

No. 21A490

In The  
Supreme Court of the United States

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GLENN GROTHMAN, *et al.*

*Applicants,*

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*

*Respondents.*

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*On Application for Emergency Stay  
Pending Petition for Writ of Certiorari or, in the Alternative,  
a Petition for a Writ of Certiorari and Summary Reversal*

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

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF,  
MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER,  
AND AMICUS CURIAE BRIEF OF  
NATIONAL REPUBLICAN REDISTRICTING TRUST  
SUPPORTING APPLICANTS**

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## **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The National Republican Redistricting Trust respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as Amicus Curiae supporting Applicants Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, and Congressman Scott Fitzgerald.

### **IDENTITY AND INTERESTS OF MOVANTS<sup>1</sup>**

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state-legislative redistricting effort currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the U.S. Constitution, the State legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Grove v.*

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<sup>1</sup> Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amicus Curiae authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and its counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants have consented to the filing of this brief. Counsel for the following Respondents have consented to the filing of this brief: The Wisconsin Legislature; Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha ("Citizens Mathematicians and Scientists"); Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson and Rebecca Alwin; and Governor Tony Evers. Respondents the Wisconsin Elections Commission took no position on Amicus' request. The remaining counsel for Respondents did not respond before this motion and the accompanying brief were filed.

*Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily through application of the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, and by avoiding the forced combination of disparate populations to the greatest extent possible. Such sensible districts follow the principle that legislators represent individuals living within identifiable communities.

Legislators do not represent political parties, and the United States does not have a system of statewide proportional representation in any state. Article I, Section 4 of the U.S. Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches—the state legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

## REASONS TO GRANT LEAVE TO FILE AMICUS CURIAE BRIEF

This case presents an issue of critical importance to proposed Amicus. Amicus believes that the Wisconsin Supreme Court's order: (1) has resulted in the enactment of a congressional district map that violates Article I, Section 2 of the U.S. Constitution; and (2) does not achieve the Wisconsin Supreme Court's stated objective of maximizing core-retention.

Amicus represents the view that the one-person, one-vote requirement in Article I, Section 2 is mandatory. The Wisconsin Supreme Court's approval of a map that does not satisfy one-person, one-vote is a dangerous instance of a state court treating a federal constitutional requirement, which is necessary to protect a fundamental right, as if it is a mere guideline that can be ignored under the right circumstances. Further, Amicus represents the view that drawing a core-retention maximization map is a simple procedure that could be completed in short order on remand. Because Amicus can provide a unique vantage point into the redistricting process underway throughout the Nation, its submission will materially help the Court as it decides how to resolve this application for an emergency stay.

For the foregoing reasons, the motion should be granted.

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## **MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER**

Amicus respectfully moves for leave of Court to file its brief supporting Applicants on 8 ½ by 11-inch paper rather than in booklet form. In support, Amicus asserts that the Emergency Application for Stay Pending Petition for Writ of Certiorari or, in the Alternative, a Petition for a Writ of Certiorari and Summary Reversal filed by Applicants was filed on Wednesday, March 9, 2022. The expedited filing of the application and the resulting compressed deadline for any response prevented Amicus from properly preparing this brief for printing and filing in booklet form. Nonetheless, Amicus desires to be heard on the Application and requests the Court grant this motion and accept the paper filing.

/s/ Jason B. Torchinsky

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## TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF.....	i
MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER .....	iv
INTEREST OF AMICUS CURIAE .....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	3
ARGUMENT.....	5
I.    A new Congressional Map that is compliant with the Wisconsin Supreme Court’s requirements can be drafted and implemented without causing delay.....	5
A.    Drafting a map that complies with the Wisconsin Supreme Court’s newly preferred test takes minimal time.....	5
II.   The Governor’s Map contains an excessive population deviation not justified by any legitimate state objective.....	10
CONCLUSION.....	13

## TABLE OF AUTHORITIES

### CASES

<i>Grothman v. Wis. Elections Comm'n</i> , No. 21A490 .....	3, 4
<i>Grove v. Emison</i> , 507 U.S. 25 (1993) .....	1
<i>Johnson v. Wis. Elections Comm'n</i> , 967 N.W.2d 469 (Wis. 2021) .....	3
<i>Johnson v. Wis. Elections Comm'n</i> , 2022 WI 14 (Wis. Mar. 3, 2022) .....	5, 6, 8, 9
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983) .....	9, 10, 11, 13
<i>Markham v. Fulton Cnty. Bd. of Registration &amp; Elections</i> , 2002 U.S. Dist. LEXIS 27507, 2002 WL 32587313 (N.D. Ga. 2002) .....	3
<i>Merrill v. Milligan</i> , Nos. 21A375 (Feb. 7, 2022) .....	5
<i>Moore v. Harper</i> , No. 21A455 (filed Mar. 2, 2022) .....	6
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006) .....	5
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019) .....	6
<i>Shaw v. Hunt</i> , 861 F. Supp. 408 (E.D.N.C. 1994) .....	6
<i>Tennant v. Jefferson Cnty. Comm'n</i> , 567 U.S. 758 (2012) .....	10, 11
<i>Vieth v. Pennsylvania</i> , 195 F. Supp. 2d 672 (M.D. Pa. 2002) .....	11, 12, 13
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964) .....	10

### CONSTITUTION AND STATUTES

U.S. Const. art. I, § 2 .....	10, 11, 12, 13
U.S. Const. art. I, § 4 .....	2, 6
Wis. Stat. § 8.15(1) .....	5

**BRIEF OF AMICUS CURIAE  
THE NATIONAL REPUBLICAN REDISTRICTING TRUST  
IN SUPPORT OF APPLICANTS**

**INTEREST OF AMICUS CURIAE<sup>2</sup>**

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state-legislative redistricting effort currently underway.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the U.S. Constitution, the State legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Grove v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

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<sup>2</sup> Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E) and this Court's Rule 37.6, counsel for Movant and Amicus Curiae authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the Movant/Amicus and its counsel, make a monetary contribution to preparation or submission of the motions and brief. Counsel for Applicants have consented to the filing of this brief. Counsel for the following Respondents have consented to the filing of this brief: The Wisconsin Legislature; Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha ("Citizens Mathematicians and Scientists"); Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson and Rebecca Alwin; and Governor Tony Evers. Respondents the Wisconsin Elections Commission took no position on Amicus' request. The remaining counsel for Respondents did not respond before this motion and the accompanying brief were filed.



Second, NRRT believes redistricting should be conducted primarily through application of the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, and by avoiding the forced combination of disparate populations to the greatest extent possible. Such sensible districts follow the principle that legislators represent individuals living within identifiable communities.

Legislators do not represent political parties, and the United States does not have a system of statewide proportional representation in any state. Article I, Section 4 of the U.S. Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches—the state legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

## INTRODUCTION & SUMMARY OF THE ARGUMENT

When issuing its orders, the Wisconsin Supreme Court requested the parties use a “least-changes” approach when drawing their proposed remedial districts, which included—at least in part—consideration of other traditional districting criteria. *Johnson v. Wis. Elections Comm’n*, 967 N.W.2d 469, 488 (Wis. 2021); see also *id.* at 491 (quoting *Markham v. Fulton Cnty. Bd. of Registration & Elections*, 2002 U.S. Dist. LEXIS 27507, 2002 WL 32587313, at \*6 (N.D. Ga. 2002) (“Keeping the minimum change doctrine in mind, the Court made only the changes it deemed necessary to guarantee substantial equality and to honor traditional redistricting concerns.”). Importantly however, the “majority fail[ed] to flesh out exactly what a least-change approach entail[ed], thus leaving the parties with little actual guidance.” *Id.* at 500 (Dallet, J., dissenting). Given this lack of clarity, the parties did what anyone would do in this situation: They tried to fill the gaps. Here, that meant relying on Justice Hagedorn’s concurring opinion—whose vote was necessary to create a majority—to plug the conceptual holes in the majority opinion. *Id.* at 493-96 (Hagedorn, J., concurring).

To that end, every party below sought to balance competing ways to maximize core retention with various least-changes criteria, which included, in Justice Hagedorn’s view, other traditional redistricting criteria. Applicants’ Emergency Appl. for Stay at 2, *Grothman v. Wis. Elections Comm’n*, No. 21A490. For their part, the Congressmen sought to achieve a balance between core retention and other traditional districting criteria, such as minimizing municipal and county

splits. *See id.* Others did the same to varying degrees. *See id.* at 8-9. Upon reviewing the maps, however, the Wisconsin Supreme Court determined that what it *really* wanted was a map that moved as few people as possible when compared to the previous decade's map, without consideration of any other criteria. *Id.* at 13-14. This led that court to pick a map that not only violates the U.S. Constitution's one-person, one-vote requirement but also transgresses the court's own stated population-equality standard. *Id.* at 14-15. What's more, in reaching this result, the Wisconsin Supreme Court gave none of the parties fair notice of what standard it wanted their sample plans to satisfy, thus depriving the parties of due process.

While the Wisconsin Supreme Court's decision to prioritize the maximization of district cores over other constitutional requirements was erroneous, it is easily correctable. With advances in modern mapping technology, a new map that comports with one-person, one-vote, while making fewer changes than the Governor's "least-changes" plan, can be drafted in a trivially short amount of time on remand. To prove this point, Amicus—in less than an hour—was able to generate an exemplar plan as a proof of concept. Therefore, should this Court grant relief, any resulting issues related to the timing of the upcoming elections can be easily overcome.

## ARGUMENT

### **I. A new Congressional Map that is compliant with the Wisconsin Supreme Court's requirements can be drafted and implemented without causing delay.**

The election machinery in Wisconsin is barely in motion. The Wisconsin Supreme Court just chose its preferred map less than a fortnight ago. *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, P52 (Wis. Mar. 3, 2022) (App. 35). To that end, this Court can reverse and remand without upending the “settled” “rules of the road.” *Merrill v. Milligan*, Nos. 21A375 & 21A376, slip op. at 4 (Feb. 7, 2022) (Kavanaugh, J., concurring). That is because, in Wisconsin, the “rules of the road” have been far from “settled.” And, while that moment is quickly approaching, it has not yet arrived.

The deadline for nominations in partisan congressional primaries in Wisconsin is June 1st. Wis. Stat. § 8.15(1). Nomination papers cannot be circulated until April 15th at the earliest. *Id.* Given that the nomination deadline is still months away, Wisconsin has sufficient time, after remand from this Court, to draw new maps, conduct briefing, reach state-court resolution, and implement the chosen map without triggering any *Purcell* concerns. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

#### **A. Drafting a map that complies with the Wisconsin Supreme Court's newly preferred test takes minimal time.**

The days when maps were painstakingly hand-drawn over many weeks are long past. Today, drawing redistricting maps is a simple and efficient endeavor; the lion's share of the work stems from the complexities of the legal frameworks and

policy priorities involved. Here, both the legal framework and the policy priorities have been set by the Wisconsin Supreme Court: It wanted a map with the *least* number of changes, as measured by core-maximization.<sup>3</sup> The question then is whether a map can be drawn that advances the Wisconsin Supreme Court’s newly announced priorities, complies with constitutional notice and due process requirements, and obviates election administration concerns. As will be shown, the answer is an unequivocal yes.

For years, courts have accepted that “new developments in the way census data [is] organized geographically . . . coupled with new computer technology for processing and using that data in redistricting, ha[s] created new capabilities for rapid, accurate consideration and adjustments of proposed plans.” *Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994) (three-judge court); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting) (“[A]dvancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision.”); *Johnson*, 2022 WI 14 at ¶ 174 (Ziegler, J., dissenting) (“[W]ith advanced computer technology, the Governor could have readily reduced his population deviation while maintaining his core retention.”). All this is to say that, should the Court grant Applicants’ relief and

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<sup>3</sup> Amicus takes no position on the Wisconsin Supreme Court’s underlying rationale other than to say that state supreme courts’ role in redistricting is proscribed by the Constitution and this Court’s explanatory opinions. *See* U.S. CONST. art. I, § 4, cl. 1; *see also* Br. of Amicus Curiae of Nat’l Republican Redistricting Tr. at 6-12, *Moore v. Harper*, No. 21A455 (*filed* Mar. 2, 2022).

reverse the decision below, both the parties and the Wisconsin Supreme Court can quickly and easily produce a lawful map with little effort.

In fact, Amicus, in less than one hour, drafted a map that better comports with the standards outlined by the Wisconsin Supreme Court than any of the maps submitted.<sup>4</sup> Figure 1 (“Amicus Sample Map”), included herein and attached hereto as Appendix 1, shows a map that truly maximizes the core retention of districts while minimizing the total population changes between districts.

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<sup>4</sup> The process of creating a map is relatively straightforward. The majority of redistricting is typically done on one of two commercially available platforms: ESRI Redistricting or Maptitude for Redistricting. There are other free software packages and websites available, but they tend to lack some of the features of these two commercial programs. Creating a map is simply a matter of procuring data from the Census Bureau and other relevant sources and then loading that data into the software. The data used typically includes a map of the given region (called the base layer), the geographic boundaries of an area of geography (such as counties, cities, and towns), the previous electoral boundaries, various population figures (including, if necessary for Voting Rights Act compliance, data on race and ethnicity), and any other data that is relevant under state policy or federal law. Once that data is uploaded, the software allows a mapmaker to create and modify districts to achieve the goals dictated by law and policy makers. On the whole, with a little knowhow, it is a relatively fast process. Here, the process is even simpler because all parties already possess the relevant data and the software.

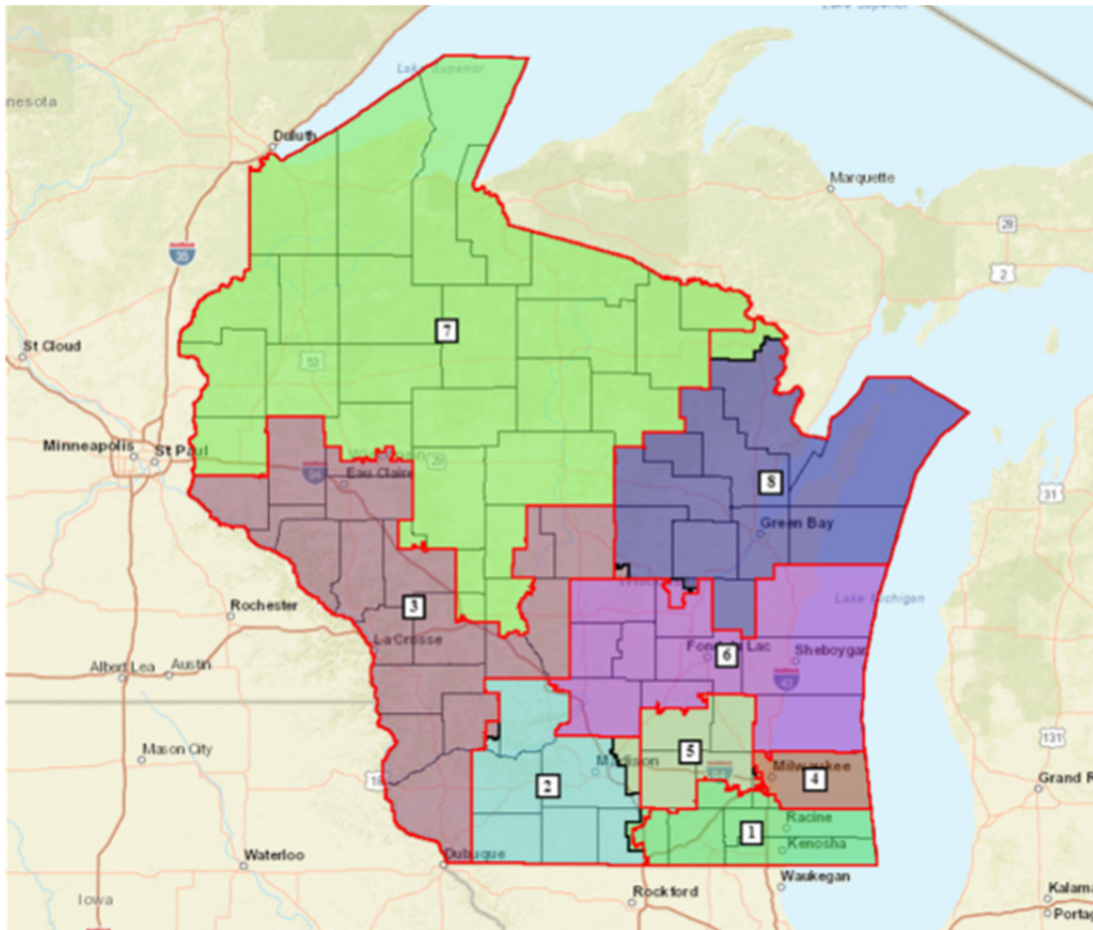


Figure 1: Amicus Sample Map. The colored areas and black lines indicate the Sample Map’s district boundaries with the Previous Congressional Map overlaid in red lines.

The Wisconsin Supreme Court held for the first time when reviewing the submitted maps that “[t]he most principled way to address least change for the congressional maps is to choose the map that, in the aggregate, moves the fewest number of people into new districts.” *Johnson*, 2022 WI 14 at ¶ 19. To that end, the court stated that “the Governor’s proposed map is superior to every other proposal,” because “[i]t is the map with the least change.” *Id.* (equating “least changes” with core-maximization). While it is true that the Governor’s map has the “least change[s],” *id.*, the question left unanswered is why the so-called “superior” map fails, as an objective matter, at its stated purpose? Table 1 is the table from

*Johnson*, 2022 WI 14 at ¶ 14 with the data from the Amicus Sample Map and the Congressmen’s Modified Remedial Map, App. 327, added.

*Table 1: Core Retention Figures from Johnson, 2022 WI 14, ¶ 14 (Wis. March 3, 2022), with data from Amicus' Sample Map and the Congressmen’s Modified Remedial Map, see App. 327, added.*

	<b>Total People Moved</b>	<b>Average Core Retention</b>
Amicus Sample Map <sup>5</sup>	109,250	98.15%
Congressmen’s Modified Remedial Map	226,723	96.16%
Governor Evers	324,415	94.5%
Congressmen	384,456	93.5%
Hunter	411,777	93.0%
MathSci	500,785	91.5%

The Amicus Sample Map performs better under both metrics the Wisconsin Supreme Court said it prioritized. The Amicus Sample Map moves *over 200,000 fewer people* and has retention scores nearly 4 percent higher than the chosen Governor’s map.<sup>6</sup> Therefore, it is evident from the data that none of the parties prioritized core-maximization in their original remedial map submissions. As seen from the data and the provided sample map, creating a constitutionally compliant map that truly maximizes the retention of district cores is a relatively simple process that can be done quickly. The parties should be given the opportunity to

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<sup>5</sup> The Amicus Sample Map also complies with this Court’s one-person, one-vote jurisprudence by having districts that are within a deviation of one-person. *See Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>6</sup> Upon request, Amicus will gladly provide this Court, the Wisconsin Supreme Court, or any party with the shapefiles used to create this map.



draw a true core-maximization map that complies not only with the Wisconsin Supreme Court's belated reasoning but also with Article I, Section 2 of the U.S. Constitution.

**II. The Governor's Map contains an excessive population deviation not justified by any legitimate state objective.**

The Supreme Court has consistently interpreted Article I, Section 2 of the U.S. Constitution to require that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). To evaluate one-person, one-vote claims, the Court applies the two-step analysis from *Karcher*, 462 U.S. 725. First, the parties challenging a congressional map must "prov[e] the existence of population differences that 'could practicably be avoided.'" *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760 (2012) (quoting *Karcher*, 462 U.S. at 734). If the challengers meet this standard, the burden shifts to the State to "'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Id.* (quoting *Karcher*, 462 U.S. at 741). The Governor's map adopted by the Wisconsin Supreme Court fails both steps of the *Karcher* test.

First, Applicants have demonstrated that the population deviation on the Governor's map could practicably have been avoided. The Governor's map deviates from perfect population equality because it exhibits "a two-person deviation between the largest and smallest district." Applicants' Emergency Appl. for Stay at 29. Although this deviation might appear small, the size of the deviation affects only the magnitude of the constitutional violation—not whether such a violation

exists. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 676 (M.D. Pa. 2002) (holding that a nineteen-person population deviation, “even though relatively small, enables the Plaintiffs to satisfy *Karcher*’s first prong and shifts to the Defendants the burden of proving justification”). This Court has consistently affirmed that “there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.” *Karcher*, 462 U.S. at 734. At least two alternative maps that satisfied the equal-population requirement were considered by the Wisconsin Supreme Court, including the initial map produced by Applicants. Applicants’ Emergency Appl. for Stay, at 10. This demonstrates that the population deviation in the Governor’s map could have practicably been avoided, and the only way the map can survive invalidation is if the deviations “were necessary to achieve some legitimate state objective.” *Karcher*, 462 U.S. at 741.

This Court in *Karcher* identified several examples of legitimate state interests that could support the existence of population deviations on a congressional map, including “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” *Id.* at 740. But not just any asserted state interest will suffice; rather only “consistently applied legislative policies” are sufficient. *Id.*

In *Tennant*, for example, this Court allowed a 0.79 percent population deviation in West Virginia’s 2011 congressional map because the State justified it by a “valid, neutral” and consistently applied state legislative policy of “minimiz[ing] population shifts between districts.” 567 U.S. at 764. With respect to

its congressional districts, Wisconsin has *no such policy*. See App. 16 (“The Wisconsin Constitution contains no explicit requirements related to congressional redistricting.”).

Neither the Governor nor the Wisconsin Supreme Court has identified any “consistently applied legislative policy” that justifies the population deviation on the Governor’s map. See App. 9 (explaining that the Governor’s map was selected solely because it moves only “5.5% of the population to new districts, leaving 94.5% in their current districts”). The Wisconsin Supreme Court acknowledged that the Governor’s map contains a “total deviation between the most and least populated districts [of] two persons,” but called Applicants’ contention that this deviation violated Article I, Section 2 “a strained reading of the law.” App. 17. The only potential justification the Wisconsin Supreme Court cited for its decision was its “least change objective”—*i.e.*, a criterion adopted by the court four months ago due to its reluctance to “mak[e] significant policy decisions or weigh[] competing policy criteria.” App. 8, 18-19. *Ad hoc* criteria devised solely to cabin the court’s discretion is a very slim reed on which to rest a deviation from Article I, Section 2’s one-person, one-vote mandate. It is slimmer still when Amicus has shown that a map can be swiftly drawn with the smallest possible population deviation while also maximizing core retention.

Like the plaintiffs in *Vieth*, Amicus and Applicants have demonstrated is that “it is possible to draw a congressional district map with zero deviation” that also satisfies the Wisconsin Supreme Court’s asserted goal of retaining the cores of existing districts to minimize population shifts. Compare *Vieth*, 195 F. Supp. 2d at 677, with *supra* at 6-9; see also Applicants’ Emergency Appl. for Stay, at 23-24

(noting that the “Modified Congressmen’s” map achieved a higher core-retention score than the Governor’s map while eliminating population deviations). Hence, “it has been conclusively proven that it is possible to draw a congressional district map with zero population deviation amongst districts without” sacrificing the state supreme court’s asserted goal of maximum core retention. *Vieth*, 195 F. Supp. 2d at 678. “Therefore, Defendants cannot rely on a general desire to [maximize core retention] as a legitimate justification” for adopting the Governor’s map when alternative equal population maps do a better job of achieving that goal. *Id.* Because the State fails at both steps of the *Karcher* test, an emergency stay should be granted.

### CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Court grant the Applicants’ request for an emergency stay and order the State to enact a congressional map that satisfies Article I, Section 2’s equal population requirement.

March 15, 2022

Respectfully submitted,

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# APPENDIX 1

