say for certain on this record that seven majority-Black assembly districts are required by the VRA." App.33 (¶47) (emphasis added); *see also* App.33-34 (¶48) (finding that small population changes "*suggest* a seventh-Black district *may* be required" (emphasis added)). But because it was "*possible* to draw a seventh sufficiently large and compact majority-Black district," App.30 (¶43) (emphasis added), the court ordered it must be drawn.[11] Without any sense of irony, the court ended with an acknowledgment that "the VRA does not require drawing maps to maximize the number of majority-minority districts," but concluded that the Governor's maximization of majority-Black districts in Milwaukee was just part and parcel of "the leeway states have to take 'actions reasonably judged necessary' to prevent vote dilution under the VRA." App.35 (¶50) (quoting *Cooper*, 137 S. Ct. at 1472). In other words, even

[11] The court added that it had "*some* concern that a six-district configuration *could* prove problematic" because of a "risk of packing." App.34 (¶49) (emphasis added). Tellingly, the court never actually concluded that the Legislature's race-neutral six-district configuration was "packed." *See also* App.84-85 (Ziegler, C.J., dissenting) (¶127 & n.18) (rejecting packing concern). Nor did the court consider more tailored alternatives to address its "concern"—for example, by shifting the boundaries between two existing majority-Black districts. Rather, the court's only solution was the most dramatic one—maximizing the number of majority-Black districts and thereby diluting the Black voting-age population of all such districts to 50 percent.

though the Voting Rights Act cannot require the maximization of majority-Black districts—as this Court has held unequivocally—no harm, no foul if the State perpetuates a racial gerrymander to maximize such districts anyway.

ARGUMENT

A stay pending appeal is appropriate when there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction;" (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).

The All Writs Act, 28 U.S.C. § 1651(a), also empowers this Court to grant injunctive relief as necessary to preserve its appellate jurisdiction. *See, e.g.*, *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-02 (1945). Because the Wisconsin Supreme Court's decision is appealable only to this Court by writ of certiorari, 28 U.S.C. §1257(a), the requested injunctive relief pending appeal would be "in aid of [this Court's] jurisdiction," §1651(a), and "cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.1.

This case features the exceptional circumstances making immediate relief appropriate, in anticipation of summary reversal or plenary review on the merits. (Given the exigency, Applicants request that this Court also construe their application as a petition for certiorari and summary reversal.) Absent this Court's intervention, Wisconsin's forthcoming senate and assembly primary elections will be run on racially gerrymandered district lines that could not possibly survive this Court's

Equal Protection Clause scrutiny. Wisconsinites will soon suffer irreparable injury once they are re-sorted into the Wisconsin Supreme Court's redrawn, racially gerrymandered plan. Once a voter is made to vote in these race-based districts, as compared to the Legislature's race-neutral districts, the harm is done.

I. This Court is Likely to Grant the Petition for Certiorari and Summarily Reverse.

The decision below directly contradicts what this Court has said about the Equal Protection Clause time and again, based on the state supreme court's backward view of the Voting Rights Act. The decision is irreconcilable with this Court's repeated warning that maximization of majority-minority districts is not required by the Voting Rights Act and that such maximization would raise "serious constitutional concerns." *See Miller*, 515 U.S. at 926; *see also DeGrandy*, 512 U.S. at 1016-17 ("Failure to maximize cannot be the measure of §2."). Part I.A, *infra.* The decision is also irreconcilable with the text of the Voting Rights Act, Part I.B, *infra*, and this Court's decision in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). If the North Carolina Legislature violates the Equal Protection Clause when setting a racial target, the Wisconsin plan violates the Equal Protection Clause when setting the same racial target. Part I.C., *infra.* Finally, the decision contradicts more than two decades of decisions that *refuse* to permit States to use the Voting Rights Act as a shield for open and obvious violations of the Fourteenth Amendment's Equal Protection Clause. States did not get a free pass in *Cooper*, *Miller*, *Shaw II*, *Abbott*, *Vera*, and others. Part I.D, *infra.* The same Equal Protection Clause applies in Wisconsin. For any one of these reasons, reversal is warranted and likely. *See, e.g.*, *V.L.*, 577 U.S. at 408; *James*, 577 U.S. at

307; *Nitro-Lift Techs.*, 568 U.S. at 21; *KPMG, L.L.P. v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (summary reversal appropriate where a lower court has "failed to give effect to the plain meaning of [federal law] and to the holding of [precedent]").

A. The Wisconsin Supreme Court imposed the Governor's unconstitutional maximization of majority-Black districts.

The Governor proposed a redistricting plan driven by the maximization of majority-Black districts. According to the state supreme court, his proposal showed it was "possible to draw a seventh sufficiently large and compact majority-Black district." App.30 (¶43). How was it possible? By diluting every majority-Black district to 50-percent Black voting-age population and no more:

Table 1: Black Voting-Age Population of Wisconsin Senate and Assembly Districts

Wisconsin State Legislative District	2022 Black Voting-Age Population[12]
Wisconsin State Senate District 4	50.62%
Wisconsin State Senate District 6	50.33%
Wisconsin State Assembly District 10	51.39%
Wisconsin State Assembly District 11	50.21%
Wisconsin State Assembly District 12	50.24%
Wisconsin State Assembly District 14	50.85%
Wisconsin State Assembly District 16	50.09%
Wisconsin State Assembly District 17	50.29%
Wisconsin State Assembly District 18	50.63%

The proposal—which will now be employed in Wisconsin's forthcoming elections absent this Court's intervention—is a textbook case for maximization of

[12] App.178 (Clelland Opening Expert Report).

majority-minority districts in a redistricting plan. *See, e.g.*, *DeGrandy*, 512 U.S. at 1016 & n.12 (hypothesizing similar maximization proposal, where every majority-minority district was drawn at 51 percent). As the Governor's self-reported Black voting-age population statistics show, there is no way to squeeze any more majority-Black districts out of Wisconsin's existing demography. And the only possible inference from the Governor's racial precision is that the Governor's plan was drawn with these racial targets at the forefront. *See* App.52 (Ziegler, C.J., dissenting) (¶87) (quoting Governor's intent "'to produce seven majority Black districts in the Assembly'").

Worse, the state supreme court adopted the Governor's proposal while expressly *refusing* to hold that the Voting Rights Act required it: "Here, we *cannot* say for certain on this record that seven majority-Black assembly districts are required by the VRA." App.33 (¶47) (emphasis added). The state supreme court might as well have said, "we *cannot* say for certain that the Governor's proposal is constitutional, but we adopt it anyway." And while the court acknowledged that the Governor's proposal must survive strict scrutiny, App.26-27 (¶38), the court applied no scrutiny at all. For the court, it was sufficient that there are "*good reasons* to believe a seventh majority-Black district is needed to satisfy the VRA," and the court need look no further in ensuring the adopted districts are constitutional. App.11 (¶10) (emphasis added). That look-the-other-way approach contradicts this Court's resolution of more than 25 years of Equal Protection Clause challenges in the redistricting context.

B. The decision below is contrary to this Court's decisions in *DeGrandy* and *Miller*.

Most fundamentally, the state court's decision contradicts this Court's warnings in *DeGrandy* and *Miller*. The Voting Rights Act does not (and cannot) require maximization of majority-minority districts. There are thus no "good reasons" for thinking that the Voting Rights Act could compel maximization of majority-minority districts. *See, e.g.*, *Miller*, 515 U.S. at 925-97 (rejecting that maximizing majority-minority districts to obtain Section 5 preclearance excused State's racial gerrymander). Summary reversal in light of these decisions alone is justified.

First in *DeGrandy*, this Court considered a challenge to legislative districts in Florida's Miami-Dade County. 512 U.S. at 1004. The district court had concluded that the State could have drawn more majority-Hispanic districts than it did, and thus diluted the votes of Hispanic voters under Section 2 of the Voting Rights Act. *Id.*; *see also id.* at 1013 (describing the claim as "whether provision for somewhat fewer majority-minority districts than the number sought by plaintiffs was dilution of minority votes"). On appeal, the State argued that the district court erred by "mistaking [this Court's] precedents to require the plan to maximize the number of Hispanic-controlled districts." *Id.* at 1006. Importantly, *DeGrandy* assumed that all three *Gingles* preconditions were met—but the question remained whether something less than the maximization of majority-minority districts was permissible even when all *Gingles* preconditions were met. *See id.* at 1007 (explaining that the State did not contest that *Gingles* preconditions two and three were met); *id.* at 1008-09 (assuming, without deciding, that first *Gingles* condition was satisfied).

This Court answered that question with a resounding no: "Failure to maximize cannot be the measure of §2." *Id.* at 1017. "[R]eading the first *Gingles* condition in effect to define dilution as a failure to maximize [even] in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted." *Id.* at 1016. After *DeGrandy*, there is no basis to believe that the Voting Rights Act requires an additional district solely because it can be drawn (*i.e.*, maximizing districts).

Second in *Miller*, the Court reaffirmed what it said the year earlier in *DeGrandy*. There, the Department of Justice refused to preclear Georgia's proposed plan (with two majority-Black congressional districts) because Georgia did not maximize the number of possible majority-Black congressional districts (with three majority-Black congressional districts). *Miller*, 515 U.S. at 906-07. To obtain preclearance, Georgia ultimately acceded to a "'max-black' plan" and adopted a redistricting scheme with a maximum three majority-Black congressional districts. *Id.* at 907-09. Voters sued, alleging the plan was an unconstitutional racial gerrymander. *Id.* at 909. This Court agreed that the plan's maximization of majority-minority districts could not be reconciled with the Equal Protection Clause, whether or not the State or federal government thought it was necessary for Section 5 preclearance. *Id.* at 925-26. This Court held that the Voting Rights Act did not "require States to create majority-minority districts wherever possible," and described such an interpretation of the Voting Rights Act as "beyond what Congress intended and we have upheld." *Id.* at 925; *see id.* at 927 ("There is no indication Congress intended such a far-reaching

application of §5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises."); *accord Shaw II*, 517 U.S. at 913 (rejecting maximization theory). The Court described any such maximization policy as raising "serious constitutional concerns." *Miller*, 515 U.S. at 926.

So too here, there is no escaping that the state supreme court adopted a plan that redraws Wisconsin's senate and assembly districts solely for the sake of maximizing the number of majority-Black districts. Districts were drawn with ultimate precision—dispersing Black voting-age individuals to hit a 50-percent target and thereby ensuring the maximum possible number of districts in the Milwaukee area. The notion that the Voting Rights Act could "require" the Wisconsin Governor's max-Black plan is irreconcilable with the plan rejected in *Miller* and the arguments rejected in *DeGrandy*. Just as the maximization theories in those cases raised "serious constitutional concerns," *Miller*, 515 U.S. at 926; *see DeGrandy*, 512 U.S. at 1016, there is no avoiding the same serious constitutional concerns here. There is no Voting Rights Act justification for the state supreme court's insistence that Wisconsin's election officials carry out elections using district lines that dilute every majority-Black district to a bare majority with all the hallmarks that race predominated.

Finally, the court below cannot evade scrutiny by merely acknowledging that "the VRA does not require drawing maps to maximize the number of majority-minority districts" and then asserting (without justification) that it did "not seek to do so here." App.35 (¶50). Defendants tried the same thing in *Miller*. It didn't work. Even when the Department of Justice "disavow[ed]" any policy of maximization and

"seem[ed] to concede its impropriety," this Court instead considered the open and obvious evidence that maximization was in fact the driving force behind the State's three-district plan and ruled it unconstitutional. *Miller*, 515 U.S. at 924-25. *Miller* compels the same here. The overt maximization of majority-Black districts in Wisconsin is alone grounds for summary reversal.

C. The decision below is contrary to the Voting Rights Act text.

The state supreme court erred in another way. According to *Gingles*, the "essence of a §2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities" for voters. 478 U.S. at 47. For that reason, the statute's text does not simply ask: can an additional district be drawn? The text asks about the "totality of circumstances" for an evaluation of whether electoral opportunities are "equally open"—meaning equal opportunities. 52 U.S.C. §10301(b); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337-38 (2021) ("The concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting….").

The totality of circumstances inquiry can balance various factors, and consideration of some are required before a court deems electoral opportunities not "equally open" and orders race-based remedial districts. *See Gingles*, 478 U.S. at 48. In *DeGrandy*, for example, this Court faulted the district court for failing to adequately consider proportionality as part of the totality of circumstances: "The court failed to ask whether the totality of facts, including those pointing to proportionality"—meaning "the number of majority-minority voting districts to minority members' share of

the relevant population"—"showed that the new scheme would deny minority voters equal political opportunity." *DeGrandy*, 512 U.S. at 1013-14 & n.11.

The court below made exactly the same error. It never asked the fundamental question of whether the existing districts, without the addition of a seventh majority-Black assembly district, are "equally open." (Nor did it ask the lurking question of whether the addition of a seventh majority-Black assembly district might actually have the opposite effect: eliminating the existing equal opportunity districts, *see, e.g.*, *id.* at 1016 n.12.) The court never considered whether an additional majority-Black assembly district—made possible only by reducing the Black voting-age population in all such assembly and senate districts to 50 percent—was necessary to remove a state-imposed obstacle to the equal participation of Black voters. *Brnovich*, 141 S. Ct. at 2337 (defining "equally open" as "without restrictions as to who may participate" or "requiring no special status, identification, or permit for entry for participation"); *cf. League of United Latin American Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (discussing markers of discrimination including "poll tax[es], an all-white primary system, and restrictive voter registration time periods"); *DeGrandy*, 512 U.S. at 1018 (discussing "ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, the white primary, and other practices censurable when the object of their use is discriminatory"). If voters can in fact elect their candidate of choice in bare-majority 50-percent districts, that merely raises the question of whether there are any circumstances that could require the creation of such race-based districts in the first place. Nor could the court have answered these questions

because the Governor did not even attempt to prove anything on this score. *See* App. 65-66 (Ziegler, C.J., dissenting) (¶105) ("the Governor has failed to provide any evidence specific to his proposed districts warranting a finding of white bloc voting that can effectively overcome a politically-cohesive black voting bloc").

Rather than consider any of this, the court instead made general observations about population changes over the decade. But by the court's own telling, those population changes were slight and nowhere near the tens of thousands of individuals that would be necessary for a new majority-Black assembly district. *See* App.33-34 (¶48) (tabulating, without citation, that Black voting-age individuals in Milwaukee County increased by 5.5%); *see also supra*, p. 8 & n.6 (Black voting-age population increased by roughly 6,600 individuals, or roughly 11 percent of an assembly district).

With respect to proportionality in particular, the court articulated that proportionality was relevant in its reticulation of relevant law, App.32-33 (¶46), but never grappled with the proportionality of the existing six districts. As of 2021, the State's existing majority-minority districts (6.1 percent of the assembly and senate) are in "substantial proportion" to the Black voting-age population statewide (between 6.1 and 6.5 percent, App.34 (¶48)). *See DeGrandy*, 512 U.S. at 1013. That failure to weigh proportionality as part of the totality of circumstances was reversible error in *DeGrandy*, and it is reversible error here too. *See id*. ("But the District Court was not critical enough in asking whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority

districts in substantial proportion to the minority's share of voting-age population."); *accord Miller*, 515 U.S. at 922 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.").

D. The decision below is contrary to this Court's decision in *Cooper*.

The state supreme court's approval of the Governor's racial targets also cannot be reconciled with this Court's rejection of North Carolina's racial targets as unconstitutional in *Cooper*. The state supreme court repeatedly invoked the first part of this Court's decision in *Cooper*:

> "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. Or said otherwise, the State must establish that it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines."

137 S. Ct. at 1464 (citation omitted); *see* App.11, 27-29, 32 (¶¶10, 40-42, 45); *see also* App.122-23 (¶¶198-99) (criticizing majority's misuse of *Cooper*'s "good reasons"). But the court failed to read on.

Cooper answers the question about the constitutionality of the Governor's proposed 50-percent districts. They are unconstitutional. *Cooper* itself says that setting a 50-percent target for districts, based on a misunderstanding of the Voting Rights Act, and then drawing district lines to hit that target are not "good reasons" to forgive a racial gerrymander. *Cooper*, 137 S. Ct. at 1472. Whatever "breathing room" a State may have to adopt a redistricting plan, *id.* at 1464, that "breathing room" does not

include setting racial targets "whose *raison d'etre* is a legal mistake." *Id.* at 1472. Even when the Voting Rights Act is in play, a "constitutional wrong occurs when race becomes the dominant and controlling consideration." *Shaw II*, 517 U.S. at 905.

The facts of *Cooper* are illuminating. At issue were two of North Carolina's congressional districts. *Cooper*, 137 S. Ct. at 1465. After the 2010 Census, the State altered Congressional District 1 so that the Black voting-age population in the district would increase from 48.6 to 52.7 percent. *Id.* at 1466. Similarly, the State altered Congressional District 12 so that the Black voting-age population in the district would increase from 43.8 to 50.7 percent. *Id.* The mapmakers "purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population." *Id.* at 1468. The State assumed the Voting Rights Act required hitting that 50-percent target. *Id.* at 1471-72, 1476. Voters sued, alleging that the districts were unconstitutional racial gerrymanders. *Id.* at 1466. This Court affirmed that "the State's interest in complying with the VRA could not justify that consideration of race" in redrawing the districts. *Id.* at 1468; *accord Miller*, 515 U.S. at 921 ("compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws").

The same failure of proof that doomed North Carolina dooms the Governor's districts here: "North Carolina c[ould] point to no meaningful legislative inquiry into … whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to §2 liability." *Cooper*, 137 S. Ct. at 1471.

There was no "strong basis in evidence to conclude that §2 demands such race-based steps." *Id.* Here too, absent from the state supreme court's majority opinion is any basis, let alone a strong basis, for why "§2 demands such race-based steps" necessary to create the seven-district plan. *See* App.33 (¶47) (refusing to conclude that seventh district was actually required); *see, e.g.*, App.42-43, 47, 53-54, 65-66, 77, 82-83 (Ziegler, C.J., dissenting) (¶¶70, 80, 90-91, 105, 118, 125); App.149-51 (Bradley, J., dissenting) (¶¶237-39) (explaining that the Governor failed to establish "a strong basis in evidence" for a seventh district). The only explanation the court offered was that population changes (to the tune of roughly 6,600 Black voting-age individuals in Milwaukee) might require a seventh district, without any further explanation, because there is none. App.33-34 (¶48); *see supra*, n.6. If that is a sufficient "strong basis in evidence," then racial gerrymandering for all.

To be sure, a State's obligations under the Voting Rights Act can at times be "notoriously unclear and confusing," *Merrill*, 595 U.S. at ___ (2022) (Kavanaugh, J., concurring) (slip op. 6), and "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim," *id.* at ___ (Roberts, C.J., dissenting) (slip op. 1-2) (citing various cases and articles). But this is not a case on the margins.

The state supreme court's decision transgresses clear and obvious constitutional guardrails put in place by this Court decades ago. Just as in *Cooper*, the "*raison d'etre*" for the Wisconsin districts adopted here "is a legal mistake"—in fact, multiple legal mistakes. 137 S. Ct. at 1472. There are no "good reasons" that can justify

maximizing the number of majority-Black districts. Part I.A, *supra*. The Court rejected that argument in *Miller*, 515 U.S. at 926-27, and *DeGrandy*, 512 U.S. at 1016-17. Nor can a court assure itself there were "good reasons" when the court fails to even take on the totality-of-circumstances inquiry. Part I.B., *supra*. And there are no "good reasons" for the unconstitutional act of setting an arbitrary 50-percent target without some "strong basis in evidence" that a redistricting plan that fails to hit that target will give way to Section 2 liability. *See Cooper*, 137 S. Ct. at 1471-72.

Cooper itself rejects the shrug of the shoulders that the court below gave to the Governor's racial gerrymander. It is inconceivable that the race-based sorting perpetuated in the Governor's map can survive this Court's scrutiny. It is contrary to the most basic promise of the Equal Protection Clause: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial … class." *Miller*, 515 U.S. at 911-12 (quotation marks omitted); *see also Holder*, 512 U.S. at 907 (Thomas, J., concurring in judgment) ("few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act").

E. The court's "good reasons" rationale cannot substitute for strict scrutiny.

Finally, the Supreme Court of Wisconsin's adoption of the "good reasons" framework for itself—the highest court of the State of Wisconsin—makes no sense. The court was not sitting in as a mapdrawer, equivalent to a legislature or another state actor. The court was presiding over the parties' malapportionment dispute

and—consistent with its judicial role—was set to provide a modest remedy, based on the existing districts, to redress the malapportionment without introducing any new federal-law violation. *See Johnson I*, 967 N.W.2d at 474. Consistent with its judicial role, the court invited parties to propose malapportionment remedies that minimized changes from the existing districts enacted by the Legislature in 2011. *Id.* at 488-92.

In a most puzzling turn, the Supreme Court of Wisconsin has since declared that it will accept the Governor's proposed remedy *without* finding one way or another whether the Voting Rights Act would *require* his race-conscious plans: "[W]e cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA." App.33 (¶47). That approach is contrary to decades of this Court's cases rejecting States' redistricting plans as unconstitutional, whatever their purported justification under the Voting Rights Act. This Court does not punt on Equal Protection Clause claims. The Supreme Court of Wisconsin is no less a court. Since the Madisonian Compromise was struck, and as required by the Supremacy Clause, the state court must interpret and abide by the Constitution and laws of the United States. *See Haywood v. Drown*, 556 U.S. 729, 746-47 (2009). It has every obligation to actually determine whether the Governor's plan survives constitutional scrutiny before imposing his racial gerrymander on Wisconsin's nearly 6 million citizens.

In *Cooper* itself, this Court agreed that a state legislature has some "leeway to take race-based actions reasonably judged necessary under a *proper interpretation* of the VRA," but "that latitude" could not "rescue" North Carolina's congressional districts predicated on a specious understanding of the Voting Rights Act. *Cooper*, 137

S. Ct. at 1472 (emphasis added). Again, the same logic applies here. Where the Governor's (and the court's) interpretation of the Voting Rights Act is legally erroneous, the racial gerrymander cannot be forgiven. There are no "good reasons" for maximization or 50-percent racial targets to achieve such maximization. The attempted justification for Wisconsin's districts fails, just as North Carolina's did in *Cooper*.

Similarly, a "good reasons" claim was rejected in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). There, the Court examined the constitutionality of a Texas house district that "was not copied" from old plans but instead created anew after redistricting litigation. *Id.* at 2334. The State increased the Latino minority population in the challenged district and removed other populations "in an effort to make it a Latino opportunity district" in excess of 50 percent. *Id.* The State argued it had "good reasons" for the racial gerrymander. *Id.* This Court considered the evidence—including evidence from recent elections that "may be suggestive" but was not enough standing alone to "alter the district's lines solely on the basis of race"—and concluded that it was "simply too thin a reed to support the drastic decision to draw lines in this way." *Id.* As *Abbott* illustrates, a State must do more than assert that the Voting Rights Act applies and that the first three *Gingles* preconditions are satisfied: "good reasons" means "the State made a strong showing of pre-enactment analysis with *justifiable conclusions*." *Id.* at 2335 (emphasis added).

Or take this Court's decision in *Miller*. That decision would make no sense if the state supreme court's "good reasons" framework were correct. Discussed above, *Miller* involved a plan maximizing majority-Black districts because the U.S.

Department of Justice told the State that is what it had to do. 515 U.S. at 906-07. When that redistricting plan reached this Court, the Department's demand was no excuse for the State's Equal Protection Clause violation: "We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922. Here, just as in *Miller*, "good reasons" are not sufficient to forgive racial gerrymandering when those "good reasons" go beyond what the Voting Rights Act can constitutionally require. "[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Id.* at 921. Here too, no reading of the Voting Rights Act can lead a State to believe there are "good reasons" for maximizing majority-minority districts. *See id.* at 925-27; *DeGrandy*, 512 U.S. at 1016-17. And it was incumbent on the state supreme court to say so, just as this Court said so in *Miller*.

Likewise in *Bush v. Vera*, 517 U.S. 952 (1996), this Court did not merely accept the State's assertions about Voting Rights Act compliance as good enough. *See id.* at 976 (plurality op.) (discussing State's arguments that race necessarily predominated in redistricting to comply with Sections 2 and 5 of the Voting Rights Act). Rather, this Court applied searching scrutiny: "Strict scrutiny remains, nonetheless, strict." *Id.* at 978. And even a "district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid §2 liability." *Id.* at 979. The state supreme court never asked that question—not anything close to it. The Court in *Vera* went on to explain that a State cannot, for

example, justify "bizarrely shaped" and "far from compact" districts merely by waving the flag of Voting Rights Act compliance. *Id.* But here, the Wisconsin districts all hit their racial targets by reaching beyond the Milwaukee County line to grab "white filler" with mathematical exactness and the utmost geographic strangeness. *See* App.43-44 (¶72) (Ziegler, C.J., dissenting). That "bizarre shaping … cutting across … other natural or traditional divisions" is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race." *Vera*, 517 U.S. at 980-81 (plurality op.). The state supreme court's lack of scrutiny for such overt racial gerrymandering flies in the face of *Vera*'s admonition: "If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotypes by government actors." *Id.* at 968-69.

And in *Shaw II*, this Court similarly refused to accept the State's argument that a congressional redistricting plan was constitutional because it was narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act. *Shaw II*, 517 U.S. at 908. The Court concluded that the State erred in its interpretation of the Voting Rights Act and refused to forgive the State's racial gerrymander based on that legal error: "[W]e find that creating an additional majority-black district was not required under a correct reading of §5 and that District 12, as drawn,

is not a remedy narrowly tailored to the State's professed interest in avoiding §2 liability." *Id.* at 911.[13] No such scrutiny was applied here.

Had the state supreme court applied the same scrutiny to the Governor's specious Voting Rights Act arguments—arguments that directly contradict this Court's decisions in *DeGrandy, Miller, Cooper*, and others—the court would have likewise found the Governor's racial gerrymander unforgivable. Just as the addition of another majority-Black district in *Shaw II* was not narrowly tailored (to the ends of Section 2 compliance) to survive strict scrutiny, the addition of another (barely) majority-Black district here cannot possibly be narrowly tailored to survive strict scrutiny.

As this Court's precedents illustrate, it is no answer to an Equal Protection Clause violation to say that the Voting Rights Act might—but might not, App.33 (¶47)—require an additional district at whatever cost. A court must answer the question of what is required by the Voting Rights Act and, from there, determine whether the district plan is narrowly tailored to that end.

II. The Balance of Harms and Public Interest Warrant a Stay.

A stay of the Wisconsin Supreme Court's order is necessary to prevent irreparable harm, will not substantially injure other parties in the interim, and will serve the public interest. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). This balance of

[13] The State also failed to show that any state "interest in ameliorating past discrimination … actually precipitate[d] the use of race in the redistricting plan." *Id.* at 910. The same flaw exists here. Discussed in Part I.B, the court never considered—and the Governor presented no evidence—about any need to remedy past discrimination. *See* App.42-43, 47, 53-54, 65-66, 77, 82-83 (Ziegler, C.J., dissenting) (¶¶70, 80, 90-91, 105, 118, 125) (discussing dearth of evidence). The court simply assumed, without deciding, that seven districts *might* be required by the Voting Rights Act. Full stop.

harms consistently leads this Court to grant stays to related to redistricting orders that are likely unlawful. *See, e.g.*, *Merrill v. Milligan*, 595 U.S. ___ (2022); *Perry v. Perez*, 565 U.S. 1090 (2011) (granting stay of court-ordered, unreviewed map); *Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J., in chambers); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J.) (although "unsure whether the possibility of reversal is significant," granting stay of court-ordered pre-clearance of new maps); *Bullock v. Weiser*, 404 U.S. 1065 (1972) (granting stay pending *White v. Weiser*, 412 U.S. 783 (1973), and staying court-ordered, unreviewed map); *Whitcomb v. Chavis*, 396 U.S. 1064 (1970) (denying motion to vacate stay); *Kirkpatrick v. Preisler*, 390 U.S. 939 (1968).

An election based on a court-ordered racial gerrymander (beyond any conceivable limits of the Equal Protection Clause) causes grave and irreparable harm. Instead of the Legislature's race-neutral reapportionment plan, the court approved the Governor's racial quotas. Such race-based redistricting, when allowed to stand, "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. It sends an "equally pernicious" message to elected representatives in those districts that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* at 648. And proceeding with an unlawful election procedure "threaten[s] irreparable harm" to the

public "by casting a cloud upon … the legitimacy of the election," *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

Already, Wisconsin's elected representatives have called out that harm here. Early in the redistricting process, the Governor assembled a redistricting commission that gerrymandered the Milwaukee area districts in the same way—expanding them beyond the county line to maximize and dilute Milwaukee's predominantly Black districts with predominantly white out-of-county voters. Minority representatives of those districts explained that such districts would combine communities with major differences in economic interests, poverty, and racial demographics. The minority representatives put the lie to any argument that such racially gerrymandered districts could serve the aims of the Voting Rights Act. During a floor vote on the Governor's commission's plans, one minority representative asked rhetorically, "Why? That's going across the county line. Doesn't make sense. Doesn't make sense at all…. That's not going to stick when it comes to people's interests. That's not going to stick when it comes to thinking you're going to elect people that look like me."[14] *Cf. Vera*, 517 U.S. at 980-81 (plurality op.). A stay pending this Court's review will prevent this racially motivated and divisive classification from taking force in Wisconsin.

But without a stay, Wisconsin's forthcoming senate and assembly elections will be conducted under that racially gerrymandered map. There is no reason for that. There is sufficient time to avoid irreparable and unconstitutional harm if the

[14] Assembly Floor Session (Nov. 11, 2021), recording available at https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/ at 2:46:55.

Legislature's requested relief is considered on an expedited basis. Wisconsin's primaries are scheduled for August 9, 2022, and the candidate qualifying window for those primaries is between April 15, 2022, and June 1, 2022. Wis. Stat. §§5.02(12s), 8.15. At the same time, a stay will preserve the opportunity for legislatively enacted districts—which are themselves "a declaration of [the] public interest" and consistent with the Legislature's constitutionally prescribed redistricting role, *Virginian Ry. Co. v. Sys. Fed'n No.* 40, 300 U.S. 515, 552 (1937); *see White v. Weiser*, 412 U.S. 783, 795-96 (1973); Wis. Const. art. IV, §3—to be used in the forthcoming elections, rather than the racially gerrymandered plan.

On the other side of the ledger, Respondents will not incur irreparable harm if this Court stays the state supreme court's order for the time necessary for the Court to consider Applicants' petition for certiorari and request for summary reversal. No party can claim an interest in preparing for elections at the direction of an unconstitutionally gerrymandered redistricting plan when there is sufficient time before the August primary to address that unconstitutional flaw. *See* Wis. Stat. §5.02(12s) (August 2022 primaries), §8.15(1) (April to June 2022 nominations period). In all events, there is no irreparable harm in being required to abide by the Constitution.

Importantly, this is not a situation where a State has already dedicated its time and resources to implementing one map and a new judicial decision would upset the *status quo* or cause confusion at this point in the election calendar. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Rather, until last Thursday, no new map was in place for the decennial. The existing 2011 districts were governing law.

And only the Legislature's proposed redistricting plans had been through the legislative process for public comment and bill passage. *See* 2021 Wis. Senate Bill 621. A stay here avoids a hasty and unreviewed change to that *status quo*. It would preserve the current districts while permitting parties to exhaust their appellate remedies with respect to the serious constitutional violations inherent in the Governor's redrawn districts. Unlike other contexts in which a court invalidates a State's already enacted redistricting plan, here full appellate review would steady the turmoil created by the state court's decision and is necessary to restore "[c]onfidence in the integrity of our electoral process." *Purcell*, 549 U.S. at 4.

Furthermore, a stay pending appeal is in the public interest. Millions of Wisconsinites who are not a party to this action will nevertheless be the latest subjects of the "balkaniz[ation] … into competing racial factions" in redistricting. *Shaw I*, 509 U.S. at 657. An immediate stay, moreover, will prevent costly and confusing implementation of election procedures in Wisconsin. State officers will not have to spend their time and resources implementing and enforcing the court-ordered Governor's plan that this Court is likely to reverse as unconstitutionally gerrymandered. *See, e.g.*, *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986). A stay will ensure that the State does not incur such costs and confusion needlessly. *See McDaniel*, 448 U.S. at 1322 ("The applicants assert that, absent a stay, they will be required immediately to expend substantial money on preclearance procedures, and that this expenditure will be irretrievable."). The balance of harms and the public interest weigh in favor of a stay.

III. An Injunction Pending Appeal Is Warranted Under the All Writs Act.

Finally, Applicants further request that this Court enter an injunction pending appeal. 28 U.S.C. §1651(a). An injunction pending appeal is warranted when (1) the applicants are likely to prevail on the merits, (2) denying relief would lead to irreparable injury, and (3) granting relief would not harm the public interest. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam); *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.). This Court has granted injunctions pending appeal in a range of circumstances. *See, e.g.*, *Am. Trucking*, 483 U.S. at 1306 (granting injunction pending appeal "requir[ing] Arkansas state officials to establish an escrow fund in which payments of [state tax] … shall be placed"); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (granting injunction of upcoming county election pending appeal); *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting injunction pending appeal imposing new protocol on federal agency for processing religious exemptions); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 65 (enjoining state executive order restricting religious services pending appeal).

For all the foregoing reasons, an injunction pending appeal to stop the use of the racially gerrymandered districts is warranted here too in light of the Wisconsin Supreme Court's order. This Court should issue an injunction pending appeal that instructs Wisconsin election officials to prepare for the forthcoming primaries using the districts passed by the Legislature—such injunction to dissolve when this Court reverses the court below or otherwise disposes of the petition for certiorari. The

Legislature's 2021 districts retain the cores of the existing 2011 districts and deviate only to adjust for shifting population. As the Wisconsin Supreme Court already helpfully explained, the Legislature's plan was second-best on the court's least-changes metrics for evaluating the proposed plans. *See* App.20-21 (¶¶27-30) (showing that the core retention of existing individuals in the Legislature's assembly plan was beaten only by the Governor's plan). Unlike the Governor's plan, the Legislature's districts are better apportioned and free from the taint of any racial predominance.[15] The districts were drawn without regard to race. *See supra*, p.7. And they are the natural choice for a substitute redistricting plan, pending this Court's review and likely reversal, that is not a racial gerrymander and that also complies with the state supreme court's announced rubric for choosing between plans.

CONCLUSION

The Voting Rights Act is a grant of authority "to uncover official efforts to abridge minorities' right to vote." *Miller*, 515 U.S. at 927. It "has been of vital

[15] Noted above, the only criticism the state supreme court made of the Legislature's plan was that it had "*some* concern" about "packing" in one district based on the Black voting-age percentage of that district alone. App.34 (¶49) (emphasis added); *see supra,* n.11. Wisely, the court never actually concluded there was a "packing" problem. That would be contrary to this Court's precedents. It would be quite a devolution of the Voting Rights Act to declare that a race-neutral map drawer must race-consciously *reduce* the percentage of minority voters in a district to ensure sufficient *retrogression* from the last redistricting cycle. Just as this Court in *Cooper* explained that neither the Equal Protection Clause nor the Voting Rights Act gives the legislature authority to blindly dial up a district to 50 percent, 137 S. Ct. at 1472, neither the Equal Protection Clause nor the Voting Rights Act gives the legislature authority to blindly dial down a district to 50 percent. The Legislature's plan was drawn without regard to race, does not "pack" voters into any district, and properly retains populations in existing boundaries that survived legal challenge in the last redistricting cycle. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012); *see also* App.84-85 (Ziegler, C.J., dissenting) (¶127 & n.18).

importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions." *Id.* "As a Nation we share both the obligation and the aspiration of working toward th[e] end" of "equal opportunity to gain public office regardless of race." *Id.* But that "end is neither assured nor well served, however, by carving electorates into racial blocs." *Id.* "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping" in redistricting that "the Fourteenth Amendment forbids." *Id.* at 927-28. That is precisely what occurred here, and it warrants this Court's intervention.

Applicants respectfully ask the Court to enter an administrative stay and then a stay pending the Court's decision on Applicants' request for appellate relief. In addition, Applicants respectfully ask for an injunction pending appeal. Given the exigency, Applicants also respectfully ask that the Court construe this application as a petition for certiorari, grant the petition, and summarily reverse the decision below.

Respectfully submitted,

Adam K. Mortara
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, IL 60606
(773) 750-7154
mortara@lawfairllc.com

Kevin M. St. John
BELL GIFTOS ST. JOHN LLC
532 Wall Street, Suite 2200
Madison, WI 53718
(608) 216-7990
kstjohn@bellgiftos.com

Jeffrey M. Harris
Taylor A.R. Meehan
Counsel of Record
James P. McGlone
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

Richard M. Esenberg
Anthony F. LoCoco
Lucas T. Vebber
WISCONSIN INSTITUTE FOR LAW & LIBERTY
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org

Counsel for Applicants

MARCH 7, 2022