No. 21A471

IN THE
Supreme Court of the United States

THE WISCONSIN LEGISLATURE, ET AL.,
Applicants,

v.

MARGE BOSTELMANN, ET AL.,
Respondents.

To the Honorable Amy Coney Barrett,
Associate Justice of the United States and
Circuit Justice for the Seventh Circuit

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI AND SUMMARY REVERSAL

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

Respondents Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha—referred to in the proceedings below as the "Citizen Mathematicians and Scientists" or "CMS Intervenor-Petitioners"—trust that the other parties will fully ventilate the merits of this dispute, and therefore file this response to make only one point: This Court should deny Applicants' request to issue an injunction requiring Wisconsin election officials to put into place for the 2022 elections the legislative map passed by the Wisconsin Legislature in 2021 but vetoed by the Governor. *See* Appl. at 4–5, 37–38. Other parties will present arguments as to why no stay or injunction pending appeal should issue at all. But even if the Court rejects those arguments and issues an order staying or enjoining use this year of the map adopted by the Wisconsin Supreme Court, in no event should that order also affirmatively require the use of a legislative map for the 2022 elections that did not survive the legislative process and is significantly flawed. Issuing such an order would violate fundamental principles of federalism and comity and would needlessly entangle this Court in thorny questions of state constitutional law.

STATEMENT OF THE CASE

Respondents are five professors of mathematics, statistics, and computer science from Marquette University and the University of Wisconsin–Madison who are also registered voters residing in legislative districts that have become unconstitutionally malapportioned over the last decade. Because those malapportioned districts cannot be used in the 2022 elections and because the Legislature and the Governor reached an

impasse as to a new legislative redistricting plan, the Wisconsin Supreme Court undertook proceedings to select a remedial redistricting plan. The Citizen Mathematicians and Scientists intervened as petitioners in those proceedings not to push the agenda of any political party, incumbent officeholder, or demographic slice of the electorate, but rather to provide the court with the best possible remedial maps, based on the relatively new field of "computational redistricting."

Rather than drawing maps manually, one at a time, the Citizen Mathematicians and Scientists' experts used multi-objective optimization algorithms to create and evaluate millions of maps, with the goal of finding combinations of geography that best comply with federal and state legal requirements. With this cutting-edge technology, the Citizen Mathematicians and Scientists and their team of experts were able to present to the Wisconsin Supreme Court the "Math/Sci Map" (also referred to below as the "CMS Map"), containing 33 senate districts and 99 nested assembly districts. On a broad range of neutral districting criteria, Respondents' Math/Sci Map outperformed the five other legislative maps that the parties below submitted to the Wisconsin Supreme Court—including the map that the Legislature passed, the Governor vetoed, the legislative leaders submitted to the court below, four Wisconsin Justices expressly rejected, and the Applicants now urge this Court to order into effect.

Indeed, the Legislature has now seen its preferred map for state senate and assembly districts rejected by coequal branches of Wisconsin's government no less than three times. First, the Governor vetoed the map (and there was no attempt to override

his veto).[1] The Legislature then asked the Wisconsin Supreme Court to accept its map as "a starting point" on the ground that it was "an expression of 'the policies and preferences of the State'"; but the court rejected that argument in November 2021 "because the recent legislation did not survive the political process."[2] And then just two weeks later, the Legislature simply asked the court to adopt its map wholesale; but again the Court declined, refusing in its March 2022 opinion to give the vetoed map any special status over the five competing maps that other parties had submitted in the litigation.[3] This Application is thus the Legislature's fourth bite at the apple.

REASONS FOR DENYING THE APPLICATION

In selecting one of the six legislative maps submitted to it, the Wisconsin Supreme Court was exercising a prerogative that this Court has repeatedly affirmed belongs to state courts. As this Court has held: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*); *see Growe v. Emison*, 507 U.S. 25, 32–37 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975). The Citizen Mathematicians and Scientists leave it to the other parties to argue over whether this Court should stay or enjoin use of the legislative map selected by the Wisconsin Supreme Court. Here, the Citizen Mathematicians and Scientists simply argue that if the Court *does* stay or enjoin use of the legislative map selected by the Wisconsin

[1] *See Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 477 (Wis. 2021).
[2] *Id.* at 490 n.8 (quoting Legislature's Br. at 16).
[3] *See* App. 9–10 (¶8).

Supreme Court, it should not usurp the state judiciary's role by also picking a particular remedial plan and ordering it into effect—especially one that the Wisconsin Supreme Court expressly considered and rejected. Such an order would violate fundamental principles of federalism and comity. *See Growe*, 507 U.S. at 35–37.

That conclusion holds special force here, where Applicants are asking this Court to choose a specific redistricting plan whose validity under state constitutional law is in doubt. The Wisconsin Constitution contains a battery of express rules for legislative redistricting. It provides, among other things, that, after each federal census, new senate and assembly districts shall be apportioned "according to the number of inhabitants," WIS. CONST. art. IV, § 3; that assembly districts must "be bounded by county, precinct, town or ward lines," *id.* § 4; that assembly districts must "be in as compact form as practicable," *id.*; that senate districts must consist of "convenient contiguous territory," *id.* § 5; and that "no assembly district shall be divided in the formation of a senate district," *id.*

The state constitution's rules about population equality and county integrity have been strictly construed for well over a century. Indeed, the Wisconsin Supreme Court was the first state supreme court to invalidate a legislative districting plan under a state constitution's apportionment provision.[4] In 1892, it held that the Wisconsin Constitution's dictate to reapportion "according to the number of inhabitants" is "mandatory and imperative," is "not subject to legislative discretion," and requires "as

[4] *See* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 927 (2006).

close an approximation to exactness as possible." *State ex rel. Attorney General v. Cunningham*, 51 N.W. 724, 730 (Wis. 1892); *see State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 563 & n.23 (Wis. 1964) (describing the "mathematical norm" as a "precise standard of apportionment" (citing *Cunningham*, 51 N.W. at 730)). Likewise, the Wisconsin Supreme Court has long spotlighted the state constitutional safeguards against "the evils of county dismemberment." *Cunningham*, 51 N.W. at 743 (Lyon, C.J., concurring).

In the decision below, however, the Wisconsin court saw no need to analyze how this battery of state constitutional rules applied to each of the six legislative maps before it. Rather, it merely held that the proposed legislative map selected by the four-Justice majority complied with all state-law requirements,[5] while saying almost nothing on this topic about the Legislature's map. And the record below casts grave doubt on whether the Legislature's map actually complies with the Wisconsin Constitution. As the Citizen Mathematicians and Scientists argued below:

- The Legislature's map does not comply with the Wisconsin Constitution's mandate to apportion districts "according to the number of inhabitants." WIS. CONST. art. IV, § 3. This is demonstrated by comparison to the Math/Sci Map, which achieves a lower population deviation while simultaneously complying with all other legal requirements.[6]

[5] *See* App. 10 (¶9), 23–26 (¶¶34–36).

[6] *See* App. 98–99 (¶146) (Ziegler, C.J., joined by Roggensack & R. Bradley, JJ., dissenting) (Math/Sci Map has "lower population deviations" than the Legislature's map); *id.* at 45–46 (¶75) (Math/Sci maps "score the best out of all the submitted maps" on "population deviations").

- The Legislature's map does not comply with the Wisconsin Constitution's mandate that districts "be bounded by county, precinct, town or ward lines." *Id.* § 4. This is demonstrated by comparison to the Math/Sci Map, which splits far fewer of these political subdivisions while simultaneously complying with all other legal requirements.[7]
- The Legislature's map does not comply with the Wisconsin Constitution's mandate that districts must "be in as compact form as practicable." *Id.* This is demonstrated by comparison to the Math/Sci Map, which is more compact than the Legislature's map according to four mathematical measures that courts in Wisconsin and elsewhere apply (the mean Polsby-Popper, Reock, and Convex Hull scores, and the Cut Edges metric), while simultaneously complying with all other legal requirements.[8]

To order the Legislature's map into effect would put this Court's imprimatur on a map raising a host of state constitutional issues. The Court certainly "ought not to enter *this* political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality op.) (emphasis added). If the duty of choosing one from among a half-dozen legislative maps must fall to the judiciary, it should be left to the Wisconsin Supreme Court in the first instance.[9]

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[7] *See id.* at 45-46 (¶75) (Math/Sci maps "score the best out of all the submitted maps" on "local government splits"); *id.* at 104 (¶155) ("CMS outperforms all parties in this metric by including 28 county splits in the senate and 40 in the assembly."); *id.* ("CMS divided zero current ward boundaries.").

[8] *See* Expert Report of Dr. Daryl DeFord 16 (table 9) (Dec. 30, 2021).

[9] In this situation, if the Wisconsin Supreme Court is "either unwilling or unable to adopt [an alternative plan (such as the Math/Sci Map)] in time for the elections," *Growe*, 507 U.S. at 37, that duty would fall to the three-judge district court in the Western District of Wisconsin, where malapportionment claims against the 2011 map remain pending. *See* Text Only Order, *Hunter v.*

None of the cases Applicants cite supports the extraordinary relief they seek of asking this Court to order the Legislature's vetoed plan into effect for the 2022 elections. Appl. at 37. The only case Applicants cite that has anything to do with elections shows that the relief they seek is unwarranted. In *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers), Justice Kennedy enjoined an election from taking place where state officials had changed its date without receiving preclearance under the Voting Rights Act as required; but he certainly did not order that the election should take place on the applicants' preferred date. *Id.* at 1305.

Indeed, the more on-point precedent here is *Perry v. Perez*, 565 U.S. 388 (2012), in which this Court found it was unclear whether the lower court had followed the proper standards in drawing an interim redistricting plan and therefore remanded for the court to try again. *See id.* at 399. In doing so, the Court refused the state respondents' request to simply order their plan into effect for the upcoming election. *See* Reply Br. for Appellants at 3–4, *Perry v. Perez*, 565 U.S. 388 (2012) (No. 11-713), 2012 WL 10392 (arguing that "this Court should order the use of the State's duly-enacted maps as the interim plans for the 2012 elections"). Respondents are not aware of any case in which this Court has issued an injunction ordering a new redistricting plan into effect (particularly one that has been vetoed by the Governor, was rejected by the state's highest court, and is of questionable validity under the state constitution).

Bostelmann, Case No. 3:21-cv-00512 (W.D. Wis. Mar. 4, 2022), ECF No. 119 (three-judge court) (directing the parties by March 18 to state their positions on whether the federal case should be dismissed given the Wisconsin Supreme Court's March 3 ruling).

As this Court has made clear on "many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27. Because granting the unprecedented injunctive relief sought by Applicants would usurp the role of the Wisconsin Supreme Court in violation of fundamental principles of federalism and comity, Applicants' request for this Court to order the Legislature's 2021 map into effect for the 2022 elections should be denied.

CONCLUSION

The Court should deny the Application's request for affirmative injunctive relief.

Dated: March 11, 2022

Respectfully submitted,

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