No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS, AND RONALD ZAHN,
Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES,
VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN,
CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN
GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN
BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT
FITZGERALD, 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,
Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,
Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,
Intervenors-Respondents.

EXPEDITED MOTION FOR A STAY PENDING APPEAL BY THE WISCONSIN LEGISLATURE

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The Wisconsin Legislature

Yesterday, this Court enjoined Wisconsin's existing legislative and congressional districts and ordered, in their place, new district plans proposed by the Wisconsin Governor. Order ¶52 (March 3, 2022). The Wisconsin Legislature seeks a stay of the court's injunction as it applies to the State's senate and assembly districts pending the Legislature's appeal to the United States Supreme Court. *See* Wis. Stat. §808.07(2)(a) (permitting Wisconsin Courts to "[s]tay execution or enforcement of a judgment or order" and "[s]uspend ... an injunction"). Given the exigency, the Legislature intends to seek an emergency stay, injunctive relief pending appeal, and a request for appellate review from the United States Supreme Court on Monday, March 8, 2022.[1]

ARGUMENT

A stay pending appeal is appropriate when the moving party (1) "makes a strong showing that it is likely to succeed on the

[1] Also given the exigency, if the Court orders briefing on the Legislature's motion, the Legislature respectfully requests that briefing be expedited so that each party has 24 hours to prepare responses and a reply, if necessary.

merits of the appeal;" (2) "shows that, unless a stay is granted, it will suffer irreparable injury"; (3) "shows that no substantial harm will come to other interested parties"; and (4) "shows that a stay will do no harm to the public interest." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

I. The Legislature Is Likely to Succeed on the Merits.

Yesterday's decision orders that Wisconsin's forthcoming elections use the Governor's unconstitutional senate and assembly district lines. The Governor's districts cannot be justified by any reasonable interpretation of the Voting Rights Act. And the lacking scrutiny of the Governor's proposed districts as a violation of the Fourteenth Amendment's Equal Protection Clause contradicts the Supreme Court's controlling caselaw and is ripe for summary reversal. *See, e.g.*, *See, e.g.*, *V.L. v. E.L.*, 577 U.S. 404, 408 (2016) (*per curiam*); *James v. City of Boise*, 577 U.S. 306, 307 (2016) (*per curiam*) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law.").

This Court concluded that there are "good reasons" that the Voting Rights Act might require seven majority-Black assembly districts in Milwaukee, as the Governor proposed, without deciding whether such districts were in fact required by the Voting Rights Act. Order ¶¶10, 47 ("we cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA"). Based on those "good reasons"—for example, observations about changes to the Black voting-age population in Milwaukee, increasing by roughly 10% of one assembly district over the decade[2]—the Court ordered the following majority-Black senate and assembly districts for the forthcoming elections:

Wisconsin State Legislative District	2022 District Black Voting-Age Population[3]
Wisconsin State Senate District 4	50.62%
Wisconsin State Senate District 6	50.33%
Wisconsin State Assembly District 10	51.39%

[2] *See* Order ¶47; *compare* "2020 Wisconsin Counties with P.L. 94-171 Redistricting Data," *with* "2010 Wisconsin Census Voting Age Population Counts," LTSB, https://legis.wisconsin.gov/ltsb/gis/data/ (showing a change in Black voting-age in population in Milwaukee of roughly 6,600 individuals county-wide).

[3] *See* Clelland Opening Expert Report 11 (Dec. 15, 2022).

Wisconsin State Assembly District 11	50.21%
Wisconsin State Assembly District 12	50.24%
Wisconsin State Assembly District 14	50.85%
Wisconsin State Assembly District 16	50.09%
Wisconsin State Assembly District 17	50.29%
Wisconsin State Assembly District 18	50.63%

The demographics of these districts speak for themselves.[4]

There can be no "good reasons" for maximizing the number of majority-minority districts by dialing down the existing Black population in the existing majority-Black districts to a 50-percent, as the ordered plans indisputably do. *See Johnson v. DeGrandy*, 512 U.S. 997, 1016-17 (1994); *accord Miller v. Johnson*, 515 U.S. 900, 925-27 (1995) (holding that the Voting Rights Act did not

[4] The Court's opinion states that "[n]o one suggests the Governor's senate map violates either the Equal Protection Clause or the VRA." Order ¶41 n.23. But the Legislature argued in both its response and reply briefs and at argument that the Governor's legislative redistricting plans were an unconstitutional racial gerrymander—using Senate District 4 as an example. In Wisconsin, moreover, because assembly districts are nested into a senate district, there is no escaping a claim that a senate district is unconstitutionally gerrymandered if the constituent assembly districts are. *See* Wis. Const. art. IV, §5.

"require States to create majority-minority districts wherever possible," and described such an interpretation of the Voting Rights Act as "beyond what Congress intended and we have upheld"); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1472 (2017) (finding Voting Rights Act could not forgive unconstitutionally drawn districts intended to hit race-based target of 50-percent-plus Black voting-age population and noting that whatever "breathing room" a State may have to adopt a redistricting plan, that "breathing room" does not include setting racial targets "whose *raison d'etre* is a legal mistake"); *accord Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 905 (1996) (explaining that even when the Voting Rights Act is in play, a "constitutional wrong occurs when race becomes the dominant and controlling consideration" in redistricting (quotation marks omitted)).

As the demographics reveal, seven majority-Black districts are the maximum number of majority-Black districts that can be drawn in Milwaukee. Ordering seven such districts instead of the existing six, because the parties showed it was "possible" that they

could be drawn, Order ¶43, is no basis at all. That is not the test, and it hasn't been the test for more than 25 years. *See DeGrandy*, 512 U.S. at 1016-17; *Miller*, 515 U.S. at 925-27; *Shaw II*, 517 U.S. at 913. A redistricting plan cannot survive strict scrutiny based on a party's mere assertion that an additional district is possible. *See Bush v. Vera*, 517 U.S. 952, 978-79 (1996) (plurality op.). "When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination," courts "do not accept the government's mere assertion that the remedial action is required. Rather, [courts] insist on a strong basis in evidence of the harm being remedied." *Miller*, 515 U.S. at 922.

The Legislature is thus likely to succeed on the merits of its Equal Protection arguments. Indeed, just last month, the U.S. Supreme Court announced that it would hear Alabama's redistricting appeals—which involve the same fundamental question of when, if ever, the Constitution's Equal Protection Clause can bend to a racially gerrymandered district in the name of the Voting Rights Act. *See Merrill v. Milligan*, 656 U.S. ___ (2022); *Merrill v. Caster*,

656 U.S. ___ (2022). The decision to review the Alabama cases to "resolve the wide range of uncertainties arising under" the existing Voting Rights Act test prescribed by *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Merrill*, 656 U.S. at ___ (Roberts, C.J., dissenting) (slip. op. 2), makes it all the more likely that the U.S. Supreme Court will also take Wisconsin's case up on appeal.

Any law that classifies citizens on the basis of race "is constitutionally suspect." *Shaw II*, 517 U.S. at 904. That is so even if the racial classification is "benign or the purpose remedial." *Id.* at 904-05. There is no redistricting exception to that constitutional principle. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 657 (1993); *see also Holder v. Hall*, 512 U.S. 874, 906 (1994) (Thomas, J., concurring in judgment) ("our voting rights decisions are rapidly progressing

toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race"). In Wisconsin—just as everywhere—racially gerrymandered districts in the name of the Voting Rights Act perpetuates the very harm that the Voting Rights Act was enacted to eliminate. *See Shaw I*, 509 U.S. at 647-48, 657.

II. The Balance of Equities Weighs In Favor of a Stay.

Pressing ahead with racially gerrymandered districts creates irreparable harm. On the other side of the ledger, there can be no argument that irreparable harm will result if the Court stays its injunction while the Supreme Court considers the Legislature's petition for certiorari and request for summary reversal. For these reasons, too, a stay is in the public interest. *See Gudenschwager*, 191 Wis. 2d at 440.

Elections based on likely unlawful court orders "seriously and irreparably harm" those forced to abide by them as well as the public, and justify equitable relief. *Abbott v. Perez*, 138 S. Ct.

2305, 2324 (2018); *see also Karcher v. Daggett*, 455 U.S. 1303, 1306-07 (1982) (Brennan, J., in chambers) (granting stay of redistricting order because applicants would "plainly suffer irreparable harm were the stay not granted"). In particular, the Court's endorsement of districts motivated by racial quotas and maximization policies "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. It sends an "equally pernicious" message to elected representatives in those districts that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* at 648.

Already, Wisconsin's own elected representatives have called out that harm here. Early in the redistricting process, the Governor assembled a redistricting commission that similarly redrew Milwaukee's existing majority-minority districts—expanding them beyond the Milwaukee's northern county line to dilute

Milwaukee's predominantly Black districts with predominantly white out-of-county voters. *Cf. Vera*, 517 U.S. at 980-81 (1996) (plurality op.) (criticizing district for "cutting across ... natural or traditional divisions"). Minority representatives of Milwaukee's majority-minority districts explained that this expansion of the districts combined communities with major differences in economic interests, poverty, and racial demographics.[5] During a floor vote on the Governor's since-abandoned commission's plans, one minority Member asked rhetorically, "Why? That's going across the county line. Doesn't make sense. Doesn't make sense at all....That's not going to stick when it comes to people's interests. That's not going to stick when it comes to thinking you're going to elect people that look like me."[6]

As for the nonmovants, it is hard to conceive an argument that they will face irreparable harm for the short amount of time

[5] Assembly Floor Session (Nov. 11, 2021), recording available at https://wiseye.org/2021/11/11/wisconsin-state-assembly-floor-session-42/ at 2:46:55.

[6] *Id.* at 2:47:55.

that the U.S. Supreme Court will take to consider the Legislature's request for emergency relief. The Legislature anticipates that it will have an indication within two to three weeks for whether the U.S. Supreme Court intends to act on its request for emergency relief, which will indicate whether it also intends to act on its request for appellate review. No party, moreover, can claim an interest in preparing for elections at the direction of an unconstitutional racially gerrymandered redistricting plan when there is sufficient time before the August primary to address that unconstitutional flaw. *See* Letter Br. by Wisconsin Legislature (Oct. 6, 2021) (explaining that candidate qualifying does not even commence until April 15, 2022, and ends in June); *see* Wis. Stat. §5.02(12s) (primary elections in August 2022), §8.15(1) (nominations period opens April 15, 2022, and closes on June 1, 2022).[7] In

[7] Even if this Court were concerned about the time remaining, a solution for that free from constitutional doubt is to suspend the injunction pending appeal and instruct the parties that Act 43 remains in effect while the appeal of the constitutionality of the Governor's districts is pending. *See, e.g.*, *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 594-95 (E.D. Pa. 2012); *Political Action Conf. of Ill. v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *accord Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964).

all events, there is no irreparable harm in being required to abide by the Constitution.

Finally, and relatedly, a stay pending appeal is in the public interest. There are millions of Wisconsinites who are not a party to this action but who nevertheless will be redrawn into new districts based on their race. An immediate stay, moreover, will prevent costly and confusing implementation of election procedures in the coming weeks in Wisconsin while the U.S. Supreme Court evaluates the Legislature's request for emergency relief. State officers will not have to spend their time and resources implementing and enforcing the court-ordered Governor's plan that the U.S. Supreme Court is likely to reverse upon its decision on the merits. The time, money, and other sovereign resources that Wisconsin would need to devote to this enterprise would be noncompensable and thus irreparable. *See, e.g.*, *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (noting "State will bear the administrative costs of changing its system to comply with the District Court's order," despite the probability of reversal by the U.S. Supreme Court). A stay will

ensure that they do not do so needlessly. The balance of harms and the public interest weigh in favor of a stay.

CONCLUSION

For the foregoing reasons, the Legislature requests a stay pending appeal to the U.S. Supreme Court of the constitutionality of the Governor's proposed senate and assembly districts.

Dated this 4th day of March, 2022.

Respectfully submitted,

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CERTIFICATION

Form. I hereby certify that this motion conforms to the rules contained in Wis. Stat. § 809.81 governing the format of motions filed with this Court.

Filing, Electronic Filing, and Service. Per the instruction of the clerk, I certify that on this day I caused this motion to be filed with the Court by emailing the clerk. In addition, on this same day, per instruction of the clerk, I caused the original and 17 paper copies of the motion to be filed with the clerk. I further certify that on this day, I caused service copies of these documents to be sent by email to all counsel of record, all of whom have consented to service by email.

Dated this 4th day of March 2022.

Respectfully submitted,

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