No. 21-1509

IN THE

Supreme Court of the United States

RYAN COSTELLO,

Petitioner,

v.

CAROL ANN CARTER, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR PENNSYLVANIA SENATOR JAY COSTA, JR., LEADER OF THE PENNSYLVANIA SENATE DEMOCRATIC CAUCUS, AND PENNSYLVANIA REPRESENTATIVE JOANNA E. McCLINTON, LEADER OF THE PENNSYLVANIA HOUSE DEMOCRATIC CAUCUS

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INTRODUCTION

As a result of the 2020 census, Pennsylvania lost one seat in the U.S. House of Representatives and thus was required to draw new congressional districts. The task of redistricting ordinarily rests with the Commonwealth's political branches, but as the 2022 election cycle approached, the political branches failed to enact a map, with the governor vetoing the only one the legislature passed. Following this impasse, the Pennsylvania Supreme Court assumed the "unwelcome obligation" of selecting a map, Pet. App. 4a, which it implemented with only slight adjustment to certain pre-primary-election deadlines so that it could preserve the May 17, 2022 primary-election date.

Petitioner Ryan Costello now challenges the state high court's adoption of an election map, arguing that it lacked authority to do so. He asks this Court to grant review and hold that the state court was required both by the U.S. Constitution's Elections Clause and by federal statute to order at-large elections—a method not used to elect Pennsylvania's congressional delegation since the eighteenth century, *see Carter* v. *Degraffenreid*, 271 A.3d 376, 377 (Pa. 2022) (Wecht, J., dissenting)—not only in 2022 but also presumably thereafter, for as long as the political impasse persists. Costello's position not only lacks any foundation in this Court's case law, but also is, with respect, absurd in both substance and consequence. If adopted, it would potentially create a subset of at-large-election States despite Congress's clear intent to avoid exactly that, *see Branch* v. *Smith*, 538 U.S. 254, 268-273 (2003). The petition also represents an abrupt about-face for Costello, who consistently argued below that the state courts *should* adopt a map (his preferred map), a request he

made fully understanding that the courts would have to adjust certain pre-primary-election deadlines due to the delays of the state legislature in selecting a map and the action of the governor in vetoing that map. The Court should deny his request for several reasons.

First and foremost, Costello is wrong on the merits. He argues that the Elections Clause constrains the remedial discretion of state courts in redistricting litigation, requiring them to defer as much as possible to state legislatures. That argument finds no support in the Elections Clause's text, which says nothing about what occurs when the political branches are at an impasse, or the clause's purpose, which is to check the power of self-interested state legislators. It also runs counter both to a phalanx of this Court's cases encouraging state-court involvement in redistricting and to the deference this Court has traditionally afforded state courts in that context.

Costello's statutory argument is just as flawed. Based on a misreading of this Court's plurality opinion in *Branch* v. *Smith*, Costello contends that the Pennsylvania Supreme Court was required by 2 U.S.C. §2a(c)(5) to order at-large elections for the upcoming cycle. That was required, according to Costello, because the state court could not implement a new district map "without disrupting the election process," *Branch*, 538 U.S. at 275. That argument misconstrues the *Branch* plurality opinion, which explains that section 2a(c)(5)'s provision for at-large elections applies only "as a last-resort remedy" when "the state legislature, and state and federal courts, have all failed to redistrict" in time for a congressional election. *Id.* It also misstates reality, because the Pennsylvania Supreme Court's minor adjustment of certain pre-election deadlines did not "disrupt[] the election process," *id.*; to the

contrary, it permitted the primary election to proceed as planned on May 17, 2022, and it had no impact whatsoever on the general-election schedule.

Merits aside, this case is an exceptionally poor vehicle to address the issue Costello presents. That issue has not been adjudicated in this or any other case, meaning there is not only no division of authority on the issue, but also no judicial reasoning for this Court to review. Moreover, Costello has heretofore in this litigation consistently taken the opposite position to the one he takes now. Having successfully endorsed the lawfulness of the Pennsylvania Supreme Court's actions, he should be barred by judicial estoppel from now complaining otherwise.

Finally, Costello provides no sound reason for this Court to hold his petition pending its decision in *Moore* v. *Harper*, No. 21-1271 (cert. granted June 30, 2022). This case presents a meaningfully different question from *Moore*, and because the argument in *Moore* has never been raised in this case, even a reversal there would almost certainly not affect the decision below here. This Court should thus deny Costello's petition in the ordinary course, allowing Pennsylvania to proceed with its upcoming elections free of uncertainty.

STATEMENT

The 2020 census revealed that Pennsylvania's population had both shifted significantly within the State since 2010 and increased at a lower rate than the population of other States. Pet. App. 3a, 32a. As a result, Pennsylvania lost a seat in the House of Representatives (going from 18 to 17) and had to redraw its congressional districts. Pet. App. 3a. In general, congressional districts in Pennsylvania "are drawn by the

state legislature as a regular statute, subject to veto by the Governor." *League of Women Voters of Pennsylvania* v. *Commonwealth*, 178 A.3d 737, 742 (Pa. 2018).

A. Pennsylvania's Political Branches Fail To Enact The Required Congressional District Map

The 2020 redistricting process in Pennsylvania encountered logistical difficulty almost immediately. In part because of the COVID-19 pandemic, the building blocks of the process—the U.S. Census Bureau's redistricting data—were not released until August 2021, a delay of five months compared to the previous census. *See* United States Census Bureau, *Pennsylvania: 2020 Census*[1]; Penn State Harrisburg, Pennsylvania State Data Center, *2010 Census Data*.[2] And the Pennsylvania election calendar was pressing: Circulation of nomination petitions by candidates for the May 17, 2022 primary election—a precondition of access to the primary ballot for the State's major political parties, *see* 25 Pa. Stat. §2867—was set to begin on February 15, 2022. Pet. App. 165a.

1. The State Government Committee of the Pennsylvania House issues a redistricting plan, and two redistricting-related lawsuits are filed

a. Republicans in the Pennsylvania House of Representatives introduced their first proposed redistricting plan, House Bill 2146, in December 2021. Pet. App.

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[1] https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html (visited Aug. 16, 2022).

[2] https://pasdc.hbg.psu.edu/Data/Locate-Data-by-Tags?tags=2010%20Census%20Data (visited Aug. 16, 2022).

213a. Later that month—after limited committee discussion and "minor updates" to the initial map—HB 2146 was reported out of the House's State Government Committee and brought up for first consideration by the House. Pet. App. 214a.

Around the same time, a group of Pennsylvania voters (the "Carter Petitioners") filed an action in Pennsylvania's Commonwealth Court. Pet. App. 7a, 166a. Invoking the court's original jurisdiction, they asserted that Pennsylvania's extant congressional district map—which had been adopted by the Pennsylvania Supreme Court in 2018 to resolve constitutional issues with the State's 2010 redistricting efforts—was unconstitutional in light of the 2020 census results. Pet. App. 8a, 166a. Specifically, the Carter Petitioners contended that the existing districts were "malapportioned" and contained significantly disparate populations, in violation of the U.S. and Pennsylvania constitutions. Pet. App. 8a, 167a-169a. They further argued that the existing map violated the requirement in 2 U.S.C. §2c that each State have a "number of districts equal to the number of Representatives to which such State is so entitled," Pet. App. 169a. The Carter Petitioners asked the court to enjoin Pennsylvania election officials from enforcing or implementing the existing districting map, and to order them to adopt a new map that complied with federal and state law. Pet. App. 8a, 169a-170a.

On the same day, another group of Pennsylvania voters (the "Gressman Petitioners") filed a separate petition for review with the Commonwealth Court. Pet. App. 7a-8a, 170a. Their claims echoed those of the Carter Petitioners, asserting that the existing congressional districts varied in population "by as much as 95,000 residents" and were therefore "significantly

malapportioned" under the federal and state constitutions. Pet. App. 8a, 170a-171a. In addition, the Gressman Petitioners contended that neither they nor potential candidates for office could know where the boundaries of their districts were, nor could they identify their "fellow district residents." Pet. App. 171a. The Gressman Petitioners blamed this unconstitutional state of affairs on "the political branches' failure to act." Pet. App. 171a.

The Commonwealth Court consolidated the two lawsuits and ordered that any party seeking to intervene promptly file an application to do so. Pet. App. 8a, 172a-173a. All parties would then have the opportunity to submit a proposed 17-district congressional redistricting plan and supporting evidence. Pet. App. 173a. The court also made clear—consistent with the process established in *Mellow* v. *Mitchell*, 607 A.2d 204 (Pa. 1992)—that it would choose from one of the proposed plans "if the General Assembly and the Governor failed to enact a congressional reapportionment plan by January 30, 2022." Pet. App. 8a-9a, 172a-173a.

b. In response to the Commonwealth Court's order, Costello moved to intervene, joined by Congressman Guy Reschenthaler, Swatara Township Commissioner Jeffrey Varner, and former Congressmen Tom Marino and Bud Shuster. Pet. App. 173a. The applicants expressed a desire to follow the "blueprint" established in *Mellow* for "adjudicating challenges to the congressional redistricting process when there is a legislative impasse." Reschenthaler Application to Intervene ¶50, *Carter* v. *Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Dec. 31, 2021). In fact, Costello and the other potential intervenors urged the court to "continue to execute the blueprint—which proved remarkably effective—as set forth in *Mellow*." *Id.* ¶54. No-

where in their application to intervene did Costello or his colleagues assert that judicial involvement was precluded—or that the state courts' remedial discretion was constrained—by either the Elections Clause or 2 U.S.C. §2a(c).

Based on the assertions in the application, the Commonwealth Court permitted Costello and his colleagues to intervene. Pet. App. 174a-175a.

2. Governor Wolf's concerns with HB 2146

Soon after HB 2146 was reported out of committee and the lawsuits discussed above were filed, Governor Wolf sent a letter to legislative leaders reflecting his concerns about the House's redistricting plan. *See* Letter from Governor Tom Wolf to Honorable Bryan Cutler and Honorable Kerry Benninghoff 2 (Dec. 28, 2021) ("Gov. Letter").[3] The letter noted that in anticipation of the redistricting process, Governor Wolf had convened a Pennsylvania Redistricting Advisory Council. *Id.* at 1; *see also* Pet. App. 362a. Made up of six members with "expertise in redistricting, political science and mapmaking," the council was charged with creating a set of principles to guide the governor's review of the plan eventually enacted by the General Assembly. Gov. Letter 1; *see also* Pet. App. 362a. In his letter, the governor explained that HB 2146 did not comply with the council's principles, particularly with respect to equal population and not splitting communities of interest.

The letter also addressed timing issues, explaining that the office of the Secretary of the Commonwealth

[3] https://www.governor.pa.gov/wp-content/uploads/2021/12/12.28.21-TWW-Cutler-Benninghoff-HB-2146-Final.pdf.

had "historically needed at least three weeks to prepare" for the State's nomination petition process, which was set "to begin on February 15, 2022." Gov. Letter 2. As a result, the then-acting secretary had requested that legislative leaders deliver a final redistricting plan "no later than January 24, 2022." *Id.* With only four legislative voting session days scheduled before that deadline, the governor's letter expressed concern that the "extraordinarily compressed schedule" would not permit sufficient time for passage and presentment of a map, and resolution of any legal issues that it might pose. *Id.*

3. The Pennsylvania House's revised plan, and Governor Wolf's own plan

Following a short period of public comment, the Pennsylvania House passed a revised version of HB 2146 on January 12, 2022, almost a month after it was reported out of committee. Pet. App. 214a. Democrats reiterated their transparency concerns, asserting on the House floor that even the Democratic chair of the State Government Committee had no idea how the map supporting HB 2146 was picked. *See* Legislative Journal—Pennsylvania House of Representatives 41 (Jan. 12, 2022) (comments of Rep. Conklin).[4] Nonetheless, the House passed the bill and sent it to the Senate. Pet. App. 214a.

Dissatisfied with HB 2146, Governor Wolf proposed his own congressional redistricting maps. Pet. App. 212a, 362a; *see also* Office of Pennsylvania Governor Tom Wolf, Press Release, *Gov. Wolf: Fair Congressional Maps are Possible, Highlights Gerryman-*

[4] https://www.legis.state.pa.us/WU01/LI/HJ/2022/0/20220112.pdf.

der-Free Examples (Jan. 15, 2022) ("Gov. Press Release").[5] The governor explained that his maps showed the feasibility of producing maps that were consistent with the principles set forth by his advisory council, free of gerrymandering and compliant with federal law. Pet. App. 362a; Gov. Press Release. Governor Wolf also made clear that he would veto any redistricting plan that did not comply with his stated standards. *See* Gov. Press Release. The governor's maps, however, did not gain traction in the General Assembly. *See* Caruso & Parish, *Courts Likely to Pick Pa. Congressional Map After Wolf, Legislature Fall Short*, Pennsylvania Capital-Star (Jan. 24, 2022).[6]

4. The General Assembly enacts HB 2146 and Governor Wolf vetoes it

Six days after the House sent its redistricting plan to the Senate, the Senate State Government Committee voted it out of committee along party lines. Pet. App. 214a; Pennsylvania Senate, Senate Committee Roll Call Votes, State Government Committee (Jan. 18, 2022).[7] HB 2146 received first consideration in the Senate on the same day. Pet. App. 214a. The following day (five days before the date by which the acting secretary had requested to receive a redistricting plan),

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[5] https://www.governor.pa.gov/newsroom/gov-wolf-fair-congressional-maps-are-possible-highlights-gerrymander-free-examples/.

[6] https://www.penncapital-star.com/government-politics/courts-likely-to-pick-pa-congressional-map-after-wolf-legislature-fall-short/.

[7] https://www.legis.state.pa.us/cfdocs/legis/RCC/PUBLIC/listVoteSummary.cfm?sYear=2021&sInd=0&chamber=S&cteeCde=41&theDate=01/18/2022&RollCallId=727.

the Senate gave the plan second consideration. *Id.* With significant questions lingering concerning whether the governor would sign the bill, the Senate failed to identify alternatives. *See* Legislative Journal—Pennsylvania Senate 59-60 (Jan. 24, 2022) (comments of Senators Costa, Argall and Street)[8]; *see also* Caruso & Parish, *Courts Likely to Pick Pa. Congressional Map After Wolf, Legislature Fall Short*, Pennsylvania Capital-Star (Jan. 24, 2022).[9] In the end, the Senate referred an unchanged HB 2146 to the Senate Appropriations Committee, reported it out of committee, and passed it on a 29-20 vote, all on the date the acting secretary had identified. Pet. App. 214a. Governor Wolf vetoed the plan two days later. Pet. App. 362a.

B. Adhering To The Established *Mellow* "Blueprint," The Pennsylvania Courts Adopt A Redistricting Plan

During the weeks leading up to the passage and veto of HB 2146, the Pennsylvania lawsuits mentioned above moved through the state courts. At no point did any party to those lawsuits—including Costello—argue that the courts were constrained by either the Elections Clause or 2 U.S.C. §2a(c). Instead, all parties encouraged the Commonwealth Court to follow the established *Mellow* "blueprint" for state-court resolution of a political impasse in drawing congressional maps.

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[8] https://www.legis.state.pa.us/WU01/LI/SJ/2022/0/Sj20220124.pdf.

[9] https://www.penncapital-star.com/government-politics/courts-likely-to-pick-pa-congressional-map-after-wolf-legislature-fall-short/.

1. Initial proceedings in the Commonwealth Court

Soon after the Commonwealth Court consolidated the two lawsuits, it ordered all parties (and invited amici) to submit one or two proposed 17-district maps. Pet. App. 176a-177a. In addition, the court ordered the parties to file a joint stipulation of facts, and it scheduled an evidentiary hearing. Pet. App. 177a.

Costello participated in the hearing with his fellow intervenors, submitting two maps for the court's consideration and producing two expert witnesses to testify in support of those maps. Pet. App. 260a-264a, 271a-273a, 297a-301a. Costello and his fellow intervenors did not assert, nor did their experts, that the court was prohibited from choosing a congressional redistricting plan in the face of an impasse between the political branches. Costello and his fellow intervenors instead urged the court to adopt one of their maps. Pet. App. 297a-301a. All this led Justice Dougherty of the Pennsylvania Supreme Court to later state that any argument that the courts could not choose a map was "irretrievably waived." Pet. App. 68a n.2.

Costello and his colleagues also argued that the Carter Petitioners and the Gressman Petitioners had "attempted to create a number of false 'deadlines'" regarding the adoption of new maps. Pet. App. 300a. According to Costello and his colleagues, the courts actually had "until at least February 22, 2022 to review, consider, and select an appropriate congressional reapportionment plan before the 2022 General Primary Election would be impacted." Pet. App. 300a-301a. That assertion obviously rested on an understanding that the courts had authority to adjust pre-primary deadlines.

2. The Pennsylvania Supreme Court assumes jurisdiction

Three days after Governor Wolf vetoed HB 2146, the Carter Petitioners filed an emergency application with the Pennsylvania Supreme Court, asking the court to assume jurisdiction over the redistricting litigation immediately. Pet. App. 11a, 177a. The court granted the application and designated the Commonwealth Court judge who was presiding over the matter, Patricia McCullough, as Special Master. Pet. App. 11a. The state high court also deemed the evidentiary hearing and other proceedings that had already occurred in the Commonwealth Court to be part of the Special Master's record. *Id.* It then directed Judge McCullough to file a report containing findings of fact and conclusions of law supporting her recommendation of a redistricting plan. *Id.*

3. The Special Master's report

Judge McCullough submitted a report to the Pennsylvania Supreme Court as directed. Pet. App. 11a. The report acknowledged the general rule that Pennsylvania redistricting "is handled as regular legislation, in that any congressional districting plan must pass both chambers of the General Assembly and be presented to the Governor for his approval or veto." Pet. App. 179a-180a. In other words, the "initial and preferred path [regarding the drawing of congressional district maps is, undoubtedly, through] legislative and executive action." Pet. App. 180a (alteration in original). "However," Judge McCullough noted, "where our state legislature is unable or chooses not to timely enact a congressional redistricting scheme, it falls upon the state judiciary to assume 'the unwelcome obliga-

tion' and fashion, or in this case choose, an appropriate congressional redistricting plan." *Id.*

Judge McCullough explained that Pennsylvania's existing congressional map "cannot be implemented to represent the congressional districts for the Commonwealth from this moment forward because it created boundary lines for 18 congressional districts and seats, and the Commonwealth now has only 17 available seats." Pet. App. 361a. Moreover, Judge McCullough deemed it "an unremarkable and undisputed proposition that the [current map] violates at least one of various constitutional provisions and, as such, the creation and adoption of a new congressional redistricting map is an absolute imperative as a matter of state law." *Id.*

Judge McCullough reviewed a total of 13 proposed congressional district maps, including the two submitted by Costello and his fellow intervenors. Pet. App. 12a, 217a-219a, 223a, 260a-264a, 363a. She found that all the maps were appropriately contiguous, "as nearly equal in population as practicable," and suitably compact. Pet. App. 363a, 365a.

Judge McCullough then proceeded to sort the maps "as a matter of comparative evidentiary weight." Pet. App. 366a. For example, despite having found that all the maps met the necessary constitutional guarantee of one person, one vote, she gave a preference to maps in which there was no more than a one-person difference between the populations of the most populous and least populous districts. Pet. App. 363a-364a. That preference weighed against maps submitted by the Carter Petitioners and others. She also gave a preference to plans that did not split the City of Pittsburgh or Bucks County. Pet. App. 365a-367a. That weighed against maps submitted by Governor Wolf, among others. Pet.

App. 365a-366a. Similarly, Judge McCullough criticized plans—including the Carter Petitioners' plan—that included "two Republican incumbents in one congressional district, which effectively eliminates a Republican from continued representation in the United States House of Representatives." Pet. App. 367a. And she determined that the Carter Petitioners' plan should be accorded "less weight" because it attempted to satisfy federal and state law while making the fewest possible changes from the existing map. *Id.* That methodology, according to Judge McCullough, was "contrary to Pennsylvania and United States Supreme Court precedent" because the existing map was "based on an entirely different census population and 18 versus 17 districts." Pet. App. 367a-368a.

Finally, Judge McCullough emphasized her own characterization of the testimony of Governor Wolf's expert, specifically that random, computer-generated plans "tended to exhibit a pronounced advantage to Republicans across the full suite of elections, throughout the Commonwealth as a whole and that random plans *must naturally and necessarily* favor Republicans." Pet. App. 368a (emphasis added). Thus, she found that "when lines are purposely drawn to negate a natural and undisputed Republican tilt that results from the objective, traditional, and historical practice whereby Democratic voters are clustered in dense and urban areas, such activity is tantamount to intentionally configuring lines to benefit one political party over another." Pet. App. 369a. Finding it necessary to review such line-drawing with "suspicious eyes," the Special Master concluded that she would give less weight, "on a comparative scale," to maps that "yield[ed] a partisan advantage to the Democratic Party." *Id.*

Ultimately, Judge McCullough recommended HB 2146 as the appropriate congressional redistricting plan. Pet. App. 386a-388a. Among other reasons, she emphasized that HB 2146 had been approved by the General Assembly. Pet. App. 387a. In her own words, she "place[d] appreciable weight to the fact that, on balance, HB 2146 represents 'policies and preferences of the state' … and constitutes a profound depiction of what the voters in Pennsylvania desire, through the representative model of our republic and democratic form of government, when compared to the Governor or any of the other parties or their *amici*." *Id.* (citation omitted).

As the Pennsylvania Supreme Court requested, Judge McCullough also recommended changes to the 2022 primary-election calendar to accommodate proceedings in that court. Pet. App. 395a. Specifically, she recommended a two-week delay of the period to circulate and file nomination petitions, and a one-week delay of the deadline to object to nomination petitions. *Id.*

4. The Pennsylvania Supreme Court temporarily suspends the election calendar

With Judge McCullough's report in hand, and with an expedited briefing schedule in place and oral argument in the case scheduled, the Pennsylvania Supreme Court issued an order on February 9, 2022, temporarily suspending the primary-election calendar. Pet. App. 154a. The only then-impending event on the calendar was the February 15 opening of the period to circulate nomination petitions. That period was originally

scheduled to run for three weeks, to March 8. Pet. App. 395a.[10]

No party to the litigation objected to the court's order, but Teddy Daniels, a Republican candidate for lieutenant governor who was not then in the lawsuit, moved to intervene in response to the suspension order. Pet. App. 398a-405a. Daniels' intervention application (filed by Costello's counsel in this Court) came almost two months after the Commonwealth Court instructed anyone interested in participating in the litigation to file intervention applications. Pet. App. 172a-173a, 405a.

Daniels sought to justify his tardy application by noting that "[n]o current party or intervenor has asked or is asking this Court to reconsider its order … suspend[ing] the General primary Election calendar." Pet. App. 403a. "Nor," Daniels continued, "is any current party or intervenor arguing that the Court's order … violates the Elections Clause, which vests 'the Legislature,' of Pennsylvania with the sole authority for prescribing the 'times, places, and manner' of electing Senators and Representatives." *Id.* (citations omitted). And, he added, "[n]o current party or intervenor is asking this Court to enforce Article I, § 4, clause 1 of the United States Constitution and 2 U.S.C. § 2a(c)(5) by

[10] The pre-election calendar applicable to candidates for Pennsylvania's General Assembly also had to be suspended, *see* Order, *In re Petitions for Review Challenging the Final 2021 Legislative Reapportionment Plan*, No. 569 (Pa. Feb. 23, 2022), due to state legislative leaders' delay in adopting a reapportionment plan for the Commonwealth's state-legislative districts, *see* Report of Mark A. Nordenberg Regarding the Commission's Final Plan 12-17 (Mar. 4, 2022), https://www.redistricting.state.pa.us/resources/Press/2022-03-04%20Report%20Chair%20of%202021%20LRC%20Final%20Plan.pdf.

ordering state officials to hold at-large elections for Pennsylvania's congressional delegation unless and until the General Assembly enacts a new congressional map." *Id.*

The Pennsylvania Supreme Court denied Daniels' application to intervene without comment. Pet. 19. Even after Daniels raised his Elections Clause and statutory arguments, no party to the litigation advanced them. Pet. 2, 6. Indeed, Costello's brief to the Pennsylvania Supreme Court made no mention of either argument. He and his fellow intervenors instead continued to advocate for the adoption of one of their proposed plans. *See* Reschenthaler Br. 66-67, *Carter* v. *Chapman*, No. 7 MM 2022 (Pa. Feb. 14, 2022).[11]

5. The Pennsylvania Supreme Court adopts the Carter Petitioners' plan

On February 23 (five days after holding oral argument), the Pennsylvania Supreme Court issued a per curiam order requiring use of the Carter Petitioners' plan in Pennsylvania's 2022 congressional elections and thereafter. Pet. App. 148a. The order lifted the court's

[11] Daniels' arguments were raised again in a complaint filed in federal court (by Daniels' same counsel) a day after Daniels' intervention application was denied. *See* Compl. (Dkt. 1), *Toth* v. *Chapman*, No. 1:22-cv-00208 (M.D. Pa. Feb. 11, 2022). The district court in that case denied plaintiffs' request for immediate injunctive relief, *see* Order (Dkt. 43), *Toth* (Feb. 25, 2022), and this Court denied plaintiffs' application for a writ of injunction, *see* Application, *Toth* v. *Chapman*, No. 21A457 (U.S. Mar. 7, 2022). The district court subsequently dismissed the Elections Clause claim for lack of standing, *see* Memorandum Opinion (Dkt. 94), *Toth* (Mar. 16, 2022), whereafter plaintiffs voluntarily dismissed the rest of their claims, *see* Notice of Voluntary Dismissal (Dkt. 102), *Toth* (Mar. 28, 2022).

suspension of the primary-election calendar, replacing it with a slightly adjusted schedule, modified only to the extent necessary to accommodate the court's already expedited proceedings. Pet. App. 148a-149a. The order did not disturb the date of the actual primary, instead adjusting the dates to circulate and file nomination petitions and papers, and for the courts to hear objections to them. Pet. App. 149a-150a. It also adjusted the date for the county boards of elections to send remote military-overseas absentee ballots. Pet. App. 150a. No date was adjusted more than 10 days, and in fact the original 13-week calendar was compressed by only that amount. *Compare* Pet. App. 149a-150a *with* Pet. App. 395a.[12]

Two weeks after issuing the order, the court issued its decision in the case. Pet. App. 51a-145a. Like Judge McCullough, the court made clear that it did not relish the prospect of choosing a congressional district map. Pet. App. 4a. But it was "tasked with that 'unwelcome obligation'" because "the General Assembly and the Governor failed to agree upon a congressional redistricting plan." *Id.* Reviewing Judge McCullough's recommendations *de novo*, the court noted that "reasona-

[12] By contrast, the pre-election calendar for General Assembly candidates was compressed more dramatically. *Compare* Order, *In re Petitions for Review Challenging the Final 2021 Legislative Reapportionment Plan*, No. 569 (Pa. Mar. 16, 2022), *with* Pet. App. 149a-150a. State legislative leaders did not adopt new General Assembly districts until February 4, *see* Nordenberg Report 17, and due to a mandatory 30-day appeal period, *see* Pa. Const. art. II, §17(c), that meant the Pennsylvania Supreme Court had to wait until mid-March to adjust the pre-election calendar for General Assembly candidates. As a result, the pre-election deadlines for General Assembly candidates lagged behind the less affected analogous deadlines for federal candidates.

ble minds can disagree in good faith as to which submitted plan best balances the requisite criteria and considerations." Pet. App. 6a. In the court's view, the balancing showed that the Carter Plan was "superior or comparable to all of the plans submitted on the designated criteria." *Id.*

The court reasoned that when the political branches fail to enact a redistricting plan, "a reasonable starting point" is the plan that makes the "least change" to the existing congressional map. Pet. App. 33a. The court also credited expert testimony that the existing map "performed very well according to traditional redistricting criteria," as it was a compact plan involving "relatively few county splits and other jurisdictional splits." Pet. App. 31a. And unlike HB 2146, it had been tested and "broadly recognized" as a fair plan, following its use in the 2018 and 2020 elections. *Id.* Finally, the existing map produced "relatively competitive elections" with outcomes "roughly in line with overall partisan preferences of Pennsylvania voters." *Id.*

The court was clear that it did not choose the Carter Plan because that plan used the "least change approach." Pet. App. 33a. Rather, it chose the plan because "the least change approach worked in this case to produce a map that satisfies the requisite traditional core criteria while balancing the subordinate historical considerations and resulted in a plan that is reflective of and responsive to the partisan preferences of the Commonwealth's voters." Pet. App. 33a-34a.

Addressing Judge McCullough's different conclusion, the court disagreed with the weight and deference she had afforded to HB 2146. Pet. App. 22a. In particular, the court noted that Judge McCullough had treated HB 2146's supposed pro-Democratic tilt as a

virtue, while treating the same tilt in six other plans as a vice. *Id.* Judge McCullough, that is, had criticized "six maps due to the absence of a sufficient 'Republican tilt,'" yet stated of HB 2146 that "the Republican majority in the General Assembly [had] 'developed and proposed a plan … that favors Democrats, which ultimately underscores the partisan fairness of the plan.'" *Id.* The court respectfully rejected this "contradictory logic," which in its view "uses partisan advantage to discredit some but not all plans." *Id.*[13]

Justices Brobson, Mundy, and Todd dissented. Pet. App. 99a-145a. None of the three, however, took issue with the court's conclusion that it was necessary for the court—in light of the political impasse—to choose a congressional districting plan. Nor did any justice conclude that HB 2146 was entitled to deference, the bill having never been signed into law.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT VIOLATE THE ELECTIONS CLAUSE OR ANY FEDERAL STATUTE

A. The Elections Clause Does Not Restrict The Role Of State Courts In Drawing Congressional District Maps

Costello's request for certiorari features a severe mismatch between rhetoric and actual argument. In

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[13] In fact, the record belies Judge McCullough's characterization of HB 2146 as tilting Democratic. As shown in the table in Justice Donahue's concurring opinion, HB 2146 was, of all the maps considered, among the most biased in favor of Republicans according to every partisan-fairness metric employed. *See* Pet. App. 58a-60a. The Carter Plan was among the least partisan, although it still favored Republicans. *Id.*; *see also* Pet. App. 46a n.30.

particular, the petition is replete with rhetoric about the Elections Clause and the constraints it supposedly places on state courts' authority to ensure that States have congressional district maps. Costello asserts, for example (Pet. 7), that "[t]he state judiciary has *no* inherent authority to draw or select congressional maps—and [that] any such idea is anathema to the Elections Clause and its decision to vest congressional map-drawing authority in 'the Legislature' of th[e] State and in Congress." But Costello's actual argument for certiorari (which is addressed in Part I.B) is different, resting not on that theory of the Elections Clause but on how a plurality of this Court interpreted two federal *statutes* in *Branch*. To the extent the Elections Clause figures in his argument at all, it is only through what Costello calls the "more modest" claim (Pet. 22) that the clause "constrain[s] [the] state judiciary's *remedial discretion*," requiring state courts to defer as much as possible to state legislatures when choosing a redistricting map. But this derivative Elections Clause argument is just as flawed as Costello's more muscular rhetoric. Neither version of the argument finds any support in the text of the Elections Clause—which says nothing about what occurs when the legislature reaches an impasse with the governor—and both versions run counter to the purpose of the provision, this Court's precedent, and principles of federalism.

As to purpose, this Court has explained that "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules," *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 576 U.S. 787, 814-815 (2015), not to place state legislatures beyond the reach of their constitutions or their judiciaries. In fact, by constraining state judiciar-

ies' role in redistricting, Costello's reading of the Elections Clause runs *counter* to the Founders' intent that the provision "act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," *id.* at 815. The Founders thought this safeguard necessary because they understood that "[c]onflict of interest is inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *Id.* (second alteration in original) (quoting Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1817 (2012)). It is dubious (to say the least) for Costello to claim that the Founders, in seeking to cure that ill, fashioned a provision that privileges those inherently self-interested legislators over other instruments of the State.

Further undermining Costello's Elections Clause theory is the fact that this Court has consistently blessed state courts' formulation of congressional redistricting plans. For example, in *Growe* v. *Emison*, 507 U.S. 25 (1993), a Minnesota state court was "fully prepared to release a congressional [redistricting] plan" after the parties stipulated that the 1990 federal census rendered the State's existing maps unconstitutional, *id.* at 27-28, 31. And when a federal district court enjoined the state-court proceedings and imposed its own remedial maps, *id.* at 31, this Court unanimously vacated the injunction as "clear error," explaining that the district court had "ignor[ed] the … legitimacy of state judicial redistricting," *id.* at 34 (emphasis omitted). Concluding that the Minnesota state court's plan "was precisely the sort of state judicial supervision of redistricting we have encouraged," *id.*, the Court reaffirmed its "teaching that state courts have a significant role in redistricting," *id.* at 33 (citing *Scott* v. *Germano*, 381 U.S. 407, 409 (1965)). That "teaching" is longstanding in-

deed; for example, nearly a century ago, this Court affirmed two state-court decisions imposing court-crafted plans where state legislatures had failed to enact constitutional redistricting laws. *See Koenig* v. *Flynn*, 285 U.S. 375, 379 (1932) (New York); *Carroll* v. *Becker*, 285 U.S. 380, 382 (1932) (Missouri). The Court repeated the lesson yet again ten years after *Growe*, reiterating in *Branch* that a State may exercise its congressional map-drawing authority "through its legislature *or other body*," including through "state-court redistricting proceedings." 538 U.S. at 261 (emphasis added). As the *Branch* Court recognized, state judicial involvement naturally follows an impasse of the political branches over "constitutionally required redistricting." *Id.* at 270, 277-278.

Finally, this Court's respect for state courts' "significant role in redistricting," *Growe*, 507 U.S. at 33, is rooted in principles of federalism. In particular, *Growe*'s holding—that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's … federal congressional districts," *id.* at 42—was based on the Court's "recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional … districts," *id.* at 34. Thus, "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Id.* at 33. *Growe* accordingly held that the federal district court there was "mistaken" in assuming "that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Id.* at 34. Costello's view, by contrast, would deny each State the ability to choose to exercise its redistricting authority "through its legisla-

ture *or other body*," including a state court, *id.* (emphasis added).

B. Costello Misreads *Branch* v. *Smith*

Notwithstanding his repeated suggestion that the Elections Clause privileges state legislatures over state courts, Costello concedes (Pet. 30) that the problem he alleges "is *not* that the Supreme Court of Pennsylvania chose to impose a congressional map in response to legislative impasse." Rather, Costello says, "[t]he problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s [plurality] interpretation of [2 U.S.C.] section 2c—and that means they were not authorized by the Elections Clause either." *Id.* That is incorrect; *Branch* is perfectly consistent with the Pennsylvania Supreme Court's actions here.

The *Branch* plurality addressed the "tension between" 2 U.S.C. sections 2c and 2a(c)(5). Section 2c requires States entitled to more than one congressional representative to elect their representatives from single-member districts, while section 2a(c)(5) requires at-large elections as a stopgap measure where, "after any apportionment," a State has lost a congressional seat and has not yet been "redistricted in the manner provided by the law thereof." To resolve this tension, the *Branch* plurality concluded that "§ 2a(c) is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c." *Branch*, 538 U.S. at 275. As for "[h]ow long … a court [must] await that redistricting before determining that § 2a(c) governs a forthcoming election," the plurality concluded that section 2a(c) functions only "as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan

exists and there is no time for either the State's legislature or the courts to develop one." *Id.*

Seizing on one phrase in the *Branch* plurality's opinion—that section 2a(c) applies when an election is so imminent that no entity can implement a redistricting plan "without disrupting the election process," 538 U.S. at 275—Costello argues (Pet. 30) that because the Pennsylvania Supreme Court deemed it necessary to adjust certain pre-primary-election deadlines in implementing its redistricting plan, "it was required to implement at-large elections under section 2a(c)(5) rather than impose a court-selected map under section 2c," Pet. 30. In other words, Costello contends that the adjustments to the election calendar "disrupted the election process," and that "[o]nce the Supreme Court of Pennsylvania recognized that these disruptions … would be necessary," it should have invoked section 2a(c)(5) and ordered at-large elections, *id.*, despite Congress's clear intent to avoid that very result, *see Branch*, 538 U.S. at 268-273. That is wrong. As noted in the Statement, the Pennsylvania Supreme Court's adjustment of election-related deadlines allowed it to *preserve* the May 17, 2022 primary-election date. The adjustments thus did not "disrupt[] the election process," *id.* at 275; to the contrary, they were adopted to, and did, "provide for an *orderly* election process," Pet. App. 149a (emphasis added).

Costello's proposed rule—that *any* adjustment of election-related deadlines constitutes impermissible disruption of the election process, even if the election date itself is unchanged—is not only conjured out of thin air, but also inconsistent with this Court's holding that "agencies of the State …, including its Supreme Court, may validly redistrict" so long as there is "ample time to permit such plan to be utilized in the [upcom-

ing] election," *Scott*, 381 U.S. at 409, *quoted in Growe*, 507 U.S. at 33. Such leeway is appropriate, this Court has explained, because of "the reality that States must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year," *Growe*, 507 U.S. at 35.

In this case, the Pennsylvania Supreme Court adopted a new district map with "ample time to permit such plan to be utilized in the [upcoming] election," *Growe*, 507 U.S. at 33. Indeed, the map *was* used in the primary election, the date of which was unaffected. Abandoning the standard this Court unanimously endorsed in *Growe* in favor of Costello's absolute-no-calendar-adjustment rule would not only upset settled law, but also ignore "the reality that States must often redistrict in the most exigent circumstances," *id.* at 35.

The only reason Costello gives (Pet. 31) for why the Pennsylvania Supreme Court was not authorized to adjust election deadlines is that it "violate[s] the Elections Clause" for a state court to modify "election-related timetables or deadlines that 'the Legislature' has adopted by statutory enactment." But as explained, *see supra* Part I.A, the Elections Clause does not so place a State's legislature beyond the reach of its judiciary. Costello's contrary contention finds no support in the Elections Clause's text and is contrary to the provision's purpose, this Court's precedent, and principles of federalism. And even if the Elections Clause *did* insulate certain election-related statutory deadlines from judicial review, Costello's argument would still fail because the only dates modified by the state court here related to the run-up to the State's *primary* election, *see* Pet. App. 149a-150a. The Elec-

tions Clause applies on its face to the "holding of Elections for Senators and Representatives," U.S. Const. art. I, §4, cl. 1—not to primary elections (let alone the run-up to a primary election), which are not required by the federal Constitution and which the Founders, who did not envision political parties, plainly did not have in mind. In fact, "state-run primaries were introduced" only "in the beginning of the 20th Century," *LaRouche* v. *Fowler*, 152 F.3d 974, 991 n.25 (D.C. Cir. 1998).

Costello next argues (Pet. 31) that by adopting a plan other than the one proposed by the state legislature, the Pennsylvania Supreme Court "disregarded" the *Branch* plurality's "instruction" that "a court-imposed map under 2 U.S.C. § 2c 'must follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature'" (quoting *Branch*, 538 U.S. at 274-275) (other quotation marks omitted). But the *Branch* plurality did *not* "instruct[]" that a court-imposed map must hew as closely as possible to a plan proposed by the state legislature. The plurality explained that "when a court, state or federal, redistricts pursuant to § 2c, it *necessarily* does so" in accordance with the "policies and preferences of the State," because "federal statutory commands such as that of § 2c[] are appropriately regarded, for purposes of § 2a(c), as a part of the state election law." 538 U.S. at 274-275 (emphasis added). Thus, the language on which Costello relies is a truism, not an instruction (let alone one that was violated here).

And even setting aside the foregoing, Costello goes astray in attributing to the Pennsylvania Supreme Court (Pet. 32) a mistaken "belief that the legislative

impasse somehow transferred the state legislature's map-drawing prerogatives under the Elections Clause to the judiciary." That characterization is in fact doubly wrong. It is wrong because, as explained in Part I.A, the Elections Clause does not insulate "the state legislature's map-drawing prerogatives" from state judicial review. It is also wrong because the map the General Assembly approved was vetoed by Governor Wolf and thus did not constitute the "policies and preferences of the State," *Branch*, 538 U.S. at 274. Other courts have rejected similar arguments on precisely this ground. For example, in one recent case, the Wisconsin Supreme Court stated that "[t]he legislature asks us to use the maps it passed during this redistricting cycle as a starting point, characterizing them as an expression of 'the policies and preferences of the State[.]' The legislature's argument fails because the recent legislation did not survive the political process." *Johnson* v. *Wisconsin Elections Commission*, 967 N.W.2d 469, 490 n.8 (Wis. 2021) (citations omitted). The Minnesota Supreme Court has likewise afforded no deference to a legislative redistricting plan because it "was never enacted into law." *Hippert* v. *Ritchie*, 813 N.W.2d 374, 379 n.6 (Minn. 2012); *accord Carstens* v. *Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (affording no deference to a vetoed redistricting plan and regarding "the plans submitted by both the Legislature and the Governor as 'proffered current policy' rather than clear expressions of state policy"). Unsurprisingly, then, not a single justice of the Pennsylvania Supreme Court concluded that the General Assembly's vetoed map was entitled to deference, and a majority expressly opined otherwise. *See* Pet. App. 26a-27a, 78a, 84a.

II. THIS CASE IS A POOR VEHICLE

Costello's question presented has not been adjudicated in this or any other case. The only filing in this case that even gestured at Costello's question was an emergency application for intervention, filed two days after the Pennsylvania Supreme Court issued its order suspending the primary-election calendar. *See* Pet. App. 397a-432a; Pet. 17. That application was denied, so the issues presented here were never considered below. Pet. 19. Nor does Costello cite any other case addressing his question, and to respondents' knowledge there is none.

The absence of any lower-court decision on the issue obviously means there is no division of authority. And the fact that the issue was not considered here means there is no judicial reasoning for this Court to review. That renders a grant here inappropriate, for as this Court "often note[s]," it is "a court of review, not of first view," and thus does not resolve issues that "the courts below never addressed." *Thacker* v. *Tennessee Valley Authority*, 139 S.Ct. 1435, 1443 (2019); *accord, e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Brownback* v. *King*, 141 S.Ct. 740, 747 n.4 (2021). When the Court has even arguably deviated from that practice, it has done so over vigorous dissent. *See McCoy* v. *Louisiana*, 138 S.Ct. 1500, 1517 (2018) (Alito, J., dissenting) (faulting the Court for "tak[ing] the first view" on a question "the Louisiana Supreme Court did not decide").

Certiorari is particularly unwarranted here because throughout the proceedings below, Costello took the opposite position to the one he takes now. Costello's state-court brief observed that, in "adopt[ing] its own remedial congressional redistricting plan" in 2018,

the Pennsylvania Supreme Court "moved and shortened certain election-related deadlines for the 2018 General Primary Election." Reschenthaler Br. 43-44, *Carter* v. *Chapman*, No. 464 MD 2021 (Pa. Commw. Ct. Jan. 24, 2022). Costello then argued that the state court in this case "can and should simply adopt and approve the same election-related deadlines" it adopted in 2018, which Costello said "would ensure that the 2022 General Primary Election remains on schedule for May 17, 2022." *Id.* at 45-46. In fact, Costello faulted other parties in the case for positing—as he does now—"false 'deadlines' by which [the court] must purportedly act to … select a congressional reapportionment plan." *Id.* at 43. The Pennsylvania Supreme Court did what Costello urged, adjusting certain election-related deadlines to preserve the planned primary-election date. Because Costello successfully endorsed the lawfulness of that action, he should not be heard to complain otherwise now. *See New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

III. THE PETITION SHOULD NOT BE HELD PENDING THE COURT'S DECISION IN *MOORE* V. *HARPER*

Costello argues (Pet. 34) that if this Court does not grant his petition, then the petition should be held pending the Court's decision in *Moore*. That argument should be rejected because this case presents a meaningfully different question from *Moore*.

Costello asserts (Pet. 34) that "[a] ruling [in *Moore*] that disapproves the North Carolina judiciary's decision to replace the congressional map adopted by the state legislature will necessarily undercut the Supreme

Court of Pennsylvania's decision to impose the Carter Map by judicial decree." But Costello himself refutes this assertion a few pages earlier, explaining (Pet. 22) that whereas *Moore* rests on the so-called independent-state-legislature theory, "[t]he arguments presented in this petition … do *not* implicate the independent-state-legislature doctrine because the Pennsylvania legislature failed to enact a new congressional map for its judiciary to review" (emphasis added). Indeed, in direct contradiction to the independent-state-legislature theory advanced in *Moore*, Costello acknowledges (Pet. 23) that "[t]he state judiciary *may* impose a congressional map in response to a legislative impasse." As explained, Costello instead contends (Pet. 30) that the state court's order here was "not authorized by *Branch*'s interpretation of [2 U.S.C.] section 2c" and thus was "not authorized by the Elections Clause either." That argument is not advanced and therefore presumably will not be addressed in *Moore*. And because the argument in *Moore* has never been raised here, even a reversal in *Moore* would almost certainly not affect the decision below. There is thus no reason to hold this petition for *Moore*. And there is an affirmative reason not to, i.e., so that Pennsylvania can proceed with its upcoming elections free of any uncertainty that the state high court's decision establishing the State's congressional districts might have to be revisited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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