No.

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 Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, OH 44114

ROBERT T. TUCKER
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, OH 43215

EFREM M. BRADEN
Counsel of Record
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1504
mbraden@bakerlaw.com

Counsel for the Petitioner

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QUESTION PRESENTED

Pennsylvania's Legislative Reapportionment Commission admittedly made extensive use of race in constructing up to 14 state legislative districts. The Commission "positioned" Pennsylvania voters into districts because of their race, drawing majority-minority and influence districts in Philadelphia, Allentown, and elsewhere, even though it admitted its use of race went well beyond what the Voting Rights Act of 1965 (the "VRA") required. The Commission asserted race was not "predominant" because it allegedly first "focused" on traditional districting principles and its districts "performed well" on various traditional districting criteria metrics like average compactness or overall municipal splits. The Pennsylvania Supreme Court held, without written opinion, that the plan complied with the U.S. Constitution.

The question presented is whether districts drawn for transparently racial reasons, without a VRA-compliance justification, satisfy the Fourteenth Amendment merely because the redistricting authority also satisfied traditional districting principles.

PARTIES TO THE PROCEEDING

Petitioner is Kerry Benninghoff, individually, and in his official capacity as the Majority Leader of the Pennsylvania House of Representatives and as a Member of the 2021 Legislative Reapportionment Commission. Petitioner was a party to the proceedings before the Pennsylvania Supreme Court.

Respondents below include Pennsylvania's 2021 Legislative Reapportionment Commission; Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Commonwealth of Pennsylvania; and House Minority Leader and Commission Member Joanna McClinton, who intervened as a Respondent below. All of these Respondents were parties to the proceedings before the Pennsylvania Supreme Court.

RELATED PROCEEDINGS

Petitioner states that certain other parties independently filed appeals from the 2021 Legislative Reapportionment Commission's final plan. Those other appeals were all filed in the Pennsylvania Supreme Court, the date of entry of judgment in all other appeals was March 16, 2022 (all appeals were decided in the same Order of the Pennsylvania Supreme Court), and they are captioned as follows:

Ryan Covert, Darlene J. Covert, and Erik Hulick, Petitioners v. 2021 Legislative Reapportionment Commission, Respondent, Case No. 4 WM 2022;

Lisa M. Boscola, Senator 18th District, Petitioner v. 2021 Legislative Reapportionment Commission, Respondent, Case No. 14 MM 2022;

Eric Roe, Petitioner v. 2021 Legislative Reapportionment Commission, Respondent, Case No. 16 MM 2022;

Ron Y. Donagi, Philip T. Gressman, Pamela Gorkin, David P. Marsh, James L. Rosenberger, Eugene Boman, Gary Gordon, Liz McMahon, Timothy Feeman, and Garth Isaak, Petitioners v. 2021 Legislative Reapportionment Commission, Respondent, Case No. 17 MM 2022;

Gabriel Ingram, Roth Moton, Mark Kirchgasser, and Susan Powell, Petitioners v. 2021 Legislative Reapportionment Commission, Respondent, Case No. 18 MM 2022;

Todd Elliott Koger, Petitioner v. 2021 Pennsylvania Legislative Reapportionment Commission, Respondent, Case No. 7 WM 2022;

Jackie Hutz, Petitioner v. 2021 PA Legislative Reapportionment Commission, Respondent, Case No. 11 WM 2022; and

Edward J. Kress, Petitioner v. 2021 Legislative Reapportionment Commission of the Commonwealth of Pennsylvania, Respondent, Case No. 12 WM 2022.

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The Order of the Supreme Court of Pennsylvania is reported at 2022 Pa. LEXIS 293 (Mar. 16, 2022) and is reprinted in the appendix. Pet.App.1a-7a.

JURISDICTIONAL STATEMENT

The Supreme Court of Pennsylvania had jurisdiction pursuant to Art. 2, § 17(d) of the Pennsylvania Constitution to review the final legislative reapportionment plan adopted by the Pennsylvania Legislative Reapportionment Commission. This Court has jurisdiction to review the Order of the Supreme Court of Pennsylvania under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Fourteenth Amendment to the United States Constitution and the Voting Rights Act, 52 U.S.C. § 10101, *et seq*. These provisions are printed in the appendix. Pet.App.178a–181a.

STATEMENT

The court below upheld the 2022 Pennsylvania House of Representatives reapportionment plan, even though several districts in the plan were textbook racial gerrymanders. Almost tracking *Miller v. Johnson*'s, 515 U.S. 900, 916 (1995), racial-predominance test word-for-word, the Chairman of

the Legislative Reapportionment Commission (the "Commission") responsible for crafting the plan said he "fashioned districts to create additional opportunities [for minority voters] beyond the minimum requirements of the Voting Rights Act, positioning voters in racial and ethnic minority groups to influence election of candidates of their choice." Pet.App.143a; 163a.

The Commission defended its racial sorting of voters on the assertion that it only pursued its racial goals *after* it "focused" on traditional districting criteria, and that its plan "performed well" on "traditional districting measures." Pet.App.196a. As such, the Commission insisted, it did not subordinate traditional districting criteria to race. That theory, if allowed to stand, would privilege semantics over constitutional principle and permit redistricting authorities to violate fundamental rights so long as their explanations are sufficiently slick.

The Commission plainly subordinated traditional principles to racial considerations, as it divided Pennsylvania cities more than "absolutely necessary," *compare* PA. CONST. art. 2, § 16, to achieve its racial goals. The Commission further admitted that it purposefully created new majority-minority and influence districts even though it did not believe the Voting Rights Act ("VRA") required them. The Commission's position that its transparent racial sorting is permissible because of some adherence to some traditional districting principles defies this Court's precedent, which holds that if race is the "criterion that . . . could not be compromised," then race predominated. *Bethune-Hill v. Va. State*

Bd. of Elections, 137 S. Ct. 788, 798 (2017) (citation omitted). It does not matter if the Commission's racial line-drawing did or did not result in an "actual conflict" with traditional districting principles. *Id.* at 799.

Despite considerable evidence of predominance, the Pennsylvania Supreme Court gave Petitioner's appeal short-shrift—upholding the plan against his challenge in a one-page order without an opinion. Its decision was wrong, and if allowed to stand, would create a roadmap for future equal-protection violations. A redistricting authority could admit to racial predominance but avoid strict scrutiny by referencing any number of "numerous and malleable" redistricting principles, *id.*, and a reviewing state court could wash its hands of the equal-protection offense by saying nothing at all. But *Bethune-Hill* signaled this Court's disapproval of that possibility, and when the Wisconsin Supreme Court similarly imposed a plan with a racially predominant purpose without sufficient justification, this Court stepped in and summarily reversed. *Wis. Legislature v. Wisconsin Elections Comm'n,* 142 S. Ct. 1245 (2022).

The result should be the same here. No circuit split was necessary to warrant this Court's intervention in Wisconsin, and, as in that case, the voting public's interest in freedom from racial segregation is of paramount importance.

This Court has granted certiorari in two other cases to address related questions of racial predominance. *Merrill v. Milligan,* Nos. 21-1086 and 21-1087 (U.S.) and *Ardoin v. Robinson,* No. 21-1596 (U.S.). The Court should grant certiorari in this case

for the same reasons. At a minimum, the Court should grant certiorari pending resolution of *Merrill* and take additional action, including vacatur and remand, after it issues its decision in that case.

I. Framework for Legislative Redistricting in Pennsylvania.

Beginning with the 1970 redistricting cycle, the Commonwealth of Pennsylvania has tasked a commission with decennial redistricting of state legislative districts, which is termed "reapportionment" in Pennsylvania. PA. CONST. art. 2, § 17. The commission consists of "five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives . . . , and a chairman . . . ." *Id.* at § 17(b). The 2021 Legislative Reapportionment Commission (the "Commission") consisted of the majority and minority leaders of each house of the Pennsylvania General Assembly and Chairman Mark Nordenberg who was appointed by the Chief Justice of the Pennsylvania Supreme Court. Pet.App.120a-121a.

In legislative reapportionment, the Commission must adhere to the requirements of both federal and state law. Article 2, Section 16 of the Pennsylvania Constitution mandates certain redistricting criteria, including that legislative districts be "composed of compact and contiguous territory as nearly equal in population as practicable" and, crucially, that "[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided . . . ." PA. CONST. art. 2, § 16. In addition to these requirements, the Commission must also

ensure that any plan complies with the Pennsylvania Constitution's Free and Equal Elections Clause (Article I, Section 5) and Article I, Section 29, together with the VRA and the Fourteenth and Fifteenth Amendments to the United States Constitutions.

II. Proceedings Before the 2021 Legislative Reapportionment Commission.

Pursuant to Section 17(a) of Article 2 of the Pennsylvania Constitution, the Commission was constituted to reapportion the Commonwealth following the 2020 Census. Pet.App.120a-121a. The Commission must file a preliminary reapportionment plan within 90 days after the Commission has duly certified the population data it receives from the Census Bureau. PA. CONST. art. 2, § 17(c).

The U.S. Census Bureau delivered the decennial census data on August 12, 2021, and the full redistricting toolkit on September 16, 2021. Following this procedure, the Commission approved a preliminary reapportionment plan on December 16, 2021, ("2021 Preliminary Plan") by a three to two vote for the House Plan, with Commissioners Kim Ward and Petitioner Benninghoff dissenting, and a unanimous vote for the Senate. Pet.App.125a-128a.

The Commission held public hearings on the 2021 Preliminary Plan between December 16, 2021, and February 4, 2022, and heard objections and other input from citizens and government officials. Petitioner Benninghoff timely submitted exceptions to the 2021 Preliminary Plan on January 15, 2022, including exceptions to many districts in the plan

created with predominant racial purposes. Pet.App.39a.

On February 4, 2022, the Commission held a public meeting to vote on the 2021 Final Plan. Pet.App.138a-140a. Before the vote, Petitioner Benninghoff proposed an amendment that addressed many of the deficiencies with the 2022 Final Plan, including by curing improper race-based districting choices. The Benninghoff Amendment was defeated by a party-line three to two vote. Pet.App.148a-150a.

By a four to one vote[1], the Commission approved the 2022 Final Plan on February 4, 2022 (the "2022 Final Plan"). Pet.App.152a-154a. Petitioner cast the dissenting vote, though Commissioner Ward expressed her reservations about the House map in the 2022 Final Plan. Pet.App.150a-151a.

III. The Commission Drew Districts Based Predominantly on Race.

There is substantial direct evidence that a predominant intent of the Commission was to draw districts based upon race. From the outset, the Commission sought to create minority "opportunity" and "influence" districts without an incumbent to allegedly help minority voters elect candidates of their choice. Yet the Commission admitted that at least some of these districts were *not* required by the Voting Rights Act.

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[1] The Commission held separate votes for the House and Senate maps for the 2021 Preliminary Plan but only one vote approving both maps for the 2022 Final Plan.

A. This was the Commission's predominant purpose from the beginning. During a November 16, 2021, meeting of the House Caucuses and the Chairman, staff employed by House Minority Leader and Commission-member Joanna McClinton circulated an analysis sheet analyzing a proposed configuration of Bucks County. Pet.App.105a; 117a. The sheet consisted of a form with fields identifying the number of "35% or Higher" Black, Hispanic, or Coalition districts in the proposed drawing of Bucks County. Pet.Appx.101a-102a.

During a December 7, 2021, meeting, the Chairman explained that the Commission designed "opportunity districts" without incumbents to ostensibly help minorities elect a candidate without dealing with an incumbent. Pet.App.106a; 118a. Just a few days later, during a December 9, 2021, meeting discussing a draft of the 2021 Preliminary Plan, the Chairman admitted that Lancaster, Reading, Allentown, and Scranton were split for the purpose of creating "VRA" or "minority influence districts," though some Scranton splits were later eliminated. Pet.App.106a; 1118a.

Then, during the December 16, 2021, hearing approving the 2021 Preliminary Plan, Chairman Nordenberg confirmed the Commission's intent was to create minority opportunity and influence districts without an incumbent:

> Let me turn to just one feature of the new House map that might not be immediately apparent from a quick review of it. This plan includes seven minority opportunity districts, true VRA districts, minority influence

> districts, and coalition districts in which there is no incumbent, creating special opportunities for the election of minority representatives. Just to quickly review those districts, they include District 9, which is in a fast-growing area of Philadelphia and has a black population exceeding 58 percent; District 22 in Lehigh County, which has a Hispanic population exceeding 50 percent; District 54 in Montgomery County, a compact district which has a minority population exceeding 50 percent; District 104 in Harrisburg, which has a minority population exceeding 50 percent; District 116, where the current incumbent has been elected to serve as a judge, has been redesigned as a district including parts of Luzerne and Schuylkill Counties which have a Hispanic voting age population over 37 percent, a total Hispanic population of 43 percent, so the growth trends are clear; and District 203 in Philadelphia, a district with a population that is 42 percent Black, 22 percent Hispanic, and 13 percent Asian. Again, there is no incumbent advantage that will have to be overcome in any of these districts, which should give minority communities residing in them a special opportunity.

Pet.App.123a-124a. His written testimony confirmed that the Commission created "seven minority

opportunity districts," HD-9, 22, 54, 104, 116, and 203, drawn without incumbents. Pet.App.131a-132a.[2]

These "opportunity" districts did not result by happenstance. The Chairman testified at a January 7, 2022, hearing that "[o]ne of the things we tried to do in both maps, because of testimony we had received earlier in the process, was to create districts with strong Latinx populations and with no incumbents, because we were led to believe that overcoming the natural powers of an incumbent was very difficult." Pet.App.135a-136a.

The Chairman further confirmed at the February 4, 2022, hearing adopting the 2022 Final Plan that the Commission purposefully "fashioned districts to create additional opportunities *beyond the minimum requirements of the Voting Rights Act*, positioning voters in racial and ethnic minority groups to influence election of candidates of their choice." Pet.App.143a (emphasis added). He emphasized and reiterated his earlier statements that the Commission drew "minority influence districts" without incumbents, even though they were not required by the VRA. *Id*. Later during the February 4 hearing, the Chairman confirmed that unpacking existing majority-minority districts to create new minority-performing districts was "very important to us." Pet.App.146a. Senator Costa likewise confirmed that the Commission worked to create "coalition

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[2] The Chairman mentioned "seven" such districts, but only described six. Because HD-19 and HD-50 also meet his criteria, the actual total of such districts is eight. Pet.App.55a n.9.

districts," comprising high percentages of racial or ethnic minority groups. Pet.App.147a-148a.

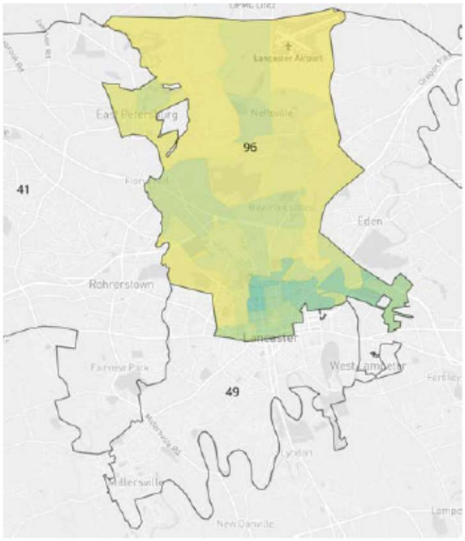
In his Final Report (the "Chair's Final Report"), the Chairman again reiterated that "the Commission fashioned districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act, positioning voters in racial and language minority groups to influence the election of candidates of their choice." Pet.App.163a. He confirmed that "the Commission team sought to create minority opportunity and influence districts without an incumbent so as to provide the greatest potential for racial and language minority voters to influence the election of candidates of their choice." Pet.App.163a-164a. All of these statements throughout the process are direct evidence that districts were predominantly drawn to meet a racial objective. This included, at a minimum, the six districts described in the Chairman's December 16th remarks: HD-9, HD-22, HD-54, HD-104, HD-116, and HD-203.

B. Circumstantial evidence corroborates the direct evidence and confirms that districts were drawn with a predominant focus on race. Expert reports and testimony presented to the Commission show racial predominance. One expert report, that of Dr. Barber, demonstrated that contrary to the state constitutional requirement that cities not be split more than "absolutely necessary," PA. CONST. art. 2, § 16, the 2022 Final Plan had excessive and unnecessary splits of Hispanic communities in Allentown (HD-22, HD-132, and HD-134), Lancaster (HD-49, HD-96), and Reading (HD-126, HD-127, and

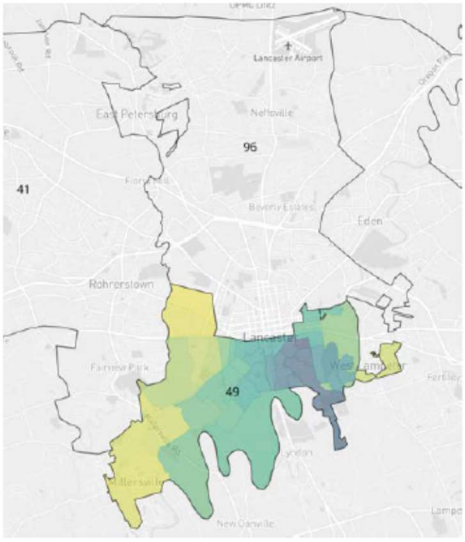
HD-129), and the Black community of Harrisburg (HD-103, HD-104). These splits helped achieve the Commission's admitted desire to create additional minority influence districts in these areas. Pet.App.73a-100a; 106a; 118a.

For example, the below map shows how the City of Lancaster was divided to achieve the creation of one district with a Hispanic voting age population of 34.3% – nearly identical to the 35% percentage reported on the worksheet months earlier:

District 96 - Hispanic VAP: 12.8%



District 49 - Hispanic VAP: 34.3%

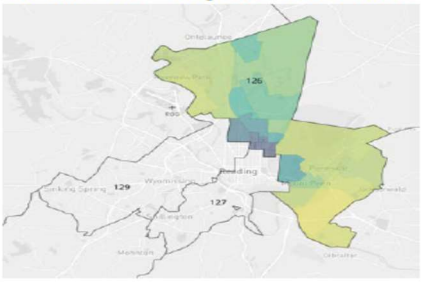


Pet.App.87a.

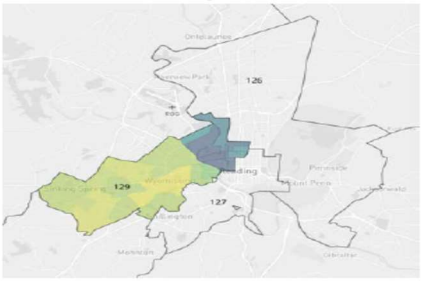
Similarly, the City of Reading was divided more than necessary, but with the result of creating two

additional minority influence districts very close to the 35% mark:

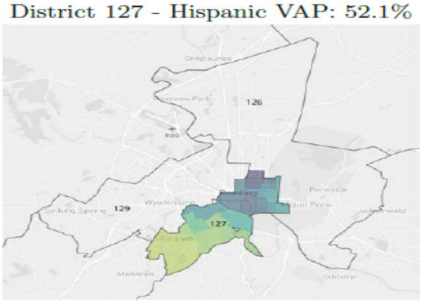
District 126 - Hispanic VAP: 33.2%



District 129 - Hispanic VAP: 34.4%



District 127 - Hispanic VAP: 52.1%



Pet.App.92a.

The Commission's race-based choices were based in part on expert advice. Dr. Barreto, a VRA expert proffered by Commission Member McClinton, presented to the Commission on January 14, 2022, to help defend the Commission's proposed plan. He compared the Minority Voting Age Percentage

("MVAP") in numerous "minority-performing districts" between the prior decade's plan and the 2021 Preliminary Plan. Pet.App.176a-177a. Some of these districts were the "opportunity" districts that Chairman Nordenberg indicated were expressly created without incumbents, purportedly to benefit minority voters, and his report reveals significant change in the MVAP in those districts. *Id*. For example, HD-116 increased from 30.4% to 40.5%. Pet.App.177a.

In his report, Dr. Barreto stated that "[i]n areas where the minority population is overconcentrated or packed, there can be consideration given to unpacking these districts, so that they still perform for minority candidates of choice, but also allow for minority voters to be influential and numerous in size in adjacent minority coalition districts." Pet.App.175a. *See also id.* at 176a-177a. For example, the MVAP of HD-22 dropped from 71.0% to 61.6% and reflects the intentional unpacking that Dr. Barreto references and the Commission adopted. Pet.App.177a. These shifts in the racial composition of districts from the prior decade's plan corroborate the Commission's predominant racial intent.

A partisan-fairness report of another expert further proves the point. After Petitioner sponsored an expert report showing that the 2022 Final Plan for the House was a flagrant partisan outlier that would likely violate the Pennsylvania Constitution,[3]

[3] The Pennsylvania Supreme Court has held that so-called partisan gerrymandering violates the Commonwealth's Constitution. *League of Women Voters of Pa. v. Com.*, 178 A.3d 737 (Pa. 2018).

Commission Member McClinton sponsored a different expert, Dr. Imai, to rebut that evidence. Chairman Nordenberg stated that Dr. Imai found the 2022 Final House Plan was "*less* of a statistical outlier than the [Petitioner] had claimed," especially when he "factored in racial data" and concluded that when "majority-minority districts are considered, there is no empirical evidence that the preliminary plan is a partisan gerrymander." Pet.App.156a (emphasis added). That is, the Commission argued that the 2022 Final Plan was not the *partisan gerrymander* it appeared to be because the Commission's *racial* intent (not any partisan intent) explains the partisan effect.

IV. Proceedings Before the Pennsylvania Supreme Court.

The Pennsylvania Constitution authorized direct appeals to the Pennsylvania Supreme Court from the final plan adopted by the Commission within 30 days of the plan's filing. PA. CONST. art. 2, § 17(d). Any challenges to the 2022 Final Plan were due by March 7, 2022. Majority Leader Benninghoff filed his Petition for Review in the Pennsylvania Supreme Court on February 17, 2022. Pet.App.29a. That same day, the Pennsylvania Supreme Court issued an Order requiring all Petitions for Review, as well as supporting briefs, challenging the 2022 Final Plan to be received by the Court by March 7, 2022. Pet.App.16a. That Order also required the Commission to file a consolidated answer and brief by 2 p.m. on March 11, 2022, prohibited the filing of reply briefs, and indicated the Court would decide the matter on the briefs.

On March 7, 2022, Petitioner filed his brief in support of his Petition for Review challenging the 2022 Final Plan on the essential grounds that it was a partisan gerrymander in violation of the Commonwealth's Free and Equal Elections Clause, and further challenged 14 districts as racially gerrymandered—those identified by the Chairman as being drawn with racial intent, HD-9, HD-22, HD-54, HD-104, HD-116, and HD-203, two others meeting his criteria but left off his list, HD-19 and HD-50, and districts in cities divided on the basis of race, e.g., Lancaster (HD-49, HD-96), Reading (HD-126, HD-127, and HD-129), and the Black community of Harrisburg (HD-103, HD-104). Pet.App.20a. Some 22 other persons filed separate appeals from the 2022 Final Plan. On March 4, 2022, Petitioner filed an Application for Relief with the Pennsylvania Supreme Court requesting leave to file a reply brief and for oral argument, which the court denied. Pet.App.18a; 21a.

Without permitting reply briefs or oral argument, the Pennsylvania Supreme Court issued a one-page Order on March 16, 2022, finding that the 2022 Final Plan is "in compliance with the mandates of the Pennsylvania Constitution and the United States Constitution," and dismissing all outstanding motions. Pet.App.6a-7a. The Pennsylvania Supreme Court did not issue an opinion. It simply rubber-stamped the 2022 Final Plan without analysis or explanation.

REASONS FOR GRANTING THE PETITION

I. This Case Presents A Compelling Question Of Federal Constitutional Law That This Court Should Resolve.

This Court should grant certiorari to reiterate, once again, that "districting maps that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (citation omitted). When the Wisconsin Supreme Court imposed a race-based map that failed to satisfy strict scrutiny, this Court promptly intervened to vacate that order and correct the plain equal-protection violation. *Id.* at 1250. It did so even in the absence of a split of authority among the lower courts.

The Court should do the same here, both to ensure state courts and redistricting authorities hear the message that racial sorting is invidious and to clarify the "predominance" standard establishing when strict scrutiny does and does not apply. This Court's *Bethune-Hill* decision clarified that predominance does not turn on a redistricting authority's adherence to traditional districting principles, but it left much to the imagination of what, precisely, predominance means.

The ambiguity is a recipe for mischief, and this is a case in point. The Commission took the view that overriding admissions of racial purpose fall short of predominance so long as a skillful set of semantic denials are employed. And the Pennsylvania Supreme Court apparently believed that what a redistricting authority lacks in facts and law can be

made up in judicial silence. Unless the Court clarifies that drawing new voting districts with the transparent purpose of hitting racial targets or specific racial objectives is presumptively unconstitutional, it can expect that, again and again, state authorities will flout its equal-protection commands.

A. The Constitutional Limitation On A State's Use Of Racial Classifications In The Construction Of Legislative Districts Requires Clarity From This Court.

1. This Court has *repeatedly* affirmed that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also, e.g., Wis. Legislature,* 142 S. Ct. at 1248. Racial classifications in redistricting "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

Thus, "[t]he Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez,* 138 S. Ct. 2305, 2314 (2018) (citing *Shaw*, 509 U.S. at 641). As this Court has held, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling

governmental interest." *Shaw*, 509 U.S. at 643; *see also, e.g., Miller v. Johnson,* 515 U.S. 900, 904–05 (1995).

The racial-gerrymandering analysis proceeds in two steps. First, a plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. By contrast, mere "race consciousness"—such as a legislature's knowledge of "racial demographics," *Miller*, 515 U.S. at 916—does not trigger strict scrutiny, *e.g., Shaw*, 509 U.S. at 646. Second, if race predominated, the burden shifts to the state to "satisfy strict scrutiny" by proving "that its race-based sorting of voters is narrowly tailored to comply with the VRA." *Wis. Legislature*, 142 S. Ct. at 1248. This Court has "assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed" because "the VRA demands consideration of race." *Abbott*, 138 S. Ct. at 2315.

2. The predominance test has proven difficult to apply because it is far from clear at what point racial goals tip from race consciousness (not suspect) to racial predominance (which is suspect). Further clarity from this Court is badly needed.

The Court's first racial-gerrymandering decision found predominance because "a district's shape [was] so bizarre that it is unexplainable on grounds other than race." *Shaw,* 509 U.S. at 644. The Court later broadened this doctrine, holding that predominance occurs where "the legislature subordinated traditional race-neutral redistricting principles,

including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 515 U.S. at 916. In one early plurality opinion, however, the Court stated that "the neglect of traditional districting criteria is…necessary" to a predominance finding. *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion). That opinion's author, Justice O'Connor, opined that this standard would ensure that mere compliance with the VRA's requirement to create minority-opportunity districts does not trigger strict scrutiny. *See Miller*, 515 U.S. at 928–29 (O'Connor, J., concurring); *see also Bush*, 517 U.S. at 962 ("Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself.").

But, in *Bethune-Hill*, this Court steered away from that approach, holding that the predominance threshold does not require a showing of a "deviation from, or conflict with, traditional redistricting principles." 137 S. Ct. at 799. The Court held that racial predominance can be found in the absence of an "actual conflict" through "direct evidence of the legislative purpose and intent or other compelling circumstantial evidence." *Id.* It called for "a holistic analysis of each district" challenged as a racial gerrymander to assess the degree of impact of a map-drawer's racial awareness, but stopped short of identifying the line beyond which race predominates and triggers strict scrutiny. *Id.* at 799.

The meaning of *Bethune-Hill* is far from clear. In the Court's next treatment of predominance, it held

that a purposefully drawn majority-minority district *was* subject to strict scrutiny (which it failed) based on evidence that the map-drawer "moved the district's borders to encompass the heavily black parts of Durham [North Carolina] (and only those parts), thus taking in tens of thousands of additional African–American voters" and "deviated from the districting practices he otherwise would have followed." *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017). In *Bethune-Hill* itself—which was remanded for a new trial—the three-judge district court found that "race predominated over traditional districting factors" in 11 Virginia legislative districts despite denials of predominance by both the redistricting consultant and architect of the plan. *Bethune-Hill v. Virginia State Bd. of Elec. (Bethune-Hill II*), 326 F. Supp. 3d 128, 136 (E.D. Va. 2018). This Court did not reach the questions of predominance posed in the follow-up appeal because it found the Virginia House of Delegates lacked standing to prosecute it. *Va. House of Delegates v. Bethune-Hill,* 139 S. Ct. 1945, 1955 (2019).

3. The Court should grant certiorari to provide essential clarity. Multiple facets of this case make it an ideal opportunity for this Court to address the meaning of *Bethune-Hill*'s predominance analysis.

First, the Commission's approach to racial predominance risks making the test merely semantic. This Court in *Cooper* had no trouble finding predominance because the map-drawing consultant "candidly admitted" that he did not draw the challenged district as he "wished" because of a majority-minority racial target the sponsoring

legislators believed the VRA required. 137 S. Ct. at 1469. As this case illustrates, redistricting defendants have wised up. The Commission here admits to having created minority-opportunity and influence districts across the 2022 Final Plan but justifies it based on neutral criteria it also allegedly achieved. Thus, while the Commission has not candidly admitted that its racial goals steered it away from what it otherwise would have done, this begs the question whether the problem in *Cooper* is what the map-drawer *said* or what he *did*. Until this Court confirms it is the latter, it can expect more specious denials of predominance that, in matter of fact, are not different from *Cooper*.

Second, the Commission applied its racial goals in a new way. Whereas *Bethune-Hill* contemplated predominance as bearing uniquely on "the lines of the district at issue," 137 S. Ct. at 800, the Commission applied race in part by eliminating incumbents from several of the districts it identified as minority-opportunity or minority-influence districts. This approach appears to be a novel form of racial differentiation. Redistricting authorities generally adopt a race-neutral approach to incumbency, either treating incumbency protection as a traditional districting principle to apply where otherwise possible, *see Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259 (2015), or as a proxy for partisan discrimination to view with skepticism or even forbid, *cf., e.g.*, *Harper v. Hall*, 868 S.E.2d 499, 550 (N.C. 2022). But here, the Commission treated incumbency protection as illegitimate for a class of districts defined by race and as legitimate for majority-white districts. Because

"the law responds to proper evidence and valid inferences in ever-changing circumstances, as it learns more about ways in which its commands are circumvented," *Bethune-Hill*, 137 S. Ct. at 799, the Court should intervene to clarify that differential treatment on the basis of race is suspect in all its forms, including where a redistricting authority applies one form of traditional criteria to majority-white districts and another to minority-opportunity districts.

Third, this case involves race-based redistricting admittedly not required by the VRA. The underlying impetus for the predominance test appears to be the concern that a stricter equal-protection standard would unduly punish or limit states in creating VRA districts, which are "created precisely because of race." *Abbott*, 138 S. Ct. at 2314. But here, the Commission advertised that it created minority-influence and opportunity districts *not* required by the VRA in a gratuitous effort to assist members of some racial groups (not all) in prevailing in or exerting influence over elections. This raises the question whether the use of suspect classifications of race and ethnicity to intentionally enhance the electoral power of some groups over others, beyond what Congress dictated under the VRA to *eliminate* the effects of prior discrimination, is constitutionally suspect. Just as "[t]here is a serious problem with any proposal to employ black or Asian or white citizens of some other ethnic background as 'fill' in districts carefully drawn to" achieve racial quotas, *Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594, 598 (7th Cir. 2008), there is a serious problem with a plan designed to secure electoral power from some

racial groups over others without a mandate under the VRA.

4. Passing up this opportunity for clarity will not aid this Court in managing its docket. If it is "fair to say" this Court's precedents under the VRA "have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim," *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Roberts, C.J., dissenting from the grant of applications for stays), it is even more fair to say that the Court's precedents on race have engendered disagreement and uncertainty; these lines of authority are but two sides of the same problem.

Unless this Court speaks clearly on the proper role of race in redistricting, more cases raising the question, in various postures, are sure to follow. Despite this Court's several racial-gerrymandering decisions in the past decade, new cases on the proper use of race in redistricting continue to arise, leading to three more cases that have been or will be resolved on the merits in this Court in the past year—*Merrill, Ardoin*, and *Wis. Legislature*. More are pending in the lower courts. *See, e.g., Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, -- F. Supp. 3d --, 2022 WL 633312, *76 (N.D. Ga. Feb. 28, 2022).

Indeed, redistricting litigation has proliferated after this decennial census. As of July 1, 2022, "a total of 72 cases have been filed challenging congressional and legislative maps in 26 states as racially discriminatory and/or partisan

gerrymanders."[4] At the same time, the use of computer technology in redistricting has proliferated, including the development of "VRA-conscious" computer algorithms designed to draw plans that "increase minority electoral opportunities." *See, e.g.,* Amariah Becker et al., *Computational Redistricting and the Voting Rights Act*, 20 ELEC. L.J. 407, 407 (2021). Clarifying the limits on the permissible use of race in redistricting is essential to provide redistricting authorities, litigants, and lower courts with clear rules of the road in this complex space.

The stakes are high. Permitting racially gerrymandered plans to stand exacts a significant toll on civil rights: "classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 509 U.S. at 643 (quoting *Hirabayashi*, 320 U.S. at 100). Addressing this difficult issue is essential to vindicate venerable Fourteenth Amendment rights.

B. The Court Is Considering Substantially Similar Issues In Two Other Cases This Term.

An equally compelling reason for this Court to grant certiorari is that it has granted certiorari in two sets of cases addressing similar issues. One of them, *Merrill,* will be argued on the second day of the upcoming Term. The other, *Ardoin,* is being held in

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[4] Brennan Center for Law and Justice, *Redistricting Litigation Roundup*, https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 (visited July 13, 2022).

abeyance pending *Merrill*. *Merrill* has raised the issue of how to distinguish between racial "predominance" and racial "awareness" when navigating the competing hazards of liability under the Equal Protection Clause and Section 2 of the VRA. *See Appl. for Stay or Injunctive Relief Pending Appeal* at 28, *Merrill v. Caster*, No. 21A376 (U.S.) (Jan. 28, 2022); *Appl. for Admin. Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment* at 26-27, *Ardoin v. Robinson,* No. 21A814 (U.S.) (June 17, 2022).

The predominance test is at the heart of both cases. *Merrill* and *Ardoin* are appeals from preliminary injunctions enjoining plans under Section 2 of the VRA. A key issue is whether illustrative plans created by plaintiffs to satisfy the first *Gingles* precondition for a Section 2 claim—that the minority community is "sufficiently large and compact to constitute a majority in a reasonably configured district," *Wis. Legislature,* 142 S. Ct. at 1248—can satisfy the precondition if they were developed with race as a predominant factor. The predominance question is important because an essential issue in any Section 2 vote-dilution case is the choice of benchmark used to assess the claimed "dilution." Stated differently: is a person's vote diluted compared to *what baseline*? *See, e.g.*, *Brnovich v. Democratic Nat'l Cmte.*, 141 S. Ct. 2321, 2338 (2021) ("[I]t is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared"); *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring in judgment) ("[I]n order to decide whether an electoral system has made it harder for minority voters to elect the

candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system"); *accord*, *Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring in judgment). For a Section 2 vote-dilution claim, the "benchmark" is a "hypothetical, undiluted [illustrative] plan." *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478–80 (1997).

In *Merrill* and *Ardoin*, the lower courts found that although the creators of plaintiffs' illustrative plans used race to ensure they drew a second second majority-minority district, race did not predominate because plaintiffs' experts allegedly did not subordinate traditional criteria to race. *See, e.g., Caster v. Merrill,* -- F. Supp. 3d --, 2022 WL 264819, *1, *79 (N.D. Ala. Jan. 24, 2022), *cert granted sub nom, Merrill v. Milligan,* 142 S. Ct. 879 (2022) (finding that "as soon as" plaintiffs' experts determined it was possible to draw a second majority-minority district, "they assigned greater weight to other traditional redistricting criteria"); *Robinson v. Ardoin*, -- F. Supp. 3d --, 2022 WL 2012389, *1, *47 (M.D. La. June 6, 2022), *cert granted sub nom*, *Ardoin v. Robinson,* No. 21-1596 (U.S.) 2022 WL 2312860 (June 28, 2022) ("Plaintiffs' expert witnesses ... explicitly and credibly testified that they did not allow race to predominate over traditional districting principles as they developed their illustrative plans"). Plaintiffs in *Merrill* and *Ardoin* purported to show a lack of predominance principally with evidence that their illustrative plans' "performance" on various plan-wide traditional districting metrics (e.g., compactness or municipal

split counts) met or exceeded the enacted plan's "performance." *See, e.g., Caster*, 2022 WL 264819, at **36-37 (map-drawer attempted to "meet or beat" the enacted plan on county splits and used enacted plan's compactness scores as a "yardstick" when drawing his illustrative plan); *Robinson*, 2022 WL 2012389, at **11-13 (comparing proposed illustrative plans to enacted plan on parish/county splits, average district compactness, VTD splits, etc.). As set forth *infra,* at § II(A), the Commission relied principally on the same type of plan-wide evidence to deny that race predominated.

This case presents the same underlying dispute about racial predominance in the context of whether the Commission's use of race complied with the Equal Protection Clause. It is highly likely that *Merrill* will impact the predominance standard at issue in this case. Considering this case along with *Merrill*, or at least holding this case pending the outcome of *Merrill* (as the Court proceeded in *Ardoin* after staying the lower court's injunction), is the appropriate course.

C. This Case Is A Suitable Vehicle To Address The Question Presented.

This case is a suitable vehicle to address the important issues presented in this petition. All the positions taken in this petition were raised and preserved below. This case comes to this Court in a suitable posture, i.e., as a direct appeal from a state court's order adjudicating a newly adopted plan. In *Wis. Legislature,* this Court did not hesitate to address important federal questions raised through this direct appellate channel, which permitted the

vindication of Wisconsin voters' fundamental rights more quickly and directly than by first requiring a lengthy federal-court collateral challenge to the plan. Granting certiorari in this case would serve the same purpose.

Although the Pennsylvania Supreme Court decided the appeal without an opinion,[5] the evidence of predominance is so clearly established that there could not be a material dispute of fact to defeat this Court's review. The Pennsylvania Supreme Court treats appeals from the Commission's final plan as akin to administrative agency appeals. 210 Pa. Code § 3321 (providing that such appeals "shall be governed by Chapter 15 (judicial review of governmental determinations)"). The Commission's record of proceedings forms the evidentiary record for Petitioner's appeal.

Second, this case raises fundamental legal questions going to the standard for racial predominance under *Miller*. This question is one of law. *See, e.g., Gingles*, 478 U.S. at 79 (nothing "inhibits" the Court's "power to correct errors of law, including those that may infect so-called mixed

[5] The Pennsylvania Supreme Court's failure to hold argument or issue a detailed opinion is an unexplained departure from 50 years of settled practice. In the 1970 through 2010 redistricting cycles, that court held argument and issued written opinions on appeals filed from those decades' plans. *See, e.g., Holt v. 2011 Legislative Reapportionment Comm'n,* 38 A.3d 711, 717 (Pa. 2012); *Albert v. 2001 Legislative Apportionment Comm'n,* 790 A.2d 989, 992 (Pa. 2002); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n,* 609 A.2d 132, 135 (Pa. 1992); *In re Reapportionment Plan,* 442 A.2d 661 (Pa. 1981); *Com. ex rel. Specter v. Levin*, 293 A.2d 15, 17 (Pa. 1972).

finding of law and fact" or a "misunderstanding of the governing rule of law") (internal citation omitted); *Abbott,* 138 S. Ct. at 2326 ("whether the court applied the correct burden of proof is a question of law subject to plenary review"); *Alabama*, 575 U.S. at 262 (vacating judgment and remanding where "error[s] about relevant law" . . . "likely infected the District Court's conclusions" about racial-gerrymandering).

Finally, "it is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000) (remanding to Florida Supreme Court to clarify federal grounds for its decision) (quoting *Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940)). Here, the Pennsylvania Supreme Court adjudicated questions of federal law when it held the 2022 Final Plan "is in compliance with the mandates of . . . the United States Constitution." Pet.App.6a. Its failure to issue an opinion is not a barrier to this Court's review.

II. The Lower Court's Decision Is Wrong.

The Pennsylvania Supreme Court's finding that the 2022 Final Plan complied with the Constitution is wrong. The record demonstrated that Pennsylvania voters throughout the Commonwealth were assigned—or "position[ed]"—on the basis of race. And the Commission conceded away the only recognized compelling state interest to justify predominant racial classifications in redistricting, compliance with the VRA, by admitting its use of

race went beyond that required to comply with the VRA. Its order must not stand.

A. Race Predominated.

The record of racial predominance could not be clearer. Racial gerrymandering occurs when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama,* 575 U.S. at 272 (quoting *Miller*, 515 U.S. at 916). Racial predominance is analyzed on a "district-by-district" basis, *Bethune-Hill*, 137 S. Ct. at 800, using "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape or demographics,' or a mix of both." *Cooper*, 137 S. Ct. at 1464 (citations omitted). Although the focus is on the district itself, statewide evidence of a "common redistricting policy toward multiple districts" is probative of racial predominance. *Bethune-Hill*, 137 S. Ct. at 800. And the review is a "holistic analysis" of the district's configuration. *Id.*

1. Direct evidence of racial intent comes from the statements of the Chairman and Members of the Commission. The Chairman expressly stated during a hearing on the 2021 Preliminary Plan that it "include[d] seven minority opportunity districts, true VRA districts, minority influence districts, and coalition districts in which there is no incumbent, creating special opportunities for the election of minority representatives." Pet.App.123a-124a. The racial composition of those districts were described, identifying both districts that hit majority-minority (50%+) targets as well as influence districts around the 35% MVAP level identified on the district

analysis worksheets Petitioner's staff was shown. *See id.*

Chairman Nordenberg's written testimony further confirmed that the Commission created "seven minority opportunity districts", HD-9, 22, 54, 104, 116, and 203, drawn without incumbents to expressly give minorities an opportunity to elect candidates of their choice. Pet.App.131a-132a. (HD-19 and HD-50 also satisfy this criteria). The Chairman also admitted that Lancaster, Reading, Allentown, and Scranton were split in the 2021 Preliminary Plan for the purpose of creating "VRA" or "minority influence districts." Pet.App.106a; 118a.

And if that was not enough, during the February 4, 2022, hearing adopting the 2022 Final Plan, the Chairman confirmed the Plan purposefully "fashioned districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act, *positioning voters in racial and ethnic minority groups* to influence election of candidates of their choice." Pet.App.143a (emphasis added). Chairman Nordenberg also confirmed that unpacking existing majority-minority districts to create new minority-performing districts was "very important to us." Pet.App.146a. Commission Member Jay Costa likewise confirmed that the Commission worked to create minority "coalition districts." Pet.App.148a. The Commission tried to chalk this extensive direct evidence of predominance up to mere racial "aware[ness] of racial demographics," Pet.App.193a, but fails to explain how its admitted "positioning of voters in racial and ethnic minority groups" in districts is anything other than a

"predominant factor motivating the [Commission's] decision to place a significant number of voters within . . . a particular district." *Miller*, 515 U.S. at 916.

2. This direct evidence was supported by circumstantial evidence. Petitioner's expert, Dr. Barber, produced maps depicting how the unnecessary division of cities like Reading and Lancaster (among others) divided the Hispanic vote. Pet.App.73a-100a. This was, to be sure, a subordination of traditional principles, since the state constitution forbids dividing counties and cities unless "absolutely necessary." PA. CONST. art. 2, § 16. Moreover, the presentation by Leader McClinton's VRA expert, Dr. Barreto, demonstrated several significant shifts in the racial composition of numerous districts from the prior decade's plan. For example, HD-22 drops from 71% to 61.6% MVAP (despite the fact that a Latina candidate *lost* a primary election for that district in 2020), HD-19 increases from 42% to 48.2% MVAP, and HD-116 increases from 30.4% to 40.5% MVAP, just to name a few. Likewise, Dr. Barreto's numbers confirm the racial impact of the division of Reading into three districts: HD-126 reduces from 47.4% to 42.4% MVAP, HD-127 reduces from 75.6% to 61.3%, and HD-129 skyrockets from 14.9% to 45.4% MVAP. 176a-177a. Splitting the City of Reading in this manner allowed for the creation of an additional "opportunity" district by shifting minority voters into the adjacent district. *Id.*; *see also* Pet.App.92a. This is consistent with the Chairman's admission that Reading was split to create VRA or influence districts. Pet.App.106a; 118a.

These sorts of meaningful shifts in a district's minority-VAP have been found to be probative evidence of racial predominance. *See, e.g., Bethune-Hill II*, 326 F. Supp. 3d at 149–58 (identifying evidence of predominance where districts with high BVAP were "donors" of Black population to adjoining districts with lower BVAP). And it is undisputed that the districts designed without incumbents—another race-based design criteria—in fact lacked incumbents. The racial effect of the lines at issue matches the stated intent of the map-drawers, making this circumstantial evidence corroborative of Petitioner's direct evidence.

3. The Commission claimed race did not predominate its work because, it allegedly only considered race after it "first focused on the traditional redistricting factors of Article II, § 16 and the Free and Equal Elections Clause." Pet.App.196a. Only after doing so, it claimed, did it "look[] to ensure that minority communities would have opportunities to elect or influence the election of candidates of choice." *Id.* The Commission supported the claim that it did not subordinate traditional redistricting factors to race by asserting that its "plan performs well under all the traditional redistricting measures . . . ." *Id.*

But this Court rejected the argument that strict scrutiny does not apply "where a State 'respects' or 'compl[ies] with traditional districting principles.'" *Shaw v. Hunt,* 517 U.S. 899, 906 (1996) (citation omitted). The mere fact that North Carolina "effectuated its interest in creating one rural and one urban district, and that partisan politicking was

actively at work" did not save its District 12: "that the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration." *Id.* at 907. That was because race was the criterion that "could not be compromised," and those race-neutral factors "came into play only after the race-based decision had been made." *Id.*

In *Bethune-Hill,* the Court confirmed that a subordination of traditional criteria to race does not require an "actual conflict between the enacted plan and traditional redistricting principles." 137 S. Ct. at 798. Hence, the Court rejected the argument that "race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria." *Id.* And for good reason: "[t]raditional redistricting principles . . . are numerous and malleable," and "[b]y deploying those factors in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles" while still predominantly considering race. *Id.* at 799.

That is because "the Equal Protection Clause does not prohibit misshapen districts. It prohibits racial classifications." *Id.* at 798. Here, both direct and circumstantial evidence supports the conclusion that the Commission "separate[d] its citizens into different voting districts on the basis of race." *Miller,* 515 U.S. at 911. The mere fact it achieved this feat while claiming to still comply with traditional districting criteria does not save the 2022 Final Plan. *See Bethune-Hill*, 137 S. Ct. at 799 (acknowledging

that challengers may "able to establish racial predominance in the absence of an actual conflict [with traditional districting principles] by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence"). The Pennsylvania Supreme Court has itself recognized the risk that "advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote . . . ." *League of Women Voters of Pa. v. Com.*, 178 A.3d 737, 817 (Pa. 2018) (discussing partisan gerrymandering).

4. Finally, the Commission's claim that the plan "performs" well on "traditional redistricting measures" misses the mark because those "measures" were reported at the state-wide level and say nothing about the configuration of specific districts. The Commission referenced plan-wide figures for the 2022 Final Plan for the House, including its number of county and municipal splits, population deviation, and average district compactness scores. Pet.App.183a–190a. The Commission, for example, touted that its 2022 House Plan split 23 fewer municipalities than the prior decade's plan (from 77 to 54), and that the average district's Reock compactness score increased by 0.03 compared to the prior decade's plan (from 0.39 to 0.42). *Id.* at 184a, 189a.

But the House contains 203 districts. Plan-wide statistics are not probative of the degree to which

race was used when drawing specific districts. Racial gerrymandering "applies district-by-district" and is "a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Alabama*, 575 U.S. at 262–63 (emphasis in original). The fact that the 2022 Final Plan might have split a small number of municipalities overall in the Commonwealth does not excuse the Commission's excessive and unnecessary splits of Hispanic communities in Allentown, Lancaster, and Reading–or of Harrisburg's Black community–in service of the Commission's stated racial goals. Pet.App.73a–100a. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others."). And it does not excuse the Commission's deliberate "positioning [of] voters in racial and ethnic minority groups" in numerous identified districts. Pet.App.143a; 163a.

The Pennsylvania Supreme Court's affirmance of the 2022 Final Plan cannot be sustained on this record, and it must be reversed.

B. The Commission's Use Of Race Is Not Justified By A Compelling State Interest.

Since the Commission predominantly used race in the construction of several districts, its 2022 Final Plan is subject to strict scrutiny. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 920.

At the tailoring stage, the question is whether "the legislature [had] a strong basis in evidence in support of the (race-based) choice that it has made." *Bethune-Hill*, 137 S. Ct. at 801 (citation omitted).

Here, the Commission conceded that it "fashioned districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act." Pet.App.143a; 163a. But the *only* compelling interest this Court has assumed justifies race-based redistricting is compliance with the VRA, and, to invoke VRA-compliance as a compelling interest, the state must show it "has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill,* 137 S. Ct. at 801 (citation omitted). In particular, "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Cooper*, 137 S. Ct. at 1470 (citation omitted). By conceding it racially classified Pennsylvania voters *beyond* that required by the VRA, the Commission has conceded it made those classifications without a compelling state interest and failed strict scrutiny—full stop.

In addition, the Commission did not have a strong basis in evidence to believe there was legally significant racially polarized voting, under *Gingles*, anywhere in the Commonwealth. 478 U.S. at 56–57. Dr. Barreto, who testified before the Commission on behalf of Minority Leader McClinton, studied only a limited set of 2020 elections. And in his limited study, he failed to demonstrate the third *Gingles* precondition—that minority-preferred candidates

lose most of the time due to white-bloc voting. To the contrary, Dr. Barreto found substantial evidence of white crossover voting in Philadelphia, Allegheny County, and the Lehigh Valley (including Allentown).

The Commission's fundamental error was the failure to appreciate the "crucial difference between legally significant and statistically significant racially polarized voting." *Covington v. North Carolina*, 316 F.R.D. 117, 170 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017). Even though Dr. Barreto may have concluded that white and Black or Hispanic voters generally supported different candidates, he did not identify a *single candidate* who lost due to white-bloc voting, and fell far short of showing that "majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Id.* at 168. Before the Pennsylvania Supreme Court, the Commission barely contested this point, relegating its entire discussion of its evidence of racially polarized voting to a footnote. Pet.App.197a. That is because it failed to provide this evidence. And the Pennsylvania Supreme Court failed to issue any opinion identifying how it resolved these important issues.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition.

Respectfully submitted,

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square
Suite 2000
Cleveland, OH 44114

ROBERT T. TUCKER
BAKER & HOSTETLER LLP
200 Civic Center Drive,
Suite 1200
Columbus, OH 43215

EFREM M. BRADEN
Counsel of Record
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
(202) 861-1504
mbraden@bakerlaw.com

Counsel for the Petitioner

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