Nos. 16A1149, 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,
Appellants,
v.
WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin

RESPONSE IN OPPOSITION TO APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Appellees filed this suit in July 2015, alleging that Wisconsin's legislative redistricting plan—Act 43—was one of the worst partisan gerrymanders in modern American history and seeking to enjoin the use of the plan for any future elections. The majority of the three-judge court below agreed with Appellees that Act 43 was indeed an egregious partisan gerrymander in violation of the First and Fourteenth Amendments. However, the court did not reach its decision in time to enjoin the use of the plan for the 2016 elections. Instead, the court unanimously enjoined the use of the plan for any election after 2016 and invited the legislature to submit a remedial plan by November 1, 2017, so that new districts would be in place in time for the 2018 elections. The court's order specifically allowed the legislature to make its remedial plan contingent upon this Court's affirmance of its decision on the merits, but rejected Appellants' argument that the State should not have to begin any remedial process until after resolution of Appellants' appeal in this Court. In doing so, the court thoughtfully weighed the equities, unanimously concluding that "the people of Wisconsin already have endured several elections under an unconstitutional reapportionment scheme" and "[i]f they are to be spared another such event, a new map must be drawn in time for the preparatory steps leading up to the election, such as candidate petition circulations in mid-Spring 2018." J.S. App. 321a.

The court's carefully considered unanimous remedial judgment (including the judge who dissented on the merits) should be upheld. As an initial matter, this Court should not entertain the new "evidence" of purported irreparable harm upon which

Appellants' application for a stay relies. Appellants never moved the three-judge court for a stay of judgment pursuant to Federal Rule of Civil Procedure 62 and therefore never presented this "evidence" below. *See* S. Ct. R. 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."). Instead, Appellants waited nearly *three months* after the court's judgment issued and then filed a stay application in this Court. Because Appellant's stay application relies almost entirely upon purported evidence about irreparable harm never presented to the court below, it is procedurally improper and should be summarily denied.

Even if their application were procedurally proper, Appellants have not met their high burden of showing that a stay is warranted. This Court has repeatedly held that the grant of a stay pending appeal is an extraordinary remedy. That is particularly true in redistricting cases, where granting a stay could result in forcing voters to participate in yet another election under unconstitutional districts. Appellants' *only* reason for requesting a stay now—six months after Act 43 was held unconstitutional and three months after the judgment was entered below—is that there *might* be a waste of legislative resources *if* this Court were to reverse the decision below. Appellants cite no case in which this Court has held that the mere possibility of wasting legislative resources constitutes irreparable harm. To the contrary, this Court has repeatedly rejected such arguments. Thus, even if Appellants were correct—and they are not—that it is likely that five Justices of this Court will reverse the district court's judgment, Appellants have not identified any irreparable harm they would suffer if they had to comply with the

court's remedial order during the pendency of their appeal. That omission is fatal to their stay application.

In contrast, the harm to Appellees if this Court were to stay the district court's judgment pending resolution of this appeal could be irreparable, and thus the balance of equities strongly favors denying the request for a stay. If there were no remedial plan in place by the spring of 2018, candidate filing deadlines for the 2018 elections would be placed in jeopardy and voters might be forced to endure yet another election in 2018 under unconstitutional districts. If this Court did not issue a decision in this appeal until June 2018 and if this Court affirmed the court below, the exigencies of time at that point could force the court below to impose its own plan and to alter certain state election-related deadlines. All of this potential disruption and possible usurpation of the legislative process would be avoided by denying Appellants' request for a stay and following the eminently sensible remedial plan established by the court below.

In any event, Appellants' speculation about the possibility that the State will be forced to expend legislative resources on a plan that might not be needed is unwarranted because this Court is likely to affirm the court below on the merits. And as to Appellants' argument that even if this Court affirms, it may still revise the district court's test, Appellants do not explain how any remedy that solves the constitutional problem under the district court's test could possibly remain unconstitutional under a modified test from this Court. For all of the reasons set forth in Appellees' motion to affirm and further discussed herein, it is not likely that five Justices of this Court will vote to reverse the decision below.

STATEMENT OF THE CASE

In 2010, as part of a coordinated national strategy to "win Republican control of state legislatures with the largest impact on . . . redistricting," the Republican State Leadership Committee "spent $1.1 million to successfully flip both chambers of the Wisconsin legislature." Ex. 472. Republican legislative leaders in Wisconsin then authorized a secretive and exclusionary mapmaking process aimed at securing for their party a large advantage in the legislature that would persist no matter what happened in future elections.

The state legislative redistricting plan—Act 43—was drafted behind closed doors in a "map room" at a private law firm that only a handful of attorneys and aides were allowed to enter. J.S. App. 12a; Ex. 463. Ordinary rules of legislative transparency were waived by outsourcing the work to that firm. J.S. App. 12a; Ex. 355. Each Republican incumbent had to sign a secrecy agreement before being shown a draft of his or her new district (and an accompanying memo). Exs. 243-44. And *only* Republican legislators had a chance to see the districts; Act 43's authors declined to meet with, or send a memo to, even a single Democrat prior to the bill's unveiling. Dkt. 147:95-99; Ex. 341:8.

To design the maps, the responsible individuals—Adam Foltz, Joseph Handrick, and Tad Ottman—created composites of Republican candidates' vote shares in selected statewide races between 2004 and 2010. J.S. App. 17a-18a. Using the composites, the drafters then crafted a series of provisional plans. J.S. App. 19a-20a. All of these plans assumed that Republicans would win about 49% of the statewide Assembly vote. Ex. 467. For this *minority* of the vote, the plans steadily ratcheted upward the expected

number of Republican seats: from forty-nine under the court-drawn 2000s map to a supermajority of *fifty-nine* of the ninety-nine legislative seats under the "Final Map." J.S. App. 129a-130a; Ex. 487.

While obsessively focusing on drawing the map for maximum partisan advantage, Act 43's drafters paid little attention to traditional redistricting criteria. J.S. App. 130a n.195. They failed to produce a single analysis of their districts' contiguity, compactness, or splits of political subdivisions. Dkts. 147:154, 148:84. Nor did their memos to Republican legislators even mention these criteria, instead presenting likely electoral outcomes. J.S. App. 136a. Act 43 divided more counties than any other plan in Wisconsin's history. Dkt. 125 ¶ 221. And Act 43's treatment of minority voters was so deficient that portions of the plan were ruled unlawful under Section 2 of the Voting Rights Act. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854-58 (E.D. Wis. 2012).

Once the drafters were fully satisfied with their plan's partisan performance and that performance had been verified by their consultant, Act 43 was introduced, debated, and passed by the Wisconsin legislature in just nine days in July 2011. J.S. App. 29a. In the elections that followed in 2012 and 2014, Act 43 performed exactly as designed. Republicans won 48.6% and 52.0% of the two-party Assembly vote, respectively. But in these nearly tied elections, Republicans won supermajorities of 60.6% and 63.6% of the seats in the Assembly. J.S. App. 148a.

In July 2015, Appellees—a group of registered voters in the State of Wisconsin who support the Democratic Party and its candidates—filed suit alleging that Act 43 was

an unlawful partisan gerrymander because it treated Democrats unequally based on their political beliefs and impermissibly burdened their First Amendment rights of association. Dkt. 1. Appellees alleged that the purpose and effect of Act 43 was to dilute their voting strength because of their political affiliations. *Id.* Appellees asked the court to enjoin the use of the plan for the 2016 state legislative election and all future elections. *Id.*

After the three-judge panel of Circuit Judge Kenneth F. Ripple, District Judge Barbara B. Crabb and District Judge William C. Griesbach was convened, the parties engaged in extensive pre-trial discovery and motions practice, culminating in a four-day trial in June 2016. In addition to the parties' experts and one plaintiff, two of Act 43's drafters (Foltz and Ottman) and the legislature's consultant (Professor Gaddie) provided testimony at trial. Foltz and Ottman confirmed that they had gone to extraordinary lengths to analyze—and augment—the Republican advantage under Act 43. J.S. App. 126a-140a. Professor Gaddie shed further light on the methods of Act 43's drafters, while also explaining how he had verified the durability of the Republican edge that Act 43 was designed to create. J.S. App. 126a-131a.

The court issued its opinion on November 21, 2016 (after the 2016 elections). After thoroughly analyzing all of this Court's relevant jurisprudence, a majority of the three-judge court (with Judge Griesbach dissenting) held that the First Amendment and the Equal Protection clause "prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." J.S. App. 109a-110a. As to the first prong, the court painstakingly

reviewed the extensive evidence of the mapmaking process and concluded that "the evidence establishes that one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power." *Id.* at 140a. Turning to the second prong, the court found that "Act 43 also achieved the intended effect: it secured for Republicans a lasting Assembly majority. It did so by allocating votes among the newly created districts in such a way that, in any likely electoral scenario, the number of Republican seats would not drop below 50%." *Id.* at 145a. Finally, as to the third prong, the court held that "Act 43's partisan effect cannot be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process," and that in particular, "although Wisconsin's natural political geography plays some role in the apportionment process, it simply does not explain adequately the sizeable disparate effect seen in 2012 and 2014 under Act 43." *Id.* at 180a.

The court reached these conclusions in an opinion that spans 116 pages, thoroughly and thoughtfully analyzing the existing jurisprudence, the extensive factual and expert evidence before the court, and the credibility of the witnesses at trial. The record was unlike that in any other partisan gerrymandering case, leading the court to conclude that the case was "not plagued by the infirmities that have [concerned] the [Supreme] Court[] in previous cases." J.S. App. 155a.

After holding Act 43 unconstitutional, the court invited the parties to brief the issue of remedy. Appellees asked the court to draw a remedial map. Alternatively, Appellees argued that if the court afforded the Wisconsin legislature the opportunity to

redraw the map, it should require that the new map be in place by April 1, 2017, to allow sufficient time for a court-supervised remedial process if the elected branches were unable or unwilling to act. Dkt. 170. The next primary election is scheduled for August 14, 2018, and the general election for November 6, 2018. *See* Wis. Stat. § 5.02(5), (12s). Candidates for Assembly can begin to circulate nomination papers on April 15, 2018, and the requisite paperwork is due on June 1, 2018. Wis. Stat. § 8.15(1); *id.* § 8.21(1). While acknowledging these deadlines, Appellants argued that the court should not require the legislature to engage in any remedial proceedings until after their appeal in this Court was resolved. Dkt. 169.

Evaluating those submissions, the court found that while the "parties agree that the appropriate remedy in this case is to enter an injunction prohibiting the use of Act 43's districting plan in future elections," they disagreed on "who should draft a remedial map, how that map should be drafted, and when it should be implemented." J.S. App. 317a. The court then rejected the proposals of both parties and charted its own course. The court noted that while "[i]n a perfect world, the defendants' suggestion [that the court avoid ordering any remedy until after the Supreme Court decided this appeal] would make sense," there were "several countervailing considerations that [the court] must consider." *Id.* at 321a. The court observed that "Members of the Wisconsin Assembly are elected for a term of two years" and the "people of Wisconsin already have endured several elections under an unconstitutional reapportionment scheme." *Id.* Thus, "[i]f they are to be spared another such event, a new map must be drawn in time for the preparatory steps leading up to the election, such as candidate petition circulations in

mid-Spring 2018." *Id.* The court further noted that, "[a]t the same time, the defendants' right of appeal must be protected" and the court "must take into consideration the drain on legislative resources and energy in enacting a new plan and be cognizant that the Supreme Court has many other important issues on its docket and may well need a significant amount of time to finish its work on this case." *Id.*

Balancing these "competing considerations," the three-judge court unanimously required a remedial plan to be enacted and signed by November 1, 2017. *Id.* The court explained that this "deadline affords the Legislature ample time to enact a plan contingent on the Supreme Court's affirmance of our judgment." *Id.* The court found there would be no irreparable injury to Appellants from its order, but that there could be irreparable injury to Appellees if work on a remedial plan was postponed until this Court ruled. As the court stated: "Here, we must balance the harm to the defendants against the harm to the plaintiffs…. In setting a November 1, 2017 deadline for the enactment of at least a contingent replacement map, we considered the State's burden in enacting even a contingent remedial plan and have concluded that the State's thorough earlier work may significantly assuage the task now before them. Additionally, by choosing to enact a plan contingent on the Supreme Court's affirming our judgment, the defendants will retain easily the present map if the Supreme Court does not agree with our disposition." *Id.* at 322a-323a.

The court then issued its judgment ordering "that the defendants have a remedial redistricting plan for the November 2018 election, enacted by the Wisconsin Legislature and signed by the Governor, in place no later than November 1, 2017. This plan must

comply with the November 21, 2016 order but may be contingent upon the Supreme Court's affirmance of the November 21, 2016 order." *Id.* at 323a. The court noted in its judgment that it "retain[ed] jurisdiction to enter such orders as may be necessary to enforce the court's judgment in this matter and to remedy in a timely manner the constitutional violation." *Id.* at 329a-330a.

Appellants filed a notice of appeal from the court's judgment, but did not seek a stay of the judgment from the three-judge court. Instead, they waited almost three months after the judgment issued and then filed a stay application in this Court, relying on purported "evidence" of irreparable harm that they never presented in the district court.

ARGUMENT

The Court should not entertain this stay application because it relies on purported "evidence" of irreparable harm that was never presented to the district court. However, if the Court does entertain the application, it should be denied. "Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). In cases such as this, where the Court "lack[s] the discretionary power to refuse to decide the merits," Appellants must show that "five

Justices are likely to conclude that the case was erroneously decided below." *Id.*[1] While Appellees acknowledge that there is a reasonable probability that the Court will note probable jurisdiction in this case, it is not likely that five Justices of this Court will conclude that the decision below was erroneous. But even if Appellants were correct as to their likelihood of success on the merits, it would not matter, because Appellants are unable to make the required showing that they will suffer any irreparable harm absent a stay. In contrast, Appellees likely will suffer irreparable harm if the stay is granted, and therefore the balance of equities weighs strongly in favor of denying the stay application.

I. The Court Should Not Entertain The Stay Application Because It Relies On New "Evidence" Never Presented To The Court Below.

In their briefing regarding the proper remedy for the constitutional violations found by the court below, Appellants asked the court to hold off on ordering any remedy at all until their appeal in this Court was resolved. Dkt. 169. The trial court declined, and issued a judgment setting a deadline of November 1, 2017 for the State to have a remedial plan in place for Assembly elections in 2018. Appellants never moved the court to stay its judgment. Instead, they waited three months and then filed a stay application in this Court.[2]

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[1] As is further explained *infra*, Appellants erroneously cite the stay standard for discretionary appeals to this Court, which requires only a "fair prospect" that the decision below will be reversed. Stay at 11. Here, Appellants must meet the higher burden of showing it is "likely" that five Justices will conclude the case was erroneously decided.

[2] Although the three-judge court construed Appellants' remedial briefing as a request for the court to stay *any* remedial holding, *see* J.S. App. 322a, Appellants never moved for a stay once the court issued its remedial order and judgment, nor did they ever present any evidence to the three-judge court in support of a stay request.

Appellants' stay application should be summarily denied because it relies upon "evidence" never presented to the court below. Appellants' only real argument in this Court is that a stay is "necessary to avoid Wisconsin wasting substantial sovereign resources to draw a map that, in all likelihood, will never become law." Stay at 2. To support this argument, Appellants rely almost entirely on a new declaration from legislative aide Adam Foltz, one of the architects of Act 43. In the proceedings below, the court specifically noted that it did not have "confidence in Foltz's testimony" and explained that there were "areas of [his] testimony" that the court found "unworthy of credence." J.S. App. 126a n.177; *see also Baldus*, 849 F. Supp. 2d at 851 (refusing to credit Foltz's testimony and finding his assertion that he was "not influenced by partisan factors" in drawing Act 43 "almost laughable").

In his declaration in support of Appellants' application for a stay in this Court, Foltz claims that "drawing district maps is a very time-consuming and resource intensive process." Stay App. 178. Foltz then details the time and effort he expended to create the extreme partisan gerrymander the court found unconstitutional and opines on the time and effort he believes will be necessary to create new legislative maps by the November 1, 2017 deadline. *See id.* at 178-85. Foltz further makes claims about computers being "decommissioned" and about the capabilities and timeline of the Legislative Technology Services Bureau. *See id.* Appellants' stay application relies almost entirely on Foltz's declaration for its irreparable harm argument. *See* Stay at 24-25.

Because Appellants never moved for a stay of the judgment below in accordance with Federal Rule of Civil Procedure 62, none of the "evidence" proffered by Foltz in

support of the stay application was ever presented to or considered by the three-judge court. In fact, in their remedial briefing, Appellants specifically told the court below that they did "not think that additional evidence [was] warranted" for the court to make a remedial decision. Dkt. 169:2; *see id.* at 11.

Had Appellants presented the court below with their "evidence" from Foltz about purported irreparable harm, Appellees would have had a chance to rebut it; for example, by showing that the vast majority of the time and resources Foltz claims to have spent in his declaration was devoted to constructing—in complete secrecy—the most effective partisan gerrymander possible, and that presumably, this same amount of time and resources will not be necessary this time around. Appellees also would have pointed out that legislatures regularly craft remedial maps in far less time than the "approximately six months" that Foltz claims is required. Stay App. 179. For example, in North Carolina the legislature is statutorily provided with just two weeks to craft a remedial redistricting plan. *See* N.C. Gen. Stat. § 120-2.4. Moreover, as is discussed in greater detail *infra* in Part II, Foltz's claim as to the time and burden involved in drawing a remedial plan rings particularly hollow in light of the fact that there are already multiple examples of constitutionally compliant plans in the record.

Because the court below never had the opportunity to pass on any of these arguments, this Court should not entertain the stay application. Appellants make no argument that there are "extraordinary circumstances" excusing their failure to properly move for a stay of the judgment below and to present their purported evidence of irreparable harm, which was certainly known to them at the time. *See* S. Ct. R. 23.3. The

application should be summarily denied. *See, e.g., Conforte v. Comm'r*, 459 U.S. 1309 (1983) (Rehnquist, C.J., in chambers) (denying stay, in part, because of failure to seek relief in the court below); *Dolman v. United States*, 439 U.S. 1395 (1978) (Rehnquist, C.J., in chambers) (same).

II. Appellants Have Not Established That They Will Suffer Any Irreparable Harm Absent A Stay.

As discussed *infra* in Part IV, Appellants have not shown that they are likely to succeed on the merits of their appeal. But even if they had, "[a]n applicant's likelihood of success on the merits need not be considered … if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (citing *Whalen v. Roe*, 423 U.S. 1313, 1317-18 (1975) (Marshall, J., in chambers)). Here, Appellants have not established that they will suffer any irreparable harm absent a stay. This failure is fatal to their application, regardless of their likelihood of success on the merits.

Appellants cite no case that supports their argument that a legislature's expenditure of "time, money, and other sovereign resources," to remedy a constitutional violation is "noncompensable and thus irreparable." Stay at 24.[3] In fact, members of this Court have held exactly the opposite in denying stay requests, finding that "[m]ere

[3] Appellants string cite three cases that do not support their argument. In *Ledbetter v. Baldwin*, 479 U.S. 1309 (1986) (Powell, J., in chambers), Justice Powell granted the stay based on the likelihood the Court would reverse on the merits. In *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014) (Roberts, C.J., in chambers), Chief Justice Roberts *denied* the stay application because there was no showing of irreparable harm. And *Odebrecht Construction, Inc. v. Secretary of the Florida Department of Transportation*, 715 F.3d 1268 (11th Cir. 2013) is entirely inapposite as it does not deal with either a stay application or the potential waste of legislative resources absent a stay.

injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (quotation marks omitted); *see also, e.g.*, *Cane v. Worcester Cty.*, 874 F. Supp. 695, 698 (D. Md. 1995) (holding that the "the time and expense of implementing a new system" is an "injury [that] is not irreparable"); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (having to redistrict is a "mere administrative inconvenience").

The burden is on Appellants to demonstrate that they will experience irreparable harm, and "simply showing some 'possibility of irreparable injury,' fails to satisfy" this burden. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). In redistricting cases, this Court regularly rejects arguments about potential wasted resources or administrative inconvenience involved in implementing a remedial plan, finding them insufficient to constitute irreparable harm. For example, in *McCrory v. Harris*, 136 S. Ct. 1001 (2016), this Court denied a stay application pending direct appeal in a North Carolina case where the remedial order required redrawing two racially gerrymandered congressional districts, despite Appellants' claim that the order "would impose significant and unanticipated challenges and costs for county elections administrators and for the State Board of Elections." Emergency Application to Stay the Final Judgment at 16, *McCrory v. Harris*, No. 15A-809 (U.S. Feb. 9, 2016); *see also Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (denying stay application pending direct appeal in Virginia case where remedial order required redrawing one congressional district found to be racially gerrymandered); *Graves*, 405 U.S. at 1204

(denying stay of remedial order imposing certain single-member districts for Texas legislature); *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying stay of district court order requiring New York to use court-approved remedial redistricting plan in upcoming election). In fact, "[d]enial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright*, 556 U.S. at 1401.[4]

Nor is Appellants' argument about the time, money, and resources the State supposedly will have to expend to "repeat a significant portion of [the legislature's] work," Stay at 24, availing in light of the findings of the court below that most of the time, money, and resources in the last redistricting process went toward ensuring an unconstitutional partisan gerrymander. Presumably, the legislature will not need to expend time and money on a secret, off-site map room, J.S. App. 12a, nor on multiple iterations of partisan performance, *id.* at 19a-20a, nor on consultants to maximize partisan

[4] Additional examples of this Court denying stays in redistricting cases include *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers) (denying stay in a Voting Rights Act case and noting that the Court "will grant a stay only in extraordinary circumstances" (citation omitted)); *Abrams v. Johnson*, 521 U.S. 74, 78 (1997) (noting the Court's refusal to stay a judicially crafted remedial map in a racial gerrymandering case); and *Mahan v. Howell*, 404 U.S. 1201, 1203 (1971) (Black, J., in chambers) (declining to stay a court-imposed map in a one-person, one-vote case). Indeed, Appellants do not cite a single case in which this Court granted a stay application in a redistricting matter. Appellants' *amici,* however, cite the initial grant of a stay of a district court injunction ordering New Jersey to design new congressional districts in *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). Wisconsin State Assembly and State Senate Amicus Br. at 9. Justice Brennan's grant of a stay in *Karcher*, however, was an atypical order at odds with the Supreme Court's usual tendency to reject such requests. Later in the *Karcher* litigation itself, when the district court took the more aggressive step of imposing its own remedial plan in the wake of the Supreme Court's decision on the merits, the Court denied the state's motion for another stay. *See Karcher v. Daggett*, 466 U.S. 910, 910 (1984). Shortly after Justice Brennan's ruling, the First Circuit also commented that it was an "exception" to the Supreme Court's pattern over the previous decade of disfavoring stays. *See Latino Political Action Comm., Inc. v. City of Boston*, 716 F.2d 68, 70-71 & n.3 (1st Cir. 1983).

performance, *id.* at 13a-14a, 17a, 22a, nor on drafting agreements with Republican legislators to ensure secrecy, Exs. 243-44.

Indeed, the legislature need not expend any time, money, or resources at all on a remedial plan as there are already multiple examples of constitutionally compliant districting plans in the record. As the court below found, during the mapmaking process, Act 43's drafters produced (and then subsequently rejected) "several statewide draft plans that performed satisfactorily on legitimate districting criteria without attaining the drastic partisan advantage demonstrated . . . in Act 43." J.S. App. 218a. Moreover, Appellees' expert Professor Kenneth Mayer, created a demonstration plan that matched or exceeded Act 43 on every federal and state criterion, but exhibited nothing like the partisan skew of Act 43. J.S. App. 212a.[5] Likewise, Professor Jowei Chen, whose work Appellants' *amici* favorably cited in support of Appellants' Jurisdictional Statement, generated 200 separate Assembly maps, every one of which exhibited a much smaller partisan skew than Act 43, while featuring more compact districts and splitting fewer political subdivisions. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf. The legislature could save itself time and money simply by using any one of these existing maps as a starting point for its remedial plan.

[5] Appellants have criticized this plan for *unintentionally* pairing incumbents. J.S. 15-16, 33. But incumbency protection is not a redistricting criterion in Wisconsin. Wis. Const. art. IV, §§ 4-5.

The legislature could also choose *not* to draw a remedial plan at all, thereby saving itself *any* expenditure of time, money, and resources. The court's remedial order invites the legislature to submit a remedial plan by November 1, 2017, but if the legislature chooses not to do so, the court below will simply undertake the "unwelcome obligation" of crafting a contingent remedial plan itself. *Connor v. Finch*, 431 U.S. 407, 415 (1977); *see also, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 861 (E.D. Wis. 2012) (redrawing two districts to remedy Voting Rights Act violation after "[t]he Wisconsin Legislature chose not to make any submission"). The legislature could also choose to take submissions from the public rather than craft a plan itself. Thus, the legislature is left with multiple options and cannot possibly claim that its own choice to expend time, money, and resources will cause it irreparable injury.

Finally, Appellants' argument that "the very existence of the district court's currently unstayed injunction, prohibiting Defendants from 'using the districting plan embodied in Act 43 in all future elections,' causes irreparable harm to the State," Stay at 26 (citation omitted), is curious given that Appellants themselves asked for this injunction. After the court held Act 43 unconstitutional, Appellants told the court below that "the proper remedy is for the Court to issue an injunction that directs the Legislature to revise the Assembly districts to comply with its decision" and the court "should therefore enter an injunction [that] directs the Legislature to devise a new plan." Dkt. 169:1. The court gave Appellants the injunction they requested. "[S]elf-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003).

III. The Balance Of The Equities Weighs Strongly Against Appellants' Request For A Stay.

In contrast to the lack of irreparable injury to Appellants, the risk of injury to Appellees if the Court were to grant a stay is profound. In evaluating a stay application, Circuit Justices must "determine on which side the risk of irreparable injury falls the most heavily." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09 (1973) (Marshall, J., in chambers). Here, the court below found that the risk fell most heavily on Appellees. The trial court thoughtfully balanced the potential harm to Appellants against the potential harm to Appellees, finding that although "[i]n a perfect world, the defendants' suggestion [that the court avoid ordering any remedy until after the Supreme Court decided this appeal] would make sense," there were "several countervailing considerations that [the court] must consider." J.S. App. 321a. Chief among them was the fact that "Members of the Wisconsin Assembly are elected for a term of two years" and the "people of Wisconsin already have endured several elections under an unconstitutional reapportionment scheme." *Id.* All three members of the court—including Judge Griesbach who dissented on the merits—unanimously found that if the people of Wisconsin "are to be spared another such event, a new map must be drawn in time for the preparatory steps leading up to the election, such as candidate petition circulations in mid-Spring 2018." *Id.*

The court carefully considered "the drain on legislative resources and energy in enacting a new plan" as well as the need for the legislature to have "ample time to enact a plan contingent on the Supreme Court's affirmance of our judgment." *Id.* The court then "balance[d] the harm to the defendants against the harm to the plaintiffs" and found that the most appropriate remedy was to set a "November 1, 2017 deadline for the

enactment of at least a contingent replacement map." *Id.* at 322a. The court below thus performed exactly the sort of equitable balancing this Court recently held is required whenever a court is faced with remedying an unconstitutional districting plan. *See North Carolina v. Covington*, No. 16–1023, 2017 WL 2407467, at *1 (U.S. June 5, 2017) (noting that when considering relief in redistricting cases, a district court "must undertake an 'equitable weighing process' to select a fitting remedy for the legal violations it has identified, … taking account of 'what is necessary, what is fair, and what is workable'" (citations omitted)).

The district court's balancing of the equities is "entitled to considerable deference." *Monsanto*, 463 U.S. at 1316. This Court has held that "once a State's . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The court below weighed the equities and took appropriate action to ensure that—if its decision were affirmed—no further elections would be conducted under the invalid plan. Staying that action likely would have the opposite effect, giving the State "the fruits of victory for another election cycle, even if they lose in the Supreme Court." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016) (denying request to stay remedial order after finding racial gerrymandering).

Courts have regularly denied stay applications where the result would be to force plaintiffs to endure another unconstitutional election. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1336, 1344 (N.D. Ga. 2004) (noting that "courts evaluating redistricting challenges

have generally denied motions for a stay pending appeal" and denying the stay application in that case because "the practical effect of a stay would be that the State of Georgia would conduct the 2004 elections again using unconstitutional apportionment plans"), *aff'd*, 542 U.S. 947 (2004); *Personhuballah*, 155 F. Supp. 3d at 560 ("To force the Plaintiffs to vote again under the Enacted Plan even if the Supreme Court affirms our finding that the Plan is unconstitutional . . .constitutes irreparable harm to them . . . ."); *Johnson*, 926 F. Supp. at 1543 ("Plaintiffs will suffer significant and irreparable injury if the stay is granted."); *Vera v. Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996) (declining to stay the remedy phase because "[t]o force the plaintiffs to vote again under the unconstitutional plan . . . constitutes irreparable harm to them, and to the other voters in [the challenged districts]"); *Cousin v. McWherter*, 845 F. Supp. 525, 528 (E.D. Tenn. 1994) (holding that "to prolong the creation of a plan by the Legislature would only serve to prolong the harm that plaintiffs have suffered for many years"). If the stay were granted here, it is possible that the voters of Wisconsin would have to endure yet another unconstitutional election in 2018.

Ignoring the specific findings of the court below that a remedial plan would need to be in place by spring 2018 to ensure that the 2018 elections proceed smoothly in the public interest, the Wisconsin State Senate and Assembly in their *amicus* brief argue that "because the next state legislative elections will not take place until November 2018, granting a stay would in no way preclude this Court from resolving the State's appeal on a timeline that still allows for a remedy before that election." Wisconsin State Assembly and State Senate Amicus Br. at 3. That suggestion is disingenuous at best. Indeed, just

one day before filing their *amicus* brief in this case, counsel for the Wisconsin legislators filed a brief on behalf of North Carolina legislators in another redistricting case arguing that it would be "exceedingly difficult (if not entirely unrealistic)" to implement a remedial plan in North Carolina at that point (in late May 2017), such that legislative elections could go forward in November 2017. Supp. Br. for Appellants North Carolina, et al. at 7 n.4, *North Carolina v. Covington*, Nos. 16-649, 16-1023 (U.S. May 24, 2017).

Considering that it is possible (if not likely) that the Court's decision in this appeal will not issue until June 2018, it is hard to fathom what special abilities Wisconsin legislators possess that North Carolina legislators do not such that there would be no problem with implementing a remedial plan in Wisconsin in June 2018 for primary elections in August 2018 and general elections in November 2018, when it would be "entirely unrealistic" to implement a remedial plan in North Carolina in June 2017 for primary elections in August 2017 and general elections in November 2017. *See id.; see also, e.g.*, Br. for Appellants Perry, et al. at 54, *Perez v. Perry*, Nos. 11-713, 11-714, 11-715 (U.S. Dec. 21, 2011) (arguing in December 2011 that there was not "enough time to remand the case and allow the district court to craft yet another batch of interim maps for the upcoming [primary] elections" in Texas in April 2012).

Indeed, it is difficult to square the arguments from Appellants and their *amici* about the supposedly significant amounts of time and effort required to craft a redistricting plan with their glib assurances that granting a stay would not affect the possibility of implementing a remedy in time for the 2018 elections. *See* Wisconsin State Assembly and State Senate Amicus Br. at 13 (arguing that "granting the stay and

allowing this case to proceed in the normal course will leave ample time to answer the important questions presented without jeopardizing the feasibility of any remedy that may become necessary"). If it is indeed true that the redistricting process requires "months of full-time work by legislative aides and consensus-building in party caucuses," *id.* at 11, then regardless of whether a stay is granted, it would behoove the Wisconsin legislature to start now since there are not many months available for "full-time work" between the end of this Court's Term in June 2018 and the regularly scheduled primary elections in August 2018.

An additional consideration strongly weighing in favor of denying the stay application is the fact that the 2020 redistricting cycle is fast approaching. If a remedy is not in place in time for the 2018 elections, the citizens of Wisconsin will suffer compounded harms. Not only will they be forced to endure another election under an unconstitutional Assembly plan, but they also will have lost the chance to constitutionally elect up to half of the state Senate who will be responsible for the next redistricting plan following the 2020 elections. Because each state Senate district is made up of three nested Assembly districts, *see* Wis. Stat. § 4.001, and because Senate elections are staggered such that not all senators will be up for election in 2020, *see* Wis. Const. art IV, § 5, the loss of a constitutional plan for 2018 would necessarily affect the composition of the body that will shape redistricting after 2020. This impact is yet another reason that the balance of equities weighs strongly in favor of denying the stay application.

IV. Appellants Have Not Shown That It Is Likely That Five Justices Of This Court Will Reverse The Judgment Below.

In any event, Appellants have not shown that they are likely to succeed on the merits. Appellees acknowledge that there is a reasonable probability this Court will note probable jurisdiction. However, it is not likely that five Justices of this Court will vote to reverse the judgment below. As an initial matter, Appellants have the standard wrong. Appellants claim that they must show only a "fair prospect" that the decision below will be reversed. *See* Stay at 11 (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). Not so. "[I]n cases presented on direct appeal—where [this Court] lack[s] the discretionary power to refuse to decide the merits," the question is "whether five Justices are *likely to conclude* that the case was erroneously decided below." *Graves*, 405 U.S. at 1203 (Powell, J., in chambers) (emphasis added); *see also*, *e.g.*, *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (Stevens, J., in chambers) (noting that the "inquiry where a stay is sought in a case within this Court's appellate jurisdiction is 'whether five Justices are likely to conclude that the case was erroneously decided below'"). Moreover, Appellants fail to acknowledge that in evaluating the likelihood of success on the merits, the "judgment of the court below is presumed to be valid." *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). For the reasons set forth herein and explained more fully in Appellees' motion to affirm, the most likely outcome here is this Court's affirmance of the decision below.

A. It Is Not Likely That Five Justices Of This Court Will Conclude That The Plurality Opinion In *Vieth* Foreclosed Statewide Partisan Gerrymandering Claims.

There is no merit to Appellants' argument that a statewide partisan gerrymandering challenge is foreclosed by the plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth*, four Justices of this Court (Chief Justice Rehnquist, and Justices Scalia, Thomas, and O'Connor), joined an opinion stating that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims" existed and "[l]acking them, we must conclude that political gerrymandering claims are nonjusticiable." *Id.* at 281 (plurality opinion). Although these four Justices recognized that the "excessive injection of politics" into the redistricting process is fundamentally "[incompatible] with democratic principles," *id.* at 292-93, they found that partisan gerrymandering is a political question that the judicial branch should not entertain at all.

Five members of the Court (Justices Kennedy, Breyer, Ginsburg, Stevens, and Souter) rejected that conclusion and held that partisan gerrymandering claims are justiciable. Despite Appellants' attempts to contort the opinion, that is the one and only holding of the *Vieth* plurality. There is no holding specifically as to the justiciability of statewide partisan gerrymandering claims. To be sure, Justice Stevens *in his dissent* explained that he favored a standard akin to that used in racial gerrymandering cases, which are district-specific rather than statewide challenges. In his view, "[a]lthough the complaint in this case includes a statewide challenge" it was a "stronger claim" to allege a district-specific challenge. *Id.* at 330 (Stevens, J., dissenting). Justice Stevens never stated that he would hold statewide claims nonjusticiable. In fact, he expressly stated

that it would be appropriate to "entertain [a] statewide challenge" where the plaintiffs "alleged a group harm that affected members of their party throughout the State." *Id.* at 327.

It is blackletter law that when there is no majority opinion in a case, the Court treats as "'the holding of the Court . . . that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). In *Vieth*, Justice Kennedy was the only Justice who concurred in the plurality's judgment but did not join the plurality's opinion. Although Appellants pretend otherwise, Justice Stevens dissented from the plurality's judgment. Despite Appellants' best efforts, Justice Stevens' dissent cannot be cobbled together with the plurality to fashion some imaginary holding precluding statewide claims.

Moreover, Justice Kennedy's controlling opinion in *Vieth* clearly contemplated that partisan gerrymandering claims would proceed on a statewide basis. *See* Mot. to Affirm at 26-27. That *Vieth* did not preclude statewide partisan gerrymandering claims is also evident from the subsequent treatment of such claims in *League of United Latin American Citizens v. Perry ("LULAC")*, 548 U.S. 399 (2006). In *LULAC*, this Court entertained a statewide partisan gerrymandering claim to Texas's congressional plan in its entirety without ever suggesting such claims were forbidden. *See* 548 U.S. at 416 (opinion of Kennedy, J.). Justice Stevens himself would have struck down Texas's entire congressional plan because it "impose[d] a severe *statewide* burden on the ability of Democratic voters and politicians to influence the political process." *Id.* at 464 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

As explained in Appellees' motion to affirm, no other Justice of this Court has espoused Justice Stevens' view that partisan gerrymandering claims should meet the same standards as racial gerrymandering claims. Mot. to Affirm at 28-29. And for good reason—the harms are different. It is not likely that five Justices of this Court will hold that statewide partisan gerrymandering claims are precluded or that they must meet the same standards as racial gerrymandering claims.

B. It Is Not Likely That Five Justices Of This Court Will Conclude That Noncompliance With Traditional Districting Criteria Is A Necessary Element Of A Partisan Gerrymandering Claim.

Appellants are simply wrong in their contention that "a majority of the Justices [in *Vieth*] concluded that a legislature does not engage in unlawful partisan gerrymandering where it complies with traditional districting principles." Stay at 16. Once again, Justice Kennedy was the only Justice to concur in the plurality's judgment in *Vieth*, so his is the controlling opinion. Justice Kennedy's concurrence specifically explained why traditional criteria are not "sound as independent judicial standards for measuring a burden on representational rights." 541 U.S. at 308 (Kennedy, J., concurring in the judgment). As Justice Kennedy explained, their defect is that "[t]hey cannot promise political neutrality when used as the basis for relief," but rather "unavoidably have significant political effect." *Id.* at 308-09. Justice Kennedy joined the portion of the plurality's opinion rejecting the idea that noncompliance with traditional districting criteria is a necessary element of a partisan gerrymandering claim. *See id.* at 308 (Kennedy, J., concurring in the judgment). The plurality stressed the unmanageability of this criterion, asking "*How much* disregard of traditional districting principles?" and

"What is a lower court to do when . . . the district adheres to some traditional criteria but not others?" *Id.* at 296 (plurality opinion). The plurality also observed that aesthetically pleasing districts nevertheless can be grossly gerrymandered: "it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution." *Id.* at 298.

Vieth was not the first time that this Court rejected Appellants' argument. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice Powell opined that the "most important" factor should be "the shapes of voting districts and adherence to established political subdivision boundaries." *Id.* at 173 (Powell, J., concurring in part and dissenting in part). The plurality specifically "disagree[d] . . . with [his] conception of a constitutional violation" because noncompliance with traditional criteria does "not show any actual disadvantage beyond that shown by the election results." *Id.* at 138-40 (plurality opinion). Likewise, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), a unanimous Court was unmoved by evidence that "irregularly shaped districts" "'wiggle[d] and joggle[d]' boundary lines." *Id.* at 752 n.18. "[C]ompactness or attractiveness," declared the Court, "has never been held to constitute an independent federal constitutional requirement." *Id.*

Very recently, in the racial gerrymandering context, this Court observed that "[t]raditional redistricting principles … are numerous and malleable." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Given the repeated rejection in both the racial gerrymandering and partisan gerrymandering contexts of a test that is based primarily on compliance with numerous and malleable traditional districting criteria, it is not likely that five Justices of this Court will reverse course and decide that

noncompliance with traditional districting criteria is a threshold requirement for a partisan gerrymandering claim.

C. It Is Not Likely That Five Justices Of This Court Will Conclude The District Court Adopted The *Bandemer* Test.

Finally, Appellants argue that the decision below was based on a test "materially identical" to the approach in *Davis v. Bandemer*, 478 U.S. 109 (1986). Stay at 19. As explained at length in Appellees' motion to affirm, the only thing the two tests have in common is that they each have three prongs. Appellees do not repeat herein their entire explanation of why the test applied by the court below is "limited and precise" and why it is much different from the test adopted by the Court in *Bandemer*. But it is worth repeating a point that Appellants deliberately seem to miss: the concept at the heart of this litigation—partisan asymmetry—was not even mentioned in *Bandemer*. It was not until *LULAC* that the Court discussed for the first time the methods that social scientists use to measure gerrymandering, and at least five Justices in *LULAC* discussed the potential utility of partisan symmetry to establish discriminatory effects.[6]

[6] Justice Stevens defined *partisan symmetry* as a "'require[ment] that the electoral system treat similarly-situated parties equally'" in terms of the translation of their popular support into legislative representation. 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). He then observed that symmetry is "widely accepted by scholars as providing a measure of partisan fairness in electoral systems," calling it a "helpful (though certainly not talismanic) tool." *Id.* at 466, 468 n.9. Justice Souter (joined by Justice Ginsburg) stressed the "utility of a criterion of symmetry as a test," and urged "further attention [to] be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.* at 483-84 (Souter, J., concurring in part and dissenting in part). Justice Breyer remarked that asymmetry may cause a plan to "produce a majority of congressional representatives even if the favored party receives only a minority of popular votes." *Id.* at 492 (Breyer, J., concurring in part and dissenting in part). And Justice Kennedy wrote with respect to partisan symmetry that he did not "discount[] its utility in redistricting planning and litigation." *Id.* at 420 (opinion of Kennedy, J.).

With its reliance on social science measures of partisan symmetry, the court below answered Justice Kennedy's call for "new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose." *Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment). As the court below discussed, measures of partisan asymmetry like partisan bias and the efficiency gap, as well as analytical techniques like sensitivity testing, can capture quantitatively the ways in which gerrymanders distort the translation of the electorate's preferences into legislative representation. They also exploit recent conceptual and methodological advances in the social sciences. Ex. 34:11-32. It is not likely that five Justices of this Court will reject exactly the type of analysis that they previously suggested litigants and lower courts should employ.

Curiously, Appellants repeatedly contend that Appellees' motion to affirm "do[es] not even defend the district court's test." Stay at 2; *see id.* at 18, 22. That argument is hard to understand. The entire point of Appellees' motion to affirm was to ask this Court to "affirm the decision below" because the decision "correctly articulated and applied a test for evaluating partisan gerrymandering claims that is judicially discernible and manageable." Mot. to Affirm at 5. And, as explained in the motion to affirm, there is no meaningful difference between the test the court applied and the test Appellees advocated below. *See id.* at 35-36. This Court is likely to affirm the application of the district court's test.

CONCLUSION

For these reasons, the stay application should be denied, either summarily because of Appellants' failure to properly move for a stay of the judgment below, or on the merits because Appellants have not shown that they will suffer any irreparable harm absent the stay, that the balance of equities weighs in their favor, or that it is likely that five Justices will reverse the decision below.

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