No. 21A471

IN THE

Supreme Court of the United States

THE WISCONSIN LEGISLATURE, *et al.*,

Applicants,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Respondents.

ON APPLICATION FOR STAY AND INJUNCTIVE RELIEF AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE AND BRIEF FOR SENATOR LENA C. TAYLOR AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Senator Lena C. Taylor respectfully moves the Court under Supreme Court Rule 37.2(b) for leave to file the attached brief as amicus curiae in support of neither party.

IDENTITY AND INTEREST OF MOVANT

Senator Lena Taylor is a Wisconsin state senator representing District 4.[1] She is a lifelong resident of Milwaukee, and she has been a member of the Wisconsin State Legislature since 2003. Her current Senate district is majority-Black, and it is made up of three majority-Black Assembly districts: 10, 11, and 12.

Senator Taylor is African American. She is a member of the NAACP, the National Black Caucus of State Legislators, and the National Organization of Black Elected Legislative Women. She has an interest in the proper application of the Voting Rights Act to protect her own voting rights and those of her constituents. Senator Taylor is also planning to run for reelection in 2024. She therefore has a strong interest in the district boundaries under which she and her colleagues must run. She also has a strong interest in the administration of a nondiscriminatory election system that gives all

1. In accordance with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the Applicants and for all but one of the Respondents have consented. Counsel for the Respondent Wisconsin Elections Commission has indicated that the Commission will take no position on the filing of this or any other amicus brief.

Wisconsin voters an equal opportunity to participate in the political process and to elect candidates of their choice.

Senator Taylor's proposed brief analyzes the Wisconsin Supreme Court's application of the Voting Rights Act from her unique vantage point as an experienced Black legislator. She is concerned that the legislative map adopted by that court dilutes the voting strength of Black voters in Wisconsin.

Neither Senator Taylor nor any other sitting Black legislator was a party to the proceedings in the state supreme court that give rise to the Legislature's Application.

REASONS TO GRANT LEAVE TO FILE AMICUS CURIAE BRIEF

This case presents important questions about the application of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Senator Taylor is a Black legislator whose views went unheard in the proceedings below, both sides of which were dominated by partisan interests. Because she offers a perspective on the Voting Rights Act that is focused where it should be—on Black voters—her brief as amicus curiae will materially help the Court as it decides how to resolve the Legislature's application for an emergency stay and other relief.

The Court should therefore grant this motion for leave to file the attached amicus brief.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE SENATOR LENA C. TAYLOR IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE

Senator Lena Taylor is a Wisconsin state senator representing District 4.[1] She is a lifelong resident of Milwaukee, and she has been a member of the Wisconsin State Legislature since 2003. Her current Senate district is majority-Black, and it is made up of three majority-Black Assembly districts: 10, 11, and 12.

Senator Taylor is African American. She is a member of the NAACP, the National Black Caucus of State Legislators, and the National Organization of Black Elected Legislative Women. She has an interest in the proper application of the Voting Rights Act to protect her own voting rights and those of her constituents. Senator Taylor is also planning to run for reelection in 2024. She therefore has a strong interest in the district boundaries under which she and her colleagues must run. She also has a strong interest in the administration of a nondiscriminatory election system that gives all Wisconsin voters an equal opportunity to participate in the political process and to elect candidates of their choice.

Senator Taylor's brief analyzes the Wisconsin Supreme Court's application of the Voting Rights Act

1. In accordance with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the Applicants and for all but one of the Respondents have consented. Counsel for the Respondent Wisconsin Elections Commission has indicated that the Commission will take no position on the filing of this or any other amicus brief.

from her unique vantage point as an experienced Black legislator. She is concerned that the legislative map adopted by that court dilutes the voting strength of Black voters in Wisconsin.

SUMMARY OF THE ARGUMENT

The Supreme Court of Wisconsin's voting-rights analysis gets it half right. On the one hand, the court correctly determined that there is a "strong basis in evidence" to suggest that the Voting Rights Act requires the State to create opportunity districts for Black voters. Much of that evidence was undisputed. There was no dispute that it is possible to draw seven majority-Black Assembly districts in the Milwaukee area—a number that is roughly proportional to the state's Black voting-age population. There was no dispute that Black voters in Wisconsin are politically cohesive. And there was little dispute that White voters in Wisconsin vote sufficiently as a bloc to enable them usually to defeat Black-preferred candidates. That evidence was more than enough to justify the creation of majority-Black districts.

On the other hand, the supreme court's conclusion—with no analysis whatsoever—that the Governor's map complies with the Voting Rights Act is clearly erroneous. The very same evidence on which the court relied for its finding that voting in Milwaukee is racially polarized shows that Black voters would *not* be able to nominate their preferred candidates in at least one of the bare-majority-Black districts. It would be a reliable *Democratic* district, to be sure, but it would not provide Black voters with the opportunity that the Voting Rights Act requires. And neither would the Wisconsin Legislature's proposed map.

This Court should therefore grant the Applicants' motion for a stay to prevent the Governor's map from taking effect, but it should not grant the Applicants' request for an injunction imposing the Legislature's dilutive map. Instead, the Court should either issue an injunction or stay pending appeal that would permit Wisconsin's 2022 state legislative elections to proceed under the existing map or summarily reverse and remand this matter to the Supreme Court of Wisconsin for further proceedings before the State's August 9 primaries.

ADDITIONAL BACKGROUND

Senator Taylor does not dispute the general background and procedural history set out in the Application. She offers additional background, however, to highlight the voting-rights-specific evidence in the record before the Wisconsin Supreme Court.

Once Wisconsin's Governor vetoed the Legislature's redistricting bills, the state supreme court solicited redistricting proposals from all parties in the original action that had been filed in that court in anticipation of an impasse. *See Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469 (Wis. 2021). The court also announced the criteria that it would use to choose among them. Those included compliance with the United States Constitution, the Voting Rights Act of 1965, and the Wisconsin Constitution. *Id.* at 643. The court also said that it would "confine any judicial remedy to making the minimum changes necessary in order to conform the existing congressional and state legislative redistricting plans to constitutional and statutory requirements." *Id.*

The court received state-legislative map proposals from six parties: (1) the so-called BLOC intervenors;[2] (2) the Citizen Mathematicians and Scientists;[3] (3) Wisconsin's Governor; (4) the so-called Hunter intervenors[4]; (5) Senator Janet Bewley;[5] and (6) the Wisconsin Legislature. App. 9-10. The parties submitted expert reports along with their proposals, and some parties submitted expert response and reply reports as well.[6]

Most of the expert reports focused on the criterion that the supreme court said was the most important: whether a proposed map makes the "least changes" from the existing districts. Only three experts said anything of substance related to the Voting Rights Act.

The Governor's expert, Professor Jeanne Clelland, showed in her opening report that the Governor's map

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2. The BLOC intervenors include the organizations Black Leaders Organizing for Communities, Voces de la Frontera, and League of Women Voters of Wisconsin, along with Cindy Fallona, Lauren Stephenson, and Rebecca Alwin. App. 10 n.5.

3. The Citizen Mathematicians and Scientists include Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha. App. 9 n.2.

4. The Hunter intervenors-petitioners include Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim. App. 9 n.4.

5. Senate Minority Leader Janet Bewley intervened on behalf of the Senate Democratic Caucus. App. 10 n.6.

6. Documents in the original action before the Wisconsin Supreme Court are available on the court's website here: https://www.wicourts.gov/courts/supreme/origact/2021ap1450.htm.

includes seven reasonably compact majority-black districts. App. 178. She did not perform a racial bloc voting analysis or a performance analysis of the Governor's map or any other. The bulk of her opening report and later reports focused on the least-change issue.

The BLOC intervenors' expert, Professor Loren Collingwood, performed a racial bloc voting analysis that revealed a pattern of racially polarized voting between Black and White voters in the Milwaukee area.[7] He found racially polarized voting in seven of eight contests analyzed, with high rates of political cohesion by Black voters and sufficient opposition by White voters to defeat the Black-preferred candidates in most cases. Collingwood Report 23.

Professor Collingwood also conducted a performance analysis of the BLOC intervenors' proposed Assembly map, which, like the Governor's map, contains seven majority-black districts. *Id.* at 23-27. The performance analysis focused on the 2018 Democratic gubernatorial primary election which included a Black candidate (Mahlon Mitchell), who was also the Black-preferred candidate, against now-Governor Evers and eight other White candidates. Professor Collingwood found that Mitchell received an outright majority of the votes in six of the seven majority-Black Assembly districts in the BLOC intervenors' proposed map. *Id.* at 26. In the seventh district, proposed District 10, Mitchell won a plurality of

7. Professor Collingwood's initial report (hereinafter "Collingwood Report") appears in the appendix to the BLOC intervenors' December 15 merits brief, which is available on the Wisconsin Supreme Court's website here: https://www.wicourts.gov/courts/supreme/origact/docs/appbriefctobloc.pdf.

around 46 percent of the vote.[8] Professor Collingwood did not separately analyze the performance of the BLOC intervenors' proposed Senate map.

In his rebuttal report, Professor Collingwood extended his performance analysis to the other five proposed Assembly maps. For the Governor's proposed map, Professor Collingwood found that Mitchell carried proposed District 10 with only 41 percent of the vote, and he therefore concluded that the Governor's proposed Assembly map—even though it has seven majority-Black Assembly districts—offers only six districts in which Black voters "have a realistic opportunity to elect candidates of their choice."[9] Collingwood Rebuttal at 5-6, 15. Turning to the Legislature's map, Professor Collingwood found that Mitchell carried proposed District 10 with only 39 percent of the vote, and he therefore concluded that the Legislature's map offers only five Black opportunity districts. *Id.* at 10-12, 15. Professor Collingwood concluded that the BLOC intervenors' proposed Assembly map contains seven opportunity districts—but he only arrived at that conclusion through some creative math. *Id.* at 14-15. In order to get Mitchell over the 50-percent

8. Professor Collingwood's initial report overestimated Mitchell's performance in District 10, but he corrected the error in an addendum to his rebuttal report. Professor Collingwood's Rebuttal Report (hereinafter Collingwood Rebuttal) appears in the appendix to the Bloc intervenors' December 30 response brief, which appears on the Wisconsin Supreme Court's website here: https://www.wicourts.gov/courts/supreme/origact/docs/appctobloc2.pdf.

9. Professor Collingwood only reported the result of his performance analysis for proposed District 10 in the Governor's map. He did not report the vote-share that Mitchell would have received in any of the Governor's other proposed Assembly districts.

threshold in the BLOC intervenors' proposed District 10, Professor Collingwood simulated a head-to-head contest by reallocating the votes that were not cast for either Mitchell or Evers. *Id.* at 15 n.3. He assumed that, in a hypothetical head-to-head contest, sixteen percent of the voters who supported the eight White candidates would have voted for Mitchell, which is just enough to raise his vote share in proposed District 10 to about 51 percent. *Id.*

The Legislature's expert, Dr. John Alford, focused mainly on the least-change issue, but he also conducted a performance analysis of the Legislature's proposed Senate and Assembly maps.[10] Dr. Alford found that Mitchell carried four proposed majority-Black districts with a clear majority of the votes.[11] Dr. Alford also found that Mitchell won a plurality of about 47 percent in proposed majority-Black District 18 and won a plurality of around 39 percent of the votes in proposed plurality-Black District 10. Alford Reply 8. Dr. Alford also analyzed the 2018 Democratic primary for Lieutenant Governor, which featured a head-to-head contest between a Black candidate and a White candidate. *Id.* That contest was not competitive and likely not polarized, however, because the Black candidate carried every proposed district

10. Dr. Alford's initial report (hereinafter Alford Report) appears on the Wisconsin Supreme Court's website here: https://www.wicourts.gov/courts/supreme/origact/docs/expertrepalford.pdf.

11. Dr. Alford's initial report overestimated Mitchell's performance in all districts, but he corrected the errors on page 8 of his reply report. Dr. Alford's Reply Report (hereinafter "Alford Reply") is available on the Wisconsin Supreme Court's website here: https://www.wicourts.gov/courts/supreme/origact/docs/expertrepalford3.pdf

with more than 80 percent of the votes. *Id.* Based on his performance analysis, Dr. Alford concluded that all six proposed plurality- or majority-Black Assembly districts and both proposed majority-Black Senate districts in the Legislature's map would perform for Black voters. Alford Report 9.

In its opinion selecting the Governor's map, the supreme court relied on Professor Collingwood's racial bloc voting analysis for its conclusion that there is a strong basis in evidence to suggest that the Voting Rights Act requires the State to create opportunity districts for Black voters, but it mentioned neither Professor Collingwood's nor Dr. Alford's performance analysis. App. 30-32, 35.

ARGUMENT

I. The Wisconsin Supreme Court had a strong basis in evidence for concluding that the Voting Rights Act requires Black opportunity districts in Milwaukee.

For decades, this Court has recognized that a State may draw districts with racial considerations as the predominant factor if it has "a strong basis in evidence" or "good reasons" to believe that the Voting Rights Act requires the State to do so. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). This standard "gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017)).

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court identified three threshold conditions for proving vote dilution under Section 2 of the Voting Rights Act. First, a minority group must be "sufficiently large and geographically compact to constitute a majority" in a reasonable compact legislative district. *Id.* at 50. Second, the minority group must be "politically cohesive." *Id.* at 51. And third, the White majority must "vote[] sufficiently as a bloc" to enable it usually to "defeat the minority's preferred candidate." *Id.* "If a State has a good reason to think that the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district.… But if not, then not." *Cooper*, 137 S. Ct. at 1470 (citation omitted).

Here, no party presented specific evidence that race was the predominant factor in drawing the majority-Black districts in the Governor's map or any other. In fact, there was substantial expert testimony about the various maps' *adherence* to traditional redistricting criteria such as compactness, core retention, and communities of interest, because those were among the factors that the Wisconsin Supreme Court had previously identified as important to its choice among the maps. The Wisconsin Supreme Court made no finding that race did or did not predominate over those factors, but it proceeded nonetheless to consider whether there are good reasons to believe that Section 2 requires race-based redistricting here.[12]

12. The Legislature argues strenuously that the Black population percentages in the seven majority-Black districts in the Governor's map—all of which are just above 50 percent—establish racial predominance without more. But this Court has never held that districts drawn to establish the first *Gingles* precondition, *i.e.*, whether the minority group can constitute a majority in a single-

No party disputed that the first and second *Gingles* preconditions were satisfied, and there was little dispute over the third. App. 29-32. The BLOC intervenors' expert, Professor Collingwood, performed a racial bloc voting analysis that revealed a pattern of racially polarized voting between Black and White voters in the Milwaukee area that resulted in the defeat of Black-preferred candidates in most cases. App. 30. The court "received little in the way of alternative data or analysis to counter" Professor Collingwood's analysis. App. 30-31. The Legislature's expert, Dr. John Alford, stated that he had "serious doubts" about whether the third *Gingles* precondition was met in Milwaukee County, but he did not conduct any racial bloc voting analysis of his own to dispute Professor Collingwood's findings. App. 31 n.27. The Wisconsin Supreme Court could thus reasonably conclude, based on this record, that "there are good reasons to think all three *Gingles* preconditions are satisfied." App. 32.

The Application does not challenge that basic conclusion. Instead, the Legislature faults the court for its determination that "there are good reasons to believe a seventh majority-Black district is needed to satisfy the VRA." Application 7. That dispute boils down to an argument about proportionality.

Proportionality, as that term is used here, "links the number of majority-minority voting districts to the minority members' share of the relevant population."

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member district, necessarily subordinate traditional redistricting criteria to racial considerations. This Court need not decide that issue here, however, because the Wisconsin Supreme Court considered whether compliance with the Voting Rights Act justifies race-based redistricting here and properly concluded that it does.

Johnson v. De Grandy, 512 U.S. 997, 1014 (1994). This Court has explained that the concept of equality that appears in the text of Section 2 means that the Voting Rights Act cannot require a number of majority-minority districts that exceeds rough proportionality with a minority group's share of the population. *Id.* Though this Court has never precisely defined "rough proportionality," the Legislature contends that seven districts constitute reversible error here whereas six do not.

The Legislature does not dispute the supreme court's findings that Black Wisconsinites make up between 6.1 and 6.5 percent of the relevant population and that precise proportionality would therefore require between six and seven Assembly districts. App. 34. Instead, its argument presumes that rough proportionality means the maximum number of majority-minority districts possible *without exceeding proportionality*. But this Court has never so held, and the only circuit to have considered the issue has expressly rejected such an interpretation. *See Stabler v. Thurston Cnty., Neb.*, 129 F.3d 1015, 1022 (8th Cir. 1997).

Under these circumstances, the Wisconsin Supreme Court had good reasons to believe that the Voting Rights Act might require seven districts here.

II. The record does not support the Wisconsin Supreme Court's conclusion that the Governor's proposed map complies with the Voting Rights Act.

Once the Wisconsin Supreme Court determined that the Voting Rights Act could require seven majority-Black districts in Milwaukee, its analysis ended there. It made

no determination of whether the Governor's map—or any other—contains seven Assembly districts with an *effective* Black majority. That was error. This Court has repeatedly explained that even majority-minority districts can violate the Voting Rights Act if they do not contain a sufficiently large majority to provide minority voters with a realistic opportunity to elect candidates of their choice. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 802 ("55% BVAP was necessary for black voters to have a functional working majority"); *LULAC v. Perry*, 548 U.S. 399, 428-429 (2006) (it is "possible for a citizen voting-age majority to lack real electoral opportunity"); *see also, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 858 (E.D. Wis. 2012) (three-judge district court) (holding that a district in which Latinos were 60.52 percent of the voting-age population did not create "a functioning majority-minority district for Milwaukee's Latino community").

Here, there is no evidence whatsoever that the Governor's Assembly map contains seven opportunity districts. The BLOC intervenors' expert, Professor Collingwood, was the only expert to provide any performance analysis of the Governor's map, and he concluded that it has only six opportunity districts because the seventh district will not perform for Black voters. But even Professor Collingwood's analysis falls short of what is required here because his report only presents an analysis of one Assembly district in the Governor's map. He does not establish that the other six districts will perform for Black voters, and he provides no analysis of the proposed Senate districts in the Governor's map. The latter omission is crucial because the non-performing Assembly district in the Governor's map—proposed District 10—is nested within proposed Senate District 4—Senator Taylor's

district. There is thus no evidence that Senate District 4 remains an opportunity district under the Governor's map.

The BLOC intervenors' seven-district map fares no better. Although Professor Collingwood analyzed all seven proposed majority-Black Assembly districts and concluded that all seven would perform for Black voters, that conclusion is based on an untenable assumption. He was only able to conclude that proposed District 10 would perform for Black voters by reallocating the votes that were not cast for the top two candidates in the 2018 gubernatorial primary. And, critically, he reallocated some votes cast for White candidates to the Black-preferred Black candidate in order to get that candidate over the 50-percent threshold of victory in a simulated two-person race. But that reallocation process is inconsistent with long-accepted procedures for interpreting racial polarized voting analyses in the context of multi-candidate elections:

> When there are candidates from more than one racial or ethnic group and at least two candidates are of the same race or ethnicity, then determining racial polarization or minority cohesion requires the analyst, in general, to look at both the combined votes for the set of minority candidates and the combined votes for the set of all nonminority candidates as well as the estimates of minority and nonminority votes for each candidate.

Bernard Grofman, Lisa Handley, and Richard Niemi, *Minority Representation and the Quest for Voting Equality* 99 (1992). In other words, Professor Collingwood should have allocated all votes cast for White candidates

to Governor Evers, which would have given the governor enough votes to prevent the Black-preferred candidate from carrying BLOC's proposed District 10 in a simulated two-person race. This means that the BLOC intervenors' Assembly map, like the Governor's Assembly map, contains at most six Black opportunity districts and that the BLOC intervenors' Senate map, like the Governor's Senate map, may not contain two Black opportunity districts.

The Wisconsin Supreme Court's failure to consider the performance of the proposed maps for Black voters undermines its reliance on the Voting Rights Act to select the Governor's map. Although it had a strong basis for believing that the Voting Rights Act might require the State to draw seven Black opportunity districts for the State Assembly, it had no basis for concluding that the Governor's map did so. This Court should therefore stay implementation of the Governor's potentially dilutive map.

III. The Legislature's proposed map would violate the Voting Rights Act.

The Legislature's proposed map would dilute Black voting strength because it contains only four proposed Assembly districts that would perform for Black voters. Professor Collingwood's analysis shows that the Black-preferred candidate in 2018's multi-candidate gubernatorial primary carried proposed District 10 with only about 39 percent of the votes. Professor Collingwood correctly concluded that proposed District 10 in the Legislature's map is not an opportunity district for Black voters. The Legislature's expert, Dr. Alford, concluded that the Legislature's map has six opportunity districts,

but his conclusion is infected by the same mistake that undermines Professor Collingwood's conclusion about the BLOC intervenors' map: he ignored the significance of the votes for the eight White candidates other than Governor Evers.

Dr. Alford's performance analysis of the Legislature's map shows that neither proposed District 10 nor proposed District 18 would perform for Black voters. Like Professor Collingwood, Dr. Alford found that the Black-preferred candidate in 2018's multi-candidate gubernatorial primary carried proposed District 10 with only about 39 percent of the votes. But Dr. Alford also found that the Black-preferred candidate carried District 18 with only about 47 percent of the votes. Given that White candidates not preferred by Black voters won a majority of the votes in those elections, the record does not establish that either district would perform for Black voters.

This Court should therefore deny the Legislature's request for an injunction requiring the State to implement the Legislature's map pending this appeal.

CONCLUSION

Senator Taylor respectfully asks this Court to grant the Applicants' request for a stay. Doing so will prevent the Governor's potentially dilutive map from taking effect.

But elections must proceed. Senator Taylor therefore requests that the Court either summarily reverse and remand the case to the Wisconsin Supreme Court while there is still time for further proceedings before the State's August 9 primaries or issue an injunction or stay pending

appeal that would leave the existing districts in place for the upcoming elections—a regrettable but permissible result given the circumstances here. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Pileggi v. Aichele*, 843 F. Supp. 2d 584, 594-95 (E.D. Pa. 2012) (collecting cases).

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