No. 21A471

In the Supreme Court of the United States

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

Applicants,

v.

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

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

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The court-ordered maximization of majority-minority districts in Wisconsin is irreconcilable with *DeGrandy* and *Miller*. And the maximization-guaranteeing racial quotas used to create those districts cannot be reconciled with *Cooper*. Reversal would be swift and straightforward. The decision is a textbook example of "the consciously segregated districting system currently being constructed in the name of the Voting Rights Act," *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in judgment), without any legal basis.

Respondents say Applicants don't have standing. They are wrong. *See Swann v. Adams*, 385 U.S. 440, 443 (1967) (individual voters have standing to appeal the rejection of their preferred reapportionment remedy); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (legislature has standing to appeal to vindicate its institutional interest in redistricting).

Respondents say there is no time left to stay the Governor's districts. They are wrong. *See* WEC Resp. 1-4 (confirming the candidate qualifying window does not even begin until April 15, that the primary elections are not until August, and that there is no March redistricting cutoff); *see also infra*, n.8 (collecting Wisconsin cases involving court-ordered redistricting at later dates).

Respondents say there is no way to return to the *status quo* to keep in place the existing 2011 districts for now, should an appeal require it. They are wrong. *See Reynolds v. Sims*, 377 U.S. 533, 585-86 (1964) (acknowledging "certain circumstances" might require delay of reapportionment remedy); *see, e.g.*, *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 597 (E.D. Penn. 2012) (leaving 2001 legislative districts in place

pending the state court's correction of constitutional errors in the 2012 districts); Amicus Br. of Lena Taylor 15-16 (affected senator supporting a stay to leave existing districts in place for the upcoming elections if necessary).

Worst of all, Respondents say that the state court was just stepping in as a mapmaker, giving it wide berth to violate the Equal Protection Clause without deciding what the Voting Rights Act actually requires. *See* App.33 (¶47). They are wrong. *Johnson v. Wis. Elections Comm'n* (*"Johnson I"*), 967 N.W.2d 469, 489 (Wis. 2021) ("We have the power to provide a judicial remedy but not to legislate. We have no authority to act as a 'super-legislature' by inserting ourselves into the actual lawmaking function."); *see Bush v. Vera*, 517 U.S. 952, 978-79 (1996) (plurality op.) ("Strict scrutiny remains, nonetheless, strict" and even a "district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary[.]'"). They say that the state court can order the creation of seven (barely) majority-minority districts because the preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), are met. They are most wrong about that. *See Johnson v. DeGrandy*, 512 U.S. 997, 1007-09, 1016-17 (1994) (assuming *Gingles* preconditions met and then concluding that the court still erred by demanding maximization of majority-minority districts). The notion that whenever a State "can draw a majority-minority district, it must do so" is an "idea … at war with [this Court's] jurisprudence." *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

The Wisconsin Supreme Court does not have the last word on the question of whether federal law permits a redistricting plan contrary to the Equal Protection

Clause, the Voting Rights Act, and this Court's precedents. And the Wisconsin Elections Commission's submission to this Court confirms that there is ample time for the Court to correct the error given Wisconsin's elections calendar, which is considerably more protracted than those of other States. Any one of the following courses would be justified to remedy this racial gerrymander.

- The Court could summarily reverse right away. Summary reversal in light of *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *Miller v. Johnson*, 515 U.S. 900 (1995), and *Cooper v. Harris*, 137 S. Ct. 1455 (2017), is appropriate given the state court's straightforward and obvious error and would moot Applicants' request for a stay or injunction pending appeal.

- The Court could issue an immediate stay pending the Court's consideration of Applicants' request for summary reversal. That stay would mean that the existing districts enacted in 2011 would temporarily remain in place for only as long as summary reversal or denial of the petition would take. *See, e.g.*, *Smith v. E.L.*, 577 U.S. 1046 (2015) (stay pending *V.L. v. E.L.*, 577 U.S. 404 (2016)).

- The Court could issue an immediate stay pending further review on the merits, for example holding the case for *Merrill v. Milligan*, No. 21-1086. In the unlikely event a longer stay could leave the existing 2011 districts in place for the primaries, that is itself contemplated in *Reynolds*, 377 U.S. at 585-86. *See infra*, Part II.B.2.

- Or the Court could issue an injunction pending further action from this Court. The injunction would put in place the 2021 districts passed by both houses of the Legislature, adjusting the existing 2011 district lines based on 2020 Census data. The state court has already identified them as the next-best plan under its metrics, *see* App.20-21 (¶¶27-30), without the racial gerrymander.

Letting the Wisconsin Supreme Court's flagrant error in violation of the Equal Protection Clause stand because it is a few days old should not be on the list of options.

I. Applicants Have Standing.

Respondents argue no one has standing to appeal. Evers Resp. 13-17; Hunter Resp. 8-11; BLOC Resp. 21-24. Their argument rests on a mis-framing of this case. According to the Governor, "The issue before the Wisconsin Supreme Court, acting as

map-drawer, was *solely* which map to adopt" and now "the Legislature seeks to bring a *distinct* Equal Protection Clause challenge to the remedial map adopted." Evers Resp. 16-17 (emphasis added); Hunter Resp. 10 (similar). They add that racially gerrymandered districts—in lieu of the districts proposed by the Legislature in the court below—pose no harm to the Legislature or the individual voters. *See, e.g.*, Evers Resp. 15 (courts have "never held that a legislature itself suffers an injury-in-fact from the alleged racial gerrymander of specific districts").

A casual observer might think this dispute arises from some court-run redistricting commission, vested with authority every ten years to redraw district lines. It does not. Wisconsin has no such commission, and the state supreme court has no such power. *See Johnson I*, 967 N.W.2d at 473 ("Nothing in the constitution empowers this court to second-guess those [legislative] policy choices [of past redistricting plans], and nothing in the constitution vests this court with the power of the legislature to enact new maps."); Wis. Const. art. IV, §3 (vesting the Legislature with redistricting authority). Rather, this dispute arises from the court below acting as a court, exercising judicial power to adjudicate a malapportionment claim. Individual voters sued the Wisconsin Elections Commission and its members and alleged that the existing districts were malapportioned. The state court agreed and then ordered a *remedy* for that claim. The state court did act in any capacity other than a court. *See Johnson I*, 967 N.W.2d at 473 (describing court's own role as "*a purely judicial one*, which limits us to declaring what the law is and affording the parties a remedy for its violation" (emphasis added)). The state court then issued its order and opinion.

The question now on appeal is: Does the remedy violate federal law? There is nothing novel about that posture. *See, e.g.*, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020) (correcting state court's remedy, which "flowed directly from [its] failure to follow the dictates of federal law" by adopting rule of decision that "expressly discriminates on the basis of religious status").

Now before this Court, Applicants are the individual voters who initiated this case and the Wisconsin Legislature, which intervened as a Respondent below. Both the voters and the Legislature urged the state court to adopt redistricting maps that passed both houses of the Legislature in 2021 to remedy the voters' malapportionment claims. *See* 2021 Wis. Senate Bill 621. The state court rejected the Legislature's maps and selected the Governor's racially gerrymandered maps as its chosen remedy. Of course the voters and the Legislature have standing to appeal that order rejecting the Legislature's maps for the Governor's.

A. With respect to the individual voters, Respondents contend that they do not have standing because they do not live in racially gerrymandered districts. Evers Resp. 14; *see also* BLOC Resp. 22 (similar). This Court's opinion in *Swann v. Adams*, 385 U.S. 440 (1967), forecloses that argument. In *Swann*, voters brought a malapportionment action alleging (as the individual voters alleged in commencing this case) that their existing districts were malapportioned. *Id.* at 441-42. The *Swann* voters proposed a new plan. *Id.* at 443. The trial court rejected their proposed remedial plan and approved a different one. *Id.* The voters appealed, and the State argued that the voters lacked standing because, whatever the problems with the court-approved plan,

the appealing voters' particular districts were properly reapportioned. *Id.* This Court rejected that argument and affirmed that the voters had standing to appeal. *Id.* It was sufficient that the voters had a continuing interest in the adoption of their preferred remedial plan, and that the court chose a different one. *Id.* So standing on appeal is decidedly *not* "limited to voters who reside in districts allegedly drawn in violation of equal protection principles." Evers Resp. 14.

Likewise here, the individual voters who are Applicants in this Court initiated this original action and asked the state supreme court to remedy their claims with the Legislature's 2021 redistricting plan. Contrary to Respondents, the voters did *not* get "exactly what they asked for." Hunter Resp. 1. The state supreme court chose a different remedy.[1] The rejection of their preferred remedy gives the individual voters standing to appeal. *See Swann*, 385 U.S. at at 443; *cf. Forney v. Apfel*, 524 U.S. 266, 271 (1998) (a party "can appeal the District Court's order insofar as it denies [the party] the relief [it] has sought").[2]

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[1] Among other differences between the plans, each individual voter's senate or assembly district (or both) has greater population deviations under the Governor's plan than the voters' preferred plan. *See* Response Report of John Alford 11-18 (Dec. 30, 2021), available at https://www.wicourts.gov/courts/supreme/origact/docs/expertrepalford2.pdf (deviations); Omnibus Amended Petition ¶¶30-33 (identifying voters' districts).

[2] The BLOC Respondents suggest that the better course is for a new plaintiff to initiate a new lawsuit to challenge the racial gerrymander. BLOC Resp. 24. Such a follow-on action "would be an attempt to obtain direct review of the [state] Supreme Court's decision in the lower federal courts and would represent a partial inroad on *Rooker-Feldman*'s construction of 28 U.S.C. §1257." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989). Especially in these circumstances involving a plain violation of the Equal Protection Clause, a "decision by [this Court] to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the [court-imposed maps] by injured third parties," to the extent that such a challenge would be feasible, "would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Craig v. Boren*, 429 U.S. 190, 193-94 (1976).

B. The Wisconsin Legislature also has standing to appeal. Contrary to Respondents' arguments, the Legislature has a distinctly "direct stake" in the outcome of this litigation. *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 687 (1973); *see Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome'"). The state supreme court rejected the Legislature's redistricting plans, and it has standing to appeal that order just as the individual voters do. *See Swann*, 385 U.S. at 443; *Forney*, 524 U.S. at 271; *Espinoza*, 140 S. Ct. at 2262.

The Legislature has an institutional interest in redistricting that gives it the necessary stake in the outcome of this litigation to press its appeal. The Wisconsin Constitution endows the Legislature with the power to reapportion: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." *See* Wis. Const. art. IV, §3; *see Johnson I*, 967 N.W.2d at 473; *see also, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-96 (2019) (discussing Framers' general delegation of congressional redistricting authority to legislative bodies). That power is separately enumerated and distinct from the Legislature's general legislative power. *See* Wis. Const. art. IV, §1 ("The legislative power shall be vested in a senate and assembly.").

The Legislature's institutional interest is crystallized here. The Legislature exercised its redistricting authority in creating the 2021 maps and passing them through both houses of the Legislature after solicitation of public comments,

committee votes, debate, and floor votes. And from day one of this litigation, the Legislature has asked the Wisconsin Supreme Court to adopt those exact maps as a remedy for the malapportionment claims.

Plainly, the Legislature's interest is not vindicated by a court order rejecting the Legislature's maps. The Legislature's interest continues here. *See Ariz. State Legislature*, 576 U.S. at 802; *see also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).[3] On appeal, both houses of the Legislature, "acting together," have standing to challenge the rejection of the Legislature's redistricting plan by the state supreme court. *Bethune-Hill*, 139 S. Ct. at 1953. Nothing further is required.

[3] The Legislature also has an interest in what senate and assembly maps are chosen; they set the boundaries for the Legislature's own members. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) ("certainly the senate is directly affected by the District Court's [reapportionment] orders"). This Court has assumed *Beens* remains "binding precedent on standing" while requiring the legislative body to establish how it would be harmed by the redrawing of district lines. *Bethune-Hill*, 139 S. Ct. at 1955; *see also id.* at 1957 (Alito, J., dissenting) ("It seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong interest in how its members are selected."). Applied here, the plans passed by the full Legislature "embod[y] the [Legislature's] judgment' regarding the best way to select its members" and, unlike *Bethune-Hill*, the full Legislature has now appealed the rejection of those plans. *Id.* at 1955 n.7 (quoting *id.* at 1957-58 (Alito, J., dissenting)). Additionally, minority members of the Legislature have explained that there is no basis for expanding and diluting their districts in Milwaukee. *See* Application 34 (quoting floor testimony); Amicus Br. of Sen. Lena Taylor at 2 (explaining that Governor's plan might include "a reliable *Democratic* district … but it would not provide Black voters with the opportunity that the Voting Rights Act requires"); Assembly Floor Session (Nov. 11, 2021), recording available at https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/ at 2:18:05 (speech of Rep. Sylvia Ortiz-Velez) (describing earlier iteration of Governor's plan as the manifestation of "a national effort to dilute minority communities to create more Democratic seats … at the expense of legal rights of the communities of interest"). And in the court below, one of the Legislature's experts explained how changed district lines could cause "rolloff" where voters are placed in new districts abstain in down-ticket elections for state senate or assembly. Expert Report of Brian J. Gaines at 6-7 (Dec. 30, 2021), *available at* https://www.wicourts.gov/courts/supreme/origact/docs/expertrepgaines.pdf.

C. Despite the above, some Respondents contend the Wisconsin Legislature lacks standing just as the Virginia House of Delegates lacked standing in *Bethune-Hill*. Evers Resp. 15; BLOC Resp. 41. Two essential differences between this case and *Bethune-Hill* confirm the Legislature's standing here.

1. First, this appeal involves both the original Petitioners and both houses of the Legislature. There is no "mismatch between the body seeking to litigate" (the Legislature) and the body that passed the redistricting plans (the Legislature). *Compare Bethune-Hill*, 139 S. Ct. at 1953-54 (involving only one house of the legislature), *with Ariz. State Legislature*, 576 U.S. at 802 (involving both). Just as in *Arizona State Legislature*, here the Legislature's institutional interest in redistricting is at the heart of this case. And the full Legislature appeals.[4]

2. Second, in addition to the Legislature's institutional interest and unlike the Virginia House of Delegates, the Wisconsin Legislature has the statutory authority to litigate on behalf of the State under state law. *Bethune-Hill* forecasted that the case would be different had Virginia not made the Attorney General's power to litigate on behalf of the state exclusive: "[I]f the State had designated the House to

[4] To the extent Respondents intend to suggest that *Arizona State Legislature* requires a "permanent deprivation of legislative authority," they are wrong. Evers Resp. 15-16; *see also* BLOC Resp. 23. *Arizona State Legislature* does not announce a "permanent deprivation" rule for standing. (After all, the Arizona Legislature could have always deployed whatever available political means it had to take back its redistricting power, but that did not negate its standing to appeal.) And while that so-called "permanent deprivation" was one reason this Court later distinguished the facts of *Arizona State Legislature* in *Bethune-Hill*, it wasn't the only reason, nor was it the even the first reason. 139 S. Ct. at 1953 (first discussing "no mismatch" between Legislature as plaintiff and Legislature's redistricting power). All told, a "permanent deprivation" of power might have been a *sufficient* basis for standing by *one house* of a legislature in *Bethune-Hill*, but *Bethune-Hill* does not purport to make a "permanent deprivation" a *necessary* condition of standing for the full Legislature's appeal here.

represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State." 139 S. Ct. at 1951. In Wisconsin, the litigating power of Wisconsin's executive branch "is not exclusive." *Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 428 (Wis. 2020). The Legislature shares a statutory right to litigate on behalf of the State in suits challenging the constitutionality of state law (*e.g.*, the constitutionality of the existing districts challenged in this lawsuit). *Id.*; *see also Service Employees Int'l Union v. Vos*, 946 N.W.2d 35, 54 (Wis. 2020) ("While representing the State in litigation is predominately an executive function, it is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature").[5] That authority does not stop at the step-one question of whether state law is unconstitutional; it necessarily extends to the step-two question of remedy, lest the State not be permitted to appeal the contours of remedies entered against it.

* * *

Respondents confuse standing (Applicants' stake in the case or controversy) with the merits (the error in the court's remedy). The "gist of the question of standing" is whether appellants have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Its purpose is to ensure that the

[5] One reason to equip the Legislature with litigating authority on behalf of the State is a case like this where the named state defendant takes no position on the merits or the remedy. *See* WEC Resp. 2 (describing Commission's "neutral position").

Court resolve only "a real controversy with real impact on real persons," not mere advisory opinions. *Amer. Legion v. Amer. Humanist Assn.*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in judgment); *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) (federal courts "cannot be umpire to debates concerning harmless, empty shadows"). Here, Applicants' continuing interest in this case is beyond question. They asked the state court to adopt the legislatively passed redistricting plan. The court adopted a different redistricting plan, based on a fundamental error of federal law. The individual voters' and the Legislature's interest in the adoption of their maps remains. Standing is no obstacle to the relief that Applicants seek.

II. Respondents Have *Purcell* Backwards, and a Stay Returning to the *Status Quo* Pending Appeal Is Warranted.

On the balance of harms, Respondents' overarching argument is that a stay of the court-ordered districts cannot issue because there is insufficient time to correct the error of federal law. *See, e.g.*, Evers Resp. 30; BLOC Resp. 44-45. But until last week, the operative electoral districts in Wisconsin were those enacted in 2011. *See* 2011 Wis. Act 43, Wis. Stat. §4.001 *et seq*. Nine days have passed since this Court's decision instructing election officials to replace those existing districts with the Governor's. The Court's decision has not cemented a new *status quo*—the cement has not even been poured.

A. The applicable election schedule is Wisconsin's, not other States'.

1. The Wisconsin Elections Commission's response confirms that there is sufficient time to stay the Governor's districts, *infra*. Ignoring that, the other Respondents appeal to other States' elections schedules. They believe Justice Kavanaugh's

recent concurrence in *Moore v. Harper*, 595 U.S. ___ (2022) (Kavanaugh, J., concurring in denial of application for stay), forecloses relief here. *See* Evers Resp. 29; BLOC Resp. 44. But the concurrence in *Moore* emphasizes that the timing question was specific to North Carolina: "In light of the *Purcell* principle and the *particular circumstances and timing of the impending primary elections in North Carolina*, it is too late for the federal courts to order that the district lines be changed…." *Moore*, 595 U.S. at ___ (slip op. 2) (emphasis added). Those "particular circumstances" in North Carolina are materially different from those here. In North Carolina, the window for candidate qualifying has already concluded. *See N.C. League of Conservation Voters, Inc. v. Hall*, 2022 WL 124616, at *115 (N.C. Super. Ct. Jan. 11, 2022). While in Wisconsin, candidate qualifying does not begin until April 15 and ends in June. Wis. Stat. §8.15. Additionally, the North Carolina primary elections will occur in May. *See Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021). While in Wisconsin, primary elections are not until August 9. Wis. Stat. §5.02(12s).

Similarly, the Governor likens Wisconsin's elections calendar to Alabama's elections calendar at issue in *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Evers Resp. 31 ("If it was too late in early February … in Alabama," "it follows a fortiori that it is too late in mid-March" in Wisconsin). The calendars tell a different story. Alabama's candidate qualifying window ended a month ago and primaries are in May. Ala. Stat. §§17-13-3, 17-13-5. Wisconsin's election deadlines look nothing like that.

2. The Court need not take the Legislature's word for it. The Wisconsin Elections Commission confirms that there are nearly five months left before Wisconsin's

August primaries, Wis. Stat. §5.02(12s), and three months to go before Wisconsin's candidate qualifying window ends in June, *id.* §8.15. WEC identifies steps to be taken "before the candidate nominating petition circulation period begins" on April 15. WEC Resp. 4. And WEC would like to know the boundaries by March 15, so that it avoids "*increas*[*ing*] the risk of errors" in the voter database and "*decreas*[*ing*] the time available to correct those errors" before April 15. *Id.* (emphasis added).[6]

WEC's submission is striking for what it does *not* say. WEC does not say there is *no time* left to address the constitutional defect here. WEC does not even say that redistricting must be done by March 15—only that changes after March 15 might "increase the risk of errors" in the voter database and "decrease the time available to correct" them. *Id.* And WEC does not say that elections must proceed on the Governor's districts. WEC has *not* begun any "specific implementation" of those freshly ordered districts, confirming they are not the *status quo. Id.* And with all hope that there will not be an "increas[ed] risk of errors" in the voter database (which WEC can then correct), *id.*, that concern is far outweighed by the substantial likelihood that the Governor's racial quotas will have to be undone.[7]

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[6] Tellingly, WEC does not repeat the other Respondents' arguments that nothing can happen after March 15 when certain election notices are first issued or other election-related dates. *See* BLOC Resp. 45 (citing Wis. Stat. §10.01); Evers Resp. 35. The election notice statute does not purport to impose a redistricting deadline. It instructs county clerks to provide notices of particular elections, which "shall contain a statement specifying where information concerning district boundaries may be obtained." Wis. Stat. §10.01(2)(a). The statute does not require the notice itself to specify the district boundaries. The notice does not even require that the district boundaries are final. Rather, the notice requires instructions about where the election boundaries can be found. Any clerk can issue the notice and state that boundaries will be available at whatever location once final. This is confirmed by past redistricting disputes, where courts have acted well after such notice dates. *Infra*, n.8.

[7] Wisconsin's own history of redistricting disputes confirms that court-ordered redistricting relief has been historically ordered on or after the nominations period begins, and it has

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WEC's submission undercuts the other Respondents' arguments that there is insufficient time for a stay returning to the existing 2011 districts—and yet these timing arguments are Respondents' only counter to Applicants' arguments regarding irreparable harm and the public interest. On the other side of the ledger, Applicants face irreparable harm without a stay. If the elections proceed on the Governor's districts, those elections "cannot be undone." *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). The State cannot have a do-over election using the district lines advanced by Applicants. And the irreparable constitutional harm created by leaving the Wisconsin court's order in place is the same as that which would have resulted if the Court had not stayed the district court's order in Alabama. In both cases, courts ordered newly drawn majority-minority districts hovering just over 50-percent Black voting population, all because it was "possible" to draw an additional district. App.30 (¶43); *see* Stay Application at 8-9, *Merrill v. Caster* (No. 21A376) (describing addition of bare-majority-Black district). A stay was warranted in light of that constitutional

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been that way for decades. In 2000s, the nominations period was from June to July with the primary in September. Wis. Stat. §§5.02(18), 8.15(1) (2002). Even so, federal court issued a remedial plan on May 30, 2002, and amended it on July 11, 2002. *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002). In the 1990s, the nominations period was from June to July with the primary in September. Wis. Stat. §§5.02(18), 8.15(1) (1992). Even so, a federal court issued a remedial plan on June 2, 1992. *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992). In the 1960s, the nominations period was from May to July with the primary in September. Wis. Stat. §§5.01(2), 5.03, 5.05(1), (4) (1964). Even so, the state supreme court finalized a remedial plan in late May after the nominations period had begun. *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16 (Wis. 1964); *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 349 (Wis. 1964).

harm in *Merrill*, 142 S. Ct. 879, and it is likewise warranted here. There is sufficient time for a stay to correct the fundamental error.

B. The timing arguments ignore that a stay preserves the *status quo* existing districts.

A stay would keep in place the *status quo*: Wisconsin's existing 2011 districts. *See* WEC Resp. 4 (WEC has not begun implementing the Governor's districts). So while the other Respondents fear "chaos" if the Governor's districts are tabled, Evers Resp. 3, they ignore that, until last week, the operative districts were those enacted in 2011. A stay here does not require a "change." Evers Resp. 40. Still now, officials are not arranging their affairs around the Governor's proposed districts, WEC Resp. 4, including because Applicants' appeal was immediate. A stay would keep in place that familiar *status quo*, for only as long as is necessary to correct the error.

1. Most likely, a stay to preserve that *status quo* would be temporary, ending well before the candidate qualifying deadline ends in June. Indeed, in *Perry v. Perez*, 565 U.S. 388 (2012), this Court adjudicated the entire case—from emergency application to additional merits briefing and argument to final decision—in less than two months over the holidays. Had *Perry* involved only summary reversal, the timeline would have been even more expeditious.

If there were a remand to the state court after this Court corrects the state court's error, that also would be swift. The alternative remedies are well-known to the state supreme court. They have been litigated for months, and the state court has already assessed them in its decision. *See* Order ¶¶27-30 (comparing plans). It is

fanciful to assert that, because a week has passed since the state court's decision, the time for correcting the state court's error has expired.

2. But even if a stay—warranted by Applicants' likelihood of success and the imbalance of harms—could extend into the summer or fall, however unlikely, that is not a reason to reject Applicants' request for emergency relief. *Cf. Merrill*, 142 S. Ct. 879 (granting stay, reinstating legislatively enacted districts, and granting case for plenary review). The BLOC Respondents are wrong that "granting a stay in this case would leave *no* state legislative maps in place for the 2022 elections underway." BLOC Resp. 49. Granting a stay would leave the existing 2011 districts in place.

There is nothing impossible about conducting a one-time-only "impending primary election" pursuant to an existing redistricting plan, even though malapportioned. *Reynolds*, 377 U.S. at 586. In *Reynolds v. Sims*, the very case announcing the one-person-one-vote principle for state legislative districts, this Court went on to acknowledge that there will not always be time to redress malapportionment on the eve of an "impending primary election." *Id.* at 586-87. While "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid [malapportioned] plan," "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* at 585. All that is required is that a State have a "reasonably conceived

plan" for reapportionment, *id.* at 583-84—confirmed here by the ongoing litigation in the Wisconsin Supreme Court.

Relying on this portion of *Reynolds*, federal courts have permitted elections to proceed on existing, ten-year-old districts where reapportionment is not quite complete. For example, a Pennsylvania federal court permitted old 2001 districts to be used for 2012 primary elections if necessary, when it appeared unlikely that the state supreme court would complete redistricting before those elections. *Pileggi*, 843 F. Supp. 2d at 592-95. There, as here, Pennsylvania had not neglected the reapportionment process. But, as is often the case, the short amount of time between the delivery of new Census data and the next primary election left the state supreme court with insufficient time to correct errors in newly proposed plans before the election. *See id.* at 595-97; *see also, e.g.*, *Mac Govern v. Connolly*, 637 F. Supp. 111, 114-15 (D. Mass. 1986) (refusing to "intrude into a census and reapportionment process that is presumably proceeding apace" among the state branches of government, even though the state branches of government would not reapportion the state legislative districts in the year after delivery of Census data); *Watkins v. Mabus*, 771 F. Supp. 789, 802 (S.D. Miss. 1991), *aff'd in part, vac'd in part on other grounds*, 502 U.S. 954 (1991) (finding "it is constitutionally permissible to utilize the [malapportioned] 1982 plan in fashioning interim relief" given particular circumstances); *Political Action Conference of Ill. v. Daley*, 976 F.2d 335, 340 (7th Cir. 1992) (finding that a 1991 election based on a ward map using 1980 census data was valid under *Reynolds*).

In sum, there is ample time in Wisconsin's election calendar to correct the racial gerrymander here or on remand. But in the unlikely event more time is necessary, it would be better to proceed with the primaries under the existing *status quo* than under the Governor's racially gerrymandered districts. These are the unique circumstances that *Reynolds* anticipates: the State's branches of government have not delayed in the reapportionment process. Applicants have not delayed their request for correction of the serious and unanticipated constitutional defects in the malapportionment remedy chosen by the court below. But should the racial gerrymander take some time to remedy—again, unlikely, given the state court's familiarity with the alternatives after months of litigation—the existing districts may remain in place in the interim.

C. The Governor's districts warrant no special deference under *Purcell*.

Respondents also misapply *Purcell* to the posture here. *See, e.g.*, Evers Resp. 30. This posture bears no resemblance to *Merrill* or *Purcell* itself. In *Merrill*, this Court intervened to stay a court order enjoining Alabama's already-enacted 2021 districts. 142 S. Ct. 879. The enacted districts had been in place for months, and the lower court invalidated them days before the candidate qualifying deadline. *Id.* at 881-82 (Kavanaugh, J., concurring) (explaining it was too late to unwind the State's already-enacted redistricting plan). Likewise, *Purcell* involved a 2006 lawsuit to invalidate a 2004 state election law. *Purcell v. Gonzalez*, 549 U.S. 1, 2-3 (2006). One month before the November election and without an opinion, the lower court enjoined that election law. *Id.* at 3. With less than three weeks before the November election,

this Court vacated the injunction so that the election could proceed without suspending the two-year-old election law. *Id.* at 5-6.

By comparison, the Governor's districts were created for litigation and approved last week by a court. They were not enacted through the legislative process. *Purcell* does not insulate the court-ordered districts from review. "Correcting an erroneous lower court injunction of a state election law does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election law. That would be absurd and is not the law." *Merrill*, 142 S. Ct. at 882 n.3 (Kavanaugh, J., concurring). The state supreme court issued an erroneous late-breaking injunction here against the existing 2011 districts that defies this Court's precedents. That error is not unreviewable. This Court can correct it. 28 U.S.C. §1257(a).

If the *Purcell* principle is to have any application here, it compels keeping in place the existing districts enacted in 2011. *See* Amicus Br. of Ron Huff at 2. *Purcell* counsels that the *Governor's* brand-new districts be stayed to return to something that more closely resembles the *status quo. See id.* at 6-7. Election officials should not begin the rigmarole of putting in place the Governor's districts when they are likely to be invalidated as a racial gerrymander.

III. Respondents Cannot Elide the Fundamental Problem on the Merits.

A. The state court's error is clear and reversible.

For all of the reasons given in the emergency Application, there is well beyond "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth*, 558 U.S. at 190. The state court's legal

errors warrant no deference. *See Gingles*, 478 U.S. at 79. This is not a question of whether the state court "clearly err[ed]" on some specific factfindings. *See* BLOC Resp. 20. After all, *DeGrandy* assumed all the *Gingles*-related facts Respondents attempt to bury this Court in, and still the lower court's analogous maximization plan was illegal. 512 U.S. at 1007-09, 1016-17. This is a straightforward case about whether the state court's decision was "predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79.

1. Respondents assert that the court below is entitled as much—perhaps more—deference than a legislature. Evers Resp. 18, 24 ("there is no good reason why [the law] can lay a trap for state courts"). They ask this Court to "to take the Wisconsin Supreme Court at its word" that it complied with the Equal Protection Clause. Evers Resp. 27; *but see Gamble v. United States*, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring) (calls for deference are invoked "most fervently" when the decision "at issue is least defensible"). They argue that the state court had more "leeway" than a federal court because it was stepping into the shoes of a state legislature. *See* Evers Resp. 12; *id.* at 9 (court "functioned in the capacity of map-drawer"). And they add that the Wisconsin Supreme Court—conveniently—couldn't possibly have permitted race to predominate. *See* Evers Resp. 21; Hunter Resp. 11.

Explained above, the state court was *not* acting as a redistricting commission, or some other state agency. It was acting as a court. And the state court is obliged to apply federal law just as the lower federal courts are. It cannot avoid its judicial obligation to apply federal law, be it the Equal Protection Clause or the Voting Rights

Act, by asking whether there are good enough reasons for redrawing districts, diluting districts, and adding a district without actually considering whether those reasons are consistent with the Voting Rights Act as interpreted by this Court. *See, e.g.*, *Shaw v. Hunt* (*"Shaw II"*), 517 U.S. 899, 911 (1996) ("creating an additional majority-black district was not required" and "is not a remedy narrowly tailored"); *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"). But here, the court stopped at: "we cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA." App.33 (¶47).

Any amount of scrutiny to the Governor's obvious racial targets could have resolved the court's uncertainty: the Voting Rights Act does not require, lest it raise serious constitutional questions, the maximization of majority-Black districts. *See DeGrandy*, 512 U.S. at 1016-17; *Miller*, 515 U.S. at 925-97. And *Cooper* does not permit a legislature, let alone a court, to set maximization-guaranteeing racial targets of 50-percent. *Cooper*, 137 S. Ct. at 1472, 1474. As *DeGrandy* confirms, that is true even where the *Gingles* factors are satisfied for the maximum number of districts. Satisfying *Gingles* does not make maximization okay. *Compare DeGrandy*, 512 U.S. at 1007-09 (assuming all *Gingles* preconditions satisfied), *with id.* at 1016-17 (reversing court's ordering the maximum number of districts).[8]

[8] For this reason, Respondents' prolonged *Gingles* discussion does not save the court-ordered districts. *See* BLOC Resp. 3. The measure of section 2 compliance is *not* the maximization of (barely there) majority-minority districts. *DeGrandy*, 512 U.S. at 1016-17. Failing to understand that critical portion of *DeGrandy*, the Governor thinks he has scored a point by

2. Respondents also assert that there is no constitutional problem with the court-ordered plan because there is no proof that race predominated. *See* Evers Resp. 19; BLOC Resp. 26-27. This is fantasy. To be sure, *the Legislature* submitted a race-neutral plan. App.42 (¶69) (Ziegler, C.J., dissenting). Its plan was rejected. But the Governor's seven-district plan before the court was necessarily drawn with race at the forefront.[9] Those plans could accomplish that seven-district configuration only by expanding districts past Milwaukee's natural boundaries,[10] sacrificing core retention of the existing districts, and hitting a racial target of 50-percent Black voting-age population with precision not once, not twice, but nine times. *But see Vera*, 517 U.S. at 980-81 (plurality op.) ("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"). If the state court is going to accept such a race-conscious plan,

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pointing out that the Legislature "assumed" at oral argument that the Voting Rights Act required some Black opportunity districts in Milwaukee. Evers Resp. 8. *DeGrandy* also "assumed" that was so in Miami-Dade County. And still, the court's fundamental misconception of the Voting Rights Act—if it can be drawn, it must be drawn—was reversible error.

[9] *Compare, e.g.*, Evers Opening Br. at 14 (Dec. 15, 2021) ("[T]here is a sufficiently large and compact population of Black residents to produce seven majority Black districts in the Assembly. The Governor's plan thus creates seven majority Black districts based on voting age population of those who identified as Black[.]"), *available at* https://www.wicourts.gov/courts/supreme/origact/docs/briefctoevers2.pdf, *with Cooper*, 137 S. Ct. at 1472 (notion that "whenever a legislature can draw a majority-minority district, it must do so…is at war with…§2 jurisprudence").

[10] The Governor's *post hoc* attempt to justify why the districts had to be redrawn to ignore Milwaukee County's natural borders, Evers Resp. 6 n.6, with *zero citations* to anything in the record below, even though there were hundreds of pages of briefs and expert reports and hours of argument, is entirely inappropriate and does not somehow cure the taint of the constitutional violation.

it has to do better than "we cannot say for certain on this record" that such a plan is required by the Voting Rights Act. App.33 (¶47).

Ultimately, Respondents retreat to a semantic debate. Maximization of majority-minority districts is not maximization, they say. *See, e.g.*, BLOC Resp. 39. They tell Applicants not to believe their lying eyes when they see the following:

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

Wisconsin State Legislative District	**2022 Black Voting-Age Population**
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%

Wisconsin's newly ordered districts are *DeGrandy* come to life. They are not an accident. The Governor proposed seven bare-majority-Black assembly districts because that's how many he could draw. *See* App.30 (¶43) ("it is now *possible* to draw a seventh sufficiently large and compact majority-Black district" (emphasis added)); *supra*, n.9 (similar). No party proposed eight because one cannot draw eight majority-Black assembly districts in Wisconsin. Indeed, the only way in which the Governor gets to seven majority-Black districts is by setting the *maximization-guaranteeing*

racial target in every majority-Black district at 50-percent Black voting-age population. *But see DeGrandy*, 512 U.S. at 1016 & n.12; *Miller*, 515 U.S. at 925-97; *Shaw II*, 517 U.S. at 913. The laser precision of the districts' demographics proves that race was put above all other redistricting criteria.

Echoing the court below, Respondents counter that population changes required the across-the-board dilution of the existing majority-Black assembly districts to make room for a seventh majority-Black district. The Governor says there was "a substantial increase" in Black voters to justify the court's "well supported" and "evidence-based reasoning." Evers Resp. 27; *see* BLOC Resp. 10, 20. But there was no "careful study" here. Evers Resp. 6. The state court's opinion includes a single paragraph about changing population by percentages—without citation—and then, *ipse dixit*, announces those numbers "*suggest* a seventh majority-Black district *may* be required." App.34 (¶48) (emphasis added). Respondents do not appear to even acknowledge Applicants' argument that this so-called "substantial" population change was an increase of less than 7,000 Black voters, or roughly 11 percent of an assembly district. *See* Application 8.[11] That does not a majority-minority district make.

[11] Respondents quibble with which multi-race demographic categories ought to be included in calculating Black voting-age population. *See, e.g.*, BLOC Resp. 4 n.2. (For example, if one were to include only individuals reporting as "non-Hispanic Black alone or non-Hispanic (Black + White) alone," then the Black voting-age population of the Governor's majority-minority districts range between 48.51 to 49.99 percent; the Governor hits his 50-percent target only by including additional multi-race categories. App.177-178. But even if one were to assume *all* multi-race individuals in Milwaukee are some-part Black, the Black voting-age population still increased by less than 8,000 persons over the decade. *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/ (reporting increase of

But above all other indications that the court-ordered maps are court-ordered racial gerrymandering is this: Dozens of times, Respondents repeat that the court employed a race-neutral "least changes" approach in selecting a remedy. *See, e.g.*, Evers Resp. 5-6, 8, 13 (decision "based almost entirely on the neutral 'least change' criterion"), 18 ("*express* adherence to 'least change' analysis"), 19 ("court placed 'least change' analysis at the very heart of its decision"), 20 ("'least change' criterion…prevailed over every other redistricting consideration"), 27 ("only thing it sought to maximize was the 'least changes' approach"), 28, 37; BLOC Resp. 8, 14-15 ("prioritized the least changes approach"), 15, 28 ("Court had a *single* overriding motivation—imposing a plan with the 'least changes'"); Hunter Resp. 1-2, 5, 12 ("least change approach does not reflect any impermissible racial motive").

Guess what? The chosen remedy then abandons that "least-changes" approach to effectuate the racial gerrymander in Milwaukee. Statewide, more than 85 percent of Wisconsinites remain in their existing districts; but in the court-ordered majority-Black districts in Milwaukee, average core retention is less than 67 percent.[12] Meaning, one out of every three individuals in those affected districts is moved out of her existing district and into a new one. For a glaring example, the court-ordered districts remove more than 17,000 Black individuals, roughly 17 percent of the existing Black population in that district, from Senate District 4 (*amicus* Senator Lena Taylor's

6,609 of "Black" voting-age population and increase of 1,305 for all other multi-race individuals).

[12] *See* App. 20 (¶¶27-28). For a comparison of core retention scores of the Milwaukee-area districts, *see* Legislature's Response Br. at 23 (Dec. 30, 2022), *available at* https://www.wicourts.gov/courts/supreme/origact/docs/respbriefwislegis2.pdf.

district) to Senate District 5, which is not a majority-minority district. App.245. But for race, the move makes no sense because Senate District 4 was an underpopulated district that needed to add population. *Id.* (showing existing Senate District 4 with population of 163,208, or 15,000 persons short of the 178,598-person ideal). The only reason for this is fine-tuned race-based sorting to reduce every majority-minority district to 50-percent Black voting age population, thereby creating a maximum seven majority-Black assembly districts.

B. A stay is warranted even if the Court declines to issue an injunction pending appeal.

Respondents also object to the Legislature's request for an injunction pending appeal and rehash old critiques of the Legislature's 2021 districts. *See, e.g.*, Evers Resp. 11, 38. The Legislature's 2021 districts would not be plucked from "thin air." BLOC Resp. 47. The basis for the injunction is that the state court *already* expressly ranked the Legislature's 2021 districts as second only to the Governor's districts. *See* App.20-21 (¶¶27-30). The Legislature's 2021 districts follow the *status quo* 2011 districts. And the Legislature's 2021 districts will have no lingering infection of racial gerrymandering. They were drawn without regard to race (and thus can have no conceivable "packing" "concern," Application 38, n.15). And they were scrutinized by the Legislature's Voting Rights Act expert.[13] But even if Respondents' arguments

[13] The Governor's criticism of the Legislature's 2021 districts reveals his fundamental misunderstanding of this Court's decision in *Cooper*. The Governor objects to a district with 47-percent Black voting-age population, neighboring a district with 73-percent Black voting-age population. *See* Evers Resp. 39. Had the Legislature intentionally adjusted those districts just so that the 47-percent district exceeded 50-percent Black voting-age population, the Legislature would have violated *Cooper*, 137 S. Ct. at 1472. Voters in the 47-percent Black voting-age population district will elect their candidate of choice. Reply Expert Report of John Alford

regarding an injunction pending appeal are right, the solution is not denial of the emergency Application. Either summary reversal—likely rather quickly—and a remand for further proceedings or a stay pending this Court's disposition of Applicants' request for review are proper to correct the state court's error.

CONCLUSION

For the foregoing reasons, 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 its Application as a petition for certiorari, grant the petition, and summarily reverse the decision below.

5-6 (Jan. 4, 2022) (describing wins by Black candidates in reconstituted election in 47-percent Black voting-age population district), *available at* https://www.wicourts.gov/courts/supreme/origact/docs/expertrepalford3.pdf. That means that the Legislature, as a state actor, would have *no* constitutional basis for dialing up the district to 50 percent just because. That is the lesson of *Cooper*. 137 S. Ct. at 1471-72.

Respectfully submitted,

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