

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.,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

**OPPOSITION BRIEF OF RESPONDENT
JOANNA E. MCCLINTON**

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QUESTION PRESENTED

Whether Petitioner, who does not live in any of the districts he is challenging, failed to meet his threshold burden of showing that race predominated in the redistricting process in violation of the Fourteenth Amendment where the 2022 Pennsylvania House of Representatives map admittedly satisfies the requirements in the Pennsylvania Constitution, traditional redistricting criteria were never subordinated and Petitioner failed to show that race was the predominant consideration in drawing any district?

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INTRODUCTION

The new reapportionment plan for the Pennsylvania House of Representatives prepared by the Legislative Reapportionment Commission, and approved unanimously by the Pennsylvania Supreme Court, is the product of a lengthy, transparent and inclusive process and satisfies all constitutional requirements. It compares favorably to the previous map and to tens of thousands of computer-simulated maps on the specific criteria in the Pennsylvania Constitution and has been widely praised notwithstanding that it maintains a slight Republican advantage. Petitioner Kerry Benninghoff would have this Court believe that the Commission deliberately drew “up to 14” districts based predominantly on race while paying lip service to traditional redistricting criteria, but the record and facts are very different.

The Petitioner is a member of the Commission and the leader of the Republican Caucus of the Pennsylvania House of Representatives. He is not a resident of any of the “up to 14” districts he now claims were racially gerrymandered. Pet. at i. He does not, because he cannot, argue that he personally suffered injury as a result of any of the challenged district boundaries. Petitioner’s primary argument below was that the districts were drawn for partisan purposes and specifically to benefit Democratic interests. He declared that the Commission map was “meant for no other reason than to cement a legislative majority for a certain party for the coming decade,” LRC Tr. at 1785, and posited that the Commission should have adopted *his* map because it

did *more* to benefit minority populations, Benninghoff SCOPA Br. at 32-33. His own expert opined that the municipal splits Petitioner challenges in this Court as racial gerrymanders were not made “for minority representation but rather for partisan gain.” Benninghoff SCOPA Pet. for Review, App. A at 0061a. Petitioner now argues the opposite—that the same cities were split in violation of the Fourteenth Amendment.

Petitioner lacks standing to claim racial gerrymandering with respect to the 14 districts and has not established that race predominated in drawing any district boundary lines. This Court lacks jurisdiction, there was no violation of the Fourteenth Amendment and there is no basis to grant certiorari. The Pennsylvania Supreme Court properly rejected Petitioner’s appeal from the Commission’s final map and the Petition should be denied.

STATEMENT OF THE CASE

A. The Reapportionment Process

State legislative districts in the Commonwealth of Pennsylvania are reapportioned every ten years pursuant to the procedure mandated by the Pennsylvania Constitution. The Constitution directs that a Legislative Reapportionment Commission shall be constituted for this purpose in the year following the federal census. Pa. Const. art. II, § 17(a).

The Constitution provides that the Commission shall consist of the majority and minority leaders of

the Pennsylvania Senate and the Pennsylvania House of Representatives. *Id.* § 17(b). The members of the 2021 Commission include: Senate Majority Leader Kim Ward; Senate Minority Leader Jay Costa; House Majority Leader Kerry A. Benninghoff; and House Minority Leader Joanna E. McClinton, a Respondent here. *Id.* Both houses of the Pennsylvania General Assembly are presently Republican-controlled. The only Petitioner here is Kerry A. Benninghoff, the current representative of District 171 in the Pennsylvania House of Representatives and leader of the Pennsylvania House Republican Caucus. Pet. App. 35.

The fifth member of the Commission and its Chairman is Mark A. Nordenberg, Chancellor Emeritus of the University of Pittsburgh and Chair of the University's Institute of Politics. LRC R. at 19-20. Pursuant to Article II, § 17(b) of the Pennsylvania Constitution, Nordenberg was appointed by the Pennsylvania Supreme Court (not by its Chief Justice alone as Petitioner claims, Pet. at 4) after the other Commissioners were unable to agree upon a fifth member. While the Constitution designates the fifth member of the Commission to serve as its Chairman, Pa. Const. art. II, § 17(b), the position carries no greater weight or influence than other Commission members. Rather, the Constitution directs that the Commission acts "by a majority of its entire membership." Pa. Const. art. II, § 17(a).

The Pennsylvania Constitution also dictates the standards applied in reapportioning the Commonwealth. Article II, § 16 sets forth the

following specific criteria the Commission must utilize in creating state legislative district maps:

The Commonwealth shall be divided into fifty senatorial and two hundred three 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, § 16. The Pennsylvania Supreme Court declared that this provision does not impose “immovable guideposts” with respect to the constitutional criteria, *Holt v. 2011 Legis. Reapportionment Comm’n*, 38 A.3d 711, 736 (Pa. 2012) (“*Holt I*”), and “a reapportionment plan is not required to solve every possible problem or objection in order to pass constitutional muster,” *Holt v. 2011 Legis. Reapportionment Comm’n*, 67 A.3d 1211, 1240 (Pa. 2013) (“*Holt II*”). Rather, the Commission “retain[s] considerable discretion” in fashioning a plan that balances relevant interests and complies with the Constitution. *Holt I*, 38 A.3d at 761.

Reapportionment in Pennsylvania must also comport with the Free and Equal Elections Clause in the Pennsylvania Constitution which mandates that

“[e]lections shall be free and equal.” Pa. Const. art. I, § 5. The Pennsylvania Supreme Court has held that this provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis in original). This clause requires that “an individual’s electoral power not be diminished through any law which discriminatorily dilutes the power of his or her vote” *Id.* at 816.

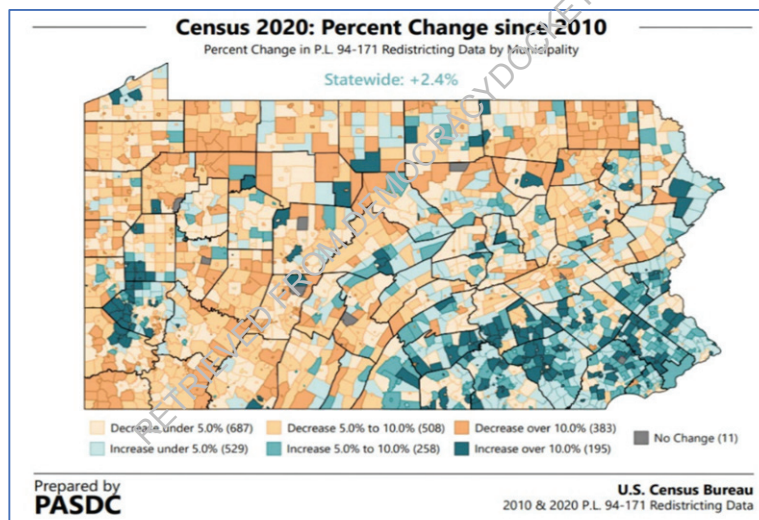
In addition, reapportionment must comply with Article I, § 29 of the Pennsylvania Constitution which directs that “[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual.” Pa. Const. art. I, § 29.

B. Demographic Changes in PA

The 2020 census identified significant population changes in Pennsylvania that impacted reapportionment. Pennsylvania’s population grew by 2.4% or 300,321 persons, but growth was not uniform across the Commonwealth. Forty-four of Pennsylvania’s 67 counties lost population, primarily in rural areas in the northern and western parts of the state.¹ The population of some House districts in these areas declined by 10% or more. LRC SCOPA

¹ See Pennsylvania’s 2020 Census State Profile, available at <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html> (last visited Sept. 15, 2022).

Br., App. A at 20-21. The counties that grew in population include Allegheny, Butler and Washington Counties in areas bordering the City of Pittsburgh in the southwestern part of Pennsylvania and Philadelphia, Montgomery, Chester and Lancaster Counties in the southeastern and south-central regions of the state where population density is also greatest.² The map below prepared by the Pennsylvania State Data Center shows these changes, with population losses in orange and population gains in green³:



² See Pennsylvania State Data Center Data Brief, available at <https://pasdc.hbg.psu.edu/> (last visited Sept. 15, 2022).

³ See Pennsylvania State Data Center Data Brief, available at https://pasdc.hbg.psu.edu/sdc/pasdc_files/researchbriefs/August_2021.pdf (last visited Sept. 15, 2022).

The White, non-Hispanic population in the Commonwealth declined by 541,235 since the last census. LRC R. at 1073. The total minority population increased by more than 840,000 persons, roughly the equivalent of 13 House districts which consist of approximately 64,000 residents each. *Id.* Minority groups now account for 25% of the total population in the Commonwealth.⁴

C. The Commission's Work

The Commission solicited and received input from the public, community groups, elected officials and candidates. The Commission held seven public meetings and 16 public hearings and received testimony from more than 180 witnesses. LRC Tr. at 1740. The witnesses included Pennsylvania citizens who shared their perspectives on redistricting objectives and the impact of reapportionment on their communities, representatives from professional and non-profit community organizations who offered insights into geographic, social and cultural matters affecting reapportionment (including representatives from the National Conference of State Legislatures, Center for Rural Pennsylvania, Pennsylvania Redistricting Reform Commission, Fair Districts of PA, Common Cause of Pennsylvania, Committee of Seventy, Draw the Lines, PA Voice, Campus Vote Project, League of Women Voters and New PA

⁴ See Pennsylvania's 2020 Census State Profile, available at <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html> (last visited Sept. 15, 2022).

Project), and expert witnesses with expertise in redistricting, including the Voting Rights Act.

Citizens were also invited to submit their own maps and written comments. The Commission received more than 6,000 comments and over 100 citizen maps. LRC Tr. at 1740.

D. Preliminary Plan and Exceptions

Under Article II, § 17(c) of the Pennsylvania Constitution, the Commission was required to file a preliminary reapportionment plan within 90 days after receipt of usable census data. Pa. Const. art. II, § 17(c). Usable census data was received on October 14, 2021. LRC Resolution 6A. The Commission prepared a preliminary reapportionment plan which was presented and approved at a public meeting of the Commission on December 16, 2021.⁵

The preliminary House plan was filed with the Pennsylvania Department of State and published by the Commission on its website. LRC R. at 788. Pursuant to the procedure in the Pennsylvania Constitution, the Commission thereafter had a period of 30 days to make corrections to the plan. Pa. Const. art. II, § 17(c). Any person “aggrieved” by the preliminary plan was authorized to file exceptions

⁵ The Pennsylvania Constitution refers to the new maps for the Pennsylvania Senate and Pennsylvania House of Representatives collectively as “the preliminary plan” and “the final plan.” Pa. Const. art. II, § 17(c), (d). Because the Petition relates only to the House map, the Senate map and proceedings relating to the plan for reapportioning the Senate are not separately discussed here.

during the same 30-day period and the Commission thereafter had 30 days to prepare and file a revised reapportionment plan. *Id.*

During the exception period, the Commission evaluated additional written comments from Pennsylvania citizens, conducted public hearings, and received additional testimony from both expert and lay witnesses, including experts in the fields of political science, quantitative social science and the Voting Rights Act. *See, e.g.*, LRC R. at 66-97, 99-140, 526-539, 576-593. The expert presentations consisted of in-person testimony and reports from experts retained by the respective legislative caucuses.

Petitioner filed exceptions to the preliminary House plan, LRC R. at 7904-7912, asserting principally that the plan was “an extreme partisan outlier,” *id.* at 7905. He argued that municipalities were unnecessarily split, districts were unevenly populated, Republican incumbents were paired and minority communities were “cracked,” all to benefit Democrats. *Id.* at 7904-7912. In support of his exceptions, Petitioner offered an expert report and testimony from Michael Barber, an Associate Professor of Political Science at Brigham Young University. LRC R. at 7913-7970. Barber opined based on computer-simulated plans that splits in certain cities, including Allentown, Lancaster, Reading and Harrisburg, were motivated solely by a desire to increase Democratic seats. LRC R. at 7929-7950.

McClinton offered expert testimony from: Kosuke Imai, Ph.D., Professor of Government and Statistics and affiliate of the Institute for Quantitative Social Science at Harvard University, LRC R. 1125-1151; LRC Tr. at 1496-1520; McClinton SCOPA Br., Ex. D; Matt Barreto, Ph.D., Professor of Political Science and Chicana/o and Central American Studies at the University of California Los Angeles, LRC R. 1072-1090, 1169-1172; LRC Tr. at 1520-1549; McClinton SCOPA Br., Ex. E; and Christopher Warshaw, Ph.D., Associate Professor of Political Science at George Washington University, LRC R. 1096-1123; LRC Tr. at 1549-1572; McClinton SCOPA Br., Ex. B.

Using specialized software that he created and Petitioner's expert (Barber) used, Imai generated computer-simulated plans and demonstrated through this work that the number of expected Democratic districts under the House plan is within the computer simulation ranges and that the map is not a partisan gerrymander. LRC R. at 1128-1130; McClinton SCOPA Br., Ex. D at 5-6. In addition to summarizing the demands of the Voting Rights Act and refuting Barber's theories, Barreto demonstrated through charts and ecological inference tables that certain regions in Pennsylvania, particularly the southwest, central and southeast areas of the state as well as the Lehigh Valley, show a clear pattern of racially polarized voting. LRC R. at 1077-1090. Barreto cautioned that districts in these areas should not dilute minority voting opportunities in violation of the Voting Rights Act, 52 U.S.C. § 10301, and opined that the House map is not contrary to law. McClinton SCOPA Br., Ex. E at 2-6. Warshaw used three different methodologies to test partisan fairness and,

based on each methodology, concluded that the House plan is not a partisan gerrymander, but rather is relatively neutral with a small pro-Republican bias. LRC R. at 1408-1411; McClinton SCOPA Br., Ex. B at 7-10.

Petitioner offered a late written submission from Professor Jonathan Katz from the California Institute of Technology purporting to critique Barreto's methodology. LRC R. 1152-68. Katz did not testify before the Commission. Petitioner did not offer any expert (live or via written report) on the requirements of the Voting Rights Act or the impact of the House map on minority voting opportunities.

E. Petitioner Offered His Own Map at the Eleventh Hour

Hours before the start of the February 4, 2022 public meeting to vote on the final House map, Petitioner called a press conference where he announced and distributed his own map. He claimed that his map “retains 70 percent of the preliminary map approved by . . . the commission in December [2021],” but is better because it creates “[m]ore majority Hispanic districts[,] [m]ore majority-minority districts[, and] [m]ore Hispanic opportunity districts.”⁶ This foreshadowed Petitioner's criticism expressed at the public meeting later that same day that the Commission's map is “about protecting that

⁶ See Benninghoff Proposes Amendment to Final House Map, available at <https://www.pahousegop.com/News-Print/25238/Latest-News/Benninghoff-Proposes-Amendment-to-Final-House-Map> (last visited September 15, 2022).

Democratic incumbent, not about increasing opportunity for minorities to elect candidates of their choice.” LRC Tr. at 1777-78. Petitioner argued that his plan is the “best plan” because he achieved three more majority-minority and minority opportunity districts and avoided what he claimed was “extreme partisanship.” Benninghoff SCOPA Br. at 33, 52-54.

Petitioner offered his plan as an amendment to the Commission’s final plan at the public meeting on February 4, 2022. LRC R. at 8190-8253. The motion was defeated by a vote of three to two, with Petitioner and Ward voting in favor of the amendment and Nordenberg, Costa and McClinton voting against the amendment. LRC Tr. at 1773-1774.

F. Final House Plan Approved by Bipartisan 4-1 Vote

The Commission voted on the final House map—the map at issue here—at the public meeting on February 4, 2022. The final House map reflected numerous corrections to the preliminary map based on public comments and expert input and improved upon the preliminary map on nearly every relevant redistricting metric, including by reducing overall population deviation and by further reducing municipal splits. The Commission approved the House map by a four to one vote, with only Petitioner voting against the map. LRC Tr. at 1793-1794; LRC R. at 8344-8345. Public reaction to the final map has been overwhelmingly positive.⁷

⁷ See, e.g., League of Women Voters of Pennsylvania, (@LWVPA), Twitter (Feb. 4, 2022, 3:35 pm) (“After a months-

G. Appeals to the Pennsylvania Supreme Court

Under Article II, § 17(d), any “aggrieved person” may file an appeal from the final plan directly to the Pennsylvania Supreme Court within 30 days after the final plan is filed. Pa. Const. art. II, § 17(d); *see also* 42 Pa. C.S.A. § 725(1). The appellant has the burden in any such proceeding of establishing that the final plan is “contrary to law.” Pa. Const. art. II, § 17(d).

There were seven appeals to the Pennsylvania Supreme Court from the final House plan, including Petitioner’s appeal. Because the statutory period for collecting signatures to appear on the primary election ballot was running, by Order dated February

long effort, the LRC today approved legislative maps for PA. These maps are a marked improvement over our existing maps, and we commend the progress that has been made.”); Better PA (@Better_PA), Twitter (Feb. 4, 2022, 5:00 pm) (“In the end, this process was fair, these maps are fair, and all Pennsylvanians, no matter where they live, will benefit for the next decade.”); Jordan Routh, *Mark Nordenberg Discusses Yearlong Effort To Ensure Fairness in Pa.’s New Legislative Map*, Pittsburgh Post-Gazette, Feb. 4, 2022 (quoting David Thornburgh, President and CEO of Committee of Seventy: “This iteration of [the commission] deserves credit for embracing the spirit of the law by actively seeking and soliciting public input, providing citizen mappers with easy access to maps and data, and doing a good job of explaining why districts were drawn the way they were.”); Fair Districts PA (@FairDistrictsPA), Twitter (Feb. 12, 2022, 5:08 pm) (“The maps demonstrate that legislative leaders on both sides had a large say in the process & outcome, but voters’ choices were included & new maps are far better by legal metrics.”).

23, 2022, the Pennsylvania Supreme Court briefly stayed the signature deadlines and set an expedited briefing schedule to allow for consideration and disposition of appeals sufficiently in advance of the primary election which was scheduled for May 17, 2022.

As in his exceptions to the preliminary plan, Petitioner's primary challenge in the Pennsylvania Supreme Court was that the final House plan was a partisan gerrymander designed to advance Democratic interests. He argued that the plan was drawn to benefit Democrats by pitting Republican incumbents against each other and by creating districts that favor Democrat incumbents by including a greater percentage of the prior district or more Democrat registered voters. Benninghoff SCOPA Br. at 61-62. He claimed this was not by accident but rather was "evidence of discrimination against Republican voters and the subordination of traditional redistricting criteria for partisan favoritism." *Id.* at 61.

Petitioner also argued that the plan unnecessarily divides cities to create Democratic seats. He based his argument on a theory that his expert, Barber, derived from Jonathan A. Rodden's *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide*. Relying on Barber, Petitioner argued that Democratic voters in Pennsylvania naturally concentrate in urban areas and Republican voters spread out in rural areas and therefore "Democrats would need a redistricting process that intentionally carved up large cities like pizza slices or spokes of a wheel, so as to combine some very

Democratic urban neighborhoods with some Republican exurbs in an effort to spread Democrats more efficiently across districts.” He claimed that the final House map split, *inter alia*, Allentown, Lancaster, Reading and Harrisburg to combine “highly Democratic areas” with Republican suburban areas “to spread out Democratic voters and dilute Republican votes.” *Id.* He concluded that “these splits represent an execution of the roadmap Professor Rodden described,” *id.* at 45, and were intended to “overcome any slight, naturally recurring Republican leaning tilt in the state’s political geography . . . to the Democratic Party’s benefit.” *Id.* at 56. McClinton filed a rebuttal report from Rodden himself refuting Barber’s interpretation of his book. McClinton SCOPA Br. at Ex. C.

Opposite to his argument in this Court, Petitioner also argued in his appeal to the Pennsylvania Supreme Court that the final House map disadvantages minority voters by diluting or “cracking” minority populations in Allentown, Lancaster, Reading and Harrisburg. Benninghoff SCOPA Br. at 67-68. Then Petitioner forecasted that the reduction in minority populations in these districts lessened the likelihood that they will be able to elect candidates of their choice. *Id.* at 78-79.⁸

⁸ None of the other appellants before the Pennsylvania Supreme Court have petitioned for certiorari and, contrary to the Petition, Pet. at ii, there are no related proceedings.

H. Appeals Denied by Unanimous Pennsylvania Supreme Court

In a unanimous *per curiam* Order dated March 16, 2022, the Pennsylvania Supreme Court ruled that the final plan “is in compliance with the mandates of the Pennsylvania Constitution and the United States Constitution and is not contrary to law, and therefore, shall have the force of law.” Pet. App. 6. The Court further Ordered that the plan “shall be used in all forthcoming elections in the General Assembly until the next constitutionally-mandated reapportionment shall be approved.” *Id.*⁹

I. Map Used in 2022 Primary and General Elections

The new House map served as the basis for the primary election in Pennsylvania on May 17, 2022 and will be the basis for electing all 203 members of the House at the general election on November 8, 2022.

REASONS FOR DENYING THE PETITION

A. Petitioner Lacks Article III Standing.

Petitioner is the elected representative of District 171 of the Pennsylvania House of Representatives

⁹ *Amici Curiae* Judicial Watch, Inc. and Allied Educational Foundation suggest that issuance of a *per curiam* order without an opinion violated the Pennsylvania Supreme Court’s process, Amicus Br. at 4, but this is not accurate. *Per curiam* orders without an opinion are authorized by Pennsylvania Supreme Court Internal Operating Procedure § 3.C.

which consists of parts of Centre and Mifflin Counties in central Pennsylvania. Pet. App. 35. He does not reside in any of the districts he claims were racially gerrymandered and therefore lacks standing to bring this challenge under the Fourteenth Amendment.

Petitioner claims that the Commission drew eight districts—Districts 9, 19, 22, 50, 54, 104, 116 and 203—without incumbents in violation of the Fourteenth Amendment. Pet. at 8-9 & n.2. He also claims that the Commission unnecessarily split certain mid-size cities to create additional minority influence districts, specifically Districts 22, 132 and 134 in Allentown, Districts 49 and 96 in Lancaster, Districts 126, 127 and 139 in Reading and Districts 103 and 104 in Harrisburg. *Id.* at 10-11.

Petitioner does not live in any of the allegedly racially gerrymandered districts and does not have standing under the Fourteenth Amendment to challenge the validity of any of those districts in this Court. He does not even attempt to demonstrate an entitlement to proceed in this Court and precedent forecloses any argument he may advance.

To reach the merits, an Article III court must have jurisdiction. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). “One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so.” *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.” *Hollingsworth*, 570 U.S. at 705. Accordingly,

“standing ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.’” *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). “No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

Petitioner acknowledges that racial gerrymandering claims are evaluated on a district-by-district basis. Pet. at 20, 22, 31, 36-37. “[T]he basic unit of analysis . . . is the district.” *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017). A claim of racial gerrymandering “applies to the boundaries of individual districts” and not to a state as “an undifferentiated whole.” *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015). The harms that underlie racial gerrymandering are “personal” and “directly threaten a voter who lives in the *district* attacked,” but do not “so keenly threaten a voter who lives elsewhere in the State.” *Id.* at 263. This Court has rejected the argument that any voter should be able to challenge a state’s redistricting map on equal protection grounds, *United States v. Hays*, 515 U.S. 737, 744 (1995) (“Only those citizens able to allege injury ‘as a direct result of having *personally* been denied equal treatment’ may bring such a challenge. . . .”) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)), and has denied standing to plaintiffs living outside alleged gerrymandered districts seeking to challenge redistricting maps in their “entirety” or “as a whole,” *Hays*, 515 U.S. at 746;

Alabama Legis. Black Caucus, 575 U.S. at 262, or claiming harm to an “interest in the overall composition of the legislature,” *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (“[O]ur cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing.”).

This Court has also repeatedly held that standing in gerrymandering cases is limited to residents of the challenged districts. *See id.* at 1930 (“[W]e have held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered.”); *Alabama Legis. Black Caucus*, 575 U.S. at 268-70 (remanding to consider racial gerrymandering claim “as applied to particular districts” and to permit plaintiff to introduce evidence of standing with respect to challenged districts); *Sinkfield v. Kelley*, 121 S. Ct. 446, 447 (2000) (residents of majority-white districts lacked standing to bring racial gerrymandering claim challenging neighboring majority-minority districts) (per curiam); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (“Two appellants . . . live in District 12 and thus have standing to challenge that part of [reapportionment plan] which defines District 12. . . . Therefore, we conclude that only [these two appellants] have standing and only with respect to District 12.”); *Bush v. Vera*, 517 U.S. 952, 957 (1996) (plaintiff who did not live in challenged districts lacked standing to bring racial gerrymandering claim); *Miller v. Johnson*, 515 U.S. 900, 909 (1995) (“As residents of the challenged Eleventh District, all appellees had standing.”); *Hays*, 515 U.S. at 744-45 (“Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has

been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.").

Petitioner does not reside in any of the districts he claims were racially gerrymandered and therefore cannot claim that he was personally denied equal treatment in violation of the Fourteenth Amendment. Under this Court's precedents, he plainly lacks standing to challenge any of the 14 districts.

Nor can Petitioner claim standing as a member or leader of the Pennsylvania House of Representatives or as a member of the Commission. He does not and cannot assert that he was deprived of any right or privilege afforded to him by virtue of his membership or leadership position in the House or his membership on the Commission. And he cannot seek to assert any right of any member of his caucus or constituents of any member of his caucus. As this Court recognized, even in the limited exceptions when litigants have been allowed "to assert the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute." *Hollingsworth*, 570 U.S. at 708 (citation and internal punctuation omitted). Petitioner suffered no injury in fact and therefore cannot maintain this action on his behalf or on behalf of anyone else.

As a single member, Petitioner cannot assert any legal rights or interests of the General Assembly or Commission. See *Virginia House of Delegates*, 139 S. Ct. 1945 (single house of bicameral legislature lacked standing to appeal decision invalidating redistricting

plan); *Raines*, 521 U.S. 811 (individual members of Congress lacked standing to challenge constitutionality of legislative enactment). Finally, there is no state statute or other authority specifically empowering Pennsylvania legislative leaders to challenge a redistricting plan in federal court. *Cf. Berger v. North Carolina State Conf. of NAACP*, 142 S. Ct. 2191, 2195 (2022) (North Carolina law authorized legislative leaders to defend state laws as agents of state).

Put simply, because Petitioner does not live in any of the 14 districts, he lacks standing to challenge the validity of any of those districts. Granting certiorari and exercising jurisdiction over his appeal would require reversal of more than a quarter century of Court precedent limiting standing in racial gerrymandering cases to residents of challenged districts.

B. The House Map Does Not Violate the Fourteenth Amendment.

Even if Petitioner had standing, the Petition should be denied because race did not predominate in drawing any district.

Petitioner acknowledges that it is his burden in the first instance to “show that ‘race was the predominant factor motivating the . . . decision to place a significant number of voters within or without a particular district.’” Pet. at 19 (quoting *Miller*, 515 U.S. at 916). To make this showing, he must prove that the Commission “subordinated traditional race-neutral districting 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. “The ultimate object of the inquiry . . . is the . . . predominant motive for the design of the district as a whole.” *Bethune-Hill*, 137 S. Ct. at 800. A “holistic analysis” is required where “all of the lines of the district at issue” must be considered, together with “any explanation for a particular portion of the lines” and “the districtwide context.” *Id.* Federal court review of districting decisions “represents a serious intrusion on the most vital of local functions” and therefore courts exercise “extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.” *Miller*, 515 U.S. at 915-16. Good faith of state officials must be presumed. *Id.* at 915. The burden of proof lies with the challenger, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), who must show that the map-drawer “subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations,” *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017) (citation and internal quotation marks omitted).

Petitioner has not made this showing. He has not demonstrated that any voters were placed in any particular district in the House map because of their race or that traditional redistricting criteria were subordinated to racial considerations in drawing any district.

1. The House map satisfies all constitutional criteria.

There is no dispute that the House map scores well on the specific redistricting criteria in the Pennsylvania Constitution. As the chart below demonstrates, it compares favorably to the previous map approved by the Pennsylvania Supreme Court in 2013:

Redistricting Principle	Metric	2022 House Map	2013-2021 House Map
Contiguity	Non-Contiguous Districts	7	10
Compactness ¹⁰	Polsby-Popper	0.35	0.28
	Reock	0.42	0.39
Respect for Political Subdivisions	Split Counties	45	50
	Split Municipalities	54	68
Population Equality	Overall Deviation	8.65%	7.88%
	Average Deviation	2.07%	1.98%

McClinton SCOPA Br., Ex. A. Further, Petitioner’s expert conceded that the House map scores better than his 50,000 computer-simulated plans with respect to municipal splits—Barber admitted that it

¹⁰ The higher the compactness score, the greater the geographic compactness. *League of Women Voters*, 178 A.3d at 771.

“perform[s] well at having few municipal splits”—and was within the range of the simulated plans with respect to population deviation, compactness and county splits. Benninghoff SCOPA Pet. for Review, App. A at 0008a. Barber—Petitioner’s expert—published the following chart in his report demonstrating the superiority of the House map:

Table 1: Commission Proposal and 50,000 Simulations: Population, Splits, and Compactness

	Commission Final Proposal	Simulations Median	Simulations Range
Population Deviation			
Smallest District:	-4.24%	-4.22%	[-4.25%, -3.91%]
Largest District:	4.40%	4.23%	[3.93%, 4.25%]
Boundary Splits			
Counties Split:	45	46	[42, 52]
Total County Splits:	186	195	[184, 208]
Municipalities Split:	56	82	[61, 105]
Total Municipal Splits:	92	119	[98, 140]
Compactness			
Median Polsby-Popper:	0.35	0.32	[0.29, 0.34]

Id.

These objective measurements prove the Commission’s faithful adherence to traditional redistricting criteria. This Court has never before affirmed a predominance finding or remanded a case for a determination with respect to predominance absent evidence that district lines deviated from traditional principles. *Bethune-Hill*, 137 S. Ct. at 799 (citations omitted). Nothing about the House plan warrants a different outcome here.

2. Race did not predominate in drawing any district.

Unable to identify a conflict with traditional redistricting criteria, Petitioner claims that the Commission intentionally drew eight districts without incumbents to “give minorities an opportunity to elect candidates of their choice.” Pet. at 32. The record, however, proves otherwise. Three of the challenged districts—Districts 10, 49 and 54—are without incumbents because they were relocated to eastern Pennsylvania due to the significant shift in state population since the last census. LRC SCOPA Br., App. A at 52. District 116 was without an incumbent because the sitting representative ran for and won a seat on the Court of Common Pleas of Luzerne County in November 2021, before the map was finalized.¹¹ Petitioner claims that District 19 was also drawn without an incumbent, but this is not accurate. The sitting representative in District 19 announced his retirement effective January 31, 2022¹² and was replaced in a special election on April

¹¹ See Salavantis, Toohil emerge as winners of Luzerne County judge race, available at <https://www.wnep.com/article/news/local/luzerne-county/salavantis-toohil-emerge-as-winners-of-luzerne-county-judge-race-wilkes-barre-courthouse/523-a1992248-6bc3-465e-8df6-fbe90e4ad011> (last visited Sept. 15, 2022).

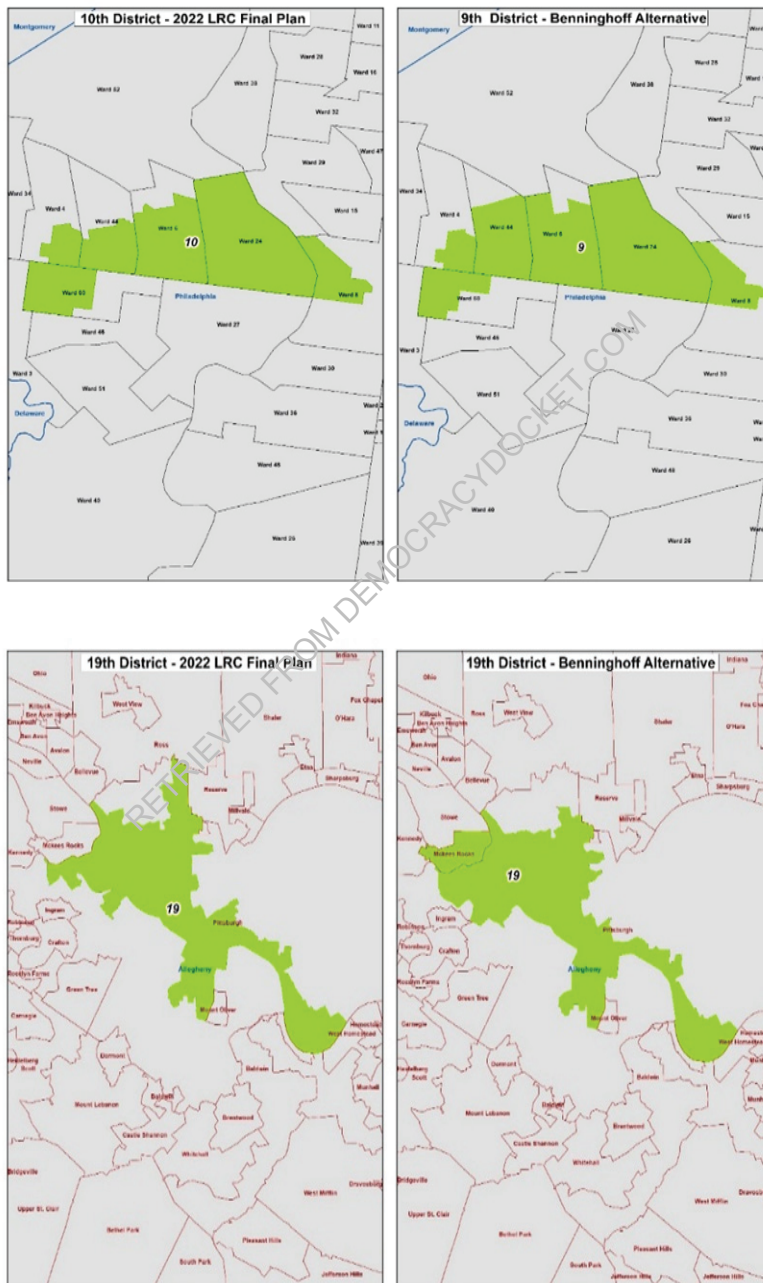
¹² See Gainey starts naming cabinet—Jake Pawlak as deputy mayor, Jake Wheatley as chief of staff, available at <https://www.wesa.fm/politics-government/2022-01-04/gainey-starts-naming-his-mayoral-cabinet> (last visited Sept. 15, 2022).

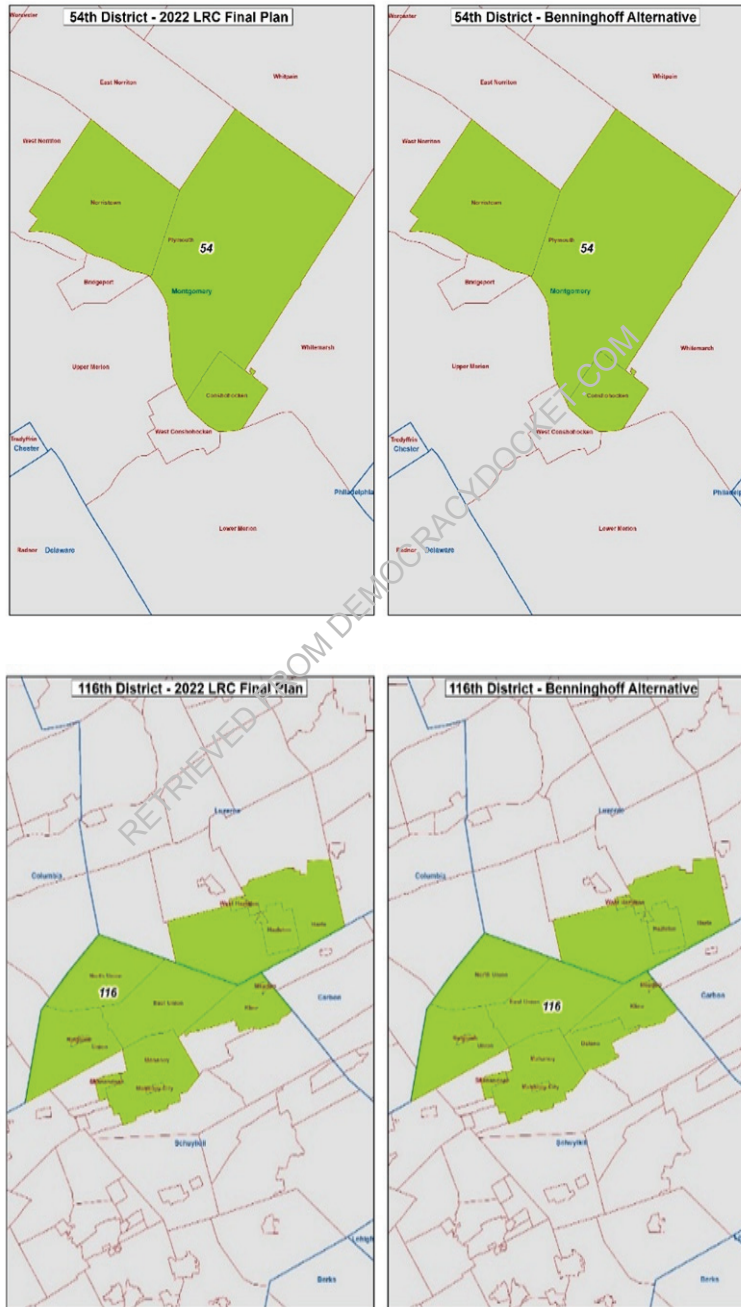
19, 2022.¹³ Neither District 116 nor District 19 is vacant today. Further, the minority population of District 22 did not materially change from the 2013 map to the 2022 plan. McClinton SCOPA Br., Ex. E at 6. It was not redrawn to benefit any group.

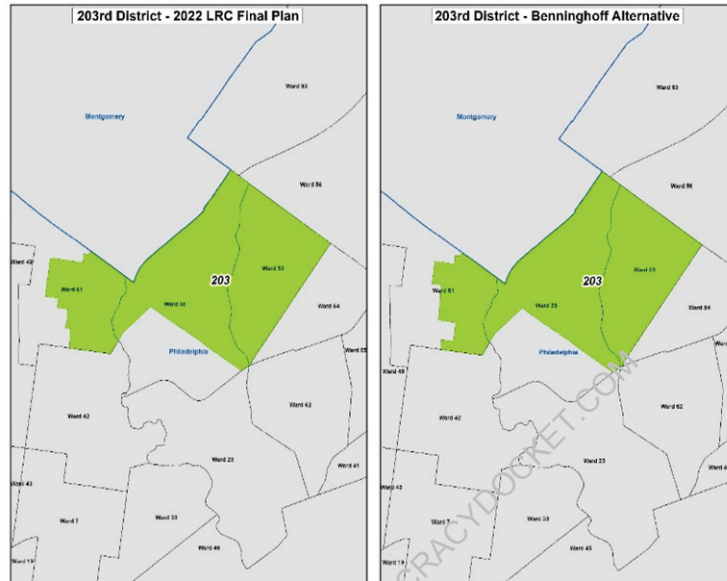
Further, Petitioner cannot credibly complain about Districts 10,¹⁴ 19, 54, 116 or 203. As demonstrated below, Petitioner proposed the same or nearly identical draws for each of these districts as the final House map:

¹³ See Julian Routh, *Democrats Aerion Abney, Martell Covington win special elections to fill former seats of Ed Gainey, Jake Wheatley*, Pittsburgh Post-Gazette, available at <https://www.post-gazette.com/news/politics-state/2022/04/05/pittsburgh-special-election-results-pennsylvania-house-districts-19-24-martell-covington-wilksburg-aerion-abney/stories/202204050112> (last visited Sept. 15, 2022).

¹⁴ Petitioner's proposed map referred to this region as District 9 to correspond with the district numbers in the preliminary plan. This district became District 10 in the final plan.







The absence of an incumbent in these districts simply cannot be attributed to any attempt to sort voters on the basis of race. Importantly, unlike *Miller* and other cases finding Fourteenth Amendment violations, Petitioner has not shown that any of these district boundaries were manipulated to include or exclude minority voters, has not offered demographic evidence suggesting gerrymandering on racial lines and has not shown that traditional redistricting criteria were in any way subordinated. *Cf. Miller*, 515 U.S. at 917 (“drawing of narrow land bridges to incorporate within 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”); *see also Cooper*, 137 S. Ct. at 1474-75 (state turned district “into a majority-minority district” by “slimming the district and adding a couple of knobs to its snakelike body . . . [to]

incorporate[] tens of thousands of new voters and push[] out tens of thousands of old ones”).

Petitioner avoids the required “holistic” analysis because he cannot meet it. Instead, he attributes a racial motive to the Chairman’s remark that districts without an incumbent are attractive to candidates. Pet. at 7-8, 32-33. But one does not follow the other. Recognizing that districts without incumbents for neutral reasons enable competition is in no way an admission that any **voters** were sorted on the basis of race. See LRC Tr. at 994 (“This plan includes seven minority opportunity districts . . . in which there is no incumbent, creating special opportunities [for] the election of minority representatives.”). To the contrary, the Chairman consistently and credibly explained what the metrics show—that redistricting decisions were based on traditional redistricting criteria. See, e.g., LRC SCOPA Br., App. A at 68. Petitioner has not met his burden of proving otherwise.

Petitioner also claims that race was a predominant factor in splitting or “cracking” minority populations in Allentown, Lancaster, Reading and Harrisburg which he claims “helped achieve . . . additional minority influence districts.” Pet. at 10-11. This is a racial reincarnation of the principal argument Petitioner unsuccessfully advanced below—that these cities were split into “pizza slices or spokes of a wheel” to overcome Pennsylvania’s geography which, he claimed, favored Republicans. Benninghoff SCOPA Br. at 15-32, 42-47. Rodden, the author of the book on which Petitioner’s expert relied in formulating this theory, rejected Petitioner’s

interpretation of his writings and demonstrated that the challenged districts in Allentown, Lancaster, Reading and Harrisburg are not irregularly shaped (like pizza slices or wheel spokes, or otherwise) or violative of traditional redistricting principles and do not constitute partisan gerrymanders, but rather the Commission's decision to split these municipalities "reflected basic tradeoffs that are well known to the redistricting community," specifically selecting between municipal splits, on the one hand, and compactness, contiguity, county splits and preserving communities of interest, on the other. McClinton SCOPA Br., Ex. C at 9-21.

Unable to refute Rodden's critique of his pizza-slice and wheel-spokes theory, Petitioner changes course in this Court and argues that these cities were split for predominantly racial reasons. He relies for support on his own expert, Barber, Pet. at 10-11, but Barber concluded just the opposite. He opined that "the decision to divide particular cities ***was not made for minority representation*** but rather for partisan gain." Benninghoff SCOPA Pet. for Review, App. A at 0061a (emphasis added). Barber reasoned that the House map was ***not*** drawn to increase the number of majority-minority or minority-influence districts because its 25 majority-minority districts and 19 minority coalition districts were within the range of 50,000 computer-simulated plans that he drew without consideration of race. *Id.* at 0009a-10a. This fact and Barber's admission distinguish the House map from the map at issue in *Wisconsin Legis. v. Wisc. Elections Comm'n*, 142 S. Ct. 1245 (2022), where state officials intentionally set out to maximize the number of majority-minority Black districts. Even

Petitioner's expert agrees that this did not occur here and Petitioner himself advocated for more majority-minority and minority-influence districts. Barber's denial that race predominated in splitting Allentown, Lancaster, Reading and Harrisburg debunks Petitioner's appeal to this Court.

Petitioner offers as "circumstantial evidence" that the composition of districts in these regions changed from the prior reapportionment plan, Pet. at 10-11, 33, but this is not suggestive of racial intent. Three of the four cities—Allentown, Harrisburg and Reading—experienced population growth since the last census and all four counties in which the cities sit experienced significant population growth. Lehigh, Dauphin, Berks and Lancaster Counties rank within the top 12 out of Pennsylvania's 67 counties in the percentage of population growth over the last decade.¹⁵ Changes in the makeup of districts in these regions are not suspect, but rather, expected.

Petitioner's other attempts to show racial predominance are no more availing. He argues that the Commission made "race-based choices" because it received advice about the impact of the Voting Rights Act on various communities from Barreto, a Voting Rights Act expert. Pet. at 13. This argument is a non-starter. This Court has repeatedly recognized that

¹⁵ See Pennsylvania State Data Center, Census 2020, available at <https://pasdc.hbg.psu.edu/Census-2020-Dashboards/Census-2020-County-Data> (last visited Sept. 15, 2022); see also Census 2020 Municipal Data, available at <https://pasdc.hbg.psu.edu/Census-2020-Dashboards/Census-2020-Municipal-Data> (last visited Sept. 15, 2022).

race consciousness does not equate with impermissible racial classification. *See Vera*, 517 U.S. at 958 (“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.”) (citation omitted) (O’Connor, J., principal opinion); *Miller*, 515 U.S. at 916 (“Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.”) (citations omitted); *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (state “always is *aware* of race when it draws district lines”).

Petitioner also points to a “worksheet” relating to “Bucks County” with, *inter alia*, “fields identifying . . . 35% or Higher Black, Hispanic, or Coalition districts” as ostensible evidence of predominant racial intent. Pet. at 7. None of the districts that he is challenging are located in Bucks County and the sheet has blanks or “0” entries in each of these boxes. Pet. App. 101. The sheet was never adopted by the Commission and is not evidence that race predominated in the redistricting process. Again, Petitioner improperly seeks to penalize the Commission for engaging in the review that the Voting Rights Act demands. *Abbott*, 138 S. Ct. at 2315 (“Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to ‘competing hazards of liability.’”) (quoting *Vera*, 517 U.S. at 977)).

3. Petitioner fails to meet his burden.

In short, Petitioner offers no proof that voters were assigned to any of the 14 challenged districts because of their race and no basis for federal intrusion into Pennsylvania's reapportionment plan. Because federal court review of a state's redistricting process represents "a serious intrusion," *Miller*, 515 U.S. at 915-16, and the burden of proof applicable to such claims is "demanding," *Cooper*, 137 S. Ct. at 1479, redistricting officials "must have discretion to exercise the political judgment necessary to balance competing interests," *Miller*, 515 U.S. at 915. Until a claimant makes a showing sufficient to support the allegation that decisions were based on race, the good faith of state officials "must be presumed." *Id.*; see also *Abbott*, 138 S. Ct. at 2324. Petitioner has not crossed this important threshold. The Petition should be denied for failure to make out a violation of the Fourteenth Amendment.

C. This Matter Is Not a Suitable Vehicle To Clarify Application of the Fourteenth Amendment.

Petitioner urges the Court to grant certiorari to "reiterate" that sorting voters on the basis of race is "invidious" and to "clarify" when strict scrutiny applies in evaluating claims under the Fourteenth Amendment. Pet. at 17. This case is not a proper vehicle to meet these objectives for several reasons.

First, Petitioner did not suffer any injury as a result of any Commission decision. He does not live in any of the districts he purports to challenge. He

participated fully in the Commission process and proposed his own map—which was identical to 70% of the Commission’s map—for consideration by his fellow Commissioners. His real gripe is that his map was not chosen and he was unable to convince his fellow Commissioners to draw the nine districts he is complaining about (as demonstrated above, his draws on the other five districts are the same as or substantially the same as the final House map) the way he thinks they should have been drawn. Even if Petitioner had standing to bring a racial gerrymandering claim challenging districts he does not live in—and he does not—his disagreement with his fellow Commissioners over how best to balance competing interests in these regions is not well suited to clarify the meaning of the law in a racial gerrymandering case. *See Miller*, 515 U.S. at 915 (“States must have discretion to exercise the political judgment necessary to balance competing interests.”).

Second, Petitioner’s arguments for certiorari are very different than the arguments he advanced below. His primary argument in the Pennsylvania Supreme Court was that the House map was a **partisan** gerrymander. He claimed that the Commission intentionally paired incumbents to disadvantage Republicans and deliberately split municipalities to overcome Pennsylvania’s purported natural geography favoring Republicans. Benninghoff SCOPA Br. at 15-22. In support of his quest to prove partisan bias, Petitioner offered an expert opinion from Barber that “the decision to divide particular cities **was made not for minority representation** but rather for partisan gain.” Benninghoff Pet. for Review at 0061a (emphasis added). Having failed to

convince the Pennsylvania Supreme Court that the map was a partisan gerrymander, Petitioner pivots and implores the Court to grant certiorari because the same districts were drawn without incumbents and the same cities were split with the predominant purpose of benefitting minority voters. Pet. at 7-11. Petitioner's partisan role in the General Assembly and his relabeled partisan gerrymandering argument undermine his request for federal intervention in the Commission's process. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

Third, Petitioner's vote dilution argument is markedly different than the argument he made below. In his arguments before the Commission and his appeal to the Pennsylvania Supreme Court, Petitioner argued that the House plan unfairly dilutes minority voting opportunities in and around Allentown, Lancaster, Reading and Harrisburg and “will not improve the odds” of minority candidates of choice being elected. Benninghoff SCOPA Br. at 78-79. He argues just the opposite here—that the Commission drew districts in these regions to create additional opportunities for minority populations. Pet. at 10-11.

Fourth, the decision below is based on a different standard. Under settled Pennsylvania law, Petitioner's appeal to the Pennsylvania Supreme Court from the House map was required to “encompass the Final Plan as a whole.” *Holt I*, 38 A.3d at 733; *Albert v. 2001 Legis. Reapportionment Plan*, 790 A.2d 989, 995 (Pa. 2002) (“In conducting

this review, we must examine the final plan as a whole.”). By contrast, racial gerrymandering claims apply only to “the boundaries of individual districts” and not to “a State considered as an undifferentiated whole.” *Alabama Legis. Black Caucus*, 575 U.S. at 262. This lack of symmetry makes a grant of certiorari particularly inappropriate. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view[.]”).

Fifth, there is no basis for a grant of certiorari under Supreme Court Rule 10(b) or (c). The Pennsylvania Supreme Court Order approving the House map does not conflict with any other state court or federal court of appeals on an important federal question, does not resolve an important question of federal law that has not yet been settled by this Court, and does not decide an important federal question in a way that conflicts with relevant decisions of this Court. The wisdom of selecting the final House map over Petitioner’s alternative proposal is properly left to the Commission with review by the Pennsylvania Supreme Court.

D. There Is No Need To Hold This Petition.

Petitioner proposes that, if this Court does not grant his Petition, then his Petition should be held pending decisions in *Merrill* and *Ardoin*. Pet. at 25-28. But this matter is materially different and therefore holding the Petition would serve no purpose other than to cast doubt over the upcoming election of representatives in the 14 districts.

This Court granted certiorari in *Merrill* to decide whether a three-judge district court after a hearing properly found that Alabama's congressional redistricting plan violated Section 2 of the Voting Rights Act by unlawfully diluting the votes of the state's Black population. *Merrill v. Milligan*, Nos. 21-1086, 21-1087. Similarly, this Court granted certiorari in *Ardoin* to decide whether a three-judge district court properly determined after a hearing that Louisiana's congressional redistricting map diluted the votes of Black Voters in violation of Section 2. *Ardoin* was stayed pending a decision in *Merrill*. *Ardoin v. Robinson*, No. 21-1596.

Petitioner proposes that, because the plaintiffs in *Merrill* and *Ardoin* attempted to show a lack of predominance by offering evidence that the plans met traditional redistricting metrics, this case “presents the same underlying dispute about racial predominance” and “it is highly likely” that a decision in *Merrill* will impact the issues in this case. Pet. at 28. But the issue in *Merrill* and *Ardoin*—whether compliance with a court order to draw a majority-minority district necessarily and unlawfully prioritizes race over race-neutral factors—does not exist here. Just the opposite. Petitioner maintains that the Commission drew majority-minority and minority-influence districts *without* any legal obligation under the Voting Rights Act or otherwise. Any clarification that *Merrill* and *Ardoin* may provide as to when majority-minority districts are required by the Voting Rights Act and how they may properly be drawn will not apply here and a reversal in either case will not affect the Pennsylvania Supreme Court Order

approving the House map. There is no reason to hold the Petition for *Merrill* and *Ardoin*.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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