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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 Congressmen's motion for stay

Dear Ms. Reiff:

The Governor provides the following response opposing the Congressmen's motion for a stay of this Court's March 3, 2022, decision instituting Wisconsin's new congressional districts.

The Congressmen's motion should be denied. This Court conducted thorough proceedings—over a five-month period—to adopt a new congressional map following an impasse. In reaching its decision, the Court considered and properly rejected every contention set forth here by the Congressmen. In their latest filing, the Congressmen come nowhere close to making a showing that supports a stay of the Court's decision pending the disposition of their filing at the U.S. Supreme Court. Nor do they make a showing that would authorize renewed consideration of a second map that this Court already held to have been submitted in violation of its own procedural rules.

First, the Congressmen are exceedingly unlikely to prevail on the merits. The Congressmen first insist that this Court somehow violated the Due Process Clause of the U.S. Constitution by applying a legal standard that the Congressmen themselves vigorously advocated (until they finally saw they could not satisfy it). That argument does not withstand scrutiny. Even if they have Article III standing to press this exotic due process claim (which is doubtful), the Congressmen suffered no violation of their

rights from the Court's reasoned and reasonable interpretation of its own state law precedent. There is simply no force whatsoever to the assertion that the Due Process Clause forbade this Court's finding that the core-retention metric was the strongest proxy for the least change standard adopted on November 30, 2021. Moreover, as the record confirms, the Congressmen's position is flagrantly at odds with their own repeated filings, not to mention the filings from every other intervenor. From the outset, everybody involved appreciated that "core retention"—as the classic, defining metric of "least change"—was fundamental (and likely dispositive) under this Court's November 30 Order. The Congressmen's belated realization that their maps would fail under their own standard does not give rise to a cognizable constitutional injury. Indeed, it is particularly galling for the Congressmen to invoke due process when *they* are the ones who tried to help themselves to the submission of two alternative maps (whereas every other party was permitted by this Court to submit only a single map).

This leaves only the Congressmen's equally vacuous assertion that the map adopted by this Court violates the one-person/one-violate principle. Of course, as this Court knows well, the Congressmen explicitly (and twice) stated otherwise in their response brief. And when the Congressmen finally raised this issue in their reply brief, it appeared in a lone footnote without argument or citation. Those facts alone make the issue an unlikely candidate for U.S. Supreme Court intervention. But there is more. No court has ever stricken down on this basis a map with a similar plus-or-minus-one deviation. Further, the Governor had perfectly legitimate and sensible reasons for the trade-offs embodied in his map. And this Court rightly held that core retention legitimately justifies the map's minor deviation from perfect population equality. Given all that, the Congressmen are decidedly unlikely to prevail.

Second, the Congressmen's suggestion that this Court should stay its decision because the U.S. Supreme Court is likely to stay the map has no basis. The U.S. Supreme Court has shown 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*,

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

No. 21A457, the U.S. Supreme Court denied an application asking it to invalidate congressional maps drawn by the Pennsylvania Supreme Court. Notably, those petitioners also raised a one-person/one-vote argument based on an asserted plus-or-minus one deviation from perfect equality, yet the Court did not intervene.[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 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*. In light of these recent rulings, the U.S. Supreme Court is unlikely to upend Wisconsin's maps at this late stage.

Finally, the Congressmen's proposal that this Court stay its decision (and start over with new maps) is untenable, prejudicial, and in direct conflict with the orders governing the recently completed proceedings. This Court received extensive briefing on the need to reach a decision on or around March 1, 2022, to avoid disrupting administration of the upcoming election. Consistent with that briefing, the Court issued its decision on March 3, 2022. Were the Court to stay that decision and start over, it would spread uncertainty and confusion about the 2022 election. It would also prejudice candidates (who need to know where they can run and who their voters will be) and election officials (who need to update voter databases and launch other preparation for the rapidly approaching partisan primary election cycle). In these circumstances, the balance of equities decisively cuts against granting a stay.

For these reasons, the Congressmen's motion should be denied.

Sincerely,

Anthony D. Russomanno
Assistant Attorney General

cc: All parties via electronic mail

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[2] *Toth v. Chapman*, U.S. Supreme Court, No. 21A457, Emergency Application To Justice Alito For Writ Of Injunction at 5, 22–33, *available at* http://www.supremecourt.gov/DocketPDF/21/21A457/215083/20220228094055298_Toth%20v.%20Chapman%20Emergency%20SCOTUS%20Filing%20FINAL.pdf.