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March 9, 2022

VIA ELECTRONIC MAIL & HAND DELIVERY

Wisconsin Supreme Court
c/o Sheila Reiff, Clerk
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: Johnson v. Wisconsin Elections Commission, Case No. 2021AP1450-OA

Dear Ms. Reiff:

Pursuant to the Court's March 7, 2022 Order, Intervenor-Respondent Janet Bewley, Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus ("Senate Democrats"), hereby submits this letter brief in opposition to the Wisconsin Legislature's motion for a stay pending appeal.

The Senate Democrats join the letter brief submitted by Governor Tony Evers in its entirety. We write separately to underscore that the Legislature has failed to make a strong showing that it is likely to prevail on the merits of the appeal. *See Waity, et al. v. LeMahieu, et al.* 2022 WI 6, ¶ 49, 400 Wis. 2d 356.

As noted by Governor Evers, it is not clear that the standards for a stay of a judicial decision are appropriate to apply to this inherently legislative action of apportionment, performed by the Court only by necessity to "fill[] the gap" following failure of the legislative process. *Johnson, et al. v. Wisconsin Elections Commission, et al.*, 2022 WI 14, ¶ 2, ___ Wis. 2d ___. But if the Court wishes to consider those standards here, given alone the standing concerns and unlikelihood that the petition will be granted, as identified by the Governor, the Legislature has demonstrated no more than a mere possibility of success on the merits of its appeal to the United States Supreme Court. A mere possibility of success provides an insufficient basis for a stay pending appeal. *Id.* at ¶ 54, quoting *Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995).

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Moreover, in considering the likelihood of success on the merits, a key factor is whether the legal questions involved in the case are novel, or have previously been addressed by the appellate courts. *Id.* at ¶ 53. The Legislature claims that this Court incorrectly applied Voting Rights Act and Federal Equal Protection Clause law to the Senate and Assembly maps selected by the Court. They have made no novel legal arguments in those areas of law, however, either before the Court selected the maps or since, and the Court properly rejected those arguments in its March 1, 2022 decision, based on well-developed and well-settled law. *Johnson*, 2022 WI 14, ¶¶ 38-50. The Court can therefore be reasonably assured that the United States Supreme Court, applying those same bodies of law, will come to the same conclusions as this Court did.

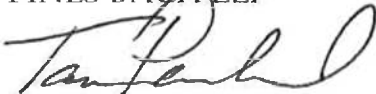
The Governor's submission emphasizes that the harms analysis weighs heavily against staying the March 1, 2022 decision. As this Court emphasized less than two months ago, "[w]hen reviewing the likelihood of success on appeal, 'the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay.' . . . Thus, the greater the potential injury, the less a movant must prove in terms of success on appeal." *Waity*, 400 Wis. 2d 356, ¶ 54 (quoting *Gudenschwager*, 191 Wis. 2d at 441). Conversely, the greater the irreparable injury to the non-moving parties and the public should a stay be granted, the more a movant must prove in terms of success on appeal. Given the severity of harms that would be visited upon the non-moving parties and the public, as compared to the Legislature, an extremely strong likelihood of success on appeal would need to be shown by the Legislature. It has failed in that regard. Indeed, the Legislature has failed to make a strong showing that it is likely to even be granted the opportunity to be heard on its appeal.

The Court should deny the Legislature's motion.

A copy of this letter is filed and simultaneously served on all counsel of record by email. An original of this letter will be hand-delivered to the Court later today.

Sincerely,

PINES BACH LLP



Tamara B. Packard

TBP

cc: All counsel of record (via email)