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DEPARTMENT OF JUSTICE

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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: Remanded proceedings in *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA

Dear Ms. Reiff:

In a March 23, 2022, per curiam decision, the U.S. Supreme Court reversed and remanded this Court's March 3, 2022, decision regarding its adoption of state legislative maps. A majority of the U.S. Supreme Court ruled that this Court erred in its analysis of the U.S. Constitution and the Voting Rights Act (VRA) and remanded for proceedings consistent with its opinion. The Court instructed that, "On remand, the court is free to take additional evidence if it prefers to reconsider the Governor's maps rather than choose from among the other submissions. Any new analysis, however, must comply with our equal protection jurisprudence." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, No. 21A471, 2022 WL 851720, Slip Op. at 7 (U.S. Mar. 23, 2022).

That is, in remanding, the U.S. Supreme Court stated that it would be appropriate to take additional evidence about the adopted legislative maps. That is indeed the appropriate next step, which can and should be done expeditiously by allowing the parties until April 1 to submit reports and briefing on the VRA issues raised by the U.S. Supreme Court, with a brief window for responses. No other path is tenable, as the preexisting maps are indisputably unconstitutional statewide, and this Court already observed that the Legislature's proposal posed problems under the VRA. Further, and importantly, the Legislature's proposal significantly

underperformed on the Court's key principle of least changes, measured through core retention, where the Governor's Assembly map was "vastly superior," *Johnson v. Wisconsin Elections Comm'n*, 2022 WI 14, ¶ 29, *cert. granted, opinion rev'd sub nom. Wisconsin Legislature v. Wisconsin Elections Comm'n*, No. 21A471, 2022 WL 851720 (U.S. Mar. 23, 2022). In other words, neither the preexisting maps nor the Legislature's proposal are available fallbacks but rather would lead to further federal litigation and would conflict with this Court's decisions.

As this Court's March 3 decision correctly explained, its VRA analysis here came within an unusual procedural posture. *Johnson,* 2022 WI 14, ¶ 40. This Court also correctly explained that much of the VRA analysis had not been meaningfully disputed in briefing. For example, the first VRA factor was undisputed, regarding a sufficiently large and compact population; and no party meaningfully disagreed that the second factor—political cohesiveness—was met. *Id.* ¶¶ 43–44. As to the third factor—other voters voting as a block to defeat minority candidates—this Court pointed to a strong evidentiary basis in previous election data. *Id.* ¶ 45. Further, every party assumed in briefing that this factor was met because all parties submitted or supported VRA districts for the Milwaukee area.[1]

The U.S. Supreme Court has noted that putting the VRA principles into effect is "notoriously unclear and confusing." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (Kavanaugh, J., concurring); *accord id.* at 883 (Roberts, C.J., dissenting) (noting "disagreement and uncertainty"). Nonetheless, here, the Court stated that more analysis was needed at the district level. *Wisconsin Legislature*, 595 U.S. _, Slip Op. at 6. Relatedly, the Court stated that it should be addressed "whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity." *Id.* at 7.

In light of these statements from the U.S. Supreme Court, the proper path forward is to allow the parties to address the topics identified as insufficiently analyzed. That would comply with the remand's instructions and allow the parties to address the clarified announcements of law. It also makes sense because much of the VRA analysis went without meaningful dispute in the briefing before this Court.

[1] The Court also concluded that the totality of circumstances test was met based on the submissions. *Id.* ¶ 46.

While time is of the essence, this Court already has analyzed the existing proposals and need not revisit the large majority of its existing decision. Further, the need to act expeditiously should be balanced against the need to adopt legal maps without inviting further litigation. On remand, the VRA topics can be further addressed with focused and expedited reports and briefing, solely addressing the U.S. Supreme Court's concerns about more district-level analysis of the adopted maps under *Gingles* and the totality of circumstances. Further proceedings here do not require a federal court to dive into a case at the last minute, but rather allows this Court, as the map-drawer, to supplement the analysis it already has done. In other words, that does not pose the same problems as a federal court inserting itself in a state's redistricting at the last minute.

Again, no other path is tenable, as the existing maps are indisputably unconstitutional statewide, and this Court already observed that the Legislature's proposal poses problems under the VRA. That is, the Legislature's proposal, with five majority-minority districts and one opportunity district, included districts that were inconsistent with the VRA's restrictions on packing and cracking voters. *Id.* ¶ 49. For example, not only did the Legislature reduce the number of districts from the previous map but also it packed a 73.28% Black voting population into one of its Milwaukee districts, District 11, while cracking voters elsewhere, such as in the Village of Brown Deer. *Id.*; BLOC Resp. Br. 9. As this Court properly identified, that kind of packing has been recognized as a VRA violation.

And that map also fell short under the Court's preeminent concern of least changes. Again, as this Court recognized, the Legislature's proposal vastly underperformed the Governor's Assembly map on the key least changes principle and core retention metric. *Johnson*, 2022 WI 14, ¶ 29. Thus, the Legislature's proposal cannot be the path forward.

Accordingly, the Governor requests that the Court set a deadline of April 1 for the parties to submit simultaneous reports and briefs addressing the points raised by the U.S. Supreme Court, and to set a responsive deadline soon thereafter, so that these issues can be addressed ahead of the April 15 date when candidates may commence circulating nominating petitions. Alternatively, if this Court desires, the Governor is prepared to submit changes to the Milwaukee VRA districts that would instead create six majority-minority Black districts while improving upon the maps'

performance on least changes—that alternative would be consistent with this Court's focus on core retention and could be implemented in an expedient manner.[2]

Sincerely,

Anthony D. Russomanno
Assistant Attorney General

cc: All parties via electronic mail

[2] The Governor continues to believe that seven majority-minority Black districts are necessary under the VRA. However, that decision is ultimately up to the Court as the entity selecting maps. Therefore, the Governor offers this alternative—which preserves the existing core retention and would further improve on it—if the Court were to disagree that seven districts are necessary.