No. 21A490

In the Supreme Court of the United States

CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD,
Applicants,

v.

MARGE BOSTELMANN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ET AL.,
Respondents.

GOVERNOR TONY EVERS'S OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A PETITION FOR A WRIT OF CERTIORARI AND SUMMARY REVERSAL

Joshua L. Kaul
Wisconsin Attorney General
Anthony D. Russomanno
Brian P. Keenan
Assistant Attorneys General
WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
(608) 267-2238
russomannoad@doj.state.wi.us
keenanbp@doj.state.wi.us

Christine P. Sun
Dax L. Goldstein
STATES UNITED DEMOCRACY CENTER
3749 Buchanan St., No. 475165
San Francisco, CA 94147
(415) 938-6481
christine@statesuniteddemocracy.org
dax@statesuniteddemocracy.org

Joshua Matz
Counsel of Record
Raymond P. Tolentino
Jacqueline Sahlberg*
KAPLAN HECKER & FINK LLP
1050 K Street NW | Suite 1040
Washington, DC 20001
(929) 294-2537
jmatz@kaplanhecker.com
rtolentino@kaplanhecker.com
jsahlberg@kaplanhecker.com

Amit R. Vora
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | 63rd Floor
New York, NY 10118
(212) 763-0883
avora@kaplanhecker.com

**Admitted only in Idaho,*
Not admitted in D.C.
Practicing under the supervision of counsel admitted in D.C.

Counsel for Respondent Governor Tony Evers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

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

It takes true *chutzpah* for Petitioners to complain about a supposed bait-and-switch. They urged the Wisconsin Supreme Court to adopt a least-change approach that would "maximize core retention"; now they insist that the court violated their Due Process Clause rights by prioritizing core retention. They tried to break the rules below by submitting two proposed maps when everybody else got only one; now they complain that the Wisconsin Supreme Court violated their rights by rejecting that map. They told the Wisconsin Supreme Court that "the Governor's Proposed Map equally reapportions Wisconsin"; now they argue the opposite, despite failing to raise this point until a conclusory footnote in their state court reply brief. And they urged the Wisconsin Supreme Court to engage in deliberate process; now they seek an order requiring a crazed, 24-hour lightning round in which everything starts over, everyone makes brand new maps, the state court rules immediately, and election officials (who would have to undo all their work) breathlessly race to meet statutory deadlines.

With all due respect, these arguments "tax[] the credulity of the credulous." *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

Every relevant consideration compels denial of Petitioners' application. To start, their constitutional arguments are meritless. This Court has never held that a party suffers a Due Process Clause violation whenever a court interprets or applies its own rulings in a manner the party did not foresee. That rule would open floodgates nationwide and is at loggerheads with this Court's precedents governing law-of-the-case doctrine and *stare decisis*. Regardless, Petitioners had *plenty* of notice that the

least-change approach (which they urged) would center on core retention (which they also urged). It was Petitioners' own litigation strategy—not a supposed due process violation—that led them to disregard core retention while pivoting to emphasize other metrics that they considered more favorable. And Petitioners' equal population claim is equally vacuous: they flip-flopped on the issue below; they failed to brief the issue below; they misdescribe the record and the law; and they establish no error in the Wisconsin Supreme Court's finding that the least-change approach (which, again, Petitioners had urged) justified the vanishingly small deviation in its chosen map.

Equity independently bars Petitioners' application. As the Wisconsin Elections Commission has explained in its response, Petitioners' request for a stay—and for either a rapid-fire redo of the districting process or a mandatory injunction—poses a grave risk of confusion and disruption in the upcoming Wisconsin election. Moreover, Petitioners' own inequitable conduct cuts against any equitable relief, as does their failure to establish irreparable injury. This conclusion is only confirmed by the truly unprecedented and irresponsible remedy that Petitioners ask this Court to render.

For all these reasons, Petitioners' application should be denied.

BACKGROUND

A. A Political Impasse Requires the Wisconsin Supreme Court to Redistrict Wisconsin's Congressional Maps

Following the 2020 census, which revealed that Wisconsin's 2011 congressional map was malapportioned, the Wisconsin Legislature and the Governor undertook to redistrict. App. 6-7. Ultimately, they reached a political impasse. *Id.* As a result, the Wisconsin Supreme Court was called upon to draw new districts. *See Johnson v. Wis.*

Elections Comm'n, 399 Wis. 2d 623 (2021). In the Wisconsin Supreme Court's original proceeding, the Governor, the Congressmen, and two additional groups (the "Hunter Intervenors" and the "Citizen-Mathematician Intervenors") intervened to propose congressional maps. This litigation unfolded in a single consolidated case that also addressed the State's malapportioned legislative maps, where the Legislature and the "BLOC Intervenors" (among others) addressed the appropriate legal standards.

On September 22, 2021, the Wisconsin Supreme Court asked the parties "when (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date." Order at 3, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. S. Ct. Sept. 22, 2021). The Wisconsin Elections Commission—a bipartisan state agency—replied as follows: "[I]n order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Letter Br. of Wis. Elections Comm'n (Oct. 6, 2021), at 1 ("WEC Letter").[1] Citing Wis. Stat. § 8.15, which establishes April 15, 2022 as the nomination paper date, the Commission added that "[i]f new maps are not in place at least 45 days before April 15, 2022, there is a significant risk that there will be errors in the statewide system[.]"[2] *Id.* at 3.

[1] Briefs and orders in the Wisconsin Supreme Court are available on the court's electronic docket, which is accessible here: https://www.wicourts.gov/courts/supreme/origact/2021ap1450.htm.

[2] Respondent BLOC identified March 14, 2022 as the latest date, since March 15, 2022 "is a statutory deadline for [WEC] to provide notice of those new districts to county clerks," and "Wisconsin statutes, as well as practical constraints, require election officials and candidates to complete multiple administrative steps well in advance" of the August 2022 primary. Br. of BLOC (Oct. 6, 2021), at 1.

B. Petitioners Advocate Adoption of a Least-Change Approach That Would (In Their Own Words) "Maximize Core Retention"

In early October, the Wisconsin Supreme Court asked the parties to address (among other things) whether it should "modify existing maps using a 'least-change' approach." *See* Order, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. S. Ct. Oct. 14, 2021). Petitioners answered with an emphatic "yes," submitting a brief that extolled the virtues of a least-change methodology. *See* Br. of Congressmen (Oct. 25, 2021), at 14-23; *see also id.* at 15 (heading entitled "This Court Should Use the 'Least-Change' Approach In Adopting A Remedial Congressional Map").

In describing the virtues of a "least-change" approach, Petitioners prominently emphasized—in their "Summary of Argument"—that it "would both minimize voter confusion and *maximize core retention*, since it limits the total number of people moved into a new district." *Id.* at 5 (emphasis added). Later in this brief, Petitioners again described "core retention" as the core of the "least-change" approach: "The least-change approach would simultaneously 'minimize voter confusion,' *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012), and maximize 'core retention,' [*Baumgart v. Wendelberger*, No. 01 Civ. 0121, 2002 WL 34127471, at *3, *7 (E.D. Wis. 2012)], by limiting the number of people placed in different congressional districts." *Id*. at 22 (alteration omitted). In other words, the key benefits of a "least-change" approach were the *direct result* of its maximization of "core retention"—which (as Petitioners added) also "preserv[ed] the relations between representatives and their constituents

in the existing districts, promoting continuity and stability." *Id.* (citation and quotation marks omitted).[3]

Petitioners doubled down on this position in the response brief they filed on November 1, 2021. There, they maintained that the Wisconsin Supreme Court was "compel[led]" to adopt a least-change standard that, among other asserted virtues, would "maximize core retention." *See* Resp. Br. of Congressmen (Nov. 1, 2021), at 3. Petitioners also scoffed at the Governor's argument that the least-change approach would "impermissibly elevate the retention of the existing district lines over other binding constitutional and statutory requirements." *Id.* at 8. And they lambasted multiple parties (including BLOC) for encouraging the Wisconsin Supreme Court to consider an "unbounded," free-wheeling array of redistricting factors beyond core retention—such as preserving communities of interest. *Id.* at 6-7, 15.

Petitioners were not alone in describing the maximization of core retention as definitional of least-change analysis. The Legislature, for instance, recognized that the least-change approach (which it endorsed) "maximize[d]" "core retention." Br. of Legislature (Oct. 25, 2021), at 37-38. The Johnson petitioners (represented by the Wisconsin Institute for Law and Liberty, or WILL), in turn, advocated for the least-change approach because "the value of core retention is obvious." Br. of Johnson et al. (WILL) (Oct. 25, 2021), at 16. Indeed, the Johnson petitioners used these terms interchangeably throughout its brief. *See id.* at 17 (anticipating that other parties "will argue that 'core retention' or 'least changes' should be abandoned"). Similarly,

[3] *See also* Omnibus Amended Pet. (Oct. 21, 2021) at 45-46.

the parties and amici who *opposed* the Wisconsin Supreme Court's proposed reliance on least-change analysis did so because it elevated core retention above all else. *See, e.g.*, Resp. Br. of Governor Tony Evers (Nov. 1, 2021), at 7 (arguing that "least change" approach would treat "core retention" as the "domina[nt]" redistricting "concept"); Resp. Br. of BLOC (Nov. 1, 2021), at 2 (noting that "core retention" and "least change" are "benign labels" to describe a "supreme legislature" theory of redistricting); Br. of Amicus Curiae William Whitford et al. (Oct. 25, 2021), at 8 (arguing that the least-change approach wrongly "prioritizes core preservation over all other criteria").

In short, it was crystal clear to everyone involved in the proceedings below that maximizing "core retention" was most fundamental to a least-change methodology.

C. At Petitioners' Urging, the Wisconsin Supreme Court Adopts the Least-Change Methodology for Redistricting

On November 30, 2021, the Wisconsin Supreme Court issued a reasoned decision adopting the least-change standard advanced by Petitioners (among others).

In that ruling, Justice Rebecca Grassl Bradley, writing for herself and two other justices, explained that the court would "confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements." *Johnson*, 399 Wis. 2d at 634 (op. of R.G. Bradley, J.). Emphasizing the limited nature of the judicial role—and its aversion to any policy making—the majority resolved to follow a "least-change" approach that "safeguards the long-term institutional legitimacy of this court by removing us from the political fray and ensuring we act as judges rather than political actors." *Id.* at 669.

Concurring, Justice Hagedorn agreed that "[a] least-change approach is the most consistent, neutral, and appropriate use of our limited judicial power to remedy the constitutional violations in this case." *Id.* at 675 (Hagedorn, J., concurring). He therefore invited parties to submit maps "that comply with all relevant legal requirements, and that *endeavor to minimize deviation from existing law*." *Id.* at 676 (emphasis added). He added that, "[w]hile other, traditional redistricting criteria may prove helpful and may be discussed, our primary concern is modifying only what we must to ensure the 2022 elections are conducted under districts that comply with all relevant state and federal laws." *Id.* at 677. This opinion left no doubt that the Wisconsin Supreme Court would seek to modify as little as possible—and thus to retain as much as possible—while coming into compliance with the law. While other factors might be considered if needed as tiebreakers, the least-change factor would control and was centered on maximizing retention from the 2011 maps. *See id.*

D. The Intervenors Submit Proposed Maps Reflecting a (Largely) Shared Understanding of the Centrality of Core Retention

After the Wisconsin Supreme Court adopted the least-change approach urged by Petitioners, the intervenors below focused significant attention on core retention as the central consideration in adopting new maps. The Governor thus emphasized that his proposed map had outperformed the others because it scored high on "'core retention,'" which "refers to keeping voters where they already are located, thus making the 'least changes.'" Br. of Governor (Dec. 15, 2021), at 9. The Legislature similarly recognized that a "redistricting plan with high core retention scores is indicative of a 'minimum changes' redistricting plan," and touted that its "soaringly

high core retention numbers" illustrated that its proposals were "minimal change plans." Br. of Legislature (Dec. 15, 2021), at 5, 16-18. As the Legislature's expert put it: "a proposed plan with high core retention scores is indicative of a plan that makes minimum changes to Wisconsin's existing districts, as required by this Court." Expert Rep. of Thomas M. Bryan (Dec. 15, 2021), at 20 ¶ 62.

BLOC, too, understood the assignment. As they wrote while submitting their proposed map: the "high 'core retention'" score reflected their plans' "faithful implementation of the 'least-change' approach." Br. of BLOC (Dec. 15, 2021), at 58. The Hunter Intervenors similarly appreciated that, to "make only the minimum changes necessary," they needed to "intentionally maintain the cores of current districts." *See* Br. of Hunter Intervenors (Dec. 15, 2021), at 6.

Alone among the intervenors, Petitioners pivoted away from core retention as the best proxy for least change. Perhaps this was because they belatedly recognized that their advocacy of the Legislature's proposed congressional map left them at a disadvantage under the least-change methodology they had once favored. Indeed, as the Governor's expert concluded, the Governor's proposed map moved only 5.50% of Wisconsin's population, as compared to 6.52% under Petitioners' proposed plan (a difference of approximately 60,000 people who were not retained in their original districts under Petitioners' map). *See* Expert Rep. of Dr. Jeanne Clelland (Dec. 15, 2021), at 8. Whatever the explanation, Petitioners no longer spoke about the need to "maximize core retention." Resp. Br. of Congressmen (Nov. 1, 2021), at 3. Instead, they highlighted two considerations they deemed more favorable for themselves—

including "limiting the number of county and municipal splits" and consistency "with Wisconsin's political geography." Br. of Congressmen (Dec. 15, 2021), at 1, 19-21.

E. Petitioners Continue Their Retreat from Core Retention

After the intervenors submitted their proposed maps, the Wisconsin Supreme Court received two rounds of briefing and conducted a five-hour oral argument. By this point, it was undisputable that Petitioners' proposed map would fail if the court (as Petitioners originally requested) sought to "maximize core retention." Resp. Br. of Congressmen (Nov. 1, 2021), at 3. So Petitioners completely abandoned the core retention value they had once championed, replacing it with the metrics they had foregrounded while submitting their proposed map: avoiding "county and municipal splits" and adhering to "Wisconsin's political geography." Br. of Congressmen (Dec. 15, 2021), at 1. The words "core retention" (a recurring mantra in Petitioners' earlier submissions to the Wisconsin Supreme Court) make no appearance in their December 30, 2021 submission, or in their reply brief submitted January 4, 2022.

In contrast, the other intervenors—including those aligned with Petitioners—continued to focus on core retention as the crucial factor in determining which map should be selected under the "least-change" methodology. *See* Letter Resp. Br. of Johnson et al. (WILL) (Dec. 30, 2021), at 10 (discussing comparative "core retention" scores as a key marker of "least-changes" map); Resp. Br. of Hunter Intervenors (Dec. 30, 2021), at 7, 9-10 (recognizing that "'core retention' score" was the measure of "adherence to the 'least change' requirement," and urging adoption of maps "with the highest core retention scores" as "consistent with the November 30 Order"); Resp. Br.

of Governor (Dec. 30, 2021), at 22 ("The Governor's proposed congressional map outperforms on the key 'core retention' measure."); Resp. Br. of Citizen Mathematicians (Dec. 30, 2021), at 13 (urging adoption of map because it "applies the least-change approach"); Br. of BLOC (Dec. 30, 2021), at 21 ("Core retention provides the most logical and appropriate way to gauge whether a proposal adheres to a 'least-change' approach as it measures how many people are retained in their current districts."); *cf.* Resp. Br. of Legislature (Dec. 30, 2021), at 5 (arguing that Legislature's proposed state assembly and senate maps made the least changes because they "maximize[] core retention"); *see also* Reply Br. of Governor (Jan. 4, 2022), at 14-16; Reply Br. of Hunter Intervenors (Jan. 4, 2022), at 9.[4]

F. Petitioners Initially Agree, then Deny in a Short Footnote, that the Governor's Map Satisfies Article I, Section 2

The briefs submitted by the intervenors also addressed the issue of population equality—and on this point, too, Petitioners were decidedly inconsistent. When the Governor submitted his map, which contained a plus-or-minus-one deviation from perfect equality, he stated correctly that it complied with federal law. *See* Resp. Br. of Governor (Dec. 15, 2021), at 11-12. In their response brief, Petitioners *explicitly* agreed that "the Governor's Proposed Map reaches equal apportionment[.]" Resp. Br.

[4] At oral argument on January 19, 2022, Petitioners' counsel acknowledged that the Wisconsin Supreme Court's selection methodology would be to select the legally valid map that made the least changes—and to consider other factors, such as avoiding county or municipal splits, only as tertiary tie-breakers. *See* Oral Arg. Video Recording, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Jan. 19, 2022) ("Oral Arg. Video Recording") at 4:06:54-4:07:06 ("Justice Hagedorn: So [county or municipal splits] are part of that … third thing. If you get past the legal requirements and, you know, least change, that's where that would maybe factor in. Is that the reason you would offer?" / Congressmen's Counsel: "That's right."). Citations to "Oral Arg. Video Recording" refer to the time-stamps of the January 19, 2022 argument recording, which is accessible here: https://invintus-client-media.s3.amazonaws.com/2789595964/6563c4ae1b950699ec71ca651028be4bc5424423.mp4.

of Congressmen (Dec. 30, 2021), at 2. Indeed, they made this point not once, but twice: "The Governor's Proposed Map equally reapportions Wisconsin[.]" *Id.* at 8.

It was not until Petitioners filed their reply brief that they switched positions and hinted at concern regarding population equality in the Governor's proposed map. Yet even here, they offered no argument, no citations, no substantive engagement. On page 5 of their reply, they agreed that the Governor's map would satisfy "all relevant legal requirements" with "just a minor adjustment." Reply Br. of Congressmen (Jan. 4, 2022), at 4-5. Then they added this conclusory footnote: "The Citizen Mathematicians correctly point out that the Governor's and the Hunter Petitioners' proposed congressional maps fail to achieve perfect population equality because they do 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, *see Johnson*, 2021 WI 87, ¶ 25." *Id.* at 5 n.2 (citing the Citizen Mathematicians' brief, which offered an equally conclusory claim).

Petitioners were thus for the Governor's maps (with respect to population equality) before they were against them. Even then, Petitioners treated the issue as a pittance requiring no substantive argument or analysis. Moreover, Petitioners did not seek to demonstrate (or establish a record) that the plus-or-minus-one deviation was not legitimately justified by the Governor's concern for core retention.

By the time oral argument occurred, it was clear that Petitioners' congressional map didn't stand a chance under the least-change analysis as the Wisconsin Supreme Court had described it. So Petitioners asserted not only that entirely different metrics

should control the least-change analysis, but also that the Governor's map should be disqualified as violative of the one-person/one-vote principle. This issue (which had not been substantively briefed) attracted just a few short minutes of attention at oral argument. Petitioners' counsel, when questioned, was unable to name any case in which a plus-or-minus-one deviation had been held unconstitutional. Oral Arg. Video Recording at 3:51:31-3:52:25. The Governor's counsel, in turn, highlighted that his map was "one away from exact; one up and one down" and in that respect "every district is within one of the ideal." *Id.* at 2:13:34-56. The Governor's counsel (in language Petitioners seize on) also stated that this degree of deviation "could be fixed overnight," but made that statement during a colloquy whose starting point (and major premise) was that "there is some inherent tension between least changes [and] population equality" since "Wisconsin's population didn't grow across the state uniformly." *Id.* at 2:10:23-31; 2:15:25-34.

G. Meanwhile, the Wisconsin Supreme Court Denies on Procedural Grounds Petitioners' Attempt to Submit a Second Map

When it became apparent that their map would not succeed on the least-change metric, Petitioners also tried yet another tactic: submitting a proposed second, alternative map to the Wisconsin Supreme Court. *See* Motion of Congressmen (Dec. 30, 2021). In this motion, Petitioners stated that they "believe that their original Proposed Remedial Map better complies with *Johnson* than the modified version of the Proposed Remedial Map." *Id.* at 7. On that basis, Petitioners described their proposal, which they tried to pass off as a mere modification of their original map, as "an alternative (as opposed to a replacement) map, for this Court's own remedial

consideration." *Id.* In other words, whereas every other intervenor had submitted only a single map—and had stood by that map (while in some cases submitting amendments to it)—Petitioners wanted two bites at the apple. They wanted to submit two *entirely different* maps, to present arguments in favor of *both* maps, and to do so *after* the other intervenors had submitted their principal briefing and expert reports.

The Wisconsin Supreme Court saw straight through this violation of its own procedural rules. In an order issued on January 10, 2022—and consistent with its November 17, 2021 order establishing procedures for the redistricting process—it held that the Governor and BLOC could amend their maps (at the expense of asking the court to "disregard their initial maps") but that Petitioners could not amend their maps (since they sought to submit a second, alternative map rather than a modified single map). Order, *Johnson v. Wisconsin Elections Commission* (Jan. 10, 2022), at 2. The court explained that Petitioners' motion was "different-in-kind," since it was "not a motion to amend a previously submitted map," but rather a request that the court "accept two congressional maps from them, while accepting only one such map from every other party." *Id.* Because that request "plainly [ran] afoul of our direction that each party may submit only a single set of maps," the court ordered that Petitioners' second map "is not accepted and will not be further considered by the court." *Id.*

H. The Wisconsin Supreme Court Adopts the Governor's Proposed Congressional Map and Finds That It Satisfies Federal Law

On March 3, 2022, consistent with the least-change approach adopted in its prior decision and the litigants' reading of that decision, the Wisconsin Supreme Court selected the Governor's proposed congressional map because it had the highest

core retention score. App. 9, 12. In reaching that decision, the court reiterated that "core retention figures are … especially helpful" as a "spot-on indicator of least change statewide" since they "represent[] the percentage of people on average that remain in the same district they were in previously." App. 13; *see also id.* at 9 ("With only eight districts, core retention—a measure of voters who remain in their prior districts—is the best metric of least change[.]").

Notably for present purposes, the Wisconsin Supreme Court explained its focus on core retention by pointing out that "multiple parties contended from the beginning of this litigation" that core retention is "central to a least change review." App. 13. Here, the court (in a footnote) singled out Petitioners, the Legislature, and the Johnson petitioners as exemplifying that position:

> Three parties asked us to adopt a least change approach, and each made it abundantly clear that core retention is central to that inquiry. In briefing advocating a least change approach (before our November 30 opinion), the Legislature explained that a least change approach is one that "maximizes core retention." *The Congressmen agreed, arguing that a "'least-change' approach would simultaneously 'minimize voter confusion,' and maximize 'core retention' by limiting the number of people placed in different congressional districts."* The Johnson petitioners were in full accord: "Preserving the cores of prior districts is the foundation of 'least change' review."

App. 13 n.9 (emphasis added). The court specifically noted that, "[w]hile core retention is not the only relevant metric, every party understood that our adoption of a least change approach would place core retention at the center of the analysis." *Id.*

Focusing on core retention in assessing least-change, the Wisconsin Supreme Court readily concluded that the Governor's map prevailed because it had the highest core retention score (94.5%) and "move[d] the fewest number of people into new

districts." App. 14. By comparison, Petitioners' proposed map scored 93.5%, meaning that their proposed map moved 60,041 more people than the Governor's did. App. 5, 14; *see also* App. 9 ("In raw numbers, the Governor's proposal to move 324,415 people to new districts is 60,041 fewer people than the next best proposal.").[5]

Turning to compliance with federal law, the Wisconsin Supreme Court found that the Governor's map "comes close to perfect equality," with districts comprised of "either 736,714 people, 736,715 people, or 736,716 people." App. 17. Discussing this Court's cases, and observing that 14 states adopted districts with greater than single-person deviations following the 2010 census, the Wisconsin Supreme Court held that "this minor population deviation is justified under Supreme Court precedent by our least change objective." App. 18; *see also id.* ("We know of no case in which a court has struck down a map based on a two-person deviation."). Having concluded that the "least change approach should guide our decision," and that "[c]ore retention is central to this analysis," the court held it could legitimately justify the exceedingly minor deviation here to avoid adopting "a map that does substantially worse on core retention." App. 19 (citing *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012) (per curiam), and concluding that *Tennant*'s rationale applies equally here).

[5] Petitioners' map also failed on other, less central metrics that some litigants viewed as bearing on the least-change issue. For example, as the Hunter Intervenors noted, Petitioners' map had the "highest percentage of population and geographic changes," and it "result[ed] in the highest number of splits of municipalities and precincts among the proposed maps." *See* Resp. Br. of Hunter Intervenors (Dec. 30, 2021), at 5, 13. Moreover, according to the Citizen Mathematicians and Scientists, Petitioners' map fell "far behind all other parties in terms of areal displacement, moving 6.1 percentage points more of the state's area than the MathSci Map and 7.6 percentage points more than the Governor's Map." Resp. Br. of Citizen Mathematicians and Scientists Intervenors (Dec. 30, 2021), at 15. Petitioners also "split[] 3 more counties and 11 more municipalities than the MathSci map and by far the most wards (48) of any proposed congressional map." *Id.*

I. Petitioners File a Motion to Stay the Wisconsin Supreme Court's Judgment and to File Additional Proposed Maps

On March 9, 2022, Petitioners moved the Wisconsin Supreme Court to stay its decision pending this Court's resolution of their emergency application. They also asked the Wisconsin Supreme Court to essentially restart the process, throwing open the door for all parties to submit new maps within a 24-hour period and choosing between those maps in disregard of the extraordinarily thorough proceedings that it conducted over the past five months. As this filing tacitly recognizes, the alternative map that Petitioners sought to file below (and which they tout in their filing in this Court) was rejected on procedural grounds by the Wisconsin Supreme Court. Because they sought to submit that untested and unreviewed map in violation of state court rules, and in a plainly unfair manner (giving themselves two maps while everyone else got only one), that map has never been properly submitted to *any* court. Although Petitioners treat it as part of the case, the Wisconsin Supreme Court held otherwise, a conclusion confirmed by Petitioners' request that the state court start over again.

ARGUMENT

This Court grants a stay pending appeal "only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). An applicant must "meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (requiring a "reasonable probability" of certiorari, a "fair prospect" that a majority of this Court

will reverse the decision below, and a likelihood of irreparable harm absent a stay).

The standard for a mandatory injunction is higher still: an applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings, *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013).

Petitioners do not satisfy these standards. The constitutional claims that they present are fundamentally meritless; the equities cut overwhelmingly against their request for disruptive intervention in Wisconsin's election; and they fail to establish either irreparable injury or an entitlement to the extraordinary remedies they seek.

I. PETITIONERS' ATTACKS ON THE DECISION BELOW LACK MERIT

Petitioners assert that the Wisconsin Supreme Court violated the Due Process Clause and Article I, Section 2. These arguments rest on a faulty account of the decision below, a misdescription of the record, and a misapplication of precedent. At bottom, Petitioners' splitless, factbound, and meritless arguments do not come close to justifying certiorari, let alone summary reversal, a stay, or a mandatory injunction.

A. Petitioners' Due Process Argument Is Meritless

Petitioners first contend that the Wisconsin Supreme Court violated the Due Process Clause in its application of the least-change legal standard that Petitioners themselves urged that court to adopt in the first place. According to Petitioners, the Wisconsin Supreme Court engaged in an "unforeseeable" and unconstitutional "bait

and switch"—violating rules against "retroactivity" and the "right of fair warning"—by treating core retention as the defining metric in its application of the least-change approach. Pet. 19-22. In light of this egregious constitutional violation, Petitioners add, the Wisconsin Supreme Court further offended the Due Process Clause by not allowing them to submit an extra map, despite a clear procedural order limiting each party to a single proposed map (an order every other party complied with). *Id.* at 23.

Petitioners' theory is utterly meritless. To begin, it rests on an inversion of what actually happened here: it was Petitioners, not the Wisconsin Supreme Court, who engaged in a bait-and-switch on the significance of core retention to the application of the least-change methodology. Petitioners pivoted not out of principle, or out of some zealous (albeit misguided) reading of the Wisconsin Supreme Court's order adopting the least-change approach, but rather because they sought to preserve strategic advantage once it became clear that they would lose under the very standard they had originally pressed. Moreover, and independently, Petitioners' legal theory has no foundation. This Court has never held that judicial rulings vest parties with a protected liberty or property interest—enforceable against state (and presumably also federal) judges through the Due Process Clause—in requiring courts to adhere to their own precedent with what litigants consider to be sufficient fidelity. In fact, to the extent this Court has addressed the issue, it has rejected that proposition. And it would be especially odd to announce Petitioners' proposed new constitutional rule here, where the Wisconsin Supreme Court acted not only in a judicial capacity, but also exercised a unique State sovereign responsibility as Wisconsin's map-drawer.

1. Petitioners' claim under the Due Process Clause rests on a single factual premise: Petitioners lacked constitutionally adequate "notice" that core retention would be the defining metric in the Wisconsin Supreme Court's least-change analysis. Pet. 20-27. As we have already established, this premise is riddled with factual errors.

Remember, it was Petitioners (along with the Legislature and the Johnson petitioners) who urged the Wisconsin Supreme Court to adopt the least-change methodology. *See supra* pp. 4-6. In so doing, Petitioners *twice* stated that employing this approach would "maximize core retention." *See supra* p. 4. And the benefits that Petitioners imputed to the least-change approach were dependent on maximizing core retention. *See supra* p. 4. Indeed, when the Governor (among others) resisted these claims, Petitioners doubled down in a response brief that again described the least-change method as one that would "maximize core retention." *See supra* p. 5. Petitioners were not alone in this understanding. Every other litigant before the Wisconsin Supreme Court shared and articulated it while responding to that court's request for briefing on the propriety of the least-change approach. *See supra* pp. 5-6.

On November 30, 2021, the Wisconsin Supreme Court gave Petitioners exactly what they asked for by adopting the least-change standard that Petitioners and their allies had proposed. *See Johnson*, 399 Wis. 2d at 634, 665, 671. Although this opinion did not use the words "core retention," the reasoning it provided to explain its decision—and the briefs it had received advocating that result—cohered with the litigants' uniform understanding that core retention would be crucial. *See supra* pp. 6-7. The same was true of Justice Hagedorn's concurrence, which emphasized that

"our primary concern is modifying only what we must" and "minimiz[ing] deviation from existing law." *Johnson*, 399 Wis. 2d at 676-77 (Hagedorn, J., concurring).

Petitioners profess that they (mis)read this opinion as a disavowal of "core retention" as the foundational metric for a least-change approach. Pet. 22-25. Even crediting that claim, Petitioners were (and remain) entirely isolated in that view. Every other party to the litigation clearly understood that the least-change analysis adopted by the Wisconsin Supreme Court would ultimately center on core retention. That included the Legislature, which had drafted the map that Petitioners pressed and whose own expert agreed that a "proposed plan with high core retention scores is indicative of a plan that makes minimum changes to Wisconsin's existing districts, as required by this Court." *See supra* p. 8. Simply put, after the November 30, 2021 Opinion, while other parties identified further virtues of their maps, they all behaved in a manner that evinced a shared belief about the extraordinary importance of core retention. So Petitioners' claim that they lacked "notice" of this point is untenable.[6]

To be sure, Petitioners' briefs in support of their proposed maps said virtually nothing about core retention, instead highlighting the number of county splits and the asserted coherence of their plan with Wisconsin's political geography. *See supra* pp. 8-9. But there is very good reason to believe this reflected a strategic calculation

[6] In support of their strained reading of the Wisconsin Supreme Court's order, Petitioners point to a string cite of cases which (they say) reflect the court's recognition that "core retention" is just one of many factors. Pet. 22 (citing cases). But the Wisconsin Supreme Court said no such thing. Far from eschewing "core retention" as the critical factor, the court cited those cases for the proposition that "[t]he least-change approach is far from a novel idea" and has been "applied in numerous cases during the last two redistricting cycles." *Johnson*, 399 Wis. 2d at 666. In fact, the Wisconsin Supreme Court borrowed that string cite from the Legislature's October 25 brief, which argued that "a 'least changes' map maximizes … 'core retention'" and acknowledged that core retention is "the most significant of the traditional redistricting criteria." Br. of Legislature (Oct. 25, 2021), at 37-38.

rather than a supposed lack of "notice." Petitioners had made a choice (supported by, among other things, their own partisan self-interest) to advocate for a congressional map originally enacted by the Legislature. Whatever its other claimed virtues might be, that map—as confirmed by experts—fared quite poorly on any metric that treated core retention as the most controlling consideration. It is therefore unsurprising that Petitioners pivoted away from core retention and urged the Wisconsin Supreme Court to privilege other potential metrics of least change. That strategic choice, however, was self-inflicted; it offers no basis for a complaint about supposed lack of "notice."

Dissatisfied with their position in the litigation, Petitioners decided to throw a Hail Mary, submitting an additional proposed map on December 30, 2021—*after* the other parties had already submitted their maps, submitted their expert reports, and submitted both responses to each other's maps and rebuttal expert reports. Rather than abandon their original proposed map, Petitioners tried to help themselves to a second path to victory, requesting that the Wisconsin Supreme Court allow them (but nobody else) to submit *two* alternative maps for simultaneous consideration. In some circles, that would be known as cheating. In the Wisconsin Supreme Court, it was known as a violation of the court's November 17, 2021, procedural order. On that basis, the court denied Petitioners' motion. This was not—as Petitioners claim without any apparent sense of irony—a violation of their due process rights. It was instead a perfectly appropriate application of rules designed to ensure fair play.

As this record confirms, nothing about the Wisconsin Supreme Court's process was unfair, let alone irredeemably defective under the U.S. Constitution.

2. Petitioners' due process claim not only gets the facts wrong; it also misstates the law. It is unsurprising that Petitioners allege no circuit split, raise only factbound complaints, and identify no case arising in a remotely analogous posture.

At bottom, Petitioners' theory (even crediting their faulty account of the facts) is that a court violates the Due Process Clause if it announces a legal standard and then later refines or alters that standard in the course of applying it. If accepted, this Due Process Clause theory would transform a wide range of routine state and federal judicial rulings into alleged constitutional violations: just imagine the floodgates that would open if every alleged judicial error in applying precedent could be re-described as a federal due process violation. Petitioners are not the first litigants to complain about a court's application of precedent; they certainly will not be the last. Litigants nationwide rely on courts to apply precedent faithfully and express frustration when they think courts have shifted the goalposts. But most litigants (unlike Petitioners) do not try to make a U.S. Supreme Court lawsuit out of that frustration.

To the extent courts have encountered such expansive arguments, they have uniformly rejected them. Consider, for example, the law-of-the-case doctrine (which is essentially what Petitioners invoke here). It is hornbook law that a "court's failure to stand by a prior decision doesn't violate the Fourteenth Amendment's Due Process Clause." Bryan A. Garner et al., *The Law of Judicial Precedent* 445 (2016) (citing *Moss v. Ramey*, 239 U.S. 538, 546-57 (1916)); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (observing that the law-of-the-case doctrine "expresses the practice of courts generally" but does not impose a "limit on their

power"). Or consider *stare decisis*. Justices of this Court have expressed a range of opinions on *stare decisis*. *See, e.g.*, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177 (2019); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). But no Justice has opined that parties have a literal due process right—enforceable against courts—to sufficient notice of when a court may vary from precedent or change a legal standard (even in the middle of proceedings and even when parties have established reliance interests). Consistent with this understanding, courts have rejected in many contexts claims based on a decisionmaker's alleged misapplication of its own precedent. *See, e.g.*, *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001) (holding that the Board of Immigration Appeals' alleged "misapplication of relevant case law" did not give rise to a "colorable due process claims"). There is no basis for an exception here—particularly given the deference owed to the Wisconsin Supreme Court as the ultimate expositor of Wisconsin law and as the institution carrying out the State's sovereign function of redistricting. *See Growe v. Emison*, 507 U.S. 25, 32-37 (1993).

In seeking to show otherwise, Petitioners invoke two cases—one that is nearly three decades old, the other of which is more than a century old. These inapposite cases do not support the startling legal proposition that Petitioners press here.

Reich v. Collins, 513 U.S. 106 (1994), held that the State of Georgia had violated the Due Process Clause when it initially offered taxpayers a post-deprivation remedy to dispute illegally collected taxes but then suddenly reconfigured its remedial scheme (after the plaintiffs had already paid the illegal taxes) to withdraw that post-deprivation remedy. *Id.* at 111. As the Court explained, this "midcourse"

reconfiguration of the State's remedial scheme was a "bait and switch," *id.*, that deprived plaintiffs of their property without the notice or fair warning required by due process. But *Reich* bears no resemblance to this case. It hinged entirely on the application of longstanding due-process principles governing state-law remedial schemes for taxpayers. *Id.* at 110. Under those rules, states must provide taxpayers with a "clear and certain" remedial scheme for recovering illegally collected taxes. *Id.* at 110-11. There is a world of difference between *Reich* (which required clarity when states establish rules to remedy tax disputes) and this case (where the Wisconsin Supreme Court announced and applied a standard for a redistricting process). The case for a constitutionally protected interest in *Reich* was clear; here, it is nowhere to be found and would conflict with settled practice in state and federal courts.

Nor do Petitioners find respite in *Saunders v. Shaw*, 244 U.S. 317 (1917). That opinion, which consists entirely of three short paragraphs, is known mainly as "one of the earliest of the due process decisions" to establish the contours of the independent-and-adequate-state-ground doctrine. Edward H. Cooper, 16B Fed. Prac. & Proc. Juris. (Wright & Miller) § 4025 (3d ed., Apr. 2021 update). The dispute in *Saunders* arose from a somewhat convoluted fact pattern, which began when the plaintiff sought to enjoin the collection of a drainage tax and offered evidence that his land could not benefit from drainage improvements. *See* 244 U.S. at 318-20. The trial judge excluded the evidence—and so the defendant won without ever having the opportunity to introduce rebuttal evidence that the land *could* have benefitted. *Id.* The state supreme court initially found for the defendant. *Id.* But after the plaintiff

filed a petition for rehearing, the court reversed, inferring from an intervening federal decision that the plaintiff was correct that the land could not have benefitted. *Id.* The defendant then filed his own petition for rehearing on the ground that "the case ha[d] been decided against him without his ever having had the proper opportunity to present his evidence." *Id.* The state supreme court denied the petition due to a state procedural rule prohibiting a second rehearing petition, and it entered judgment against the defendant. *Id.* This Court reversed, holding that it violated due process for the state supreme court not to hear the second petition. *Id.*

Like *Reich*, *Saunders* scarcely supports Petitioners' claim that the Wisconsin Supreme Court violated Petitioners' due-process rights by choosing the congressional map that maximized core retention. To the contrary, *Saunders* 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." *See* Wright & Miller, *supra*, § 4025. But that proposition only begs the question here, which is whether the Wisconsin Supreme Court's ruling itself caused a denial of due process. That question is not answered by *Saunders*'s brief and highly factbound discussion of the unusual procedural trap that the state courts had set for the defendant in the underlying case. *Saunders* does not purport to create—and has never been read as creating—a property or liberty interest in how state courts apply their own precedents. Nor did it announce a general rule requiring courts to reopen their proceedings (and to throw out their own procedural orders) whenever they apply their own precedents in a manner that one party supposedly did not anticipate.

All said and done, Petitioners seek summary reversal and other extraordinary relief on the basis of an objectively meritless due process theory—one directly at odds with the facts and inconsistent with precedent. This request should be denied.

B. Petitioners' Article I, Section 2 Argument Is Meritless

Secondarily, Petitioners seek summary reversal of the decision below on the ground that it violates this Court's one-person/one-vote precedents. They press this claim despite initially conceding—twice, no less—that the map ultimately adopted by the Wisconsin Supreme Court satisfies Article I, Section 2. *See* Resp. Br. of Congressmen (Dec. 30, 2021), at 2 ("[T]he Governor's Proposed Map reaches equal apportionment[.]"); *id.* at 8 ("The Governor's Proposed Map equally reapportions Wisconsin[.]"). Untroubled by those concessions—and by their failure to brief the issue below (except for a conclusory footnote in their reply)—they insist that the map they initially described as *constitutional* is, in fact, so obviously *unconstitutional* that it merits the most extraordinary intervention this Court can muster.

Petitioners had it right the first time. As became clear at oral argument below, and as remains clear in their application, Petitioners have not identified a single case striking down a map with a plus-or-minus-one deviation. To our knowledge, only two courts have considered maps with such a vanishingly small deviation—and both courts upheld those maps without hesitation. *See Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) ("[T]he court plan complies with the 'as nearly as practicable' population equality requirement of Article I, § 2 … , with a deviation of plus or minus one person."); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 702894,

at *9, *14-16 (Pa. Feb. 23, 2022) (finding deviation of plus or minus one person sufficiently justified). The absence of any analogous judicial authority makes this an especially doubtful ground on which to summarily reverse or stay the decision below.

That conclusion also follows from first principles. Article I, Section 2 requires that congressional districts be apportioned to contain equal population "as nearly as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Under this standard, "[p]recise mathematical equality" is not required. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969). Instead, even where a plaintiff shows that it was possible to have achieved still smaller deviations, a map will be upheld where the defendant shows "that each *significant* variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 731 (emphasis added). This showing is "a 'flexible' one" and depends on—among other things—"the size of the deviations" and "the importance of the State's interests." *Tennant*, 567 U.S. at 760.

In passing, Petitioners suggest that *Evenwel v. Abbott*, 578 U.S. 54 (2016), overruled this test. Pet. 29. It didn't. Instead, after stating the familiar principle that maps must be drawn "with populations as close to perfect equality as possible," *Evenwel*, 578 U.S. at 59, the Court cited the pages in *Kirkpatrick* that discuss allowing a measure of legitimately justified deviation, *see id.* (citing *Kirkpatrick*, 394 U.S. at 530-31).

As this Court has recognized, where a deviation is very small, the burden of justification is correspondingly light. *See Tennant*, 567 U.S. at 765; *Karcher*, 462 U.S.

at 741; *see also Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1295 (D. Kan. 2002) (upholding map in part because of "small size of the deviation"—33 people); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004) (noting that "the showing required to justify population deviations is proportional to the size of the deviations" and describing 72-person deviation as "very small indeed"), *aff'd on other grounds*, 542 U.S. 947 (2004); *Stone v. Hechler*, 782 F. Supp. 1116, 1128 (N.D. W. Va. 1992) ("Because the relative population variance in [the chosen map] is only 0.09%, the State's burden to justify the population deviations is correspondingly light."); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 677 (M.D. Pa. 2002) ("[T]he burden borne by the State varies inversely with the magnitude of the population deviation.").[7]

Here, the deviation is surpassingly small: literally a single person in a single congressional district. This is a deviation of 0.00146%. Contrary to the view advanced by Petitioners, the Wisconsin Supreme Court was not required to summit Mount Everest to justify that figure. *See Carter*, 2022 WL 702894, at *15 ("[T]he size of the deviation between a one-person and two-person deviation is as small a population deviation as is possible and thus results in a low burden of justification.").

Regardless, as that court explained, there is a perfectly legitimately basis for this deviation: achieving the very same least-change objective that Petitioners (among others) had originally insisted should drive Wisconsin's redistricting process.

[7] *See also Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election L.*, 781 F. Supp. 394, 397-98 (D. Md. 1991) (upholding map with average variance among congressional districts of 2.75 and actual deviation of 10), *aff'd*, 504 U.S. 938 (1992); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) ("The Court's plan results in two districts with populations of 713,278 and two with populations of 713, 281.").

The Wisconsin Supreme Court faced several maps with a trivial range of deviation: one person versus plus-or-minus one person. In selecting among these maps, it decided to adopt a map that moved *60,041 fewer people*. This choice vindicated the State's legitimate interest in core retention—which it reasonably treated as the primary measure of the important public purposes that the least-change approach aimed to secure, *see supra* pp. 6-7; which has been recognized as a traditional redistricting criterion, *see Baumgart v. Wendelberger*, No. 01 Civ. 0121, 2002 WL 34127471, at *3, *7 (E.D. Wis. May 30, 2002); and which this Court (among others) has expressly held can justify a measure of population deviation, *see Tennant*, 576 U.S. at 764 ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy.").[8] This decision was reasonable and appropriate; it affords no basis for a stay or reversal.

Petitioners mount two responses as part of their rearguard action. First, they attack the Governor's explanation of his own map. Pet. 30. But this argument is both factually wrong (*see supra* pp. 10-12) and irrelevant (since it was the Wisconsin Supreme Court that adopted the map for itself and provided a reasoned justification for the plus-or-minus-one deviation). Second, Petitioners complain that the decision below was merely "administratively convenient" because the Wisconsin Supreme Court "had before it the modified version of the Congressmen's Map," which

[8] *See Turner v. Arkansas*, 784 F. Supp. 585, 588-89 (E.D. Ark. 1991) (upholding map "causing the fewest changes in the location of counties and people," even when other proposed maps had lower variance of populations among districts), *aff'd*, 504 U.S. 952 (1992); *Colleton Cty. Council*, 201 F. Supp. 2d at 664 (court sought to "maintain the cores of the existing congressional districts" in adopting plan with plus-or-minus-one deviation); *Stone*, 782 F. Supp. at 1126-28 (upholding map where "there is a reasonable factual basis for [the] conclusion that [the chosen map] better preserves the cores of prior districts" than the other proposed maps).

Petitioners believe would have been a better choice. Pet. 30-31. But this proposed alternative map was *not* in fact "before" the Wisconsin Supreme Court: Petitioners' motion to file it as a second, alternative map had been denied as a violation of the court's procedures (and as inconsistent with principles of fair play). *See supra* p. 13; *see also Murray v. Carrier*, 477 U.S. 478, 490 (1986) ("A State's procedural rules serve vital purposes … ."). In that respect, Petitioners simply misrepresent the record. That is reason enough to reject their argument, particularly as they seek equitable relief here. Regardless, the alternative map that they proposed has not been vetted by any court, not has it been fully subject to the adversarial process (given their gamesmanship in submitting it near the end of the briefing below), so it affords no serious basis in which to question the Wisconsin Supreme Court's reasoned justification of the map it chose to adopt.

For these reasons, Petitioners' equal population argument must be rejected. They said the proposed map was constitutional before they said it wasn't; they failed to substantively brief this issue below; they misread *Evenwel* as rewriting settled law in this field; they misdescribe the record and the burden of justification; they fail to demonstrate that core retention and least-change analysis (which they originally advocated) afford legitimate justifications for the single-person deviation here; and their final pot-shots at the Wisconsin Supreme Court's ruling are wholly baseless.

II. THE RELIEF THAT PETITIONERS SEEK WOULD CREATE A GRAVE RISK OF DISRUPTING WISCONSIN'S ELECTION

As confirmed by the Wisconsin Elections Commission and its Members in their response, Petitioners' application should also be denied because the equities cut

firmly against their request for federal judicial intervention in Wisconsin's electoral process (which is already well underway). *See, e.g.*, Resp. of Wisconsin Election Commission and its Members at 3-5, *Grothman v. Bostelmann*, No. 21A490 (U.S.). Petitioners' request that the Wisconsin Supreme Court be directed to undertake some sort of lightning-round redistricting process—with entirely new congressional maps invented and proposed in 24 hours, a speed-at-all-costs judicial ruling, and even more precipitous measures required to meet statutory election deadlines—only confirms how unconcerned they are with the integrity and stability of Wisconsin's elections.

As this Court has recognized repeatedly, including in very recent rulings, it takes substantial time and energy to operationalize new congressional maps. Election officials in Wisconsin have already made considerable progress in implementing the Wisconsin Supreme Court's chosen map, but they still have lots to do and a tight timeline before the statutory nomination paper circulation date of April 15, 2022. Any delay in those efforts—or, worse, any order that requires undoing the work they have already done since March 3, 2022—endangers sound election administration. WEC puts it plainly: "[I]mplementing new maps other than those approved by the Wisconsin Supreme Court would create a grave risk of introducing significant inaccuracies into the WisVote system, would generate a situation in which candidates will not know what district they are in when they circulate nomination papers and in which voters will not know what district they are in to sign nomination papers, and could even prevent the April 15 deadline from being met at all. If a stay were entered, local governments might not have enough time to act on the ward splits [that they

are statutorily required to enact] and candidates and voters would not have adequate time to understand the new maps and participate in the process." *Id.* at 5.

A. This Court Is Justifiably Wary of Disrupting State Election Administration Close to an Election

"[T]his Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay) (voting to deny a request to alter North Carolina's congressional districts); *see also, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (staying federal district court order requiring Alabama to redraw its congressional district lines in early February). "Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (Sutton, J.); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006). These decisions reflect "a basic tenet of election law" that the Court affirmed in another case arising from Wisconsin: "When an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

That principle takes on special force where, as here, a federal court is asked to encroach upon a state's sovereign prerogative to administer its own electoral process. Under this Court's precedents, the state—"through its legislative or judicial branch," *Growe v. Emison*, 507 U.S. 25, 33 (1993)—is entrusted with principal responsibility for carrying out the essential function of redistricting. *See also Miller v. Johnson*, 515

U.S. 900, 915 (1995) (holding that redistricting "is primarily the duty and responsibility of the State"). Accordingly, "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections," but "it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

B. Petitioners' Requested Relief Would Cause Disruption and Confusion in the Upcoming Wisconsin Election

In these proceedings, the State of Wisconsin—acting pursuant to its own constitutional process, through its highest court, and with extensive fact-finding and deliberate process—has adopted congressional maps for the upcoming election. This Court, for reasons it has expressed many times, should not attempt an on-the-fly redo of that process at this late stage. Nor should it knock over the entire apple cart and require the Wisconsin Supreme Court to restart its own process at hyper-speed.

To be sure, Petitioners see things differently. To hear them tell it, the primary is scheduled for August 9, 2022, candidates need to qualify between April 15 and June 1, 2022, and there really aren't any other impending deadlines of note. They add that it wouldn't be a big deal to force all parties to use "advanced computer technology" (Pet. 37) to come up with brand new congressional maps in just 24 hours, which the Wisconsin Supreme Court would then adjudicate in a matter of days (rather than the months it took in reaching its original decision), and which would somehow be put into near-immediate effect by election officials throughout Wisconsin (including in all voter databases, which candidates and voters will rely on in the weeks ahead).

That account of Wisconsin's electoral process is fantastically inaccurate. A

more comprehensive picture makes clear that preparing for the August 2022 primary election and November 2022 general election in Wisconsin is a herculean task—and that it is too late in the statutorily prescribed electoral calendar to change the legislative map without inflicting substantial disruption and confusion on candidates, local officials, and statewide election administrators. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) ("State and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.")

An important but oft-overlooked consideration in Wisconsin is that it has a highly decentralized election system. Although the Wisconsin Elections Commission (WEC) takes lead in overseeing the electoral process, there are 1,851 moving pieces—namely, county clerks, who need to coordinate with WEC and other local government actors. This means that even seemingly minor changes in legislative maps have ripple effects across municipalities and impose significant burdens (that are magnified as the April 15, 2022, nominating petition circulation period approaches).

For these reasons, WEC emphasized to the Wisconsin Supreme Court last year that "in order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." WEC Letter at 1. As WEC explained, once new districts are drawn, its staff "must begin the complex process of recording these new boundaries in WisVote" and

"integrate the new redistricting data with existing voter registration and address data." *Id.* at 2. "This process includes manual review of ward map changes and parcel boundary data throughout [] Wisconsin." *Id.* In addition, "[c]ommunication with municipal clerks about certain addresses is required because only local clerks would have such knowledge." *Id.* This burdensome and time-consuming process is necessary to ensure "that each voter receives the correct ballot and is correctly located in their proper districts." *Id.* Moreover, as WEC explained, if legislative maps are not settled "well before April 15, candidates will not know in what district they reside and in turn will not know for what office they can run," and "voters will not know what candidates' petitions they may properly sign." *Id.* at 2-3. That would be a serious issue because "improper residency of both a candidate and a signor of a petition are bases for a challenge to a candidate's nomination papers." *Id.* at 3. Commission staff therefore need to "produce new district lists for nomination paper review," and must do so "before candidates can begin to prepare and circulate nomination papers." *Id.*

Given all this, WEC advised that "[i]f new maps are not in place at least 45 days before April 15, 2022, there is a significant risk that there will be errors in the statewide system." *Id.* More recently, following entry of the Wisconsin Supreme Court's decision, WEC has reaffirmed its conclusion that staying or modifying the legislative maps "would be contrary to the goal of providing final state senate and assembly district maps in time for them to be properly implemented for the fall general election." *See* Letter Br. of Wis. Elections Comm'n (Mar. 9, 2022), at 2. That is particularly true in light of the fact—unmentioned by Petitioners—that WEC and

county officials are already hard at work administering the Spring 2022 statewide election for certain state executive and judicial officers. *See* WEC Letter at 3. And there is more: if county and statewide elections officials fall behind now, resulting in delay, confusion, and heightened error rates, there will predictably be cascading effects across the fast-paced deadlines that follow the nominating petitions period.

Petitioners resist all this. As WEC explains, however, Petitioners are deeply mistaken. WEC's hardworking staff have undertaken significant and continuing efforts to implement the Wisconsin Supreme Court's maps "without an unreasonable risk of errors and while meeting all statutory deadlines." WEC Response at 3. "That work began promptly after the state supreme court's March 3 decision and the work is ongoing." *Id.* But "implementation takes time." *Id.* Accordingly, if Petitioners receive the relief they seek, "some of this necessary work would need to be redone" on a rapidly diminishing timeframe. *Id.* at 4. Moreover, as noted above, once WEC completes its work, other actors in the state—including municipalities and counties—need time to make their own changes. *See id.* And once they have done so, "new redistricting data must be integrated with existing voter registration and address data, and ward map change and parcel boundary data must be manually reviewed to ensure that each voter is correctly located in their proper districts." *Id.* at 4-5.

Therefore, if Petitioners' application is granted, the inevitable result will be a significant disruption to local and statewide election administration in Wisconsin, as well as confusion for candidates and voters—particularly as they seek to understand what districts they live in, what offices can be sought, and who can sign which

nominating petitions. See *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (warning against "unanticipated and unfair consequences for candidates, political parties, and voters, among others"). The Wisconsin Supreme Court clearly took WEC's advice seriously, issuing a decision just two days after its March 1, 2022 target. That considered judgment of the experts, officials, and judges charged with supervising Wisconsin's upcoming election deserves respect, not the rough treatment that Petitioners would have this Court inflict.

III. ADDITIONAL EQUITABLE CONSIDERATIONS WEIGH DECISIVELY AGAINST THE RELIEF THAT PETITIONERS REQUEST

Petitioners' application should be denied for yet another reason: principles of equity do not support it. For reasons that should now be clear, Petitioners themselves have not conducted this litigation is an equitable manner. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands."). Instead, in pursuit of strategic advantage, they have flipped positions, broken procedural rules, attacked standards that they proposed, and materially misdescribed the record. *See Lonchar v. Thomas*, 517 U.S. 314, 338 (1996) (Rehnquist, J., concurring) ("[O]bvious attempt[s] at manipulation' … constitute equities to be considered in ruling on the prayer for relief."). On this basis—and given their failure to show irreparable injury or an entitlement to the exceedingly irregular remedies they seek—Petitioners' position cannot succeed.

A. Petitioners Have Not Established Irreparable Harm

Petitioners assert that they will suffer irreparable harm if they do not receive the relief they request. That is incorrect.

First, any injuries alleged to result from the deprivation of their constitutional rights can be set aside, since their rights were not violated. *See supra* pp. 17-30.

Second, there is no force to Congressman Steil's claim that he will be forced to spend resources campaigning in new communities "with which he has no prior relationships." Pet. 34. Every proposed map changed the boundaries of congressional districts in Wisconsin. There is no reason to believe that any new map would leave the Congressman with the exact same constituents. In any event, it is par for the course that Members of Congress have to build relationships with new constituents after redistricting—and it is Congressman Steil himself who (by filing this late-stage application) has inflicted more uncertainty and cost into Wisconsin's congressional races. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Finally, most of Petitioners' irreparable harm argument presumes that their own proposed map would go into effect if they received their requested relief. But that assumption is both speculative and doubtful. *Contra Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). As explained above, Petitioners' original proposed map was deficient on myriad metrics. *See supra* p. 15 n.5. And to the extent Petitioners ask this Court to order a new, hyper-accelerated redistricting process in Wisconsin, it is equally speculative to believe that their alternative proposed map would prevail. Petitioners cannot establish that they have been irreparably injured by the selection of one map when the remedies they seek require speculation about alternative maps that might be proposed to (and adopted by) the Wisconsin Supreme Court.

B. Petitioners Are Not Entitled to the Remedies They Seek

Finally, Petitioners' application is defeated by the nature of the remedies they seek. As explained above, it would be hugely disruptive for this Court to stay the maps adopted by the Wisconsin Supreme Court—especially given the heavy burdens confronting state and county election officials as they prepare for the fast-approaching circulation deadline of April 15. But Petitioners seek more than just a stay. They expressly ask the Court to take one of two additional steps: (1) restart the mapmaking process on a drastically accelerated timeline so that parties can take another crack at submitting maps that maximize core retention; or (2) adopt the congressional map enacted by the Legislature, even though that map was rejected by every other branch of government in Wisconsin and even though this Court has received virtually no briefing or adversarial process concerning the wisdom, nature, and merits of that map as compared to any other proposal. Pet. 3-4. Petitioners deserve neither of these highly unconventional remedies.

First, it would be an extraordinary intrusion on Wisconsin's sovereign duty to draw maps to require the Wisconsin Supreme Court to disregard months of careful deliberation and conduct a frantic, mad-dash-to-the-finish-line redistricting cycle. Frankly, Petitioners' request is outlandish and irresponsible. They treat this process like some sort of game show, where contestants will be forced to use "advanced technology" to come up with new maps in just 24 hours, at which point we can all watch while Wisconsin's judiciary and election officials scramble to run the 2022 elections without disaster. That is no way to conduct redistricting. That is no way to

administer an election. It would make a mockery of this Court's precedents counseling caution and would risk harm to every voter, candidate, and official in Wisconsin.

Second, Petitioners' alternative remedy request—a mandatory injunction from this Court that overrides Wisconsin's decision and requires use of the Legislature's proposed map—is equally problematic. To our knowledge, this Court has *never* thrown out a congressional map adopted by a state's high court, selected its own preferred redistricting plan in the first instance, and then directed the State to implement that plan for the upcoming election. *See Growe*, 507 U.S. at 34 (recognizing that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court"). This Court certainly has never done so on such a thin record, with so little time, and with respect to a remedial map that has not been subject to the crucible of adversarial testing. Granting Petitioners' request would drag this Court into a thicket it has never previously seen fit to enter; would constitute a jolting departure from past practice and principle; would impose a map that has quite obviously been selected for its perceived partisan advantage; and would surely lead a horde of future parties to seek comparable relief. There is no basis in law or equity for granting such unprecedented relief.

CONCLUSION

Petitioners' application for a stay and injunctive relief—and alternative petition for writ of certiorari and summary reversal—should be denied.

Respectfully submitted,

Joshua L. Kaul
Wisconsin Attorney General
Anthony D. Russomanno
Brian P. Keenan
Assistant Attorneys General
WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
(608) 267-2238
russomannoad@doj.state.wi.us
keenanbp@doj.state.wi.us

Christine P. Sun
Dax L. Goldstein
STATES UNITED DEMOCRACY CENTER
3749 Buchanan St., No. 475165
San Francisco, CA 94147
(415) 938-6481
christine@statesuniteddemocracy.org
dax@statesuniteddemocracy.org

/s/ Joshua Matz
Joshua Matz
Counsel of Record
Raymond P. Tolentino
Jacqueline Sahlberg*
KAPLAN HECKER & FINK LLP
1050 K Street NW | Suite 1040
Washington, DC 20001
(929) 294-2537
jmatz@kaplanhecker.com
rtolentino@kaplanhecker.com
jsahlberg@kaplanhecker.com

Amit R. Vora
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | 63rd Floor
New York, NY 10118
(212) 763-0883
avora@kaplanhecker.com

**Admitted only in Idaho,*
Not admitted in D.C.
Practicing under the supervision of counsel admitted in D.C.

Counsel for Respondent Governor Tony Evers