No. _____

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 a Member of the Wisconsin Elections Commission*, ET AL., RESPONDENTS.

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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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicants are Congressman Glenn Grothman, Congressman Mike Gallagher, Congressman Bryan Steil, Congressman Tom Tiffany, and Congressman Scott Fitzgerald, who intervened as Petitioners before the Wisconsin Supreme Court below.

Respondents include Tony Evers, in his official capacity as Governor of Wisconsin, who was a Respondent-Intervenor in the proceedings below.

Respondents also include the Wisconsin Elections Commission and Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, Jr., and Mark Thomsen, in their official capacities as members of the Wisconsin Elections Commission. The Commission and its members were Respondents in the proceedings below. And Respondents include Janet Bewley, in her official capacity as the Senate Democratic Minority Leader, who was a Respondent-Intervenor in the proceedings below.

Respondents also include Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim, Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha, who were Petitioners-Intervenors in the proceedings below.

Finally, Respondents include the Wisconsin Legislature, a Respondent-Intervenor in the proceedings below, and individual voters Billie Johnson, Eric

O'Keefe, Ed Perkins, and Ronald Zahn, who were Petitioners in the proceedings below.

The proceedings below were:

1. *Johnson, et al. v. Wisconsin Elections Commission, et al.*, No.2021AP1450-OA (Wis.), where the Wisconsin Supreme Court issued its final Opinion and Order on March 3, 2022. Applicants moved for an emergency stay pending appeal on Monday, March 7, 2022. Applicants informed the Wisconsin Supreme Court that they would be filing this application for a stay with this Court on Wednesday, March 9, 2022, given the emergency. The Wisconsin Supreme Court has not ruled on Applicants' emergency stay motion as of the time of this filing.

Related proceedings are:

1. *Hunter, et al. v. Bostelmann, et al.*, No. 3:21-cv-512 (W.D. Wis.), where the District Court has deferred the proceedings for the state-court proceedings before the Wisconsin Supreme Court.

2. *Black Leaders Organizing for Communities, et al. v. Spindell, et al.*, No. 3:21-cv-534 (W.D. Wis.), where the District Court has deferred the proceedings for the state-court proceedings before the Wisconsin Supreme Court.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

RULE 29.6 STATEMENT

As required by this Court's Rule 29.6, Applicants hereby state that they are individuals and thus have no parent entities and do not issue stock.

Dated: March 9, 2022

Respectfully submitted,

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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:

Wisconsin, like all States, is undergoing the decennial redistricting process to equally reapportion its congressional map in light of the population growth and shifts that it saw since the last U.S. Census. After the Wisconsin Legislature and Wisconsin Governor Tony Evers politically deadlocked over the drawing of a new congressional map, the Wisconsin Supreme Court assumed the responsibility to adopt a remedial map. Acting in its original jurisdiction, the Court announced in an opinion on November 30, 2021, the standard that it would use to choose among proposed remedial maps to be submitted by the parties before it. As relevant here, the Court explained that such maps must comply with "the paramount objective" of "[a]bsolute population equality" in Article I, Section 2 of the Constitution, *Johnson v. Wis. Elections Comm'n*, 399 Wis. 2d 623, 642 (2021) (quoting *Abrams v. Johnson*, 521 U.S. 74, 98 (1997)), and must follow a "least-change approach" that minimizes changes to Wisconsin's prior congressional map, *id.* at 661–70. In explaining this least-change approach, the Court cited a number of least-change cases that, while correctly giving significant weight to core retention, also considered other indicia of least change—including avoiding the splitting of existing communities of interest—when deciding to adopt a least-change map. *Id.* at 666–67. Then, in a single-Justice concurrence that was essential to the Court's forming a majority, Justice Hagedorn explained that he would also consider compliance with "communities of interest" or "other traditional redistricting criteria" to "choose the best alternative" map when necessary. *Id.* at 674 (Hagedorn, J., concurring). Following these instructions, *every* party before the Court

interested in the congressional districts took the Court at its word, submitting proposed maps that focused on both core retention and community-of-interest considerations, including limiting the splitting of counties and municipalities.

On March 3, 2022, the Wisconsin Supreme Court ignored bedrock constitutional requirements—including basic tenets of procedural fairness—and issued an Opinion and Order that adopted the unconstitutionally malapportioned congressional map proposed by the Governor.

First, the Court's Opinion violates the Due Process Clause, as it "bait[ed]" and "switch[ed]" the parties as to the standard that it would use to adopt a map. *Reich v. Collins*, 513 U.S. 106, 111 (1994). Specifically, in announcing the Governor's Map as its choice, the Court swapped its holistic least-change approach, which approach was to take account of multiple factors, for a core-retention-maximization-only standard that looked *exclusively* to the core-retention scores. While all the parties understood from the Court's November 30 opinion that core-retention would be an important factor as *part of* a multifactored least-change approach, *no one* thought—or could have thought—that this would be the *only* factor that the Court would consider. This is why all parties submitting maps to the Court *balanced* their maps' core-retention with the need to keep communities of interest together, such as by avoiding of county and municipal splits. Remarkably, after the Court adopted its new core-retention-maximization-only standard, it refused to solicit or accept any new maps from the parties drawn under this test—despite the trivial ease with which constitutional maps could be drawn under a core-retention-maximization-only standard. The

Court's process to adopt the Governor's Map subverts "the concept of fair notice" that is "the bedrock of any constitutionally fair procedure," in violation of the Due Process Clause. *Lankford v. Idaho*, 500 U.S. 110, 120–21 (1991).

Second, the Governor's Map violates Article I, Section 2 because it fails to "draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). The Governor's Map deviates from perfect population equality solely because of the Governor's mistake of law as to what the Constitution demands. So, even apart from the Court's due-process violation, the Court's selection of the Governor's Map is plainly unconstitutional.

The Wisconsin Supreme Court's flouting of the Constitution and this Court's precedents justifies prompt, emergency relief from this Court. Indeed, the Wisconsin Supreme Court's two constitutional violations here are so straightforward that this Court should construe this Application as a petition for certiorari and summarily reverse. *See, e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam).

And there are two clear paths forward for Wisconsin's 2022 congressional elections. First, this Court could (and should) remand to the Wisconsin Supreme Court with instructions to permit all parties to submit proposed congressional maps under the Wisconsin Supreme Court's newly announced, core-retention-maximization-only methodology. Given that drawing a constitutional, congressional map under that methodology is trivially easy, the Wisconsin Supreme Court could both receive proposed maps and adopt the map that moves the fewest persons within one week of this Court's order, leaving ample time to conduct Wisconsin's 2022

congressional election under that map. Alternatively, and consistent with the request of the Wisconsin Legislature in its stay application from this same Order, *see* Emergency Application For Stay And Injunctive Relief, No.21A471 (U.S. Mar. 7, 2022), this Court should order that Wisconsin hold its upcoming 2022 elections under the congressional map passed by the Legislature in 2021, but vetoed by the Governor—which is the same map that Applicants proposed to the Court below—on a remedial basis, as all parties below conceded that this map is wholly constitutional.

DECISIONS BELOW

The Wisconsin Supreme Court's Opinion and Order adopting the Governor's Congressional Map for Wisconsin is included in the Appendix to this Application at App. 1–167. The Wisconsin Supreme Court has not ruled on Applicants' emergency motion to stay its Opinion and Order adopting the Governor's Map for Wisconsin as of the time of this filing.

JURISDICTION

The Wisconsin Supreme Court issued its Opinion and Order on March 3, 2022, App. 1–167, adopting the Governor's Congressional Map for Wisconsin. This Opinion and Order is a final judgment from the Wisconsin Supreme Court with regard to Wisconsin's congressional maps and so is reviewable by this Court via a writ of certiorari. 28 U.S.C. § 1257(a). This Court has the authority to stay the Wisconsin Supreme Court's Opinion and Order pending Applicants' filing of a petition for a writ of certiorari and this Court's disposition of that petition. 28 U.S.C. §§ 1651(a), 2101(f).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2 of the Constitution provides, in relevant part, that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2.

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

A. The Wisconsin Supreme Court Assumes The Duty To Redistrict Wisconsin's Congressional Districts

After the conclusion of the recent 2020 U.S. Census, Wisconsin's 2011 congressional-district map was malapportioned, given population growths and shifts across the State's eight congressional districts. *Johnson*, 399 Wis. 2d at 632. On November 11, 2021, the Wisconsin Legislature passed a new congressional map that apportioned the State as equally as possible after the 2020 U.S. Census—thus curing the 2011 map's malapportionment—but the Governor vetoed that map shortly thereafter. App. 6–7; *Johnson*, 399 Wis. 2d at 634, 638. Meanwhile, the Wisconsin Supreme Court had granted a group of private citizens' petition for an original action, which asked the Court to adopt a remedial congressional map that equally apportions the State's congressional districts, as the Constitution demands, given the Legislature's and Governor's political stalemate. App. 6–7; *Johnson*, 399 Wis. 2d at

634, 637–38. Applicants—who are all residents of Wisconsin who regularly vote in federal elections, all duly elected Representatives to the U.S. House of Representatives from five of Wisconsin's eight congressional districts, and all intend to run for reelection—intervened before the Wisconsin Supreme Court in this original-action proceeding. *See* App. 2, 8–9 & n.3; *Johnson*, 399 Wis. 2d at 629.

B. The Wisconsin Supreme Court Adopts A "Least-Change" Approach That Takes Into Account Both Core Retention And Other Well-Established Least-Change Criteria, As Every Party Understood

In an opinion issued on November 30, 2021, a majority of the seven-member Wisconsin Supreme Court announced the standard by which the Court would adjudge and adopt a remedial congressional map for the State. *Johnson*, 399 Wis. 2d at 632–34; *see id.* at 672–77 & n.4 (Hagedorn, J., concurring). Specifically, the Court—Justice R.G. Bradley, joined by Chief Justice Ziegler, Justice Roggensack, and by Justice Hagedorn in substantial part—announced that it would follow a "least-change approach" to reapportion the State, *id.* at 666, meaning that it would only "mak[e] the minimum changes necessary in order to conform" the State's "existing" 2011 congressional map "to constitutional and statutory requirements." *Id.* at 634. The Court noted that it would accept "no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." *Id.* at 642 (quoting *Mahan v. Howell*, 410 U.S. 315, 322 (1973)). In explaining what it meant by its "least-change approach," the Court cited a number of least-change cases that, while giving properly significant weight to core retention,

also considered other indicia of least-change—including not splitting up existing communities of interest—when deciding to adopt a least-change map. *Id.* 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); *Below v. Gardner*, 963 A.2d 785, 794 (N.H. 2002); *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)).

In a concurring opinion, Justice Hagedorn—*whose vote was essential to the Court's forming a majority*—agreed that the Court's "remedy must be tailored to curing legal violations" in Wisconsin's 2011 congressional map, including one-person/one-vote violations, and then noted that "a court is not necessarily limited to considering legal rights and requirements alone when formulating" a new congressional map as "a remedy." *Id.* at 674 (Hagedorn, J., concurring). Justice Hagedorn explained that if the Court were to "receive multiple proposed maps that comply with all relevant legal requirements, and that have equally compelling arguments for why the proposed map most aligns with current district boundaries," then the Court would consider compliance with "communities of interest" or "other traditional redistricting criteria," to "choose the best alternative" map for the State. *Id.* at 673–74. Accordingly, Justice Hagedorn "invited" the parties to: (1) "submit congressional . . . maps that comply with all relevant legal requirements, and that

endeavor to minimize deviation from [the] existing [map]," and (2) "discuss[ ]" how their proposed maps comport with "other, traditional redistricting criteria." *Id.* at 676–77.

Importantly, it was clear to all parties involved that both the majority opinion and Justice Hagedorn's concurrence agreed that the Court's least-change approach looked to *both* core retention *and* other established indicia of least change, like limiting communities of interest splits. *See Id.* at 666–67 (majority op.) (citing *Crumly*, 892 F. Supp. 2d at 1345; *Martin*, 2012 WL 2339499, at *3; *Below*, 963 A.2d at 794; *Alexander*, 51 P.3d at 1211; *Bodker*, 2002 WL 32587312, at *5, *7; *Markham*, 2002 WL 32587313, at *6); *id.* at 674, 676–77 (Hagedorn, J., concurring). As explained below, every party submitted maps that track this understanding of the Court's "least change" methodology, and no party came close to pursuing core retention without regard to community-of-interest considerations, including limiting county and municipal splits.

Justice Dallet, joined by Justice A.W. Bradley and Justice Karofsky, dissented from the majority opinion's adoption of the least-change approach to redistricting the State's congressional districts. *Id.* at 677–95 (Dallet, J., dissenting).

C. All Parties Submit Maps Reflecting Their Shared Understanding That The Court's Least-Change Approach Requires Consideration Of Core-Retention And Other Indicia of Least-Change

The Wisconsin Supreme Court subsequently received proposed remedial congressional maps from four parties: (1) a group of private citizens under the moniker "the Citizen Mathematicians and Scientists"; (2) the Congressmen, who are

the Applicants here; (3) Wisconsin Governor Tony Evers; and (4) another group of private citizens under the name "the Hunter intervenors-petitioners." App. 8–9.

Each party's proposed map focused—understandably, *see infra* pp. 22–23—on *both* core retention *and* other least-changes criteria, such as community-of-interest considerations, including avoiding the splitting of counties and municipalities. In their brief supporting their proposed map, the Congressmen stressed their proposed map's core retention—retaining 93.5% of all persons and moving only 384,456 to new districts—while also discussing how the map avoided splits of communities, including municipalities and counties. App. 202–15. In his supporting brief, the Governor explained that his map had high core retention—retaining 94.5% of all persons and moving only 324,415—while taking into account other traditional redistricting criteria, including by specifically citing his expert's report that dealt with factors such as the number of county and municipal splits. App. 228, 235–37. The Hunter Intervenors also discussed their proposal's core-retention numbers—93.0% retention, with 411,777 persons moved—while also discussing that their map minimized local-boundary splits, while uniting communities of interest. App. 14, 258–62. Finally, the Citizen Mathematicians and Scientists Intervenors noted that their map respected existing communities of interest, while respecting core retention—retaining 91.5%, moving 500,785 persons—and meeting all other requirements. App. 290, 312–16. So, while all parties clearly understood that core retention would be a key factor in the Wisconsin Supreme Court's analysis, *no one* believed that it would be the *only* factor

relevant to the Court's ultimate least-change determination, and no party's map came close to applying a core-maximization-only methodology.

Notably, only the Congressmen's Map and the Citizen Mathematicians' Map equally reapportioned the State by placing as equal a population as mathematically possible into each of Wisconsin's eight congressional districts, *see* App. 108–13 (Ziegler, C.J., dissenting); App. 17 (majority op.); App. 115 (Roggensack, J., dissenting), while the Governor's Map and the Hunter-Intervenors' Map did not, *see* App. 16–19; App. 107 (Ziegler, C.J., dissenting); App. 129–31 (R.G. Bradley, J., dissenting). After the 2020 Census, "[t]he mathematically ideal" population for each of Wisconsin's eight congressional districts is "736,714.75 persons" *see* App. 17 (majority op.). So, the Congressmen's Map and Citizen Mathematicians' Map placed either 736,714 or 736,715 people in each district, achieving as mathematically equal an apportionment as possible. App. 199. The Governor's Map and the Hunter Intervenors' Map, on the other hand, placed "either 736,714 people, 736,715 people, or 736,716 people" in each district. App. 17.

After submitting their proposed remedial map to the Court, the Congressmen moved the Court to submit a modified version of the Congressmen's Map, in order to explain to the Court that it was possible to move far fewer people than the Governor's Map, while still generally respecting many communities of interest and avoiding county and municipal splits (although not respecting those least-change interests to the same extent as their initial proposal). App. 322–29; App. 14 n.11. That is, the Congressmen's submission illustrated that it was possible to draw a remedial map

that complied with all legal requirements, including Article I, Section 2's equal population mandate, and that achieved a better core-retention score than the Governor's Map, moving *over 97,000 fewer people*. *See* App. 325–28. The modified version of the Congressmen's Map had a core-retention score of 96.16%, moving 97,692 fewer people than the Governor's Map. *See* App. 327 (explaining that the modified proposed remedial map moved only 226,723 people to a new district); App. 13–14; App. 106–07 (Ziegler, C.J., dissenting). The modified version of the Congressmen's Map continued to reapportion the State as equally as possible across its eight congressional districts, just like the original version of the Congressmen's Map. App. 327. And, to be clear, this was *not* a core-retention-maximization-only map, as the Congressmen could have moved even fewer people still if they disregarded community of interest considerations and focused, instead, only on maximizing core retention and legal compliance.

The Wisconsin Supreme Court denied the Congressmen's motion, App. 371, although it did grant a motion from the Governor to submit a corrected version of his proposed state-legislative map, App. 371; App. 337. The Court explained that its prior order that had invited submissions of proposed maps allowed parties to "submit only a single set of maps and provided a process by which parties could file a motion to amend their maps." App. 371. In the Court's view, the Congressmen's motion was "different-in-kind" than the Governor's motion, as it asked the Court to "consider an alternative map while expressly standing by their initial map," unlike the Governor's. App. 371. The Court reached that judgment despite the Governor's modified map

incorporating corrections that were quite numerous and "very significant." App. 372 (Roggensack, J., dissenting). Justice Roggensack, along with Chief Justice Ziegler and Justice R.G. Bradley, dissented from the Court's order denying the Congressmen's motion, explaining that she would have "treat[ed] all parties the same" and "grant[ed]" both the Congressmen's and the Governor's motions. App. 372 (Roggensack, J., dissenting).

On January 19, 2022, the Court heard extensive oral argument from the parties regarding the proposed congressional maps. *See* Oral Argument Recording, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Jan. 19, 2022) (hereinafter "Oral Argument Recording").* The Governor's only explanation at oral argument for his map's malapportionment was his belief that "a lower population deviation was [not] required under law." App. 111–12 (Ziegler, C.J., dissenting) (discussing oral argument). Further, the Governor "admitted" at oral argument "that a lower deviation could be done" with his map "*without issue*," App. 113 (Ziegler, C.J., dissenting) (discussing oral argument)—and that he could implement such a fix "overnight," Oral Argument Recording at 2:13:00–2:15:34. Finally, in a filing submitted to the Court shortly after oral argument, the Governor confirmed that his continued mistake of law regarding the Article I, Section 2 standard was the only reason that his map has a two-person deviation. *See* App. 375.

* Available at https://wiseye.org/2022/01/19/wisconsin-supreme-court-oralarguments-johnson-v-wisconsin-elections-commission/ (last visited Mar. 8–9, 2022).

D. The Wisconsin Supreme Court Adopts A New Core-Retention-Maximization-Only Methodology, Without Warning, And Selects The Governor's Malapportioned Congressional Map

1. On March 3, 2022, the Wisconsin Supreme Court—this time with a majority comprising Justice Hagedorn, joined by Justice A.W. Bradley, Justice Dallet, and Justice Karofsky—issued an Opinion and Order that adopted the Governor's Map as the State's remedial congressional map. App. 8, 11, 16–19.

As an initial matter, this majority of the Court now explained that it would adopt a proposed congressional map by considering only core-retention-maximization and the map's compliance with legal requirements. "[C]ore retention," the majority now explained, was the "best metric of least change" under the Court's previously announced least-change approach, meaning that it *alone* would dictate the Court's choice of the proposed remedial maps on offer, App. 8–9, assuming the map was lawful, App. 12. At the expense of "any other measures of least change," the Court explained that it would now adopt the proposed map that had "superior core retention," App. 14, so long as that map complied with other legal requirements, App. 12. Further, this majority of the Court explained that it had decided to adopt a proposed remedial map wholesale, without ordering any particular changes, despite its recognition that it was "not bound by any map proposal." App. 8; *contra* App. 107 (Ziegler, C.J., dissenting). Although all of the parties' proposed maps made "changes that appear unnecessary to account for population changes or to otherwise comply with the law"—including the Governor's Map, which the Court ultimately adopted—

the Court "determine[d] that the best approach" was simply to adopt one of these maps without modification, "imperfect though [it] may be." App. 8 (majority op.).

Applying its new core-retention-maximization-only approach, the Court adopted the Governor's Map as the remedial congressional map for Wisconsin, concluding that it had the best core-retention scores out of all of the proposed congressional maps before it. App. 11, 14. Specifically, the Governor's Map had a core-retention score of 94.5%, which was one percent higher than the accepted Congressmen's Map's score of 93.5%. App. 14. That said, the Governor's Map's core-retention score was far lower than the score of the Congressmen's modified version of the Congressmen's Map. App. 106 (Ziegler, C.J., dissenting); *see supra* pp. 10–11. And, of course, it is *far* lower still than scores the Court would have received from multiple parties had it told them that it was interested in a core-retention-maximization-only congressional map, without regard to any other least-change considerations, such as not splitting communities of interest.

The Court then proceeded to conclude that the Governor's Map complied with Article I, Section 2's equal population mandate, despite the map's indisputable failure to apportion the State's population as equally as possible. App. 16–19. The Court recognized that "there is 'no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." App. 17–18 (quoting *Mahan*, 410 U.S. at 322). Further, the Court understood that the Governor's Map has a "total deviation between the most and least populated

districts [of] two persons," since "the Governor's districts have either 736,714 people, 736,715 people, or 736,716 people" while "[t]he mathematically ideal district contains 736,714.75 persons." App. 17. Yet, the Court nevertheless concluded that this two-person deviation was constitutionally allowable, since it supposedly furthered a "consistently applied legislative polic[y]," App. 17–18 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983))—namely, the Court's own "least change objective," App. 18–19. That is, the Court excused the malapportionment in the Governor's Map only because this map performed better on core-retention-maximization than the three other maps that the Court decided it would consider. App. 18–19. The majority also noted that "many states have adopted [congressional] districts with minor variations," and "[i]f the law is clear that a two-person deviation (or more) is unacceptable, then nearly a third of states with more than one congressional district have apparently not gotten the message." App. 18.

Finally, the Court concluded that the Governor's Map complies with "all other applicable laws," App. 9, including the Voting Rights Act. Indeed, "no one argue[d] that any congressional submission [that the Court] received," including the Governor's Map, ran "afoul of the VRA." App. 17.

2. Chief Justice Ziegler, Justice Roggensack, and Justice R.G. Bradley each wrote dissenting opinions, while joining each other's dissents.

As relevant here, the dissents explained that "the majority implement[ed] a previously unknown[ ] judicial test" to judge the proposed remedial maps before it: "core retention." App. 41 (Ziegler, C.J., dissenting); *see also* App. 90, 106; App. 126–

29 & n.1, 155–59 (R.G. Bradley, J., dissenting). "Nowhere" in the Court's opinion announcing the least-change approach did the Court "use the phrase 'core retention'"; thus the parties "were . . . not advised that core retention would be the decisive factor in the court's decision." App. 44–45 (Ziegler, C.J., dissenting); *see also* App. 92; App. 126–28 & n.1 (R.G. Bradley, J., dissenting). Thus, "no one, neither among the parties nor the court, understood core retention was the sole factor for determining least change and further, for selecting maps." App. 45 (Ziegler, C.J., dissenting).

Next, the dissents explained that "[t]he Governor's map cannot be accepted because he has an unnecessary and unexplained deviation from perfect population equality." App. 107 (Ziegler, C.J., dissenting); App. 129–31 (R.G. Bradley, J., dissenting). Ignoring this Court's explicit admonishment to make "a good-faith effort to draw districts of equal population," App. 108–09 (Ziegler, C.J., dissenting) (quoting *Karcher*, 462 U.S. at 730–31, 734), the Governor failed to make such "good-faith effort to achieve zero deviation" with his map—unlike the Congressmen's Map, which has "a mathematically precise population deviation," App. 110 (Ziegler, C.J., dissenting). Indeed, "[t]he Governor's population deviation is two," since "the Governor's maximum deviation above the ideal" is one person, his "minimum deviation below the ideal" is one person, and "1 + 1 = 2." App. 110–11 (Ziegler, C.J., dissenting).

Further, contrary to this Court's observation that the State must demonstrate that "each significant variance between districts was necessary to achieve some legitimate goal," App. 108 (Ziegler, C.J., dissenting) (quoting *Karcher*, 462 U.S. at 730–31), the Governor offered no reason why "his districts have greater than

necessary population inequality," even though this is his "burden" under this Court's case law. App. 111–12 (Ziegler, C.J., dissenting). That is, the Governor provided "[n]o explanation or details . . . as to why the deviation was necessary," including as to the need to "apply[ ] reasonable priorities such as . . . preserving the cores of prior districts.'" App. 111–12 (Ziegler, C.J., dissenting) (quoting *Karcher*, 462 U.S. at 740). Instead, "the Governor at oral argument stated a population deviation of two was included because the Governor did not believe a lower population deviation was required under law." App. 111 (Ziegler, C.J., dissenting). And he "admitted that a lower deviation could be done *without issue*." App. 113 (Ziegler, C.J., dissenting); *accord* Oral Argument Recording at 2:13:00–2:15:34 (Governor's counsel explaining that, "[i]f the Court thinks that's a problem," then "that could be fixed overnight"). That is "carelessness," which "cannot satisfy the Governor's burden of proving 'with some specificity that the population differences were necessary to achieve some legitimate state objective.'" App. 112 (Ziegler, C.J., dissenting) (quoting *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760, 763–65 (2012)). And, again, the Congressmen's Map itself "showed a lower population deviation could be done, and [it] too achieved high core retention." App. 112 (Ziegler, C.J., dissenting).

E. The Wisconsin Supreme Court Fails To Timely Stay Its Decision Adopting The Governor's Malapportioned Congressional Map

On Monday, March 7, 2022, the Congressmen moved the Wisconsin Supreme Court to stay its decision adopting the Governor's Map until they could petition this Court for emergency injunctive relief. App. 378–80. In that stay motion, the Congressmen explained that the Governor's Map is unconstitutionally

malapportioned, and that the imposition of this map would cause them and the entire State irreparable harm. App. 385–87, 389–90. The Congressmen also explained that the Court's unexpected announcement of its new, core-retention-maximization-only standard for redistricting maps, without allowing submission under that newly announced standard, violated the Due Process Clause. App. 387–90. The Congressmen also asked the Court to pair the grant of this stay relief with an order allowing all parties to submit core-retention-maximization maps promptly. App. 390. Given the exigencies of this case, the Congressmen respectfully requested that the Wisconsin Supreme Court grant its stay motion by Wednesday, March 9, 2022; App. 380; Rule 23.3. As of the time of this filing, the Wisconsin Supreme Court has not acted on the Congressmen's stay request.

REASONS FOR GRANTING THE APPLICATION

This Court may stay "the execution and enforcement" of a "final judgment or decree of any court . . . subject to review . . . on writ of certiorari," including a state court of last resort, under 28 U.S.C. § 2101(f). Under the All Writs Act, 28 U.S.C. § 1651(a), this Court or an individual Justice has the broad discretion to stay a lower-court's order in "exigent circumstances" where "the legal rights at issue are indisputably clear." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (citations omitted). This Court will stay a lower court's order if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and

(3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 577 U.S. 1126 (2016); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017). Applicants have satisfied each of these standards here.

I. This Court Is Likely To Grant Review, And Then Reverse, On The Two Constitutional Issues That Applicants Raise Here

Given the Wisconsin Supreme Court's clear conflict with this Court's precedents and the importance of this case, this Court is likely to grant review and then reverse on two issues. Rule 10(c). First, the Wisconsin Supreme Court's adoption of an "unforeseeable" new standard for evaluating the remedial maps, *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), without affording the parties a chance to submit maps under that standard, *Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917), violates the Due Process Clause, in a deeply important matter of decennial redistricting. *Infra* Part I.A. Second, the Governor's Map violates Article I, Section 2 because it does not apportion the State as equally as possible. *Infra* Part I.B.

A. Applicants Are Likely To Prevail On The Merits Of Their Claim That The Wisconsin Supreme Court's "Bait And Switch" Adoption Of A New Standard For Remedial Maps Without Allowing Parties To Submit New Maps Violates The Due Process Clause

1. The Fourteenth Amendment's Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981), requiring that litigants receive

"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). This Clause's protections of procedural fairness apply to state courts. *See Reich*, 513 U.S. at 110–14; *Bouie*, 378 U.S. at 353–55; *Saunders*, 244 U.S. at 319–20.

This Court has repeatedly recognized that a state supreme court cannot give "retroactive effect" to an "unforeseeable" decision, if the application of that decision would deny "a litigant a [fair] hearing." *Bouie*, 378 U.S. at 354–55; *Reich*, 513 U.S. at 110–14; *Saunders*, 244 U.S. at 319–20. In *Saunders,* for example, a defendant won a judgment in a state trial court after that court concluded that the plaintiff's key factual claim "was not open to the plaintiff" under then-extant law. 244 U.S. at 319–20. The state supreme court then reversed, concluding that a case decided *after* the trial court's judgment made the plaintiff's factual claim legally relevant and—without remanding to the trial court to afford the defendant "the proper opportunity to present his evidence" on that now-relevant factual claim—dispositive. *Id.* at 319. This Court reversed, holding that it is "contrary to the 14th Amendment" for a state supreme court to reverse the favorable judgment obtained by a defendant based on the application of a new judicial decision without also remanding to give the defendant "a chance to put his evidence in" to respond to that new decision—at least where the defendant never "had the proper opportunity to present his evidence" before. *Id.* Similarly, in *Reich*, a plaintiff sought a tax refund for certain retirement payments paid by the federal government after his military service. 513 U.S. at 108. After this Court declared unconstitutional state laws that exempted from taxation

retirement benefits paid by the State, but not by the federal government, Georgia repealed its version of such a statute. *Id.* The plaintiff sued to recoup those taxes paid on his federal benefits under that now-repealed statute, but the Georgia Supreme Court "construe[d]" its "refund statute not to apply to the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." *Id.* at 109 (citation omitted). This Court remanded for reconsideration in light of an intervening, on-point decision in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), but the Georgia Supreme Court denied the plaintiff's tax-refund request by claiming, for the first time, that its own predeprivation state-law remedies sufficed to remedy any Due Process Clause violation, even though previously the State also offered postdeprivation remedies. *Reich*, 513 U.S. at 110. This Court explained that this was exactly "what a State may *not* do . . . reconfigur[ing] its scheme, unfairly, in *midcourse*—to 'bait and switch'" the plaintiff. *Id.* at 111. The Georgia Supreme Court's reliance on predeprivation procedures, this Court held, "was entirely beside the point" because "no reasonable taxpayer would have thought that they represented . . . the exclusive remedy for unlawful taxes." *Id.* (emphasis omitted).

The reason for the due-process rule embodied in cases such as *Saunders* and *Reich* is as obvious as it is vital. A state supreme court entering an "unforeseeable and retroactive" judicial decision plainly causes "a deprivation" of both "the right of fair warning," *Bouie*, 378 U.S. at 352, and the right to an appropriate hearing, *Mullane*, 339 U.S. at 313. So, while a state supreme court has broad "flexibility"

under the Due Process Clause to establish and "reconfigure" its precedent "over time," what it "may *not* do" is "reconfigure [a] scheme, unfairly, in *midcourse*" of litigation without giving the parties an opportunity to submit evidence on that new standard. *Reich*, 513 U.S. at 110–11. This Court put it pointedly in *Reich*: due process means that state supreme courts cannot "bait and switch" litigants. *Id.* at 111.

2. A "bait and switch," *id.*, is exactly what the Wisconsin Supreme Court did with regard to the congressional maps here, as the Court misled every party before it.

In its November 30, 2021 opinion—before any party submitted remedial maps for the Court's consideration—a majority of the Wisconsin Supreme Court announced that it would follow a "least-change approach" to reapportion the State. *Johnson*, 399 Wis. 2d at 666. In announcing this test, the majority cited a number of least-change precedents, all of which considered multiple other indicia of least changes beyond core retention, such as not splitting communities of interest. *Id.* at 666–67 (citing *Crumly*, 892 F. Supp. 2d at 1344–45; *Martin*, 2012 WL 2339499, at *3; *Below*, 963 A.2d at 794; *Alexander*, 51 P.3d at 1211; *Bodker*, 2002 WL 32587312, at *5; *Markham*, 2002 WL 32587313, at *6). In a separate concurrence, Justice Hagedorn—*who provided the critical fourth vote to the majority's adoption of the least-change approach*—agreed with the majority that any remedy imposed "must be tailored to curing legal violations" in Wisconsin's 2011 congressional map. *Johnson*, 399 Wis. 2d at 674 (Hagedorn, J., concurring). He noted that the Court would consider more than just "legal rights and requirements alone when formulating" the Wisconsin Supreme Court's map, and that respect for "communities of interest" and "other traditional

redistricting criteria" would affect the Court's choice of the best alternative map, if least-change criteria for competing maps were otherwise "equally compelling." *Id.* Thereafter, all parties submitted to the Wisconsin Supreme Court maps that focused *both* on core-retention maximization *and also* other important least-change indicia, such as communities of interest and limiting county and municipality splits, consistent with the Court majority's reasoning. *See supra* pp. 9–10.

Notably, the Congressmen also attempted to provide the Court with a modified version of their map that further prioritized core retention, while still giving some respect to community-of-interest considerations. App. 324–26, 328. That modified map had a core-retention score of 96.16%, besting the Governor's Map by more than 97,000 persons. *Compare* App. 14, *with* App. 327. In drawing this modified map, the Congressmen still maintained to some extent a proper respect for communities of interest, including county and municipality splits, although not as much as in their initial submission. *See* App. 324–38. The Wisconsin Supreme Court, however, rejected the Congressmen's submission and ignored the Congressmen's modified map, despite this map being objectively better on the very standard that the Court later unexpectedly imposed in the litigation. App. 371.

In all and importantly, none of the maps submitted to the Wisconsin Supreme Court approached the core-retention scores of the Congressmen's modified map, let alone a map that actually followed the core-retention-maximization-only approach that the Court eventually adopted, as the below table shows:

Map	Persons Moved	% Retained
Governor	324,415	94.5%
Congressmen	384,456	93.5%
Hunter Intervenors	411,777	93.0%
Citizen Mathematicians & Scientists	500,785	91.5%
Modified Congressmen	226,723	96.16%

App. 14, 327 (listing figures for all maps on record). And, of course, if one follows the Supreme Court's core-maximization-only methodology, it would be trivially easy to move the core retention figure significantly above the 96.16% mark that the Congressmen achieved in their modified proposal.

Having "bait[ed]" the parties—including the Congressmen—to submit their map to comply with its holistic least-change approach, the Wisconsin Supreme Court ultimately "switch[ed]" the standard, *Reich*, 513 U.S. at 111, by announcing that it would instead employ a core-retention-maximization-only standard to select the remedial map, App. 12. "[N]o reasonable [litigant]" would have considered this core-retention-maximization-only standard to be the "exclusive" test under the least-change approach. *Reich*, 513 U.S. at 111. This was "a previously unknown" and now exclusively applied "judicial test" that was surprisingly imposed by the Court to judge the proposed remedial maps before it. App. 41 (Ziegler, C.J., dissenting); *see also* App. 90, 106; App. 126–29 & n.1, 155–59 (R.G. Bradley, J., dissenting). "Nowhere" in the Court's opinion announcing the least-change approach did the Court "use the phrase 'core retention,'" so while the parties understood this as an important factor in any least-changes approach, they "were . . . not advised that core retention would be the

decisive factor in the court's decision." App. 44–45 (Ziegler, C.J., dissenting) (emphasis added); *see also* App. 92; App. 126–28 & n.1 (R.G. Bradley, J., dissenting). Thus, "no one, neither among the parties nor the court, understood core retention was the sole factor for determining least change and further, for selecting maps." App. 44–45 (Ziegler, C.J., dissenting). To be clear: **had the Court adequately advised the parties, rather than merely "bait and switch[ing]" them, *Reich*, 513 U.S. at 111, the submissions to the Wisconsin Supreme Court would have looked *entirely* different, with all parties submitting maps with core-retention figures north of 96%.**

The Wisconsin Supreme Court's decision to hide the ball until after all parties had submitted maps clearly violates the Due Process Clause, under this Court's case law. The Court deprived the parties of "notice and opportunity for hearing" on the pertinent question of core retention and whether the interplay of other traditional redistricting criteria would have any effect on the Court's determination, *Mullane*, 339 U.S. at 313, denying them any "[fair] hearing" on the proper criteria the Court would consider for a least-change approach, while giving "retroactive effect" to its later adopted, core-retention-maximization-only criterion, *see Bouie*, 378 U.S. at 354. Thus, the Wisconsin Supreme Court's decision to "reconfigure its scheme, unfairly, in *midcourse*," *Reich*, 513 U.S. at 111, from a consideration of core retention along with other least-changes factors to one in which pure core retention is all that matters, violated the Due Process Clause.

This "bait and switch," *Reich*, 513 U.S. at 111, is deeply prejudicial to the Congressmen, depriving them of basic fairness in the proceedings. The Congressmen had no "fair warning" about the Wisconsin Supreme Court's intention to change fundamentally its criteria for least-changes, and this "unforeseeable and retroactive" change amounted to a "deprivation" of due process in the proceedings. *Bouie*, 378 U.S. at 352. Under these circumstances and this Court's due-process precedents, this is a clear violation of the Congressmen's rights, as they absolutely would have submitted a core-maximization-only map had the Court requested such a map.

3. The Wisconsin Supreme Court's abbreviated attempt to rationalization why its new, core-retention-maximization-only standard was not a bait-and-switch is, with respect, unpersuasive. The Court majority observed that "[c]ore retention is, as multiple parties contended from the beginning of this litigation, central to a least change review," App. 13, and that "every party understood that [the Court's] adoption of a least change approach would place core retention at the center of the analysis," App. 13 n.9. With all respect, not a single party before the Court understood (or could have understood) the Court's November 30 opinion to mean that the Court would only consider core retention in applying a least-changes methodology. Rather, all parties understood that core retention would be *important* to the Wisconsin Supreme Court's least-change determination, but *no one* thought it would be the *only* factor the Court considered in the least-change approach, *see supra* pp. 9–10—consistent with the Court's November 30 opinion that itself concluded that core retention was the primary, but hardly the exclusive, measure of least changes, *Johnson*, 399 Wis. 2d at

666; *id.* at 674 (Hagedorn, J., concurring). For that reason, none of the parties' submissions focused solely on core retention, *supra* pp. 9–10, further underscoring the complete and utter surprise that the Wisconsin Supreme Court's new, "unforeseeable and unsupported" test engendered, *Bouie*, 378 U.S. at 355. Again, had the parties been adequately advised about the Court's core-retention-maximization-only approach, all maps submitted to the Court would have had much, much better core-retention scores—well north of 96%. *Supra* p. 25.

B. The Governor's Congressional Map Violates Article I, Section 2 Because It Deviates From Perfect Population Equality

1. Article I, Section 2 requires the States to apportion equally their congressional districts so "that as nearly as is practicable one man's vote in a congressional election is . . . worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). The Constitution's "one-person, one-vote principle" applies to congressional districts, meaning that "congressional districts [must] be drawn with equal populations." *Evenwel*, 578 U.S. at 59.

The one-person/one-vote principle for congressional districts is of "unusual rigor," as "has been noted several times." *Karcher*, 462 U.S. at 732. Indeed, this Court's most recent discussion of the one-person/one-vote principle in *Evenwel* indicates that it is a bright-line rule for congressional districts, requiring States to "draw congressional districts with populations *as close to perfect equality as possible*"—without any noted exception. *Id.* at 59 (emphasis added). Before *Evenwel*, this Court in *Karcher* explained that Article I, Section 2 places "absolute population equality" as "the paramount objective" in congressional redistricting. *Karcher*, 462

U.S. at 732. Thus, this Court condoned *only* deviations from "[p]recise mathematical equality" that are "impossible" to eliminate or that are "necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 730–31; *accord Mahan*, 410 U.S. at 322. Under *Karcher*, every failure of perfect population equality in a congressional map, no matter how small, must fall within one of those two categories to be constitutionally tolerable; "there are no *de minimis* population variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification." *Karcher*, 462 U.S. at 734.

Karcher "set[s] out a two-prong test to determine" whether a State's failure to achieve absolute population equality in its congressional redistricting map is nevertheless constitutionally excusable. *Tennant*, 567 U.S. at 760. First, this Court "must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730. Second, if "the population differences were not the result of a good-faith effort to achieve equality," then those differences are unconstitutional unless the State shows that they were "necessary to achieve some legitimate goal," like "preserving the cores of prior districts." *Id.* at 731, 740. Importantly, under this second step, "the State must justify each variance, no matter how small," *id.* at 730 (citation omitted), since even "*de minimis* population variations" demand "justification," *id.* at 734.

2. Here, the Governor's Map violates Article I, Section 2.

The Governor's Map deviates from perfect population equality more than is necessary. After the 2020 U.S. Census, the most "[p]recise mathematical equality" that could possibly be achieved by a congressional map in Wisconsin is one that places either 736,714 people or 736,715 people in each of Wisconsin's eight districts, *Karcher*, 462 U.S. at 730—resulting in a *one-person deviation* between the largest and smallest district, *see Evenwel*, 578 U.S. at 59; App. 17; App. 110–11 (Ziegler, C.J., dissenting). The Governor's Map, however, has a two-person deviation between the largest and smallest district, which is undisputedly bigger than one person. App. 110 (Ziegler, C.J., dissenting); App. 17 (majority op.). Simply put, "1 + 1 = 2," which is ">1." App. 111 (Ziegler, C.J., dissenting); *see generally Dr. Seuss's 1, 2, 3* (2019).

The Governor's Map violates *Evenwel*'s bright-line rule, since the Governor has failed to "draw congressional districts with populations *as close to perfect equality as possible*," 578 U.S. at 59 (emphasis added), given that his map includes a two-person deviation when a one-person deviation is possible, App. 110 (Ziegler, C.J., dissenting); App. 17 (majority op.). Further, under the pre-*Evenwel*, *Karcher* test, the Governor's Map is unconstitutional, as it fails *Karcher*'s two prongs.

First, "a good-faith effort to draw districts of equal population" could have "reduced" the Governor's two-person deviation to a one-person deviation. *Karcher*, 462 U.S. at 730. The Governor admitted at oral argument before the Wisconsin Supreme Court that he was fully capable of drawing a map to his liking that achieved a single-person deviation "*without issue*," App. 113 (Ziegler, C.J., dissenting), and "overnight," Oral Argument Recording at 2:13:00–2:15:34. The *only* reason that the

Governor did not draw a map with a single-person deviation was because he believed, wrongly, that this "lower population deviation was [not] required under law." App. 112 (Ziegler, C.J., dissenting); *see also* App. 375 (claiming that "a range of two" for a population deviation is not "unlawful"); *accord Tennant*, 567 U.S. at 763 (explaining that "the State's concession that it could achieve smaller population variations" necessarily moved the inquiry to step two of the *Karcher* framework).

Second, the Governor did not even attempt to carry his "burden" to show that his map's deviation from the ideal population "was necessary to achieve some legitimate goal"—like "preserving the cores of prior districts"—a failure that alone dooms the Governor's Map. *See Karcher*, 462 U.S. at 731, 740; App. 111–12 (Ziegler, C.J., dissenting). Instead, he admitted at oral argument before the Wisconsin Supreme Court below that he drew his map with a two-person deviation because of his own mistake of law, not because of any legitimate state objective, *Karcher*, 462 U.S. at 731, 740—that is, "the Governor did not believe a lower population deviation was required under law," App. 111 (Ziegler, C.J., dissenting); Oral Argument Recording at 2:13:00–2:15:34. This is "carelessness," which "cannot satisfy the Governor's burden of proving 'with some specificity that the population differences were necessary to achieve some legitimate state objective.'" App. 112 (Ziegler, C.J., dissenting) (quoting *Tennant*, 567 U.S. at 760).

The Wisconsin Supreme Court's independent conclusion that it would be *administratively convenient* to adopt the Governor's Map, despite its unnecessary population deviation, App. 18–19, is not a "legitimate state objective" justifying that

deviation either, *Karcher*, 462 U.S. at 740–41. To begin, this rationale is categorically unavailable here, as the Governor himself conceded that he could have achieved a lower deviation with no suggestion that this would have somehow compromised core retention. App. 111–12 (Ziegler, C.J., dissenting); Oral Argument Recording at 2:13:00–2:15:34. Regardless, the Wisconsin Supreme Court had before it the modified version of the Congressmen's Map, which achieved a higher core-retention score than the Governor's Map, complied with all legal requirements, *and still achieved as equal an apportionment as possible*. *See* App. 327. It thus is demonstrably incorrect to conclude that the Governor's Map, with its two-person deviation from the ideal population was somehow necessary or even helpful to achieving the Court's core-retention goals. *See Karcher*, 462 U.S. at 731, 740.

Finally, while the Wisconsin Supreme Court also explained that some other "states have adopted districts with minor variations" in population equality, that provides the Governor's Map no cover. App. 18. As an initial matter, all of the state examples that the Court cited were enacted before this Court's clarification in *Evenwel* that the one-person/one-vote principle is a bright-line rule requiring States to "draw congressional districts with populations *as close to perfect equality as possible*." 578 U.S. at 59 (emphasis added). And to the extent that any State not cited by the majority below is drawing such malapportioned maps after *Evenwel*, without justification—such as Pennsylvania, *see* Emergency Application at 2, *Toth v.*

Champan, No.21A457 (Feb. 28, 2022)†—that just highlights the need for this Court to grant this Application to make clear to all States that this Court's Article I, Section 2 caselaw means what it says. In any event, the States that the Wisconsin Supreme Court cites do not excuse the constitutional infirmity of the Governor's Map, even under *Karcher*. App. 18 (citing as examples the 2010 maps from Kansas, Mississippi, and West Virginia, as well as from Arkansas, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, New Hampshire, Oregon, Texas, and Washington). As for the Kansas, Mississippi, and West Virginia congressional maps, those maps' proponents justified the maps' population deviations with reference to "some legitimate state objective," unlike the Governor with his map here. *Tennant*, 567 U.S. at 763 (reviewing West Virginia's 2010 map); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088–89 (D. Kan. 2012) (reviewing Kansas' 2010 map); *Smith v. Hosemann*, 852 F. Supp. 2d 757, 765 (S.D. Miss. 2011) (justifying the deviation the district court drew into Mississippi's 2010 court-drawn map); *see generally Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (concluding that the population deviation in Pennsylvania's congressional map violated *Karcher*). As for the remaining maps that the majority references, Appellants were unable to find any decision from any court adjudicating Article I, Section 2 claims against them, thus it appears that no court

† This Court denied an application for relief in *Toth* that had challenged Pennsylvania's malapportioned map. Order, *Toth v. Chapman*, No. 21A457 (Mar. 7, 2022). However, *Toth* came to this Court in an entirely difference procedural posture, since applicants had sought relief from an order of a one-judge federal court, despite the case having "now been referred to a three-judge court," where "the parties [could] exercise their right to appeal from an order of that court granting or denying interlocutory injunctive relief." *Id.*

has decided whether those pre-*Evenwel* maps' population deviations were "necessary to achieve some legitimate state objective," as *Karcher* demands. 462 U.S. at 731.

II. Applicants Will Suffer Irreparable Harm Absent A Stay, And The Balance Of The Equities And The Public Interest Favor Such Relief

A. The Congressmen are "likely to suffer irreparable harm" absent this Court's stay and ultimate reversal of the Wisconsin Supreme Court's Opinion and Order. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

First, the Wisconsin Supreme Court deprived the Congressmen of their constitutional due-process rights to a fair judicial process in the proceedings before the Court, which is a per se irreparable harm. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam); *accord Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). As a party in this case, the Congressmen have a right to "put [their] evidence in" on the issues that the Wisconsin Supreme Court was considering when adopting new maps, so as to "protect[ ]" the Congressmen's "rights" in these proceedings. *Saunders*, 244 U.S. at 319. By springing a new and unforeseen core-retention-maximization-only standard, without affording the Congressmen any opportunity to submit a map under that standard, the Wisconsin Supreme Court deprived them of their constitutional due-process rights to participate fully and fairly in the proceedings. *See id.* Had the Wisconsin Supreme Court given the Congressmen a fair opportunity to submit a map knowing the Court's core-retention-maximization-only standard, the Congressmen would have submitted a map with north of 96% core retention. *See* App. 327; *supra* p. 25.

Second, the Court's adoption of the Governor's Map forces Congressman Bryan Steil to expend additional, significant, and unrecoverable resources campaigning for the 2022 election in a significantly altered district. Such loss of significant resources "with no guarantee of eventual recovery" constitutes irreparable harm. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Congressman Steil has invested substantial time and resources in District 1, so that he can campaign effectively, develop and maintain close relationships with his constituents, and better represent their interests in the House. App. 393–95. As Congressman Steil explained in his Affidavit, he has "invested substantial time and resources to understand the[ ] needs" of his constituents, but the Governor's new, unconstitutional map adds to the Congressman's district "significant new communities" with which he has no prior relationships, which imposes substantial costs for his campaign. *See, e.g.*, App. 394–95; *accord League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018). Congressman Steil has no practical means of recovering these vital resources from any adverse party, including because of sovereign immunity, even if this Court were to invalidate the Governor's Map after this Court's plenary review. Therefore, this loss of funds is irreparable. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Finally, the Congressmen will suffer irreparable harms from the adoption of the Governor's Map, absent a stay from this Court, because that map fails to equally apportion the State, as the Constitution demands. *Wesberry*, 376 U.S. at 7–8. To begin, the Governor's Map permanently deprives the Congressmen and the citizens of Wisconsin of their constitutional right to have their "vote in [the 2022]

congressional election" be "worth as much as another's," unless implementation of the map is stayed. *Id.* Further, the map doubly harms the Congressmen, as they also must run for reelection and vote in these same malapportioned districts. *See, e.g.*, App. 395. As with the Congressmen's due-process harms, *supra* p. 33, this one-person/one-vote harm is of constitutional dimensions, *Wesberry*, 376 U.S. at 7–8, and so its loss too is per se irreparable, *Cuomo*, 141 S. Ct. at 67.

B. The balance of the equities weighs decisively in the Congressmen's favor, as Respondents will suffer no meaningful harm from a prompt stay of the Governor's unconstitutional map, and such a stay would further the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Respondents do not have any legitimate interest in enforcing the Governor's unconstitutional map, so they would suffer no harm from a prompt stay of that map by this Court. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. That is, the Governor's Map violates Article I, Section 2, *supra* Part I.B, and was adopted through an unconstitutional process, *supra* Part I.A, and no party has a legitimate interest in enforcing an unconstitutional law, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–86 (1952)); *accord Wesberry*, 376 U.S. at 7–8; *Nken*, 556 U.S. at 435; *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Therefore, Respondents cannot claim any cognizable harm that could, on balance, outweigh the Congressmen's significant irreparable harms.

Further, no party would suffer *any* harm from the Congressmen's lead requested remedy in particular, ordering a remand to allow the parties to submit new

maps under the Court's core-retention-maximization-only methodology. Under that remedy, *every* party would have the same procedural right—consistent with the Due Process Clause, *see, e.g.*, *Saunders*, 244 U.S. at 320—to submit new maps under the Wisconsin Supreme Court's core-retention-maximization-only methodology. Placing the parties on equal footing is the hallmark of the "fundamentally fair" proceedings to which all parties are entitled, not an irreparable harm. *Lassiter*, 452 U.S. at 33. And no party would suffer any harm from the Congressmen's alternative remedy, as the congressional map the Legislature adopted is unquestionably constitutional.

Finally, Respondents cannot claim any harm to themselves or the public from the short delay that would obtain between this Court staying the Governor's Map and the Wisconsin Supreme Court adopting a new, constitutional remedial map in its place, if this Court were to select the Congressmen's first proposed remedy or second proposed remedy. *See Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (discussing the principle from *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (same). Wisconsin's primary election for its congressional districts does not occur until August 9, 2022, Wis. Stat. § 5.02(12s), with the nomination period for that election running from April 15, 2022, to June 1, 2022, Wis. Stat. § 8.15(1). While Wisconsin must have a remedial map in place prior to this mid-April nomination period in order for candidates and voters to conduct meaningful electioneering activities, *see generally Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring); *Democratic Nat'l Comm.*, 141 S. Ct. at 30 (Kavanaugh,

J., concurring), the process for drawing and adopting a new remedial map after this Court issues a stay could be completed well in advance of that time—even in a matter of days. Given the "advanced computer technology" utilized by the parties here, App. 113 (Ziegler, J., dissenting), drawing a map that maximizes core retention while complying with all other legal requirements is a trivially easy, mathematical exercise that takes minimal time and effort. Indeed, all parties could submit new proposals to the Wisconsin Supreme Court consistent with these criteria within a 24-hour period, while reviewing each other's core-retention and population-equality math taking only another 24 hours, providing the Wisconsin Supreme Court with complete briefing on its preferred criteria. Further, the Wisconsin Supreme Court's own analysis of those maps would likewise proceed expeditiously, given the ease with which the Court can compare maps' core-retention scores and equal-population figures, which is all the Court now says matters, and there are no possible Voting Rights Act or racial gerrymandering issues with a map drawn using that mathematical methodology. *See* App. 13–19. And, alternatively, if this Court follows the remedial approach that the Legislature requested in its Application earlier this week, and simply orders the 2022 congressional election run under the congressional map the Legislature adopted, but the Governor vetoed, that map could be put into place quicker than even the Congressmen's first remedial proposal.

III. In The Alternative, This Court Should Construe This Application As A Petition For A Writ Of Certiorari, Grant, And Then Summarily Reverse

This Court may construe this Application itself as a petition for a writ of certiorari, *Trump v. Mazars USA, LLP*, 140 S. Ct. 660 (2019); *Nken v. Mukasey*, 555 U.S. 1042 (2008); *accord United States v. Texas*, 142 S. Ct. 14 (2021), and then summarily reverse, *see, e.g.*, *James*, 577 U.S. at 307, given the Wisconsin Supreme Court's indisputable violations of the Due Process Clause and Article I, Section 2, as described above. Further, if this Court were to summarily reverse, it could then order one of two straightforward paths for Wisconsin's 2022 congressional elections. It could remand to the Wisconsin Supreme Court with instructions to permit all parties to submit new proposed maps under the that Court's core-retention-maximization-only methodology. Alternatively, this Court could order that Wisconsin hold these elections under the map passed by the Legislature in 2021—the same map that the Congressmen proposed to the Wisconsin Supreme Court below as the Congressmen's Map—since that map is unquestionably constitutional, was adopted by the Legislature, and moves fewer people under the Wisconsin Supreme Court's new methodology than any constitutional map that the Court considered.

CONCLUSION

This Court should stay the 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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