

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioner,

vs.

2021 LEGISLATIVE
REAPPORTIONMENT
COMMISSION,

Respondent.

Docket No. 11 MM 2022

APPEAL FROM THE FINAL PLAN OF THE
2021 LEGISLATIVE REAPPORTIONMENT COMMISSION

**BRIEF FOR *AMICI CURIAE*
LATINOJUSTICE PRLDEF AND MAKE THE ROAD PENNSYLVANIA
IN OPPOSITION TO MAJORITY LEADER BENNINGHOFF'S PETITION**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are non-partisan civic engagement and legal organizations who are committed to eliminating barriers to the ballot at all stages of the electoral process—from voter registration through redistricting—among historically disenfranchised communities. *Amici* have an interest in ensuring that redistricting and the resulting maps reflect the growth of minority communities and provide such communities with viable and meaningful opportunities to elect candidates of choice.

LatinoJustice PRLDEF, originally established as the Puerto Rican Legal Defense and Education Fund (PRLDEF) in 1972, is one of the country’s leading nonprofit civil rights public interest law organizations. LatinoJustice champions an equitable, just, and accessible society by promoting Latino civil engagement, cultivating leadership, and protecting and advancing the civil and legal rights of Latinos throughout the nation. LatinoJustice works on numerous issues critical to the Latino community, including ensuring fair access to education, employment, housing, and economic opportunity, protecting immigrant rights, pursuing racial justice, and seeking fundamental transformation of the criminal legal system. In the area of voting rights, LatinoJustice uses advocacy and litigation to combat practices that dilute the vote of minority communities, such as voter roll purges, failure to provide language assistance at poll sites, and redistricting practices that disempower communities of color.

Make the Road Pennsylvania (MRPA) builds power for justice in Latinx, immigrant, and working-class communities of color. Make the Road Pennsylvania believes in a transformational theory of change that seeks to empower community members to be the principal agents and leaders in challenging and dismantling systemic oppression through community

organizing policy innovation, transformative education, civic engagement, and advocacy. Since its founding in 2014 in Reading, Pennsylvania, its membership base has grown to 10,000 people across Allentown, Reading, and Philadelphia. Make the Road Pennsylvania's advocacy efforts reflect a strong track record of local and state campaigns, mobilizations on federal issues, large-scale civic engagement work, and active leadership among key progressive coalitions, and tables across the state.

Amici oppose the petition filed by State Representative and House Majority Leader Benninghoff because it takes the position that consideration of race and ethnicity in the redistricting process violates the state and federal constitutions. The opposite is true. Federal and state law, including newly-enacted Section 29 of the Pennsylvania Constitution, prohibit dilution of the votes of marginalized communities. As organizations that fight to safeguard the vote from inequitable redistricting processes, *amici* are uniquely positioned to address constitutional concerns raised by the Pennsylvania Legislative Reapportionment Commission's maps.

INTRODUCTION

The redistricting process—if done in a manner contrary to legal and constitutional mandates—has the potential to disenfranchise marginalized communities for an entire decade by drawing districts that dilute Latino and Black electoral power. *Amici* submit this brief in opposition to the mistaken assertions raised by Majority Leader Benninghoff’s Petition (“the Petition”) arguing that race and ethnicity should not be factored in the drawing of electoral districts.

First, contrary to Majority Leader Benninghoff’s position, federal and state law—including Section 29 of the Pennsylvania Constitution—allows for, and indeed even demands, that race and ethnicity be considered in the redistricting process, in order to ensure that the resulting maps provide all racial and ethnic groups with equal access to the franchise. Indeed, Section 29 mirrors the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the federal Voting Rights Act, and courts have consistently found that analysis of race is crucial to evaluating the lawfulness of district maps.

Second, federal and state law require that the redistricting process take account of the demographic growth of Latinos in Pennsylvania counties, an accounting that cannot be done without a focused analysis of race and ethnicity. While the Petition is correct in noting that the Pennsylvania Legislative Reapportionment Commission’s (“the Commission”) maps unlawfully “crack” Latino communities in Allentown, its proposed remedy—a requirement that the Commission not analyze race at all—would provide these communities with no remedy and indeed do more harm.

Finally, the Petition’s support of a return to prison gerrymandering, a practice widely understood as a racially discriminatory practice that dilutes the Black and Latino vote, must be

rejected. Counting incarcerated persons in the electoral district of the prison rather than in their home districts is exactly the kind of practice that Section 29 must be interpreted to prohibit.

ARGUMENT

I. Section 29 protects voters against racial discrimination and follows the constitutional protections guaranteed by the Fourteenth Amendment and the Voting Rights Act.

Federal law requires that after the completion of the decennial census, states undertake a redistricting process to create electoral districts reflective of the changes in population.¹ The redistricting process for drawing local, state, and congressional districts can either assist or hinder racial and ethnic minority groups, including Latino,² Black, and Asian communities, in electing a candidate of choice.

Enacted in 2021 by referendum, Section 29 of the Pennsylvania Constitution provides 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.”³ Prior to the enactment of Section 29, Pennsylvania had not adopted language in furtherance of protecting civil rights since 1967, when the legislature adopted Section 26 of the Constitution. Section 26 provides that “[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”⁴ Jointly, these sections of the Constitution protect racial and ethnic minorities from both action and inaction by government entities. Applied to voting rights, these sections of the

¹ U.S. Const. Art. 1, §2; Pa.Const.Art.II, §17

² In this brief, the term “Latino” will refer to the group that the Census Bureau designates as “Hispanic or Latino.” Specifically, the Census Bureau defines “Hispanic or Latino” as “a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” U.S. Census Bureau, Hispanic Origin, available at: <https://www.census.gov/topics/population/hispanic-origin/about.html>.

³ Pa. Cons. Art. I, §29.

⁴ Pa. Cons. Art. I. §26.

Constitution demand that the redistricting process produce maps that ensure citizens are not denied the fundamental right to vote due to their race or ethnicity.

Prior redistricting cycles in Pennsylvania were marked by legal challenges that raised questions about whether proposed maps were equitable, provided viable opportunities for minority communities to elect candidates of choice, or continued a pattern of gerrymandering to serve incumbent politicians.⁵ The adoption of Section 29 by popular referendum was met with a legislative push to create more obstacles than opportunities for voters. For example, soon after the adoption of Section 29, Pennsylvania legislators introduced the Voting Rights Protection Act (“VRPA”) in the state Senate. The VRPA sought to create voter identification requirements, shorten the length of voter registration windows, and place undue burdens on limited English proficient voters seeking language assistance.⁶ The bill is currently pending in the Pennsylvania legislature.

Section 29 protects Pennsylvanians of all racial and ethnic backgrounds against practices that undermine, dilute, or extinguish their electoral power. It mirrors the protections of the Equal Protection Clause of the Fourteenth Amendment, which provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷ Section 2 of the federal Voting Rights Act goes further: it prohibits a state or a political subdivision of a state from using any “standard, practice, or procedure” that “*results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. §10301(a) (emphasis added). The Supreme Court has held that Section 2 “should be interpreted in a manner that

⁵ *Holt v. 2011 Reapportionment Comm’n*, 614 Pa. 364 (2012) (finding that the 2011 Legislative Reapportionment Commission’s maps violated Pennsylvania Constitution Article II Section, 16 in that the plans unnecessarily divided counties, municipalities, and wards); *League of Women Voters v. Commonwealth*, 645 Pa. 1, 128 (2018) (finding that the State’s congressional redistricting plans unconstitutional because their aims were to achieve “unfair partisan gain” and “partisan dilution of votes.”).

⁶ Voting Rights Protection Act, House Bill No. 1300, Regular Session Pennsylvania General Assembly 2021-2022

⁷ U.S. Const., Amdt. 14, §1.

provides ‘the broadest possible scope’ in combatting racial discrimination.” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal citation omitted). Indeed, “Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent.” *Id.*

II. Section 29 of the Pennsylvania Constitution and the Voting Rights Act require the Court to find that the “cracking” of Latino population in Allentown unlawfully dilutes the Latino vote.

Majority Leader Benninghoff’s Petition asks the Court to find the 2021 Final Plan “contrary to law under Article I, Section 5, Article I, Section 29, Article II, Section 16 of the Pennsylvania Constitution, the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the United States Constitution.”⁸ It further asks this Court to “redraw the legislative district lines without race as a predominant factor unless and until there is an identified compelling state interest.” *Id.* This position—that taking race into account to empower minority communities violates rather than supports equal protection principles—completely misreads the requirements of state and federal law. Section 29’s prohibition against denial or abridgement of rights because of race and ethnicity mandates the opposite: the Court must evaluate the Commission’s plans to ensure that communities of color have viable opportunities to vote for candidates of their choice.

Viable opportunities to elect a candidate of choice exist when voters are part of electoral district where they are a decisive voting bloc and demonstrate a cohesive ability to vote for their preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 44-45, 50-51 (1986).⁹ Under the Equal Protection Clause, it is “permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of

⁸ Petition For Review Kerry Benninghoff, ¶99, 11 MM 2022 (February 17, 2022).

⁹ See also Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1415 (2001).

those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.” *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 168 (1977). In determining whether voters have viable opportunities to elect candidates of choice, courts must use Section 29 to consider not only whether a racial or ethnic group’s right to vote is outright “denied” but also whether that group’s rights are “abridged” in electoral districts where their voting power has been diluted or even silenced. Pa. Const. Art. I, §29.

It is also crucial for electoral districts to reflect the demographic changes of the last decade. “[R]edistricting [that] prevent[s] the immediate success of the emergent Latino majority” can lead to a “denial of opportunity in the real sense of that term.” *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 401 (2006).¹⁰

a. Pennsylvania’s Latino communities have grown dramatically in the last two decades.

In *LULAC v. Perry*, the Supreme Court found that the Texas legislature had unlawfully diluted the Latino vote when it redrew a district that had seen an “increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, and the near victory of the Latino candidate of choice in 2002, and the resulting threat to the incumbent’s continued election.” 548 U.S. at 401. Where a racial or ethnic minority experiences growth in both population and voter engagement, providing an opportunity to elect a candidate of choice, maps that dilute the minority vote are unlawful.

¹⁰ See also Yuriy Rudensky & Gabriella Limón, UNDERSTANDING REDISTRICTING THROUGH DEMOGRAPHIC CHANGE, NOT HORSE RACE POLITICS BRENNAN CENTER FOR JUSTICE (2021), <https://www.brennancenter.org/our-work/analysis-opinion/understanding-redistricting-through-demographic-change-not-horse-race> (last visited Mar 4, 2022).

The facts that gave rise to the unlawful maps in *LULAC v. Perry* bear striking similarities to the demographic facts in Pennsylvania. The Latino population in Pennsylvania remains the fastest-growing ethnic group in the Commonwealth. Between 2000-2010, the Latino population grew approximately 82.6%¹¹; between 2010 and 2020, it grew approximately 45.85%.¹² While the population in many Pennsylvania counties decreased, resulting in the state's loss of one congressional seat, the Latino population has continuously grown over the last twenty years and now represents about 8% of the state's total population.¹³ In fact, out of the 72 municipalities in Pennsylvania, 37 saw the Latino population more than double between 2010 and 2020.

Despite this continuous growth over the last two decades, representation at the state and federal electoral level remains almost non-existent. None of the congressional districts in Pennsylvania are held by a majority Latino population or Latino-elected official. At the state level, Latinos hold about 1% of the 203 state house seats and zero senatorial seats.¹⁴ Electoral representation does not reflect demographic growth in Pennsylvania, suggesting that Latinos do not have meaningful access to the ballot within the state.

b. The Commission's maps crack the Latino communities in Allentown.

The Commission's failure to consider the equal protection principles embodied in Section 29 effectively denies or abridges the electoral power of the growing racial and ethnic minority groups in Pennsylvania.

¹¹ 2010 Census Briefs, *The Hispanic Population: 2010*, <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>

¹² Cassie Miller, "Four take-aways from Pennsylvania's 2020 U.S. Census Data" (August 12, 2021), [Four take-aways from Pennsylvania's 2020 U.S. Census data - Pennsylvania Capital-Star \(penncapital-star.com\)](https://www.penncapital-star.com/news/2021/08/12/four-take-aways-from-pennsylvania-s-2020-u-s-census-data/)

¹³ United States Census Bureau, Quick Facts Pennsylvania <https://www.census.gov/quickfacts/fact/table/PA/PST040221#PST040221>

¹⁴ Nicole Acevedo, "Not Enough: Critics say Proposed Pa. districts limit Latino representation (January 13, 2022), [Not enough: Critics say proposed Pa. districts limit Latino representation \(nbcnews.com\)](https://www.nbcnews.com/news/politics/2022/01/13/not-enough-critics-say-proposed-pa-districts-limit-latino-representation/)

This failure is evident when analyzing the electoral representation of Latinos in Allentown. The City of Allentown is currently the third-largest majority-Latino city in Pennsylvania, after Reading and Hazelton. A total of 54% of the city’s population identifies as Latino. The Commission’s proposal unnecessarily splits the Latino community into three House districts: 22, 132, and 134.¹⁵ In proposed District 22, the Latino population is diminished to 55.6% total Latino population and 50.8% voting age population, an overall 4.7% decrease in the eligible voter population¹⁶. The Latino electorate in this proposed district would have to ensure an almost perfect voter turnout in order to have a decisive say in the choice of their state representative. Proposed House District 132 diminishes the Latino population to 21.3% of the total population and 18.3% of the voting age population. Proposed House District 134 takes over a large geographic portion of House District 22, including Latino communities, to create a new district that has a 43.5% Latino population and a 38.5% Latino voting age population.¹⁷

The splitting of the city of Allentown into three house districts would effectively negate the effects of Latino growth in Allentown and further dilute the voting capacity of this electorate. This is legally and morally unacceptable given the obstacles to voting that Latinos already face, including barriers to language access at poll sites.¹⁸

While Majority Leader Benninghoff’s Petition correctly highlights the Commission’s “cracking” of Latinos in Allentown, his flawed assertion—that consideration of race is improper when drawing districts—cannot be the basis of any remedy for Latino voters. A “race-blind”

¹⁵ <https://www.redistricting.state.pa.us/maps/>

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See, e.g.*, Genesis Ortega, “Election Officials in need of more bilingual poll workers for Lehigh, Northampton counties”, WLVR (National Public Radio) (October 21, 2020), <https://wlvr.org/2020/10/election-officials-need-bilingual-poll-workers-in-november/#.YiIW9InMI2x>; Marie Albiges, “Spanish speakers in Pa. faced confused poll workers, lack of interpreters on Election Day,” WHYY (PBS) (November 17, 2020), <https://whyy.org/articles/spanish-speakers-in-pa-faced-confused-poll-workers-lack-of-interpreters-on-election-day/>

approach to redistricting ignores the obvious truth that the electoral power of communities can be abridged long before a ballot is cast. Section 29 requires the Commission to protect racial and ethnic minority groups from voting practices, including redistricting, that dilute or diminish their access to the franchise. Analysis of the maps' impact on racial and ethnic minorities is essential to ensuring that Latinos have the ability to elect candidates of choice. Such analysis makes clear that the Pennsylvania Commission's cracking of the Latino community in Allentown undermines and dilutes Latino voting power.

III. The Commission's reallocation of incarcerated people to their home districts complies with Section 29.

The Petition's flawed argument in favor of a return to prison malapportionment or gerrymandering further underscores the weakness of its claims in its purported attempt to vindicate equal protection principles. Petition ¶¶ 60-64.¹⁹ Contrary to the Petition's suggestion—for which it cites no authority—there is nothing unlawful about counting persons in their pre-incarceration residences for redistricting purposes. To the contrary, it is prison malapportionment that “offends the fundamental principle of equal representation.” Alaa Chaker, *Prison Malapportionment: Forging a New Path for State Courts*, 130 YLJ 1250 (March 2021).

Counting incarcerated individuals in the districts where they are imprisoned would continue a practice of creating deceptively inflated prison districts that diminish the electoral power of Latino and Black communities, whose members are incarcerated at greatly disproportionate rates. While federal courts have not yet articulated a standard for finding prison gerrymandering or malapportionment unlawful, the United States Court of Appeals for the Second Circuit Court has found that such schemes may violate the Equal Protection Clause when

¹⁹ Petition For Review Kerry Benninghoff, ¶60, 11 MM 2022 (February 17, 2022).

they “minimize representational strength in prisoners’ [predominantly Black and Latino] urban home districts.” *Nat’l Ass’n for Advancement of Colored People v. Merrill*, 939 F.3d 470, 477 (2d Cir. 2019).

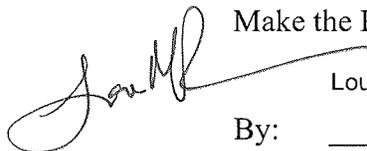
When district maps artificially inflate the political power of rural residents at the cost of diluting the vote of urban residents, they perpetuate the disenfranchisement of Latino and Black communities. The Commission’s decision to allocate incarcerated persons to their home districts is consistent with Section 29 and equal protection principles.

CONCLUSION

Section 29 of the Pennsylvania Constitution did not exist in prior redistricting cycles. Pennsylvania’s renewed commitment to equal protection principles through the popular enactment of Section 29 must guide the Court in evaluating the Commission’s maps. *Amici* respectfully ask the Court to (1) dismiss the Petition insofar as it seeks a race-blind analysis of the Commission’s maps; (2), find that the Commission violated Section 29 in cracking of the Latino population in Allentown; and (3) reject the Petition’s call for a return to prison malapportionment.

Respectfully submitted,

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CERTIFICATION PURSUANT TO PA.R.A.P. 531

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2)(i) and (ii), Amici Curiae, LatinoJustice PRLDEF and Make the Road Pennsylvania, certify that no person other than Amici Curiae, their counsel, and their members contributed money intended to fund the brief's preparation or submission.



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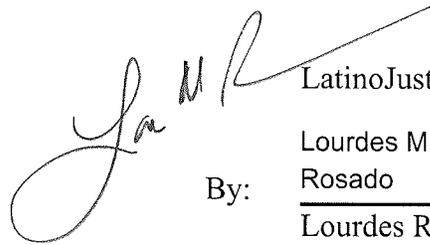
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CERTIFICATE PURSUANT TO PA.R.A.P.2135(d)

I hereby certify that this brief contains 3052 words within the meaning of Pa. R. App. Proc. 2135(d) (exclusive of the caption, signature block, and the certifications herein). In making this certificate, I have relied on the word count of the word-processing system used to prepare this brief.



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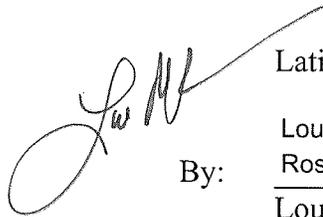
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CERTIFICATE OF CONFIDENTIALITY

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.



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