No. 21A490

In the Supreme Court of the United States

GLENN GROTHMAN, UNITED STATES CONGRESSMAN, ET AL.,
APPLICANTS,
v.
WISCONSIN ELECTIONS COMMISSION, ET AL.,
RESPONDENTS.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A PETITION FOR A WRIT OF CERTIORARI AND SUMMARY REVERSAL

On Application For Stay, Or, In The Alternative, On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

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

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

The Wisconsin Supreme Court's decision below has forced upon Applicants and the people of Wisconsin a malapportioned congressional map, adopted through an unconstitutional bait-and-switch process. The constitutional violations here are clear, egregious, and easy for this Court to remedy. Indeed, the only upshot of this Court granting the primary relief that Applicants seek is that the congressional map that the Wisconsin Supreme Court would adopt within a week both will comply with Article I, Section 2 and will far better satisfy the core-retention-maximization-only criteria that the Wisconsin Supreme Court itself belatedly imposed upon the parties.

The two constitutional errors here are indefensible. *First*, if the Wisconsin Supreme Court had given the parties constitutionally required fair notice in its November 30 opinion of the core-retention-maximization-only methodology that was to govern its selection of a map on March 3, every party would have submitted entirely different maps. *See* Stay Appl.24–25. While Respondents now tell this Court that they knew that the core-retention-maximization-only methodology was the test, *that is flagrantly, demonstrably false*. As these parties concede by silence, not a single one of them even attempted to submit a core-retention-maximization-only map below, because no one could have thought that was the test. Indeed, as *Amicus* National Republican Redistricting Trust points out, drawing a core-retention-maximization map for Wisconsin's eight congressional districts is a trivial exercise—easily completed within an hour—which would move over 200,000 fewer people than the Governor's Map and score nearly 4% higher than that map on core retention. NRRT

Amicus Br.7, 9. But this Court need not speculate about whether a bait-and-switch occurred below: every Justice joining the Court's November 30 least-change decision in full said so in their March 3 writings, explaining how the test that the Court adopted on November 30 was "previously unknown," App. 41, that core retention was never noted as "the sole factor to be considered," App. 90, or as the "sole determinant of a least change inquiry," App. 106, and that the Court imposed a "made [ ] up," rule, App. 156. None of the Respondents explain these Justices' March 3 writings in their Oppositions. *Second*, as to the Governor Map's violation of Article I, Section 2, Stay Appl.27–33, no Respondent disputes that it would have been easy to draw a one-person-deviation map that far outperformed the Governor's Map on core-retention-maximization, meaning that the Governor's Map's deviation is not "necessary to achieve some legitimate state objective," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Finally, no other considerations should prevent this Court from remedying the Wisconsin Supreme Court's procedural and substantive violations of the Constitution here. Wisconsin's election administration deadlines—the first of which does not occur until April 15—do not counsel against relief, as there is ample time for this Court to order, and the Wisconsin Supreme Court to implement, the Congressmen's requested remedy. And the Congressmen have standing and have suffered irreparable harm from the Court's March 3 Opinion and Order, given the deprivation of the Congressmen's procedural due process rights; the loss of unrecoverable funds from campaigning in the significantly altered districts adopted by the Court below; and the harm of voting and campaigning in malapportioned districts.

ARGUMENT

I. This Court Is Likely To Grant Review And To Summarily Reverse On Both Of The Congressmen's Questions Presented

A. The Wisconsin Supreme Court Violated The Due Process Clause

1. The Fourteenth Amendment requires States to adhere to those "standards necessary to ensure that judicial proceedings are fundamentally fair," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981), including the minimum safeguards of "notice and opportunity for hearing appropriate to the nature of the case," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); Stay Appl.19–20. A state supreme court violates these constitutional protections when it gives "retroactive effect" to an "unforeseeable" decision that deprives litigants of a fair "hearing." *Bouie v. City of Columbia*, 378 U.S. 347, 354–55 (1964); *see also Reich v. Collins*, 513 U.S. 106, 110–14 (1994); *Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917); Stay Appl.19–20. That is, what a state supreme court "may *not* do" under the Due Process Clause is "reconfigure" its legal "scheme, unfairly, in *midcourse*—to 'bait and switch'" the parties before it. *Reich*, 513 U.S. at 111.

As the Congressmen explained in their Application, the Wisconsin Supreme Court's March 3 Opinion and Order worked a "bait and switch" of the Court's governing legal standard for the adoption of congressional redistricting maps. Stay Appl.22–27. In its November 30 opinion, the majority adopted a "least-change approach" to reapportion the State, citing a number of least-change cases that all considered multiple least-change factors beyond core retention, such as not splitting communities of interest. *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 666–67

(2021); Stay Appl.22–23. Justice Hagedorn—whose vote was essential to forming a majority—explained in a concurrence that he would also consider a map's respect for "communities of interest" and "other traditional redistricting criteria" if competing maps were "equally compelling" as to least changes." *Johnson*, 399 Wis. 2d at 673–74 (Hagedorn, J., concurring); Stay Appl.22–23. Unsurprisingly, every one of the parties submitted proposed maps that *balanced* considerations of core-retention maximization with other least-change indicia, like respect for communities of interest and avoiding county and municipal splits. Stay Appl.22–23. Then, having "bait[ed]" the other parties, the Court "switch[ed]" the standard, *Reich*, 513 U.S. at 111, in its March 3 Opinion and Order to the core-retention-maximization-only standard. Stay Appl.24–25. The Court did not afford the parties the opportunity to submit evidence—that is, new maps—under this new standard, without a coherent explanation. Stay Appl.25–26. The Court's hide-the-ball approach violates the Due Process Clause. Stay Appl.25–26; *see Reich*, 513 U.S. at 111; *Bouie*, 378 U.S. at 354; *Saunders*, 244 U.S. at 319–20.

2. Respondents claim that the Court's dramatic shift from its holistic least-change approach to its core-retention-maximization-only test was what the Court ordered in its November 30 opinion. Gov. Resp.19–20; Hunter Resp.14–15. That is, with all respect, not a serious argument. If this Court has any doubt, the only three Justices who joined that decision in full, including the opinion's author, specifically and unequivocally explained on March 3 that the November 30 opinion did not contain any suggestion of a core-maximization-only test**.** App. 41, 90, 106, 126–29 &

n.1, 155–59. The fourth Justice who made up the November 30 opinion majority had explicitly told the parties that he would look to both core retention *and* community of interest considerations. *Johnson*, 399 Wis. 2d at 673–77 (Hagedorn, J., concurring). The Wisconsin Supreme Court's abrupt shift from a *multifactor* least-change approach to a *single-element*, core-retention-maximization-only test was an unexpected, mid-litigation "reconfig[uration]" of the Court's controlling standard. *Reich*, 513 U.S. at 111; *accord NAACP v. Patterson*, 357 U.S. 449, 456 (1958) (explaining that state supreme court's subsequent holding could not be "reconcile[d]" with its "past unambiguous holdings" on the controlling issue); *see* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1186–87 (1989) (discussing the sharp distinction between "totality of the circumstances tests" and the "law of rules" (emphasis omitted)).

While the Governor claims that the Congressmen "were (and remain) entirely isolated in th[e] view" that the Wisconsin Supreme Court had adopted a core-retention-maximization approach, Gov. Resp.20, that is flagrantly, demonstrably false. The proof is in the filings below, as no party—including the Governor—submitted anything approaching a core-retention-maximization congressional map after the November 30 opinion, and each party focused on a balance between core-maximization and other least-changes indicia. After all, a constitutional map focused only on core-retention would move over 200,000 fewer people than does the Governor's Map. NRRT *Amicus* Br.9. Put another way, it is now beyond doubt (and undisputed in the papers here) that all parties to the proceedings below, had they

been adequately advised of the core-retention-maximization-only approach the Wisconsin Supreme Court eventually adopted, would have submitted very different maps, with radically better core-retention scores. *Id.*

The Hunter Respondents' citations of *In Re Petition Of Reapportionment Comm'n Ex. Rel.*, No. SC 20661, 27 (Conn. Jan. 18, 2022);[1] *Below v. Gardner*, 963 A.2d 785, 795 (N.H. 2002); and *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 702894, at *26 (Pa. Feb. 23 2022) (Wecht, J., concurring), do not support a different conclusion. Hunter Resp.15–16. The Wisconsin Supreme Court did not cite most of these decision in its November 30 opinion, one of which issued after even the March 3 Opinion and Order. *See Carter*, 2022 WL 702894 (noting that opinions were filed on March 9, 2022). Instead, the November 30 opinion relied upon multiple cases all applying multi-factor, least-change approaches, *Johnson*, 399 Wis. 2d at 666–67 (citing *Crumly v. Cobb Cnty. Bd. of Elections & Voter Registration*, 892 F. Supp. 2d 1333, 1344–45 (N.D. Ga. 2012); *Martin v. Augusta-Richmond Cnty. Comm'n*, No. CV 112–058, 2012 WL 2339499, at *3 (S.D. Ga. June 19, 2012); *Stenger v. Kellett*, No. 4:11-cv-2230, 2012 WL 601017, at *3 (E.D. Mo. Feb. 23, 2012); *Below*, 963 A.2d at 794; *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002); *Bodker v. Taylor*, No. 1:02-cv-999, 2002 WL 32587312, at *5 (N.D. Ga. June 5, 2002); *Markham v. Fulton Cnty. Bd. of Registrations & Elections*, No. 1:02-cv-1111, 2002 WL 32587313, at *6 (N.D. Ga. May 29, 2002)). And while Hunter Respondents claim that *Below* (the *only* decision they

[1] Available at https://jud.ct.gov/supremecourt/Reapportionment/2021/Docs/FinalOrder.pdf (all websites last visited Mar. 16, 2022).

cite that the Wisconsin Supreme Court also cited) stands for proposition that "[c]ourts routinely implement the least-change standard by examining core retention," Hunter Resp.15, the court there considered core retention alongside other traditional redistricting criteria as part of its least-change inquiry, *Below*, 963 A.2d at 794–95, which is the approach the November 30 opinion announced. And, again, every Justice who joined the November 30 opinion in full agreed that the March 3 Opinion and Order blindsided the parties on this core-retention-maximization-only methodology, "implement[ing] a previously unknown, judicial test," App. 41, "[n]ever before" submitted as "the sole factor to be considered," App. 90, or the "sole determinant of a least change inquiry," App. 106, imposing a test that "th[e] [March 3 Opinion and Order] majority made [ ] up," App. 156.

Respondents next argue that the Congressmen cannot claim surprise at the Wisconsin Supreme Court's sudden adoption of the core-retention-maximization-only methodology, since, in Respondents' view, the Congressmen themselves advocated for this single-element methodology before the Court, and because the Congressmen tried to submit an alternative map. Gov. Resp.17–18, 21; Hunter Resp.14–15. As a threshold matter, Respondents are wrong, given that the Congressmen advocated for the Court to follow a "'least-change' approach" that requires it "to adopt a remedial map by making minor or obvious adjustments to the existing map to account for shifts in [ ] population," Supp.App. 108 (citations omitted), while recognizing that the Court "must exercise some limited discretion . . . when determining precisely how to adjust existing district lines," Supp.App. 109. For that limited discretion, the Congressmen

explained, "traditional redistricting principles would guide" the Court and "counsel in favor of adjusting the district's lines" in one "manner" over another. Supp.App. 110; *see also* Supp.App. 73–74. Nowhere did the Congressmen argue that core retention should be the only indicia of least-change, including in deciding which changes would qualify as minor or obvious, *see* Supp.App. 84, 95–130. In any event, it does not matter what the parties advocated before the November 30 opinion, it matters what the Wisconsin Supreme Court actually ordered as the standard it would employ, and (1) every Justice who joined the November 30 opinion in full agrees fervently with the Congressmen as to that opinion's meaning; and (2) every party submitted maps to the Court under the understanding that the least-change approach did not equate to core-retention-maximization-only. As for the Congressmen's attempt to submit an alternative map, that submittal continued to respect traditional redistricting criteria to some extent—such as communities of interest and county/municipal splits—while further emphasizing core retention. App. 322–29; App. 14 n.11. While that map moved about 100,000 people fewer than did the Governor's Map, it still moved roughly 100,000 people more than a core-retention-maximization map. NRRT *Amicus* Br.9.

The Governor takes the remarkable position that the Due Process Clause permits state courts to mislead parties, switching a multifactor test to a single factor, and then applying that single-factor test without allow the parties to present evidence under the single-factor test. This Court's decisions in *Bouie*, *Reich*, and *Saunders* all refute that surprising argument.

In *Bouie*, this Court explained that a state supreme court cannot, consistent with the Due Process Clause, give "retroactive effect" to an "unforeseeable" decision, if the application of that decision would deny "a litigant a [fair] hearing." 378 U.S. at 354–55. The Governor's failure to engage with *Bouie* is a tacit admission that this Court has long imposed due-process safeguards on state supreme courts to prohibit what happened here—a lack of "fair warning" before imposing an adverse decision after a change in the law. *Id.* at 352.

Similarly, in *Reich*, this Court held that while the Due Process Clause did not deny a state supreme court the "flexibility" to choose an "exclusive[ ] . . . remedial scheme," the court could not do so "unfairly, in *midcourse*" by "h[o]ld[ing] out what plainly appeared to be a 'clear and certain' . . . remedy" before revoking that option and imposing an alternative and exclusive option. 513 U.S. at 110–11. While the Governor attempts to distinguish *Reich* by claiming that it "hinged entirely on the application of longstanding due-process principles governing state-law remedial schemes for taxpayers," Gov. Resp.24, he ignores that this Court found that the facts of *Reich* bore "a remarkable resemblance to" *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449 (1958)—a mandamus case in which this Court held that a state court's deprival of fair review of contempt judgments could violate a litigant's "federal constitutional rights," *Reich*, 513 U.S. at 112–13 (citation omitted).

In *Saunders*, this Court held that "the 14th Amendment" precluded a state court from reversing a favorable judgment based on a new judicial decision without permitting the losing litigant to "put his evidence in" in response to that new decision

if he did not have "the proper opportunity to present his evidence" before. 244 U.S. at 319. The Governor acknowledges these aspects of the decision, Gov. Resp.24–25, but then makes an about-face and seeks to confine *Saunders* to its facts, arguing that it "stands for a modest, unremarkable proposition: that 'state procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process,'" *id.* at 25 (citing Edward H. Cooper, 16B Federal Practice & Procedure (Wright & Miller) § 4025 (3d ed. Apr. 2021 update) (hereinafter "Wright & Miller")). While this is *one* holding of *Saunders*, this Court *also held* that "it was a denial of due process to refuse to entertain the defendant's petition for rehearing," and "the denial of due process rights 'need not be by legislation.'" Wright & Miller, *supra*, § 4025 (quoting *Saunders*, 244 U.S. at 320).

None of the doctrines that the Governor cites support his parsimonious understanding of the Due Process Clause. He first points to law-of-the-case precedent to suggest that judicial substitution of a new test is constitutionally permissible. Gov. Resp.22. But if a court were ever to take the remarkable step of displacing the law of the case by adopting a new test and then subsequently refusing to allow the parties even to submit evidence under this new rule—as occurred here—*that* would create the very Due Process Clause problem that *Bouie*, *Reich*, and *Saunders* identify. Similarly, as to *stare decisis*, Gov. Resp.23, while courts certainly have the authority to overrule prior decisions, this power does not include the authority to adopt an entirely new test—such as switching from a multi-factor test to a one-factor test—and then give the parties no opportunity to submit evidence under that test,

especially when, as here, it is undisputed that allowing the parties fairly to submit evidence under the new standard would change the outcome of the case at issue.

Finally, the Hunter Respondents argue that the Congressmen suffered no deprivation of due process rights because "no candidate holds a protected property interest or liberty interest in their election to office, let alone in election to office under the district lines of their choosing." Hunter Resp.13. That is just a rehash of their meritless irreparable-harm argument, addressed below, *see infra* Part III.

B. The Wisconsin Supreme Court Violated Article I, Section 2

1. Article I, Section 2 imposes a "one-person, one-vote principle" on the States' congressional districts, meaning that "congressional districts [must] be drawn with equal populations." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). Specifically, States must "draw congressional districts with populations as close to perfect equality as possible"—with no exceptions given. *Id.* But even under the pre-*Evenwel* rule in *Karcher*, "absolute population equality" is "the paramount objective," tolerating only those deviations from "[p]recise mathematical equality" that are "impossible" to eliminate or that are "necessary to achieve some legitimate state objective." 462 U.S. at 730–31, 740; *accord Mahan v. Howell*, 410 U.S. 315, 322 (1973); Stay Appl.27–28.

The Governor's Map unquestionably violates Article I, Section 2. Stay Appl.28–33. As an initial matter, the Governor's Map violates *Evenwel*, since it has a two-person deviation from ideal population, although it is indisputably possible to draw a map with a one-person deviation. Stay Appl.29; *Evenwel*, 578 U.S. at 59. In any event, the Governor's Map also fails under *Karcher*: First, and again, it is

possible to draw a map with a one-person deviation, yet the Governor failed to do so only because of his own mistake of law. Stay Appl.29–30. Second, the Governor did not even attempt to carry his burden of justifying his deviation from ideal population with reference to any legitimate state objective, admitting at oral argument that this was solely because of his own mistake of law. Stay Appl.30. Further, the Wisconsin Supreme Court's own conclusion that it would be administratively convenient to adopt the Governor's Map fails to justify its deviation either. Stay Appl.30–33.

2. Respondents' attempts to salvage the Governor's Map all flounder.

To begin, the Governor chides the Congressmen for not addressing the one-person/one-vote violation in the Governor's Map in their response brief before the Wisconsin Supreme Court below, apparently claiming that this issue was not preserved for this Court's review here. Gov. Resp.1, 12, 30. But this issue was squarely and repeatedly raised below—including by the Congressmen—and addressed by the Court, *see Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992). Respondents Citizen Mathematicians and Scientists raised this issue in their relevant response brief to the Wisconsin Supreme Court, explaining that the "Governor's . . . proposed plan[ ] fail[s] to satisfy even th[e] fundamental requirement" of apportioning the State as equally as possible "because [it] exhibit[s] more than the mathematical minimum population deviation between districts." Supp. App. 33. Then, in their relevant reply brief, the Congressmen argued that "the Governor's . . . proposed congressional map[ ] fail[s] to achieve perfect population equality because [it] do[es] not reduce the difference between the most and least populous districts to

a single person, which violates the one-person/one-vote requirement applicable to congressional redistricting," while expressing their expectation that the Governor would file a motion to fix this malapportionment and bring his map into constitutional compliance. Supp. App. 12 & n.2 (citations omitted). After it became clear that the Governor had no intention of curing this constitutional violation because he did not understand the law, the Wisconsin Supreme Court and the parties—including the Congressmen—focused extensively on this issue at Oral Argument. *See, e.g.*, Stay Appl.12, 17, 29–30. Finally, both the majority opinion and dissenting opinions in the March 3 Opinion and Order fully discussed this malapportionment issue, App. 16–19; App. 107 (Ziegler, C.J., dissenting); App. 129–31 (R.G. Bradley, J., dissenting), placing it beyond any possible doubt that this constitutional question was squarely preserved for review, *see Taylor*, 503 U.S. at 645–46.

Next, the Governor and the Hunter Respondents claim that the deviation in the Governor's Map was justified by the Wisconsin Supreme Court's own core-retention goal, Gov. Resp.27–30; Hunter Resp.20–25, but this is obviously wrong. The Governor conceded that he could have achieved a lower population deviation without even suggesting that this would somehow harm core retention, Stay Appl.30–31; *see Karcher*, 462 U.S. at 731, 740 (placing the "burden" of justification on the Governor), and his indecipherable attempts to explain away this concession now are just hand-waiving, *see* Gov. Resp.11–12, 29–30. In any event, the Wisconsin Supreme Court cannot rely on core retention as a legitimate justification for the Governor's

population deviation. The Court had before it the modified version of the Congressmen's Map, which had a higher core-retention score than the Governor's Map *and* achieved as equal an apportionment as possible. Stay Appl.31 (citing App. 327). Even if the Court did not wish to adopt that map for procedural reasons, *compare* Gov. Resp.29–30, that map unequivocally proves the obvious: *nothing* about the Governor's deviation is even arguably justified by core-retention goals. Indeed, any argument to the contrary is risible, given that it takes less than an hour to create a map with a constitutionally compliant, one-person deviation that moves 200,000 fewer people than the Governor's Map. NRRT *Amicus* Br.7, 9.

None of the authorities that the Governor and the Hunter Respondents cite supports the Governor's Map's deviation here. Gov. Resp.28–29 & n.8; Hunter Resp.21–23. This Court's cases require an *actual* legitimate justification for population deviations, *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) ("minimiz[ing] population shifts between districts"); *Abrams v. Johnson*, 521 U.S. 74, 99 (1997) ("not splitting counties" or "precincts"), as do the overwhelming majority of the cited lower-court cases, *Carter*, 2022 WL 702894, at *16 ("limit[ing] the number of [district] splits"); *Turner v. Arkansas*, 784 F. Supp. 585, 588–89 (E.D. Ark. 1991) ("causing the fewest changes in the location of counties and people"); *Stone v. Hechler*, 782 F. Supp. 1116, 1128 (N.D. W. Va. 1992) ("preserv[ing] prior district cores and maintain[ing] compactness"); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) ("maintain[ing] the cores of the existing congressional districts," while "adding or subtracting" population in a "compact and contiguous"

manner). The only cited exception appears to be *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012), a district-court decision with no reasoning on this issue.

Finally, the Hunter Respondents cite this Court's recent refusal to stay the Pennsylvania Supreme Court's court-drawn map in *Toth v. Chapman*, No. 21A457, 2022 WL 667924 (U.S. Mar. 7, 2022), as support for their claim that the Governor's Map's two-person deviation from ideal population is excusable here, Hunter Resp.20–21, but *Toth* is procedurally distinguishable. Prior to requesting a stay in this Court, the *Toth* petitioners—a group of Pennsylvania voters—filed a federal lawsuit requesting a district court to enjoin the congressional map adopted by the Pennsylvania Supreme Court. *See* Intervenor-Resp'ts Resp. in Opp'n To Emergency Appl. For Writ of Inj., *Toth v. Chapman*, No. 21A457 (U.S. filed Mar. 3, 2022); *see also* Compl. at 4, *Toth v. Chapman*, No.1:22cv208 (M.D. Pa. filed Feb. 11, 2022); Emergency Mot. for TRO or Prelim. Inj. at 2–3, *Toth v. Chapman*, No.1:22cv208 (M.D. Pa. filed Feb. 20, 2022). Following the district court's denial of the *Toth* petitioners' motion for a temporary restraining order—and before that court could even convene the three-judge panel or rule on petitioners' motion to file an amended complaint that raised, for the first time, their malapportionment claim—the petitioners filed an emergency application for relief in this Court. Emergency Appl. to J. Alito for Writ of Inj., *Toth v. Chapman*, No. 21A457(U.S. filed Feb. 28, 2022). This Court denied that emergency application, stating that the "case has now been referred to a three-judge court, and the parties may exercise their right to appeal from an order of that court granting or denying interlocutory injunctive relief." Order in Pending Case,

Toth v. Chapman, No. 21A457, 2022 WL 667924 (U.S. Mar. 7, 2022). The Congressmen's Application here is in a different procedural posture, as they come to this Court directly from the Wisconsin Supreme Court's decision adopting the Governor's Map. *See* Rule 10(b).

II. The Congressmen's Proposed Remedies Can And Would Be Implemented Quickly, Without Any Burden On Election Administration

A. Selecting A Core-Retention-Maximization-Only Congressional Map On Remand Would Take A Week, At Most

As the Congressmen explained, their primary requested remedy here is for this Court to remand to the Wisconsin Supreme Court with instructions to permit all parties to submit new proposed maps under the Court's newly announced, core-retention-maximization-only methodology. Stay Appl.3–4, 35–37, 39. This would fully address the Court's due process violation by allowing the parties the opportunity to submit evidence under the Court's new governing standard, while also mooting the issue of the malapportionment of the Governor's Map. Further, drawing a map under the Wisconsin Supreme Court's newly announced, core-retention-maximization-only methodology is a trivially easy exercise, Stay Appl.2–3, 37, which also eliminates any plausible claim that any delay from this Court's stay would cause any harm in light of upcoming election deadlines, Stay Appl.35–37. Indeed, as *Amicus* National Republican Redistricting Trust notes, this core-retention-maximization-only congressional map can be drafted "in less than one hour." NRRT *Amicus* Br.4, 6–7.

None of the other parties raises a serious argument that employing this remedy would take more than a week. While the Hunter Respondents assert that

ordering this remedy would somehow "substantially harm other parties and the public," Hunter Resp.27, they fail to explain what part of the easy process of adopting a core-retention-maximization-only map for just eight congressional districts would cause such harm to anyone. Indeed, their only actual claim of burden appears to be the hypothetical fear of multiple parties submitting maps with exactly identical core-retention-maximizing figures, presumably somewhere near the *Amicus*' 98.15% core-retention figure. Hunter Resp.28; *see* NRRT *Amicus* Br.9. As an initial matter, the Hunter Respondents' recognition that, upon remand under a core-retention-maximization-only standard, the parties would submit new maps with radically lower core-retention scores refutes any argument that the parties had fair notice of such a requirement after the November 30 opinion. *See supra* Part I.A. In any event, concerns of a core-retention "tie," Hunter Resp.28, are unwarranted, as it is exceedingly unlikely that two maps would *exactly* tie for best core-retention-maximization score, given the very minor adjustments that any map-drawer will need to make at the end of the draw to achieve a one-person deviation in population. But even if such an unlikely, exact tie were to happen, the Wisconsin Supreme Court would resolve any such issue very quickly. To give just one example, the Court proved its ability to resolve election-related disputes with utmost expediency less than two years ago, answering a complicated certified question for the Seventh Circuit in an election-related dispute in four days' time. *See* Order Granting Certification and Accepting Appeal, Dkt. Entry 10-02-2020, *Democratic Nat'l Comm. v. Bostelmann*,

2020AP1634 (Wis.); *Democratic Nat'l Comm.*, 949 N.W.2d 423 (Wis. 2020) (issuing opinion on certified question on October 6, 2020).

Respondent Wisconsin Elections Commission, for its part, claims that this Court granting a stay now—even if only for the week that it would take to hold a fair, core-retention-maximization-only proceeding—would create a "grave risk" of harm to its implementation of Wisconsin's upcoming elections. WEC Resp.5. This contradicts the timeline that the Commission provided to this Court in its response to the companion stay application in this case. There, the Commission requested a ruling from this Court by "March 15, 2022," so that it could "implement new maps for the next election." Resp. of Resp'ts WEC To Emergency Appl. For Stay at 1, 5, *Wis. Legislature v. Wis. Elections Comm'n*, No. 21A471 (U.S. Mar. 11, 2022). It then explained that a delay "beyond March 15" would only "*increase* the risk of errors," *id.* at 4—as opposed to the "grave risk" of harm that seemingly any delay would somehow cause here, WEC Resp.5. The Commission does not even attempt to justify these inconsistent positions. *Compare* WEC Resp.3–5, *with* Resp. of Resp'ts WEC To Emergency Appl. For Stay at 3–4, *Wis. Legislature*, No. 21A471.

In any event, even the March 15, claimed "increase[d] . . . risk" date is based upon mere administrative convenience, not election-administration necessity. Resp. of Resp'ts WEC to Emergency Appl. for Stay at 3–4, *Wis. Legislature*, No. 21A471. While the first upcoming election-related deadline is April 15, this marks just the *beginning* of the nomination period for candidates to circulate nomination papers to appear on the primary ballots. Wis. Stat § 8.15; *compare* Gov. Resp.3, 31, 33–35, 39;

WEC Resp.2, 4–5; Hunter Resp.27. After that start date, candidates have until June 1 to submit their nomination papers to appear on the primary ballots. Wis. Stat § 8.15. Thus, the 30-days-away April 15 deadline is far less meaningful than the deadlines that this Court considered in *Moore v. Harper*, 142 S. Ct. 1089 (2022) (mem.), and *Merrill v. Milligan*, 142 S. Ct. 879 (2022), where the candidate-qualifying windows had already concluded, *see N.C. League, of Conservation Voters, Inc. v. Hall*, Nos. 21 CVS 015426 and 21 CVS 500085, 2022 WL 124616, at *115 (N.C. Super. Ct. Jan. 11, 2022) (closing candidate-qualifying window on March 4); Ala. Stat. §§ 17-13-3, 17-13-5 (setting primary election on May 24, and closing candidate-qualifying window on January 28).

B. Ordering The Use Of The Legislature's Adopted Congressional Map Can Be Done Immediately

The Congressmen's alternative remedy—ordering Wisconsin's upcoming 2022 congressional election to proceed under the congressional map passed by the Wisconsin Legislature in 2021, but vetoed by the Governor, which is the same map that the Congressmen proposed to the Wisconsin Supreme Court below, Stay Appl.3–4, 38–39—may be done immediately. The map passed by the Wisconsin Legislature in 2021 moves fewer people under the Wisconsin Supreme Court's core-retention-maximization-only methodology than any of the constitutional maps that the Court agreed to consider. Stay Appl.38. In contrast, the Hunter Respondents' proposed remedy—ordering the Wisconsin Supreme Court to make whatever slight corrections to the Governor's Map are necessary to apportion it as equally as possible, consistent with the Constitution's one-person/one-vote principle, Hunter Resp.25—is not

available under the Wisconsin Supreme Court's own newly announced standard for judging proposed remedial maps for Wisconsin, which involved adopting a map without modification. *See* Stay Appl.13–14 (discussing App. 8–9, 12, 14). Thus, with the Governor's Map disqualified for failure to comply with the Constitution's one-person/one-vote principle, the map passed by the Legislature in 2021 is the next-best option under the Wisconsin Supreme Court's own methodology. Of course, the Congressmen's primary request is that all parties be given the right to submit core-retention-maximization maps, *see supra* Part II.A, but the Congressmen's alternatively remedy is certainly the second-best option.

III. The Congressmen Have Standing And Would Suffer Grave Irreparable Harm Absent Immediate Relief From This Court

As the Congressmen explained in their Application, Stay Appl.33–37, they will suffer irreparable harm absent emergency relief from this Court, and they have Article III standing for the same reasons.

A. Harm From Rejection Of Congressmen's Proposed Maps. The Congressmen have standing, and would suffer irreparable harm, because the Wisconsin Supreme Court deprived the Congressmen of their Due Process Clause rights to a procedurally fair judicial process, including fair notice that would have allowed them to submit a proposed congressional map under the controlling legal standard that the Court announced. Stay Appl.33; *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020) (per curiam); *accord Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). Relatedly, as this Court's decision in *Swann v. Adams*, 385 U.S. 440

(1967), held, the Congressmen have standing given the Wisconsin Supreme Court's "reject[ion]" of the Congressmen's "alternative plan." *Id.* at 443.

The Hunter Respondents argue that the Congressmen have no standing to assert this Due Process Clause claim because, in their view, candidates have "no legally cognizable interest in the composition of the district" that they wish to represent. Hunter Resp.14 (quoting *Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018), and citing *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980)). Yet, as to their due process claim, the Congressmen are asserting their Due Process Clause-protected interest in a "judicial proceeding[ ]" that is "fundamentally fair," *Lassiter*, 452 U.S. at 33, including one that is free from an unconstitutional "bait and switch," *Reich*, 513 U.S. at 111. Once the Wisconsin Supreme Court granted the Congressmen party status and recognized their "interest relating to the subject of this redistricting action," Supp. App. 92, they obtained the same procedural due process rights under the Due Process Clause that every litigant before a state court enjoys—and the infringement of those rights inflicts a cognizable injury on the Congressmen, under Article III, *see Reich*, 513 U.S. at 110–11 (explaining that a "reconfig[uration]" of a state "scheme" mid-litigation violates a party's constitutional due process rights, although the State is otherwise free to "reconfigure its [ ] scheme over time"); *accord Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (holding that "[a] State need not subsidize private education," but "once a State decides to do so," it must comply with the Establishment Clause).

B. Harm From Expenditure Of Unrecoverable Funds. The Wisconsin Supreme Court's selection of the Governor's Map forces Congressman Bryan Steil, in particular, to expend additional and unrecoverable resources campaigning for the 2022 election in a significantly altered district—a harm that establishes his standing. Stay Appl.34; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *Rumsfeld v. Forum for Acad. & Institutional Right, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

The Governor and the Hunter Respondents do not overcome this straightforward showing. They cannot, and do not, dispute that the unrecoverable expenditure of funds is irreparable. *See generally* Gov. Resp.37–38; Hunter Resp.25–28. Instead, the Hunter Respondents quibble with the magnitude of the change in lines in the Governor's Map. *See* Hunter Resp.26. Yet, as the Congressmen explained, the Governor's Map significantly alters District 1, in particular, by adding "significant new communities" into Congressman Steil's district, with whom he has no existing ties. App. 393–95; Stay Appl.34. Contrary to the Hunter Respondents' apparent claims, a core-retention-maximization-only map would not make these significant changes, and, thus, the adoption of the Governor's Map forces at least Congressman Steil to incur substantial and unrecoverable campaign costs that he would have avoided under a different map, sufficient to give him standing, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *Rumsfeld*, 547 U.S. at 52 n.2.

C. Harm From Voting And Running In A Malapportioned District. The adoption of the Governor's malapportioned map forces several of the Congressmen to

vote and campaign in overpopulated congressional districts, which doubly injures them as voters and candidates, Stay Appl.34–35, and is an irreparable harm, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); Stay Appl.34–35.

The Hunter Respondents claim that none of the Applicants suffer any harm from the Governor's Map's malapportionment because none of the Applicants live in overpopulated districts, but this is incorrect. Hunter Resp.18–20. Under the Governor's Map, Districts 1, 3, 5, and 7 are overpopulated, as they all contain 736,715 or 736,716 people, Supp. App. 2, while the constitutionally ideal population is 736,714.75 people, App. 17. Several of the Applicant Congressmen live in, represent, and intend to run for reelection in the unconstitutionally overpopulated districts, including Congressman Steil in District 1. *See* App. 393. These Congressmen have standing to challenge "the particular composition of [their] own district" in this Court, *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018), given their constitutionally sufficient interests "in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962); *see Rumsfeld*, 547 U.S. at 52 n.2 (only one party needs standing).[2]

[2] If a map placed 736,714 or 736,715 people in each district, as the Congressmen's Map and the modified version of the Congressmen's Map did, Stay Appl. 10–11, those living in districts with 736,715 people would still be living in overpopulated districts. But those districts would be *constitutional*, since they are as equally apportioned "as nearly as is practicable," *Wesberry*, 376 U.S. at 7–8; *see also Karcher*, 462 U.S. at 730–31.

CONCLUSION

This Court should stay the March 3 Opinion and Order of the Wisconsin Supreme Court—or, alternatively, construe this Application as a petition for certiorari and summarily reverse—and then either: (1) remand to the Wisconsin Supreme Court with instructions to permit all parties to submit new proposed maps under the Wisconsin Supreme Court's newly announced, core-retention-maximization-only methodology; or (2) order that Wisconsin hold its upcoming 2022 congressional elections under the map passed by the Legislature in 2021, on a remedial basis.

Respectfully submitted,

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