No. 21A490

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

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

Respondents.

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

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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

After successfully convincing the Wisconsin Supreme Court to take charge of the state's redistricting impasse and to adopt a new congressional plan using the exact standard they requested, Wisconsin's Republican Congressmen, the Applicants here, challenge the map that resulted from that process. The Congressmen's real complaint is that the Wisconsin Supreme Court did not select the plan that the Congressmen proposed. Instead, after a lengthy litigation process, the Wisconsin Supreme Court selected the plan that most closely hewed to the "least change" criterion for which the Congressmen themselves advocated. The factual record establishes beyond dispute that the plan selected had the least changes from the existing congressional plan among all of the timely proposals, making the decision to select that submission over the Congressmen's submission, in the Wisconsin Supreme Court's words, "not a close call."

Now the Congressmen ask this Court to override the decision of the Wisconsin Supreme Court to implement their preferred map: a plan that failed to garner approval in either Wisconsin's political process or its judicial process. This Court should reject the Congressmen's request. Such interference would be wholly inconsistent with this Court's precedent cautioning federal courts to refrain from obstructing a state's redistricting processes when a state court has timely redistricted, as the Wisconsin Supreme Court has done.

The Congressmen's claims also fail on the merits. Their due process claim is based on feigned surprise at the standard the Wisconsin Supreme Court used to select

a map, months after the Congressmen themselves affirmatively argued that it should apply a "least-change" standard that would, in their words, "maximize core retention." That is precisely the standard that the Court applied. But even if that were not the case, the Congressmen do not have a legally protected interest in the contours of their districts, precluding their due process claim from the start.

The Congressmen's malapportionment claim, which argues that the Wisconsin Supreme Court violated Article I, Section 2 of the U.S. Constitution by adopting a map with a plus-or-minus one person deviation, is similarly flawed. As a threshold matter, it is unlikely that a plus-or-minus one person deviation could be properly deemed a cognizable injury-in-fact, even for voters who live within the one district in the enacted map that has one additional person. But because none of the Congressmen claims to live in that district, none can claim to suffer a personal injury-in-fact from that one-person deviation. This Court declined to act on an application with nearly an identical claim just last week. *See* Order List, No. 21A457, 595 U.S. __ (Mar 7, 2022). It should do the same here.

Finally, this Court should not entertain the Congressmen's request to order the Wisconsin Supreme Court to consider a new round of map submissions. The Wisconsin Elections Commission already indicated that maps would need to be finalized no later than March 1. It is now two weeks past that date. Nor is there any compelling reason to give the Congressmen a "do-over." The Congressmen had no more and no less information than all the other parties in this litigation; that they now regret their map submission is not a reason to throw Wisconsin's elections into

disarray.

BACKGROUND

I. Both a federal three-judge court and the Wisconsin Supreme Court were called to remedy Wisconsin's redistricting impasse.

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 Wisconsin federal court, alleging that, applying 2020 census data, 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. A three-judge court was convened under 28 U.S.C. § 2284. *See id.*, ECF No. 16.

Ten days later, another group of Wisconsin voters—Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn (the "Johnson Petitioners")—petitioned the Wisconsin Supreme Court to accept an original action raising similar claims under state law. The Johnson Petitioners alleged that "redistricting is a state matter both with respect to the legislative function and the judicial function," Hunter App. 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 bring the current map—which was the map enacted in 2011, based on 2010 census data—into constitutional compliance, *id.* at 88, ¶ 35. Shortly thereafter, the Congressmen similarly urged the Wisconsin Supreme Court to accept the petition to ensure that Wisconsin would not "cede a core aspect of its sovereignty to the federal courts." Hunter App. at 100; *see also id.* at 103 (arguing that state redistricting impasse

disputes are "Wisconsin courts' constitutional responsibility").

After the Wisconsin Supreme Court accepted the petition, the Hunter Respondents intervened as petitioners, as did the Congressmen. Other intervenors included Wisconsin Governor Tony Evers, the Wisconsin Legislature, State Senate Democratic Minority Leader Janet Bewley, a coalition of civic organizations and voters (the "BLOC respondents"), and a group of citizen mathematicians and scientists.

The Wisconsin Supreme Court subsequently solicited briefing from all parties to determine the date by which final redistricting plans would need to be in place. In response, the Congressmen represented to the Wisconsin Supreme Court that a final map should be in place no later than February 28, 2022. *See* Hunter App. at 116. Other parties agreed with this general timeline. The Wisconsin Elections Commission, which is the body responsible for implementing such plans, told the Wisconsin Supreme Court that "in order to enable the Commission to accurately integrate new districting data into its statewide election databases, and to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Hunter App. at 118.

In early October 2021, the three-judge federal court stayed any further proceedings pending the progression of the parallel Wisconsin Supreme Court action. *See* Opinion & Order, *Hunter. v. Bostelmann*, No. 3:21-cv-512, ECF No. 103 (W.D. Wis. Oct. 6, 2021) (three-judge court) (stating "this court will stand by to draw the

maps—should it become necessary”). That three-judge federal court remains convened today.

II. The Congressmen successfully convinced the Wisconsin Supreme Court to adopt a "least-change" approach to redistricting.

Once it became clear that the state 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 party-proposed maps. The Johnson Petitioners urged the court to select the proposal that made the “least change” to the existing redistricting plans. Hunter App. at 143. As they explained, “[p]reserving the cores of prior districts is at the foundation of ‘least change’ review.” *Id.* at 138–39 (citing *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764, (2012) for the proposition that “[t]he desire to minimize population shifts between districts is clearly a valid, neutral state policy”). They emphasized that prior federal courts remedying Wisconsin’s impasses in earlier redistricting cycles had aimed “to move the fewest number of people as possible,” and they argued for the Wisconsin Supreme Court to take the same approach. *Id.* at 139.

The Congressmen advocated for an identical approach, urging the Wisconsin Supreme Court to adopt a “least change” standard and lauding the merits of that approach: “The ‘least-change’ approach would both minimize voter confusion and maximize core retention, since it limits the total number of people moved into a new district.” Hunter App. at 169. The Congressmen contended that such an approach would “reduce[] voter confusion by decreasing the number of people forced to vote in elections for unfamiliar congressional candidates, after a switch to a new district. And

it [would] further[] core retention by preserving the 'relations' between representatives and their 'constituents' in the existing districts, promoting 'continuity' and 'stability.'" *Id.* at 186.[1] Showing their full understanding of the standard they now claim was unknown to them, the Congressmen explained how this approach would function:

> The 'least-change' approach would have this Court adopt a remedial map by beginning with the "'existing [congressional] districts' and then 'mak[ing] only minor or obvious adjustments' to the lines to reestablish equal apportionment among the districts, in light of the 'shifts in [Wisconsin's] population' as reflected in the 2020 Census. Once equal apportionment is achieved . . . this Court would not make further adjustments to pursue any traditional redistricting criteria or other values.

Id. at 182-83 (citations omitted). The Wisconsin Legislature also agreed with this standard, explaining that "a 'least changes' approach here simultaneously maximizes core retention and minimizes the Court's involvement in the 'political thicket' of redistricting by preferring a map that keeps voters in their current districts." Hunter App. at 236.

The appropriateness of using the least-change standard was hotly contested and fully litigated before the Wisconsin Supreme Court. Multiple parties opposed the standard, including the Hunter Respondents, Governor Evers, and others. As the Hunter Respondents emphasized, "Wisconsin's Legislature created some of the most extreme and effective [partisan] gerrymanders in the country in the last redistricting

[1] The Congressmen's response brief two weeks later continued to emphasize that a least-change approach "would also minimize voter confusion and maximize core retention." Hunter App. at 253.

cycle" and "adopting a least-change approach would calcify that gerrymander into existence indefinitely." Hunter App. at 304; *see also id.* at 311 ("[T]his Court should not reward the Legislature with a least-change map on this basis when the Legislature itself moved an extraordinary number of voters outside of their existing [] districts to accomplish its gerrymander in the 2010 redistricting cycle.").

Notwithstanding this and similar objections, the Wisconsin Supreme Court adopted the least-change approach at the urgings of the Johnson Petitioners, the Congressmen, and the Wisconsin Legislature. In its November 30 order establishing the governing criteria for selecting maps, the court announced, "We adopt the least-change approach to remedying any constitutional or statutory infirmities in the existing maps[.]" Hunter App. 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.").

Justice Hagedorn alone wrote separately from the majority opinion to say that he would not "foreclose" in advance consideration of other traditional redistricting criteria. *Id.* at 50, ¶ 82 n.4. Justice Hagedorn explained why he would not shut that door: "Suppose we 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. In that circumstance, we still must exercise judgment to choose the best alternative. Considering communities of interest (or other traditional redistricting criteria) *may* assist us in doing so." *Id.* at 51–52, ¶

83 (emphases added); *see also id.* at 55, ¶ 87 ("While other, traditional redistricting criteria *may* prove helpful and *may* be discussed, *our primary concern is modifying only what we must* to ensure the 2022 elections are conducted under districts that comply with all relevant state and federal laws.") (emphases added).

III. The Wisconsin Supreme Court adopted a new congressional plan after considering submissions and input from all parties.

Two weeks after its November 30 order, the Wisconsin Supreme Court accepted proposed map submissions and supporting briefs from the parties.[2] Each party filed briefing attempting to make the case for why their submission best complied with a "least-change" approach. The Congressmen described a "least-change" approach as synonymous with maximizing core retention:

> The [Congressmen's] Proposed Remedial Map best follows the *Johnson* majority opinion's 'least-change' approach, including as further explained in Justice Hagedorn's concurrence. Overall, the Proposed Remedial Map moves only 384,456 people into new congressional districts, which is about 6.52% of the population. Thus, it has a core retention of 93.48%.

Appl. App. at 191–92; *see also id.* at 288–89 (Citizen-Scientists arguing "the MathSci Proposed Maps exhibit a 'least-change' approach with respect to the existing maps" because "the MathSci Proposed Congressional Map has a core retention rate of 91.5%"); *id.* at 227-28 (Governor Evers arguing the map that he submitted performed best on the least-change metric because "the Governor's plan moves only 5.50% of the population"); *id.* at 258 (Hunter Respondents emphasizing that the map that they

[2] All parties, including the Congressmen, also had the opportunity to submit opposition and reply briefs and participate in oral argument.

submitted "minimizes changes from the 2011 Map" because "the Hunter Congressional Map keeps over 93% of Wisconsin's population in their existing district").

Two weeks after the deadline for map proposals (the submissions of which demonstrated that Governor's congressional proposal had the highest core retention score), and after the parties had submitted briefs and expert reports critiquing each other's maps, the Congressmen sought to provide the Wisconsin Supreme Court with a *second* proposal, one that made far fewer changes to Wisconsin's existing congressional plan than their first proposal. *See* Appl. App. at 322-30. The Congressmen highlighted the fact that their new proposal improved upon the core retention score of their initial proposal. *Id.* at 327. In the end, the Wisconsin Supreme Court refused to consider the Congressmen's second proposal because it was untimely and would have given the Congressmen an unfair advantage over all the other parties who had complied with the court's directive to submit just one map. Appl. App. at 371.[3]

After conducting more than five hours of oral argument and considering four different proposed congressional maps and accompanying written testimony from eleven expert witnesses, the Wisconsin Supreme Court adopted Governor Evers'

[3] In the same Order, the Wisconsin Supreme Court permitted Governor Evers to make non-substantive, *technical* corrections to his state assembly and senate proposals (such as removing splits which "inadvertently severed very small segments of some municipalities, leaving zero-population or very small population remnants"). Such technical modifications were expressly contemplated by the court's prior orders and did not affect any party's ability to evaluate the Governor's underlying proposal.

proposed legislative and congressional plans because they scored highest on the least-change metric. As the Court explained:

> With only eight districts, core retention——a measure of voters who remain in their prior districts——is the best metric of least change, and the map submitted by Governor Evers easily scores highest. His map moves 5.5% of the population to new districts, leaving 94.5% in their current districts. In raw numbers, the Governor's proposal to move 324,415 people to new districts is 60,041 fewer people than the next best proposal.

Appl. App. at 8–9, ¶ 7. The Court emphasized that, given the strong core retention scores of the maps proposed by the Governor, it was "not a close call." *Id.* at 14, ¶ 15. The Court also confirmed that Governor Evers's submission met other basic legal requirements, concluding, "Governor Evers' proposals satisfy the requirements of the state and federal constitutions. Under the Wisconsin Constitution, all districts are contiguous, sufficiently equal in population, sufficiently compact, appropriately nested, and pay due respect to local boundaries. Governor Evers' proposed maps also comply with the federal constitution's population equality requirement." *Id.* at 10, ¶ 9.

On population equality in particular, the Court explained that the congressional plan's plus-or-minus one person deviation was common across states, noting that if such a small deviation is unacceptable, "then nearly a third of states with more than one congressional district have apparently not gotten the message." *Id.* at 18, ¶ 23. The Court also explained that this deviation was justified by its attempt to choose a least-change plan: "Selecting a map from among those submitted to us with a maximum deviation of one person would require us to adopt a map that

does substantially worse on core retention." *Id.* at 18-19, ¶ 24. The Court concluded by enjoining the Wisconsin Elections Commission from "conducting elections under the 2011 maps" and ordering the Commission to "implement the congressional and legislative maps submitted by Governor Evers for all upcoming elections." *Id.* at 35, ¶ 52.

IV. The Congressmen now ask this Court to substitute the Wisconsin Supreme Court's chosen map for their own submission.

On March 7, the Congressmen moved the Wisconsin Supreme Court to stay its order pending resolution of the emergency application it subsequently filed in this Court. The Congressmen also asked the Court to allow all parties to re-submit new maps for consideration and for the court to select a new map. As of the date of this filing, the Wisconsin Supreme Court has not acted on the Congressmen's motion.

On March 9, two days after the Congressmen moved for a stay before the Wisconsin Supreme Court, the Congressmen filed the Application that is now before this Court, requesting that it step in and issue an emergency stay. In their Application, the Congressmen allege that the Wisconsin Supreme Court's selection of Governor Evers's congressional plan was based on an unannounced standard and thus constituted a "bait and switch," in violation of their due process rights. The Congressmen also claim that the selected congressional plan's plus-or-minus one person deviation violates Article I, Section 2 of the U.S. Constitution. The Congressmen ask this Court to "remand to the Wisconsin Supreme Court with instructions to permit all parties to submit new proposed maps" or "order that Wisconsin hold its upcoming 2022 congressional elections under the map passed by

the Legislature in 2021, on a remedial basis." Appl. at 39. This same map was proposed to the Wisconsin Supreme Court in the proceedings before it, but was not selected, as the Court noted that it moved more than 60,000 more voters out of their present districts than the map proposed by Governor Evers. Appl. App. at 14, ¶ 15.

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). In reviewing a stay pending appeal, the Court may also consider "the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

The burden to obtain an injunction from this Court 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) (Rehnquist, C.J., in chambers)). 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 (quoting 28 U.S.C. § 1651(a)).

The Congressmen's Application falls far short of these standards. Beyond the merits, which have no chance of success, the equities weigh strongly in favor of allowing the Wisconsin Supreme Court's adopted congressional plan, which is already being implemented across Wisconsin, to remain in place without interference from this Court.

I. The Court is unlikely to grant certiorari and Applicants have no likelihood of success on the merits.

A. The Wisconsin Supreme Court did not violate any litigant's due process rights.

The Congressmen's frustration that the Wisconsin Supreme Court rejected their proposed map cannot sustain a cognizable due process claim. Far from it. It is a basic tenet that "the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). But the Congressmen do not explain what underlying interest was jeopardized in this litigation, much less identify one sufficient to invoke the Due Process Clause.

It should be obvious that no candidate holds a protected property interest or liberty interest in their election to office, let alone in election to office under the district lines of their choosing. *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (explaining it is a "core principle of republican government" that voters "choose their representatives, not the other way around"). To the Hunter Respondents' knowledge, there is no precedent holding that a candidate for office has a procedural due process right to be heard in the

determination of the boundaries for the office he seeks. To the contrary, courts have held elected officials and candidates have "no legally cognizable interest in the composition of the district" that they hope to represent, *Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018), and a legislator "suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment," and holds no legal interest "in representing any particular constituency." *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). For that reason alone, the Congressmen's due process claim must fail.

But the Congressmen's alleged due process claim should also fail because it rests on a gross mischaracterization of the procedural history of this litigation. The fact that the Wisconsin Supreme Court relied significantly, or even exclusively, on a core retention metric in choosing a congressional plan hardly came as a surprise to any of the parties, including the Congressmen. Quite to the contrary, when the Congressmen urged the Wisconsin Supreme Court to adopt a least-change approach in this litigation, they specifically identified core retention as the key measurable metric central to that approach: "The 'least-change' approach would both minimize voter confusion and *maximize core retention*, since it *limits the total number of people moved into a new district*." Hunter App. at 169 (emphasis added). Moreover, after the parties submitted their proposed maps to the Court, and the Congressmen learned that the Governor's plan moved significantly fewer voters out of their districts than the Congressmen's plan did, the Congressmen realized they had overplayed their hand and sought to provide a new proposal to the Wisconsin Supreme Court in an

attempt to improve their core retention score. It is plainly inaccurate, therefore, to suggest that the Court's selection criterion was "unforeseeable" to the Congressmen or any of the other parties in the litigation. Appl. at 19 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

Even if the Congressmen had not represented to the Wisconsin Supreme Court that a least-change approach would "maximize core retention," it would have been reasonable for the Congressmen to anticipate that the Court would equate the two concepts because courts routinely do just that. Courts routinely implement the least-change standard by examining core retention, including in decisions issued prior to the Congressmen's submission of their proposed maps in this case. *See, e.g.*, Order at 27, *In Re Petition Of Reapportionment Comm'n Ex. Rel.*, Case No. SC 20661 (Conn. Supreme Court, Jan. 18, 2022) (Connecticut Special Master remedying Connecticut's impasse aimed to "mov[e] the fewest voters as possible" to comply with the Connecticut Supreme Court's "least change directive"); *Below v. Gardner*, 963 A.2d 785, 795 (N.H. 2002) (New Hampshire Supreme Court remedying impasse and explaining "the court's plan imposes the least change for New Hampshire citizens in that it changes the senate districts for only 18.82% of the State's population").[4] Just last week, the Pennsylvania Supreme Court, also tasked with remedying a congressional impasse, issued an opinion explaining their earlier decision to choose a plan that made the "least change" to Pennsylvania's existing congressional plan. *See*

[4]Available at:
https://jud.ct.gov/supremecourt/Reapportionment/2021/Docs/FinalOrder.pdf.

Carter v. Chapman, 7 MM 2022, Mar. 9, 2022 Opinion (Pa. 2022). As Justice Wecht explained in his concurring opinion, "[t]he 'preeminent' metric for a least-change analysis is 'core retention,' which can be derived by comparing the existing district boundaries to the proposed district boundaries and then calculating the share of the population that would be retained in the overlapping portions." Hunter App. at 354.

While the Congressmen suggest the Wisconsin Supreme Court subjected the litigants to a "bait and switch" by promising that it would employ a "holistic" least-change methodology that considered factors like communities of interest, Appl. at 2, that argument is refuted by the record. In support of this theory, the Congressmen cite Justice Hagedorn's concurring opinion from the Wisconsin Supreme Court's November 30 order. Appl. at 7. But even if that concurring opinion were considered the most narrow and controlling, Justice Hagedorn did not promise the litigants that he would consider traditional redistricting criteria like communities of interest in selecting a map, let alone that such factors would be dispositive. Rather, he explained that, unlike the plurality opinion, he would not "foreclose" the possibility of considering other traditional redistricting criteria. Hunter App. at 50, ¶ 82 n.4. He explained further: "Suppose we 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. In that circumstance, we still must exercise judgment to choose the best alternative. Considering communities of interest (or other traditional redistricting criteria) *may* assist us in doing so." *Id.* at 51–2, ¶ 83 (emphases added); *see also id.* at 55, ¶ 87 ("While other, traditional

redistricting criteria *may* prove helpful and *may* be discussed, *our primary concern is modifying only what we must* to ensure the 2022 elections are conducted under districts that comply with all relevant state and federal laws.") (emphases added). And Justice Hagedorn did just what he promised: He—along with a majority of the court—made his primary concern "modifying only what [the court] must" to ensure Wisconsin had constitutional maps for the 2022 elections. Because the Governor's proposed plan was plainly superior to others on the least-change metric, Hunter App. at 12–13, ¶ 18, the court did not need to "exercise judgment to choose the best alternative," or consider other factors like communities of interest. *Id.* at 51–52, ¶ 83.

Even if the Congressmen were somehow caught by surprise by the court's application of the least-change principle, due process does not require that a court announce in advance which factor will ultimately prove dispositive in its decision-making process. None of the cases the Congressmen rely upon establish otherwise. *Saunders v. Shaw*, 244 U.S. 317 (1917), stands only for the proposition that after a litigant has been *barred* from offering evidence at the trial court which later becomes relevant due to an intervening decision by the U.S. Supreme Court, the litigant should be permitted to offer such evidence.[5] Similarly, *Reich v. Collins*, 513 U.S. 106

[5] To the extent the Congressmen claim they were "barred" from offering a maximum core-retention proposal, that allegation has no basis in reality. The Congressmen could have put a maximum core-retention plan forward to the court in their initial submission; they chose not to do so. The Congressmen only sought to introduce a new, secondary proposal which increased their core retention scores upon learning that other parties' plans had stronger scores on that basis. Permitting the Congressmen to submit a second substantive proposal would have violated the Wisconsin Supreme Court's pre-existing rules for the litigation and invited an endless cycle of revision

(1994), establishes only that it would violate due process to withhold taxes from a citizen after a determination that the taxes were unconstitutional. Finally, *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), concerns "judicial enlargement of a criminal act by interpretation," which patently has no relevance here.

That the Wisconsin Supreme Court chose to solicit the parties' input on the applicable criteria and signal in advance what it intended to prioritize was intended to guide the parties as they developed and submitted their proposed plans, not bind the court or create a legal entitlement to a certain interpretation of the criteria. Simply put, there is no support for the proposition that a court violates the federal constitution when it disagrees with a litigant's preferred application of a legal standard.

B. The Wisconsin Supreme Court's adopted congressional map does not violate the one person one vote principle.

1. The Congressmen lack standing to appeal the alleged malapportionment.

The Congressmen's appeal on the basis of malapportionment should fail at the outset for the simple reason that the Congressmen do not have standing to pursue it. Federal courts require intervenors who are seeking appellate review to meet Article III standing requirements, "just as [they] 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, 705 (2013). In malapportionment cases, the "harm arises from the particular composition of the voter's own district." *Gill v.*

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and counter-revision in which every party attempted to continually beat the others' core retention scores.

Whitford, 138 S. Ct. 1916, 1921 (2018). The rights that are protected under the Equal Protection Clause in malapportionment cases are "individual and personal in nature," and thus only those "individuals voters living in disfavored" districts—or overpopulated districts—have been injured. *Reynolds v. Sims*, 377 U.S. 533, 561, 563 (1964); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962) (explaining that those who have standing to sue are those who have an interest "in maintaining the effectiveness of their votes") (citing *Coleman v. Miller*, 307 U.S. 433, 438 (1939)).

The Congressmen do not meet this standard. Conspicuously, none claim to live or vote in an overpopulated district—in fact, their Application fails to even identify the district that they believe to be overpopulated by one person. Establishing standing is their burden, which they have not (and cannot) satisfy. Had they developed a record on this point, it would have shown that their claim applies *only* to Wisconsin's Congressional District 3, currently represented by Congressmen Ron Kind, which is "overpopulated" by a single voter. Hunter App. at 361. The remaining congressional districts either reach exact population equality or are "underpopulated" by one voter. *See id.*[6]

For that simple reason, none of the Congressmen has standing to pursue an alleged malapportionment injury on appeal. Even if the Congressmen sincerely believed that the new congressional plan is malapportioned, the mere desire "to have the Government act in accordance with law" does not confer standing. *Allen v. Wright*,

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[6] While the existing record does not demonstrate precisely where the Congressmen live, it makes clear that none of them represent or reside in the previous boundaries of Congressional District 3. *See* Hunter App. 368-69, ¶¶9-13.

468 U.S. 737, 754 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, *an injury in law is not an injury in fact*. Only those plaintiffs who have been *concretely harmed* by a defendant's . . . violation may sue . . . over that violation in federal court.") (emphasis added).

Because none of the Congressmen 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. The Congressmen's injury is merely disappointment that the Wisconsin Supreme Court did not adopt the map they preferred. That disappointment is not redressable in federal court.

2. The adopted congressional map meets this Court's standards for population equality.

Even if this Court had jurisdiction to hear the Congressmen's malapportionment appeal, their argument fares no better on the merits. Just last week, this Court declined to hear a nearly identical malapportionment challenge to Pennsylvania's congressional map, which was adopted by the Pennsylvania Supreme Court after the state reached impasse. The applicants there challenged Pennsylvania's new congressional plan as unconstitutionally malapportioned after the state supreme court selected a plan with a plus-or-minus one person deviation, even though the court had been presented with several plans with exact population equality. *See* Emergency Application to Justice Alito for Writ of Jurisdiction, *Toth v.*

Chapman, No. 21A457 (Feb. 28, 2022). That application alleged that Pennsylvania's congressional plan was "constitutionally intolerable" and "flout[ed]" the Court's one-person one-vote jurisprudence. *Id.* at 22–23. This Court denied the application without dissent. *See Toth v. Chapman*, No. 21A457, --- S.Ct. ---, 2022 WL 667924 (Mar. 7, 2022). There is no reason this case should turn out any differently.

This Court's denial of that application was not surprising. Article I, § 2 of the U.S. Constitution establishes that congressional districts must be apportioned to contain equal population "as nearly as is practicable." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); *see Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (explaining that this principle applies to court-ordered plans, which "should 'ordinarily achieve the goal of population equality with little more than *de minimis* variation'" (citing *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975))).

Population deviations of plus or minus one person have long been considered to satisfy the population equality standard. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) ("In keeping with our overriding concern, the court plan complies with the 'as nearly as practicable' population equality requirement of Article 1, § 2 of the Constitution . . . with a deviation of plus or minus one person.") (citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983))); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) ("The Court's plan results in two districts with populations of 713,278 and two with populations of 713,281. Such a distribution provides equality among Kansas voters as nearly as practicable, and therefore satisfies Article I, Section 2 of the U.S. Constitution."). Likewise, since 2000,

at least six states have adopted congressional apportionment plans with a two-person deviation without constitutional consequence. *See, e.g.*, Oregon (two-person population range after 2010 redistricting cycle);[7] Georgia (two-person deviation after 2010 redistricting cycle);[8] South Carolina (two-person deviation in court-enacted plan after 2000 redistricting cycle);[9] Kentucky (two-person deviation after 2000 redistricting cycle);[10] Colorado (two-person deviation in court-enacted plan after 2000 redistricting cycle);[11] Maryland (two-person deviation after 2000 redistricting cycle).[12]

While the Congressmen argue that *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016), created a "bright-line rule" that congressional population deviations could *never* exceed more than one person, Appl. at 27, *Evenwel* explicitly did not concern "disputes

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[7] *See* "2010 Redistricting Deviation Table," Nat'l Conf. State Legislatures (Jan. 15, 2020), https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx.

[8] *Id.*; *see also* "Justice Approves Georgia's Redistricting Plans," Ga. Dep't of Law (Dec. 23, 2011), https://law.georgia.gov/press-releases/2011-12-23/justice-approves-georgias-redistricting-plans (announcing preclearance by U.S. Department of Justice).

[9] *See* "Designing P.S. 94-171 Redistricting Data for the Year 2010 Census," U.S. Census Bureau (Sept. 2004), https://www2.census.gov/programs-surveys/rdo/2010_pl94-171rv.pdf, at 26; *Colleton Cnty. Council*, 201 F.Supp.2d 618, 664 (D. S.C. 2002).

[10] *Id.*

[11] *See* "Designing P.S. 94-171 Redistricting Data for the Year 2010 Census," U.S. Census Bureau (Sept. 2004), https://www2.census.gov/programs-surveys/rdo/2010_pl94-171rv.pdf, at 26; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (adopting plan).

[12] *See Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 551 (D. Md. 2002), *aff'd sub nom. Duckworth v. State Admin. Bd. of Election L.*, 332 F.3d 769 (4th Cir. 2003).

over the permissibility of deviating from perfect population equality," but rather "centered on the population base jurisdictions must equalize." 578 U.S. at 60.

Additionally, this Court's precedent speaks only of "*significant* variance between districts" as raising constitutional concerns. *Karcher*, 462 U.S. at 730–31 (emphasis added). Even if the adopted congressional plan's two-person deviation did not fall within the plus-or-minus one person requirement of population equality, it is not the kind of significant deviation that requires further review or justification. *Cf. Tennant*, 567 U.S. at 762–65 (accepting justifications for 4,871-person deviation in congressional plan); *Abrams*, 521 U.S. at 99–100 (finding court-ordered congressional plan with "slight deviation[]" of 2,047 persons justified); *see also Johnson v. Miller*, 922 F. Supp. 1556, 1571–72 (S.D. Ga. 1995) (listing absolute population of each district in the map at issue in *Abrams*). Thus, the Congressmen's malapportionment claim fails as a matter of law.

But even if there were a colorable question as to the constitutionality of Wisconsin's congressional plan's population deviation, this Court has upheld congressional plans with significantly greater deviations where, as here, they are justified by a legitimate state interest. As this Court has explained, "we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher*, 462 U.S. at 740. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, *preserving the cores of prior districts*, and avoiding

contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that on a proper showing could justify minor population deviations." *Id.* (emphasis added).

The Wisconsin Supreme Court's adoption of the current congressional plan is easily justified by its desire to select a plan that made the least changes to the districts in which Wisconsinites currently reside. This is exactly the kind of tradeoff that this Court has approved as sufficient justification for minor population deviations—including deviations significantly greater than plus or minus one person. *See Tennant*, 567 U.S. at 763–65 (concluding a 4,871 population deviation in West Virginia's congressional plan was justified by the state's interest in avoiding contests between incumbents, not splitting political subdivisions, and limiting population shifts between the new and old congressional districts); *Abrams*, 521 U.S. at 99–100 (finding plan adopted by federal court with an overall population deviation of 0.35%, the equivalent of several thousand people, contained a "slight deviation[]"justified by state's interest in reducing political subdivision splits, maintaining the core of its districts, and preserving communities of interest).

While the Congressmen argue the Wisconsin Supreme Court's congressional plan is unconstitutional because it is mathematically possible to draw a plan that maximizes core retention even more *and* achieves perfect population equality (even though no such plan was presented to the court during its initial review of plans), that is not the standard courts are held to in making a good-faith effort to achieve population equality. The U.S. Supreme Court has never demanded that courts

remedying impasse disputes exhaust every possible permutation of maps, or accept countless submissions from the parties, before one can be constitutionally compliant. Nor was the Wisconsin Supreme Court required to select the Congressmen's original proposal—a map that moved an additional 60,041 Wisconsin citizens outside their current congressional district, *see* Appl. App. at 14, ¶ 15—simply to equalize the entire state's congressional plan by one person.[13]

Finally, even if this Court were to ultimately conclude that the congressional plan's population deviation was "unacceptable," the proper remedy would be to "require some very minor changes in the court's plan—a few shiftings of precincts—to even out districts with the greatest deviations." *Abrams*, 521 U.S. at 100. It would not require the selection of a new wholesale plan, as the Congressmen suggest. Appl. at 37.

II. There is no likelihood of irreparable harm, and the equities weigh against a stay.

While the Congressmen must establish a likelihood of irreparable harm absent a stay, *see Perry*, 558 U.S. at 190, they have not done so here. At the outset, two of the Congressmen's alleged irreparable harms rest on their mistaken view of the merits of their claims. The Congressmen allege that without a stay, they will be required "to run and vote" under a "malapportioned" map. Appl. at 35. But as

[13] While the Congressmen argue the Governor's own inclusion of an absolute two-person deviation in his proposal was not justified by a legitimate state interest, Appl. at 29-30, the Governor did not adopt a map—the Wisconsin Supreme Court did. This Court has held that the body that adopts a districting plan does not adopt the intent of a prior map-drawer. *See Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).

described above, because none of the Congressmen allege to be voters in the one congressional district that has one additional person, they suffer no injury from that population deviation. *See, e.g.*, *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 611 n.7 (M.D.N.C. 2018) ("Plaintiffs in underpopulated districts lack standing to challenge a districting plan on one-person, one-vote grounds."). If anything, they benefit from it. The Congressmen also allege irreparable harm from the loss of their "due-process rights to a fair judicial process," Appl. at 33, but that, too, depends on the merits of their due process claim, which fails for the reasons described above.

While the Congressmen also claim irreparable harm because the Wisconsin Supreme Court's selected plan will cause the Congressmen to "expend additional, significant, and unrecoverable resources campaigning for the 2022 election in a significantly altered district," *Id.* at 34, that allegation is both undermined by the facts of the litigation, and is in many ways a self-imposed harm, to the extent it is a harm at all. First, the Wisconsin Supreme Court chose a plan that specifically *did not* make significant alterations to districts. *See supra* at 8. But even more to the point, if the Congressmen had wanted to "guarantee" themselves their preferred plan, they could have submitted, in the first instance, a plan that moved only the minimum number of persons required to satisfy equal population. They did not do so, submitting a plan that instead moved far more persons outside their congressional district than was necessary. Appl. App. at 13-14, ¶¶ 14-15. Finally, re-visiting the state's congressional map, as the Congressmen suggest, would only further delay the

Congressmen's knowledge of which voters are in their district and their ability to manage a campaign.

The Congressmen's application does not meaningfully grapple with the potential harm to other parties and the public at large, should this Court issue a stay. *See* Appl. at 35-37 (arguing how "trivially easy" it would be to submit a new round of map proposals). But a stay pending appeal *would* substantially harm other parties and the public in at least two significant ways.

First, because a stay would have the effect of pausing the Wisconsin Supreme Court's order until the appeal is resolved, it would have the effect of putting back in place Wisconsin's prior congressional map, which all parties have already agreed is severely malapportioned on a magnitude of tens of thousands of people. Such a result would violate the precise constitutional rights that the Wisconsin Supreme Court set out to remedy months ago. It would also be an absurd outcome to require *tens of thousands* of Wisconsin's voters to remain in malapportioned districts while the Congressmen pursue a claim of malapportionment *for a single person*.

Second, a stay pending appeal would freeze the Wisconsin Election Commission's efforts to prepare for rapidly approaching elections. The Commission has already told the Wisconsin Supreme Court that "to timely and effectively administer the fall 2022 general election, a new redistricting plan must be in place no later than March 1, 2022." Hunter App. 118. We are now two weeks beyond that date.

It is no answer to say that the parties should be ordered to submit new core-maximization maps within 24 hours and the Wisconsin Supreme Court could simply select a new map quickly. While the Congressmen suggest this process would be a simple mechanical exercise, if every party simply ran an algorithm to minimize population changes, there would almost certainly be a several-way tie for maximum core retention among several maps. To pick a new winner, the court would need to re-engage with traditional redistricting criteria and select which map best met the remaining criteria. It is not plausible that this could be done in a week, much less 24 hours.

Moreover, an injunction ordering the Wisconsin Supreme Court to engage in a brand-new mapmaking process would be wholly inconsistent with this Court's prior precedent. "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). "Absent evidence that [the state court] cannot timely perform their duty," a federal court should stay its hand. *Growe v. Emison*, 507 U.S. 25, 26 (1993). Here, there is no indication that the Wisconsin Supreme Court failed to timely perform its duty. There is no basis for this Court to intervene at all, let alone to order the Wisconsin Supreme Court to conduct its map selection process in a certain manner.

III. The Congressmen are not entitled to an injunction replacing the Wisconsin Supreme Court's map with their own submission.

Almost as an afterthought, the Congressmen suggest that this Court could also "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." Appl. at 38. This request for injunctive relief should be treated with no more seriousness than it was given in the Application itself.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction." *Turner Broad. Sys. Inc.,* 507 U.S. at 1301 (Rehnquist, C.J., in chambers). 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 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.

To meet this heavy burden, first, "an applicant must demonstrate that the legal rights at issue are indisputably clear." *Id.* (quotation omitted). 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)). Even then, this Court must consider whether "exceptional circumstances" warrant such an exercise of the Court's discretionary powers. S. Ct. R. 20.1.

The Congressmen's request for an injunction plainly fails this test. For all the reasons described above, the Congressmen's right to relief is far from indisputably clear—if anything it is just the opposite—and the Congressmen do not attempt to explain why an injunction would be necessary to aid this Court's jurisdiction. All an

injunction would do is give the Congressmen their preferred map—a map that failed to survive the state's political and judicial process. It was just a few months ago that the Congressmen told the Wisconsin Supreme Court that the congressional redistricting was a matter of state sovereignty over which federal courts should have no input. *See supra* at 3. Now that those same state proceedings have turned out contrary the Congressmen's liking, they brazenly demand this Court to substitute their preferred—and rejected—map for the court-adopted plan. This Court should not indulge such gamesmanship.

CONCLUSION

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

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Respectfully submitted,

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