No. 21A471

IN THE SUPREME COURT OF THE UNITED STATES

THE WISCONSIN LEGISLATURE, BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Applicants,

v.

MARGE BOSTELMANN, *in her official capacity as Member of the Wisconsin Elections Commission*, *et al.*,

Respondents.

On Application for Stay and Injunctive Relief and Alternative Petition for Writ of Certiorari to the Supreme Court of Wisconsin

HUNTER RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no Hunter Respondent has a parent company or is a publicly held company with a 10 percent or greater ownership interest in it.

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INTRODUCTION

Nearly six months ago, Wisconsin voters Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn (the "Johnson Petitioners") petitioned the Wisconsin Supreme Court to remedy the malapportionment of state legislative districts. The Wisconsin Legislature intervened as a respondent to ensure the judicial proceedings would not interfere with its own efforts to adopt new maps through the political process and, once the political process reached an impasse, insisted that the Wisconsin Supreme Court adopt state legislative maps that made minimal changes from the maps the Legislature enacted in the previous redistricting cycle. Both the Johnson Petitioners and the Legislature (together, "Applicants") got exactly what they asked for: The Wisconsin Supreme Court stayed its hand until it was clear that legislative redistricting efforts were at impasse, and then, just as Applicants requested, invited all parties to propose new maps that would remedy the malapportionment while committing itself to a restrained, least-change approach. The court selected the submission that best reflected that objective. Both sets of Applicants enjoyed full participation in the proceedings, and the malapportionment is cured.

Unfortunately for Applicants, their preferred maps were not selected. But rather than accept the proper result of the months-long judicial process that Applicants themselves proposed, they now accuse the state court of racial gerrymandering in violation of the Fourteenth Amendment. The basis for their claim? The maps that scored best on the "least change" metric—and thus the maps the court

selected—also created seven majority Black assembly districts in Milwaukee, which Applicants believe is too many. But Applicants do not have standing to advance that claim on appeal, as none of them resides in Milwaukee or otherwise was even allegedly subject to a racial classification. And even setting aside this dispositive jurisdictional bar, the state court's selection procedures were meticulously race-neutral. The court did not select the adopted maps because of predominant racial considerations; it selected them because they scored best on the least-change metric *that Applicants had urged*. A review of racial data was only necessary at the backend to ensure the maps did not fail to include districts required by the Voting Rights Act. The process was minimalist, neutral, judicious—and consistent with this Court's precedent.

The emergency injunction proposed by Applicants, in contrast, is none of these things. Applicants ask this federal Court to enjoin a State's duly adopted redistricting plan before any deficiencies are proved, and to substitute a losing submission for the maps the state court conscientiously selected. There is simply no basis for their requested relief. The emergency application for stay and injunctive relief and alternative petition for writ of certiorari should be denied.

JURISDICTION

The Court lacks jurisdiction because no Applicant has Article III standing to pursue the claims raised or relief sought.

BACKGROUND

On August 13, 2021, Wisconsin voters Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the "Hunter Respondents") filed a malapportionment claim in the U.S. District Court for the Western District of Wisconsin, alleging that recent census results revealed that Wisconsin's congressional and state legislative districts contained population deviations beyond what the federal Constitution permits. Compl., *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 13, 2021), ECF No. 1. Ten days later, the Johnson Petitioners petitioned the Wisconsin Supreme Court to accept an original action raising similar claims under state law. Resp. App. 76. The Johnson Petitioners alleged that "redistricting is a state matter both with respect to the legislative function and the judicial function," *id.* at 80 ¶ 11, and they urged the state court to remedy their malapportionment injury by "making the least number of changes to the existing map as are necessary to meet the requirement of equal population and the remaining traditional redistricting criteria," *id.* at 88 ¶ 35.

After the state court accepted the petition, the Hunter Respondents intervened as petitioners and the Legislature intervened as a respondent. In support of its intervention, the Legislature asserted i) a state law right to participate in actions challenging the validity of state laws, and ii) an interest in ensuring the litigation

would not impede its efforts to enact redistricting plans through the political process. *Id.* at 101, 104. Other intervenors included four Republican congressmen; a coalition of civic organizations and voters (the "BLOC Respondents"); a group of citizen mathematicians and scientists; Wisconsin Governor Tony Evers; and State Senate Democratic Minority Leader Janet Bewley.

The federal court stayed any further proceedings in response to the parallel state court action. Order, *Hunter*, ECF No. 103 (Oct. 6, 2021). On September 24, 2021, the Legislature petitioned this Court for a writ of mandamus and writ of prohibition ordering the federal three-judge court to dismiss the stayed action. Resp. App. at 110. The Legislature first argued that the Hunter Respondents lacked standing to pursue their malapportionment claims because, in the event of an impasse, the state court would be fully and better equipped to resolve it. *Id.* at 139. And in the Legislature's words, a "federal court interferes with the State's sovereign redistricting power" when it interrupts parallel state proceedings. *Id.* at 151. The Legislature insisted, "Federal courts are not the overseers of redistricting. Quite the opposite. The States have that power." *id.* at 152. After the Hunter Respondents explained that their federal court action was stayed and thus could not impede any state efforts, this Court denied the Legislature's petition. Order Denying Pet., *In re Legislature*, 21-474 (Dec. 6, 2021).

Once it became clear that Wisconsin's Legislature and Governor would fail to enact redistricting plans through the political process, the Wisconsin Supreme Court solicited briefing on the criteria it should use to evaluate and adopt proposed remedial maps. Both sets of Applicants advocated a process where all parties to the litigation

could submit proposed maps for the court's consideration. *See* Resp. App. at 190 (Johnson Petitioners' proposal); *id.* at 261 (similar proposal from the Legislature). And both advocated the Wisconsin Supreme Court to select the map that made the least changes to the last enacted map. *See id.* at 209-10 (Johnson Petitioners urging Wisconsin Supreme Court to select the proposal that made the "least change" to existing law, which would "reduce the need for any complicated fact finding or lengthy litigation"); *id.* at 262 (Legislature advocating that the Court "choose between the proposed 'least changes' remedies").

The Wisconsin Supreme Court agreed to this approach. It invited each party to file proposed maps for the court's consideration. And in an order prescribing the relevant criteria that it would consider and prioritize during the map-selection process, the court announced, "We adopt the least-change approach to remedying any constitutional or statutory infirmities in the existing maps[.]" *id.* at 49 ¶ 81 (plurality op.); *see also id.* at 53-54 ¶ 85 (Hagedorn, J., concurring) ("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."). All parties except the congressmen and Johnson Applicants submitted state legislative maps drawn pursuant to this least change policy for the court's consideration.

To select among these proposals, the court honored its prior commitment and "beg[a]n [its] analysis by probing which maps make the least change from the current district boundaries." Appls.' App. Vol. I ¶ 12. This test identified a clear winner: the court concluded that "the Governor's legislative maps produce the least change from

current law." *Id.* ¶ 33. The court then reviewed those maps to determine whether they complied with relevant state and federal law. Having "already stated our aim to avoid deciding between competing policies," the court "look[ed only] to whether the [Governor's] maps meet constitutional standards, not whether they perform comparatively better or worse on these metrics [such as compactness and population deviation] than other maps we received." *Id.* ¶ 35. The court explained, "Maps are either lawful or they are not; no constitutional map is more constitutional than another." *Id.*

The court determined the Governor's submissions "comply with all relevant legal requirements." *Id.* ¶ 51. The Governor's proposed districts are contiguous; proposed assembly districts are properly nested within proposed senate districts; and "the Governor's maps are consistent with historical practice and court-sanctioned requirements for compactness, respect for local boundaries, and population equality." *Id.* ¶ 36 (footnote omitted). The court further determined that the Governor's proposed maps comply with federal law because it saw "good reasons to conclude a seventh majority-Black assembly district may be required" by the Voting Rights Act, which the Governor's submission created. *Id.* ¶ 50.

Satisfied that the Governor's legislative maps produced fewer changes from existing maps than any other party's proposals while complying with all relevant legal requirements, the court ordered, "Beginning with the August 2022 primary elections, the Wisconsin Elections Commission is enjoined from conducting elections

under the 2011 maps and is ordered to implement the . . . legislative maps submitted by Governor Evers for all upcoming elections." *Id.* ¶ 52.

On March 4, the Legislature moved the Wisconsin Supreme Court to stay its order pending resolution of the emergency application it subsequently filed in this Court. The state court has yet to rule on the motion to stay.

REASONS TO DENY THE APPLICATION AND ALTERNATIVE PETITION

"Stays pending appeal to this court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "[A]n applicant must show (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).

The burden to obtain an injunction pending appeal is even heavier. First, "an applicant must demonstrate that 'the legal rights at issue are indisputably clear.'" *Lux v. Rodrigues,* 561 U.S. 1306, 1307 (2010) (quoting *Turner Broad. Sys., Inc. v. FCC,* 507 U.S. 1301, 1303 (1993)). Second, "[a]n injunction is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)).

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10.

Applicants fail all of these standards. The Hunter Respondents join the arguments filed today in the BLOC Respondents' opposition to the application and alternative petition. The Hunter Respondents write separately to emphasize three points: *First,* Applicants fail to satisfy Article III's standing requirements. *Second*, Applicants mischaracterize the Wisconsin Supreme Court's map-selection process, which was not predominantly motivated by racial considerations. And *third*, Applicants' requested injunctive relief is entirely inappropriate.

I. Applicants do not have standing to pursue a racial gerrymandering claim.

Applicants' attempted appeal fails at the threshold: neither the Legislature nor the Johnson Petitioners have standing to challenge the districts they allege to be racially gerrymandered in violation of the Fourteenth Amendment. Federal courts require those who seek appellate review to meet Article III's standing requirements, "just as it must be met by persons appearing in courts of first instance." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997); *see also Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (holding parties lacked standing to appeal where "[t]heir only interest in having the [lower court] reversed was to vindicate the constitutional validity of a generally applicable [state] law"). Individuals have standing to challenge districts as racial gerrymanders, in turn, only if they "reside[] in a racially gerrymandered district." *United States v. Hays*, 515 U.S. 737, 745 (1995). Voters who "do not live in the district that is the primary focus of their racial gerrymandering claim" have no standing to pursue such a claim. *Id.* at 739.

The Legislature fails this simple test. It brings this application in its institutional role, not on behalf of any of its individual members or constituents. And while this Court has indicated that it might be possible, under particular circumstances not present here, for a state legislature to *defend* legislatively enacted districting plans against racial gerrymandering claims, *see Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-56 (2019), this Court has never indicated that a legislative body could *challenge* an adopted districting plan as a racial gerrymander. Such a rule would be incoherent, for equal protection injuries are individual, personal ones, and only plaintiffs who have "personally been subjected to a racial classification" have standing to sue. *Hays*, 515 U.S. at 745.

The Legislature asserted two interests in support of its state court intervention, neither of which suffices for standing here. First, the Legislature relied on a state law authorizing its intervention to defend against any action challenging the validity of a state statute. Resp. App. at 101. But this state law right of defensive *intervention* does not confer Article III *standing*. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017) ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right."); *see also Diamond v. Charles*, 476 U.S. 54 (1986) (holding intervenor defendant who had interest in subject matter of proceedings lacked standing to appeal adverse ruling). Here, the state statute no longer applies. The Legislature is not seeking to intervene; a state statute is not being challenged; and the Legislature is not seeking to defend anything.

The Legislature's second basis to intervene concerned the impact judicial proceedings could have on its efforts to enact new districting maps through the political process. Resp. App. at 104 (stating "[t]he case is inextricably intertwined with the Legislature's ongoing redistricting efforts" and could result in a "date certain" by which a court would take over the redistricting task). That institutional interest in reserving a seat at the table also is insufficient for standing. As this Court explained in *Town of Chester*, even "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." 137 S. Ct. at 1651. The state court petitioners sought relief for Wisconsin's unconstitutionally malapportioned state legislative districts. The Legislature now seeks relief for the altogether *different* claim that some districts were allegedly racially gerrymandered. It would not have had standing to bring that claim in the first instance, and it does not have standing to raise it now.

The addition of the four individual Johnson Petitioners as Applicants does not change the analysis. Applicants challenge two senate districts and seven assembly districts in and around Milwaukee as alleged racial gerrymanders. None of the Johnson Applicants resides in any of these districts; instead, they claim to live in Madison, Spring Green, Grand Chute, and Wrightstown, respectively. Resp. App. at 81-82 ¶¶ 14-17. Thus, they, too, lack the requisite injury-in-fact to maintain an appeal on these grounds. The malapportionment claim on which their state court action was based has been remedied by the court-ordered maps, extinguishing their interest in this action.

Because none of the Applicants have standing, there is no reasonable probability that certiorari will be granted or that they will succeed on the merits. For the same reason, they cannot show that they will be irreparably harmed absent a stay. Applicants' injury is merely disappointment that the state court did not adopt the maps that they preferred. That disappointment is not redressable in federal court.

II. Racial considerations did not predominate in the Wisconsin Supreme Court's choice of remedial maps.

Applicants are also unlikely to succeed for a second, independent reason: even if they could clear the significant jurisdictional hurdle discussed above, the Wisconsin Supreme Court did not enact a racial gerrymander. To succeed on their claim, Applicants bear the burden of showing "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 266-67 (2015). As this requirement suggests, racial gerrymandering claims challenge a *legislature's* intent. Applicants conspicuously fail to identify any case in any jurisdiction where a court-drawn map was found to suffer from illicit intent. There is no reason to expect this case will supply the first example in American history.

Moreover, Applicants barely muster any argument that racial considerations predominated in the Wisconsin Supreme Court's map selection process. That omission is no accident: that court made clear throughout the course of litigation that it would adopt maps that most closely satisfy the "least change" criterion. Resp. App. at 49 ¶ 81 (plurality op.) ("We adopt the least-change approach to remedying any constitutional or statutory infirmities in the existing maps[.]"); *id.* at 53-54 ¶ 85

(Hagedorn, J., concurring) ("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."). This least change approach does not reflect any impermissible racial motive. In fact, it is *the very approach urged by Applicants* at the outset of litigation. *See id.* at 250 (Legislature arguing that "least changes" approach "would comport with the Court's limited role in redistricting, respect the traditional redistricting principle of core retention, and mitigate temporal vote dilution"); *id.* at 179-85 (similar argument by Johnson Petitioners).

Parties submitted maps drawn according to the least change policy, and the state court selected a winner on that basis. Appl. App. ¶ 12 (explaining "we begin our analysis by probing which maps make the least change from current district boundaries"). The Wisconsin Supreme Court concluded that "the Governor's legislative maps produce the least change from current law." *Id.* ¶ 33. The court then reviewed those maps and concluded they "comply with all relevant legal requirements." *Id.* ¶ 51. This second step required race consciousness only to ensure the maps did not violate the Voting Rights Act, but "[t]hat sort of race-consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

The Wisconsin Supreme Court's explanation of its process was clear and consistent. The "selection of remedial maps in this case [wa]s driven solely by the relevant legal requirements and the least change directive the majority adopted in the November 30 order." Appl. App. ¶ 11, n.7. There is no plausible argument that

the court "subordinated traditional race-neutral districting principles . . . to racial considerations." *Bush v. Vera*, 517 U.S. 952, 958 (1996). Race was never the "predominant, overriding factor" motivating the court's adoption of the Governor's map. *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Indeed, even others who disagree with the Wisconsin Supreme Court's decision and have asked this Court to substitute alternative maps readily acknowledge that the Wisconsin Supreme Court "looked *exclusively*" at core retention as "the only factor that the Court . . . consider[ed]" when reviewing maps. Emergency Application to Justice Barrett for Stay of Pending Petition for Writ of Certiorari, *Grothman v. Bostelmann*, No. 21A490 (Mar. 9, 2022) at 2.

Applicants confuse the issue by attacking *the Governor's* supposed motivations. But the Governor did not adopt a map—the Wisconsin Supreme Court did. That court's order recognized that parties' map submissions inevitably were the product of any number of motives, but the court was clear: "[R]ather than weigh motives and pick and choose which changes we approve of and which we don't, we look to which maps actually produce the least change." Appl. App. ¶ 18. Full stop. There is no authority that would allow a federal court to find that Applicants are likely to succeed on a racial gerrymandering claim based on their allegations about the Governor's motivation. In fact, quite to the contrary, this Court has held that the body that adopts a districting plan does not adopt the intent of a prior map-drawer, even where that intent had been found to be discriminatory by a prior court. *See Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018). Here, the Governor's intent has never been found

unlawful.[1] And *Abbott* makes clear that the state court is not responsible for the motives privately harbored by any party's map-drawers.

This is particularly so here, where the map in question was adopted by a court that declared, from the outset, that it was not examining motives and would choose the map that hewed most closely to Wisconsin's prior maps. The Wisconsin Supreme Court conspicuously did not require parties to submit maps that maximize majority-minority districts in Milwaukee. Nor did it invite party submissions, and then cull proposals that failed to include a sufficient number of majority-minority districts. It did not impose any race-based goals or requirements at all. Because the Wisconsin Supreme Court did not adopt districting maps with unconstitutional racial intent, Applicants are not likely to succeed on their racial gerrymandering claim.[2]

III. Applicants are not entitled to an injunction replacing the Wisconsin Supreme Court's maps with rejected submissions.

Applicants' proposed injunction is unserious, contrary to law, and sure to be denied. "The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's

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[1] Indeed, the Wisconsin Supreme Court noted that "[i]t was not until oral argument that anyone meaningfully contested" key features of the Governor's VRA analysis. Appl. App. ¶ 45. Even if the Governor's intention to comply with the VRA were subject to review, relitigating the fact-intensive nature of Applicants' claim is inappropriate at this procedural stage.

[2] Applicants would fail on the merits even if they could make the unprecedented showing that the state court was predominantly motivated by racial considerations. Such a showing would shift the burden to the state to "demonstrate that its districting [plan] is narrowly tailored to achieve a compelling state interest." *Miller*, 515 U.S. at 920. For the reasons explained in today's brief of the BLOC Respondents, this burden would be satisfied by the state court's compelling interest in abiding by the Voting Rights Act.

authority to issue an injunction." *Turner Broad. Sys. Inc.,* 507 U.S. at 1301. The Court has "consistently stated, and [its] own Rules so require, that such power is to be used sparingly." *Id.*; *see* S. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."). Issuance of such an "injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux*, 561 U.S.at 1307.

Applicants cannot carry this heavy burden. They request "an injunction pending appeal that instructs Wisconsin election officials to prepare for the forthcoming primaries using" the proposed assembly and state senate maps submitted by the Legislature in the state court proceedings. Appl. at 37. These unenacted maps failed the political process, failed the judicial process, and are not entitled to the force of law. It was just a few months ago that the Legislature rushed into this Court crying that a "federal court interferes with the State's sovereign redistricting power" when it interrupts parallel state proceedings. Resp. App. at 151. Now that those same state proceedings have turned out contrary to its liking, the Legislature demands a federal court stay a state-adopted districting map before its appeal is even accepted, let alone heard. This Court should not indulge such gamesmanship.

Assuming—as Applicants themselves appear to concede—that there is insufficient time for a full remedial process, elections should proceed on the maps

ordered by the Wisconsin Supreme Court. In the unlikely event that these maps are later found to require amendment, the state court may be tasked with remedying "district-specific claims" by adjusting the boundaries of some subset of challenged Milwaukee districts. *Ala. Leg. Black Caucus*, 575 U.S. at 268. Because Applicants have no cognizable interest in the shape of those particular districts, this brings the problems with their theory full circle: Applicants are pursuing claims that are due to be rejected.

CONCLUSION

For the foregoing reasons, the emergency application for stay and injunctive relief and alternative petition for writ of certiorari should be denied.

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Respectfully submitted,

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