No. 21A490

IN THE
Supreme Court of the United States

GLENN GROTHMAN, ET AL.,
Applicants,

v.

WISCONSIN ELECTIONS COMMISSION, 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 PENDING PETITION FOR WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND SUMMARY REVERSAL

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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"—hereby oppose the Applicants' request for a stay pending their petition for a writ of certiorari, or, in the alternative, petition for writ of certiorari and summary reversal. Applicants do not come close to meeting the standard for an emergency stay and their request for summary reversal borders on frivolous. This Court has never held that a maximum deviation of two persons in a congressional districting plan violates Article I, Section 2 of the U.S. Constitution. And Applicants advocated below for the exact measure of "least change" that the Wisconsin Supreme Court applied. While Applicants are now unhappy that the Governor bested them on the very standard they advocated, that does not give rise to a due-process violation.

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 congressional 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 congressional redistricting plan, the Wisconsin Supreme Court undertook proceedings to select a remedial congressional redistricting plan. The Citizen Mathematicians and Scientists intervened as petitioners in those proceedings not to push

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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 map, 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"), a congressional plan that outperformed the other plans submitted by the parties below to the Wisconsin Supreme Court on all traditional neutral districting criteria—including keeping political subdivisions together in compact, contiguous districts with a population deviation of no more than one person between the largest and smallest district—but which did not score as well as the other parties' maps on the "core retention" measure of "least change." The Wisconsin Supreme Court selected the congressional districting plan proposed by the Governor, which scored best on the "core retention" measure of "least change."

REASONS FOR DENYING THE APPLICATION

"Stays pending appeal to this Court are granted only in extraordinary circumstances," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers), and "[d]enial … is the norm," *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). "To prevail in an application for a stay or an injunction, an

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applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (citation omitted). In a case, like this one, on the Court's discretionary docket, the applicant also "must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, [and] (2) 'a fair prospect' that the Court will then reverse the decision below." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quoting *Conkright*, 556 U.S. at 1402 (Ginsburg, J., in chambers)); *see Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) (observing that the applicant's likelihood of success on the merits turns in part on "a discretionary judgment about whether the Court should grant review in the case"). Moreover, two Justices recently concluded that when an applicant seeks federal-court equitable relief "close to an election," relief is available only if "(i) the underlying merits are entirely clearcut …; (ii) the [applicant] would suffer irreparable harm absent the [relief]; (iii) the [applicant] has not unduly delayed bringing the complaint to court; and (iv) the changes … are … feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring, joined by Alito, J.). Applicants do not meet any of these standards.

1.   Even assuming they have standing (a disputed issue that the Citizen Mathematicians and Scientists leave to other parties), Applicants are not likely to succeed in their claim that the Wisconsin Supreme Court violated Article I, Section 2 by

selecting a remedial congressional redistricting plan with a total population deviation of two persons between the largest and smallest districts. The Wisconsin Supreme Court thoroughly considered and rejected Applicants' arguments about this population deviation below. As the court explained—with reference to this Court's holdings in both *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012) (*per curiam*)—this Court "has been willing to accept 'small differences in the population of congressional districts' 'so long as they are consistent with constitutional norms.'"[1] As the court further explained, "this minor population deviation" of two persons was "justified under Supreme Court precedent" because it furthered the Wisconsin Supreme Court's own "least change objective."[2] Further, the court correctly observed that there is no case from this Court or elsewhere that has struck down a map for a two-person deviation.[3] It is highly unlikely that four Members of this Court would consider the question whether a two-person deviation in a remedial congressional districting plan violates Article I, Section 2 worthy of review, or that five Members of this Court would vote to upset the Wisconsin Supreme Court's determination that "the two-person deviation between the most- and least-populated districts in the Governor's proposed map does not violate the United States Constitution."[4] Accordingly, the Application should be denied on this ground.

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[1] App. 17 (¶22) (quoting *Karcher*, 462 U.S. at 740).
[2] App. 18 (¶24).
[3] App. 18 (¶23).
[4] App. 19 (¶24). This Court just rejected an emergency stay application claiming that Pennsylvania's congressional districts were unconstitutionally malapportioned due to a two-person deviation. *See Toth v. Chapman*, No. 21A457, 2022 WL 667924 (U.S. Mar. 7, 2022).

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2.   Applicants' due-process claim likewise fails. It should have come as no surprise to Applicants that the Wisconsin Supreme Court used a "core retention" measure of "least change" given that this was the very measure Applicants advocated below. In briefs filed in October 2021, Applicants expressly asked the Wisconsin Supreme Court to "maximize 'core retention,' … by limiting the number of people placed in different congressional districts," as this would "reduce[] voter confusion by decreasing the number of people forced to vote in elections for unfamiliar congressional candidates, after a switch to a new district."[5] While the Citizen Mathematicians and Scientists argued that "least change" should mean simply that the new congressional plan must respect the choices the Legislature made with respect to traditional districting criteria in the prior plan, Applicants instead advocated for a "core retention" approach to "least change."

Applicants won this argument. They got exactly what they requested. In the Wisconsin Supreme Court's November 30 Opinion, the court announced that it would adopt a "least change" approach in part because it "maintains the continuity of representation for each district."[6] And the dissent expressly noted that this "least change" metric could be measured by the "fewest number of people moved from one district to the next."[7] Applicants are, of course, disappointed that the Governor proposed a map that performed better on the core-retention measure than did their own. But that disappointment does not give rise to a due-process violation, and none of the cases cited

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[5] Congressmen's Br. at 22, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 25, 2021); *see id.* at 5 (arguing that the "'least-change' approach would both minimize voter confusion and maximize core retention, since it limits the total number of people moved into a new district").
[6] *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 491 (Wis. 2021) (quotation marks omitted).
[7] *Id.* at 500 (Dallet, J., dissenting).

by Applicants even remotely supports their arguments. Accordingly, Applicants are not likely to succeed in persuading four Members of this Court to grant certiorari or five Members of this Court to reverse the decision below on due-process grounds.

3. Beyond their failure to show any likelihood of success on the merits, Applicants also fail to show that a stay would be in the public interest. Quite the contrary. The effect of a stay would be to put the current severely malapportioned congressional plan back into place, which has a 94,000-person deviation between the largest and smallest districts, rather than a two-person deviation.[8] It would make little sense to remedy a potential vote-dilution problem by imposing the possibility of much greater vote dilution on Wisconsin voters. A stay is thus not in the public interest.

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[8] Applicants also have suggested that this Court could simply "order that Wisconsin hold these elections under the map passed by the Legislature in 2021," even though map was vetoed by the Governor and rejected by the Wisconsin Supreme Court. Appl. at 38. For the reasons explained in the Citizen Mathematicians and Scientists' response in opposition in docket number 21A471, that is not a viable option.

CONCLUSION

The Court should deny the Application.

Dated: March 15, 2022

Respectfully submitted,

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