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

UNOPPOSED MOTION FOR LEAVE AND BRIEF OF *AMICI CURIAE* WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY IN SUPPORT OF STAY

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF STAY

Amici Wisconsin State Senate and Wisconsin State Assembly respectfully move for leave of Court to file the accompanying brief in support of Appellants' Application For Stay Pending Resolution Of Direct Appeal. Counsel for all parties have been notified of this brief, and no party opposes its filing. Despite the lack of opposition, *amici* file this motion out of an abundance of caution, as this Court's Rules do not expressly address *amicus* briefs in support of stay applications.

STATEMENT OF INTEREST[1]

Amici are the legislative bodies to which the Wisconsin Constitution assigns the task of drawing state and federal legislative districts. Wis. Const. art. IV, §3. As the Wisconsin legislature, *amici* crafted the districting plan struck down by the district court and would have the primary responsibility for complying with the district court's order to redistrict by November 1, 2017, if it is not stayed pending this Court's plenary review. Accordingly, *amici* have an acute interest in both defending the constitutionality of Wisconsin's districting plan and ensuring that *amici* do not spend countless hours in a redistricting effort that could well prove unnecessary or unavailing in light of the

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

guidance that may ultimately emerge from this Court's merits decision.

INTRODUCTION

Enacting a state legislative districting plan is no mean feat. Indeed, the Wisconsin State Legislature has successfully accomplished that task at the beginning of a redistricting cycle only once in the past four decades—only to have its plan, more than five years after its enactment, become the first in decades to be invalidated by a federal court as an unconstitutional partisan gerrymander. To make matters worse, the district court ordered the State to enact a new districting plan by November 1, 2017, a deadline that, absent summary reversal, will likely come and go before this Court has time to resolve the State's pending appeal of the district court's nearly unprecedented decision. Accordingly, left standing, the district court's remedial order will force *amici* to devote considerable resources to drawing a new map that in all likelihood will prove wholly unnecessary, or at a minimum obsolete.

If this Court holds, as it should, that the district court has not discovered the long-sought justiciable test for differentiating between permissible political considerations and impermissible partisan gerrymandering, then drawing and enacting a new map will have been a complete and irrevocable waste of limited time and resources. After all, the district court's remedial order expressly allows the new plan to be contingent on this Court affirming the decision below, and no general legislative election will take place before this Court resolves this case. Likewise, if this Court remands for application of a different

standard, the new map would become legally outmoded before ever being used. Indeed, even if this Court ultimately were to affirm the district court's judgment, the Court's opinion almost certainly would provide significant new guidance about whether and to what extent partisan impact may be considered when drawing a districting map—and thus in all likelihood would require the legislature to design yet another plan to comply with that new guidance instead of the district court's flawed test. Accordingly, no matter how this Court resolves this appeal (short of summary resolution), forcing the State to enact a new districting plan in the interim would be a costly exercise in futility.

Granting a stay, by contrast, will allow the legislature to continue devoting its limited resources to serving the many other interests of the people of Wisconsin until this Court resolves this appeal and determines if and how a new map must be drawn. And 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, should one remain necessary. Accordingly, *amici* respectfully ask this Court to grant the stay application if the Court notes probable jurisdiction rather than summarily reversing the decision below.

ARGUMENT

To obtain a stay of a lower court's order, an applicant must show (1) a reasonable probability that the Court will note probable jurisdiction; (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). In evaluating a stay application, this Court also considers "whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The stay factors are plainly satisfied here.

I. Any Districting Plan Designed On The District Court's Timeline Is Unlikely To Survive This Court's Merits Review.

As an initial matter, there unquestionably is "a reasonable probability" that this Court will note probable jurisdiction and review the decision below. This appeal falls within the Court's mandatory jurisdiction, 28 U.S.C. §1253, was timely filed, and is fully briefed at the jurisdictional stage. Moreover, notwithstanding plaintiffs' half-hearted suggestion of summary affirmance, this appeal presents indisputably substantial questions, including whether the district court has finally discovered a "judicially discernible and manageable standard[] by which political gerrymander cases are to be decided." *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (plurality opinion). Indeed, even plaintiffs "acknowledge that the importance of the issue may warrant full briefing and argument." Mot.5. Accordingly, unless the Court summarily reverses (in which case the district court's remedial order would be moot), this case is unlikely to be resolved before the district court's November 1, 2017 deadline for enacting a new districting plan.

There also is at least the requisite "fair prospect" that the Court will reverse, vacate, or modify the decision below—any of which would render either unnecessary or obsolete a districting plan enacted in time to comply with the district court's deadline. Assuming the Court notes probable jurisdiction, it is highly unlikely to issue a decision before the district court's November 1 deadline, meaning the State would have no choice but to design its remedial plan in accordance with the district court's test. But that test is highly unlikely to remain the law for long. The district court's decision is profoundly out of step with this Court's partisan gerrymandering jurisprudence and with the political realities in Wisconsin. These flaws are set forth in greater detail in the jurisdictional statement and in *amici*'s brief in support of that jurisdictional statement, but even a summary of the decision's flaws underscores that a stay is appropriate.

First, the decision cannot be squared with this Court's precedent. For example, the district court's determination that plaintiffs' statewide claims are justiciable directly conflicts with the position of five Justices in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), all of whom opined that federal courts lack authority to entertain statewide partisan gerrymandering challenges. *See* JS21-25. Likewise, the district court's decision to invalidate a districting plan that fully complies with traditional districting principles is irreconcilable with the position of seven Justices in *Vieth*, all of whom would have made noncompliance with traditional principles a necessary element of any partisan gerrymandering claim. *See* JS26-28. Because the decision below is inconsistent with those

precedents, the district court's test is unlikely to remain the law after this Court's review, meaning that any effort spent designing a districting plan under that test will be wasted.

Second, the district court's decision would produce unprecedented federal intervention in the state redistricting process, which this Court has repeatedly discouraged. If allowed to stand, the decision below will make it all but impossible for legislatures to perform the decennial task of redistricting without running afoul of one legal prohibition or another—or at least without being forced to defend against costly and time-consuming litigation initiated by a rival political party. That increased litigation would transfer to federal judges and private litigants a power that the people assigned to elected legislators, a result this Court is unlikely to sanction. *See* Legis.Br.4-10.[2]

Third, in allowing plaintiffs to pursue statewide partisan gerrymandering claims, the district court adopted a legal theory that this Court has repeatedly rejected. The "effects" prong of the district court's test focuses on the extent to which statewide vote totals for candidates from one political party translate into seats for that party in the state legislature as a whole. That test, by treating disproportional representation as a constitutional harm, necessarily establishes a countervailing right to *proportional* representation. But this Court's cases "clearly foreclose any claim that the

[2] "Legis.Br." refers to the *amicus* brief filed by the Wisconsin State Senate and Assembly in support of the jurisdictional statement.

Constitution requires proportional representation." *Bandemer*, 478 U.S. at 130 (plurality opinion); *see* Legis.Br.11-12. The district court attempted to sidestep that significant problem by relying on the concepts underlying this Court's vote-dilution precedents, but its analysis improperly equates vote-dilution claims, which concern *individual* rights, with the claim recognized here, which concerns *group*-based rights. *See* States.Br.14-18.[3]

Fourth, the factual assumptions built into the district court's analysis do not accord with reality. For example, the court equated votes for individual candidates with support for statewide political parties, even though Wisconsin voters choose candidates based on their records and positions, not just their partisan affiliation. Legis.Br.13-16. The court also presumed that voters who supported losing candidates have no representation in the state legislature, even though a fundamental characteristic of representative democracy is that legislators represent *all* of their constituents—not just the ones who voted for them. Legis.Br.16-19. And the court treated partisan preference as an immutable characteristic, even though election results in Wisconsin reveal significant intra-decade volatility in partisan balance. Legis.Br.19-21. This Court is unlikely to uphold a decision premised on so many assumptions that are "antithetical to our system of

[3] "States.Br." refers to the *amicus* brief filed by Texas, Arizona, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Oklahoma, South Carolina, and Utah in support of the jurisdictional statement.

representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

Finally, the district court's decision fails to adequately account for the unavoidable effects of Wisconsin's political geography. Democratic voters in Wisconsin are concentrated in urban areas; Republican voters are dispersed throughout the State. As a result, *any* districting map based on traditional principles will appear to have a pro-Republican bias under the "efficiency gap" test. Indeed, the *court-drawn* plans over the past three decades produced the same type of pro-Republican "efficiency gap" as the plan challenged here. This Court is unlikely to adopt a test that fails to distinguish between the effects of gerrymandering and the natural consequences of a state's political geography. Legis.Br.21-25.

Because of these insurmountable flaws in the district court's approach, complying with the district court's remedial order would be futile. This Court is likely to reverse or at least vacate the judgment below, making any new districting plan beside the point given that the district court's order allows the new plan to be contingent on this Court affirming. JS.App.332. Indeed, even if this Court ultimately affirms the judgment below—*i.e.*, if it determines that partisan gerrymandering claims are justiciable and then invalidates Wisconsin's districting plan—there is little chance that this Court would adopt the district court's analysis *in toto*. After all, courts have spent decades trying and failing to discern manageable standards for partisan gerrymandering claims; the notion that this Court would embrace *every* aspect of

the district court's novel approach is fanciful—especially considering how closely that test matches the one this Court unanimously rejected in *Vieth*. *See* JS29-34. Perhaps for that reason, even Appellees do not ask this Court to adopt the district court's particular "measure of partisan asymmetry" or its preferred "technique for demonstrating durability." Mot.22.

Thus, regardless of the precise outcome of this appeal, there is unquestionably at least the requisite "fair prospect" that this Court's decision will alter the legal landscape for how new districting maps should be drawn—and in the process, eliminate the utility of any plan designed to conform to the district court's irredeemably flawed approach.

II. The State, The Legislature, And The People Of Wisconsin Will Suffer Irreparable Harm If The Stay Application Is Denied.

Forcing the State to design and defend a districting plan that likely will never be used would waste significant, non-recoupable State resources. The circumstances here are nearly identical to those in *Karcher v. Daggett*, where the district court ordered the New Jersey legislature to adopt a new districting plan without leaving time for this Court to consider an appeal. 455 U.S. 1303 (1982) (Brennan, J., in chambers). Justice Brennan stayed the district court's order, explaining that absent a stay, the State "would plainly suffer irreparable harm" by being forced to "either adopt an alternative redistricting plan ... or face the prospect that the District Court will implement its own." *Id.* at 1306.

The same is true here, as the district court's order requires the legislature to pour considerable resources into designing a new districting plan while the decision below is on appeal to this Court. In designing that plan, the legislature cannot simply recycle one of the alternative maps it considered during the 2011 redistricting process. For one thing, as a result of plaintiffs' four-year delay in bringing their partisan gerrymandering claim, the computers used during that process have been decommissioned. Appl.25. And even if the draft maps once contained on those computers were recoverable, they were not designed to comply with the district court's since-created framework, and therefore did not account for "partisan asymmetry," "efficiency gap," and "sensitivity testing," much less the "recent conceptual and methodological advances in the social sciences" to which plaintiffs now vaguely allude. Mot.21.

Moreover, again as a product of plaintiffs' four-year wait, more than three-fifths of the current members of the Assembly were not in office when Act 43 was designed and enacted. The redistricting process requires close coordination with sitting legislators, whose intimate knowledge of local conditions ensures that new district lines do not split communities of interest or derail ongoing projects. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017). Even if it were technically feasible, recycling old maps designed with outdated input from ousted legislators would be unlikely to advance the "fair and effective representation" that redistricting is intended to promote. *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). For all of these reasons, previous drafts of districting maps—even if

they could be recreated—are of no value in designing a plan that satisfies current legislators, passes the district court's test, and complies with all other state and federal requirements.

Drafting a new plan would be no small task. The redistricting process is both time-consuming and resource-intensive, requiring months of full-time work by legislative aides and consensus-building in party caucuses. In 2011, for example, the redistricting process alone cost the legislature hundreds of thousands of dollars and countless hours that otherwise would have been spent on other legislative priorities. Legislative leaders assigned aides to design the districting plans, retained a law firm to ensure compliance with applicable state and federal law, hired consultants to assess the likely effects of proposed plans, and secured office space, hardware, and software to support their efforts. *See* JS.App.12-14. And once that redistricting staff designed and submitted preliminary plans, legislative leadership had to sort through the options, agree on a set of regional maps, and build support for the final plan within the party caucus. JS.App.14-28.

Repeating those efforts to comply with the district court's order would come at a substantial cost. All the while, the legislature's attention would be diverted from making good on campaign promises, depriving Wisconsin voters of the representation to which they are entitled. Those voters, moreover, would struggle to keep track of their districts as the map needlessly changes from Act 43 to a remedial plan and then either back to Act 43 or to a new map that complies with this Court's forthcoming guidance.

That is not just a once-every-two-years type of problem: Legislators cannot provide the services at the core of the legislator-constituent relationship unless their constituents know where to direct their requests and express their preferences. As voters are shuttled in and out of districts multiple times in short succession, the effectiveness of representative government is diminished, as are the corresponding benefits citizens can expect to receive. Denying a stay is thus likely to result in voter confusion, voter frustration, and a "consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

All of that unproductive waste is classic irreparable injury, even apart from the principle that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

III. Issuing A Stay Will Not Injure Other Parties And Is In The Public Interest.

Granting a stay would avert all of that harm without causing plaintiffs any prejudice. If this Court reverses, of course, plaintiffs would not be entitled to any remedy and would thus suffer no prejudice from the stay. But even in the unlikely event that this Court *affirms* the decision below—and the more unlikely event that it adopts the district court's reasoning *in full*—granting the stay still would not force plaintiffs to vote in unconstitutional districts or deprive them of a remedy.

This is not a case involving a special election or a regularly scheduled election right around the corner. Candidates for the next Assembly election do not even have to submit their paperwork until June 2018, Wis. Stat. §§8.15(1) & 8.21(1), with primary elections slated for August 2018, Wis. Stat. §5.02(12s), and general elections set for November 2018, Wis. Stat. §5.02(5). With over a year until the next election cycle even gets started, 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.

A stay pending appeal is also in the public interest. The public is always well-served by stability and certainty, and always disserved when the state legislature is forced to devote considerable resources to empty gestures. And the public interest will further be served by preserving this Court's ability to address the important issues in this appeal before the district court's order inflicts irreparable harm on a sovereign State. This Court should therefore follow its "ordinary practice" and prevent the district court's order "from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

CONCLUSION

For the foregoing reasons, this Court should grant the stay application.

Respectfully submitted,

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