PERKINSCOIE

700 13th Street, NW
Suite 800
Washington, D.C. 20005-3960

T +1.202.654.6200
F +1.202.654.6211
PerkinsCoie.com

John M. Devaney
JDevaney@perkinscoie.com
D. +1.202.434.1624
F. +1.202.654.9124

March 28, 2022

Via Email & Hand Delivery

Sheila T. Reiff
Clerk of the Wisconsin Supreme Court and Court of Appeals
Wisconsin Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA

Dear Ms. Reiff:

Several parties have submitted letter briefs recommending procedures this Court should follow in light of the U.S. Supreme Court's March 23, 2022 remand order. The Governor, BLOC, and Senator Bewley request that this Court invite and consider the more robust evidentiary record that the U.S. Supreme Court held is required where strict scrutiny is applied. The Legislature and Johnson Petitioners, in turn, request an expedited approach and urge the Court to adopt the Legislature's problematic legislative maps without any further inquiry into whether those maps comply with federal law. In light of these submissions, the Hunter Intervenors respectfully propose an alternative resolution that is expeditious, consistent with this Court's legal determinations, and compliant with the U.S. Supreme Court's order and all other governing law.

The U.S. Supreme Court's March 23 order deserves careful reading. That Court remanded for further proceedings because, in its view, the Equal Protection Clause's strict scrutiny test involves a more intensive evidentiary analysis than this Court's March 3, 2022 order and opinion provided. *Wis. Legislature v. Wis. Elections Comm'n*, No. 21A471, 2022

WL 851720, at *4. But conspicuously, the U.S. Supreme Court carefully avoided ever suggesting that strict scrutiny was, in fact, required.

Instead, the U.S. Supreme Court observed without comment that this Court had chosen to undertake the strict scrutiny inquiry prescribed in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and then it expounded on what that inquiry properly entails. "When the Wisconsin Supreme Court *endeavored to undertake* a full strict-scrutiny analysis," the Court said, "it did not do so properly under our precedents[.]" *Wis. Legislature*, 2022 WL 851720, at *4 (emphasis added). This unusual locution could not have been by accident. If this Court were required to apply strict scrutiny, the high court plainly would have said so. And it never did. The U.S. Supreme Court simply instructed that *when* a court applies strict scrutiny in the racial gerrymandering context, *then* it needs to include a more comprehensive evidentiary analysis. The Court was concerned with ensuring that the racial gerrymandering test was not diluted, while going out of its way to avoid weighing in on whether the test is necessary in this unusual posture.

The context of the U.S. Supreme Court's order confirms that it intended a narrow holding. If the U.S. Supreme Court believed that the Equal Protection Clause required this Court to apply strict scrutiny before adopting a map, then it would not have left unresolved the dispositive question of *whose* decisionmaking should be subject to *Cooper*'s test. The high court acknowledged this issue, admitting that "[i]t is not clear" whether this Court intended to apply strict scrutiny to the Governor's process or to its own. *Id.* But it saw no need to resolve—or even provide guidance on—how that question should be approached. It is clear, then, that the Court was not announcing the analytical test to be applied in the novel circumstance of a racial gerrymandering challenge to judicial adoption of party submitted maps. Rather than assume that the U.S. Supreme Court intended to make entirely new law in a per curiam summary reversal, we should read its opinion to mean only what it said. The Court's order simply clarified the *Cooper* inquiry—nothing less, and nothing more.

Properly read in this way, the Supreme Court's order leaves two options on remand. The first option is the path advocated by the Governor, BLOC, and Senator Bewley. If this Court intends to apply strict scrutiny, it should invite parties to submit whatever additional evidence is necessary to resolve with greater confidence the appropriate racial distribution of assembly districts in Milwaukee. If the evidence further confirms that seven majority-minority districts are required, then this Court can re-adopt the Governor's proposed maps.

And if the Court determines that one or more of the Governor's proposed districts fails strict scrutiny, then it can amend the boundaries of those particular districts (on its own, or with the assistance of district-specific party submissions). *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (holding that a racial gerrymandering claim "applies to the boundaries of individual districts. It applies district-by-district."); *see also Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012) (ordering minor adjustments to Milwaukee-area districts to remedy VRA challenge).[1]

The second option would be more straightforward. This Court could—and in the view of the Hunter Intervenors, should—clarify that race was not the predominant factor motivating this Court's selection of legislative maps. As the U.S. Supreme Court's order was careful to maintain, there is no requirement that this Court apply *Cooper*'s test at all—only if this Court *chooses* to apply that test must it do so precisely. And the fairest reading of *Cooper* is that the strict scrutiny inquiry is inapplicable here because this Court adopted a map predominantly on the basis of its least-change metric, and not on the basis of race.

Cooper's substantive discussion leads by announcing the context for its framework: "When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis." 137 S. Ct. at 1463. At this threshold, no party has sued this Court or any other Wisconsin officials for drawing race-based lines. (Indeed, to the knowledge of undersigned counsel, *no court anywhere in the country* has ever been found to have racially gerrymandered.) Few parties here—and certainly not the Legislature or Johnson Petitioners—would even have standing to sue for racial gerrymandering because none of

[1] In no event would it be appropriate to adopt the Legislature's proposed maps. Besides the fact that the Legislature's maps flunk both the Voting Rights Act's requirements and (if it is applied) *Cooper*'s strict scrutiny test, the Legislature's map makes substantially more changes than the Governor's map to districts outside of Milwaukee. Especially where this Court has announced that core retention is its primary criterion, there could be no justification for making more changes to districts across the state that were never alleged to be racially gerrymandered. *See* Mar. 3 Order ¶ 31 ("The Legislature does not explain why we should reject the Governor's map for its changes to Milwaukee, while accepting the Legislature's proposal to change districts even more elsewhere.").

them resides in any of the challenged Milwaukee districts. *See U.S. v. Hays*, 515 U.S. 737, 745 (1995).[2] Thus, the entire racial gerrymandering paradigm is inapposite from the start.

Where a plaintiff does sue for racial gerrymandering, *Cooper* instructs, "First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). "That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 137 S. Ct. at 1463-64 (quoting *Miller*, 515 U.S. at 916). Again, this language speaks explicitly of legislative gerrymandering—it is not clear that the claim is even cognizable against judicially adopted maps. But even if it is, this Court very clearly did not select the districts proposed by the Governor on the basis of racial considerations—and no party has asserted otherwise. This Court adopted the Governor's proposals because they made the least changes to the enacted districts. *See* Mar. 3 Order Adopting Final Maps ¶ 12 (explaining "we begin our analysis by probing which maps make the least change from current district boundaries"); *id.* ¶ 33 (concluding "the Governor's legislative maps produce the least change from current law"). Because the Court did not review racial data until after presumptively selecting the Governor's submission—and then, only to verify compliance with federal law—it is clear that the Court would have adopted the Governor's maps even if its process had been entirely race-blind. It is therefore indisputable that race was not the "predominant, overriding factor" motivating the Court's adoption the legislative maps proposed by the Governor. *Miller*, 515 U.S. at 920.

The second step in *Cooper*'s framework requires that "*if racial considerations predominated over others*, the design of the district must withstand strict scrutiny." 137 S. Ct. at 1464. The U.S. Supreme Court's recent order focused exclusively on delineating strict scrutiny's requirements in the context of racial gerrymandering. But because racial considerations did not "predominate" over other considerations in this Court's map-selection process, it may avoid this second step altogether.

Notably, this Court's inquiry into whether its adopted maps complied with the federal Voting Rights Act ("VRA") does not trigger a requirement that it undertake the

[2] Several parties, including Hunter Intervenors, raised this point in briefing to the U.S. Supreme Court. The Court's pointed failure even to mention the issue further confirms it was being careful not to disrupt settled law in this area or to require this Court to apply the strict scrutiny test.

racial gerrymandering inquiry. The VRA imposes an objective "effects" test that sets a floor for the number of districts where protected minorities must have an opportunity to elect candidates of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). The Equal Protection Clause, in contrast, proscribes certain race-based legislative intents. *See Cooper*, 137 S. Ct. at 1463-64. *Cooper* explains that where a legislature enacts districts predominantly on the basis of race, it may justify that race-based districting in certain circumstances by invoking its intention to comply with the VRA. *Id.* at 1464. But here that premise is missing—the Court did not enact districts predominantly on the basis of race. Thus, while this Court's efforts to verify that the Governor's proposed districts complied with the VRA were laudable, they were not necessary to avoid running afoul of the Equal Protection Clause.[3]

During oral argument in this matter, Justice Hagedorn acknowledged that every party harbored motivations—some shared publicly, and some not—that influenced the placement of proposed district lines. Recording I at 41:10.[4] But, as Justice Hagedorn made clear, the Court was not endorsing, adopting, or even considering those private intentions. *Id.* The Court's predominant motivation was simply to select the maps that made the least changes to the enacted districts. *See* Mar. 3 Order ¶ 18 (in discussion of congressional maps, recognizing "[p]erhaps" the Governor had unstated motives, but "rather than weigh motives and pick and choose which changes we approve of and which we don't, we look to which maps actually produce the least change"). This Court found that the Governor's legislative submissions did so. Mar. 3 Order ¶ 33. Districts in those maps were appropriately compact, contiguous, and proportionately populated; they respected local political boundaries; assembly districts were properly nested within senate districts; and the maps did not violate the VRA. *Id.* ¶¶ 36, 47.

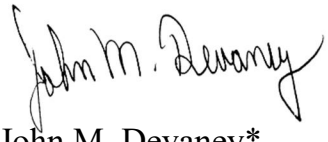
The Hunter Intervenors recommend that the Court reiterate exactly that, adopt the Governor's proposed maps for the same reasons articulated in its March 3 Order, and replace the *Cooper* digression that the U.S. Supreme Court disfavored with an unequivocal confirmation that race with not the predominant factor motivating the Court's adoption of these maps.

---

[3] No party contests that the Governor's submissions satisfy the VRA's requirements. The same cannot be said of the Legislature's submissions.

[4] Available at **********.wicourts.gov/supreme/scoa.jsp?docket_number=2021AP1450&begin_date=&end_date=&party_name=&Submit=Search.

Respectfully,



John M. Devaney*
PERKINS COIE LLP
700 Thirteenth St., NW
Washington, D.C. 20005
(202) 654-6200
JDevaney@perkinscoie.com

Charles G. Curtis, Jr.
Bar No. 1013075
PERKINS COIE LLP
33 E Main St, Ste 201
Madison, Wisconsin 53703-3095
(608) 663-7460
CCurtis@perkinscoie.com

Christina A. Ford*
William K. Hancock*
Jacob D. Shelly*
ELIAS LAW GROUP LLP
10 G St., NE, Suite 600
Washington, D.C. 20002
(202) 968-4490
CFord@elias.law
WHancock@elias.law
JShelly@elias.law

Attorneys for Hunter Intervenors
*Admitted *Pro Hac Vice*

CC:
By Email

All Counsel of Record