No. 22-47

IN THE

Supreme Court of the United States

KERRY BENNINGHOFF, INDIVIDUALLY, AND AS MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,

Petitioner,

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF 2021 LEGISLATIVE REAPPORTIONMENT COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Under the facts of this case, did Petitioner fail to meet the demanding burden to show that race was the predominant factor in drawing Pennsylvania's state legislative districts, where Petitioner established only that the Pennsylvania Legislative Reapportionment Commission, like all redistricting authorities, was aware of the racial impacts of its plan, and the evidence showed that the Commission's predominant purpose was to adhere to the Pennsylvania Constitution's dual requirements of traditional redistricting criteria and partisan fairness?

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ADDITIONAL CONSTITUTIONAL PROVISIONS

In addition to the provisions Petitioner indicated, this case involves Article III, Section 2 of the Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This case also involves the following provisions of the Pennsylvania Constitution:

Pa. Const. art. I, § 5:

> Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. art. I, § 29:

> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual.

Pa. Const. art. II, § 16:

> The Commonwealth shall be divided into 50 senatorial and 203 representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Pa. Const. art. II, § 17:

> (a) In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth. The commission shall act by a majority of its entire membership.
>
> (b) The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected as hereinafter provided. No later than 60 days following the official reporting of the Federal decennial census as required by Federal law, the four members shall be certified by the President pro tempore of the Senate and the Speaker of the House of Representatives to

the elections officer of the Commonwealth who under law shall have supervision over elections.

The four members within 45 days after their certification shall select the fifth member, who shall serve as chairman of the commission . . . .

If the four members fail to select the fifth member within the time prescribed, a majority of the entire membership of the Supreme Court within 30 days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer. . . .

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within 30 days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order. . . .

INTRODUCTION

Petitioner seeks review of the Pennsylvania Supreme Court's unanimous, bipartisan summary affirmance of the redistricting plan for the Pennsylvania House of Representatives, which was adopted by a bipartisan, 4-1 vote of Pennsylvania's Legislative Reapportionment Commission. Petitioner, the Pennsylvania House Republican leader, was the sole dissenting Commissioner, and his appeal was among the nine appeals that the often ideologically-divided Pennsylvania Supreme Court unanimously rejected. The Court should deny the Petition because:

- Petitioner does not reside in any of the districts he challenges and therefore lacks Article III standing to assert a racial gerrymandering claim.

- Petitioner waived his *racial* gerrymandering claim when he challenged the state legislative redistricting as a *partisan* gerrymander (even though the plan continued to favor Republicans, albeit less than previous plans), and asserted that partisanship, and not race, was the Commission's predominant consideration. Petitioner, contrary to his arguments here, argued to the Commission and to the Pennsylvania Supreme Court that the Commission failed to take race sufficiently into account. Petitioner now contends that the Commission used race (and not partisanship) as its predominant purpose in drawing district lines.

- Petitioner seeks only fact-bound error correction by taking issue with how the Commission and

Pennsylvania Supreme Court applied the well-established predominance test.

- Petitioner demonstrates no error because Petitioner's cherry-picked, supposed evidence ignores the actual record and, regardless, is legally insufficient to satisfy Petitioner's "demanding" burden of proof.

- There is no reason to hold this Petition in abeyance pending *Merrill v. Milligan*, which involves different issues that will not change the analysis here and will not resolve Petitioner's lack of standing and waiver of the only question presented.

STATEMENT

The Legislative Reapportionment Commission is Pennsylvania's constitutional body for decennial redistricting. Pa. Const. art. II, § 17. It has five members: the majority and minority leaders of the Pennsylvania House and Senate, and an appointed Chair. *Id.* § 17(b). If the four caucus leaders cannot agree on a Chair, as happened here, the Pennsylvania Supreme Court appoints the Chair. *Id.* This cycle, the Supreme Court unanimously[1] selected Mark A. Nordenberg, the Chancellor Emeritus and Law School Dean Emeritus of the University of Pittsburgh.

The Commission's majority was attentive to the population shifts revealed in the 2020 Census and to public

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1. Petitioner incorrectly states that only the Chief Justice, and not the full Court, selected the Chair. *Compare* Pet.4 *with* R.18-19.

calls for more transparency into both the Commission's decisionmaking process and the effects of the plan on communities throughout the Commonwealth. These population shifts, the Pennsylvania Constitution's mandate of partisan fairness, and the prioritization of traditional redistricting criteria explain the Commission's choices in drawing new districts for the Pennsylvania House of Representatives.

The result was bipartisan approval of the Commission's final plan—with only Petitioner dissenting—and unanimous, bipartisan affirmance by the Pennsylvania Supreme Court.

I. Population Shifts in Pennsylvania Revealed in 2020 Census

Pennsylvania's population and demographics changed dramatically between 2010 and 2020. Legislative districts necessarily had to change to reflect those population shifts. Significantly, the 2020 census revealed two unmistakable trends within Pennsylvania: first, Pennsylvania's population materially shifted from rural to urban areas—particularly from the north and west to the southeast; second, Pennsylvania's minority population increased, with most of that growth in the southeast. *See* R.418-20, 425. The Commission was required to account for these numerical and geographic population changes in redistricting the Pennsylvania House of Representatives.

A. Growing Populations in Southeastern Pennsylvania and Declining Populations Elsewhere

The 2020 census revealed that Pennsylvania's population grew from 12,702,379 to 13,002,700, for a total increase of 300,321, or 2.4%. R.424; LRC.SCOPA. Br.App.A.5-6. That growth, however, was not evenly distributed. Of Pennsylvania's 67 counties, 44 (mostly rural) lost population, and 23 (mostly urban) gained population. R.422-424. For example, Philadelphia County remained the most populous county and grew by 5.1% since 2010. *Id.* Three of Pennsylvania's most populous counties—Montgomery, Bucks, and Delaware (all also in the southeastern part of the state)—grew at rates greater than Pennsylvania's overall growth rate. *Id.* By contrast, Pennsylvania's rural population declined over the past decade. R.423. While the southeastern portion of the state increased in population by 344,075 people in the last decade, the rest of the Commonwealth experienced a decline in population of 43,754. LRC.SCOPA.Br.App.A.5-6; N.T.1028. As the Director of the Center for Rural Pennsylvania explained to the Commission, "[i]n terms of population changes, Pennsylvania can be divided into two regions: the southeast and the rest of the state." R.99.

Therefore, the Pennsylvania House districts adopted in 2013 were severely malapportioned and failed to satisfy the constitutional requirement of "one person, one vote." For example, the 2020 census revealed that the House districts along Pennsylvania's northern and western borders were underpopulated, with populations between 6% and 12% below the number necessary for a House district. R.299. The converse was true of southeastern

Pennsylvania, where the 2013 House districts were significantly overpopulated by 2020. Multiple southeastern House districts were more than 15% overpopulated, and one House district was even 21.1% overpopulated. R.800.

The Commission's House map addressed these population shifts by "moving districts" from underpopulated rural areas into urban and suburban areas in southeastern Pennsylvania, including Philadelphia, Montgomery, and Lancaster Counties, where there had been sizeable population increases. R.801.

B. Growing Minority Populations

The 2020 census also confirmed that Pennsylvania's population continues to become more diverse. In 2000, approximately 1.97 million minorities lived in Pennsylvania. R.425. According to the 2020 census, that number is now approximately 3.46 million. *Id.* In other words, the minority population increased by 76% over two decades. *Id.* This trend was true across the Commonwealth, with both rural and urban areas becoming more diverse. Nevertheless, the vast majority of minorities—upwards of 90%—live in urban areas. R.419, 425. In particular, the most significant minority population growth occurred in southeastern Pennsylvania. R.425.

When the Commission moved seats into southeastern Pennsylvania because of population growth in the region—with that population increase largely driven by growth in minority communities—the Commission's plan inevitably increased opportunities for minority voters to influence the election of candidates of their choice. Indeed, to account for population growth—much of which occurred in urban areas with significant minority populations—

more districts, and thus more opportunities, had to be placed in these areas.

All Commission members were aware of these demographic changes. In addition, a large number of citizen witnesses, through both oral testimony and written submissions, urged that the Commission be attentive to the effect the new House map would have on different communities of interest, including racial and ethnic communities.[2]

II. History of Partisan Gerrymandering in Pennsylvania

Another significant development occurred before the 2020 census: the Pennsylvania Supreme Court expressly recognized that partisan gerrymandering is a justiciable violation of the Free and Equal Elections Clause, Pa. Const. art I, § 5. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018). The Court held that the Free and Equal Elections Clause forbids partisan gerrymandering, because it "dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage." *Id.* at 814. The Clause also recognizes that voters should not have their votes diluted based on where they live. *See id.* at 809. The Pennsylvania Supreme Court ultimately held that the 2010 congressional districts resulted from a partisan gerrymander and ordered that the districts be redrawn. *Id.* at 818.

2. The Commission held more hearings and solicited more comments from citizens than ever before—hosting 7 public meetings and 16 public hearings, during which the Commission heard from 181 witnesses. The Commission also received, read, and cataloged over 6,000 comments from Pennsylvanians about the redistricting process. LRC.SCOPA.Br.App.A.32-33.

In addition, in explaining this year's congressional redistricting decision, the Pennsylvania Supreme Court made clear that, under Article I, Section 5 of the Pennsylvania Constitution, "consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria, is *necessary* to ensure that a [redistricting] plan is reflective of and responsive to the partisan preferences of the Commonwealth's voters." *Carter v. Chapman*, 270 A.3d 444, 459 (Pa. 2022) (emphasis added). As a matter of Pennsylvania constitutional law, partisan fairness is as important as the traditional redistricting criteria in Article II, Section 16. *Id.* at 462.

Because they are rooted in the Pennsylvania Constitution, the Pennsylvania Supreme Court's decisions apply with equal, and perhaps greater, force to state legislative redistricting compared with congressional redistricting. Accordingly, in contrast to prior redistricting efforts, the Commission was required by the Pennsylvania Constitution to avoid partisan bias and move toward partisan fairness.

The Pennsylvania Supreme Court's reinvigoration of the Free and Equal Elections Clause particularly impacted the Commission's drawing of state House districts. The districts that had been in place based on the 2000 and 2010 censuses were largely recognized as partisan gerrymanders. R.853, 866; *see also* Alex Keena, et al., *Gerrymandering the States: Partisanship, Race, and the Transformation of American Federalism*, 74 (2021). Because of the Pennsylvania Supreme Court's recognition of partisan gerrymandering as a justiciable claim, the Commission could not make only small changes to the previous map. More was required.

The Commission's plan reduced partisan bias by drawing districts that more fairly reflect the partisan balance found in Pennsylvania, though the plan still favors Republicans. The plan also struck a better balance between urban, suburban, and rural parts of the state and scored better on measures like political subdivision integrity and compactness. To achieve that result, the Commission considered the map's "responsiveness to voters," evaluated "whether a party with a majority of votes is likely to win a majority of seats," and examined whether the proposed map was "likely to produce 'anti-majoritarian' results, without focus[ing] on exact proportionality of representation." *Carter*, 270 A.3d at 470; *see also* LRC.SCOPA.Br.App.A.52-55. The Commission's plan came closer to partisan fairness according to these metrics while still clearly respecting the redistricting criteria in Article II, Section 16.

III. Results of the Commission's House Plan

The Commission's plan passed by a 4-1, bipartisan vote, with only Petitioner dissenting. The Commission's House plan performed well on all the traditional redistricting criteria in Article II, Section 16—compactness, contiguity, respecting the integrity of political subdivisions, and near equal population. Indeed, the plan performs better on every metric, other than population equality, than the prior plan.

According to most experts, the Commission's plan favors Republicans, but to a lesser degree than previous maps. The Commission's final map also comes closer to representative ideals, such as responsiveness and majoritarianism, than prior maps. McClinton.SCOPA.Br.App.B.16-17.

House Plan Comparisons

	2013 House Plan	2022 House Plan
Counties Split	50	45
Number of County Splits	221	186
Municipalities Split	77	54
Number of Municipality Splits	124	92
Reock	0.39	0.42
Polsby-Popper	0.28	0.35
Smallest District	60,111	61,334
Largest District	65,041	66,872
Overall Deviation	7.87%	8.65%
Average Deviation	2.0%	2.1%
Partisan Bias	4.5%	2.3%

LRC.SCOPA.Br.54.

The Pennsylvania Supreme Court rejected nine challenges to the Commission's plan—including Petitioner's—and unanimously affirmed the plan. Pet. App.6. The Commission's state House plan also received widespread praise across Pennsylvania. For example, the founder and Chair of Fair Districts PA, a non-partisan, citizen-led coalition working to stop gerrymandering, described the plan as follows: "The final maps show that it's possible to balance concern for incumbents with traditional redistricting criteria, provide representation for minority communities and yield maps that limit partisan bias."[3]

3. "The good and the bad of Pennsylvania redistricting," Lancaster Online (Mar. 2, 2022), https://lancasteronline.com/opinion/columnists/the-good-and-the-bad-of-pennsylvania-redistricting-column/article_f4852e2a-998c-11ec-b226-5741c8513951.html.

REASONS FOR DENYING THE PETITION

I. There are Insurmountable Obstacles to this Court's Review.

A. Petitioner lacks Article III standing.

Petitioner argues that the Commission engaged in impermissible racial gerrymandering. However, Petitioner does not claim that *he* lives in a district that was drawn based on race. Thus, according to this Court's precedent, Petitioner lacks Article III standing.

Article III standing must be established by "persons seeking appellate review" in this Court, "just as it must be met by persons appearing in courts of first instance." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). At a minimum, Article III "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)

Petitioner's status as the appellant in the Pennsylvania Supreme Court does not confer Article III standing in this Court. When certiorari is sought from a state court that does not apply federal standing requirements, petitioners still must show that the state court judgment "causes direct, specific, and concrete injury to the parties who petition for [this Court's review], where the requisites of a case or controversy are also met." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989).

For racial gerrymandering claims, this Court has repeatedly observed that "a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district," but "a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification." *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015); *Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000); *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

Petitioner neither lives in any challenged district, nor alleges (or supports with evidence) that he, *personally*, was subjected to a racial classification. Petitioner lives in Centre County and House District 171, yet his Petition challenges districts in Allentown, Harrisburg, Lancaster, Philadelphia, and Reading. Pet.16. Further, Petitioner has never claimed that his district, or even any district in the vicinity, was drawn on the basis of race. Indeed, his own expert conceded that the two other Centre County districts do "not have a large or geographically concentrated minority population"— undermining any claim that Petitioner, himself, could have been subject to racial classifications. Pet.SCOPA.Petition.for. Review("PFR").App.49a.

Petitioner, suffering no actual harm, cannot rely on his various official capacities—as legislator, House Majority Leader, or Commissioner—to establish standing. First, Petitioner's role as a legislator does not give him standing to appeal the Pennsylvania Supreme Court's affirmance of the Commission's plan. *See Raines v. Byrd*, 521 U.S.

811, 830 (1997) (refusing to recognize legislative standing for individual members of Congress).

Nor does Petitioner's position as House Majority Leader confer standing. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019), this Court held that the Virginia House of Delegates lacked standing to appeal the district court's determination that some districts drawn by the Virginia House were racial gerrymanders. The Virginia House argued that it had standing because it drew the challenged districts. *Id.* at 1953. But that interest was not enough to establish standing, in part because the House was only one chamber of the legislature, which, as a whole, was responsible for redistricting in Virginia. The Court explained: "[j]ust as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953-54 (citing *Raines*, 521 U.S. at 829). Only the full state legislature has standing to challenge redistricting decisions. *Id.*; *c.f. Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245 (2022) (reaching merits in suit by entire state legislative redistricting authority).

Petitioner, as the leader of only one party in only one chamber of the General Assembly, obviously lacks standing under *Virginia House of Delegates* because he does not appeal on behalf of the entire Pennsylvania General Assembly. Nor can Petitioner claim to represent the institutional interests of the General Assembly. Unlike in Virginia, the Pennsylvania General Assembly has no role in reapportionment other than providing an appropriation. Pennsylvania's state legislative

redistricting is performed exclusively by the Legislative Reapportionment Commission. Pa. Const. art. II, § 17(b). Accordingly, Petitioner, in his representative capacity, would have even less standing than the Virginia House (which, itself, lacked standing) to pursue a racial gerrymandering claim. Petitioner likewise cannot rely on the standing of any of his caucus members to assert representational standing, because none of Petitioner's caucus members lives in the challenged districts.

For the same reasons, Petitioner cannot rely on his position as a member of the Commission to establish standing. Only a redistricting authority, as a whole, has standing to appeal a decision invalidating a redistricting plan. *Virginia House of Delegates*, 139 S. Ct. at 1953. Petitioner is only one (dissenting) member of the Commission. His only "injury" is that the Commission voted not to adopt his belatedly introduced alternative plan. Put differently, Petitioner is similar to a member of an agency who dissented from an agency decision that was affirmed on appeal. That dissenting agency member has never been held to have standing to seek further review. Neither should Petitioner.

Petitioner does not attempt to show that he has standing—an obvious facial defect in the Petition. This incurable jurisdictional defect in the Petition requires denying review.

B. Petitioner waived or forfeited his racial gerrymandering claim by failing to raise it adequately in prior proceedings.

Petitioner failed to present his racial gerrymandering claims adequately to the Commission or to the Pennsylvania

Supreme Court. *See City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ as improvidently granted because the Court "ordinarily will not decide questions not raised or litigated in the lower courts").

Petitioner originally challenged the Commission's plan as a partisan gerrymander, not a racial gerrymander. In speaking against the preliminary plan, Petitioner stated: "When you look at splits in Harrisburg, Lancaster, Reading, Altoona, Scranton, the only conclusion we can draw is that these splits were purely for partisan gain." N.T.1008. He further characterized the preliminary plan as "drawing a map that is meant for no other reason than to cement a legislative majority for a certain party for a coming decade." N.T.1009. In other words, Petitioner made clear that he thought the plan was unconstitutional for *partisan* reasons, not *racial* reasons.

Petitioner then switched, contrary to his argument here, to arguing that the Commission's plan should have been *more attentive* to minority voters. Petitioner repeatedly claimed that the splitting of cities—which he alleged was done "purely" for improper *partisan* purposes—had the negative effect of decreasing minority communities' ability to elect candidates of choice. *See* N.T.1777-1778 (arguing that the Commission's House plan divides minority communities to protect Democratic incumbents).

For example, in response to one witness explaining that he was largely happy with the House map's divisions in the Allentown area, Petitioner noted: "Actually the percentage of Hispanic population was reduced in three out of those four, so actually it reduces . . . statistically the

ability for a minority to get elected, specifically." N.T.1185. In the same colloquy, Petitioner indicated that he thought minority population percentages below 40% would be "counterproductive" for minority advancement. N.T.1184. In questioning another witness, Petitioner stated his view that decreases in Hispanic population in districts with Hispanic representatives would "seem to put people at a disadvantage." N.T.1235. And in another exchange, he informed a Hispanic witness that, "from [his] calculations" for certain districts, "the overall voting age [population] of Hispanics actually goes down in three of those four. That should probably be a concern to you as well." N.T.1439. Petitioner expressed the view that, while it is possible to create districts with "the appearance of having some Latino population in there," "if they aren't proportionally good enough or large enough, you may never get a Latino member elected to the House." N.T.1440.

In other exchanges, too, Petitioner expressly argued that the Commission should be considering the plan's impact on minority populations through a results-oriented lens. For example, Petitioner stated, "I think we can do better. . . . After the testimony we've heard day in and day out from multiple groups across the Commonwealth really highlighting the population changes and the dramatic growth, predominantly in the Hispanic community, that our ultimate final map should reflect that better." N.T.1386.

Accordingly, in direct contradiction of his argument here, Petitioner argued that the Commission should expressly consider race and do so in a way that keeps the minority population percentages sufficiently high so that members of that minority group can be elected. Indeed, Petitioner thought that the minority population

percentage should be so high that, if minority voter turnout is low because of rain or snow, a member of the minority community would still be elected, N.T.1100—*i.e.*, that the minority population should be "packed," which *actually would* have been a racial gerrymander.[4] *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018) (holding that Texas racially gerrymandered when it moved a community into a district solely "to bring the Latino population back above 50%").

Petitioner continued this line of argument in the Pennsylvania Supreme Court. In his initial filing, Petitioner criticized the Commission's House plan as a partisan gerrymander, a racial gerrymander, *and* violative of § 2 of the Voting Rights Act. Pet.App.60-63. In addition to other claims, Petitioner challenged a number of districts as having minority population percentages that were too low. *Id.* Thus, in advancing his racial gerrymandering and VRA claims, Petitioner claimed *both* that the Commission lacked a "strong basis in evidence" for creating majority-minority districts "anywhere in the Commonwealth," *and* that the Commission impermissibly reduced minority voting strength in certain cities. *Id.*

In his subsequent brief to the Pennsylvania Supreme Court, Petitioner focused almost exclusively on his partisan gerrymandering claim. Petitioner submitted to the Court a report in which Petitioner's expert expressly concluded that "the decision to divide particular cities in the Commission's proposal is not driven by minority

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4. Petitioner never introduced evidence that "packing" was necessary for minority communities to elect candidates of choice, and, indeed, the evidence in the record shows that "packing" was *not* necessary. McClinton.SCOPA.Br.App.E.2-3.

representation, but instead by partisan considerations." Pet.SCOPA.PFR.App.64a.

Of his 85-page brief to the Pennsylvania Supreme Court, only 3.5 pages were devoted to any argument that the Commission allegedly used race as a predominant factor. *See* Pet.SCOPA.Br.66-69. Tellingly, that section attempted to refute a rationale that the Commission never asserted—that the allegedly "extreme" partisanship of the map was necessary to comply with § 2 of the VRA.[5] The Commission instead justified its map based on the redistricting criteria in Article II, Section 16, and Article I, Section 5's mandate of partisan fairness. LRC.SCOPA. Br.6-20, 52-53.

Thus, contrary to his argument here, where he claims any consideration of race needs to meet strict scrutiny, Petitioner argued previously that race *must* be considered. He just wanted it to be considered differently from how he perceived the Commission to be accounting for the growth of minority communities.

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5. For this reason, the Pennsylvania Supreme Court presumably concluded no opinion was necessary to dispose of Petitioner's Fourteenth Amendment claim. Rather than attributing any nefarious purpose to the lack of an opinion, as Petitioner and Amici do, there is a more logical explanation: the insubstantial and meritless nature of Petitioner's Fourteenth Amendment argument, combined with the meritless Pennsylvania constitutional law arguments, explain why the Court saw no need to write an opinion—particularly where the decision to affirm was unanimous by an often ideologically divided Court. Further, while the Amici suggest that this Court should remand the case and order the Pennsylvania Supreme Court to write an opinion, Amici cite no law or precedent giving this Court that authority.

In this Court, Petitioner contends that only race, independent of partisanship, was the predominant factor in how the Commission drew districts for certain cities. Petitioner waived and forfeited his claim by arguing to the Pennsylvania Supreme Court the opposite of what he argues here. Petitioner's presentation of inconsistent and incompatible theories warrants denying the Petition.

II. Race Did Not Predominate in Drawing Pennsylvania State Legislative Districts.

Even if Petitioner had standing and had not waived his claim, this Court should deny certiorari because the Petition is meritless. Race was not the predominant factor in drawing any districts or placing any population within or outside of any district. Petitioner's attempts to manufacture such a record should be rejected.

A. The Fourteenth Amendment is implicated only if race predominated in the drawing of any district.

The Fourteenth Amendment's Equal Protection Clause's "central purpose is to prevent the States from *purposefully discriminating* between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*) (emphasis added). This includes "separating . . . citizens into different voting districts on the basis of race" without "sufficient justification." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Bethune-Hill v. Va. State Bd. of Elections.*, 137 S. Ct. 788, 797 (2017)).

Claims that districts have been drawn based on race are evaluated under a two-step analysis. First, plaintiffs

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.* at 1463-64 (emphasis added) (quoting *Bethune-Hill*, 137 S. Ct. at 979). To make that "demanding" showing, *id.* at 1479, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Subordination occurs when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Only after plaintiffs meet this burden does the burden then shift to the defendant "'to prove that its race-based sorting of voters serves a compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1463-64 (quoting *Bethune-Hill*, 137 S. Ct. at 979).

Petitioner concedes that the burden of showing that race predominated cannot be met simply by pointing to the redistricting authority's awareness of race. Redistricting authorities will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller*, 515 U.S. at 916; *see also Shaw I*, 509 U.S. at 646 (explaining that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors"). For a racial gerrymandering claim, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the . . . districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). Thus, to satisfy the first element of a racial gerrymandering claim, challengers must show that

"'[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Shaw II*, 517 U.S. at 907).

Moreover, "[a]s a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria." *Id.* at 799. In the typical case, "legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so." *Id.* In fact, as of this Court's decision in *Bethune-Hill*, the Court had "not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Id.*

Petitioner does not argue that the "predominance" test is wrong or should be overruled. Instead, Petitioner takes issue with how the Commission and the Pennsylvania Supreme Court applied that predominance test. This Court should not exercise review where, as here, Petitioner complains solely about the highly fact-bound application of settled law. Sup. Ct. R. 10.

B. Petitioner cannot show that the Commission's compliance with the Pennsylvania Constitution was pretextual.

As even Petitioner admitted, Pet.34, the Commission, through its Chair, repeatedly confirmed that its primary goal was to ensure compliance with the redistricting criteria in the Pennsylvania Constitution, Article II,

Section 16, and the Free and Equal Elections Clause's prohibition of partisan gerrymandering and requirement of partisan fairness. LRC.SCOPA.Br.App.A.44-46, 60; N.T.1741-1743. Only after these criteria were addressed did the Commission consider whether the House map adequately represented minority communities. LRC. SCOPA.Br.App.A.44-46, 60-61; N.T.1741-1743.

Petitioner dismisses the Commission's stated rationale as "specious," claiming instead that race was the factor that the Commission placed above all others (even though, in pressing his Pennsylvania Supreme Court appeal, Petitioner claimed that *partisanship*, and not race, was the Commission's predominant consideration). Pet.22. Petitioner's argument suffers from several fatal legal and evidentiary deficiencies.

Petitioner inverts the burden of proof, erroneously putting the onus on the Commission to explain why its decision to divide certain cities in the House map did *not* constitute a racial gerrymander and calling the Commission's explanations "a skillful set of semantic denials." Pet.17. However, as the party asserting a racial gerrymandering claim, Petitioner bears the burden of showing that race predominated. *Miller*, 515 U.S. at 916.

This burden is demanding because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Id.* at 915. As this Court recognized, "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Id.* Accordingly, "until a claimant makes a showing sufficient to support" the allegation that the redistricting authority

engaged in race-based decisionmaking, "the good faith of a state [redistricting authority] must be presumed." *Id.* Put differently, the evidentiary difficulty of distinguishing between a redistricting authority that is aware of racial considerations as compared with being predominantly motivated by them, "together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.*

1. The Commission's predominant purpose was to comply with Pennsylvania's traditional redistricting criteria and the Free and Equal Elections Clause.

Contrary to Petitioner's representations, the Chair repeatedly made clear that "the Commission's predominant purpose always was to create districts that comply in all respects with the requirements of the Pennsylvania Constitution—most notably, Article II, Section 16 (which sets forth requirements for legislative districts); Article I, Section 5 (also known as the "Free and Equal Elections" clause); and Article I, Section 29 (the Racial and Ethnic Equality clause)." LRC.SCOPA. Br.App.A.44. The Commission's predominant focus on the traditional redistricting criteria bore fruit: it produced a plan that was significantly more compact and divided significantly fewer political subdivisions than the prior plan. LRC.SCOPA.Br.App.A.70-71; LRC.SCOPA.Br.7-14. In fact, Petitioner's own expert confirmed: (1) the Commission's number of county splits is in line with the expert's simulations; (2) the Commission's plan divided *fewer* municipalities than the simulations; and (3) the Commission's plan "is similarly compact and largely in

line with the results of the simulations." Pet.SCOPA. PFR.App.8a.

While the Commission was aware of the racial impacts of its plan—as this Court acknowledged is always the case, *Miller*, 515 U.S. at 916—the Commission repeatedly confirmed that race was considered only after the redistricting criteria were accounted for and "while being mindful of and adhering to the traditional redistricting criteria . . . and other constitutional mandates." LRC. SCOPA.Br.App.A.45. Indeed, the redistricting criteria in Article II, Section 16 of the Pennsylvania Constitution were the "starting point for all of [the Commission's] work." *Id.* By definition, race did not predominate, both because it was not the factor "that, in the State's view, could not be compromised," and because race-neutral considerations did not come "into play only after the race-based decision had been made." *Bethune-Hill*, 137 S. Ct. at 798.

2. Mid-sized cities were not divided for racial reasons.

The Pennsylvania Constitution requires 203 House districts, Pa. Const. art. II, § 16, and Pennsylvania has 67 counties and 2,560 municipalities, 124 Pennsylvania Manual § 6-3 (2020). Some municipalities are as populous as Philadelphia and Pittsburgh, and some have a few hundred people. What is clear, as a matter of geometry and arithmetic, is that it is impossible not to split some municipalities. As one Pennsylvania Supreme Court Justice noted, the process of redistricting Pennsylvania "is complex beyond words" and a "daunting task." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 762-63 (Pa. 2012) (Eakin, J., concurring and dissenting). "The

result of changing any one area" of the Commission's plan is akin to "squeezing a water balloon: if you squeeze it here, it will bulge over there. If you change one line, it causes ripples that necessitate changes elsewhere." *Id.* at 763.

The Commission offered a specific reason for dividing many of the Commonwealth's cities—divisions that sit at the heart of Petitioner's racial gerrymandering claim. As the Commission explained, it consistently chose to divide more populous municipalities, like mid-sized cities, over small ones when possible. LRC.SCOPA.Br.App.A.47, 49-50. This choice was made because of smaller communities' concerns that, if divided, their voices would be diluted when combined with large, undivided urban populations. *Id.* By contrast, residents of cities tend to identify more with their neighborhoods and other communities of interest. Splitting mid-size cities to keep smaller communities together helps, in the Commission's judgment, ensure effective representation for all. That decision was met with approval by elected representatives from those mid-sized cities. *See* "We're Pa. small city mayors, fair legislative maps will aid our recovery," Pennsylvania Capital Star (January 19, 2022).[6]

The Commission's decision to split State College—an area close to Petitioner's home and about which Petitioner complained in his *partisan* gerrymandering argument to the Pennsylvania Supreme Court—demonstrates that the Commission employed a race-neutral approach in dividing larger communities when the division of some community was necessary for population equality. Petitioner's expert

6. https://www.penncapital-star.com/commentary/were-pa-small-city-mayors-fair-legislative-maps-will-aid-our-recovery-opinion/.

acknowledged that State College does "not have a large or geographically concentrated minority population," Pet. SCOPA.PFR.App.49a, meaning the Commission could *not* have divided that mid-sized city for racial reasons. Instead, consistent with the Commission's publicly articulated approach, State College was divided because it is the most populous municipality in the region. LRC. SCOPA.Br.App.A.49. Petitioner's earlier complaints about splits in State College—which were lumped together with his complaints about Reading, Allentown, Harrisburg, and Lancaster—undermine his current claim that these divisions were made for racial reasons.

3. Petitioner's "evidence" only shows that the Commission was aware of the racial effects of its Plan, not that it acted with a racial purpose.

In attempting to rebut these clear statements of the Commission's process and priorities, Petitioner entirely ignores the Commission's rationale, dismisses it as pretextual, or cherry-picks sentences from the Chair's public statements and report (which represent a mere fraction of the hundreds of pages of explanation offered in support of the plan). Petitioner's "evidence," at most, demonstrates that the Commission was aware of the racial *effects* of its plan, not that it acted with any racial *purpose*.

First, Petitioner relies on a statement by the Chair that, "[w]hen circumstances permitted the Commission to do so, and after ensuring compliance with all aspects of state and federal law, the Commission fashioned districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act, positioning voters in racial and language minority groups to influence the

election of candidates of their choice." Pet.32 (quoting Pet.App.143). Petitioner reads the word "positioning" in isolation, claiming it shows that specific voters were "positioned" in districts based on their race. *Id.* That is a strained and incorrect reading of the Chair's statements. In context, it is clear the Chair meant that minority voters would be in a better position to influence the election of candidates of their choice after the redistricting cycle, not that they were placed in any specific district to increase their chances of electing a representative.

Further, by including minority-influence districts and coalition districts in the House plan, the Commission was actually working to avoid the harms that the Fourteenth Amendment is meant to prohibit: "being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Bethune-Hill*, 137 S. Ct. at 797. Influence districts do not create similar problems. Instead, they "are to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions." *Uno v. City of Holyoke*, 72 F.3d 973, 991 (1st Cir. 1995). In other words, "influence districts bring us closer to 'the goal of a political system in which race no longer matters.'" *Id.* (quoting *Shaw I*, 509 U.S. at 657).

Second, Petitioner makes much of the Chair's statements that the plan includes seven districts with significant minority populations where there is no incumbent. Pet.31. But the Chair's statements reveal nothing about the Commission's *purpose* in creating those districts. Instead, the Chair was simply explaining the *effects* of the plan as part of the Commission's commitment

to transparency and in response to the many comments from citizens and good government groups advocating for maps that fairly represent the Commonwealth's minority communities. Further, in a district without an incumbent, *any* candidate has an increased likelihood of success, whatever the candidate's race.

Petitioner also attributes some improper racial motive to the Commission's decision to "move districts" into the urban and suburban areas of southeastern Pennsylvania, because moving those districts resulted in districts with substantial minority populations and no incumbents. However, these districts were moved because of population growth. And because the overall population growth in these areas was driven by *minority* population growth, moving districts into these areas necessarily resulted in districts with significant minority population. Further, moving districts means that some districts will not have incumbents in their new locations and other districts will have paired incumbents (about which Petitioner also complained, *see* Pet.SCOPA.Br.61). Nothing invidious can be inferred from the Chair's comments highlighting this inevitable result.

Petitioner also implies that the Commission had a double standard regarding incumbency—that it protected incumbents in majority-white districts and chose to ignore incumbency in areas with substantial minority populations. Pet.22-23. But Petitioner previously complained about the *lack* of incumbency protection for Republican legislators in the white, rural areas. Pet. App.51-52; Pet.SCOPA.Br.61-62. And he claimed that the divisions of the cities with minority populations were done to protect white, Democratic incumbents at the

cost of minority communities. N.T.1777-1778. He cannot now say the opposite because it better suits his racial gerrymandering, rather than partisan gerrymandering, theory.

Petitioner's final example of what he considers "direct evidence" of racial gerrymandering—a "worksheet" prepared by the House Democratic Leader's staff—fares no better.[7] Pet.7. This worksheet compared various plans for Bucks County and, among other data like population deviation, compactness, municipal splits, and competitiveness, included boxes for the number of districts where minority population exceeded 35%. Pet.App.101-102. Notably, Petitioner does not actually challenge any districts in Bucks County as being a racial gerrymander. Regardless, every relevant box was filled with a zero, meaning no districts in the area had substantial minority populations. *Id.* This worksheet, at most, reveals that one Commission member was aware if different proposals drew districts with substantial minority populations. And in Bucks County, there was none. The awareness of the lack of any districts in Bucks County with substantial minority

7. At various points, Petitioner also appears to rely on declarations from his own staff stating that the Chair admitted that certain cities were split to create VRA or minority-influence districts. Pet.7, 32. These declarations, at most, raise a factual question about racial intent that the Pennsylvania Supreme Court unanimously found insufficient to warrant intervention. Indeed, the claim that the Chair said splitting Scranton (which was later undone) was for racial reasons makes no sense in light of the relatively small minority population in that city. Regardless, any factual disputes about why certain lines were drawn further demonstrate that this case is not the vehicle for resolving legal issues about what it means for race to predominate.

populations is hardly evidence that race predominated in the drawing of any other district outside the county. The worksheet is direct evidence of nothing.

Equally unpersuasive is Petitioner's supposed "circumstantial evidence" of racial gerrymandering.

Petitioner focuses on the splits of Pennsylvania's mid-sized cities, like Allentown, Reading, Lancaster, and Harrisburg, each of which Petitioner contends were split once more than "absolutely necessary" based on population. Pet.10-13.

However, Petitioner fails to show these splits were not "absolutely necessary" under Article II, Section 16. As one expert—on whose work Petitioner's expert extensively relied, yet mischaracterized, McClinton.SCOPA.Br.App.C.7-9—explained, Petitioner's critique of the mid-sized city divisions, "divorced from other considerations like compactness, communities of interest, county boundaries, and splits of other surrounding municipalities . . . tells us very little about whether, from the perspective of the Pennsylvania Constitution or traditional redistricting principles more broadly, these splits were necessary." McClinton.SCOPA.Br.App.C.21. For example, "removing the extra split would have involved a variety of countervailing compromises of other constitutional redistricting criteria." *Id.* By splitting Allentown and Harrisburg, for instance, the Commission was able to draw districts that were more compact. McClinton.SCOPA.Br.App.C.18. Dividing Lancaster avoided drawing non-contiguous and non-compact districts. McClinton.SCOPA.Br.App.C.13. And the divisions of Reading prevented odd-shaped districts and an extra county line cut. McClinton.SCOPA.Br.App.C.15. Simply pointing to

a split of a city and its population, without more, does not show that the split was unnecessary.

Moreover, Petitioner ignores the Commission's express explanation that these cities were split to achieve population equality. *See* Section II.B.2, *supra*. As the Chair explained, some municipalities needed to be divided, and the Commission exercised its discretion to divide larger municipalities, rather than smaller ones. LRC. SCOPA.Br.App.A.47, 49-50. The Commission made that choice to ensure that smaller communities receive effective representation and to prevent their interests from being overshadowed by larger, more populous cities.

The only expert called by Petitioner to testify to the Commission (also the only expert upon whom Petitioner has relied at every stage of this process) proffered a different reason for splitting the cities—to create a partisan gerrymander in favor of Democrats. Pet.SCOPA. PFR.App.A.64a. According to this expert, "the decision to divide particular cities in the Commission's proposal is not driven by minority representation, but instead by partisan considerations." *Id.*

Ignoring both the Commission's statements and the conclusions of his own expert, Petitioner now claims that the cities were divided for predominantly racial reasons. Such a contention, which is supported only by Petitioner's *ipse dixit*, cannot satisfy the "demanding" standard for a racial gerrymandering claim.

The "evidence" Petitioner submitted in the Pennsylvania Supreme Court also undercuts his claim that race predominated. As described in Petitioner's brief to that Court, when a member of Petitioner's caucus

discussed with the Commission's redistricting consultant the preliminary House plan's reduction of Hispanic voting-age population in an Allentown district where a Hispanic candidate only narrowly lost the Democratic primary, the consultant allegedly showed "surprise and disbelief." Pet.SCOPA.Br.28. If racial considerations actually predominated in the drawing of the districts in Allentown, the Commission's consultant would have been *aware* of these demographic nuances. Petitioner's own evidence—which he used to support his unsuccessful partisan gerrymandering claim in the Pennsylvania Supreme Court—further undermines his refashioned racial gerrymandering claim in this Court.

4. Petitioner does not engage in the "holistic" analysis required for a racial gerrymandering claim.

Petitioner also fails to undertake the analysis necessary to succeed on a racial gerrymandering claim.

As Petitioner concedes, a racial gerrymandering claim must make a "district-by-district" challenge. *Bethune-Hill*, 137 S. Ct. at 800. Further, "all of the lines of the district at issue" must be considered, and "any explanation for a particular portion of the lines, moreover, must take account of the districtwide context." *Id.* In other words, there must be a "holistic" analysis of the district lines. *Id.*

Petitioner does not undertake such a holistic analysis. Instead, in attempting to show that traditional redistricting criteria were subordinated, he claims only that cities were split more often than absolutely necessary. Pet.2, 33. But Petitioner never explains the basis for all the lines demarcating the district, nor does he explain

why the particular placement of a city split speaks to racial—as opposed to any other—purpose. Nor does he acknowledge that, in cities like Philadelphia, adding a district will necessarily have a racial impact because so many of the city's residents are minorities.[8]

In the absence of the required holistic analysis, Petitioner invites this Court to make the same mistakes that have warranted reversals of lower courts. *See Bethune-Hill*, 137 S. Ct. at 800 (remanding racial predominance inquiry for a new trial because of trial court's focus on only particular district lines and its failure to take a holistic view of the district).

C. Petitioner's alleged evidence falls far short of the legal threshold for proving that race predominated.

Petitioner's evidence of racial predominance is legally insufficient to establish that race predominated in the drawing of any House district. Indeed, although Petitioner erroneously claims the Chair's comments "[a]lmost track[ed]" the predominance test in *Miller* "word-for-word," Pet.1-2, this Court has never entertained a racial gerrymandering claim on so flimsy a record.

In *Miller*, for example, it was "exceedingly obvious" from the district's shape and racial demographics "that the drawing of narrow land bridges to incorporate within

8. Notably, Petitioner's proposed plan, which he revealed mere hours before the Commission was scheduled to vote on a final plan, also added a district in the Philadelphia region (HD-9). Pet.SCOPA.PFR.App.84a. That district had almost identical boundaries to HD-10, about which he now complains. Pet.SCOPA.PFR.App.145a.

the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district." 515 U.S. at 918. The state admitted that many of its decisions would not have been made "but for the need to include additional black population in that district." *Id.* The state also conceded that "a substantial reason" for dividing precincts in the district "was the objective of increasing the black population of that district." *Id.* In fact, it was "undisputed" that the district was drawn "to create a majority black district." *Id.* Based on this record, the Court explained that it "fail[s] to see how the District Court could have reached any conclusion other than that race was the predominant factor" in drawing the district. *Id.*

The showing of racial predominance was equally apparent in *Cooper*. There, the evidence was "uncontested" that the "state's mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population." 137 S. Ct. at 1468. Their mapping consultant explained which black communities were moved into the district to achieve this racial threshold and, at the same time, admitted that he did not "respect county or precinct lines as he wished because 'the more important thing' was to create a majority-minority district." *Id.* at 1469. This Court concluded that, "this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites" was sufficient to show that race predominated. *Id.*

Similarly, in a case that Petitioner emphasized previously but fails to cite here, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (three-judge district court), *aff'd* 137 S. Ct. 2211 (2017), the record was equally strong. There, the court found "overwhelming and consistent evidence" that race was the predominant factor in drawing districts. *Id.* at 130. Indeed, everyone involved in the redistricting process repeatedly confirmed that they drew districts with three instructions in mind: (1) draw so-called "VRA districts" with at least 50%-plus-one black voting age population; (2) "draw these districts first, before drawing the lines of other districts"; and (3) "draw these districts everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state." *Id.* The North Carolina plan also made no attempt to comply with traditional redistricting criteria, splitting an extra 100 municipalities and leaving the court with the impression that "little to no attention was paid to political subdivisions, communities of interest, or precinct boundaries." *Id.* at 137-38. Nor was attention paid to compactness. *Id.* at 138.

This Court's decision in *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022), which Petitioner repeatedly invokes, is similarly inapposite. There, the Governor proposed a map that added a majority-minority district "by reducing the black voting-age population in the other six majority-black districts." *Id.* at 1247 & n.1. In the Governor's plan, the black voting-age populations in those districts were all in the suspiciously narrow range between 50.1% and 51.4%. *Id.* Further, "[t]he Governor argued that the addition of a seventh majority-black district was necessary for compliance with the VRA," even though the record was not

clear that a seventh majority-black district was required by the VRA. *Id.*

Here, the record is demonstrably different. The Commission did not use race in the prescriptive, population percentage-driven, results-focused way that the redistricting authorities in those cases did and that Petitioner here sometimes urged. *See* Section I.B., *supra*. Instead, the overwhelming and consistent evidence is that the Commission first focused on the traditional redistricting criteria of Article II, Section 16 and the Free and Equal Elections Clause, and then, when consistent with those general principles, was attentive to opportunities for minority communities to elect or influence the election of candidates of choice. LRC. SCOPA.Br.App.A.44-46, 60-61. Indeed, unlike the plans in *Covington* and *Cooper*, the Commission's plan performs well under all the traditional redistricting measures and even performed better than the simulations produced by Petitioner's expert. Petitioner's proffered evidence does nothing to undercut this evidence or demonstrate that race was the sole or predominant factor in how the Commission drew districts. As a result, Petitioner never gets past the first hurdle for establishing a racial gerrymandering claim.[9]

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9. Petitioner, echoed by the supporting Amici, also argues that the Commission cannot satisfy strict scrutiny because the Commission has insufficient evidence of racially polarized voting. Because Petitioner fails to make the threshold showing that race was the predominant factor in the Commission's drawing of districts, this Court need not reach the question of whether strict scrutiny was satisfied based on the strong evidence in the record. R.1077-90; McClinton.SCOPA.Br.App.E.2-5.

III. This Petition Should Not Be Held Pending a Decision in *Merrill v. Milligan.*

Petitioner alternatively argues that this Court should hold the Petition pending resolution of *Merrill v. Milligan*, Nos. 21-1086, 21-1087. According to Petitioner, *Merrill*—and another case being held pending *Merrill*, *Ardoin v. Robinson*, No. 21-1596—will "address related questions of racial predominance." Pet.3.

Regardless of *Merrill*'s ultimate outcome, the analysis for Petitioner's racial gerrymandering claim will not change. *Merrill* and *Ardoin* address the *Gingles* factors for a VRA Section 2 claim. In particular, *Merrill* asks for clarification about when a minority community is cohesive enough to warrant drawing a majority-minority district if traditional redistricting criteria have to be ignored to draw such a district. In other words, *Merrill* questions whether racial considerations can be deemed important enough to justify subordination of traditional redistricting criteria.

This Petition, by contrast, asks an entirely different question: how is a court to determine whether race predominated in drawing district lines when Section 2 of the VRA may *not* be a consideration? While many of the same terms are used, the analysis is entirely different. The Petition asks questions about measuring a redistricting authority's intent; *Merrill*, by contrast, seeks clarification on when a statute applies.

Further, the procedural posture of this case is entirely different from *Merrill*. There, the parties obtained discovery, deposed witnesses, and introduced evidence at

trial. A three-judge district court heard that evidence and wrote an exhaustive opinion summarizing the evidence, weighing it, and analyzing it. This Court now has an opportunity to consider the Section 2 issues based on a developed factual and legal record.

Here, by contrast, Petitioner made only a limited record about his racial gerrymandering claims. Indeed, his argument was so insubstantial as to justify the Pennsylvania Supreme Court's denial of his appeal in a unanimous, one-paragraph per curiam order. While Petitioner tries to make it seem like race obviously predominated, the actual record reveals that, to the extent race was considered at all, race was only considered after traditional redistricting criteria and partisan fairness were first addressed. Put differently, at most, race was *subordinate to* traditional redistricting criteria and partisan fairness. To the extent Petitioner contests the Commission's express statements about its rationale, Petitioner raises factual issues that were decided against him by the Pennsylvania Supreme Court and that make his Petition an inappropriate vehicle for this Court's review.

Given the differences in issues, procedural postures, and records, this Court's decision in *Merrill* is unlikely to have any bearing on the Petition. Indeed, the Petition relied on few, if any, Section 2 cases from this Court. It follows that neither *Merrill* nor *Ardoin*, both Section 2 cases, would have any impact.

Finally, nothing in *Merrill* will remedy Petitioner's lack of standing and his waiver or forfeiture of the question presented, discussed in Section I, that make this case an unsuitable vehicle. These threshold problems—which are reasons to deny the Petition outright—mean that holding

the Petition pending the decision in *Merrill* ultimately will be futile. In addition, holding the Petition under these circumstances would create an unnecessary cloud over the Pennsylvania House districts in an election year, something this Court should avoid.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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