No. 22-47

In the
Supreme Court of the United States

KERRY BENNINGHOFF,
Individually, and as Majority Leader of the Pennsylvania House of Representatives,

Petitioner,

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents' opposition briefs confirm that review is both warranted and necessary to ensure that this Court's racial-gerrymandering precedents are not reduced to empty rhetoric. The Petition demonstrated that race permeated the construction of more than a dozen districts in the 2021 Final House Plan, as both direct and circumstantial evidence establish. As the Petition predicted, Respondents attempt to nitpick away the direct evidence and turn the circumstantial inquiry into a contest of redistricting beauty in the eye of the beholder. But, when a redistricting authority admits it made "efforts" to create minority-opportunity districts, applied a unique set of criteria only to those districts, and did so regardless of whether the Voting Rights Act requires this use of race, it creates a textbook racial gerrymander. Unless this Court grants review and reverses, as it did in *Wis. Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245 (2022), it can expect more efforts to follow this new pathway around precedent.

ARGUMENT

I. Petitioner Has Standing

Respondents' standing arguments miss their mark, erroneously attempting to show that Petitioner lacks the standing required of "a plaintiff" in a racial-gerrymandering lawsuit. Comm'n.Opp. 14 (quoting *Shaw v. Hunt*, 517 U.S. 899, 904 (1996)); *see also* McClinton.Opp. 19. But Petitioner seeks review of the Pennsylvania Supreme Court's judgment, and the question is not whether he had "standing to sue under principles governing the federal courts" but whether "the judgment of the state court causes di-

rect, specific, and concrete injury to" him. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623–24 (1989).

Petitioner need not establish federal-court plaintiff's standing through residency in a challenged district, when Petitioner "has experienced an injury 'fairly traceable to the *judgment below*,'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022) (citation omitted), which affirmed the Commission's redistricting plan and thereby excluded the competing plan Petitioner proposed. Petitioner stands in the shoes of the petitioners in *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245 (2022), who successfully challenged a judgment of the Wisconsin supreme court on racial-gerrymandering grounds, even though they did not reside in any challenged district. The petitioners were individual voters and the Wisconsin legislature, who asserted injury on the ground that "[t]he state supreme court chose a different" plan than what they submitted. Application for Stay, *Wis. Legislature v. Wis. Elections Comm'n*, at 5, No. 21A471 (filed Mar. 12, 2021); *see also id.* at 7–8 (same injury to the legislature). Like the voters who "who initiated the state-court proceeding," 142 S. Ct. at 1248, Petitioner initiated the proceeding below as an "aggrieved" party. Pa. Const. art. II, § 17(d). And like all petitioners in *Wisconsin Legislature*, Petitioner's plan was excluded by the judgment. The "direct, specific, and concrete injury" is the same in each case. *ASARCO*, 490 U.S. at 623–24.

The Commission (at 15) incorrectly reads *Wisconsin Legislature* as dependent upon the institutional interest of "the full state legislature," an extrapolation it draws from *Virginia House of Delegates v. Be-*

thune-Hill (Bethune-Hill III), 139 S. Ct. 1945 (2019). But *Bethune-Hill III* addressed the legislative institutional prerogative (or lack thereof) “to defend legislation,” *id.* at 1952, which was irrelevant in *Wisconsin Legislature* because “the Governor vetoed” the redistricting bill, it never became law, and the governor competed against the legislature and voters in the resulting impasse case—all as co-equal litigants. 142 S. Ct. at 1247. The legislature’s submission was not “a legislative plan,” “owed substantial deference,” but that of a regular litigant like any other (including Petitioner). *Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133, 1139 (10th Cir. 2012).[1]

At best, Respondents’ arguments provide another basis for certiorari. To the extent *Wisconsin Legislature* (which did not expressly identify the basis of standing) supports Petitioner’s claim to standing and *Bethune-Hill III* casts doubt on it, this ambiguity presents an important question for this Court’s resolution that is likely to reoccur in future redistricting cases. If it deems the question in doubt, the Court should grant certiorari and request merits briefing on the question of standing.

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[1] Nor is it material that the Wisconsin judiciary selected a litigant’s plan whereas the court below approved the Commission’s adopted plan, since there is no functional difference in the judgments: each had the same impact on competing proposals. Any contrary view (which Respondents have not offered) would erroneously turn not on what injury “actually exist[s]” but on “intangible” legal formalities. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016).

II. This Court Should Grant Certiorari To Review The Judgment Below

A. The Question Presented Merits This Court's Review

As the Petition explained (at 17–24), this case exemplifies how redistricting authorities have attempted to sidestep this Court's racial-gerrymandering precedents through superficial argumentation. By employing the very semantics the Petition forecasted, Respondents only demonstrate why this Court's review is needed.

1. The Commission admits to the use of race, asserting that it was "attentive to opportunities for minority communities to elect or influence the election of candidates of choice." Comm'n.Opp. 38. But it denies that race predominated on the theory that, alongside its racial goals, "redistricting criteria were accounted for." *Id.* at 26. Commissioner McClinton explains at some length how the plan "score[d] well" on these criteria. McClinton.Opp. 23; *see also id.* at 25.

This only proves Petitioner's point (at 21–24) that the only real difference between this case and prior decisions is superficial denials and red herrings. The central point of this Court's *Bethune-Hill* decision is that traditional redistricting principles are "numerous and malleable" and thus subject to manipulation. *Bethune-Hill v. Virginia State Bd. of Elec.*, 137 S. Ct. 788, 799 (2017). After all, "[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" even though "race for its own sake [was] the overriding reason" for the plan. *Id.* Hence, a good "score" on redistricting criteria does *not* establish that a plan complies with the Fourteenth Amendment.

The Petition explained that the response to *Bethune-Hill* and the Court's similar holding in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), has been *more* emphasis on malleable redistricting principles, not less. Respondents can hardly dispute this point when their opposition briefs exemplify it.

This case illustrates why the Commission's focus is erroneous. The record is replete with direct evidence that the Commission "fashioned" districts on the basis of race. Petition at 32. The Commission employs semantics (at 28–32) in answering this evidence of predominance, alleging the Chair's repeated assertions of purposeful intent to create minority opportunity districts merely described the plan's racial effect, not the Commission's intent. But there is a "distinction between being aware of racial considerations and being motivated by them," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), and this Court should not permit clever wordplay to erase it.

Clever wordplay is all the Commission offers. To begin, it plucks the word "positioning" from the Chair's comments to argue that the Chair meant only "that minority voters would be in a better position to influence the election," which the Commission apparently would have the Court believe was accidental. Comm'n.Opp. 29. But this dislocates the word "positioned" from the beginning of that very sentence, which says the Commission "fashioned districts to

create" that result. Petition at 32. That is the language of purpose, not effect.

The same is true of other language in the same passage. The Chair went on to state that the Commission drew "minority influence districts without an incumbent" where it was "*able* to do so," Pet.App.143a (emphasis added), and that the "efforts to create these districts also were hailed" by Latino House members and the House Legislative Black Caucus leadership. *Id.* at 146a. Previously, the Chair asserted that the Commission tried "to create districts with strong Latinx populations and with no incumbents. . . ." Pet.App.135a–136a. The phrases "we fashioned," "we drew," "we tried . . . to create," and "the Commission's efforts to create" all speak to intent, not merely effect.

Indeed, in the next paragraph of its brief, the Commission tips its hand. In defending its use of race, it claims that, "by including minority-influence districts and coalition districts . . . , the Commission was actually working to avoid the harms that the Fourteenth Amendment is meant to prohibit. . ." Comm'n Opp. 29. That plainly bespeaks intentionality.

2. The Commission cannot avoid these admissions by simply claiming that the 2021 Final Plan also satisfies traditional redistricting criteria. For example, Respondents emphasize that the 2021 Final Plan splits fewer municipalities overall than the prior decade's plan. Comm'n.Opp. 25; McClinton.Opp. 23–24. But that number alone does not address *which* municipalities are split, *how* they are split, and *why* they are split. By relying on such a plan-

wide metric, a redistricting authority can easily pay homage to "a 'holistic' analysis of the district lines" and yet place their reliance on diversions far removed from any holistic analysis of any specific district's lines, or why they were drawn. *See* Comm'n.Opp. 34.

These and other arguments allow wide latitude for mapmakers to utilize race so long as they ensure that their plans comply with some undefined level of traditional redistricting criteria. It allows mapmakers to mask predominance by making up for unnecessary municipal splits or less compact districts in areas of the state where race was used by reducing splits or increasing compactness in other regions–a task made easier through advanced computing. And Respondents' proposed framework ignores that traditional redistricting criteria are generally examined statewide, while racial gerrymandering is identified at the district level.

Under Respondents' approach, it is unclear what evidence could *ever* establish racial predominance—except, perhaps, a flagrant departure from traditional districting principles. Respondents cite the "narrow land bridges" and other contorted district shapes in *Miller* and the mapmaker's direct admission of drawing to racial targets in *Cooper* as the sort of evidence needed to find predominance. Comm'n.Opp. 35–36; McClinton.Opp. 29–30. *See also* McClinton.Opp. 24 (citing the Court's observation in *Bethune-Hill*, 137 S. Ct. at 799, that it had never before affirmed a predominance finding, or remanded a case for determination of predominance, without "evidence that some district lines deviated from tradi-

tional principles."). As the Petition explained (at 21–22), these arguments only illustrate why review is necessary: the problem in *Cooper* was not what the mapmaker testified but what the legislature *did*. As *Bethune-Hill* recognized, "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." 137 S. Ct. at 799.

3. The Petition explained (at 22) that this case involves a novel form of racial gerrymandering where criteria were applied uniquely to minority-opportunity districts that were not applied to other districts. Respondents offer no meaningful basis to disagree. For example, they do not seek to establish that the Commission applied its policy of creating minority districts without incumbents equally to majority-white districts (because, in fact, there was no such policy).[2]

Nevertheless, the Commission denies that its choice to exclude incumbents from the challenged minority-influence districts evidences racial predominance, but that denial rings hollow. The Chair admitted that "one of the things that we tried to do in both maps…was to create districts with strong Latinx populations and with no incumbents, because

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[2] The Commission accuses Petitioner of inconsistency for criticizing the Commission's preliminary plan for inadequately considering incumbency in "white, rural" areas with Republican incumbents, *see* Comm'n.Br. 30, but the Commission does not dispute that it generally attempted to protect incumbents. The Commission also claimed that, in response to Petitioner's criticism, it *improved* protection for Republican incumbents—which only illustrates how differently the Commission treated incumbency-protection in minority districts. *See* Pet.App.166a.

we were led to believe that overcoming the natural powers of the incumbent was very difficult." Pet.App.135a–136a. *See also* Pet.App.146a. These districts were touted as "creating special opportunities for the election of minority representatives." Pet.App.123a–124a. And the Commission later described how it "looked for opportunities where districts with sizeable minority communities could be drawn in ways that did not include an incumbent" in order to "counter" the effect of incumbency, which it perceived to be a "barrier" to minority voters' ability to elect candidates of choice. Pet.App.165a.

These statements leave no room for the argument that "the absence of an incumbent in these districts simply cannot be attributed to any attempt to sort voters on the basis of race." McClinton.Opp. 29; *see also* Comm'n.Opp. 29 (similar). The clear import of these statements is both that minority districts were purposefully created and that a unique no-incumbency criterion was applied only to these districts, and no others.

4. Respondents also mistakenly assume racial gerrymandering occurs only when districts are "packed" with racial minorities and imply Petitioner may not allege a racial gerrymander by means of *reducing* minority percentages in given districts. Comm'n.Opp. 19; *see also* McClinton.Opp. 36. But racial gerrymandering occurs when race is the predominant motivation for a decision to "place a significant number of voters within *or without* a particular district." *Miller*, 515 U.S. at 916 (emphasis added). A redistricting authority that intentionally sorts voters into districts by *removing* minority voting-age per-

sons, as the Commission did here, engages in presumptively unconstitutional racial gerrymandering to the same degree as an authority that adds minority voters. Even if that position were not sufficiently clear from this Court's precedent, this would only underscore yet again why this case warrants review.

B. This Case Is A Suitable Vehicle

This case is an optimal vehicle to address the question presented. *See* Petition 1. Respondents' efforts to show otherwise are unpersuasive.

First, there is nothing to Respondents' baffling claim that Petitioner failed to raise the racial-gerrymandering issue in the court below. Comm'n.Opp. 16–21; McClinton.Opp. 35–36. The Commission itself alleges that Petitioner devoted "3.5 pages" to arguing predominance. Comm'n.Opp. 20. That, on its own, would be more than sufficient to preserve the issue. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469–70 (2000); *Bailey v. Int'l Bhd. of Boilermakers*, 175 F.3d 526, 529-30 (7th Cir. 1999). And the Commission's assertion is woefully short of what Petitioner actually devoted to the argument: Petitioner devoted *16 pages* to his racial gerrymandering argument in his Pennsylvania Supreme Court brief, plus *seven pages* of his background section, for a total of 23 pages on racial gerrymandering. PaSC Br. at 25–32, 62–77.[3] The Commission also ignores that 28 numbered paragraphs addressed this issue in Petitioner's petition for review, the pleading

[3] Available at https://www.pacourts.us/Storage/media/pdfs/20220308/162106-march7,2022-petitioner'sbrief.pdf.

that commenced the action below. Pet.App.52a–63a. Petitioner not only preserved the question presented but did so in an exemplary way.

Second, there is also no merit in Respondents' assertion that "Petitioner originally challenged the Commission's plan as a partisan gerrymander, not a racial gerrymander." Comm'n.Opp. 17; *see also* McClinton. Opp. 35–36. This assertion is difficult even to understand. Needless to say, there is no rule that an otherwise preserved issue somehow becomes forfeited if it is raised alongside a *different* argument that is not presented in a petition for certiorari. So, while it is true that Petitioner challenged the 2021 Final Plan as both a racial gerrymander and a political gerrymander, it is a complete mystery why that joinder of claims matters at this stage.

To the extent Respondents believe there is something mutually inconsistent with joining those two claims—an assertion they did not make below when faced with that same joinder—they are wrong. Petitioner challenged the 2021 Final Plan as a partisan gerrymander on a *statewide* basis, asserting that the plan divided various cities across the state when not absolutely necessary in violation of the state constitution. Pet.App.41a–47a. Petitioner asserted this challenge to the plan based upon expert statistical evidence and through specific examples of areas where Pennsylvania's cities were unnecessarily divided to reach desired partisan outcomes.

Petitioner's racial-gerrymandering claim proceeded along different lines, as he asserted that specific districts in the 2021 Final Plan were fashioned for predominantly racial reasons. Pet.App.52a–63a. It is

not inconsistent to claim that a complete plan is both a partisan gerrymander and specific districts are racial gerrymanders. Indeed, if "race is used as a proxy for political characteristics," that use is subject to strict scrutiny like any other. *Bush v. Vera,* 517 U.S. 952, 968 (1996) (plurality opinion). *See also Bethune-Hill v. Virginia State Bd. of Elec. (Bethune-Hill II),* 326 F. Supp. 3d 128, 143 (E.D. Va. 2018) (three-judge court).

Third, Respondents erroneously cherry-pick certain questions Petitioner asked of witnesses, during the dozens of hours of Commission hearings, about the reduction of minority voting percentages in districts. Comm'n.Opp. 17-18. Petitioner did not argue for a higher racial target, as Respondents imply, but rather demonstrated that by unnecessarily dividing certain cities, the Commission's plan diluted (or cracked) minority voting strength, even as certain Commissioners claimed the plan would benefit minority voters. Commissioner McClinton cites (at 9, 12) to portions of Petitioner's exceptions brief to the Commission and of his remarks to the Commission that make effectively the same point. In other words, Petitioner established that the Commission's use of race was not narrowly tailored to comply with the Voting Rights Act, and Respondents can hardly fault these assertions: they practically concede the point. Comm'n.Opp. 38 n.9.

The Commission similarly takes out of context Dr. Barber's statement about a "decision to divide particular cities" being "not driven by minority representation, but instead by partisan considerations." SCOPA.Pet.App.64a. Dr. Barber was refuting an ar-

gument that the specific splits in the 2021 Final Plan were "necessary to create a sufficient number of" minority districts, because a similar number of districts could be created without the splits. *Id.* at 62a. This is powerful evidence that the Commission used race as a proxy for politics, since race was not being used effectively to avoid vote dilution.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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