STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Anthony D. Russomanno
Assistant Attorney General
russomannoad@doj.state.wi.us
608/267-2238
FAX 608/294-2907

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(Via email file and service)

Ms. Sheila T. Reiff
Clerk of Supreme Court
110 East Main Street, Suite 215
Madison, WI 53701-1688

Re: *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450, Response to Legislature's motion for stay

Dear Ms. Reiff:

The Governor provides the following response opposing the Wisconsin Legislature's motion for a stay of this Court's March 3, 2022, decision instituting Wisconsin's new districts. The Legislature's motion is flawed on multiple levels and should be denied. It is premised on the wrong framework and, even taken on its own terms, points to no proper basis for a stay. To the contrary, the Legislature's proposal is that an indisputably unconstitutional statewide map should remain in force based on an already-rejected theory about a few districts. In the meantime, the Wisconsin Elections Commission has made clear that it needed the maps in place on March 1 to administer in an orderly way the upcoming March and April election deadlines, which begin on March 15. It already is more than a week past the date given by the Commission, and there is no justification for inserting additional uncertainty into that expedited process.

To start, as a matter of Wisconsin law, the Legislature's motion begins from the wrong proposition. In its March 3rd decision, this Court did not simply issue an ordinary opinion that is then subject to ordinary appellate review—it is that scenario where the stay-pending-appeal standards might make sense, if the factors are met. Rather, here, the Court acted for the State of Wisconsin. As the U.S. Supreme Court has recognized, redistricting is the states' province and can be accomplished either

by the political branches or the state courts. Both sets of actors are a state's "agents of apportionment" "designing those districts." *Growe v. Emison*, 507 U.S. 25, 36 (1993). Where this Court is compelled by an impasse to redistrict, the resulting maps are not subject to ordinary stay standards, particularly where a purported stay motion functions as a request that the Court summarily reverse its own decision and abandon a timeline fundamental to these proceedings. The Legislature already had the chance to make its arguments, and a majority of this Court correctly ruled that they fell short under its established districting criteria and the law. The Legislature's motion should be denied on this basis alone.

Regardless, none of the factors recited by the Legislature favor a stay.

First, a stay of this Court's maps would mean that concededly unconstitutional statewide maps would remain in place at the very time that the Wisconsin Elections Commission and municipalities are doing their work to prepare for an orderly election process. That makes no sense under multiple factors that ask whether there is irreparable injury to others, to the parties, and to the public at large. It would impose a statewide constitutional problem based on already-rejected contentions about a few districts. From a balancing of interests perspective, it is not a close call.

Indeed, the U.S. Supreme Court has stated and demonstrated its immense reluctance to stay state-drawn maps at this late stage in the 2022 election process. For example, on March 7, the U.S. Supreme Court denied a stay pending disposition of a certiorari petition in the North Carolina congressional redistricting matter, *Moore v. Harper*, No. 21A455. In his concurrence, Justice Kavanaugh explained that the Court would not entertain the "extraordinary interim relief" of staying a state-drawn map under the *Purcell* principle. He added that it was "too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections."[1] Also on March 7, in *Toth v. Chapman*, No. 21A457, the U.S. Supreme Court denied an application asking it to invalidate congressional maps drawn by the Pennsylvania Supreme Court.[2] And a full month earlier, the U.S. Supreme Court reached a similar conclusion in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), where it

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[1] *Moore v. Harper*, No. 21A455, Order (Mar. 7, 2022), *available at* https://www.supremecourt.gov/opinions/21pdf/21a455_5if6.pdf.

[2] *Toth v. Chapman*, 21AP457, Order (Mar. 7, 2022), *available at* https://www.supremecourt.gov/orders/courtorders/030722zr_p86a.pdf.

stayed a federal panel's decision on the premise "that federal district courts ordinarily should not enjoin state election laws in the period close to an election" under *Purcell*.

Second, on the merits, the Legislature takes issue with this Court's analysis of the Voting Rights Act (VRA). But it is unlikely to succeed in persuading the U.S. Supreme Court that this Court erred. For starters, it is doubtful that the Legislature (and the individual voters who joined its application at the U.S. Supreme Court) have Article III standing to press an Equal Protection Clause challenge there. Further, regardless of the role that race may or may not have played in any proposal submitted to this Court (and all proposals accounted for race in seeking to ensure compliance with the VRA), it is simply untrue that race was a predominant factor in *this Court's* own independent decision about which map to adopt: as this Court made clear, the predominant factor in its own analysis was making the least changes, and it considered the VRA only while ensuring that the map it had decided to adopt was consistent with federal law. Beyond all that, this Court's legal reasoning was well-justified under cases including *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which require only "good reasons" for concluding that a districting plan is required for compliance with the VRA. Finally, there was overwhelming evidence before this Court—which the Legislature largely ignores—that seven majority-minority districts were *in fact* required by the VRA, and that the Legislature's own proposed plan violated the VRA by improperly packing Black voters and reducing the total number of majority-minority districts in ways that risked undermining minority political opportunity.

Accordingly, the Legislature is unlikely to succeed in obtaining review or reversal of this Court's decision, and the entry of a stay by this Court would be injurious to sound election administration for all voters in Wisconsin.

Sincerely,

Anthony D. Russomanno
Assistant Attorney General

ADR:jrs

cc: All parties via electronic mail