Nos. 16A1149, 16-1161

In The Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS,

v.

WILLIAM WHITFORD, ET AL., APPELLEES

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States a
Circuit Justice for the Seventh Circuit

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INTRODUCTION

The district court required Defendants to submit a new statewide map, adopted by the Legislature and signed by the Governor, which complies with its unprecedented ruling finding an unlawful political gerrymander. Defendants' stay request is sensible: given the obvious legal flaws in the district court's opinion, and in light of the uncertain nature of this entire area of law, it makes no sense to force the Legislature to spend unrecoverable sovereign resources to draft a new plan. After all, this Court has never found an unlawful partisan gerrymander and has yet to articulate what test (if any) applies in this area. Given this highly unusual level of legal uncertainty, respect for Wisconsin's sovereign resources calls out for a stay.

Plaintiffs' arguments in their Opposition do not support a different approach. On the merits, Plaintiffs simply repeat the same points that they made in their Motion to Affirm. Plaintiffs would have this Court adopt a more expansive approach to statewide political-gerrymandering claims than it has adopted for racial gerrymandering, and enshrine a limitless test, based upon an unspecified combination of social-science techniques, with no technique being controlling or even presumptively correct. On the equities, Plaintiffs mainly worry about the impact of a stay on the 2018 election. But if Defendants are correct that this Court is unlikely to affirm the district court—either because this Court upholds Act 43 (as Defendants think is likely), or because this Court puts forward important guidance on the contours of political-gerrymandering claims—then any new map that the

Legislature were to adopt by November 1, 2017, would have no relevance to the 2018 elections. Finally, Plaintiffs raise some procedural objections to Defendants' Stay Application, but these are based upon a misunderstanding of both the law and the standard stay-application procedures.

In all, in the unlikely event that the Legislature will need to draft an entirely new map, based on an unprecedented political-gerrymandering theory, it should at least first have the benefit of this Court's guidance for this novel endeavor.

ARGUMENT

I. The District Court's Unprecedented Decision Is Exceedingly Unlikely To Survive Review

In their Stay Application, Defendants explained that the district court's decision below is indefensible because: (1) it permits plaintiffs to bring a statewide political-gerrymandering claim, where such a claim is not permitted even in the racial-gerrymandering context, Stay Appl. 12–16; (2) it allows plaintiffs to challenge a map as a political gerrymander, even when that map complies with traditional redistricting principles, Stay Appl. 16–17; and (3) it is based upon an entrenchment approach that even Plaintiffs do not defend, Stay Appl. 17–23. Plaintiffs' responses on these points do not come close to rebutting Defendants' showing on the merits.[1]

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[1] Relying on outdated cases from the 1970s, Plaintiffs claim that, in a direct appeal, the standard for granting a stay is whether a majority of this Court is "likely to conclude" that the decision below was wrong. Opp. to Stay 11 n.1, 24 (citing *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers)). More recent cases have applied the "fair prospect" standard to cases on direct appeal. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (direct appeal); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)

A. With regard to the statewide-challenge issue, Plaintiffs double down on their misunderstanding of the proper method for reading divided opinions of this Court. Opp. to Stay 25–26. As Defendants have repeatedly explained, JS 20–21, Opp. to Mot. to Aff. 2–4, Stay Appl. 12–13, Plaintiffs' approach—under which lower courts can disregard the votes of Justices of this Court at their option—is flatly contrary to *United States v. Jacobsen*, 466 U.S. 109, 115–18 & n.12 (1984), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 17 (1983). Plaintiffs have now filed two briefs in this Court in this case and have yet to mention—let alone attempt to address—these controlling cases.

More generally, Plaintiffs still have no coherent answer for Defendants' argument on the merits of the statewide standing issue. *See* Opp. to Mot. to Aff. 5. This Court has repeatedly held that even in the far more serious context of racial gerrymandering, a plaintiff has no standing to bring a statewide claim. Stay Appl. 14–15 (citing *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)). It would be incoherent, and entirely anomalous, to refuse to apply this same rule in the political-gerrymandering context as well.

B. As to Act 43's compliance with traditional redistricting principles, Plaintiffs again repeat their misunderstanding of how to read divided opinions of this Court, offering no answer for either *Jacobsen* or *Moses H. Cone*. Opp. to Stay

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(Brennan, J., in chambers) (direct appeal); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (citing *Lucas* and *Rostker* as providing the controlling rule for stay applications in general). Regardless, given the clear legal flaws in the district court's decision, Defendants would prevail under any standard.

25–26. Plaintiffs also cite the *Bandemer* plurality's decision, Opp. to Stay 28, which only shows that Plaintiffs—like the district court—are simply unwilling to accept that this Court in *Vieth* unanimously rejected the *Bandemer* plurality's approach.

Plaintiffs' decision to point to racial-gerrymandering cases that permit single-district claims against districts that comply with traditional redistricting principles is particularly telling. Opp. to Stay 28–29. Plaintiffs urge this Court, in crafting its political-gerrymandering doctrine, to reject the limitations that this Court has recognized in the racial-gerrymandering context, such as the district-by-district rule, while importing the race-based doctrine where it would lead to expansive application. This one-way ratchet approach—which will inevitably lead to political-gerrymandering claims being favored vis-à-vis racial-gerrymandering claims—is contrary to this Court's caselaw, which has recognized, over and over again, that "[r]ace is an impermissible classification[, but] [p]olitics is quite a different matter." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment); *accord Cooper v. Harris*, No. 15-1262, 2017 WL 2216930, *6 (U.S. May 22, 2017) (comparing "partisan advantage" favorably to "racial" considerations); *Id.* at *26 (Alito, J., concurring in the judgment in part and dissenting in part) ("Partisan gerrymandering dates back to the founding, and while some might find it distasteful, our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." (citations and emphasis omitted)).

Plaintiffs also repeat their meritless suggestion that Act 43 may not comply with traditional redistricting principles. Opp. to Stay 5. As Defendants have demonstrated, it is *undisputed* that Act 43 fares as well as, or better than, the prior two court-drawn maps on these principles. Stay Appl. 16; Opp. to Mot. to Aff. 6–7.

C. Finally, with regard to the district court's test for a partisan gerrymander, Plaintiffs attempt to morph that test—which they elsewhere quote accurately as an entrenchment methodology, Opp. to Stay 7 ("Act 43 also achieved the intended effect . . . [because] in any likely electoral scenario, the number of Republican seats would not drop below 50%." (directly quoting the district court))—into their preferred social-science stew, where no one social-science methodology is controlling or even presumptively correct. Opp. to Stay 29–30. That Plaintiffs seek to transform the district court's entrenchment test into something else is understandable, given that entrenchment was the approach the *Bandemer* plurality adopted, and which this Court unanimously rejected in *Vieth*. Stay Appl. 18–21.

But, in any event, Plaintiffs' social-science hodgepodge—whether they choose to label it partisan symmetry, durability analysis, or some combination thereof—is no more defensible than the district court's approach. What this Court has called for is "a workable standard" that is "limited and precise." *Vieth*, 541 U.S. at 306, 311 (Kennedy, J., concurring in the judgment). The *same* social-science concepts that Plaintiffs tout here were presented to this Court in *LULAC*, and Justice Kennedy rejected those concepts as insufficient, standing alone, to serve as "a

reliable measure of unconstitutional partisanship." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419–20 (2006) (plurality op.).

Indeed, the metamorphosis of Plaintiffs' positions in this case demonstrates how utterly they have failed to carry out their obligation to articulate "a workable standard" that is "limited and precise." *Vieth*, 541 U.S. at 306, 311 (Kennedy, J., concurring in the judgment). Before the district court, Plaintiffs claimed to have found the silver bullet in the "efficiency gap." App. 74; Dkts. 1 ¶ 5, 149:208–13. When the district court rejected this approach in favor of entrenchment, Plaintiffs did not defend *either* the efficiency gap or entrenchment on appeal. Instead, they threw up their hands and declined to "ask th[is] Court to endorse any *particular* measure of partisan asymmetry or any *particular* technique for demonstrating durability." Mot. to Aff. 22. Then, casting all pretense aside, they cited an article by the *very same* professors that Justice Kennedy found insufficient in *LULAC* as supporting their approach. Mot. to Aff. 21 & n.9; Opp. to Mot. to Aff. 11.

II. Requiring Defendants To Spend Considerable Sovereign Resources To Draft A New Statewide Plan Would Cause Irreparable Harm And Needless Confusion, While Providing No Benefit To Anyone

In their Stay Application, Defendants explained that drafting a new statewide plan by November 1, 2017, will cause Wisconsin to lose unrecoverable sovereign resources. Stay Appl. 24–26. Given that this new plan would not become operative unless this Court affirms the district court's decision in whole, creating that plan would, in all likelihood, be a pointless endeavor. Indeed, even in the unlikely situation that this Court did not simply uphold Act 43 as lawful, this

Court's opinion would likely provide important guidance for the Legislature's redrafting process, if any such process proved necessary. Stay Appl. 2, 26–28. And refusing to grant a stay will result in a needlessly confusing situation for Wisconsinites, as the Legislature would need to adopt a new statewide plan that is unlikely ever to apply in the real world. Stay Appl. 26–28. Plaintiffs' responsive arguments do not come close to overcoming these points.

First, Plaintiffs argue that forcing the Legislature to expend substantial sovereign resources is not irreparable harm at all. Opp. to Stay 14–18. As their only support for this legal proposition (other than two decades-old district court opinions), Plaintiffs misrepresent Justice Ginsburg's quotation of this Court's decision in *Sampson v. Murray*, 415 U.S. 61, 90 (1974), in her opinion in *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers). Opp. to Stay 14–15. The full quotation is as follows: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. *The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.*" *Conkright*, 556 U.S. at 1403 (Ginsburg, J., in chambers) (quoting *Sampson*, 415 U.S. at 90) (emphasis added); *accord Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621, 1621 (2014) (Roberts, C.J., in chambers) ("Respondents acknowledge that, should [the applicant] prevail in this Court and its patent be held valid, [the applicant] will be able to recover damages from respondents for past patent infringement."). Here, Defendants do not

speculate that they "*may* have trouble recouping" expended resources, *Conkright*, 556 U.S. at 1403 (Ginsburg, J., in chambers) (emphasis added); rather, it is undisputed that the resources they will need to expend to create a new map will be *impossible* to recoup under any circumstances.

Plaintiffs also misconstrue *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers), by asserting that "Justice Powell granted the stay based on the likelihood the Court would reverse on the merits." Opp. to Stay 14 n.3. In fact, Justice Powell explained that "the State will suffer irreparable harm if the decision is not stayed. The State will bear the administrative costs of changing its system to comply with the District Court's order. Even if this Court reverses the judgment of the District Court, it is unlikely that the State would be able to recover these costs." *Ledbetter*, 479 U.S. at 1310 (Powell, J., in chambers). This reasoning directly refutes Plaintiffs' argument with regard to irreparable harm.

Second, Plaintiffs point out that this Court has denied stays in some racial-gerrymandering and Voting Rights Act cases. Opp. to Stay 15–16 & n.4. Tellingly, Plaintiffs do not cite a single word, from any of those orders, suggesting that these denials were on lack-of-irreparable-harm grounds. In Plaintiffs' lead denial-of-a-stay case, *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (mem.), Opp. to Stay 15, for example, this Court later *affirmed* the finding of an unlawful racial gerrymander, *Harris*, No. 15-1262, 2017 WL 2216930, which provides a ready explanation for the stay denial. *Harris* thus aptly demonstrates why Plaintiffs' reliance on this Court's nonuniform approach to stay applications, *see Karcher v. Daggett*, 455 U.S. 1303

(1982) (Brennan, J., in chambers), in well-trodden areas of law is inapposite in the political-gerrymandering context. This Court has never found an unlawful partisan gerrymander and has not even announced a standard under which such cases are to be evaluated. There is thus no equivalence between a State needing to redraw a district or two to comply with well-known racial-gerrymandering standards, and the Wisconsin Legislature being forced to redraw its entire new Assembly map, on a statewide basis, with the only guidance being a district court decision with a central rationale that even Plaintiffs are unwilling to defend.

Third, Plaintiffs argue that the Legislature could decrease, or even eliminate, the amount of time it devotes to drafting a new map by letting the district court do the drafting or by outsourcing the map-drawing function to the public (including to Plaintiffs' expert). Opp. to Stay 18. But "[l]egislative bodies should not leave their reapportionment tasks to the federal courts." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). In fulfilling its sovereign responsibility, the Legislature must take into account many legitimate factors that were not in play in 2011. To take just the most obvious example, "well over half of the State Assembly has turned over since 2011," App. 184–85 ¶ 19, and those new legislators will likely have different preferences in terms of district lines than did their predecessors in 2011. Each change to accommodate a new legislator will have "rippling effects" in other districts. App. 184 ¶ 18. Taking those preferences into account, while attempting to comply with the district court's order, will be challenging and time-consuming. After all, Plaintiffs do not dispute that the results that obtained under the 2002

court-drawn plan—where Republicans earned 50.50% of the vote for 58 seats in the first election and 50.00% for 60 seats in the second election, Stay Appl. 4—involved outcomes that, if replicated under a new map, would be unlikely to survive the district court's entrenchment test. Thus, not only would map-drawers need to accommodate the preferences of new legislators, they would need to seek to craft a more Democrat-friendly map than did the district court in 2002.

Fourth, Plaintiffs argue that Defendants' injuries are "self-inflicted," Opp. to Stay 18 (citations omitted), because Defendants asked the district court to enter an injunction. What Defendants requested below was an injunction to "allow the defendants' appeal to the Supreme Court to proceed immediately [under 28 U.S.C. § 1253], while avoiding a waste of resources devising a plan that is a temporary placeholder until the Supreme Court's ruling in this case." Dkt. 169:1–2.

Finally, Plaintiffs worry that if this Court grants Defendants' stay application—and assuming this Court does not issue a merits decision "until June 2018"—"candidate filing deadlines for the 2018 elections would be placed in jeopardy," and Act 43 may end up governing the 2018 elections, Opp. to Stay 3, 19–23. This argument only highlights the urgent need for a stay. Under the district court's injunction, the plan that Defendants must submit by November 1, 2017, need not become effective unless this Court *affirms* the district court on the merits. Stay Appl. 10, 27; App. 166. But under Plaintiffs' own projected June 2018 timeframe for a merits decision from this Court, any new plan would not be operative for the Spring 2018 candidate-filing deadlines. Indeed, it is unclear which

plan would govern the Spring 2018 candidate-filing period, given that Act 43 would remain enjoined, while the new remedial plan would not be in effect. The confusion this would cause for voters and candidates, Stay Appl. 26–27, provides a powerful reason to grant Defendants' stay application.

More generally, if this Court agrees with Defendants that the district court's decision is unlikely to survive this Court's review, then the creation and approval of a new statewide map by November 1, 2017, will have no impact on the 2018 election. If this Court upholds Act 43 as entirely lawful, any new map will be a nullity. Stay Appl. 24–26. And even if this Court holds that Act 43 is unlawful (or could be unlawful, upon a further showing by Plaintiffs on remand), but announces a different approach than the district court did, then in all fairness the Legislature must be permitted to draft a map that would comport with *this* Court's guidance. Stay Appl. 25–26. However long it would take the Legislature to draw this new map once it knows what the rules of the road are, the Legislature should not be forced to engage in the redrafting process until it has the benefit of this Court's views on this highly uncertain area.[2]

III. Plaintiffs' Procedural Objections Are Entirely Meritless

In an effort to avoid a ruling on Defendants' Stay Application, Plaintiffs raise two procedural objections, both resting on a misunderstanding of the law and well-established stay-application procedures.

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[2] Plaintiffs' alleged concern about the 2018 election's impact on the composition of the State Senate, Opp. to Stay 23, is misplaced, given that Plaintiffs have never even alleged that the State Senate lines are unlawful in any respect.

Plaintiffs first argue that because Defendants did not move for a stay of the district court's remedial order below, Opp. to Stay 11–14, Defendants have not complied with the exhaustion requirement of Supreme Court Rule 23.3. But Rule 23.3 merely requires that the movant has "first sought" relief from the lower court before seeking a stay from this Court. Defendants easily satisfied this requirement by seeking *precisely* the same remedy below in their post-verdict remedial brief that they now ask from this Court: not having to draw any legislative plans until this Court rules on the merits of their appeal. *See, e.g.*, Dkt. 169:9–10 ("Given the uncertainty in the governing legal standard, it would waste judicial and legislative resources to proceed with replacement plans before the Supreme Court has ruled . . . . Even if the Supreme Court establishes a standard for partisan gerrymandering, such a ruling would likely require changes to any remedial map . . . . A ruling to this effect is supported by the reasoning employed by Justice Brennan in granting a stay of an injunction ordering New Jersey to draw new congressional districts [in] *Karcher v. Daggett*, 455 U.S. 1303, 1304 (1982) (Brennan, J., in chambers)."); Dkt. 173:1–2 ("The novelty of this Court's decision makes it extremely likely that the Supreme Court will either reverse entirely or provide substantial additional guidance, which guidance would then shape whatever new plan the Legislature would adopt (and this Court would thereafter review). It would thus be a needless waste of judicial and State resources to require the creation of a new plan before the Supreme Court acts.").

As even Plaintiffs concede, the district court "construed Appellants' remedial briefing as a request for the court to stay any remedial holding," Opp. to Stay 11 n.2, and then "rejected Appellants' argument[s]," Opp. to Stay 1. This concession is both necessary and fatal to Plaintiffs' position; the district court unambiguously ruled that it would not "stay [its] judgment pending appeal, *as the defendants request.*" App. 165 (emphasis added). There is no rule or caselaw requiring Defendants to go through the "futile" exercise, *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers), of asking the district court to issue a stay of its remedial opinion, in the face of its clear holding that Defendants' already-filed remedial brief *was* a stay request, which the court unambiguously denied (and obviously would deny again if renewed).

Plaintiffs are also wrong to suggest, Opp. to Stay 13, that Defendants' submission of a declaration with their stay application, which was not presented below, is somehow improper. "Affidavits are not necessary [for stay applications], but may be attached to the application if thought desirable." Stephen M. Shapiro *et al.*, *Supreme Court Practice* 890 (10th ed. 2013); *see Foster v. Chatman*, 136 S. Ct. 1737, 1746 n.3 (2016) (citing Shapiro with approval). Plaintiffs cite no rule, practice manual, or any other authority calling into question the common approach of submitting new affidavits with stay applications before this Court. *Compare* Reply App. to Stay Appl., *West Virginia v. EPA*, No. 15A773 (U.S. 2016) (attaching nine new declarations, which were not submitted to the court below), *with West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (granting the stay application).

In any event, the declaration here merely supports the uncontroversial proposition that drafting a new map will, of course, take time and resources. The district court took this obvious fact into account, acknowledging Defendants' argument that "enacting a new plan" would be a "drain on legislative resources and energy," App. 165, but finding that other factors outweighed this consideration. The question before this Court is the same one that the district court faced: whether to force Defendants to spend unrecoverable sovereign resources to create a new map, when it is exceedingly likely that their efforts will be futile.[3]

CONCLUSION

Assuming this Court does not grant Defendants' respectful request for summary reversal before the end of this Term, this Court should issue a stay pending resolution of this direct appeal.

[3] Plaintiffs are also wrong to argue that the district court called into doubt the credibility of the declarant, Adam Foltz. Opp. to Stay 12. The district court relied extensively on Foltz's testimony in outlining the facts of how the Act 43 process occurred, App. 7–15, which is the same type of information contained in Foltz's declaration before this Court. While the district court observed that it had "less confidence" in Foltz's testimony than in the testimony of Tad Ottman and that it would specifically note any such "areas of testimony" in its opinion, App. 64 n.177, Plaintiffs do not cite *any* instance where the district court discounted Foltz's testimony on any subject matter relevant to his declaration.

Respectfully submitted,

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June 8, 2017

CERTIFICATE OF SERVICE

I, Misha Tseytlin, a member of the bar of this Court, certify that on June 8, 2017, I served a paper copy of the Reply In Support Of Application for Stay Pending Resolution of Direct Appeal on the listed counsel of record by Federal Express Priority Overnight, and a courtesy PDF copy via email, and that all persons required to be served have been served.

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Dated: June 8, 2017

Misha Tseytlin

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